Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding BENTALLGREENOAK (CANADA) LIMITED PARTNERSHIP and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **ARI-C**

Introduction

This hearing dealt with the Landlord's Application under the *Residential Tenancy Act* (Act) and the *Residential Tenancy Regulation* (Regulation) for an additional rent increase for capital expenditures under section 43 of the Act and under section 23.1 of the Regulation.

Regional property manager C.L., legal counsel A.A. attended the hearing for the Landlord.

Twelve Tenants A.P., C.J., M.B., K.B., A.P., M.V., R.V., I.V., I.S., S.P., D.C., J.B. attended the hearing for the Tenants.

Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (RTB) Rules of Procedure prohibits the recording of dispute resolution hearings. All parties testified that they were not recording this dispute resolution hearing.

Service of Notice of Dispute Resolution Proceeding and evidence (Proceeding Package)

The Landlord uploaded an affidavit of service that describes how each Tenant was served with the Landlord's Proceeding Package. The Landlord either served their Proceeding Package by email or they attached the package to the Tenant's door. The 12 Tenants that attended the hearing confirmed receipt of the Landlord's Proceeding

Package. I find that the Tenants were sufficiently served with the Landlord's Proceeding Package for this hearing on June 2, 2024 in accordance with section 71(2)(b) of the Act.

The 12 Tenants that attended the hearing confirmed that they did not serve on the Landlord or upload any evidence to be considered for this matter.

Two Tenants uploaded evidence on the RTB website, but their uploads do not confirm how their materials were served on the Landlord. Legal counsel A.A. stated they were not served with the Tenants' evidence.

Rule 11.3 of the RTB Rules of Procedure describe how a respondent's evidence must be submitted to the RTB and served on the other party. Due to lack of service, and proof of service on the Landlord, I find I cannot consider these Tenants' evidence for this matter.

Issues to be Decided

Is the Landlord entitled to impose an additional rent increase for capital expenditures?

Background, Evidence, and Analysis

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the Landlord's claim, the Tenants' submissions, and my findings are set out below.

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Summary of Proceedings

The hearing for this matter covered one hearing time. The Tenants posed questions to the Landlord's legal counsel, but did not dispute the Landlord's testimony about the capital expenditures. I accept the Landlord's convincing and credible testimony about the capital expenditures.

The Landlord submitted that the residential properties are two towers that were constructed in 1974. The Landlord uploaded a BC Assessment property page that confirms the year built, and that the total number of units in the two buildings is 224.

The Landlord's additional rent increase for capital expenditure application seeks approval for capital expenditures of:

Capital Expenditures	Amount
Replacement of garage membrane	$3,477,552.57
Replacement of emergency generator	$23,136.75

A. Statutory Framework

Sections 21 and 23.1 of the Regulation set out the framework for determining if a Landlord is entitled to impose an additional rent increase for capital expenditures. I will not reproduce the sections here but to summarize, the Landlord must prove the following, on a balance of probabilities:

- the Landlord has not made an application for an additional rent increase against these Tenants within the last 18 months;
- the number of specified dwelling units on the residential property;
- the amount of the capital expenditure;
- that the submitted capital expenditures were:
    - an *eligible* capital expenditure;
    - incurred less than 18 months prior to making the application; and,
    - not expected to be incurred again within five years.

The Tenants may defeat an application for an additional rent increase for capital expenditure if they can prove on a balance of probabilities that the capital expenditures were incurred:

- for repairs or replacement required because of inadequate repair or maintenance on the part of the Landlord, or
- for which the Landlord has been paid, or is entitled to be paid, from another source.

One Tenant, who said they were new to the building, believes that the amount they pay for their small studio apartment already incorporates the cost of the additional rent increase sought. The regional property manager said they will take this comment under advisement with the Landlord.

Another Tenant was concerned about the percentage of any additional rent increase that may be imposed on the Tenants. I direct the Tenants to read the Residential Tenancy Policy Guideline-Additional Rent Increase for Capital Expenditures #37C (PG#37C) which can be found on the RTB website, and in the Landlord's submissions document, pages 12 to 30. If the Tenants want more information about additional rent increases, they may contact an Information Officer at the RTB. An Information Officer can be reached at:

5021 Kingsway
Burnaby, BC
Phone: 604-660-1020 (Lower Mainland)
250-387-1602 (Victoria)
1-800-665-8779
Website: www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies

I find the Tenants have neither proven that the capital expenditures were incurred for repairs or replacement required because of inadequate repair or maintenance on the part of the Landlord, nor whether the Landlord has been paid, or is entitled to be paid, from another source.

If a Landlord discharges their evidentiary burden and the Tenants fail to establish that an additional rent increase should not be imposed (for the reasons set out above), the Landlord may impose an additional rent increase under sections 23.2 and 23.3 of the Regulation.

B. Prior Application for Additional Rent Increase

Legal counsel submitted that the Landlord has not applied for an additional rent increase for the capital expenditures against any of the Tenants prior to this application. Based on the Landlord's undisputed testimony, I find the Landlord has not made a previous application for an additional rent increase for the eligible capital expenditures in the last 18 months in accordance with section 23.1(2) of the Regulation.

C. Number of Specified Dwelling Units

Section 23.1(1) of the Act contains the following definitions:

"dwelling unit" means the following:
(a) living accommodation that is not rented and not intended to be rented;

(b) a rental unit;

[…]

"specified dwelling unit" means

(a) a dwelling unit that is a building, or is located in a building, in which an installation was made, or repairs or a replacement was carried out, for which eligible capital expenditures were incurred, or

(b) a dwelling unit that is affected by an installation made, or repairs or a replacement carried out, in or on a residential property in which the dwelling unit is located, for which eligible capital expenditures were incurred.

Legal counsel submitted that the total number of specified dwelling units in the residential properties is 224. This number was confirmed in the BC Assessment of the property. I find the number of specified dwelling units for the purposes of the capital expenditures is equal to the total number of units in the building, or 224 units. I find the calculation of the additional rent increase will include the total number of specified dwelling units in the residential property.

D. Amount of Capital Expenditure

The Landlord submitted this application on May 2, 2024. I find the prior 18-month cut-off date for eligible capital expenditures is November 2, 2022.

The Landlord testified that they are seeking, under section 23.1(4) of the Regulation, to impose an additional rent increase for the following capital expenditures incurred:

Capital expenditures		Amount
1	Replacement of garage membrane	$3,477,552.57
2	Replacement of emergency generator	$23,136.75

Legal counsel stated when making their application for the additional rent increase, they were only able to submit that the replacement of the garage membrane was $1,000,000.00. Legal counsel said this was the RTB's dispute access website that set that maximum. The actual amount of the replacement of the garage membrane was $3,477,552.57.

E. Is the Work an *Eligible* Capital Expenditure?

For the capital expenditure to be considered eligible, the Landlord must prove all the following:

- the capital expenditure was to repair, replace, or install a major system or a component of a major system;
- the capital expenditure was undertaken for one of the following reasons:
  - to comply with health, safety, and housing standards;
  - because the system or component was
    - close to the end of its useful life; or
    - because it had failed, was malfunctioning, or was inoperative
  - to achieve a reduction in energy use or greenhouse gas emissions; or
  - to improve the security of the residential property;
- the capital expenditure was incurred less than 18 months prior to the making of the application; and,
- the capital expenditure is not expected to be incurred again within five years.

Legal counsel submitted that their client did not receive payments from another source for any of the above capital expenditures. Further they wrote they are not expecting and are not eligible to receive any payments going towards any of the capital expenditures. No Tenants submitted that the repairs or replacements were required because of inadequate repair or maintenance on the part of the Landlord.

Based on the Landlord's undisputed testimony, I find the Landlord has established that the capital expenditures undertaken neither have been required for repairs or replacement because of inadequate repair or maintenance on the part of the Landlord, nor has the Landlord been paid, or is entitled to be paid, from another source for the above capital expenditures in accordance with section 23.1(5) of the Regulation.

Types of Capital Expenditure

Section 21.1(1) of the Regulation defines "major system" and "major component" as:

> ***"major component"****, in relation to a residential property, means*
>
> *(a) a component of the residential property that is integral to the residential property, or*
>
> *(b) a significant component of a major system;*

***"major system"**, in relation to a residential property, means an electrical system, mechanical system, structural system or similar system that is integral*

(a) to the residential property, or

(b) to providing services to the tenants and occupants of the residential property;

1. Replacement of garage membrane

Reason for replacement of garage membrane

The Landlord testified that the existing garage membrane was the original membrane installed on the residential property in the mid-1970's. In February 2016, the Landlord retained an engineering firm to conduct a garage evaluation on the residential property.

The engineers' report summarized that the two towers are serviced by a two level underground parking garage "*with around 156 parking stalls, mechanical room, garbage collection and various storage. The garage structure is concrete-framed, with conventionally reinforced concrete slabs, supported by reinforced concrete columns with drop panels and poured concrete foundation walls*."

The report also summarized past repair and restoration work in and around the parking garage from 2008 to 2015 that totaled $1,173,000.00. None of that work is the subject of the Landlord's application for this ARI-C.

Some of the key findings of the report were that the garage roof slab membrane, "*can no longer bridge cracks, joints or transitions in the roof slab, and should no longer be relied upon to protect against water and chloride (road salt) penetration. Ongoing leakage will accelerate corrosion of the reinforcing steel which will aid in concrete deterioration.*" Active leakage was observed throughout the parking garage roof slab. Concrete deterioration was evident on slab soffits in the form of spalling (fragments of material broken off a larger solid body) and delaminations (material fractures into layers).

In 2016, the waterproofing membrane on the south portion suspended slab of the upper parking level was found to be in serviceable condition. The slab on grade portion in the upper and lower parking area was also found to be in serviceable condition.

The report noted that a resident/facility manager advised that he noted evidence of leakage below the pool deck that suggested the garage roof slab membrane under the pool deck has past its useful life.

After receipt of the 2016 report, the Landlord chose to defer restoration work as the current extent of deterioration did not pose an immediate risk with respect to structural safety.

In August 2018, the Landlord retained the engineering firm to conduct another report to understand the extent or progress of deterioration, and determine whether the parking garage roof slab remains safe for use.

The 2018 report found that the roof slab membrane is generally past its serviceable life and active leakage was noted through the roof slab membrane. However, the report also found that there was minimal visual increase in concrete deterioration and the depth of carbonation remained consistent

The report stated that none of the components required immediate structural intervention, and the Landlord chose to defer and monitor the repairs.

In February 2021, the Landlord sought a different engineering company to complete a pre-design review of the parkade roof waterproofing replacement project. This engineering company, with the benefit of previous garage evaluations, determined that deferring repairs is not recommended, and doing a full garage roof slab waterproofing membrane replacement is the recommended next step.

Residential Tenancy Policy Guideline #40-Useful Life of Building Elements (PG#40) provides a general guide for determining the useful life of building elements. The useful life is the expected lifetime, or the acceptable period of use, of an item under normal circumstances.

PG#40 states that the useful life of a waterproofing membrane is 15 years. In 2021, the garage roof membrane on the residential property was 47 years old.

In March 2021, the Landlord began the replacement of the garage roof membrane.

I find the replacement of the garage roof membrane was a capital expenditure undertaken because the original garage roof membrane had failed and was malfunctioning. The membrane was approximately 47 years old. The engineering

companies both agreed that the garage roof membrane was at the end of its useful life and needed replacement.

I find that the garage roof membrane is a major component, in relation to the residential property, that is integral to the parking garage system which provides a service to all the Tenants and occupants of the residential property.

I find the Landlord has established that the replacement of the garage roof membrane was incurred for a valid reason under section 23.1(4)(a)(ii) of the Regulation.

When the replacement of the garage membrane was incurred

The Regulation uses the past tense when defining a specified dwelling unit. PG#37C states that ARI-C applications can only be made once the work associated with the capital expenditure is complete, and a capital expenditure refers to the entire project of installing, repairing, or replacing a major system or major component as required or permitted. As such, the date on which a capital expenditure is considered to be incurred is the date the final payment related to the capital expenditure was made.

The Landlord provided copies of all expenditures claimed for the full replacement of the garage membrane. The Landlord uploaded copies of invoices, summary invoicing, and endorsed cheques for payment of the work and permits. Invoiced work and payments for work incurred for the replacement of the garage membrane are dated between April 28, 2021 and December 1, 2022.

As the Landlord submitted their application for the additional rent increase on May 2, 2024, I find the Landlord proved that they incurred the expenditures in the 18-month period preceding the submission of the application, November 2, 2022, in accordance with sections 23.1(4)(b) and 23.1(1) of the Regulation.

The replacement of the garage membrane is not expected to be incurred again for at least 5 years

Legal counsel submitted that the garage membrane is not expected to be incurred again for at least 5 years. In fact, the Landlord uploaded a letter written by the engineers who had conduct of the project, and they said the "*expected service life of the new waterproofing membrane installed is twenty-five (25) years, and there is no remediation*

work to be expected in the next five (5) years." Legal counsel submits that the replacement is expected to last for decades.

I find the Landlord has established that the replacement of the garage membrane is not expected to be incurred again in the next five years in accordance with section 23.1(4)(c) of the Regulation.

2. Replacement of emergency generator

Reason for replacement of emergency generator

Legal counsel testified that the existing generator was the original generator installed on the residential property in the mid-1970's. This generator serviced both towers and is the second subject of this application.

In April 2021, the Landlord retained consulting engineers to provide a review of the condition of the existing emergency generator and associated distribution systems for both towers.

The consulting engineers determined that the natural gas generator is at the end of its useful life, and their inspections indicated that it no longer is able to operate under a full load. The engineers determined that the current connected emergency panel load is estimated at 45 KW, and the existing generator was only capable of handling a 40 KW load. The consulting engineers recommended a replacement generator with a minimum load capability of 60 KW.

PG#40 states that the useful life of a generator is 25 years. The old generator was approximately 48 years old.

Legal counsel submitted that all tenants in both buildings benefit from this replacement.

Between September and October 2022, the Landlord replaced the emergency generator.

I find the old emergency generator has exceeded its useful life as confirmed by the consulting engineer company and PG#40. I also find, if needed, the old generator would not be able to satisfactorily provide power to both buildings. I find this replacement was undertaken because the existing system was malfunctioning and past its useful life.

I find that the emergency generator is a major power system that is integral to the residential property and would provide needed electrical services on a loss of normal power supply.

I find the Landlord has established that the replacement of the emergency generator was incurred for a valid reason under sections 23.1(4)(a)(i) and (ii) of the Regulation.

When the replacement of the emergency generator was incurred

The Landlord provided copies of two invoices from the electrical contractor, and a final invoice from the consulting engineers for work incurred for the replacement generator dated between October 6, 2022 to November 10, 2022.

As the Landlord submitted their application for the additional rent increase on May 2, 2024, I find the Landlord proved that they incurred the expenditures for the emergency generator in the 18-month period preceding the submission of the application, November 2, 2022, in accordance with sections 23.1(4)(b) and 23.1(1) of the Regulation.

The replacement of the emergency generator is not expected to be incurred again for at least 5 years

The Landlord uploaded a letter from the consulting engineers that reported that the life expectancy of the new emergency generator would be 30 to 40 years.

I find the Landlord has established that the replacement emergency generator is not expected to be incurred again in the next five years in accordance with section 23.1(4)(c) of the Regulation.

For the above-stated reasons, I find that the following capital expenditures incurred are eligible capital expenditures as defined by the Regulation:

Capital expenditures	Amount
Replacement of garage membrane	$3,477,552.57
Replacement of emergency generator	$23,136.75
Total capital expenditures	$3,500,689.32

OUTCOME

The RTB dispute access website limitations for submitted amounts for additional rent increases were reported to the Information technology team. They will look into addressing this limitation.

A director's decision does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30-day period specified under section 77(1)(d) of the Act . I offer my apologies for finishing this decision after the 30-day period.

The Landlord has been successful. They have proven, on a balance of probabilities, all the elements required to be able to impose an additional rent increase for capital expenditures. Section 23.2 of the Regulation sets out the formula to be applied when calculating the amount of the additional rent increase as such:

$$\text{Additional rent increase} = \left[\frac{\text{Eligible capital expenditure}}{\text{Number of specified dwelling units}}\right] / 120$$

$$= \left[\frac{\$3{,}500{,}689.32}{224}\right] / 120 = \$130.23$$

In this case, I have found that there are 224 specified dwelling units and that the amount of the eligible capital expenditures is $3,500,689.32.

So, the Landlord has established the basis for an additional rent increase for capital expenditures of $130.23. If this amount exceeds 3% of a Tenant's monthly rent, the Landlord may not be permitted to impose a rent increase for the entire amount in a single year.

The parties may refer to PG#37C (June 2023), and 40 (March 2012), section 23.3 of the Regulation, section 42 of the Act (which requires that a Landlord provide a Tenant three months' notice of a rent increase), and the additional rent increase calculator on the RTB website for further guidance regarding how this rent increase made be imposed.

Conclusion

The Landlord has been successful. I grant the application for an additional rent increase of $130.23 for a capital expenditure of $3,500,689.32. The Landlord must impose this increase in accordance with the Act and the Regulation.

I order the Landlord to serve the Tenants with a copy of this decision in accordance with section 88 of the Act.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: September 08, 2024

Residential Tenancy Branch