Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding LE GERS PROPERTIES INC. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes ARI-C

Introduction

This hearing dealt with the Landlord's application pursuant to sections 43(1)(b) and 43(3) of the Residential Tenancy Act (the Act) and section 23.1 of the Residential Tenancy Regulation (the Regulation) for an additional rent increase for capital expenditure.

The Landlord's president and Tenant D.V., in her individual capacity and as a representative for various tenants listed on the cover page to this Decision, attended the hearing.

The Landlord confirmed service of the Notice of Dispute Resolution Proceeding and documentary evidence submitted with the Notice of Hearing as well as subsequent documents provided by the Landlord in response to a request for additional information from Tenant D.V. The Landlord provided a proof of service to each Tenant by posting on the rental unit door the initial packet containing the Notice of Hearing and evidence submitted as of August 1, 2024; with the exception of service to Tenant D.V. which was done by Canada Post registered mail, with postal service confirmation of delivery on August 6, 2024. The Landlord further submitted a proof of service of additional evidence in response to Tenant D.V.'s request by posting to each Tenant's rental unit door on August 22, 2024; again with exception of serving the evidence to Tenant D.V. by Canada Post registered mail, with postal service confirmation of receipt on August 26, 2024. I find the Tenants were served with the required materials in accordance with the Act and Order permitting service to a tenant by posting to a rental unit door. Tenant D.V. confirmed receipt of the Landlord's evidence and an opportunity to review prior to the hearing.

Tenant D.V. stated she served copies of her evidence to the Landlord by email, as agreed upon with the Landlord. The Landlord's representative confirmed receipt as well as an opportunity to review the Tenant's evidence prior to the hearing.

Issue for Decision

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

Background and Evidence

I have considered the submission of the parties, the documentary evidence as well as the testimony of the participants at the hearing. However, not all details of the respective submissions are reproduced in this Decision. Only that relevant and material evidence related to the Landlord's application and necessary to my findings are set forth in my analysis.

The residential rental unit building at issue was constructed in 1973 and has 73 units, including a unit for a resident building manager. The Landlord's representative testified the building is L-shaped and has 4 storeys. The rental property has two cast iron boilers. One boiler provides hot water to the units. The second boiler – the subject of this application – provides heating for the building. The Landlord submitted documentation to establish the boilers were installed on October 7, 1991.

The Landlord purchased the residential rental building in May 2015. Prior to purchase, the Landlord commissioned a property inspection of the rental property that was conducted in March 2015. The Landlord provided copies of the pages from the inspection report upon Tenant D.V.'s request that are relevant to the subject boiler. The property inspector determined the subject boiler had approximately 1 to 10 years of remaining useful life. The inspector's estimated cost for replacement of the boiler was $72,000.00. The Landlord, also at the request of Tenant D.V., submitted invoices containing maintenance records for the boiler for 2017, 2018, 2021 and 2022 (the invoice for 2020 was for maintenance at a different building and was erroneously submitted).

The Landlord's representative testified the boiler which provides heat to the building failed on March 26, 2023. The Landlord submitted photographs showing the water that had leaked from the boiler into the hallway where the door to the equipment is located.

In May 2023, the Landlord obtained an estimate for replacement of the subject boiler. The representative stated the plumber was retained and the plumber (not the Landlord) obtained various quotes for replacement boilers. The representative further testified he relied upon the plumber's knowledge and expertise, when the plumbing company obtained various quotes and availability of replacements. The representative stated that two energy-efficient boilers were selected to replace the cast iron boiler. He explained the failed cast iron boiler operated as "all or nothing" when heat was required; thus, any drop in temperature required the entire unit to operate resulting in a temperature differential throughout the building (the lobby very warm while other areas of the

building remained colder). The replacement boilers operated in a manner, the representative stated, that when the temperature dropped one of the boilers would begin to operate, and as temperatures dropped further during the colder months the second boiler would then automatically operate to ensure a steady ambient temperature throughout the building. This method of operation of the replacement units results in energy efficiency. The Landlord's representative further stated that the combined BTU's of the two replacement units approximated that of the BTU's of the replaced cast iron boiler. The Landlord submitted documentary evidence regarding the BTU's for both the cast iron and the installed energy efficient units.

The boiler was replaced August 8, 2023, and payment by the Landlord was made on October 3, 2023. The installation certificate was issued on September 19, 2023 (a copy provided in evidence). The final installation inspection certificate was issued June 18, 2024 (a copy provided in evidence). Photographs of the newly installed boilers were also provided in evidence by the Landlord. The Landlord submitted the plumbing company's installation invoice for the work done, as well as proof of payment. The Landlord's representative confirmed the replacement boilers had a useful life exceeding five years. The representative further testified there was a one-year warranty on labor and a two-year warranty for parts issued for the new boilers.

The Landlord provided documentation from the applicable provincial ministry regarding energy efficiency, together with a rebate pursuant to the utility company's program to promote the installation of energy efficient products. The representative stated the plumbing contractor completed the documentation necessary for the Landlord to receive the rebate. A copy of the rebate cheque from the utility rebate program for qualified equipment was submitted in evidence and was accounted for in the final cost for the replacement boilers in the Landlord's application.

Tenant D.V. presented evidence on behalf of herself and the "organized tenants" (individual tenants listed on the cover page to this Decision) she represented for purposes of this hearing. Tenant D.V. submitted evidence providing information on fouling and scaling (mineral deposits) that occurs with cast iron boilers. She also provided in evidence sections 61 and 72 of the *Safety Standards Act* regarding an operator's requirement to keep records of maintenance, and information regarding redundancy of systems, maintenance (blow-down's), maintenance of the heat exchanger unit (for mineral scaling and to prevent fouling) and technical data for the cast iron boiler. The organized tenants also submitted guidelines issued by the National Board and Pressure Vessel Inspectors that address maintenance requirements and malfunctions of cast iron boilers.

Tenant D.V. position was the cast iron boiler was not replaced due to its age but rather as a result of lack of proper maintenance (in particular of the heat exchanger in the unit) by the Landlord. She did not dispute the boiler had been installed in 1991. Tenant D.V. explained the Landlord had failed to provide adequate documentation the cast iron boiler had received necessary annual maintenance. Tenant D.V. noted the first service

for maintenance of the boiler did not occur until 2 years and 5 months after installation. Tenant D.V. stated the 2018 service records provided by the Landlord indicated some maintenance had been completed but there was no indication the heat exchanger was maintained nor a blow-down of the unit completed. She further noted the record for 2020 maintenance records provided were for a different residential building. The 2022 maintenance record indicated replacement of a low-water cut-off valve and relief valve. (Records for 2021 showed only a routine maintenance service without specificity as to what was done).

Tenant D.V., referring to the maintenance manual for the cast iron boiler, stated a cast iron boiler cracking (as occurred in this case) was “always” related to overheating. She explained overheating could be caused by calcium build-up (hence the necessity for a blow-down). Tenant D.V. stated there was evidence the boiler was not maintained and repairs were not performed according to the manufacturer's requirements. As a result, Tenant D.V. concluded, the cast iron boiler’s replacement was necessitated by lack of proper maintenance rather than its age. Tenant D.V., noting the repair records provided by the Landlord, stated a blow-down or blow-out was not the same as the cleaning of a heat exchanger.

Tenant D.V. also provided in evidence email exchanges she had with the manufacturer of the cast iron boiler regarding a replacement and the cost thereof. The email exchanges indicate the manufacturer’s agent or representative stated that a replacement was available at a price of approximately $21,000.00 per unit. In connection with the cost for a replacement unit from the same manufacturer as the cast iron boiler, Tenant D.V. testified that the two new boiler units were unnecessary as the product of redundancy in design. She explained that boiler redundancy was a “trend” in boiler design where the second unit was redundant to the operation of the first and served, essentially, a back-up function. Tenant D.V. stated the cast iron boiler operated well without a redundant, back-up second unit. She pointed to the email from the manufacturer’s representative to the effect that the replacement unit the manufacturer had would operate as full replacement, without need of a second unit. Tenant D.V. contended that there was no provision in the Act or regulations that required tenants to pay for two major systems when only one was necessary.

The Landlord’s representative replied that maintenance records were retained by the Landlord for a period of seven years to comply with Revenue Canada retention requirements for documents. He said thereafter older documents would be shredded. As the maintenance records were provided by the plumber as part of its invoice, records pre-dating 2018 were unavailable. With regard to the proposition that a heat exchanger cracks due to excessive heat resulting either from low water in the boiler or deposit build-up requiring the heat exchanger to be cleaned annually, the representative noted the plumber’s maintenance invoice for 2022 indicates the boiler as “all good.” The 2021 invoice provides the technician removed and cleaned the heat exchanger conducting a blow-out. The Landlord’s representative stated a heat exchanger would not last forever, regardless of maintenance, and the Landlord justifiably relies on the professional

plumbing company for the maintenance it performs. The representative further noted the property inspector had indicated in 2015 the boiler had 1 to 10 years of useful life remaining.

Tenant D.V. responded that a blow-down or blow-out is not the same as cleaning which requires physical removal of the heat exchanger accompanied by cleaning. She noted the only time the heat exchanger in the cast iron boiler was removed and cleaned was 2017. She stressed an inspection or blow-out was not the same as cleaning the heat exchanger. Tenant D.V. further stated the cast iron boiler was not regularly maintained and this was the reason for its replacement, not that that the boiler broke down.

With respect to the Tenants' objection to the new boiler system incorporating redundancy, the representative stated he was not taking the position only one unit was required and the second new unit was a back-up but rather the two new units approximated the BTU capacity as the old cast iron boiler. The representative noted the BTU capacity for both the old and new system was set forth in the documentation regarding each boiler the Landlord had submitted. He stated the benefits of the new two-boiler system was that only one unit would be activated (and needed) in milder cooler weather and when temperatures dropped below a certain point, then the second boiler would begin operating. This, the representative contended, was both more energy efficient and provided a more consistent ambient air temperature throughout the residential building.

Analysis

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. As the dispute relates to the Landlord's application for an additional rent increase based upon eligible capital expenditures, the Landlord has the burden of proof to support its application.

Section 43(1)(b) of the Act allows a Landlord to impose an additional rent increase in an amount that is greater than the amount calculated under the Regulations by making an application for dispute resolution.

1. Statutory Framework

Sections 21.1, 23.1, and 23.2 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 successfully applied for an additional rent increase against these tenants within the last 18 months (s. 23.1(2));
- the number of specified dwelling units on the residential property (s. 23.2(2));

- the amount of the capital expenditure (s. 23.2(2));
- that the Work was an *eligible* capital expenditure, specifically that:
    - the Work was to repair, replace, or install a major system or a component of a major system (S. 23.1(4));
    - the Work was undertaken for one of the following reasons:
        - to comply with health, safety, and housing standards (s. 23.1(4)(a)(i));
        - because the system or component:
            - was close to the end of its useful life (s. 23.1(4)(a)(ii)); or
            - had failed, was malfunctioning, or was inoperative (s. 23.1(4)(a)(ii));
        - to achieve a reduction in energy use or greenhouse gas emissions (s. 23.1(4)(a)(iii)(A)); or
        - to improve the security of the residential property (s. 23.1(4)(a)(iii)(B));
    - the capital expenditure was incurred less than 18 months prior to the making of the application (s. 23.1(4)(b)); and
    - the capital expenditure is not expected to be incurred again within five years (s. 23.1(4)(c)).

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 (s. 23.1(5)(a)); or
- for which the landlord has been paid, or is entitled to be paid, from another source (s. 23.1(5)(a)).

If a landlord discharges its evidentiary burden and the tenant fails 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 pursuant to sections 23.2 and 23.3 of the Regulation.

2. Prior Application for Additional Rent Increase

In this matter, the Landlord's representative confirmed there have been no prior applications for an additional rent increase within the last 18 months before the application was filed.

3. Number of Specified Dwelling Units

Section 23.1(1) of the Regulation 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.

There are 73 specified dwelling units to be used for calculation of the additional rent increase.

4. Amount of Capital Expenditure

The Landlord is claiming the total amount of **$88,440.00** as detailed in the Landlord's summaries for each capital expenditure set forth above, which includes the utility company's rebate for the installation of energy efficient boilers.

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

As stated above, for the Work to be considered an eligible capital expenditure, the landlord must prove the following:

- the Work was to repair, replace, or install a major system or a component of a major system
- the Work 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
    - 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;
- the capital expenditure is not expected to be incurred again within five years.

Section 21.1 of the Regulation defines "major system" and "major component":

"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;

"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;

RTB Policy Guideline 37 provides examples of major systems and major components:

> Examples of major systems or major components include, but are not limited to, the foundation; load bearing elements such as walls, beams and columns; the roof; siding; entry doors; windows; primary flooring in common areas; pavement in parking facilities; electrical wiring; heating systems; plumbing and sanitary systems; security systems, including things like cameras or gates to prevent unauthorized entry; and elevators.

I find the boiler which operates to provide heat to the rental building is a major component of the building. Policy Guideline 40 provides that the useful life for a heating system is 15 years; furnaces range from 20 to 25 years (depending upon type), and commercial hot water tanks have a useful life of 20 years. The property inspector's report at time of purchase of the building in 2015 notes the cast iron boiler had a further useful life of 1 to 10 years before replacement would be necessary. I find the cast iron boiler was replaced as it had exceeded its useful life or was nearing its useful lifespan based upon the range provided for similar systems in Policy Guideline 40 and this is consistent with the property inspector's report.

I further find the replacement boilers meet energy efficiency standards of the utility company sufficient to qualify for a product rebate as documented by the Landlord's evidence. The evidence established the replacement boilers were energy efficient (94% thermal efficiency) and due to the tandem system of their operation, would consume less energy during cooler seasonal temperatures when only one unit was necessary to provide heating.

I find these reasons sufficient to satisfy the requirements of the Regulation. I find the boiler replacement was required because it exceeds its expected serviceable life as permitted by 23(1)(4)(a)(ii) of the regulations and on the further basis that the replacement units are energy efficient.

Residential Tenancy Branch Policy Guideline 37 states:

> A capital expenditure is considered "incurred" when payment for it is made.

I accept the Landlord's evidence that the final payment for the Work was made October 3, 2023, and within 18 months of the Landlord making this application on July 25, 2024.

The Landlord provided proof of payment for the capital expenditure, and I find the final payment was incurred less than 18 months prior to making the application and I find it is reasonable to conclude that this capital expenditure will not be expected to incur again within five years.

As stated above, the Regulation limits the reasons which a tenant may raise to oppose an additional rent increase for capital expenditure. In addition to presenting evidence to contradict the elements the landlord must prove (set out above), the tenant may defeat an application for an additional rent increase if they can prove that:

- the capital expenditures were incurred because the repairs or replacement were required due to inadequate repair or maintenance on the part of the landlord, or
- the landlord has been paid, or is entitled to be paid, from another source.

Tenant D.V. stated a position that the cast iron boiler malfunctioned due to the Landlord's failure to properly assure the heat exchanger was properly maintained. Tenant D.V. provided generally available information to support this position. Tenant D.V. also noted the invoices from the plumber which itemized work done on the boiler the Landlord had produced as maintenance records as evidence that the heat exchanger in the unit had not been properly maintained. Tenant D.V. states the proximate cause for the unit's failure was the inadequate or improper maintenance of the heat exchanger.

The maintenance records suggest annual maintenance was done. Other than generally available information, there is no evidence to support Tenant D.V.'s position. While the plumber's records provided to the Landlord may not be as detailed as hoped for, that the boiler was properly serviced is demonstrated by its longevity of approximately 32 years of service before it failed. At some point, all mechanical systems fail – hence, Policy Guideline 40 pertaining to useful life of building elements – and there was no evidence to suggest that simply maintaining the heat exchanger for the subject cast iron boiler would have assured a greater useful life than those it actually operated. The property inspection report from 2015, which Tenant D.V. requested the Landlord produce, indicate that at that time the longevity of the boiler at most was 10 years.

Additionally, Tenant D.V.'s argument the Landlord impermissibly installed two units (at greater cost) rather than one that was available from the manufacturer of the cast iron boiler is not sufficient under the Regulation to defeat the Landlord's application. As noted by the Landlord's representative during the hearing, the quote for a boiler Tenant D.V. obtained was more general in scope as it did not include an evaluation of the installation site, the requirements for the building, installation costs, permit fees and similar expenses incurred for the actual replacement. The Landlord's representative

stated he relied upon the expertise of the plumbing contractor for the selection of an appropriate available replacement, and its proper installation.

Furthermore, the redundancy design which Tenant D.V. raised in objection to the Landlord's application did not address the energy efficiency provided by the two units and the system's ability to operate efficiently over the span of fluctuating temperatures. The Landlord was entitled to obtain energy efficient replacement boilers which the Regulation specifically permits, notwithstanding repair or failure of the replaced cast iron unit.

I find the Tenant's arguments are insufficient to defeat the Landlord's application. I find the Landlord completed necessary replacement of the cast iron boiler used to heat the rental building, paid for the work, and is bound only by the statutory framework in seeking the capital expenditures, and not the arguments described above.

I find the Tenants have failed to defeat an application for an additional rent increase for capital expenditure.

Based on the above, I find the Landlord is entitled to recover for the replacement energy-efficient boilers in the amount of **$88,440.00.**

Summary

The Landlord has been successful in this application. They have proved, on a balance of probabilities, the elements required in order to be able to impose an additional rent increase for total capital expenditures of **$88,440.00,** for the major component as described herein.

Section 23.2 of the Regulation sets out the formula to be applied when calculating the amount of the additional rent increase as the number of specific dwelling units divided by the amount of the eligible capital expenditure divided by 120. In this case, I have found that there are 73 specified dwelling unit and that the total amount of the eligible capital expenditures is the amount of **$88,440.00.**

I find the Landlord has established the basis for an additional rent increase for capital expenditures of **$10.10 (calculated as: 88,440.00 ÷ 73) ÷ 120 = 10.10).** 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 RTB Policy Guideline 40, 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

I grant the Landlord's application for an additional rent increase for capital expenditures totaling **$88,440.00.** 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 issued on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 3, 2024

Residential Tenancy Branch