Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes ARI-C

Introduction

This hearing concerned 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 parties listed on the cover page attended the hearing on November 15, 2024.

The Landlord confirmed service by posting to each rental unit door a copy of the Notice of Dispute Resolution Proceeding and letter with link to documentary evidence filed by the Landlord on September 18, 2024. The Landlord provided an affidavit confirming this service. The Landlord's counsel stated that one Tenant had contacted him regarding the evidence, and he noted four Tenants had downloaded copies of the evidence. I find the Tenants were served with the required materials in accordance with the Act.

No documents were submitted by a Tenant to the Landlord or the RTB for this proceeding.

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 attending the hearing. However, not all details of the respective submissions are reproduced in this Decision. Only relevant and material evidence related to the Landlord's application and necessary to my findings are set forth in my analysis.

The residential rental property was constructed in 1969 and has a total of 57 rental units.

The Landlord's application requests an additional rent increase for certain capital expenditures made by it:

- Installation of water efficient toilets totaling $27,049.58 (Landlord's last payment for this work made March 6, 2023)
- Installation of a building automation system in the amount of $22,130.08 (Landlord's last payment made December 11, 2023)

Documentation of invoices and payments made by the Landlord were provided in evidence. Landlord's counsel stated these capital expenditures were incurred within 18 months preceding the application submitted by the Landlord on September 5, 2024. Additionally, the Landlord represents these expenditures are not expected to reoccur for at least five years, confirming that each capital improvement was expected to last for at least 5 years. The Landlord submits there was no other source of payment for these expenditures.

Landlord's counsel explains the water efficient toilets use approximately 3.0 litres per flush compared to the replaced toilets which use between 4.8 and 12.0 litres per flush. The Landlord submitted the water efficient toilet specification sheet from the manufacturer to confirm the reduced amount water used. Landlord's counsel states the water efficient toilets qualify as energy efficient for purposes of the Regulation. Counsel states this term is undefined by the Regulation and therefore entitled to broad interpretation to include expenditures that conserve environmental resources, relying on a recent judicial appellate decision (cited herein). The Landlord also submits a prior arbitration decision to support its position that water efficient toilets qualify under the Regulation for an additional rent increase. The water efficient toilets installed by the Landlord have a 10-year warranty.

The Landlord requests an additional rent increase for the installation of a building automation system. Landlord's representative G.W. testified this system controls the heat and domestic hot water supply systems for the building. He stated it reduces the natural gas used to power these systems. It replaces a manual system that was controlled by a maintenance person setting the temperature controls and adjusting these during the year for seasonal changes to temperature. The Landlord did not provide utility billing statements, counsel urging these statements "do not tell the whole story" as other systems in the building use natural gas as well. Landlord's counsel stated the Regulation requires only a reduction in energy use, however small. The manufacturer's documents for the system were submitted by the Landlord.

Several Tenants present at the hearing raised concern about the water efficient toilets. While these Tenants agreed with water conservation practices, they objected they had

not been informed prior to the installation, lack of notice from the Landlord at time of installation that they may be required to pay for the toilets through increased rent, and/or the function and operation of the toilet as less than optimal compared to the replaced toilet. The Tenants also stated the new toilets were not installed properly and/or the toilets were less than efficient in requiring several flushes whereas the replaced toilets only required one. A Tenant also noted that after installation of the water efficient toilets, the building had several disruptions in water service. Counsel stated the interruptions to water service at the building was not a result of the new toilets but rather other construction in the area. Counsel also stated the toilets were installed according to the manufacturer's instructions and the specifications indicate lower water usage, which he stated is sufficient under the Regulation to establish energy efficiency.

With respect to the building automation system and cost savings to the Landlord in lower utility bills, the Tenants objected to the inequity of allowing the Landlord the benefits while requiring them to pay the cost.

One Tenant stated he supported the changes made by the Landlord but emphasized he was not informed prior to the installation of the toilets.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means it is more likely than not the facts occurred as claimed. As the dispute related to the Landlord's application for an additional rent increase based upon eligible capital expenditures, the Landlord bears the burden of proof in support of its application.

Section 43(1)(b) of the Act allows a Landlord to impose an additional rent increase in an amount greater than the annual amount provided under the Regulations by submitting 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. 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)).

The Regulation provides tenants may have an application for an additional rent increase for capital expenditure dismissed 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 the 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, I accept the Landlord's representation that 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 57 specified dwelling units to be used for calculation of the additional rent increase.

4. Amount of Capital Expenditure

The Landlord claims the total amount of **$49,179.66** as in the Landlord's application and set forth above, there being no other source of payment in whole or in part for these expenditures.

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.

Each item of capital expenditure will be reviewed under this analysis.

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.

Residential Tenancy Branch Policy Guideline 37 states:

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

Policy Guideline 37C provides “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.”

Water-Efficient Toilets

I find toilets to be a major component of a major system; namely, the plumbing and sanitary system. The Landlord provided the receipts for the capital expenditure, and I find the final payment on March 6, 2023, was incurred less than 18 months prior to the Landlord filing this application on September 5, 2024. I find it is reasonable to conclude this capital expenditure is not expected to reoccur within five years. I further accept the Landlord’s counsel’s confirmation there was no other source of payment (such as insurance proceeds or rebates) to pay for the capital expenditure.

The Landlord takes the position the water-efficient toilets are an eligible capital expenditure under the Regulation as the toilets qualify as energy efficient. The Landlord references a prior arbitration decision in another matter which granted an additional rent increase for the capital expenditure of water-efficient toilets.

As a threshold matter, pursuant to section 64(2) of the Act, an arbitrator is not bound by a decision rendered by another arbitrator regarding another application, although it is noted that consistency in application of the Act and Regulation is generally beneficial.

The reduction in energy use is not defined but the terms have a plain, unambiguous meaning. Energy efficiency is qualified by the subsequent terms relating to the reduction in greenhouse gas emissions. Policy Guideline 37C provides:

> Greenhouse gas means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride and another substance prescribed in the regulations to the *Climate Change Accountability Act.*
>
> Any reduction in energy use or greenhouse gas emissions established by a landlord will qualify the installation, repair, or replacement for an additional rent increase. Some examples of installations, repairs, or replacements of major systems or major components that may reduce energy use or greenhouse gas emissions include:
>
> - replacing electric baseboard heating with a heat pump,
> - installing solar panels, and
> - replacing single-pane windows with double-paned windows

In this case, the toilets installed by the Landlord conserve water by reducing the number of litres used per flush based upon the design and increased velocity on the flush of the newer toilet. The toilet does not consume energy as it does not require an energy source (such as, a fossil fuel or electricity) to operate nor does it use heated water that would require the expenditure of energy necessary to raise the water temperature (as with domestic hot water systems). Rather, gravity and velocity of water make the toilet functional. While the toilets installed by the Landlord are water-efficient, this efficiency is not equivalent to a reduction in energy. It is noted that energy is traditionally measured in kilowatts, joules, degrees or similar; whereas, in contrast, water usage is measured volumetrically. Additionally, insofar as the reduction in water usage may be attributed to lower energy consumption as less energy may be expended in acquisition and/or transportation of the water, I find these factors too tangential and indirect to support a finding the toilets are energy efficient as the term is used in the Regulation.

This interpretation is consistent with the plain meaning of the text of the Regulation, in conformity with the context of the Regulation in its ordinary sense. The phrase “energy use” in the Regulation is followed by “greenhouse gas emissions.” A broad interpretation of the former to include any improvement that falls within the ambit of environmental conservation is contrary to the plain words of the Regulation. *Canadian National Railway Company v. British Columbia, 2024 BCCA 309.* This is in keeping with Policy Guideline 37C which refers to those building products which save on energy as opposed to conserve natural resources.

Therefore, I decline to accept the Landlord’s position that water-efficient toilets qualify as energy-efficient under the Regulation. I decline to include this capital expenditure

totaling $27,049.58 for an additional rent increase as I find it does not qualify under the Regulation as “reducing energy use.”

Installation of Building Automation System

In this case, I find the installation of the building automation system which monitors the outdoor ambient temperature to initiate heating to qualify as a major component or system of the building. Based upon the Landlord’s documentary evidence and testimony, I find this capital expenditure increases energy efficiency. I find this is sufficient to satisfy the requirements of the Regulation.

The Landlord provided the receipts for the capital expenditure and the final payment on December 11, 2023, was incurred within 18 months prior to the Landlord submitting this application on September 5, 2024. I accept the Landlord’s statement and therefore I find it is reasonable to conclude that this capital expenditure is not expected to reoccur within five years. I further accept the Landlord’s submission there is no other source of payment for this capital improvement.

Based on the above, I find the Landlord is entitled to recover the amount of **$22,130.08.**

Tenant Objections to the Capital Expenditures

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.

The Tenants’ primary objection to the capital expenditures was the benefit obtained by the Landlord at the expense of higher rent to the Tenants. I find this and other objections raised by the Tenants are insufficient under the Regulation to result in the director dismissing the Landlord’s application.

Based on the above, I find the Landlord is entitled to recover for the installation of the building automation system as an energy efficient capital improvement in the amount of **$22,130.08.**

Summary

The Landlord has been successful in its application. The Landlord has established, on a balance of probabilities, the elements required to impose an additional rent increase for

total capital expenditures of **$22,130.08,** for the major component or system 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 57 specified dwelling unit and that the total amount of the eligible capital expenditures is the amount of **$22,130.08.**

I find the Landlord has established the basis for an additional rent increase for capital expenditures of **$3.24 ($22,130.08 ÷ 57) ÷ 120 = $3.24).** 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 Landlord has stated that any rent increase would be imposed on those Tenants residing in their units prior to March 6, 2023, the date of the earliest final payment made by the Landlord for a capital expenditure in its application.

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 application for an additional rent increase for capital expenditures totaling **$22,130.08.** The Landlord must impose this increase in accordance with the Act and the Regulation.

I order the Landlord to serve all Tenants with this Decision, in accordance with s. 88 of the Act within two weeks of this Decision. I authorize the Landlord to serve a Tenant by email if the Tenant has provided an email address for purposes of service. The Landlord must also provide a copy to any Tenant who requests a printed copy.

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: December 4, 2024

Residential Tenancy Branch