Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding AMSTAR 1035 PENDERGAST APARTMENTS LTD. and [tenant name suppressed to protect privacy]

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 4, 2024.

The parties confirmed service of Notice of Dispute Resolution Proceeding and documentary evidence filed by the Landlord. The Landlord submitted an affidavit confirming service to each Tenant by posting on the rental unit door on September 19, 2024, the Notice of Hearing together with other material documents relevant to the proceeding, including correspondence from the Landlord's counsel with on-line links for Tenants to access the Landlord's evidence. Landlord's counsel stated 4 Tenants utilized the on-line links, and none contacted him with difficulty in accessing the Landlord's evidence. I find the Tenants were served with the required materials in accordance with the Act.

Documentary evidence was not submitted by any Tenant 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 Landlord's application requests an additional rent increase for these capital expenditures made by it:

- Installation of water-efficient toilets in the amount of $24,214.05 (Landlord's last payment for this capital expenditure made on March 6, 2023)
- Installation of a building automation system in the amount of $24,203.18 (Landlord's last payment made on December 11, 2023)

The residential rental property was constructed in 1968, is 4-storeys and has a total of 57 rental units. Landlord's counsel states the capital expenditures were incurred in relation to these installed items within 18 months preceding the application and these costs are not expected to reoccur for at least five years. Documentation of invoices and payments made by the Landlord were provided in evidence. Counsel also confirmed that each capital improvement was expected to last for at least 5 years and there was no other source of payment for these expenditures.

Counsel explained the Landlord undertook the replacement of toilets in 41 units of rental property (some rental units had denied accessed for the work). He stated the previous toilets used approximately 4.8 litres of water per flush, whereas the water-efficient toilets used only 3.0 litres per flush. The Landlord submitted documents from the manufacturer describing the water-efficient toilets in greater detail. The toilets come with a 10-year warranty. Landlord's counsel, referring to a prior arbitration decision, stated that water-efficient toilets conserved environmental resources and thus should be subject to inclusion within the Regulation affording additional rent increases for capital expenditures relating to energy efficiency or the reduction of greenhouse gas emissions.

The building automation system was installed to reduce energy (natural gas) usage. The Landlord's director of energy testified the building automation system controls the temperature of heat generated by the boiler and domestic hot water tanks. Its main function is to control the temperature of heat provided to throughout the rental building as well as the temperature of the hot water supplied to units. Landlord's representative further testified the automated system replaces the manual change of temperature for the boiler and hot water tanks. The system is designed to be more responsive to temperatures as these decrease/increase through the fall, winter and spring seasons.

Tenants attending the hearing acknowledged the water-savings provided by the new toilets but noted these toilets seldom worked well. Additionally, comments were noted that the Landlord knew it was purchasing an older building and should, or did, factor in the cost of completing these improvements at the time of purchase. The Tenants' position was the Landlord may have bargained for a decreased purchase price due to the age of the building and need for upgrades, and now are able to pass the cost of these capital expenditures to the Tenants. A Tenant further noted the Landlord has increased the rent annually as permitted under the Regulation, the most recent increase

at 3.5 per cent. Tenant L.E. commented the building automation system was energy efficient, but the domestic hot water tanks were not affected by the system. He stated he "applaud[ed] the new system," however, he noted that after the system was installed there was a disruption to the Tenants' hot water delivery for several days. Tenant L.E. also inquired as to the Landlord's potential ability to receive tax benefits for these improvements.

Counsel replied that the Landlord's purchase price of the building was not a factor in applying for an additional rent increase under the Regulation. Additionally, Landlord's representative stated the lack of hot water for a few days concerned the failure of a heat exchanger rather than the installation of the automation system. Landlord's counsel also noted that insofar as any additional rent increase may pose a financial hardship to a tenant, noting the building had several Tenants who were elderly, that information had been provided to Tenants on contacting the Landlord regarding their circumstance.

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 Regulations provide 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 find 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 **$48,417.23** for these itemized capital expenditures set forth in the Landlord's application, there being no collateral source or rebates to off-set this cost fully or partially.

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, 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 making the application on September 5, 2024. Additionally, I find it is reasonable to conclude that this capital expenditure will not be expected to occur again 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 reimburse the Landlord for some or all of this capital expenditure.

The Landlord takes the position the water-efficient toilets are an eligible capital expenditure under the Regulation as the toilets qualify upon a broad interpretation given to "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. Counsel also stated "energy efficient" is not defined in the Regulations, and thus an expansive interpretation is warranted.

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 on the newer toilet. The toilet does not utilize energy as it does not require an energy source (such as, a fossil fuel or electricity) for its operation nor does it use heated water that would require the expenditure of energy in order to raise its 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 units; 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 energy efficient as the term is used in the Regulation. I find that notwithstanding the lack of specific definition for the term “energy efficient,” the term is subject to its plain meaning and the Policy Guideline references its application with regard to energy use and greenhouse gas emissions.

Therefore, I decline to accept the Landlord’s position that water-efficient toilets qualify as energy-efficient under the Regulation. I dismiss this capital expenditure as a qualifying capital expenditure under the Regulation for purposes of an additional rent increase.

Installation of Building Automation System

In this case, I find the installation of the building automation system which monitors the heating in the rental building to constitute 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.

Based on the above, I find the Landlord is entitled to recover the amount of **$24,203.18.**

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.

It is noted that Policy Guideline 37C states that although Landlords may "access tax credit and deduction schemes to reduce their taxable income when they incur capital expenditures," that this is not considered a "payment from another source" under the Regulation, as "landlords are not reimbursed by another party under tax credit and tax deduction schemes."

I find the Tenants have not provided sufficient evidence to support a dismissal of the Landlord's application for an additional rent increase for capital expenditure.

Based on the above, I find the Landlord is entitled to recover for cost in the amount of **$24,203.18** to install the building automation system as permitted under the Regulation for capital expenditures for major systems or components that are energy efficient that are subject to additional rent increase.

Summary

The Landlord has been successful with its application. The Landlord has established, on a balance of probabilities, the elements required in order to be able to impose an additional rent increase for total capital expenditures of **$24,203.18,** for those major components or systems as described herein. I accept the Landlord's representation in its applications that the additional rent increase applies to those Tenants occupying units before December 11, 2023, which was the date of last payment made by the Landlord for that capital expenditure.

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 there are 57 specified dwelling unit and that the total amount of the eligible capital expenditures is the amount of **$24,203.18.**

I find the Landlord has established the basis for an additional rent increase for capital expenditures of **$3.54 ($24,203.18 ÷ 57 specified dwelling units) ÷ 120 months = $3.54).** 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 application for an additional rent increase for capital expenditures totaling **$24,203.18.** 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 section 88 of the Act within two weeks of this Decision. I authorize the Landlord to serve a Tenant by email if the Tenant provided an email address for service and to provide any Tenant with a printed copy if requested by the Tenant.

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 01, 2024

Residential Tenancy Branch