Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Hollyburn Properties
and [tenant name suppressed to protect privacy]

DECISION

Dispute Code: ARI-C

Introduction

The landlord made an application in which they seek a rent increase pursuant to sections 43(1)(b) and 43(3) of the *Residential Tenancy Act* ("Act") and section 23.1 of the *Residential Tenancy Regulation,* B.C. Reg. 477/2003 (the "Regulation").

This Decision is in respect of the landlord's application.

History of Application and Proceedings

The application was made on November 19, 2021. A preliminary hearing was held, by telephone conference call, on January 28, 2022. An Interim Decision was issued on January 29, 2022. As noted in the first Interim Decision, this matter was adjourned to June 14, 2022, at which time the landlord's application was to be considered in a written submission-only hearing format (pursuant to section 74(2)(b) of the Act). However, for the reasons set out in the second Interim Decision (which does not appear to have been sent out by the Residential Tenancy Branch until a few months later), the matter was adjourned to November 28, 2022. It is on this date that the parties' written submissions, along with relevant evidence, was considered in respect of the application.

While issues concerning proper service appear to be of some concern for the respondents, I am not satisfied that, at this point in the proceedings (months after the interim decisions have been issued) that either party is prejudiced by service. Both parties have had ample opportunity to make submissions and provide supporting evidence. Further, despite late service by the landlord earlier in these proceedings, this is not a basis by which the landlord's application is to be dismissed. (See also Rule 9.1 of the *Rules of Procedure.)*

Issue

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

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the issue of this application, and to explain the decision, is reproduced below.

The landlord seeks an additional rent increase based on four categories of capital expenditures incurred within the 18-month period immediately preceding the date of filing the application in regard to the rental property. These expenditures are for the cost of the installation of a secured bicycle storage facility, the cost of repairs to the exterior of the building, the cost of engineering and consultation services required to determine the nature and extent to complete the repairs, and the cost of drainage repair and modifications to the roof.

The landlord has not made a previous application under subsection 23.1(1) of the Act in regard to the property.

The residential property consists of 115 storey building comprising 103 residential rental units, inclusive of a two-unit caretaker suite office. The first level of the building includes a parkade with several underground parking floors. The rental units are located on floors 1 to 15 of the building. For the purposes of this application the building contains 103 specified dwelling units as each rental unit is located within the single building in which all of the subject capital expenditures were incurred.

The building is of concrete construction, believed to have been originally constructed in the 1960s. The landlord is owned the building since July 2005.

The landlord seeks to impose an additional rent increase for capital expenditures (totalling $747,249.52) incurred to pay for work done to the residential property's as follows (referred to individually and collectively as the "Work"):

Description	Date Completed	Amount
Bike room/security repairs	November 30, 2020	$14,473.52
Exterior repairs	September 30, 2021	$681,694.12
Engineering and consultation	September 27, 2021	$50,326.28
Drainage repair	October 14, 2020	$756.00

The landlord submitted copies of invoices supporting these amounts.

The vast majority of the invoices rendered in each of the four categories of expenditures were paid within 18 months prior to the application date. There are a few invoices that were not. However, the level landlord submits but these invoices are still eligible as the final invoice for each project, the capital expenditure chroma was paid within the 18 month eligibility, which catches the earlier invoices rendered. While argues that it would be a wrong approach and contrary to the intention of the regulation and the policy guideline to exclude these invoices.

Regarding the bicycle room security, the landlord submitted that the bicycle room is a new secured storage facility located in Billings garage area, completed in 2020. The facility provides free secured bicycle storage for all tenants. Prior to the bicycle room tenants had no secure location to store their bicycles. Additional detail regarding the bicycle room is set out in the landlords written submission.

The landlord submits that the installation of the bicycle room provides additional security for the residential property and satisfies the requirement of 23.1(4)(a) of the Regulation. the items comprising the bicycle room are expected to last for a period of at least five years. In most cases, much of the components making up the bicycle room will last anywhere between 10 to 25 years.

Regarding the claim for external building repairs and engineering services, these were two capital expenditures associated with conducting exterior repairs to the building. An engineering report was submitted into evidence. The work itself was restoration work to the external concrete of the building, which the landlord submits falls within the definition of a major system that is structural and integral to the residential property. The report from the engineer indicated that the damage observed on the exterior to the building is consistent with ordinary wear and tear for an older concrete building and not due to neglect or failure to maintain the concrete exterior or openings.

During the exterior repair project, it was determined that some modification of the main roof needed to be completed to improve drainage to stop water ingress. The work itself consisted of a channel cut to allow cooling water to freely move to an existing drain. The cost of this work was $756. The landlord submits that the roof is a major system or component and needed modification or repair to provide better drainage. The work is expected to have a useful life of at least five years.

The tenants opposed the claim for exterior work specifically in relation to $160,000.00 in painting. They referenced policy guideline 37 which specifically includes “painting walls” as something that would not be captured by this type of application.

The tenants oppose a sub-claim of $28,800.00 for bird spike epoxy glue. The tenants submitted that “The landlord’s evidence again provides no details or even basic information about what this is for. However, if the landlord is found to have lifted their burden of proof for this specific item, it is assumed that it is for the installation of bird spikes.”

They further argue that bird spikes would not fall into the meaning of a “major component.”

The tenants further submit that the bicycle room is not a major system or component and that it does not improve the security of the rental property. They submit that

> It is not a major system since it is insignificant to the overall security of the building. Additionally, it is not mentioned in any of the examples of major system provided in the RTB’s policy, nor are there any mentions of anything similar to a secure bike storage mentioned. It is also not a major system because it provides no additional security to units who does not have bicycles, nor can it even by its design provide it to all tenants since there are only 59 steel placements for bicycles and there are 103 units (which each could have multiple bikes).

Analysis

1. Statutory Framework

Sections 21 and 23.1 of the Regulations sets 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 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
    - 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

        - 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
    - the capital expenditure is 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.

If a landlord discharges their 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

There has been no prior application made by the landlord in respect of this property.

3. 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.

There are, for the purpose of this application, 103 specified dwelling units.

4. Amount of Capital Expenditure

The amount claimed by the landlord is $747,249.52.

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

As stated above, in order 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
    - 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;
- the capital expenditure is not expected to be incurred again within five years.

I will address each of these in turn.

a. Type of Capital Expenditure

The Work included upgrades to the building's exterior, including to the roof. I find that this falls within a major component as contemplated by the policy and the Regulations.

The engineering and consultation services are also, I find, part of the Work.

However, I must agree with the tenants' submissions that the painting of the outside is excluded. Similarly, the claim for bird spike epoxy glue cannot be captured by the claim. Bird spikes are not, I find, something that can be called a major component.

Regarding the secured bicycle storage facility, I must conclude that it does *not* meet the definition of a major system or component. And while the bike room is designed to provide security to the bikes therein, it does not, I find, provide an "improvement in the security of the residential property." It only, as it were, an improvement in the security of tenant property (that is, bikes.) For this reason, I do not accept this claim.

As such, I find that some, but not all, of the Work was undertaken to replace "major components" of a "major system" of the residential property.

b. Reasons for Capital Expenditure

The reasons for the eligible capital expenditures were to repair, replace and install a major system or a component of a major system because the exterior was reaching the end of its useful life. The drainage to the roof was installed to ensure that the roof no longer pools water, which can be said to be malfunctioning.

c. Timing of Capital Expenditures

The landlord made the following submission on the timing:

Timing of Capital Expenditures

9. The following principles apply to determining the eligibility of capital expenditures based on the date they were "incurred":

   (a) a capital expenditure must be incurred within 18 months of the application for an ARI being made: Regulation s.23.1(4)(b); and
   (b) a capital expenditure is "incurred" when payment for it is made (Policy Guideline 37).

10. Unfortunately, neither the Regulation nor the Policy Guideline provide guidance as to when payment of a capital expenditure is made. For the reasons that follow, Hollyburn submits that payment of the capital expenditure is made only upon the payment of the last invoice comprising the underlying project for which the capital expenditure is incurred. It would be contrary to the intent of the Regulation to simply look at the dates

of payment of individual invoices as the dates of payment of the capital expenditure itself.

11. A "capital expenditure" is generally understood to be an expense incurred to acquire fixed (or capital) assets or to repair, replace or improve them. Many capital expenditures will involve several elements comprising multiple contractors or suppliers who are involved at various stages of the project. Each supplier or contractor may issue invoices as various times while the project is being undertaken. Projects may last for more than 18 months.

12. It is submitted that s. 23.1 of the Regulation is project-centric in terms of the incursion of capital expenditures. It contemplates, among other things, capital expenditures to install, repair or replace major systems and major components. Policy Guideline 37 provides some explanation of these items, referring to them as things essential to support or enclose a building, protect its physical integrity or support a critical function of the residential property. Replacing a major system, will generally involve a number of suppliers and contractors who will render invoices at various times. <u>The capital expenditure is the project itself, not the individual invoices that form only part of the capital expenditure.</u>

13. To apply s. 23.1 of the Regulation and the Policy Guideline as requiring each individual invoice rendered in regards to a capital expenditure to fit within the 18 month period immediately preceding the date of the application, would lead to an absurd result. Specifically:

    (a) for longer projects involving a number of aspects or components, it may lead to only part of the capital expenditure for the project being eligible. It makes no sense if, for example, only half of a capital expenditure to replace a building's electrical system was eligible, and the other half was not, as the landlord took additional time to complete the project so as to lessen the inconvenience for tenants, or there was delay beyond the control of the landlord. In such a case, the landlord would have to make a claim for expenditures before the project is complete but would be barred from making a further claim for the balance of the expenditures for 18 months: Regulation s. 23.1(2). Multiple applications involving the same project capital expenditures should not be encouraged.

    (b) eligibility of a landlord's capital expense will be determined by a contractor's timing of the rendering an invoice, which is outside the control of a landlord.

    (c) such a position would discourage prompt payment of invoices by a landlord, solely to extend the time for the invoice to be included in the eligibility period.

(d) it fails to take into account the effect of the *Builder's Lien Act*, which provides for a mandatory holdback for payment for 55 days from substantial completion of the contract or the improvement: s. 8. This 55 day mandatory extension may result in early invoices being excluded from the eligibility period, unless the capital expenditure is seen as a project, rather than as a number of disjointed, individual invoices.

14. As noted, the Policy Guideline provides that the capital expenditure is incurred when "it" is paid. When a capital expenditure is seen as a project to install, repair or replace a major system or a major component (or is related to security of improves energy efficiency), "it" (the capital expenditure) is paid only after the final invoice for the project is paid, generally following the expiration of the Builder's Lien holdback period.

15. For the purposes of this application, the vast majority of the invoices rendered in each of the 4 categories of capital expenditures were paid within 18 months prior to the application date. There are a few invoices that were not. However, Hollyburn submits that these invoices are still eligible as the final invoice for each project (capital expenditure) was paid within the 18 month eligibility period, which catches the earlier invoices rendered. It would be a wrong approach and contrary to the intention of the Regulation and the Policy Guideline to exclude these invoices.

Having carefully considered the landlord's submissions and argument on this point, I am inclined to agree. As such, the entirety of the (allowed) payments made are accepted and considered to fall within the 18-month period.

d. Life expectancy of the Capital Expenditure

As stated above, the useful life for the components replaced all exceed five years. There is nothing in evidence which would suggest that the life expectancy of the components replaced would deviate from the standard useful life expectancy of building elements set out at RTB Policy Guideline 40. For this reason, I find that the life expectancy of the components replaced will exceed five years and that the capital expenditure to replace them cannot reasonably be expected to reoccur within five years.

For the above-stated reasons, I find that the capital expenditure incurred to undertake the Work is an eligible capital expenditure, as defined by the Regulation.

6. Tenants' Rebuttals

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.

While there were several submissions made by various tenants, none satisfied the grounds 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 that the landlord has been paid, or is entitled to be paid, from another source.

7. Outcome

The landlord has been partly successful, minus the above-noted amounts not meeting the eligibility.

Original claim:	$747,249.52
Less bike room/security repairs:	$ 14,473.52
Less bird spike work	$ 28,800.00
Less painting:	$160,000.00

Final amount of eligible capital expenditures: $543,976.00.

Section 23.2 of the Regulation sets out the formula to be applied when calculating the amount of the addition 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 103 specified dwelling units and that the amount of the eligible capital expenditure is $543,976.00.

So, the landlord has established the basis for an additional rent increase for capital expenditures of $44.01. (Calculated as follows: $543,976.00 ÷ 103 units ÷ 120).

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

The landlord has been successful, in part. I grant the application for an additional rent increase for capital expenditure of $44.01. The landlord must only impose this increase in accordance with the Act and the Regulation.

I order the landlord to serve all tenants with a copy of this decision in accordance with section 88 of the Act.

This decision is made on delegated authority under section 9.1(1) of the Act. A party's right to appeal this decision is limited to grounds provided under section 79 of the Act or by way of judicial review under the *Judicial Review Procedure Act,* RSBC 1996, c. 241.

Dated: November 30, 2022

Residential Tenancy Branch