



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes ARI-C

Introduction

The Landlord in this matter seeks an additional rent increase for capital expenditure pursuant to s. 43 of the *Residential Tenancy Act* (the “Act”) and s. 23.1 of the Residential Tenancy Regulation (the “Regulation”).

C.D. appeared as counsel for the Landlord. M.D. also identified himself as counsel for the Landlord but did not participate in the hearing. C.H. attended as agent for the Landlord. The building’s manager, M.T., also attended. The Landlord called D.S. as a witness.

Of the respondent tenants, A.K., Y.O., N.E., J.S., P.R., and J.O. attended the hearing.

Service of Documents

Landlord’s counsel advises that each tenant was served with the Landlord’s application materials between September 8th and 10th, 2023. M.T. confirmed that she posted the application package to the doors of each rental unit. The Landlord’s evidence contains a certificate confirming service on the tenants signed by M.T., M.W., and A.G.. It also contains a letter dated September 7, 2023 explaining how the Landlord’s evidence could be accessed via cloud portal.

Of the tenants who attended, all confirmed receipt of the Landlord’s application materials and raised no issue on service.

Rule 11.2 of the Rules of Procedure requires landlords who apply for an additional rent increase for capital expenditure to serve their evidence on each respondent tenant and that the evidence be received by the tenants at least 30 days prior to the hearing. By way of standing order of the Director dated February 17, 2023, service by posting

documents to the door is permitted for this application. Finally, Rule 3.10.4 of the Rules of Procedure permits service of evidence by way of file hosting service.

Taking the above into account, I find that the Landlord served its application materials as permitted by the Director's standing order of February 17, 2023. I accept that this was done between September 8th and 10th. Pursuant to s. 90 of the *Act*, I deem that the tenants received the Landlord's application materials by no later than September 13, 2023.

I find that service of the Landlord's evidence was completed in accordance with the *Act* and Rules of Procedure.

Issue to be Decided

- 1) Is the Landlord permitted to impose an additional rent increase for capital expenditures?

Evidence and Analysis

The parties were given an opportunity to present evidence and make submissions. I have reviewed all included written and oral evidence provided to me by the parties and I have considered all applicable sections of the *Act*. However, only the evidence and issues relevant to the claims in dispute will be referenced in this decision.

Relevant Legislation

Section 43(3) of the *Act* permits landlords to request approval from the Director to impose a rent increase greater than the limit imposed by s. 43(1)(a). 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.

Landlords seeking an additional rent increase under s. 23.1 of the Regulations must prove, on a balance of probabilities, the following:

- The landlord has not successfully applied for an additional rent increase against the tenants within 18 months of their application.
- The capital expenditure was incurred for the repair, replacement, or installation of a major component or major system for the property.
- The capital expenditure was incurred for one of the following reasons:

- to comply with health, safety, and housing standards required by law in accordance with the landlord's obligation to repair the property under s. 32(1) of the *Act*;
 - the major component or system has failed, is malfunctioning or inoperative, or is close to the end of its useful life; or
 - the major component or system achieves one or more of either reducing greenhouse gas emissions and/or improves security at the residential property.
- The capital expenditures were incurred in the 18-month period preceding the date on which the landlord applies.
 - The capital expenditures are not expected to be incurred again for at least 5 years.

Tenants may defeat a landlord's application for additional rent increases for capital expenditures if they can prove on a balance of probabilities that:

- the repairs or replacements were required because of 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.

Once the threshold question has been met, the Landlord must also demonstrate how many dwelling units are present in the residential property and the total cost of the capital expenditures incurred.

Section 21.1(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;

[...]

"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;

"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.

General Background

Counsel advises that there are 276 dwelling units within the subject residential property and confirms this number comprises vacant suites, occupied rental units, and accommodations occupied by managers. In total, the Landlord claims \$693,484.90 in capital expenditures for the additional rent increase against all 276 dwelling units.

I note that the Landlord's application lists 267 dwelling units for the claim. However, I accept counsel submissions at the hearing, which is further stated in its written submissions, that there are 276 specified dwelling units for this claim.

I am advised that the Landlord had previously filed a claim for this residential property, with the file number for the previous matter noted on the cover page of this decision. Counsel advises that the previous application was withdrawn. I am further told that when this application was filed, the Landlord revised its claim to reflect changes in the Policy Guidelines with respect to additional rent increases for capital expenditures.

Counsel confirms that there was no previous order made granting the Landlord authorization for an additional rent increase for a capital expenditure. Upon review of the previous file, the Landlord did withdraw their previous application and no decision or findings were rendered in that matter.

I find that the Landlord has not previously obtained an order for an additional rent increase for a capital expenditure with respect to the residential property. I further find that the previous application is largely irrelevant as no findings were made on its claims. The Landlord had the right to withdraw the previous claim and in refiling also had the right to revise the claim in line with the Policy Guidelines. There is no prejudice to the Landlord by withdrawing its previous application.

With respect to this application, I find that it was filed on August 30, 2023 in light of the information on file and in consideration of Rule 2.6 of the Rules of Procedure. For the

capital expenditure to qualify, the Landlord must have incurred the expenditure within 18 of August 30, 2023, which in this case is February 28, 2022.

Capital Expenditure #1 – Roof Replacement

The Landlord claims \$660,449.96 for the replacement of the roof at the residential property, which counsel submitted was at the end of its useful life. The Landlord's agent advises that the residential property was built in 1979, with the Landlord purchasing the property in 2014. I am advised by the agent that she is uncertain when the entire roof system was replaced but indicates that they have records to show the outer roof layer was installed in 2008.

Counsel directs me to a report dated June 25, 2018 concerning the evaluation of the roof at the residential property (the "2018 Report"). The 2018 Report was prepared by a consultant engineer retained by the Landlord and details reported leaks in the roof, improperly adhered membranes, and moisture present within the roof assembly. The 2018 Report recommended removal of the entire roof assembly and installing a new roof system. At the time the 2018 Report was authored, the cost estimate for the project was \$550,000.00.

Counsel advises that the Landlord retained a roofing maintenance contractor and directs me to maintenance records in evidence. The maintenance records date from 2015 to 2022 and outline various instances in which holes were patched due to water leak being reported by occupants of the residential property.

I am advised by counsel that the Landlord retained a project management company to look after tendering the roof replacement project and managing its installation. The Landlord's evidence includes a copy of a retainer letter dated November 27, 2020 between the Landlord and the project management company.

D.S. was called as a witness by the Landlord and identified himself as president for the project management company. D.S. described how water had made its way into the roofing system, which caused the insulation to collapse such that water was pooling on the roof. D.S. provided his opinion that the roof system was beyond repair and continued maintenance. In his view, the roof had to be replaced. D.S. further provided his opinion that the roof replacement had an expected life expectancy of 25 years.

On cross-examination, D.S. denied that the roofing system was poorly maintained and emphasized that roofs age and require replacement. D.S. says that he does not have

precise knowledge on the age of the roof at the residential property but says that inspection of an adjacent roof area at the building suggested that the bottom layers of the roofing system were between 25 and 30 years old and that the top layer was 10 years old.

Counsel directs me to photographs in evidence of the roof before it was replaced, review of which show loose patches, tears in the roofing membrane, and several previous patches.

The Tenant N.E. argued that the roof was improperly maintained and directed me an email dated January 30, 2020 from an employee of the roof maintenance contractor. The employee who put together that email claimed he “knew something like this would come up” and that “materials and workmanship” of the roof was “questionable”. Multiple deficiencies are noted by the employee, including a query on whether someone was clearing the roof off with a shovel. The employee strongly recommended that a maintenance plan be put in place to address some of the deficiencies on an ongoing basis.

I have little difficulty finding that the roof is a major component of the residential property, comprising an integral part of the exterior membrane of the building.

It was argued that the roof was improperly maintained. However, the preponderance of the evidence suggests that the roof system failed due to age and poor workmanship in its installation. D.S. held the opinion that the roof was not improperly maintained and had simply reached the end of its life. Pooling was reported on the roof and D.S. indicates this occurred as a result of water degrading the roof insulation to the point that the material softened and created depressions in the roof.

The maintenance contractor suggests poor workmanship in the installation but does not say the failures are the result of improper maintenance through the course of the life of the roof. When viewed in the context of the 2018 Report, the suggestion from the maintenance contractor that a maintenance plan be put in place is merely a reflection of the need to take remedial action to address the ongoing failures of the roof.

Review of the photographs shows numerous patches, and the repair logs note leaks into the building. When viewed as a whole, there simply comes a point when a roof cannot be patched any further. Given the frequency of leaks within the residential property, the roof needed replacement.

I find that the Landlord has established that the roof system had reached the end of its useful life and required replacement.

As suggested by Policy Guideline #37C, a landlord may claim for expenditures paid outside the 18-month window provided the final expenditure for the overall project is paid within the 18 months of filing the application. In other words, the Landlord may claim for the total project cost provided the final payment on the project was made after February 28, 2022.

The Landlord's evidence includes invoices beginning in April 2021 and ending in April 2023 for the roof replacement. The invoices show the replacement was undertaken in stages as different roof areas were replaced sequentially.

An invoice dated November 25, 2022 from the roofing contractor shows the replacement was mostly completed by November 2022. A subsequent invoice from the roofing contractor dated February 27, 2023 indicates final work for the project was completed in February 2023. The final invoice provided by the Landlord is dated March 30, 2023 from the project management consultant.

Upon review of the invoices provided, I accept that the final costs for the roof replacement were incurred in early 2023. I find that the Landlord incurred the expenditure for the roof replacement within 18 months of filing this application.

I find that the new roof is expected to have a life expectancy greater than 5 years. I make this finding based upon the opinion evidence of D.S., the fact that the previous roof lasted longer than 5 years, and information in the tender indicating the contractor that installed the roof provided a 20-year warranty.

I find that the Landlord has demonstrated that the roof replacement is an eligible capital expenditure.

Review of the invoices show that the total cost incurred on the project was \$660,449.96. I find that the Landlord is proven an eligible capital expenditure in this amount.

Capital Expenditure #2 – Exterior Repairs

The Landlord also claims \$6,247.50 for water proofing repairs to the exterior of the residential property. The Landlord's written submissions indicate that the work involved sealing cracks in the building's exterior and painting the exterior.

Landlord's counsel directs me to quote dated November 3, 2022 from the contractor retained for the project. The quote details the scope of the work to be undertaken to seal areas which had "water ingress". Counsel also directs me to photographs of the work area before and after the repairs were undertaken.

The Landlord's evidence contains an invoice dated November 16, 2022 for \$6,247.50 pertaining to the repairs undertaken. I find, as demonstrated by the invoice, that the cost was incurred within 18 months of this application.

The quote provided by the Landlord demonstrates that the cracks in the exterior of the building were such that water was making its way into the building. I find that the exterior of the building is a major component of the residential property and that it had failed such that repairs were necessary so that the Landlord complied with its obligations under s. 32(1) of the *Act*.

Counsel refers me to the Policy Guideline #40, which provides guidance on the useful life of building elements, citing it for the proposition that the exterior repairs have a useful life of 10 years. However, review of Policy Guideline #40 does not cover this specific type of repair, which is remedial in nature. The quote from the contractor on this project, however, indicates that the life expectancy of the sealant used is 7 to 10 years.

I accept that the sealant used for the project has a life expectancy longer than 5 years. Based on this, I find that the cost for this repair is not expected to reoccur within 5 years as the product used has a life expectancy exceeding that.

I find that the Landlord has proven that the exterior repairs are an eligible capital expenditure and has proven total cost for the expenditure at \$6,247.50.

Capital Expenditure #3 – Patio Membrane Repair

The Landlord also claims \$20,658.75 for the repair of an exterior patio at the residential property. As described in written submissions, the decking for a patio had to be removed and the membrane and concrete replaced to correct the patio's drainage. As described by the agent at the hearing, the drainage for the patio was causing water to leak back into the residential property affecting other rental units.

The Landlord's evidence includes a quote from the contractor dated January 23, 2022 describing the scope of the work. I am also provided with photographs of the patio membrane, which is worn through and compromised.

The Landlord's evidence includes two invoices for this project dated January 31, 2023 and February 28, 2023, both of which total \$20,658.75.

I find that the patio membrane and slope, forming part of the building envelope, are major components of the residential property. I accept that the repair was required to ensure there was no water ingress into the residential property, which adversely affected other occupants at the residential property.

I find that the cost of the expenditure was necessary for the Landlord to comply with its obligation under s. 32(1) of the *Act* and on the basis that the membrane was clearly compromised and at the end of its useful life. Based on the invoices in evidence, I find that the expenditure was incurred within 18 months of this application.

Policy Guideline #40 suggests that waterproofing membranes have a life expectancy of 15 years. Based on this, I find that the patio repair is not expected to reoccur within the next 5 years.

I find that the patio repair is an eligible capital expenditure, and the Landlord has demonstrated the cost of this repair was \$20,658.75.

Capital Expenditure #4 – Window Replacement

Finally, the Landlord claims \$6,128.69 for the replacement of several windows. The Landlord's written submissions indicate that the seals for the windows were broken on some of the north facing windows at the residential property.

The Landlord's evidence includes an invoice dated March 22, 2023 for the window replacement order listing a total cost of \$6,128.69. I am also provided with photographs of the windows that needed replaced.

I find that the windows to the residential property are a major component of the residential property, forming a part of the building's exterior envelope.

I accept that the windows in needed replacement as the photographs provided show condensation build up between the panes, indicating the seal for the window has been compromised. I find that the repairs were necessary for the Landlord to comply with its obligation under s. 32(1) of the *Act*.

Based on the invoices in evidence, I find that the cost was incurred within 18 months of this application being filed.

I further find that the expected life expectancy of the windows, as suggested by Policy Guideline #40, exceeds 5 years, such that the cost will not be reincurred for these windows again within the next 5 years.

I find that the window replacements are eligible capital expenditures, and that the Landlord has demonstrated the cost of the repair at \$6,128.69.

Arguments by the Tenants

It was argued by J.S. and P.R. that they moved into their rental unit in August 2023 such that the costs had been incurred and the rent increase ought to have been reflected in their rent. Though I accept the logic of the Tenants argument, s. 23.1 of the Regulation does not specify that the additional rent increase must only be imposed on occupants who resided at the property prior to the capital expenditure being incurred.

Indeed, it simply states that the additional rent increase is to be spread out across all the specified dwelling units, regardless of when the suites were occupied or even if they are occupied. The only restriction would be that the Landlord can only impose the increase on respondent's named in its application, meaning against tenants who reside at the residential property when the application is filed. In the case of J.S. and P.R., that means them. Their argument, though a valid policy argument, is irrelevant insofar as the *Act* and Regulation are concerned.

There were also generalized arguments about lack of maintenance at the residential property. With respect to the argument, though it may be a valid ground for defeating a claim by the landlord, there must be more than mere invocation of lack of maintenance. To be clear, there is no evidence to support the capital expenditures claimed by the Landlord were due to lack of maintenance and is merely a reflection of the fact that building elements degrade over time and require replacement.

Summary

I find the Landlord has proven the following eligible capital expenditures as follows:

| Item | Amount |
|--------------------|---------------------|
| Roof Replacement | \$660,449.96 |
| Exterior Repair | \$6,247.50 |
| Patio Repair | \$20,658.75 |
| Window Replacement | \$6,128.69 |
| TOTAL | \$693,484.90 |

The Landlord has established total eligible capital expenditures in the amount of \$693,484.90.

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, as there are 276 specified dwelling units, the Landlord has established the basis for an additional rent increase for capital expenditures of \$20.94 ($\$693,484.90 \div 276 \text{ specified dwelling units} \div 120$).

The parties may refer to Policy Guideline 37C, s. 23.3 of the Regulation, s. 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 for capital expenditure of \$20.94 for the specified dwelling units. 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 any of the methods set out in s. 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 *Residential Tenancy Act*.

Dated: October 25, 2023

Residential Tenancy Branch