Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding MASON INVESTMENTS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes ARI-C

Introduction

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

The Landlord (agents of) attended the hearing. Two Tenants and an advocate were present at the hearing. All parties provided affirmed testimony. The Tenants confirmed receipt of the Landlord's application, Notice of Dispute Resolution Proceeding, and all evidence packages, including the supplemental evidence package. The Landlord provided proof of service for the remaining tenants who were not in attendance.

The Landlord confirmed receipt of the Tenant's evidence package. No service issues were raised.

I find the Landlord sufficiently served the Tenants with the Notice of Dispute Resolution Proceeding and evidence packages, and the Tenants sufficiently served the Landlord with their evidence.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence submitted in accordance with the rules of procedure, and evidence that is relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

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

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The Landlord is seeking this additional rent increase to pay for two major projects completed to repair and modernize some of the building components. The two items are as follows:

1) $237,864.97 – Building envelope repairs/crack repair
2) $25,725.00 – Underground parking remediations

With respect to item #1 above, building envelope repairs/crack repair, the Landlord relied on an engineering report (the report), dated December 24, 2020, provided into evidence to highlight the issues with the building. The report specifies the following:

> *The [building], located at [address] Street, in Vancouver, BC, was built circa 1959. The building envelope consist of roofs, walls, windows and doors mostly dating back to original construction. JRS was informed by the Owners the roofing membrane was replaced in recent years and painting of the exterior cladding done in 2015. At approximately 61 years of age, the original building envelope assemblies have exceeded their expected service life, especially for their type, location and exposure. There is a history of leaks that have affected multiple units and were selectively reviewed.*
>
> *The exterior walls were observed to have deficiencies at several areas. Cracking and peeling of the paint coating over the finish stucco/parge coat were discovered at the concrete walls, which may allow for water to enter the wall assembly. Cracking and peeling can also be indicators that moisture is getting behind the coating, and being absorbed through the cementitious, porous parge coat. At several construction joints, cracks have formed, or are forming. Furthermore, sealant around windows and cladding transitions appears to be delaminated and failed, allowing for water ingress into these assemblies.*
>
> *Evidence of age-related deterioration in the building envelope components is apparent at multiple units in the building, along with signs and reports of active water ingress. Numerous instances of interior drywall cracks and paint peeling were observed at the*

exterior walls, and previous repairs have been completed at locations of water ingress. The windows are dated back to original construction and are showing visible condensation on the frames and glazing. There are multiple units reviewed to have glazing seal failures that can lead to additional air leakage and potential water ingress.

To address water ingress, and to ensure the continued long-term performance of the building, it is recommended to allow for repairs of the building envelope. For the concrete walls, our recommended approach is to complete sealant and painting renewals along with waterproofing at the construction joints. Another alternative is to install an exterior insulation and cladding system followed with sealant renewal. The windows are recommended for full replacement as it is well past its service life and areas of active water ingress are present. To improve long term performance, the vinyl clad walls could be replaced with a waterproofing membrane, exterior insulation and vinyl cladding.

[…]

The property manager indicated multiple units with water ingress issues and interior wall cracks. Units 602, 702 and 902 reported water ingress in the past, while units 802 and 806 reported a more recent occurrence of water ingress into the units. Units 201, 401 and 501 reportedly had interior drywall cracks. These units were included in the review.

The Landlord also provided several photos, taken in 2020, showing paint spalling, delamination, and cracking of the exterior building membrane. The recommended remediation work was completed around October 25, 2021. This amount is comprised of two invoices, one for $23,786.50, dated October 25, 2021, and another dated the same date in the amount of $214,078.48, totaling $237,864.97 for this item.

The Landlord explained that there were water issues reported in 2019 when various units reported water ingress. Then, following that, the Landlord did inspections and documented the issues in 2020, and engaged a series of professionals to address the issues with the building envelope. The Landlord pointed to the executive summary in the engineering report to show that there was peeling and cracking of the parge coat, delaminating stucco, and age related breakdown of that component. The Landlord pointed out that they followed all the repairs recommended by the engineering consultant.

The Landlord also pointed to the fact that the engineering report noted that this component had exceeded the useful service life, although this was in part due to the fact that in 2015, a new sealant was applied over an existing sealant. The Landlord also pointed to the contractor quote for the building envelope work to show that the work

performed matched almost exactly what was recommended in the engineering report, and that the useful life expectancy of this type of waterproofing repair would be at least 5 years.

The Landlord argued that policy guideline #40 shows that the useful life expectancy of sealers is 5 years, and exterior painting is 8 years. The Landlord pointed out that the Tenant may defeat this application if they can prove there was inadequate maintenance, or that the Landlord is entitled to be paid from another source. However, it is their burden to prove. Although no specific documentary evidence was provided showing maintenance over the years (from 2014-2019), the Landlord argued that they perform an inspection of the entire property at least twice a year with the property manager and the building manager. Also, the Landlord noted that the building manager does daily checks of the grounds and building to stay on top of cracking, peeling, bubbling or discolored painted exterior surfaces, as well as clean up general debris on the grounds.

The Landlord acknowledged that the waterproofing on the wall membrane should likely not have been installed over an older substrate, but they assert that this is only one of many factors contributing to the failure of the building membrane, including that it was many decades old, and required a substantive rebuild.

The Landlord also argued that the Tenant should not be able to defeat the application by saying the Landlord should have sued the previous contractor from 2015 for improper installation, as that falls outside the scope of reasonable ways for the Landlord to obtain funding from another source.

The Landlord is also seeking item #2, *Underground parking remediations,* in the amount of $25,725.00. This work was completed on September 30, 2022. The Landlord also provided photos of the parking area to highlight the cracks observed in the concrete surface/roof which sits above the underground building parking on the property. The parkade abuts the larger building and is used for general parking stalls for guests, as well as for Tenants in the building to rent as part of their tenancies. The general photos were taken in May of 2022, and show signs of water ingress in the interior ceiling of the underground parking, as well as some previous patching, which did not stop water ingress.

The Landlord stated that the surface of the parkade is decades old and is likely original to the building. The aggregate of the concrete was exposed since the cementitious material had been eroded by decades of wear and rain. This lead to cracking and water ingress, which infiltrated the lower parking area. The Landlord pointed to some work

they did as part of eliminating a tripping hazard as some of the maintenance done on the parking area. The Landlord stated that the building manager routinely (daily) walks the grounds and inspects the parking lot area, and saw nothing alarming until it started to leak more recently.

The Landlord argued that the parkade surface repair/waterproofing should be considered a major component, since it is directly involved in keeping the interior of the parkade dry, as that surface also functioned as a roof for that garage. Also, it is specifically noted in the policy guidelines #37C as an allowable repair for this type of claim.

Tenant's submissions

The Tenants were represented at the hearing by an advocate. Generally, the Tenants argue that:

> *[…] the Landlords application should fail for the following reasons:*
>
> *1) The work done by the Landlord, was only necessary due inadequate repair or maintenance on the part of the Landlord*
> *2) For the parking facility it should additionally be dismissed because a parking facility cannot be considered a major system under the RTA*
> *3) That the Landlord has failed to lift the burden of proof and specifically left out documents that they are required to submit under the 11.4 rules of procedure.*

The Tenants argued that they do not believe the Landlord has adequately repaired and maintained the building. They also assert that this repair must be "assumed" to be largely identical to the sealant and painting job that occurred in 2015, which failed within 4 years due to poor installation.

The Tenants (advocate) argued that not all Tenants have a parking spot, and there is only around 19 spots for about 53 units. The Tenants did not dispute the amounts of the capital expenditures, only whether they are eligible.

With respect to the exterior wall waterproofing project, the Tenants argued that the Landlord hasn't lifted the burden placed on them to demonstrate that the repairs were warranted. The Tenants also argued that the previous repair to the wall in 2015 was inadequate, which led to the need for this repair, and also that the repairs are only necessary due to lack of maintenance.

The Tenants pointed to the engineering report which speaks to the fact that the waterproof sealant applied in 2015 wasn't done in accordance with "good practice", which is why the coating failed in 4-5 years, rather than last 10 years. The Tenants asset that the Landlord ought to sue the previous contractor as a source of payment, rather than pursue this rent increase from the Tenants.

The Tenants argued that the Landlord failed to do any "proactive" maintenance, and only ever did reactive repair type work after problems were identified. The Tenants assert that without any proactive maintenance, the Landlord has failed to adequately maintain the building. The Tenants pointed to the lack of documentary evidence showing regular maintenance of the building envelope, and this work was only undertaken after discovering water ingress into several rental units in 2019. The Tenants pointed out to the Landlord's general maintenance records to show that most of the entries are reactive in nature, due to broken items such as windows. The Tenants also pointed to the portion of the engineering report which recommends that the Landlord develop a risk management strategy for repairs to the complex, which it does not appear the Landlord has done.

With respect to the parking area repairs, the Tenants argue that parking should not be considered a major system or major component, and that even though it is noted in policy guideline 37C as an acceptable repair for this type of an application, these policy guidelines are not prescriptive/binding. The Tenants pointed out that the term "integral" is not defined but they argue that parking is not integral for all Tenants in this building, since it is a service that only some use. Further, the Tenants also pointed out that the parking garage is beside the rental tower, and not integral to it. The Tenants pointed to the case law they provided in support of the fact that this ought not to be considered an allowable expense under the additional rent increase provisions. The Tenants also argued that since parking is something that can be taken away by the Landlord, provided it is accompanied by a rent reduction, that it cannot be considered integral.

The Tenants also pointed out that the Landlord has provided no evidence showing the actual age of the parking lot surface, only testimony from the managers. The Tenants also pointed out that they feel there has not been sufficient maintenance done on the parking surface, in a proactive manner.

Analysis

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)).

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 (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 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

I am satisfied that the Landlord has not successfully applied for an additional rent increase against these tenants within the last 18 months. This was not in dispute.

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.

The Landlord explained that there are 53 separate units in the building. I am satisfied that all 53 of the separate units in the building are both dwelling units, and specified dwelling units, given they are all located in the same building, where all of the renovations were completed. Further, the potential rent increase applies to all units for both the building envelope as well as the parking garage repairs. Just because there are only 19 parking spots does not preclude the Landlord from applying for this rent increase for all units. Also, I note there are common parking spots available to all occupants.

4. Amount of Capital Expenditure

The Landlord applied for the following 2 items:

1) $237,864.97 – Building envelope repairs/crack repair
2) $25,725.00 – Underground parking remediations

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
    - 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

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 37C provides examples of major systems and major components:

> *The Regulation defines a "major system" as an electrical system, mechanical system, structural system, or similar system that is integral to the residential property or to providing services to tenants and occupants. A "major component" is a component of the residential property that is integral to the property or a significant component of a major system.*
>
> *Major systems and major components are essential to support or enclose a building, protect its physical integrity, or support a critical function of the residential property. Examples of major systems or major components include, but are not limited to, the foundation; load-bearing elements (e.g., walls, beams, and columns); the roof; siding; entry doors; windows; primary flooring in common areas; subflooring throughout the building or residential property; pavement in parking facilities; electrical wiring; heating systems; plumbing and sanitary systems; security systems, including cameras or gates to prevent unauthorized entry; and elevators.*

I will address each of the items in the same order they were laid out above:

1) $237,864.97 – Building envelope repairs/crack repair

   I find this repair falls squarely within what should be considered a repair of a major system or major component. This repair was done to deal with siding and/or building membranes that were at the end of their useful life expectancy on a building that is over 60 years old.

2) $25,725.00 – Underground parking remediations

I also find this repair falls squarely within what should be considered a repair of a major system or major component. Pavement of parking facilities is specifically noted in the policy guideline as noted above. The Tenants assert this is not an integral part of the property, since many occupants don't have cars. However, I find this would likely be integral to many who use the building and the parking facilities and just because some tenants do not have cars does not mean this is not an acceptable repair to a major system or component. Also, I note the parking garage directly abuts the building, and provides protection from the elements for items stored within it, when functioning correctly. The policy guideline #37C is intended to provide context and clarity to the regulations. This type of an item is expressly

mentioned and was clearly an item that was intended to be included as an acceptable major component/major system for this type of an application.

b. Reason for Capital Expenditure

I am satisfied that the work was completed on these two items to replace aging building components and/or to replace failing, malfunctioning or inoperative components.

c. Timing of Capital Expenditure

I note the Landlord made the application on March 1, 2023, and I am satisfied that all work was completed and paid within the 18-month period preceding this application.

d. Life expectancy of the Capital Expenditure

Policy Guidelines #40 sets out the useful life expectancy for typical building components. There is nothing in this guideline which indicates this expense is likely to recur within 5 years, and this is not inconsistent with opinions in the reports provided, as long as the work was done properly.

I find that the life expectancy of the components replaced will likely 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 expenditures incurred to undertake the Work is an eligible capital expenditure, as defined by the Regulation.

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.

With respect to the building envelope/wall repairs completed, the Tenants assert that this repair was caused by the inadequate repair completed in 2015, since it was noted

in the recent engineering report that previous sealant and painting work was completed by applying new sealant on top of older product, which was not considered to be “good practice” by the engineers. I note the engineer report noted that the useful life of this type of a product should be between 5-10 years. However, it appears that this coating failed after around 4 years, when leaks were being reported in 2019. Although the waterproofing sealant and paint coat that was applied in 2015 acted as a primary means to keep water out in many areas of the building exterior, I also note there were other components that were malfunctioning and failing, such as outdated construction joints between concrete wall components, and other cracks that developed over the years. Both the concrete wall assembly itself and the paint/sealant are considered important components to keeping water out of the building, as per the engineering report.

While I accept that the repair in 2015 could likely have been performed to a higher standard, I am not satisfied that the work was done in a sufficiently egregious or negligent way such that it would have substantially contributed to the overall issues with the building envelope. It appears some of the issues stem from the fact that this building was built in 1959, before further redundancies were added to the wall system via the building code at that time, such as construction joint “waterstops” and exterior joint reveals. Water ingress is a multifactorial issue, and I do not accept that the most recent work was required merely due to a lack of proactive maintenance and poor installation of a sealant in 2015. The previous sealant work in 2015 lasted 4 years before leaks were reported, which isn’t too far off from the norm of 5-10 years. Further, even if the waterproofing that was done in 2015 was done in accordance with best practices, there are still other issues with the waterproofing of the building envelope (dated construction standards noted above) which could easily contribute to the failure that lead to water ingress into the rental units.

I note the Landlord completed the recommendation 1A from the engineering report, which included repairs to the sealant and paint, as well as installing construction joint waterproofing within the concrete wall itself. These repairs appear to be done in part to address some of the underlying deficiencies related to the age/construction type of this building, and not simply to repair damages caused by improper installation of a waterproof sealant in 2015. I am not satisfied the repairs to the wall system waterproofing are largely due to inadequate repair or a lack of maintenance by the Landlord. Further, I note the Tenants feel the Landlord ought to have provided evidence that they performed *proactive* maintenance, rather than *reactive* repairs. However, I do not find these terms are mutually as distinct as the Tenants are asserting. I find that part of reasonable maintenance ought to include both proactive and reactive components, since not all issues will be apparent ahead of time, and mitigating and

addressing issues in a reactive manner can be part of a reasonable maintenance strategy, provided there is no negligence or reckless conduct. In this case, I find there is insufficient evidence of any negligence or reckless conduct such that I could find the Landlord failed to address the issues reasonably.

I also do not find there is sufficient evidence from the Tenants with respect to negligence in the installation of the waterproofing work done in 2015 such that I could be satisfied the Landlord would or should be entitled to a claim settlement for poor workmanship. I find there is insufficient evidence showing the Landlords are likely entitled to receive or recover the claimed amount through another source for the wall membrane repair.

With respect to the parking garage repairs, I note the Tenants also feel that this was required due to inadequate maintenance of the parking surface. I note the policy guideline specifies that the useful life expectancy of parking lots and driveways is 15 years for concrete, and 5 years for repairs. The Landlord estimated that this surface is original to the building, and the Tenants pointed out that the Landlord provided no proof of this. However, I note there are photos provided. I find the photos are consistent with the Landlord's explanation as to the age of the parking surface. I find it more likely than not that the surface was at least 15 years old, and was likely at the end of its useful life. The quote from the contractor on this job indicated that the surface was washing away due to "years" of constant rain. This is also consistent with a product that is at the end of its useful life, rather than one that failing because it was not properly maintained. I find the Tenants have failed to sufficiently demonstrate that the parking lot repairs were the result of improper maintenance. There is no evidence that the Landlords are entitled to receive money from any other source for the parking lot repairs.

Outcome

I find the Landlord is successful. He has proved, on a balance of probabilities, all of the elements required in order to be able to impose an additional rent increase for 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 that there are 53 specified dwelling units and that the amount of the eligible capital expenditure is $263,589.97, for the 2 items sought.

So, the Landlord has established the basis for an additional rent increase for capital expenditures of $41.44 ($263,589.97 ÷ 53 units ÷ 120). 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 37, 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. I grant the application for an additional rent increase for capital expenditure of $263,589.97. 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 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: November 21, 2023

Residential Tenancy Branch