DECISION

Introduction

This hearing dealt with the Landlords' May 14, 2024, 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 was represented by Legal Counsel P.O., and four others including: A.T., G. K., M. H. and M.A.

10 Tenants attended the call, and were supported by an Advocate, a Legal Advocate, and Legal Counsel.

All parties were given the opportunity to provide sworn testimony and refer to evidence.

Preliminary Matters

The parties confirmed that the legal Landlord, is a corporate entity. I therefore amended the application to ensure that the Landlord is correctly identified as the corporate entity and not its representative, who was identified in the application. I made this amendment with the consent of Counsel under RTB Rule of Procedure 7.7.

The Landlord requested to remove their claim for asphalt repair from this application.

- Driveway Asphalt Repair Work = $66,736.95

The Tenants consented to the withdrawal of this project specific claim from the application and so I amended the Landlords' application to reflect these changes as permitted by RTB-Rule of Procedure 7.12 and 7.12.1.

I do not give leave to the Landlord to reapply for this item.

The Landlord confirmed that the current value of their claim for the roof repair project is $496,496.93 which is slightly more than the amount specified on the Landlord Notice of claim of $493,854.39.

Legal Counsel for the Tenant cautioned that this was a slight increase.

I incorrectly observed the opposite during the hearing, that the Landlords request was a reduction and not an increase as indicated. I allowed this amendment to the claim because the parties agreed that they Landlord served copies of all relevant financial documents on the Tenants so that they can confirm the Landlords' financial claim.

I used my discretion under RTB Rule of Procedure 3.19 to allow the Landlord to upload late evidence to this file related to documents that were confirmed served on the Tenants. The Landlord had accidentally uploaded these documents to a separate file for a separate address that is being heard by the RTB on August 6, 2024.

Service of Notice of Dispute Resolution and Service of Evidence

Legal Counsel for the Landlord indicated that Tenants were served in person, to the door, by email, and or registered mail on three occasions:

- Notice of the Dispute and initial evidence May 29 – May 30
- Evidence related to Payments on June 24, 2024
- Evidence related to professional reports and prior maintenance in the residential property on July 18, 2024

Legal Counsel for the Landlord referred to completed individual declarations of service for all Tenants for all three occasions.

Legal Counsel for the Tenants confirmed receipt of service of all items and indicated that the July documents were requested by the Tenants and so they accept late service of the documents.

There was disagreement amongst the Tenants as to whether they received the third package of evidence from the Landlord, with some Tenants indicating it was received, and others denying receipt of service.

Legal Counsel for the Landlord referred again to declarations of service for all Tenants which I reviewed and found comprehensive, and in accordance with the Standing Order for service of ARI-C dated February 17, 2023, section 89 of the Act, and section 43 of the regulations.

Legal Counsel for the Tenants submitted a written document summarizing their claim and indicated that this was served to Legal Counsel for the Landlord the day prior to the hearing.

Legal Counsel for the Landlord confirmed receipt of this document and confirmed receipt of other assorted submissions from Tenants in attendance at the July 30, 2024, hearing, including the Tenants from Unit: 1, 7, 12, and 22.

In sum, I find that the Landlords sufficiently served the Tenants with all relevant document as required by RTB Rule of Procedure 3.1, 11.2 and 11.4, and that the Tenants sufficiently served the Landlords with copies of their documentary evidence.

I make this finding as permitted by section 71(2)(b) of the Act because the Landlord provided proof of service, and Legal Counsel for the Tenant indicated that the 3rd round of documents were served less than 30 days in advance of the hearing because they were specifically documents requested by the Tenant.

Issues to be Decided

Is the Landlord entitled to impose an additional rent increase for capital expenditures costing $496,496.93 for a flat roof replacement on the residential property?

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 claims from the parties and my findings are set out below.

The residential property is a two-storey 34-unit building constructed in the 1960s.

This building is part of the multi-building residential apartment complex purchased by the Landlord in early 2020.

Legal Counsel for the Landlord presented the following:

- A November 2019 Engineering report indicated that:
  - "No evidence of major physical deficiencies was observed during the visual review of the exterior walls or roof structure."
  - "The flat roofs over the apartments appeared in poor condition with large amounts of ponding water and heavy organic material on the membranes. There were no current reports of active roof leaks. It was not known when the roofs were installed but based on observations it appears that the roofs have exceeded their expected useful life of twenty years."
- An April 10, 2023, Report from a designated contractor emphasized that the roof needed to be repaired and provided recommended options for repair including recommendations for drainage because.

Description

Ponding was observed on ~15% of the roof area, indicating multiple issues:

1) the roof is not adequately sloped to the area drains
2) area drains are not adequately sized, and some were partially blocked by vegetation/debris

Recommendations

Resloping the roof and replacing/upgrading area drains.

The designated contractor then secured a subcontractor who did the actual roof replacement between August 2023 and January 2024.

Legal Counsel summarized their claim by stating that the Landlord purchased the property, conducted all required professional reports, and then replaced the roof as required to satisfy their obligations as landlords under the Act because the roof was likely original to 1960s when the building was constructed.

Legal Counsel for the Landlord stated that the new roof is expected to satisfy the 20-year lifespan required by the RTB, and that all work was completed within the 18 months prior to this application.

Legal Counsel for the Landlord referred to the following cost breakdown and project cost summary as shown on page 102 of the Landlords' evidence and also stated that proof of all payments was provided as required:

1	Mobilization	1	Allowance	$68,271.70	$68,271.70
2	Bonding	1	Allowance	$7,264.11	$7,264.11
3	Bldg G - Labour	1	Allowance	$59,213.32	$59,213.32
4	Bldg G - Materials	1	Allowance	$101,802.82	$101,802.82
5	Bldg G - Sheet Metal Flashing	1	Allowance	$14,154.43	$14,154.43
6	Bldg H - Labour	1	Allowance	$143,796.70	$143,796.70
7	Bldg H - Materials	1	Allowance	$247,560.68	$247,560.68
8	Bldg H - Sheet Metal Flashing	1	Allowance	$34,616.81	$34,616.81
9	Soprema Warranty	1	Allowance	$6,036.42	$6,036.42

It was confirmed during the hearing that this application is specific to the work required for Building H because Building G is a separate building in the multi-building complex.

Legal Counsel for the Landlord referred to historical maintenance records related to the roof of the residential property to demonstrate that minor repairs and regular maintenance like gutter clearing and patching had occurred and so there is no merit to the claim that the roof needed to be repaired due to incomplete maintenance.

Legal Counsel for the Tenants referred to their written submission where it is argued that the Landlord received money from another source when they purchased the multi-building residential property in 2020, which was likely discounted to account for the "as is" condition of the residential property.

Legal Counsel for the Tenant also argued that roof replacement was needed due to failure to complete necessary repairs and maintenance related to the roof, emphasizing that the Landlord's own reports confirm significant ponding of water on the roof and inadequate drainage around the property.

Written submissions from the other Tenants included the following:

- Concerns for the Landlords alleged failure to maintain the roof.
- Failure to notify the Tenants when repairs to the roof were occurring.

- The roof repair process was disruptive to Tenants and lengthy.
- Rents are high enough as is considering how old the building is.
- The roof needed replacement because the drainage from the roof was inadequate.
- The roof that was replaced was the original roof.

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)).

2. 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.

There were 10 Tenants present at the teleconference hearing, along with two advocates, and Legal Counsel on behalf of the Tenants, who provided the following submissions:

The Landlord's request should be denied because:

- The Landlord does not regularly maintain the residential property.
- The Landlord does not appear to have fixed to drains from the roof, or the drainage around the property.
- The water from the flat roof has to go somewhere.
- The Landlord got funding from another source when they purchased the multi-building residential property because the purchase price was most likely discounted to account for needed repairs
- The Landlords bought the building "as is" and so this was a benefit for them.
- We pay rent, so our rent should go to upkeep of the property.
- Multiple residents experienced leaks in the unit because of the Landlords failure to replace the flat roof in a timely manner after purchasing the property in 2020.

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 34 dwelling units in the residential property.

The Landlord testified that there are 31 specified dwelling units because one unit was recently occupied by a new tenant and two other units are currently empty and being renovated.

The Tenants expressed some concern with the number of specified dwelling units and wondered why the costs of the project are not being spread across all units in the residential property.

I find that the Landlord identified 31 units as specified dwelling units because they anticipate that the monthly rent for tenants in the other 3 units will pay a higher rate of rent as new Tenants and so an additional rent increase for capital expenditures is not required.

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

As stated above, the landlord must prove the following for the Work to be considered an eligible capital expenditure:

- 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.

As seen in RTB Policy Guideline 37(c) a roof is a major component of a residential property, and as seen in RTB Policy Guideline 40, a new flat roof has an expected serviceable life of 20 years.

Specific to the Landlords' application in front of me, they are requesting to increase rent for replacement of a flat roof at the building because the flat roof had exceeded its useful life and was malfunctioning as indicated in reports of roofing related leaks.

It was undisputed during the hearing, that the flat roof that was replaced, was likely original to the residential property, which would have made it at least 60 years old, far past the expected life of 20 years as seen in RTB Policy Guideline 40 and so the Landlord was seeking to recover the costs of its replacement.

As seen in Page 1 of RTB Policy Guideline 40, a caveat is provided to the "must grant" language of 23.1(4) of the Regulations if a major building system or component, was replaced in the previous 18 months, not expected to re-occur for at least 5 years, and had exceeded its expected serviceable life or was found to be malfunctioning:

> "A landlord may apply for an additional rent increase in an amount greater than the basic Annual Rent Increase in *extraordinary circumstances* (emphasis added). One of those circumstances is when a landlord has completed significant repairs or renovations that could not have been foreseen under reasonable circumstances and that will not recur within a reasonable time period.
>
> When reviewing applications for additional rent increases, the director may use this guide to determine whether the landlord could have foreseen the repair or renovation."

Similar language is provided on page 5 of Policy Guideline 37(c) where it is written:

> "…The timeframes set out in Policy Guideline 40 will be used to determine the expected useful life of a capital expenditure, except in cases where the arbitrator determines that documentary evidence is required to establish the useful life of a capital expenditure…"

The question before me therefore becomes, not just is the project "eligible" under the regulations, but if the project was foreseeable and why?

I first take a step back to ground myself in the origins of this application type with its introduction in the TENANCY STATUTES AMENDMENT ACT, 2021. Debate in the Legislature associated with introduction of this Act from Premier Eby, speaks to recommendations from the Rental Housing Task Force, and refers to:

> "…Minor changes to regulation-making power will ensure that government can implement a process that will allow landlords to apply for an additional rent increase for capital expenditure…"[1]

1 https://www.leg.bc.ca/hansard-content/Debates/42nd1st/20210301pm-Hansard-n16.html#16B:1340

Of note is that these regulatory powers were introduced at the same time the Government continued a “freeze” on rent increases, which is seen in the larger comment from Premier Eby above.

What this means, is that this application type was introduced to potentially provide Landlords with extra revenue that it is otherwise not available due to limitations established by the government on annual rent increases.

It is important to place this intention within the larger common law precedence of cases such as *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator), 2007 BCSC 257 ("Berry"),* the assigned Justic, wrote the following in paragraph 11:

> “I start from the accepted rules of statutory interpretation. I conclude that the Act is a statute which seeks to confer a benefit or protection upon tenants. Were it not for the Act, tenants would have only the benefit of notice of termination provided by the common law. In other words, while the Act seeks to balance the rights of landlords and tenants, it provides a benefit to tenants which would not otherwise exist. In these circumstances, ambiguity in language should be resolved in favour of the persons in that benefited group: See (Canada Attorney General) v. Abrahams, [1983] 1 S.C.R. 2: Henricks v. Hebert, [1998] B.C.J. No. 2745 (QL)(SC) at para. 55:
>
> > I think it is accepted that one of the overriding purposes of prescribing statutory terms of tenancy, over and above specifically empowering residential tenants against the perceived superior strength of landlords, was to introduce order and consistency to an area where agreements were often vague, uncertain or non-existent on important matters, and remedies were relatively difficult to obtain.”

I mention this legal framework because the Tenants, their Advocates, and their Legal Counsel argued during the hearing, that the Landlords’ application should be dismissed because the Landlord received funding from another source for this project, by likely receiving a discount on purchase because as seen in the Landlord’s evidence, they had it clearly documented by appropriate professionals on page 12 of the 2019 Engineering report, that the flat roof component of the residential property “appeared to be in poor condition” and replacement was “anticipated” when the property was purchased in 2020.

I note that Section D of RTB Policy Guideline 37(c) does not include a reduction in purchase price as an example of project ineligibility for these reasons, because according to the Policy Guideline, payment from another source, is limited to literal payment from a third party.

I therefore refer back to the language of “unforeseen” in PG 40.

I find that the Landlords' application for $496,496.93 for the roof replacement project is not eligible for an additional rent increase for capital expenditure because:

- The parties agreed that the roof was documented as needing replacement when the Landlord purchased the residential property in 2020.
- I find that it was entirely foreseeable that the roof needed to be replaced in 2023 when it was finally replaced.

I therefore reject this application even though I find that the project satisfies basic criteria for the application type (e.g., completed in the previous 18 months, not expected to reoccur for 5 years, was required because the roof had failed.,) because I find that in the language of PG 40, the roof replacement project cannot be considered an eligible capital project based simply on the fact that the roof that was replaced because it was documented as being in poor condition and needing replacement when the property was purchased and so its replacement in 2023 was foreseeable.

In sum, I find that the Landlord had options regarding this roof replacement and the costs that are claimed in this application.

I find that they could have chosen to not purchase a residential property that needed a new flat roof.

But they did. And then three years later they finally replaced the flat roof in question.

I find that the Tenants in this dispute, are not responsible for the Landlords' choices.

I dismiss the Landlords' application for the reasons above, without leave to reapply.

Conclusion

The Landlord was not successful in this application. I do not give leave to reapply.

I order the Landlord 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 Act.

Dated: August 16, 2024