



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Richards at Pendre 10m

Burnaby File No. 722107

In the matter of the *Residential Tenancy Act*, SBC 2002, c. 78, as amended

between

Gordon Nelson Investments, Landlord(s),

Applicant(s)

and

[REDACTED]

Tenant(s),

Respondent(s)

Re: An application pursuant to section 43 of the *Residential Tenancy Act* regarding the rental unit at:

1436 Pendrell Street, Vancouver, British Columbia

Date of Hearing: March 11, 2009, by conference call

Date of Decision: April 2, 2009

Attending:

For the Landlords:

[REDACTED]

For the Tenants

18 tenants



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Decision

Dispute Codes: RI

Introduction

This hearing dealt with an application by the landlords for a rent increase above the limit set by the Residential Tenancy Regulation. Both parties were represented in the hearing and had opportunity to be heard.

Issue(s) to be Decided

After a rent increase permitted by the Regulation, is the rent for these rental units significantly lower than rent payable for other rental units similar to and in the same geographic area as the rental units?

Background, Evidence and Analysis

The subject property is a 3-storey apartment building located in the West End of Vancouver, four blocks from English Bay to the Southwest, 5 blocks from Robson Street to the Northeast and 4-5 blocks from Burrard Street to the Southeast. There are 14 units in the building, with units 1-12 being original and units 14 and 15 having been added to the building's basement in the 1990's. There is no unit 13 in the building. The building was constructed in the 1930's and is a timber frame construction clad in brick and stone. It is registered as a heritage building by the city and the original units and common areas feature original hardwood floors, high ceilings, mouldings, electric fireplaces and original wood doors and hardware. The kitchens and bathrooms in units 1-12 are original. The subject property does not have an elevator. Rent includes heat and hot water. There are six parking spots at the property and tenants have access to a coin-operated laundry and bike and storage lockers. Among the affected rental units, the duration of tenancies ranges from 9 months to 48 years. Rent increases have been implemented throughout the tenancies, none higher than the amount permitted under the Act and Regulation.

One unit in the building, unit 2, is not part of this application. Unit 2 is a two-bedroom unit which was recently vacated and re-rented to tenants who began occupying the unit on April 1 and paying \$2,250.00 per month in rent.

The landlords framed their request in terms of price paid per square foot, claiming that currently the units in the subject property pay between \$1.11 - \$1.76 per square foot and seeking an increase to bring the price per square foot between \$1.75 and \$2.05. The tenants argued that this was not a valid means of comparison and pointed to a survey conducted by the tenants of buildings in the West End, the "West End Renters' Survey," which showed that rent per square foot is negatively correlated to the rental unit square footage. Among the West End Renters' Survey respondents, the data showed that the larger the unit, the lower the rent per square foot and vice versa. This decision is not based solely on a rent per square foot calculation, but on a more comprehensive picture which includes square footage among comparable units as well as other considerations such as location, building character and amenities.

Both parties submitted considerable, well-researched evidence comparing the residential property to other buildings in the area. With their evidence the landlords provided advertisements for numerous other rental units in the immediate vicinity along with their own notes produced from conversations with representatives of the landlords of those properties elaborating on the details of the units. The tenants argued that the advertisements should not be considered as they represent "asking rents" rather than "rent payable," which is required by the Act. The tenants argued that on a plain reading of s. 23(1)(a) of the Regulation, rent payable refers to a rent due and payable under existing tenancy agreements rather than rent a landlord hoped to secure in a new tenancy. The landlords testified that they followed up on the advertisements submitted as comparables and that of the 62 advertised units, 60 were rented at the asking price. The tenants objected to the advertisements being considered on the basis that the evidence was hearsay and unreliable. The tenants further objected to the advertisements on the basis that they lacked sufficient detail to prove that the other units were truly comparable. Section 75 of the Act provides as follows:

75. The director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be

75(a) necessary and appropriate, and

75(b) relevant to the dispute resolution proceeding.

I have accepted the landlords' evidence with respect to the conversations they had with the owners or managers of the advertised rental units they have submitted as comparables. The tenants did not suggest that the landlords had manufactured the evidence, but merely relied on the general proposition that hearsay evidence is considered unreliable under the rules of evidence and I find no reason not to accept the evidence as presented.

With their evidence, the tenants referenced a number of rental units which they believed to be comparable to the units in the subject property. In making my decision I have not considered the comparables provided by the tenants. Section 23(1)(a) of the Regulation provides as follows:

23 (1) A landlord may apply under section 43 (3) of the Act [*additional rent increase*] if one or more of the following apply:

(a) after the rent increase allowed under section 22 [*annual rent increase*], the rent for the rental unit is significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as, the rental unit;

The landlords do not have to prove that the rent is significantly lower than all comparable rental units, but merely have to prove that there is evidence that in the current market, there exist similar rental units which attract a higher rent than what is currently being paid for the subject unit. For the same reason, I have not considered either the tenants' West End Renters' Survey and the analysis derived therefrom or the Canada Mortgage and Housing Corporation's analysis of the survey.

The tenants made other submissions to which I have given little or no weight. The tenants gave evidence that they have paid regular rent increases each year. Although the rent history must be considered pursuant to Regulation 23(3)(b), this evidence has not altered my decision as many of these tenancies are long-term tenancies and it is well within the realm of possibility that permitted rent increases have not kept the rent in line with market value. The tenants suggested that the landlords had been negligent in maintaining the building since purchasing it in 2008 by removing the services of the resident caretakers, failing to clean common areas, maintain the landscaping, sidewalks

and downspouts and remove snow in a timely fashion, among other complaints. While this might be a relevant submission under Regulation 23(3)(c), which provides that I must consider a change in a service or facility that the landlord has provided in the year preceding the application, the tenants provided no evidence of how the change in maintenance standards had affected the value of the rentals. In the absence of such evidence, the tenants' position with respect to maintenance has had no effect on my decision. The tenants further argued that the landlords' true intent was to evict the tenants through applying rent increases. The tenants appear to be importing a kind of good faith argument, which is not part of the Act. There is nothing in the Act which prohibits landlords from working to maximize their profits. In any event, it is clear from the start of their ownership that the landlords were looking for means to increase revenue from the subject building and an application for an above guideline rent increase is, on its face, the most obvious means of achieving that end. I find that this is not a motivation prohibited under the Act and it has therefore had no impact on my decision.

The landlords provided market rental estimates from three property valuers. While this evidence has been considered, I have relied almost exclusively upon the descriptions of and advertisements for comparable units provided by the landlords as in my opinion, the Regulation requires a comparison of specific rental units rather than general observations of market trends. I note that the property valuers provided examples of specific comparative rental units which the landlords had incorporated into their list of comparables and that many if not all of the examples listed in the market rental estimates had unique characteristics which, in my opinion, rendered them incomparable to the rental units.

When determining whether other units are comparable to the rental unit, it is important to note that I am tasked with determining whether the other units are similar to, not identical to, the rental unit. There will be differences between any two rental units, even those in the same building and managed by the same landlord. I have endeavoured to determine which differences are sufficiently significant to have an appreciable impact on the rent which could be attracted by a unit. Not all differences have a positive impact on rental rates.

I have reviewed all of the comparables provided by the landlords and have determined that only a limited number can be considered truly comparable. When considering the heritage suites, I have only considered comparable units in heritage buildings as other buildings would not offer the same character. I have not considered as comparable suites with balconies, more than one bathroom, ensuite laundry facilities or amenities such as swimming pools, saunas or fitness centres. Furnished suites, including those with Murphy beds, were not considered, nor were suites in heritage buildings which had been renovated to an extent that they had been substantially modernized. Although the subject property is located in the West End of Vancouver, I have narrowed the comparables to those which are in a very limited range of the subject property. I did not consider comparables within a few blocks of English Bay, Stanley Park or Robson or Burrard Streets as I find that units located closer to those attractions or conveniences are able to attract a higher rent. A number of the suites offered by the landlords as comparables were disregarded because they lacked sufficient detail to permit a meaningful comparison.

Although some of the suites used as comparables have different exteriors than the brick and stone exterior on the subject building and the tenants urged me to distinguish these comparables on that basis, they provided no evidence that the exterior cladding of a building has any appreciable impact on potential rental rates. Some of the comparables included have a prohibition on pets or exclude heat or hot water as part of the rent, but I did not distinguish units on that basis as these exclusions would serve to reduce rather than raise the value of the comparable units. There were few if any comparables which had an equivalent square footage. The comparables used below all have less square footage than the units in the subject property. I do not find this to be sufficient to exclude them as comparable as no evidence was adduced to show that a higher rent could be attracted solely on the basis that a unit had less square footage than the subject units.

Two-bedroom Heritage Unit #'s 1, 4, 6, 7, 8, 11, 12

The two-bedroom heritage units are paying rents from \$1,325.00 per month to \$1,450.00 per month. The units range in size from 1,201 – 1,238 square feet.

I have found that among the comparables provided by the landlords, only four of the units can be considered truly comparable. I find that the unit at 962 Jervis Street is comparable. The landlords' evidence shows that the unit is 750 square feet and rents at a rate of \$1,700.00 per month. The landlords' notes indicate that the suite has been renovated but the appliances are old. The body of the advertisement describes a "[N]ew kitchen with granite counter tops, refinished oak floors and new light fixtures." The tenants claim that this unit is not comparable because the square footage is less, the exterior is stucco and the unit was renovated in 2007. I find that there is no evidence proving that the difference in the building's façade has any impact on the rents the building can demand. Judging from the advertisement and the landlords' notes from discussions with the building manager, the renovations appear to have been restricted to refinishing floors and replacing countertops. The refinishing of hardwood floors is part of regular maintenance that occurs with that type of flooring and I find that it cannot form the basis for distinguishing this unit as dissimilar. While the installation of a granite countertop certainly would add to the attractiveness of the kitchen, I find that it does not have a significant positive impact on the rental rate.

I find that the unit at 1225 Nelson Street is comparable. The landlords' evidence shows that the unit is 700 square feet and rents at a rate of \$1,400.00 per month. The tenants claimed that the unit was remodeled in 2001, but gave no evidence as to the extent of the remodeling or the source of their information.

I find that the unit at 855 Thurlow Street is comparable. The landlords' evidence shows that the unit is 800 square feet and rents at a rate of \$1,550.00 per month.

I find that unit 2 in the subject building is comparable. At 1,204 square feet, the unit is approximately the same square footage as the subject units and as of April 1, 2009 was rented at a rate of \$2,250.00 per month. The tenants pointed to Residential Tenancy Policy Guideline #37 which provides, in part, as follows:

It is not sufficient for a landlord to claim a rental unit(s) has a significantly lower rent that results from the landlord's recent success at renting out similar units in the residential property at a higher rate.

Had unit 2 been the only rental unit to which the landlords compared the subject units, I would have found that the evidence was insufficient. However, the landlords provided

three other comparable units and when taken as part of that group, I find it appropriate to consider unit 2 in my considerations. While the rents payable for the subject units are not significantly lower than the unit at 1225 Nelson Street, I find that the rents are significantly lower than the rents payable at 962 Jervis Street, 855 Thurlow Street and Unit 2 in the subject property, with the \$1,450.00 highest rent for the subject units being \$100.00 less than the lowest rent of the comparables and \$800.00 less than the highest rent of the comparables. I find that the landlords have met their burden of proof and are entitled to a rent increase above that provided for in the Regulation.

Residential Tenancy Policy Guideline #37 provides some guidance when dealing with a range of comparable rents:

The amount of a rent increase that may be requested under this provision is that which would bring it into line with comparable units, but not necessarily with the highest rent charged for such a unit. Where there are a number of comparable units with a range of rents, a dispute resolution officer can approve an additional rent increase that brings the subject unit(s) into that range. For example, a dispute resolution officer may approve an additional rent increase that is an average of the applicable rental units considered.

In this case, the average rental rate for the three comparable units which are significantly higher than the rental unit is \$1,833.00. I find it appropriate to follow the Policy Guideline in these circumstances and I grant the landlords an increase to bring units 1, 4, 6, 7, 8, 11 and 12 to a monthly rate of \$1,833.00. I have not based my calculations on rent payable per square foot as submitted by the landlords. I find that basing the rent solely on a calculation of rent payable per square foot requires a degree of precision that is not contemplated by the Act and Regulation, which direct me to consider units based on similar rather than identical characteristics. Square footage is just one of a number of characteristics to consider, and to base the rent increase solely on square footage or to frame my decision in terms of rent payable per square foot would be to disregard other factors which may impact the value of a unit. I find it appropriate to raise the rent of each of the aforementioned 2-bedroom heritage units to the \$1,833.00 average rent of the similar units as demonstrated by the evidence.

Because this increase is significant, I find it appropriate to phase in the rent increase as follows. The landlords must serve on the tenants a notice of rent increase in the

Give Notice:
 ↓
 3 month
 ↓
 Notice (6 months)

prescribed form together with a copy of this decision. The first notice will increase the rent up to but not exceeding the amount set out in the table below and will take effect 3 full months after the notice is served. After the first rent increase has taken effect, the landlords may serve another notice of rent increase in the prescribed form which will take effect no earlier than 6 months after the first notice has taken effect and no earlier than 3 full months after the landlords serve the notice. The second notice will increase the rent up to but not exceeding the amount set out in the table below. After the second increase has taken effect, the landlords may serve another notice of rent increase in the prescribed form which will take effect no earlier than 6 months after the second notice has taken effect and no earlier than 3 full months after the landlords serve the notice. The third notice will increase the rent up to but not exceeding the amount set out in the table below. For the sake of clarification, if the first notice is served in the month of April 2009, the first rent increase will take effect **August 1, 2009**. If the landlords serve the second notice in October 2009, the second rent increase will take effect February 1, 2010. If the landlords serve the third notice in April 2010, the third rent increase will take effect **August 1, 2010**. The table set out below shows the amount of increase for each rental unit.

Unit	Current rent	Rent after first increase	Rent after second increase	Rent after third increase
1	1,358.00	1,533.00	1,708.00	1,833.00
4	1,374.00	1,539.00	1,704.00	1,833.00
6	1,368.00	1,538.00	1,708.00	1,833.00
7	1,450.00	1,600.00	1,750.00	1,833.00
8	1,325.00	1,510.00	1,695.00	1,833.00
11	1,362.00	1,532.00	1,702.00	1,833.00
12	1,368.00	1,538.00	1,708.00	1,833.00

21
 1883
 1325

 508

One-bedroom Heritage Unit #'s 3, 9, 10

The one-bedroom heritage units are paying rents from \$1,067.00 per month to \$1,250.00 per month. The units range in size from 870 – 974 square feet.

I have found that among the comparables provided by the landlords, only two of the units can be considered truly comparable. I find that the unit at 962 Jarvis Street is comparable. The landlords' evidence shows that the unit is 650 square feet and rents

at a rate of \$1,150.00 per month. The two-bedroom unit in this building was considered comparable in the discussion above and as noted there, I find that the renovations performed on this unit do not have a significant positive impact on the rental rate.

I find that the unit at 1225 Nelson Street is comparable. The landlords' evidence shows that the unit is 500 square feet and rents at a rate of \$1,300.00 per month.

I find that the rents payable on the comparable units are significantly higher than the rents paid for units 9 and 10 but are not significantly higher than the rent paid for unit 3. The landlords' claim to increase the rent for unit 3 above what is permitted by the Regulation is denied.

I find that the \$1,067.00 and \$1,068.00 rents payable for the subject units are significantly lower than the rents payable at 962 Jervis Street and 1225 Nelson Street, with the rent being \$82.00 - \$83.00 less than the lowest rent of the comparables and \$232.00 – \$233.00 less than the highest rent of the comparables. I find that the landlords have met their burden of proof and are entitled to a rent increase above that provided for in the Regulation.

Again applying the direction of Policy Guideline #37, I have calculated the average rental rate for the two comparable units which are significantly higher than the rental unit and find that average to be \$1,225.00. I find it appropriate to follow the Policy Guideline in these circumstances and I grant the landlords an increase to bring units 9 and 10 to a monthly rate of \$1,225.00.

I find it appropriate to phase in the rent increase as follows. The landlords must serve on the tenants a notice of rent increase in the prescribed form together with a copy of this decision. The first notice will increase the rent up to but not exceeding the amount set out in the table below and will take effect 3 full months after the notice is served. After the first rent increase has taken effect, the landlords may serve another notice of rent increase in the prescribed form which will take effect no earlier than 6 months after the first notice has taken effect and no earlier than 3 full months after the landlords serve the notice. The second notice will increase the rent up to but not exceeding the amount set out in the table below.

Unit	Current rent	Rent after first increase	Rent after second increase
9	1,067.00	1,146.00	1,225.00
10	1,068.00	1,146.00	1,225.00

Bachelor Heritage Unit # 5

The bachelor heritage unit is paying \$829.00 per month for a unit which is 623 square feet.

After having reviewed the comparables provided by the landlords, I have determined that only two of the units, at 1225 Nelson Street and at 925 Cardero Street, can be considered truly comparable. Most of the other comparables had different amenities, Murphy beds, balconies or other features which distinguished them from the subject unit. The rent payable at 925 Cardero Street was just \$21.00 more per month than the subject property, which in my view is not significantly higher. The rent at 1225 Nelson Street was \$1,000.00 per month, which I would consider to be significantly higher than the rent payable for the subject property.

Section 23(1)(a) of the Regulation provides that the rent at the unit which is the subject of the application must be significantly lower than the rent payable for other rental units, not just one other unit. I believe the legislature's choice to use the plural was deliberate and intended to ensure that rents were not compared to a unit which could be considered anomalous. In the absence of a plurality of units with which to compare the subject unit, I find the landlords have failed to prove that the rent for unit 5 is substantially lower than the rent payable in similar rental units and I deny this part of the landlords' claim.

Two-bedroom non-heritage unit #14

The rent for the two-bedroom non-heritage unit is \$1,145.00 per month for a unit which is 1,048 square feet. After having reviewed the comparables provided by the landlords, I have determined that none of the units can be considered truly comparable. Most units were not comparable because they had balconies, many were disregarded because they were closer to amenities such as shopping, the beach or Stanley Park,

others had amenities available in the building and the heritage units were eliminated because unit 14 is not a heritage unit although it is located in a heritage building. Several of the comparables had insufficient information available to permit a meaningful comparison. I find the landlords have failed to prove that the rent for unit 14 is substantially lower than the rent payable in similar rental units and I deny this part of the landlords' claim.

Bachelor non-heritage unit #15

The rent for the bachelor non-heritage unit is \$710.00 for a unit which is 403 square feet. After having reviewed the comparables provided by the landlords, I have determined that except for the unit at 1421 Burnaby Street, none of the units can be considered truly comparable, primarily for the same reasons as listed in the preceding paragraph. The few listings which demonstrated the most significant similarities were eliminated because the units described were on upper floors, some boasting views of the city or beach, as contrasted with the subject unit which is on the ground floor. Many of the landlords' comparables also had Murphy beds, which distinguished them from the subject unit.

Again, in the absence of a plurality of units with which to compare the subject unit, I find that the landlords have not proven their claim and I deny this part of the claim.

Conclusion

The landlords' application is allowed with respect to units 1, 4, 6, 7, 8, 9, 10, 11 and 12. The application as against units 3, 5, 14 and 15 is dismissed.

Dated April 2, 2009.


K. MILLER
Dispute Resolution Officer