IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Killiam Properties Inc. v. Corkery; Killiam Properties v. Ferguson, 2006 NSSM 27

2006 **Claim No. 06-269339**
Date:20061017

BETWEEN:

Name: **Killam Properties Inc.** Appellant/Landlord

- and -

Name: **Joe & Marie Corkery** Respondents/Tenants

AND BETWEEN: **Claim No. 06-269639**

Name: **Killam Properties Inc.** Appellant/Landlord

- and -

Name: **Lorraine Ferguson** Respondent/Tenant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on November 1, 2006. This decision replaces the previously distributed decision.

Appearances:
Appellant/Landlord: Eric Thompson
Respondents/Tenants: Graham Steele

D E C I S I O N

[1] This proceeding came before the Court on September 28, 2006, at which time evidence was presented. The hearing was continued to October 3 for submissions from counsel.

[2] There are two matters involved and by agreement of counsel, they were heard in a consolidated hearing. They both involve appeals of Directors' Orders; in the case of the Corkery matter, a Director's Order dated July 31, 2006; in the case of the Ferguson matter, a Director's Order dated August 8, 2006. In each case the Director disallowed the Landlord's request for a rental increase at Fairview Estates Mobile Home Park.

[3] Under the Nova Scotia *Residential Tenancies Act*, a landlord of a mobile home park may increase the rent payable by the tenants by serving notice of rent increase in the prescribed form (Section 11A(1)).

[4] The *Act* further provides that any tenant who receives such a notice may make an application pursuant to Section 14 of the *Act* to have the Notice of Rent Increase reviewed (Section 11A(3)).

[5] Section 14 of the *Act* deals with such applications. As it is the primary statutory provision governing such application, I set it out in full.

> ***Review of mobile home park rental increase***
>
> *14(1) A tenant of a mobile home park space may apply to the Director in accordance with subsections 11A(3) and (4) for a review of a notice of rent increase received on or after the twentieth day of December, 1996, and shall serve the landlord with a copy of the application in the manner prescribed by regulation.*
>
> *(2) An application filed pursuant to subsection (1) shall be in the prescribed form and all tenants of the landlord referred to in subsection (1) who pay the same amount of rent and who have received notice of the same rent increase are deemed to be parties to the application.*
>
> *(3) The landlord shall, within fifteen days of receipt of the application, provide the Director with the information required by regulation.*

> *(4) If the landlord does not provide the information required by subsection (3), the Director may make an order denying the rent increase.*
>
> *(5) In exercising authority pursuant to this Section, the Director may determine and adopt the most expeditious method of determining the rent increase.*
>
> *(6) In reviewing a notice of rent increase, the Director shall consider*
>
> *(a) the guidelines prescribed by regulation; and*
> *(b) any information provided or submissions made by the landlord or tenant.*
>
> *(7) The Director may make an order pursuant to Section 17A determining a rent increase which may be made retroactive to the date of rent increase in the notice given by the landlord and, if the order is made retroactive, it is deemed to have come into force on the date to which it is made retroactive.*

[6] At this point I would make note particularly of Section 14(2). The effect of this provision is that all of the other tenants who received the same notice of the Tenants herein are deemed to be parties to the application(s). The evidence indicated that with respect to the Corkery application there are 19 such tenants, including the Corkerys. They are:

> 39 General Avenue;
> 9, 19, 20 and 22 Glenda Crescent;
> 23 Homeward Avenue;
> 7, 15, 17, 19, 24, 25, 26, 33, 36 and 38 Shamrock Drive;
> 4, 6 and 8 Shasta Lane.

[7] With respect to the Ferguson application, there are 26 tenants, including Mrs Ferguson, who, by virtue of Section 14(2) are deemed to be parties to that application:

> 12, 21, 28, 30 and 31 General Avenue;
> 3, 28, 32, 34. 45, 49, 65, 66, 71 and 73 Glenda Avenue;

3, 5, 7, 8, 9, 11, 15, 21, 25 and 30 Homeward Avenue;
20 Shamrock Drive.

[8] Evidence was given by both Joe Corkery, on behalf of his application, and Lorraine Ferguson, on her behalf. In addition, evidence was given by Cathy Kerr-Miller, Property Manager for Killam Properties and from other tenants - Christine Hopkins, Florence Carter, and Lisa McPhee.

[9] Also of relevance in such an application are Regulations 26-31, 34-36, and Forms "C", "D" and "E" made pursuant to the *Act*.

[10] A review of the statutory provisions and regulations indicate that the intention of the scheme is that once an application is filed by a tenant pursuant to a Notice of Rental Increase, the burden then shifts to the landlord to demonstrate that the proposed increase is justified in accordance with the guidelines under the Regulations. Section 26 of the Regulations reads:

> ***Director's considerations***
> *26(1) when making a determination on an application pursuant to Section 14 of the Act, the Director shall consider the following:*
>
> *(a)* ***income*** *- total potential income at 100% occupancy of the park and any other income generated through and in relation to park operations;*
>
> *(b)* ***operating expenses*** *- include the regular expenses necessary to operate the mobile home park, and where the actual expense is known, that amount will be used;*
>
> *(c)* ***increasing operating expenses*** *- include the inflationary increases in basic operating expenses, and where the actual expense is known, that amount will be used.*
>
> *(2) In determining amounts for purposes of clauses (1)(b) and (c), the Director shall also consider Sections 27 to 32.*

[11] Form “E” which is to be completed by the Landlord was put into evidence as part of Exhibit C1. The full title of Form “E” is “Financial Information in Support of a Notice of Rent Increase”. The exercise envisioned by this form and by the Regulations is, as I perceive it, to compare one year’s operating expenses with the immediately preceding year. The expenses to be reviewed are the “operating expenses” as defined in the Regulations.

[12] The Regulations **do not** contemplate in any fashion a review of the actual net profit or rate of return of the mobile home park operations. The review seems to be limited to the operating expenses referred to but not all of the expenses of the business operation and, certainly not the financing costs or loan pay down amounts for the land acquisition.

[13] I would further observe that it seems to me that the inquiry is one between two consecutive years. It would seem to be the intention that if the operating expenses in the later year show a percentage increase equal to a greater than the proposed rental increase percentage, that the rental increase ought to be allowed. If, however, the increase in the operating expenses is less than the percentage increase for the proposed rental increase, the rental increase should only be allowed up to the demonstrated operating expense increases.

[14] Having set out those general observations, I turn to the evidence presented on behalf of the Landlord. Form “E” was presented as part of Exhibit C1. In the expenses section the Form requests information for the 12 month period before the rent increase and the 12 months after the rent increase. In both of the cases under review, the effective date of the proposed rent increase is January 1, 2007. That would mean that the information given ought to have been for the 12 month period ending December 31, 2006, and the 12 month period ending December 31, 2007.

[15] The information actually provided by the Landlord was for the for the 12 month period ending December 31, 2005, and the 12 month period ending December 31, 2006 - a year

earlier than what seems to be called for in Form "E". While some comment was made about this by counsel for the Respondents I certainly do not think it is fatal or even objectionable. If anything, the approach of the Landlord here to compare the 2006 year with the 2005 year is probably more of a representative analysis than doing everything a year forward which, it seems to me, would be an exercise involving a greater degree of speculation than what the Landlord has done here. Of most significance in my view is that there be a comparison between two consecutive years.

[16] I move to the actual expense items.

Management Fees

[17] The Landlord indicates an increase (based on a management fee of 5% of total income at 100% occupancy) of $20,576.00 for 2006 over an amount of $20,413.00 for 2005, for an increase of $163.00. I will allow that increase amount in the calculations.

Property Taxes

[18] The property tax increase between the two years is $2,376.00, i.e. $18,168.00 - $15,792.00. The Respondent Tenants do not contest this and indicate that it should be allowed and I will do so.

Insurance

[19] The insurance indicates an amount of $1,181.00 as compared to $810.00 in the previous year - an increase of $371.00. The income statement which was part of Exhibit C1 shows an amount of $97.00 per month for insurance for each of the seven months up to the end of July 2006 which are actual figures. Then there is a budget figure of $100.00 per month from August to December. There was no evidence given for an increase for the budgeted amount and, although it is a small amount, there should be substantiation for that increase, but there is not. Accordingly, I will calculate that number on the basis of the $97.00 per month, i.e. $1,164.00 for the 2006 year.

Water and Sewer

[20] This is a significant item as there is an indicated increase going from $33,220.00 to $47,274.00.

[21] The Respondent Tenants argue that there was no evidence of the Halifax Regional Water Commission bills or cancelled cheques apart from the extracts from the Killam ledger.

[22] The evidence on behalf of the Landlord indicates that an increased water expense was attributable to a leak or leaks which were ultimately repaired midway through 2006. The Tenants submit that it was not possible in the case of the Landlord's evidence to determine how much of the increase was due to the leak(s), increased consumption, or changes to the Water Commission's rates or some combination of these three elements. Further, the Tenants say that in the absence of concrete evidence on these points (i.e. water bills) the Landlord should not be permitted more than the 5% inflationary increase provided for in the Regulations.

[23] With respect, I do not accept the submission on behalf of the Tenants that the extracts from the Killam's ledger was not evidence. At the same time, I acknowledge that it would have been helpful to have copies of the Water Commission bills for both 2005 and 2006 which would have allowed an analysis to be done of the consumption and the rates and potentially some conclusion could have been arrived at in terms of what was leading to the greater water expense as between the two years. However, such does not mean that the ledger extracts do not constitute evidence. I believe they do. To reject them entirely would, in my view, be overly technical and not in keeping with the intention of this legislative scheme which, I believe, is intended to provide for a reasonably expeditious process of rent review in mobile home parks.

[24] The point is however taken that there was no basis laid for assuming that the water consumption would continue at the pre-leak level. In light of that, I feel some adjustment is in order on this figure. I note that in the actual figure supplied the respective cost for

the water in each of January, February and March (prior to the leak it would seem) were $2,846.00, $3,045.00 and $2,964.00, respectively. That indicates a rough average of $3,000.00 per month. Using that monthly average figure for the five concluding months of 2006 of August - December, would yield an overall figure of $42,274.00 for the year. That is the figure I shall use in the analysis for 2006.

Snow Removal

[25] The evidence (which I accept) is that the snow removal cost for 2006 was $26,727.00 compared to 2005 of $19,935.00.

[26] However, there is an issue, at least with some of the Tenants, as to the quality of the snow removal services. (Parenthetically, I observe that such complaints are not uncommon in other, unrelated, cases that come before this Court).

[27] The Tenants argue that there should be no allowance for the snow removal because of the poor level of service. The Tenants say that it would be unfair to impose the cost on the Tenants in the form of a rent increase when the quality of the snow removal has been significantly worse.

[28] On the face of it, this is a compelling argument. However, when I review Section 29 of the Regulations which lists various expenses which the Director is mandated to disallow, there is no obvious category for what is argued here. It is questionable therefore whether I would have jurisdiction to consider disallowing this expense. Presumably the Landlord could be "penalized" for not properly managing this expense through a reduction in management fees or conceivably such could potentially form the subject of a separate complaint by a tenant or tenants to the Residential Tenancies Director. Neither of these arguments or proceedings were however before me.

[29] I do accept that the expenditure was actually made. Further, I find that it ought to be considered in the 2006 operating expenses and I will include the amount shown by the Landlord.

Repair and Maintenance

[30] The Landlord claims the figure of $9,565.00 for increases in repair and maintenance. Some $8,969.00 of this relates to water and sewer repairs. The Tenants argue that it is not an operating expense at all but that it is a capital expense. Reference is made to Section 31(1) of the Regulations which states that "*all renovations, improvements and major repairs are considered capital costs*". The income statement indicates that expenses of $2,121.00 in May, $1,531.00 in June and a projected expenditure of $3,400.00 in September were incurred. There is also a budget amount of $400.00 per month for each of August, October, November and December.

[31] It would appear that this issue is really an example of the classic accounting issue of whether or not an expenditure is capital or current in nature. In ***Accounting Principles*** (1st Canadian Ed.), Gage Educational Publishing Limited, it is stated (p. 247):

> *"In addition to the initial cost of acquiring a plant asset, other costs related to its efficiency or capacity may be incurred from time to time during its service life. It is often difficult to recognize the difference between expenditures that add to the utility of the asset from more than one accounting period and those that benefit only the period in which they are incurred. Costs that add to the utility for more than one period are chargeable to an asset account which will relate to the accumulated depreciation account; they are termed* ***capital expenditures****. Expenditures that benefit only the current period are chargeable to expense accounts; they are referred to* ***revenue expenditures****."*

[32] By reference to this text, as well as Regulation 31(1), which refers to a "major repair", it seems to me that these expenditures were indeed capital in nature and ought not to be

included in the expense analysis. Accordingly, I will disallow $8,969.00 of the figure which leaves the amount of $596.00 for repairs and maintenance.

Other

[33] The amount of the claims and increase of "other" expenses of $2,141.00 for 2006 compared to $854.00. I have carefully reviewed the material submitted and cannot find any substantiation in support of that. Accordingly, I accept the Tenants' argument that the expense is not sufficiently substantiated and should be ignored.

Capital Costs

[34] I turn now to capital costs. The Regulations indicate that consideration is to be given to capital costs in considering an rental increase. I propose doing this by including an annual amortization figure for proven capital costs to the Form E figures

[35] The evidence indicated that there were expenditures for street signs totaling $4,497.46 in 2006. I accept Tenants' counsel submission that 20 years is an appropriate amortization period . Therefore, the annual amount is $224.87.

[36] The chain link fence amount of $974.55 is also subject to 20 year amortization and , thus, $98.73 per year

[37] The amount for "environmental clean up" was withdrawn.

[38] I am disallowing the "entrance sign"as a capital cost. In my view, in order for the capital cost expenditures to be considered they must actually have been expended. There was no evidence that anything was actually incurred in this regard.

[39] The amount of $8,969.00 disallowed as an expense for repair and maintenance for water and sewer line is to be allowed as a capital cost and therefore that needs to be added in the calculations. On a 20 year amortization, the annual amount would be $448.45.

Revised Form "E"

[40] The revised Form "E" relating to the expenses as discussed above would therefore be as follows:

	12 Month 2005 Actual	**12 Month 2006 Year to Date Plus Budget (as revised)**	**Increase**
Management Fees	$20,413.00	$ 20,576.00	$ 163.00
Property Taxes	$15,792.00	$ 18,168.00	$ 2,376.00
Insurance	$ 810.00	$ 1,164.00	$ 354.00
Water and Sewer	$33,220.00	$ 42,274.00	$ 9,054.00
Snow Removal	$19,935.00	$ 26,727.00	$ 6,792.00
Repair & Maint.		$ 596.00	$ 596.00
Other	$ 854.00	$ 854.00	$ 0
TOTALS	**$91,024.00**	**$110,359.00**	**$19,335.00**
		% Increase	**21.24%**

[41] If the annual capital costs figures are added in - $224.87 for street signs, $98.73 for fence and $448.45 for water and sewer lines - the increase would rise to approximately 22%.

CONCLUSION and DISPOSITION

[42] As stated above, the demonstrated increases in operating expenses between 2005 and 2006 is some 21.24 %. This is without factoring in an allowance for capital costs.

[43] My interpretation of this regulatory scheme is that an increase is to be allowed on such an application if the Landlord can show that the operating expenses, as defined in the Regulations, have increased or will increase to a degree that is equal to or greater than the proposed rental increase percentage.

[44] I am satisfied that the Landlord has discharged its burden - the operating expenses have been shown to be increasing in excess of 20% in 2006 as compared to 2005; the lot rent increases sought here are in the 12-13% range - well below the demonstrated increases in operating costs. Accordingly, I find that the notices of increase are allowed.

[45] **THEREFORE , IT IS HEREBY ORDERED AS FOLLOWS**:

a) The rent on the following 19 units, including that of the Respondents Joe and Marie Corkery of 17 Shamrock Drive, in SCCH NO. 06-269339, shall effective January 1, 2007, increase to $280.00 per month:

39 General Avenue;
9, 19, 20 and 22 Glenda Crescent;
23 Homeward Avenue;
7, 15, 17, 19, 24, 25, 26, 33, 36 and 38 Shamrock Drive;
4, 6 and 8 Shasta Lane.

b) The rent on the following 26 units, including that of the Respondent Lorraine Ferguson of 31 General Avenue, in SCCH NO. 06-269639, shall effective January 1, 2007, increase to $280.00 per month:

12, 21, 28, 30 and 31 General Avenue;

3, 28, 32, 34. 45, 49, 65, 66, 71 and 73 Glenda Avenue;

3, 5, 7, 8, 9, 11, 15, 21, 25 and 30 Homeward Avenue;

20 Shamrock Drive.

DATED at Halifax, Halifax Regional Municipality, Nova Scotia on October 17, 2006.

Michael J. O'Hara
Adjudicator

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