



Dispute Resolution Services

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

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

s. 22

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: Chris Nelson, Landlord
Jason Gordon, Landlord

For the Tenants Jess Hadley, Counsel

s. 22



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
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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 Jarvis 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 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

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 Jervis 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.



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

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

s. 22

Tenant(s),

Respondent(s)

Re: An application pursuant to section 43 of the *Residential Tenancy Act* regarding the
rental units s. 22

at: **1436 Pendrell Street, Vancouver, British Columbia**

Date of Hearing: October 12, 2010, at Burnaby RTO

Date of Decision: November 10, 2010

Attending:

For the Landlords: Jason Gordon
Chris Nelson
Don MacPherson

For the Tenants s. 22



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

RI

Introduction

This hearing was scheduled in response to an application by the landlord pursuant to a decision by the courts setting aside a previous decision of the Director – convening a new hearing. The matter now before me is an application by the landlord for a rent increase above the limit set by the Residential Tenancy Act Regulation: *on the basis that after an allowed rent increase the rent for the rental units are significantly lower than the rent payable for other rental units that re similar to, and in the same geographic area as, the rental unit.*

Both parties were represented in the hearing and had opportunity to be heard, present evidence including witnesses, ask questions and discuss their dispute. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

Preliminary matters

The previous tenant of unit ^{s. 22} submitted a letter stating they vacated the rental unit and ended the tenancy ^{s. 22}. As there are no provisions in legislation that rent increases can be applied retroactively, any action in respect to the landlord's application against this former tenant is preliminarily *dismissed* without leave to reapply. The hearing proceeded in respect to the remaining merits.

This is a new hearing utilizing 'dated' evidence to which the parties agree to a decision on this non-current and dated evidence of twenty two (22) months. Neither party provided new submissions. Given the passage of time and the guidance of the courts it is the landlord's desire for me to decide if their requested increases in rents are still valid. The landlord and the tenants consent and agree to the treatment of all submissions and evidence by both parties, as if "current".

On this basis, I make the following preliminary *rules* in respect to this decision.

- The current *rents payable*, and the *rents payable after applying a permitted increase* for the current year (2010) are as follows:

Unit	Current rents payable	Allowable Rent Increase for 2010 of 3.2%	<i>Rents payable after allowable increase</i>
1	1358	43.45	1401.45
3	1250	40.00	1290.00
4	1374	43.96	1417.96
5	829	26.55	855.22
6	1368	43.77	1411.77
7	1450	46.40	1496.40
8	1325	42.40	1367.40
10	1068	34.17	1102.17
11	1362	43.58	1405.58
12	1368	43.77	1411.77
14	1145	36.64	1181.64
15	710	22.72	732.72

- All *comparables* submitted by the parties remain unchanged and as if the comparables are “current”.

Issue(s) to be Decided

After a rent increase permitted by the Residential Tenancy Act Regulations (Regulation), is the rent for the dispute rental units significantly lower than rent payable for other rental units similar to and in the same geographic area as the rental units?

Background and Evidence

The landlord's property is a 3 - storey apartment block brick building located in the West End of Vancouver between Robson Street and English Bay, approximately 4.5 city blocks from Burrard Street. The building was constructed in the 1930's and is registered as a heritage building by the City. It is submitted that there are 14 rental units in the building. Suites 1 -12 are the original suites on the residential property (Heritage units). Suites 14 and 15 were newly added to the building in the 1990's (1990's units). Suites 2 (and now 9) have been more recently re-rented and are not the subject of this application. All the original suites and the common areas are characteristic of their era and are inclusive of high ceilings, the original hardwood floors, large fully tiled original bathrooms, moldings, wood doors, and electric fireplaces and original kitchens. The units are more ample in size than more newly constructed apartment block units. Rent includes heating and hot water. There are six parking spots on the property and no elevator facility. The property provides the tenants with storage lockers and includes common laundry facilities which are coin-operated. Among the units in dispute, the duration of the tenancies range from approximately 3 to

50 years. The history of rent increases reflects the rents paid have always been with rent increases as statutorily permitted under the Act and Regulation.

The landlord has highlighted unit 2 of the building - which is not part of this application. Unit 2 is a two-bedroom suite which was vacated almost 2 years ago and re-rented for significantly more than the subject suites at \$2,250.00 per month. The landlord submits that despite varying factors particular to this residential property and the rental market their belief is that the *heritage units* and *1990's units* will garner market rents in terms of 'price per square footage' as follows:

<u>Heritage units</u>	<u>1990's units</u>
Bachelor \$2.00 – \$2.10 (units #5 and #7)	Bachelor \$1.90 - \$2.00 (#15)
1 Bdrm. \$1.90 - \$2.00 (units #3 and #10)	
2 Bdrms. \$1.80 - \$1.95 (balance of <i>heritage units</i>)	2 Bdrms. \$1.70 - \$1.80 (#14)

As a result, the landlords argue that the subject rental units are undervalued – at \$1.11 - \$1.76 per square foot and seeking an increase to bring the price per square foot to near the above targets – of per square foot rents reflecting between \$1.75 and \$2.05 – and also represent rents situated within the range of the comparables submitted by the landlord.

The tenants argued that rent based primarily on square footage is 'misleading' and not supported by the actual rental market in the relevant geographical area. The tenants provided their research - a comprehensive survey conducted by the tenants of other buildings in the West End ("West End Renters Survey" – the Survey), and equally sizeable as the landlord's research. The tenants argued that the data from the respondents of the Survey showed that the larger the unit, the lower the rent *per square foot* and the smaller the unit, the higher the *rent per square foot*. It purports there are no *direct* correlation of rent to square footage and that the subject rents payable are indeed comparable rents for similar and relevantly situated units (geographically).

Both parties submitted an abundance of evidence comparing the subject residential property and rental units to other rental units in the geographically relevant area.

The landlords provided evidence comprised of information garnered from advertisements for a large pool of rental units in the surrounding area; and, interviews with landlords of those advertised properties. The tenants argued that the landlord's evidence relied on speculated rents or the *asking rent* for those advertised units, whereas the Act requires that the actual *rent payable* be considered. The tenants submit that Section 23(1)(a) of the Regulation, *rent payable* is existing rent due under a prevailing or existing tenancy agreement – not the *asking rent*, or desired rent for an advertised new tenancy – to which the landlords claim that in the overwhelming majority

of the advertisements, new rents garnered the asking rent – therefore should be considered a valid measure. In rebuttal, the tenants submitted the landlord's evidence was based on conversations and was hearsay. The tenants also provided a witness.

Witness 1, under affirmation, testified that s. 22

S22

The witness testified s. 22

process typically starts by a consensus with the owner of the building as to what the asking rent should be, and that he “feels” the rental market, and that it is very much market-dependent. s. 22

S22

s. 22 testified that he does not consider the asking rent as a reliable measure of achievable rents or rents payable. He further testified that, in general, larger suites get higher rents – but did not qualify this remark.

The witness also provided a written statement as a submission for the tenants – in which s. 22 compares s. 22 residential property S22 units to be very similar, if not nearly identical to the subject property in most aspects of age, construction, amenities, and community. The witness submits that s. 22 is not in the same geographic area as the subject property – speculating it to be in a more desirable area right beside than the subject one

S22

bedroom units. S22

s. 22

, which average **670** square feet for an average rent payable of **\$1214** per month. In comparison the subject 2 heritage suites average **922** square feet (39% larger) for an average rent of **\$1159 (\$1196** after allowable rent increase for 2010). The tenants submitted another “rent roll” of 11 – one bedroom units purportedly within a residential property very similar to the subject property. These units are all within \$45 and average \$830. The submitter of the information lives in one of the units which is **\$830** per month and is **700-750** square feet.

Analysis

Section 23 states I must consider a number of factors, if relevant, inclusive of relevant submissions from affected tenants. In this matter the affected tenants comprise the majority of the residential units of the building. The parties have provided contrasting submissions and contrasting points of view as to what constitutes “similarity” in respect to the pool of comparables submitted by both parties. It is noted that there are no identical units within the subject units or comparables submitted by the landlord or the tenants.

I have based my decision on a reasonable interpretation of the landlord's supporting material and the relevant submissions of the tenants. I have given consideration, in part, to similarity in square footage as a measure of similarity in size but I have also considered similarity as to location, building construction, exterior and interior appearance, amenities and the age of the residential property. The decision is not based solely on the parameters of square footage. I have looked to Residential

Guideline #37 – as a *guideline*, choosing to primarily rely on the provisions of legislation.

Section 75 of the Residential Tenancy Act (the Act) states, in part, that I may admit, and consider as evidence that which is:

75. 75(a) necessary and appropriate, and

75(b) *relevant to the dispute resolution proceeding.*

As a result, I accept the landlords' submissions with respect to their research involving advertised rental units as comparables and conversations they had with other landlords, in so far as their submissions are reasonably relevant against the majority of similarities. The tenant's survey / research submissions referenced a number of rental units which they believed to be comparable to the units in the subject building (Tenant's Tab C). I have also considered their submissions in making my decision in so far as they appear reasonably relevant against the majority of their similarities. The tenants submit that none of the landlord's comparables are valid comparables as, for one aspect or another, they are not identical; or, they are based on advertisements (Tenant's Tab B).

Section 23(1)(a) of the Regulation states 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 Regulation does not define or indicate the quantum of other similar rental units against which the rent is deemed as significantly lower. I find the landlord should support that there is a reasonable number of similar rental units whose rent payable is significantly higher than the subject rental units.

I find that the landlord's consultant's reports of market rental estimates may be relevant for evaluating the value(s) for the residential property, or for forecast or a sales perspective, but insufficiently relevant for the requirements of this application in respect to the Act or the Regulation.

The tenants have submitted that the landlord's motive is to evict all the tenants via additional rent increases. I am satisfied that the landlord is motivated to raise rents and is pursuing this end via the permitted legal means available to them.

The tenants provided that they have paid regular permitted rent increases each year. Although the rent history must be considered per Regulation 23(3)(b) - this information, also provided by the previous owner of the residential property, reveals that rents payable at that time were a, "fair and adequate charge", and purported by the previous

owner to be not less than the going market rate. From this submission it is not clear if rents were kept in line with the market. The tenants have also suggested that the landlords upkeep and common areas maintenance of the building have not improved in the past year, and, “if anything it has deteriorated” since they purchased it in 2008. The tenants did not advance submissions as to how it impacts or reflects the rents or the value for rent; therefore I dismissed this factor as a consideration.

I have reviewed all of the comparables submitted by the landlords and have determined that only a limited number can be considered sufficiently similar. Some of the suites offered by the landlords as being similar were not considered for lack of sufficient details to arrive at a similarity.

In respect to the relevant geographic area, I considered the guideline of ‘a reasonable kilometer’ and determined that the entire West End could be the “same geographic area” as prescribed by the legislation. I determined that as there is no geographic pattern, or rule which accurately reflects on the asking rents or the rents payable in heritage buildings. *I have narrowed the comparables to those which are in very close proximity of the subject property, as this also allows for comparison with the tenant’s research.* I considered the heritage suites to similar units in heritage buildings but not suites in heritage buildings which had been substantially updated beyond similarity.

I find that I have not been provided with credible or meaningful evidence that varying exterior cladding construction impacts rental rates, therefore I have not factored this characteristic as a required similarity. Rather, I have considered whether or not the building is a heritage and a purpose-built apartment – as is the subject property. There were no comparables which had an equivalent square footage and all the comparables used are lesser square footage than the units in the subject property. Despite the aforementioned tenant’s evidence of one building whose rent roll showed that their smaller 1 bedroom units had rents higher than the subject property despite being 39% smaller, I do not find this to be sufficient to exclude other comparables.

Heritage Unit 1, 4, 6, 7, 8, 11, 12 - Two Bedrooms

The two bedroom units range from 1201 – 1238 square feet and have rents payable, after the allowable rent increase, from \$1,367 per month to \$1,496 per month.

I find that among the comparables provided by the landlords, four can be considered the most similar.

1225 Nelson Street	700 square feet	\$1400 per month.
855 Thurlow Street	800 square feet	\$1550 per month.
962 Jervis Street	750 square feet	\$1700 per month.

In addition, I find that # 2 in the subject residential property has the best similarity. It was rented most recently at approximately \$800 more than the average rent payable at the property:

1436 Pendrell	1204 square feet	\$2250 per month per month
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However, I concede to Residential Tenancy Policy Guideline #37 which states, 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.

In this matter the landlord has provided other comparable units – albeit 3, from a list of over 60. Had these 3 units represented a lesser marked discrepancy from the rent payable for # 2 1436 Pendrell, I would find # 2 a reasonable co-comparable than the anomaly described in Guideline #37. As a result, I must rely on the 3 initial comparables. As such, I find the rents payable for the subject units, after the allowable rent increases, is for one unit marginally lower (\$33) and for the remainder, higher (\$2 - \$96) - therefore not *significantly lower* than the comparable at 1225 Nelson Street.

I find the rents payable for the subject units, after the allowable rent increases, are \$54 - \$183 lower than comparable unit at 855 Thurlow Street. I find the rents payable for the subject units, after the allowable rent increases, are \$194 - \$333 lower than at 962 Jervis Street. However, I find that the later 2 comparables, although higher than the subject units, are not a sufficient pool of comparables upon which to make a finding that the rents payable for the subject rental units are significantly lower than the rents payable for other rental units that are similar to and in the same geographic area as the rental unit. As a result, I find the landlord has not met their burden of proof in respect to these units and are therefore not entitled to a rent increase above which is provided for in the Regulation.

1990's unit #14 – two bedrooms

The rent for the two bedroom 1990's unit after the allowable rent increase has a rent payable of \$1181.64 per month and is 1048 square feet, and is a non-heritage unit in a heritage building.

On preponderance of the landlord's comparables, I find there are no units provided by the landlord that can be considered sufficiently similar and comparable. Some had features such as balconies or were closer to commercial and social amenities such as beaches and Stanley Park. Being a 'modern' unit, many heritage units were eliminated as comparables. As a result, I find the landlord has failed to prove that the rent payable for the subject rental unit is significantly lower than the rents payable for other rental

units that are similar to and in the same geographic area as the rental unit. Therefore, I deny this part of the landlords' claim.

Heritage Unit #'s 3 & 10 - One Bedrooms

The one-bedroom heritage units have rents payable, after the allowable rent increase, of \$1102.17 per month and \$1290 per month. The units are 870 and 974 square feet, respectively.

I find that among the comparables provided *by the landlord*, only two of the units can be considered similar, or comparables. I find the units as comparable at:

1225 Nelson Street	500 square feet	\$1300 per month
962 Jervis Street	650 square feet	\$1150 per month

Based on my prior finding I also find that these two units are not a sufficient pool of comparables upon which to make a finding that the rents payable for the subject rental units are significantly lower than the rents payable for other rental units that are similar to and in the same geographic area as the rental unit. Regardless, the rents payable on the comparable units are marginally higher; but, that the subject units are not at all *significantly lower* than these comparables. As a result, the landlords' claim to increase the rent for unit 3 and 10, above what is permitted by the Regulation, is denied.

Heritage Unit # 5 - Bachelor

The bachelor heritage unit, after the allowable rent increase, has a rent payable of \$855.22 per month and is 623 square feet.

I find that only the unit at 1225 Nelson Street can be considered truly similar and a comparable. The other comparables had balconies and / or other features which significantly distinguished them from the subject heritage unit. This one unit is not a sufficient pool of comparables upon which I can make a finding that the rents payable for the subject rental units are significantly lower than the rents payable for other rental units that are similar to and in the same geographic area as the rental unit. As a result, I find the landlords have failed to prove that the rent for unit #5 is significantly lower than the rent payable in similar rental units and therefore the landlords' claim to increase the rent for this unit above what is permitted by the Regulation, is denied.

1990's unit #15 - Bachelor

This bachelor 1990's unit, after the allowable rent increase, has a rent payable of \$732.72 per month and is 403 square feet.

I find that only the unit at 1421 Burnaby Street can be considered similar and a comparable. Many of the landlords' comparables had Murphy beds, which distinguished them from the subject unit. Also the subject unit is on the ground floor –

whereas some of the comparable's descriptions indicated they were on upper floors with City views. Again, the sole comparable is not a sufficient pool of comparables upon which I can make a finding that the rents payable for the subject rental units are significantly lower than the rents payable for other rental units that are similar to and in the same geographic area as the rental unit. Therefore, I find that the landlords' claim to increase the rent for this unit above what is permitted by the Regulation is denied.

Conclusion

The landlords' application for an additional rent increase in respect to all the subject units is dismissed. The landlord is at liberty to issue rent increases in accordance with and as permitted by the Regulation.

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 10, 2010

R. Lanon
Dispute Resolution Officer