

Order under Section 21.2 of the
Statutory Powers Procedure Act
and the **Residential Tenancies Act, 2006**

File Number: SOL-40297-13-RV-IN2

In the matter of: 165 ONTARIO STREET, ST CATHARINES, ON, L2R5K4

Between: RED STARLIGHT LP Landlord

and

Refer to attached Schedule 2 Tenants

INTERIM ORDER

On October 20, 2014, L. D. Blake, one of the Tenants, requested that order SOL-40297-13 issued on October 10, 2014, be reviewed and that the order be stayed until the request to review the order is resolved.

Determinations:

1. For reasons attached to this order, the review request must be granted, and the application must be re-heard.

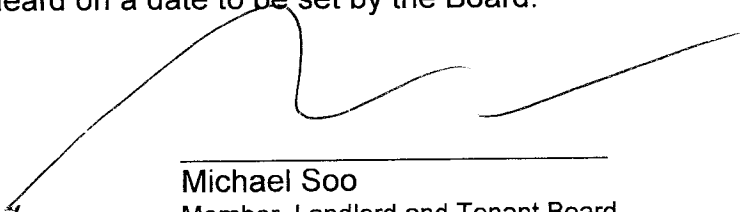
It is ordered that:

1. The Request to Review order SOL-40297-13, issued on October 10, 2014, is granted.
2. The application will be re-heard on a date to be set by the Board.

March 2, 2015

Date Issued

**Southern-RO
6th Floor, 119 King Street West
Hamilton, ON, L8P4Y7
Fax No: 905 - 521 - 7870**



Michael Soo
Member, Landlord and Tenant Board

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

REASONS

In the matter of: 165 ONTARIO STREET, ST CATHARINES ON L2R5K4

Between: RED STARLIGHT LP Landlord

and

Refer to attached Schedule 2 Tenants

RED STARLIGHT LP (the 'Landlord') applied for an order permitting the rent charged to be increased by more than the guideline for one or more of the rental units in the residential complex (refer to attached Schedule 1).

Reasons to Order SOL-40297-13-RV-IN2 issued on March 2, 2015 by Michael Soo.

1. The order under review granted an above guideline rent increase based on capital expenditures. The application was heard on a contested basis, with multiple Tenants in attendance to oppose the application.

The Requestor's Position

2. The core allegation in the review request is that the hearing member unfairly and dismissively cut off evidence and submissions from Tenants at the hearing, and displayed a closed mind.
3. The Requestor is one of the Tenants affected by the rent increase. While she did not attend the hearing, she recalled that some of her fellow Tenants returned home from the hearing complaining that their arguments had been given short shrift by the hearing member. Upon receiving the resulting order, the Requestor ordered a recording of the hearing.
4. The Requestor professed to be "*shocked*" by what she heard. She was offended by the tone of the hearing member. She submitted that the hearing member repeatedly "*lectured*" the Tenants by stating that the government encourages landlords to spend money on capital expenditure work. She further submitted that the hearing member conducted the hearing on the misapprehension that the Landlord need only prove that the money had been spent.
5. In the request, and at the hearing, the Requestor provided transcribed excerpts from the hearing, which I observed to be accurate upon listening to the hearing recording. The excerpts showed that the hearing member curtailed numerous questions from Tenants about the work at the root of the application.



6. The Requestor noted that numerous questions from Tenants about the nature of the capital expenditure work were abruptly cut off. On several occasions, the hearing member cut off such questions by asking, "Are you an engineer?" This repeated question was seen by the Requestor as particularly dismissive, and tantamount to "Sit down and shut up."
7. The Requestor very eloquently set out an argument suggesting that the hearing had been unfair. She pointed out that capital expenditure work is done by landlords without prior consultation with tenants. No input from tenants is required to undertake such work. No input from tenants is required with respect to whether such work is needed. No input from tenants is required with respect to the reasonableness of cost. Once tenants are served with an application for an above guideline rent increase, the work is a "done deal."
8. However, the Requestor further submitted that the application itself should not be a "done deal." Having been served with the application only after any opportunity for input, oversight or investigation has passed, she submitted that the hearing should be an opportunity for tenants to seek answers to the questions that they could not ask before and while the work was done.
9. In closing, the Requestor stated that she and her fellow Tenants would have been willing to accept a rent increase after a fair hearing, but that a fair hearing was not offered.

The Landlord's Position

10. The Landlord's representative acknowledged that the hearing member raised her voice repeatedly. However, he recalled that she did so because the room was full and noisy.
11. With respect to the hearing member's conduct, the Landlord's representative submitted that the hearing member allowed individual Tenants to ask questions, but intervened properly to maintain focus at times. He also submitted that the quotes cited by the Requestor need to be considered within the overall context of the hearing, particularly in consideration of the hearing member's duty to curtail repetitive or unqualified arguments.
12. With respect to the tone taken by the hearing member with Tenants, the Landlord's representative candidly acknowledged that she had also taken a "pointed" tone with him on several occasions during the hearing.
13. Lastly, it was submitted that the Tenants were assisted by Duty Counsel, who raised no objections to the hearing member's offending conduct.
14. In summary, the Landlord submitted that the issues raised in the request did not justify a "second kick at the can."

Analysis

15. The hearing recording confirms that the hearing member spoke in a raised voice. However, the recording also confirms that she did so in response to a request from an unidentified person at the back of the room.

16. Unfortunately, the recording also confirms that the hearing member repeatedly cut off questions from Tenants. To be fair, some of the questions were unfocused and possibly irrelevant. At times, the hearing member rephrased questions based on her attempt to interpret and distill what she had heard from the Tenants. At times, the questions were simply discontinued.
17. The Requestor made several submissions about the effect of the hearing member's conduct of the hearing. It was suggested that it raised a reasonable apprehension of bias. It was suggested that the Tenants were denied procedural fairness.
18. Without delving into an analysis of those principles, I will simply state that the application must be re-heard because the curtailing of questions unfairly prevented Tenants from testing the Landlord's case.
19. The Act sets out eligible capital expenditures for rent increases above the Guideline in section 126(7), as set out below:

Eligible capital expenditures

- (7) ***Subject to subsections (8) and (9), a capital expenditure is an eligible capital expenditure for the purposes of this section if,***
 - (a) ***it is necessary to protect or restore the physical integrity of the residential complex or part of it;***
 - (b) ***it is necessary to comply with subsection 20 (1) or clauses 161 (a) to (e);***
 - (c) ***it is necessary to maintain the provision of a plumbing, heating, mechanical, electrical, ventilation or air conditioning system;***
 - (d) ***it provides access for persons with disabilities;***
 - (e) ***it promotes energy or water conservation; or***
 - (f) ***it maintains or improves the security of the residential complex or part of it.***

20. Naturally, the burden of proof in this application was on the Landlord. As the Landlord's representative correctly stated, the burden was the balance of probabilities.
21. However, before deciding whether the burden had been met, the hearing member had a duty to allow the Tenants to test the Landlord's evidence, particularly as to whether the capital expenditures claimed fit within section 126(7) of the Act. She also had a duty to allow the Tenants to test the Landlord's evidence for the purposes of section 126(8), which states:

Exception



(8) A capital expenditure to replace a system or thing is not an eligible capital expenditure for the purposes of this section if the system or thing that was replaced did not require major repair or replacement, unless the replacement of the system or thing promotes,

(a) access for persons with disabilities;

(b) energy or water conservation; or

(c) security of the residential complex or part of it.

22. The hearing member allowed the Tenants to ask questions. At times, she properly intervened to clarify or focus the questions. At times, she also properly intervened to prevent interruptions of answers.
23. However, the hearing member also cut off questions for no reason that can be justified, and the bulk of these interruptions served only to cut off questions about the statutory criteria in sections 126(7) and (8) of the Act.
24. As the Requestor submitted, it was not proper to pre-emptively challenge questions by asking, "Are you an engineer?" I note that questions were cut off on multiple occasions with this particular challenge. In one case, the hearing member repeated it three times until a Tenant stopped asking a question.
25. The Tenants had a right to ask questions, regardless of their professional qualifications. It was up to the hearing member to decide if answers from such questions should be assigned lesser or greater weight. It was not proper for the hearing member to prevent such questions from being asked altogether.
26. It was also not proper for the hearing member to cut off questions from Tenants by challenging them to produce their own expert reports, as this suggests that she had reversed the burden of proof.
27. While the Landlord's representative correctly noted that Tenant Duty Counsel did not object to the hearing member's conduct of the hearing at the time, I cannot find that this factor cures what I have concluded was an unfair hearing. Notwithstanding Tenant Duty Counsel's presence and assistance, several self-represented Tenants were denied their fundamental right to contest the Landlord's evidence.
28. The hearing was not conducted in a manner that was fair, or in keeping with fundamental principles of natural justice. The request must be granted, and there will be a de novo hearing of the application.

March 2, 2015
Date Issued



Michael Soo
Member, Landlord and Tenant Board

**Southern-RO
6th Floor, 119 King Street West
Hamilton, ON, L8P4Y7
Fax No: 905 - 521 - 7870**

A handwritten signature in black ink, consisting of a series of fluid, connected strokes.

Schedule 2

File Number: SOL-40297-13-RV-IN2

Tenant names hidden to protect privacy

Tenant names hidden to protect privacy

