

In the matter of the *Manufactured Home Park Tenancy Act*, SBC 2002, c. 77., as amended

between

Charles Dennis Patterson and Leslie Patterson et al, Tenant(s),
Applicant(s)

and

Timberland Properties Inc., Landlord(s),
Respondent(s)

Re: An application pursuant to section 36(1)(a) of the *Manufactured Home Park Tenancy Act* regarding the rental units at:

2500 Florence Lake Road, Victoria, BC V9B 4H2, British Columbia

Date and place of hearing: January 15, 2008, Victoria.

Appearances

For the Tenants: Charles Patterson
Leslie Patterson
Larry Fofonoff
Roger Batchelor (Legal Counsel)

For the Landlord: Sheldon Hershberg
Durward Tillie (Legal Counsel)

DECISION AND REASONS

This application was brought by Mr. and Mrs. Patterson and joined by tenants of 127 of the 160 manufactured home sites in the rental property known as Hidden Valley Seniors Manufactured Home Park in Victoria, BC.

The application was brought to contest part of a Notice of Rent Increase dated September 15, 2007 to take effect January 1, 2008. The proposed increase incorporated the inflation rate (deemed to be 1.7% for the material period plus 2% plus the recently proclaimed "proportional amount," an amount representing an increase in government levies and utilities costs in the 12 months preceding the notice.

The tenants contest only the "proportional amount."

Counsel for the respondent landlord raised two preliminary matters:

The first matter challenged jurisdiction to hear the tenants' application on the grounds that it was prohibited by section 36(2) of the part of the *Act* which deals with rent increases and which states that:

(2) A tenant may not make an application for dispute resolution to dispute a rent increase that complies with this Part.

As the tenants' application stands on the proposition that the "proportional increase" portion of the increase does not fully comply, I found that it would be prejudicial to the tenants to dismiss their application without considering its merits.

The second matter related to errors made in the application forms and inconsistencies made between those and an addendum submitted by the lead applicants. In brief, the applicants had checked off boxes on the application form pertaining to; allowing tenants to deduct the cost of repairs, services or facilities; ordering the landlord to make repairs; recovery of the filing fee, and "other" which pointed to the addendum.

Counsel for the tenants noted that the errors primarily resulted from some ambiguity in the check box statements and the tenants' understandable lack of familiarity with the process. He stated that the application merely intended to challenge the proportional increase issue and asked that the hearing proceed on that basis.

Section 55 of the *Act* grants the Director, and by delegation, the Dispute Resolution Officer:

...authority to determine...

(b) any matters related to that dispute that arise under this *Act* or a tenancy agreement.

More to the point, section 57(3), grants the director discretionary authority to:

(c) amend an application for dispute resolution or permit an application for dispute resolution to be amended.

Accordingly, I amended the applications as requested by counsel for the tenants and the hearing proceeded on that basis; that is, that the hearing only consider the rent increase beyond the uncontested 3.7% comprised of inflation plus 2%.

To put matters in context, in early 2007, government amended *Regulation 32* under the *Act* to permit landlords to add a "proportional amount" to the annual inflation rate plus 2 percent increase allowed without applying for an additional increase under *Regulation 33*.

Proportional amount is defined as the "sum of the change in local government levies and the change in utility fees divided by the number of manufactured home sites in the landlord's manufactured home park." It is based on the increase in the 12 months ending the month before notice of the increase is given and includes "a water utility as defined in section 1 of the *Water Utility Act*."

In this instance, Notice of Rent Increase was issued September 15, 2007 to take effect January 1, 2008. Therefore, the material periods for comparison of the water usage billings are September 1 to August 31 for 2006/07 vs 2005/06. The landlord reported an increase in the water billing for the previous 12 months from \$51,242.98 to \$71,320.44.

However, the landlord based the increase on the billings available at the time of issuing the Notice of Increase, thereby using a previous 12-month period ending July 14, 2007, rather than ending August 31, 2007 as prescribed by *Regulation*. Therefore, I have, in a table to follow later, recalculated the period to August 31, 2007 and estimated costs for the missing period based on usage in the immediately preceding billing period.

The tenants argue that increase includes, among other things, \$3,588.10, proven to be attributable to a leak. That figure represents half the amount of CRD Water Services estimate of the loss and the landlord was given credit for the other half which was therefore, not passed to the tenants.

It is also noteworthy that the CRD charges per cubic metre increased from \$1.0417 to \$1.1354 (9%) January 1, 2006 and from \$1.1354 to \$1.2041 (6%) January 1, 2007.

A line graph submitted by the tenants indicates that average daily usage in the 2005/06 period was somewhere in the order of 125 to 130 cubic metres per day. That rose to about 220 cubic metres during the period of the major leak in the January to March, not a peak usage period. Average use per unit per year in that time period was 292 cubic metres.

Late payment charges and water history requests amount to something less than \$10, a figure easily set off by the landlord's rounding down to the nearest dollar on the increase and sufficiently insignificant to be omitted from consideration.

The tenants claim as follows:

About the time Mr. Hershberg bought the park in February of 2007, CRD Water Services recorded a large increase in water consumption in the park. That led to an initiative by the park owner to have residents restrict water usage.

At a subsequent meeting of residents on July 14, 2007, Mr. Hershberg advised that the increased usage had resulted from water line breaks he is said to have attributed to blasting on the nearby Bear Mountain property. The tenants submitted, supported by a statement signed by 10 of them, that Mr. Hershberg indicated (paraphrased):

- a. the tenants were doing a good job conserving water;
- b. the blasting is causing leaks;
- c. he doesn't find out about them until Langford advises the water bill is \$5,000 higher;
- d. this has happened five times since January;
- e. owners are doing what they can to find and repair the leaks
- f. pursuing city and Bear Mountain futile;
- g. will continue policy of previous owner of looking after supply lines to the shut off at each manufactured home;
- h. an appeal to tenants to advise him of any suspected leaks and pledges to attend right away.

The tenants further state that the leak credit the landlord received from CRD Water Services for the period from January 20, 2007 to March 23, 2007 for \$3,588.10 as reimbursement for half the loss indicates that the loss for the other half should not be passed to them. They state that that fact, and subsequent continuing high billings, demonstrate that the landlord has been negligent in attending to water leaks.

The tenants also claim that the proportional increase wrongly included a forward transfer of an unpaid water bill from July 16 to September 23, 2005. That issue is eliminated by my recalculation of the material periods from September 1 to August 31 (See attached Table A). The tenants also claim late payment fees for July 16 to September 23, 2005 and to January 20, 2006, charges for an invoice history request for January 21, 2006 to March 2006, and for customer information regarding the transfer of the park account should not have been included.

In addition to removal of all of the rent increase beyond 3.7%, the tenants had sought an order that the landlord repair all leaks and that the CRD provide inspection reports. I would note that I have no jurisdiction to require action by the CRD and for reasons stated hereinafter, I do not believe it necessary to order the landlord to make repairs.

The tenants ask that future water billings be based on water volume usage in the period from July 16, 2005 to July 14, 2006, or the 292 cubic metres per unit per year.

They also ask for other measures based on their request for an order that the landlord install individual water meters to which would exceed my authority under the *Act*, and which, I might add, would be so expensive as to invite an application for a very large additional rent increase from the landlord under section 36(3) of the *Act* if, in fact, the CRD would permit it. In addition, I believe such consideration was pre-empted by the tenants' agreement to amend their application(s) to address only the proportional increase.

In response to the tenants' suggestion of negligence, the landlord held that he has reacted as quickly and fully as possible to every instance of water problems and notes that he is by nature a water conservationist as well as a cost conscious landlord.

I find that the landlord has not been negligent for the following reasons:

1. Mr. Hershberg took possession of the park at the beginning of February, 2007, shortly after the water line sustained an apparently major leak. It would not be reasonable to expect him to have an intimate familiarity with park operations at that time.
2. I accept his evidence that he was not aware of the leak until notified by CRD water services that consumption was apparently increasing at an alarming rate.
3. The fact that CRD issued a leak credit for the January to March billing period indicates that the landlord acted to make repairs expeditiously and to their satisfaction.
4. That having been remedied, and the landlord now alerted to excess water consumption, he met with CRD officials and on May 1, 2007 instituted a water conservation program for the summer, prohibiting car washing, allowing only hand watering two days per week and introducing a fine schedule for non-compliance.
5. He also announced the installation of water flow counters for each section of the park to track high consumption and leaks.
6. Shortly after, and verified by written submission from assistant manager Victoria Powell, he made an offer to all residents that if they would permit inspection of their units plumbing fixtures, he would, at his own expense, have plumbers repair any leaking toilets or taps. Only two residents responded and the landlord intends to pursue this avenue more vigorously in future.
7. Though not included in the material times, the tenants held that the landlord's negligence was demonstrated in his not having a leak in the pump house repaired promptly in October 2007. The landlord gave evidence that he tried constantly to have Miles Plumbing, a major local plumbing contractor, tend to the leak. As his repeated efforts to have them attend failed, he hired a Nanaimo firm to do the work.
8. On July 14, 2007, the landlord reported to tenants at a general meeting and acknowledged that the high water consumption was in part, at least, due to leaks in the water system and not to wastage by tenants. He stated that the leaks seemed to coincide with blasting at the neighbouring Bear Mountain Development.
9. While the tenants suggested that the landlord had been negligent in not pursuing Bear Mountain and Langford civic officials, the landlord stated that he had contacted Bear Mountain many times and that they now referred his calls to the city. Both only gave him repeated assurance that charges used in the blasting were within the permitted magnitude.

This is not the record of a negligent person.

On another issue, the tenants suggest that the landlord is not entitled to pass on a increase in the billing rate as such is already accounted for in the "inflation plus 2%" increase permitted by Regulation. I reject that argument as *Regulation 32* clearly adds "proportional amount" to "inflation plus 2%."

However, on examining water consumption records for the property, I find that there is substantial cause to conclude that the increased consumption is a result of leakage as follows:

In 2005/06, residents used between 292 cubic metres (period used by parties) and 300.19 cubic metres (period used in my calculations). I pause to note that 300 cubic metres is an average annual consumption used by CRD water services web site for calculating the monetary impact of consumption and increases.

Mr. Patterson is a retired engineer and he submitted a highly detailed spreadsheet comparing volume and costs in several categories billing period and year. I have cross referenced his figures with CRD billings and found his calculations to be consistently true to the source material. Therefore, I accept Mr. Patterson's conclusion that the volume of water consumption grew by 36 percent between 2005/06 and 2006/07.

I find that the increase is far more probably a result of leaks than of usage for the following reasons:

1. The parties concurred that the park infrastructure is for the most part about 35 years old, an age at which some break down is not unusual;
2. The park is an age 55 plus facility, and a majority of the residents are elderly and most of the units are occupied by one or two residents. It is highly probably that their water usage would be less than the norm;
3. The park water supply system is somewhat unusual in that the water supply is pumped to a cistern and gravity fed to residents thus creating a greater chance for water loss within the supply system;
4. Despite claims by officials from Bear Mountain and Langford that blasting charges are within allowable limits, I believe the possibility remains that the events might be connected;
5. Absent concrete proof to the contrary, I find it highly unlikely that failed tap washers and toilet flanges occurring between the material periods would amount to a 36 percent increase in water usage.

Having determined that infrastructure failure is most probably the cause of the increase in water costs, I must determine whether Regulation 32 intended to include water billings – including those resulting from leaks- or only an increase in the rate. I find the latter.

For one reason, the Act requires that:

26 (1) A landlord must

- (a) provide and maintain the manufactured home park in a reasonable state of repair, and
- (b) comply with housing, health and safety standards required by law.

In principle, if the legislation intended that loss through leakage should be passed as "proportional increase" to the tenants, the Regulation would relieve the landlord of a duty under section 26 of the Act. While I do not believe this to be the case with the present landlord, such an interpretation would remove a very large incentive for some landlords to repair water leaks as the loss could simply be passed to tenants.

In addition, there continues to be in the legislation a seemingly much more appropriate remedy for landlords to seek recovery of such extraordinary expenses in the following regulation:

33 (1) A landlord may apply under section 36 (3) of the Act [additional rent increase] if one or more of the following apply:

- (a) after the rent increase allowed under section 32 [annual rent increase], the rent for the manufactured home site is significantly lower than the rent payable for other manufactured home sites that are similar to, and in the same geographic area as, the manufactured home site;
- (b) the landlord has completed significant repairs or renovations to the manufactured home park in which the manufactured home site is located that
 - (i) are reasonable and necessary, and
 - (ii) will not recur within a time period that is reasonable for the repair or renovation;

Therefore, I find that the landlord can not pass the cost of water lost due to leakage to the tenants by way of the "proportional amount" provision of the Regulations.

Having so determined, I find that the Notice of Rent Increase given on September 15, 2007 remains valid but with the following downward adjustments.

While there are a number of ways to calculate the proportional increase, I find that the simplest is simply to allow the landlord the amount billed in 2005/06 (\$53,187.45 as per Table A) and add on the 6.05% increase effective January 1, 2007 for 8 months (66.66% of the period).

Therefore:

$\$53,187.45 \times 1.0605 = \$56,405.29 =$ the 6.05% increase for a full year

That dollar increase is \$3,217.84.

The landlord may pass through 2/3 of that (8 months) or \$2,145.23.

That amount divided by 160 units is equal to \$13.41 per unit per year.

As a percent of total rents for 2007, that equals $\$2,145.23/\$833,269.20 = .26\%$.

Taking into account some margin for error and for ease of calculation, I round this up to .30 percent and find that the landlord may add .30 percent proportional increase to the 3.7% allowed by regulation.

Therefore, I hereby authorize and order that the Notice of Rent Increase of September 15, 2007 is amended to reduce the total increase allowed to four percent (4%).

Having found the tenants partially successful in this application, and having found no merit in their rather serious proposition of negligence on the part of the landlord, I find that the applicants and those residents who joined in the application may recover one half of their filing fee from the landlord. They may do so, in the case of Mr. and Mrs. Patterson, by deducting \$25 from the next rent due following receipt of this decision, and in the case of those who joined, by deducting \$12.50 from the rent due.

Dated January 15, 2008.



Bryan Wilkinson
Dispute Resolution Officer

Table A

ADJUSTED BILLING PERIODS – SEPT. 1 TO AUG 31			
Date of Billings	Cost of Water	Additional chgs not incl	Yearly Cost of Water
Sept. 1 - 23, 2005	23 days @ \$148.02 = \$ 3,404.46	Late paymt chg \$ 3.99	
Sept. 24 - Nov. 18, 2005	\$ 6,448.35		
Nov. 19 - Jan. 20, 2006	7,713.23		
Jan. 21 - March 24, 2006	8,958.31	Late paymt \$0.13 Hist Req. \$5	Rate increase of 9% (1.0417 to 1.1354)
March 25 - May 19, 2006	7,908.06		
May 20 - July 14, 2006	9,684.96		
July 15 - Aug. 31, 2006	48 days @ \$188.96 = 9,070.08		
TOTAL 2005/06	\$ 53,187.45		\$53,187.45
Sept. 1 - 22, 2006	22 days @ \$188.96 = \$ 4,157.12		
Sept. 23 - Nov. 17, 2006	9,418.14		
Nov. 18 - Jan. 19, 2007	8,737.83		Rate increase of 6.05% (1.1354 to 1.2041)
Jan. 20 - March 23, 2007	16,676.79	Info Change \$ 15.00	
March 24 - May 18, 2007	13,732.76		
May 19 - July 13, 2007	13,100.61	LEAK ADJ. CREDIT \$3,588.10	
July 14 – August 31, 2007	49 days @ \$290.62 = \$ 14,240.38		
SUB TOTAL	\$ 80,063.63		
Minus CRD adjustment for water leak	- 3,588.10		
Minus remaining half of water leak not recovered	- 3,588.10		
TOTAL 2006/2007	\$ 72,887.43		\$ 72,887.43

Table B

Comparison of Water Consumption by Volume 2005/06 vs 2006/07			
Date	Total Cubic Meters Used		Use per Home
Sept. 1 – 23, 2005	23 days @ 142 = 3,266		
Sept. 24 – Nov. 18	6,185		
Nov. 19 - Dec. 31, 2005	5,032	@ \$ 1.0417	
Jan. 1 – 20, 2006	2,173	@ \$ 1.1354	
Jan. 21 – March 24	7,890		
March 25 – May 19	6,965		
May 20 – July 14	8,530		
July 15 – Aug. 31, 2006	48 days @ 166.43 7,989		
Consumption per home – Sept. 1/05 to Aug. 31/06 ----	48,030 cubic meters divided by 160 homes = 300.19 cu. M.		300.19 cubic meters used per home
Sept. 1 – 22, 2006	22 days @ 166.43 3,662		
Sept. 23 – Nov. 17	8,295		
Nov. 18 – Dec. 31, 2006	5,403	@ \$ 1.1354	
Jan. 1 – Jan. 19, 2007	2,162	@ \$ 1.2041	
Jan. 20 – March 23	13,850		
March 24 – May 18	11,405		
May 19 – July 13	10,880	Leak adjust. \$3,588.10	
July 14 – Aug. 31, 2007	49 days @ 241.36 11,826.6		
Consumption per home – Sept. 1/06 to Aug. 31/07 ----	37,483 cubic meters divided by 160 homes = 421.77 cu. M.		421.77 cubic meters used per home
Percentage increase	67,483 divided by 48,030 = 1.405		41 % increase in water consumption between Sept. 1/05 and Aug. 31/07