



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LR14044
Order LR15-20**

IN THE MATTER of an appeal under
Section 25 of the Rental of Residential
Property Act, filed by CAPREIT Limited
Partnership against Order LD14-359 issued
by the Director of Residential Rental
Property dated October 27, 2014.

BEFORE THE COMMISSION
On Thursday, the 30th day of July, 2015.

J. Scott MacKenzie, Q.C., Chair
Douglas Clow, Vice-Chair
Michael Campbell, Commissioner

Order

Compared and Certified a True Copy

Philip J. Rafuse
Appeals Administrator
Corporate Services and Appeals Division

IN THE MATTER of an appeal under Section 25 of the Rental of Residential Property Act, filed by CAPREIT Limited Partnership against Order LD14-359 issued by the Director of Residential Rental Property dated October 27, 2014.

Order

INTRODUCTION and DISPOSITION

This appeal by CAPREIT Limited Partnership, (“CAPREIT”), the Lessor, is the latest in a long line of hearings and appeals that commenced on May 1, 2013. It is an appeal of the decision and order of Shayne Hogan, Residential Rental Property Officer (“Officer”) on behalf of the Director of Residential Rental Property (“Director”) dated October 27, 2014 and being Order LD14-359, which order followed a prior appeal decision and order of this Commission dated January 20, 2014 and being Order LR14-02.

For the reasons set out below the Commission allows this appeal, quashes the decision and order of the Officer issued as Order LD14-359, confirms the prior decision and order of the Commission issued on January 20, 2014 as Order LR14-02 which quashed a previous order of the Director being Order LD14-325.

The Commission hereby confirms that CAPREIT is entitled to a rental increase for the rents from the Lessees in Riverview Estates of 6%, per annum, effective August 1, 2013 and a further rental increase of 0.99%, per annum, effective August 1, 2014.

BACKGROUND

On May 1, 2013 Hambly Enterprises Ltd (“Hambly”), the Lessor, filed an application for approval for a rent increase exceeding the annual percentage allowed, which had been prescribed at 1.50% by the Commission for the 2013 year, for its mobile home park know as Riverview Estates. A hearing was held before the Director on June 4, 2013 and the Director issued her decision and order (LD13-325) on October 18, 2013 denying the application by Hambly and fixing the annual rent increase for the twelve month period of August 1, 2013 – August 1, 2014 (the established rental year for Riverview Estates) for the lot Lessees of Riverview Estates at the prescribed annual rate of 1.50%.

Hambly appealed the Director’s decision and order LD13-325, an appeal hearing was held and the Commission issued Order LR14-02 on January 20, 2014 allowing Hambly’s appeal, quashing the decision and order of the Director issued as Order LR13-325 and fixing the approved rent increase at 6.00% for the annual period commencing August 1, 2013.

In its decision in Order LR14-02 the Commission made the following finding of fact:

“The Lessees of Riverview Estates (the Respondent) were represented by Delbert Reeves (Mr. Reeves) who was accompanied by Barb Carroll (Ms. Carroll) who testified on behalf of the Respondent.” (LR13-023 page 1)”

Based on this finding of fact it is clear that Commission Order LR14-02 was duly served on the parties to that appeal, as Order 14-02 was duly served on the Appellant, Hambly, through its legal counsel, and on Delbert Reeves, the representative of the Lessees.

After the date of the original application by Hambly for rent increase on May 1, 2013 and prior to the decision of the Commission on January 20, 2014 Hambly sold the Riverview Estates mobile home park to CAPREIT. The sale was concluded on October 22, 2013 in accordance with a commercial realty agreement of purchase and sale (the “AOPS”).

The evidence before the Officer was that the CAPREIT and Hambly AOPS contained a standard commercial realty sale agreement adjustment clause (clause 9 on page 13 of the AOPS). The adjustment clause dealt with the usual commercial realty sale adjustments of realty taxes, fuel oil, sewer and water charges and rental arrears. The clause states in part:

“... [rental] arrears remain the property of the Vendor [Hambly] who shall be solely responsible for the collection thereof...”

The adjustment clause also specifically dealt with the original application for rent increase filed by Hambly on May 1, 2013 that was before the Director. That relevant portion of clause 9 reads as follows:

“The Purchaser [CAPREIT] acknowledges that the Vendor [Hambly] currently has an application for a rental increase before the Island Regulatory and Appeals Commission for the 169 lots located in Riverview Estates included in this transaction related to capital upgrades performed by the Vendor. The rental increase request is for \$46.14 per lot. The Purchaser agrees to adjust the purchase price based on any rental increase awarded on the application using a capitalization rate of 7% based on the amount per lot approved. This purchased price adjustment clause will survive the closing and expire twelve months from the Closing Date. Payment of the amount outstanding under the adjustment clause shall be made within ten business days after the Vendor submits proof of rental increase award to the Purchaser”

Although as of January 20, 2014 the Lessor had in hand Commission Order LR14-02 allowing a rental increase at 6.00% commencing August 1, 2013, the Lessor, CAPREIT, took no immediate steps to inform the Lessees of Riverview Estates of the new increased rent payable by them in accordance with the Commission’s Order.

On March 12, 2014, the regional office of CAPREIT in Charlottetown, P.E.I. prepared and sent to the Lessees of Riverview Estates a letter and a Form 10 Notice of Rent Increase, not for the approved increase of 6.00% from August 1, 2013, but for a prospective increase of 1.00% to commence August 1, 2014 in accordance with the Commission prescribed allowable annual rent increase of 1.00% for the year 2014. This Form 10 contained errors and it did not include in the base rent the approved 6.00% increase for the prior year (2013). This correspondence also included a lease renewal document, which was really nothing more than a request for confirmation by the Lessees of an intention to continue as a Lessee and did not contain any reference to the amount of rent to be payable by the Lessee.

In the appeal hearing before this panel of the Commission the CAPREIT representative gave evidence that the error in these Form 10 Notices of Rent Increase was discovered by a local representative of CAPREIT. A letter dated May 2, 2014 was then sent by CAPREIT head office in Toronto, Ontario to all Lessees to correct the error of the amount of the rent increase set out in the Form 10 dated March 12, 2014, to give notice of the addition of the 6.00% rent increase and back rent owing calculated as of August 1, 2013 in accordance with the Order of the Commission on January 20, 2014 in LR14-02. The CAPREIT letter of May 2, 2014 does, in fact, set out the correct rental increases of 6.00% for rent from August 1, 2013, the new rent payable on a go forward basis including the further 0.99% increase (within the allowable increase of 1.00% as determined by the Commission for 2014) to take effect on August 1, 2014 and the rent to be paid as of August 1, 2014.

On May 23, 2014, Delbert Reeves (Mr. Reeves), one of the Lessees of CAPREIT at Riverview Estates, filed with the Director a Form 2 – Application for Enforcement of Statutory or Other Conditions of Rental Agreement stating one very simple question – the Appellant is “seeking clarification of the legal lot rent to be collected in the Riverview Estates Mobile Home Park.” The Respondent was listed as CAPREIT.

A hearing was held before the Officer, a duly delegated officer of the office of the Director, on July 15th, 2014 with Delbert Reeves again acting as Representative of twenty Lessees of Riverview Estates. CAPREIT was represented by legal counsel Jordan Brown of the law firm of Cox & Palmer, Charlottetown, PEI office.

The Officer issued the decision and Order on October 27th, 2014 (LD14-359). Unfortunately the Officer did not deal with the very simple question put to him in the application by Mr. Reeves. Instead the Officer ventured off into territory outside his jurisdiction and made a simple matter complicated.

On November 14th, 2014 CAPREIT filed Notice of Appeal of The Officer's Order LD14-359. A hearing was held on December 15th, 2014 at which it was determined to adjourn the hearing and set the matter over for hearing on February 19th, 2015.

The appeal was heard by the Commission on February 19, 2015.

Jordan K. M. Brown, counsel, and Jill Hobb, were present for the Appellant, CAPREIT. Delbert Reeves was present as spokesperson for the Respondent, Lessees of Riverview Estates. One hundred and fifteen (115) proxies were received from Lessees appointing Mr. Reeves as spokesperson for the Respondent.

SUBMISSIONS

Appellant's Submissions

Counsel for the Appellant filed detailed written submissions (Exhibit E-18A). A summary of the Appellant's position is contained in Exhibit E-18A and is reproduced below.

Summary:

The matters in issue at this hearing can be reduced to the following:

- 1) *Hambly [Hambly Enterprises Ltd., referred throughout the present Order as Hambly] made an original application for an increase in rents beyond the allowable amount. The Director allowed an increase of 1.5%.*
- 2) *Hambly appealed. On appeal the Commission ordered an increase in rents of 6% retroactive to August 1, 2013.*
- 3) *Delbert Reeves received a copy of this order, whether in his own right or as representative of the Lessees of Riverview Estates.*
- 4) *Mr. Reeves did not appeal this order in his own right, or as representative of any Lessees.*
- 5) *Mr. Reeves did take issue with the implementation of the order in concert with the March 12th Form 10, and the subsequent May 2nd, 2014 letter correcting the error in the March 12th Form 10. Mr. Reeves was the only Lessee to have filed an appeal in respect of same. A relatively small number of Lessees later joined.*
- 6) *The Officer issued a decision ignoring the substantive merits of Mr. Reeves' appeal, and CAPREIT's response to same.*

It is our submission that this process has been rendered unduly complicated by technical/procedural errors of the Appellant, the Respondent, the Director and the Commissioners. However, to the point of the appeal to the Director, no party had suffered any legal prejudice. As such, we submit that the most common sense outcome to this matter would be to give effect to the Commissioners original Order (LR14-02) and to provide the required clarity to the service of same, and the contemporaneous service of the March 12th/May 2nd Form 10.

The Appellant requested that the six (6) percent rent increase effective August 1, 2013 awarded in Order LR14-02 be given effect and, pursuant to the relief sought on page 16 of Exhibit E-18A, and an additional 0.99 percent rent increase effective August 1, 2014.

In his closing submission Counsel for CAPREIT alleged that the reasons of the Officer in LD14-359 demonstrate a significant degree of bias.

Respondents' Submissions

Mr. Reeves filed a detailed written submission on behalf of the Respondent, dated February 13, 2015 (Exhibit E-30). Highlights of Mr. Reeves' oral submissions at the February 19, 2015 hearing include the following points:

- Mr. Reeves claimed he never represented the Lessees; rather he understood his role as spokesman presenting the Lessees' case.
- He was never informed that he would have to send out copies of any orders issued.
- He submitted that Commission Order LR14-02 had no force or effect until it has been served. Any notice given through the news media does not constitute legal notice.
- Section 22 of the *Rental of Residential Property Act* (the *Act*) requires a Form 10 for every notice of increase and it is submitted that the May 2, 2014 letter has no effect.
- On May 23, 2014, he submitted a Form 2 seeking clarification – this Form 2 was not an appeal.
- The Lessees agree with the findings of Director's Order LD14-359 that was delivered to all Lessees and the Lessees do not agree with the six (6) percent increase set out in Commission Order LR14-02. The Lessees feel that they do not need to defend the issues raised by the Director in Order LD14-359.
- That if Director's Order LD14-359 stands, the Lessees request an immediate return of excess rent paid together with interest.
- There is a significant turnover of Lessees and thus new Lessees would not be aware of the increases.

DECISION

The appeal is allowed, the Officer's Order LD14-359 dated October 27, 2014 is hereby quashed. Commission Order LR14-02 dated January 20, 2014 is hereby confirmed and CAPREIT is entitled to a maximum six (6) percent increase in rent effective August 1, 2013, and although entitled to the maximum allowable rental increase of one (1) percent for the 2014 year, CAPREIT shall be entitled to an additional rental increase of 0.99 percent as applied for by CAPREIT, effective August 1, 2014.

In the present appeal, Mr. Reeves has explained that he is not a representative of the Lessees of Riverview Estates and is not responsible for the distribution of documents. Mr. Reeves stated that at the appeal hearing before this panel of the Commission that he is only a spokesperson for the Lessees. For this present appeal, the Commission acknowledged Mr. Reeves' clarified role and as such, this present Order will be distributed by the Commission to Lessees pursuant to a Lessee list to be provided by the Appellant.

Although Mr. Reeves now states that he was not the representative of the Lessees in the prior appeal before the Commission resulting in Commission Order LR14-02, the Notice of Appeal Hearing and Proposed Exhibit List identified Mr. Reeves as the representative of the Lessees of Riverview Estates. At the December 9, 2013 hearing, Mr. Reeves did not clarify the record as to the nature of his role.

In Commission Order LR14-02, dated January 20, 2014, the parties were formally identified as follows:

The appeal was heard before the Commission on December 9, 2013. The Appellant was represented by legal counsel, Pamela Williams, Q.C. Wayne Hambly, Michael Fitzpatrick and Peter Waddell testified on behalf of Appellant. The residents [Lessees] of Riverview Estates (the Respondent) were represented by Delbert Reeves (Mr. Reeves) who was accompanied by Barb Carroll (Ms. Carroll) who testified on behalf of the Respondent. (emphasis added)

Commission hereby confirms this finding made by the Commission in its Order LR14-02, that the Lessees or residents of Riverview Estates were represented by Mr. Reeves. A certified copy of Order LR14-02 was sent to Mr. Reeves on the same day the Order was issued. In the ensuing days, Order LR14-02 was posted on the Commission's public website and an emailed link to the posting was sent to Mr. Reeves. Accordingly, this Commission finds that the Lessees of Riverview Estates were appropriately served with Commission Order LR14-02. This Commission finds that the Officer had no jurisdiction to enter upon a review of this finding of the Commission that heard the appeal and the Officer erred by issuing an order purporting to overturn the finding of the Commission on the appeal.

With respect to the issue of the standing of the appellant Hambly in its appeal before the Commission resulting in Commission Order LR14-02, that issue was previously decided by the Commission in Order LR14-02, which was not appealed to the Court. The Officer had no jurisdiction to review such a finding by the Commission. In the appeal hearing counsel for CAPREIT stated that this finding by the Officer was not based on any evidence or argument made at the hearing before the Officer. It is basic principle of Administrative Law that a party is entitled to full disclosure of the case that the party must meet and must be given a full opportunity to address and respond to all facts upon which the decision-maker intends to rely. To not do so is a denial of natural justice.

With respect to the sale of Riverview Estates by Hambly to CAPREIT pursuant to the AOPS, the Officer had before him the pertinent clauses from this standard commercial agreement for the sale of rental real property. Under the terms of the AOPS Hambly continued to have both a financial and a legal interest in the amount of the rent to be paid and the sole obligation for the ultimate collection of the past rents from the Lessees of Riverview Estates. Further, Hambly was contractually bound to be the party to deal with the matter of the application for allowable rent increase before the Commission. The Officer erred in not recognizing the legal rights and obligations flowing to Hambly by virtue of this contract. There is nothing in the **Act** that provides that legal rights of appeal are extinguished for a Lessor in circumstances where a Lessor sells the residential rental property owned by the Lessor before an appeal can be heard on the merits of the Lessor's case.

The Commission may make decisions and issue the orders as to what rent a Lessor is allowed to collect, but it is up to the Lessor to notify the Lessee of the new rent amount, the arrears payable and to then collect the rent from the Lessee. Such notice, subsequent to an order of the Commission does not require a Lessor to issue a new Form 10 Notice of Rent Increase, and may be given in writing by letter or other suitable written format that clearly sets out the requisite information. Form 10 notices are not to be used following an order of the Director or Commission, but are only to be used for a request for rent increase that has not been the subject of a prior application and decision of the Director or the Commission.

The Director or her delegate, the Officer, has no authority under the **Act** or in law to reinstate a prior decision of the Director that has been overturned on appeal by the Commission, review decisions issued by the Commission, or make findings that are contrary to the findings by the Commission in an appeal of a decision of the Director or her delegate.

On the matter of the allegation of bias on the part of the Officer, the Commission finds that, although the Officer made improper comments about the prior decision of the Commission in LD14-02 and made significant errors in his decision, those comments and errors fall short of the level required for a finding of bias in accordance with the test endorsed by the Prince Edward Island Court of Appeal in Prince Edward Island (Workers Compensation Board) v. Cormier 2011 PEICA 1.

This commission finds that the Officer exceeded his jurisdiction, made findings based on assumptions and erred as noted above and as follows:

1. Reviewing and disagreeing with the a prior finding of the Commission that Hambly had standing;
2. Reviewing and issuing an order purporting to overturn a decision and order of the Commission;
3. Considering and finding that the Commission should not have entertained the appeal of the Director's Order in LD 13 – 325;
4. Offering an opinion and finding that the Lessees had arguable grounds for judicial review of the Order of the Commission in LR14-02;

5. Reviewing and finding that it was logically inconsistent to award a return on investment to Hambly and erred by not considering that the date for determination of facts for an application for an increase in rent in excess of the prescribed allowable percentage is the date of the hearing on such an application, which in this matter was June 4, 2013;
6. Finding that the legal rights of appeal of a Lessor under the **Act** are extinguished in circumstances where the Lessor, while waiting for the Director to issue a decision on an application duly made by the Lessor, sells the rental property to another;
7. Finding that there was no appeal by the actual Lessor;
8. Reaffirming the prior finding of the Director in Order LD13-325, determining that the order had not been overturned and stating that it remained in full force, where the order of the Director had been quashed and overturned on appeal by the Commission in Order LR14-02;
9. Recognizing that he had “no jurisdiction to rewrite the Commission’s Order” in LR14-02, then proceeding to rewrite that Order of the Commission;
10. Making inappropriate comments in his decision suggesting that the Commission should revisit its Order LR14-02;
11. Reviewing, making inappropriate comments, and entering upon a discussion of his own assumptions about the Commission’s finding that Delbert Reeves was a representative of the Lessees in the appeal before the commission resulting in the order of the Commission LR14-02;
12. Finding that the Lessees were not notified of Commission Order LR14-02;
13. Finding that the Form 10 notice of rent increase of 1% as of August 14, 2014 should not have been sent by the Lessor;
14. Finding that the 6.00% increase in rent, effective August 1, 2013, as determined by the Commission in Order LR14-02, was of no force and effect;
15. Finding that only two documents were properly served in past proceedings before the Commission leading up to the appeal;
16. Finding that Hambly and CAPREIT should have advised the Director of the AOPS in advance of the Director’s Order in LD13-325; and
17. Finding that CAPREIT did not have the right to collect rents lawfully owing to it simply because an application was made by Mr. Reeves requesting clarification as to the amount of rent owing to it as the Lessor.

Accordingly, the Commission quashes the Officer’s Order LD14-359 and affirms Commission Order LR14-02. The Appellant is entitled to a rent increase of six (6) percent, effective August 1, 2013.

The Appellant has applied for a 0.99 percent increase, effective August 1, 2014. As the requested increase is within the allowable rent increase for mobile home parks in 2014 of one (1) percent, the Commission finds that the Appellant is entitled to a rent increase of 0.99 percent.

As some of the delay with respect to this matter is attributable to administrative errors caused by the Appellant, the Commission orders that interest may not be collected on any back rent confirmed to be owing by this Order.

The following table outlines the specific dollar rents to be paid as authorized by this Order:

Riverview Estates		
Approved Rents		
Existing Lot Rents	Approved Rent as of August 1, 2013 (Existing Plus 6% Increase)	Approved Rent as of August 1, 2014 (2013 Rent Plus 0.99% Increase)
\$129.93	\$137.72	\$139.08
\$137.81	\$146.07	\$147.51
\$143.08	\$151.66	\$153.17
\$148.72	\$157.64	\$159.20
\$150.95	\$160.00	\$161.58
\$154.89	\$164.18	\$165.81
\$154.90	\$164.19	\$165.82
\$155.18	\$164.49	\$166.12
\$155.52	\$164.85	\$166.48
\$156.13	\$165.49	\$167.13
\$159.26	\$168.81	\$170.48
\$160.34	\$169.96	\$171.64
\$162.29	\$172.02	\$173.72
\$163.58	\$173.39	\$175.11
\$164.85	\$174.74	\$176.47
\$168.76	\$178.88	\$180.65
\$170.23	\$180.44	\$182.23
\$172.42	\$182.76	\$184.56
\$173.62	\$184.03	\$185.85
\$173.63	\$184.04	\$185.86
\$190.99	\$202.44	\$204.44
\$191.10	\$202.56	\$204.56
\$191.11	\$202.57	\$204.57
\$191.75	\$203.25	\$205.26

This Order shall be posted on the Commission's public website immediately in order to provide public notice.

The Commission shall forward a certified copy of this Order to the Appellant's counsel, the spokesperson for the Respondents, Delbert Reeves, and to all Lessees of Riverview Estates via service as provided in the **Act**.

Please note that this present Order does not address any application for an increase for the 2015 year.

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Rental of Residential Property Act*

IT IS ORDERED THAT

1. The appeal is allowed.
2. Officer's Order LD14-359 is hereby quashed.
3. Commission Order LR14-02 is confirmed.
4. As previously ordered in Commission Order LR14-02, the Appellant continues to be entitled to an increase of six (6) percent, effective August 1, 2013.
5. The Appellant is awarded a further increase of 0.99 percent, effective August 1, 2014.

DATED at Charlottetown, Prince Edward Island, this 30th day of July, 2015.

BY THE COMMISSION:

(Sgd.) J. Scott MacKenzie

J. Scott MacKenzie, Q.C., Chair

(Sgd.) Douglas Clow

Douglas Clow, Vice-Chair

(Sgd.) Michael Campbell

Michael Campbell, Commissioner

NOTICE

Sections 26.(2), 26.(3), 26.(4) and 26.(5) of the **Rental of Residential Property Act** provide as follows:

26.(2) A lessor or lessee may, within fifteen days of the decision of the Commission, appeal to the court on a question of law only.

(3) The rules of court governing appeals apply to an appeal under subsection (2).

(4) Where the Commission has confirmed, reversed or varied an order of the Director and no appeal has been taken within the time specified in subsection (2), the lessor or lessee may file the order in the court.

(5) Where an order is filed pursuant to subsection (4), it may be enforced as if it were an order of the court.

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141y-SFN(2009/11)