



**Date Issued:** December 11, 2023  
**Docket:** LR23055  
**Type:** Rental Appeal

INDEXED AS: Prosser et al. v. Duane MacBeth  
Order No: LR23-74

**BETWEEN:**

Sarah Prosser, Kisha Veld, Jessica Pirch, Conner Bailey

**Appellant**

**AND:**

Duane MacBeth

**Respondent**

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## ORDER

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Panel Members:

J. Scott MacKenzie, K.C., Chair  
Kerri Carpenter, Commissioner

Compared and Certified a True Copy

(Sgd.) Susan Jefferson

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Commission Administrator  
Corporate Services and Appeals

# 1. INTRODUCTION

1. This appeal was heard by the Commission on September 12, 2023, and asks the Commission to determine whether the Director of Residential Rental Property (the “Director”) erred in approving a rent increase for a five-unit building.
2. As this matter was commenced before the Director prior to April 8, 2023, the former *Rental of Residential Property Act* applies to this appeal.

# 2. BACKGROUND

3. A landlord, Duane MacBeth (the “Landlord”) rents five (5) units located at 11 Avondale Road, Vernon Bridge, PE (the “Units”). Rents for the Units range from \$750.00 per month to \$899.00 per month.
4. On March 14, 2023, the Landlord gave formal notice to the Tenants that he intends to raise their rent to an amount that was set out in each notice. On March 27, 2023, the Landlord filed with the Director an application to increase the rent above the percentage allowed (the “Application”) as follows:

Unit	Current Rent	Proposed Rent	Effective Date
1	\$768.00	\$1,209.00	July 1, 2023
2	\$869.00	\$1,368.00	July 1, 2023
3	\$899.00	\$1,415.00	July 1, 2023
4	\$869.00	\$1,368.00	July 1, 2023
5	\$750.00	\$1,181.00	July 1, 2023

5. On March 27, 2023, the Landlord filed with the Director a Statement of Income and Expenses.
6. In Order LD23-300 dated July 6, 2023, the Director allowed the Application in part and ordered that the maximum allowable monthly rent for the Units would be as follows:

Unit	Rent	Effective Date
1	\$860.00	August 1, 2023
2	\$973.00	August 1, 2023
3	\$1,007.00	August 1, 2023
4	\$973.00	August 1, 2023
5	\$840.00	August 1, 2023

7. On July 21 and 24, 2023, tenants residing in three of the five units, namely: Sara Prosser (“Ms. Prosser”), Kisha Veld (“Ms. Veld”), Jessica Pirch and Connor Bailey (collectively the “Tenants”) filed an appeal with the Commission.

8. As previously noted, because this matter commenced prior to April 8, 2023, the *Residential Rental Property Act* (the “RRPA”) (RSPEI 1988, c. R-13.1) applies to this appeal.
9. The Commission heard the appeal by way of telephone conference call on September 12, 2023. Ms. Prosser and Ms. Veld participated for the Tenants, assisted by Rosalind Waters (“Ms. Waters”) of PEI Fight for Affordable Housing. The Landlord represented himself with the participation of Kevin Hobson (“Mr. Hobson”). Karen Adams was also on the conference line for the Landlord.

### **3. DISPOSITION**

10. The Commission dismisses the appeal. The allowable monthly rent as set out in Order LD23-300 is confirmed, subject to a variation in the effective date.

### **4. ANALYSIS**

#### **The Tenants’ Testimony and Submissions**

11. Ms. Prosser took issue with the capital expenditures set out on the Form 15, noting that Line 16 listed capital expenditures of \$12,650.00, which included a new roof and paving. Ms. Prosser testified that some of the property is being farmed and thus questioned the Provincial tax assessment of the property, as the Tenants do not have the benefit of the farmland. She submitted that the property consisted of 2 acres of farmland and only 0.4 acres is taxed as residential. She submitted that the residential portion of the Provincial tax assessment valuation was only a small portion of the total value, with the majority of the property value attributable to the farmland. Ms. Prosser also submitted that the Director based the increases on a 7% return on capital investment while other orders refer to only a 4% return on capital investment.
12. Ms. Waters noted that the paving and roof work were done in 2023 while the Form 15 was for 2022. She submitted that only expenditures in 2022 should be considered. Ms. Waters submitted that the Landlord was able to chose between a property tax incentive from government or apply for a rental increase, suggesting that the Provincial assessment valuation of the property should be discounted on the Form 15. Ms. Waters referred to the written “Submission regarding Mortgage Interest Form 15 Line 6” (Exhibit E-30) filed on behalf of the Tenants, arguing that the expense for mortgage interest should be averaged over a theoretical 25-year amortization period, rather than the Landlord’s actual interest costs incurred and paid to its mortgage lender. She stated that this straight-line amortization would reduce the interest expense in the early years of the mortgage and spread the cost evenly over a 25-year period. Ms. Waters suggested that if a landlord is losing money in the early years, a future application for an increase will take that into account, and future tenants would have to pay more rent.
13. Ms. Veld questioned the Form 15 deduction for vacancy arrears and losses (Line 4), submitting that in the current market a unit would only be vacant for a couple weeks.

14. Ms. Prosser and Ms. Waters both expressed that they felt there were procedural concerns with respect to the timing of the Director's Office sending the Landlord's application documents to the Tenants. This was not done until the night before the hearing before the Director. The Tenants felt that the Landlord was favoured and argued that it was unfair for them to only receive the "package" from the Director the night before the hearing.

### **The Landlord's Testimony and Submissions**

15. The Landlord testified that the roof was replaced in 2023 as that was the earliest it could be scheduled. He submitted that the cost of the roof work was based on a standard per square foot value and the roof was paid before the Application documentation was submitted. He testified that, likewise, the paving was done and paid for before the documentation was submitted.
16. The Landlord stated that only about one half of the 2.4 acres was used for farming and that because it was such a small amount of land, no rent was charged for the farmer's use of the farm land. The Landlord's evidence was that about 60% of the property is used for the apartment building and front lawn, while 40% or less is for farming.
17. With respect to the amount of the interest expense claimed, the Landlord noted that had he applied for an increase earlier he would have been able to deduct the principal portion of the mortgage payments which would have resulted in an even higher allowable rent increase. However, the Province amended the regulations on February 28, 2023 (EC159/23) to only allow the deduction of the interest portion of mortgage payments and that is what he has claimed as an expense. With respect to the suggestion that the amortization of mortgage interest be done on a notional straight-line basis over a 25-year period, the Landlord submitted that interest rates are trending upwards, not down, and that the actual mortgage interest expense being incurred should be claimed. The Landlord also noted his present mortgage is at a favourable interest rate of 2.65% where present rates are closer to 8.00%.
18. Mr. Hobson testified that the deduction for vacancy arrears and losses included costs for necessary evictions such as sheriff fees and other costs required to evict a bad tenant. He submitted that landlords buy properties, provide rental premises to tenants, and expect to turn a profit. Mr. Hobson stated that the Provincial government exerts substantial control with respect to residential rentals and if no profit is allowed, services will decline and the level of maintenance will go down. He also noted that the expectations and requests from banks are increasingly demanding.

### **The Commission's Reasoning and Findings**

19. First, in response to the Tenants concern with respect to the document "package" being made available only the night before the Director's hearing, the Commission agrees. The Tenants should have been provided with the application documents and given a reasonable amount of time to review and prepare for the hearing at the Director level. The Commission is aware that this application for a greater than allowable increase was one of over a hundred of applications filed before the proclamation of the new *Residential Tenancy Act* (RSPEI 1988, c. R-13.11) that had to be dealt with by the Director's office in

a short period of time. However, this does not excuse the extremely short period of time that the Tenants had to respond to the application. This should not have happened.

20. The Commission notes that the Tenants' appeal filed with the Commission is pursuant to subsection 26(1) of the RRPA which reads:

*Procedure*

26. (1) *An appeal to the Commission shall be by way of a re-hearing, and the Commission may receive and accept such evidence and information on oath or affidavit as in its discretion it considers fit and make such decision or order as the Director is authorized to make under this Act.*

21. In *Perry v. Kings Square Affordable Housing Corporation* (2023 PESC 32), the Supreme Court commented that a fair hearing before an intermediate appellate body, such as the Commission, may cure procedural defects in an original administrative hearing, and in the end, the question is whether the process, when examined as a whole, was fair.
22. On this appeal before the Commission, all documents were provided to both parties well in advance of the hearing, and the Tenants had the opportunity to fully review the evidence, to submit additional evidence and information, and to be heard. As was concluded in *Perry*, when the circumstances of this case are considered together with the statutory scheme, the rehearing before the Commission in this particular case was fair and remedied the procedural deficiencies faced by the Tenants before the Director.
23. . With respect to the Tenants' concerns about whether 4% or 7% applies to the calculation of a return on a landlord's capital investment, previous orders of the Commission have consistently used a guideline of 7% as a reasonable return on investment where the valuation of the property is established by a recent purchase price. This is explained in more detail in Order LR22-39, previously issued by the Commission.
24. In this case, the Director's Order relies on Order LR22-39 to support the use of a 7% guideline for return on investment when relying on a recent purchase price of the Property. The Commission agrees and is satisfied that the 7% guideline is reasonable in this case.
25. With respect to the Tenants' suggestion of averaging anticipated mortgage interest over a notional 25-year amortization, the Commission rejects this approach. The Form 15 Statement of Income and Expenses, prescribed by Regulation, specifically requires the actual mortgage interest cost to be used by a Landlord in setting out the actual expenses incurred to determine their profit/loss. This was reinforced with the amendment to the *Rental of Residential Property Act Regulations* in February 2023 (EC 159/23) that removed the ability of a Landlord to deduct the principal portion of the mortgage payments, thereby allowing only interest costs as an allowable expense. The RRPA and Regulations provide clear direction that current tenants are to have rents based on the Landlord's current income and expenses. This type of current cost accounting approach is also accepted as appropriate accounting for apartment rental businesses.

26. Further, the proposed notional straight-line amortization of interest costs would confer a benefit on current tenants (interest costs are lower) and adds an extra cost burden on to future tenants (interest costs are higher). Clearly this is unfair and is unacceptable.
27. Lastly, this suggestion is predicated on a level interest rate to be charged over the next twenty-five years. This is patently unreasonable. Therefore, The Commission confirms that mortgage interest costs must be deducted based on what was actually incurred, not a theoretical averaging over a notional amortization period.
28. With respect to the matter of the roof replacement and paving, both of these capital expenditures were incurred prior to the order of the Director approving the rent increase. That is to say the work was done and was paid for prior to the date of the Director's order approving the rental increases. Both the Director and the Commission reject speculative capital expenditures, but because these capital expenditures were incurred, they are real, not speculative, and thus are accepted by the Commission.
29. Regarding the apportionment of farmland versus residential rental property on the Provincial tax assessment, such an assessment provides little detail and no explanation. The Commission takes official notice that the valuation of the portion of the property in question devoted to the fully developed five-unit apartment building is likely much higher than the portion of which is undeveloped farmland. While the Tenants may question this concept, they would need to present evidence to the contrary, such as the testimony of a Provincial assessor explaining the assessment in detail or a duly qualified professional appraisal. The Tenants effectively have offered a theory, based on a layperson's reading of a tax bill, without professional evidence to support their theory. In the context of this matter and based on the evidence of the use of the property, the Commission accepts that the total tax bill for the entire property is an expense that the Landlord may claim.
30. With respect to the notion that the value of the property assessment should be discounted based on the fact that the Landlord could have availed himself of a Provincial incentive, the Commission notes that the Landlord had a choice: accept the incentive and forgo any rental increase or seek a rental increase and forgo the incentive. Speculatively discounting the value of the assessment based on a free choice not selected is not a persuasive argument and is thus rejected by the Commission.
31. Regarding the argument that the expense for vacancy arrears and losses is excessive and not justified; the Commission is well aware that vacancies may occur as a result of an eviction, complete with past unpaid rent, costs incurred to evict, costs to restore the unit and time during which there is no income for that unit, all before the unit can be rented again. Given these realities, balanced with a vacancy under much more pleasant and less expensive circumstances, the Commission finds that the amount claimed is reasonable.
32. Finally, in respect of the perception that the Director favoured the Landlord at the expense of the Tenants; the Commission notes that for each of the 5 units, the rent ordered in Order LD23-300 is substantially less than what the Landlord had initially requested. A reading of Order LD23-300 makes it very clear that the Director reviewed the Landlord's application carefully, adjusting expenses to ensure that the awarded increases were fair and

justifiable. Having reviewed all the documentary evidence, as well as the testimony and submissions of the parties, the Commission finds that Order LD23-300 correctly applied the law as provided for in the RRPA and was fair to both parties.

33. For the above reasons, the Commission dismisses the appeal and confirms the allowable monthly rent for the Premises is as set out in Order LD23-300, but varies the effective date as noted below.

**IT IS ORDERED THAT**

1. The appeal is dismissed.
2. The allowable monthly rent for the premises is as follows:

<b>Unit</b>	<b>Rent</b>	<b>Effective Date</b>
1	\$860.00	January 1, 2024
2	\$973.00	January 1, 2024
3	\$1,007.00	January 1, 2024
4	\$973.00	January 1, 2024
5	\$840.00	January 1, 2024

**DATED** at Charlottetown, Prince Edward Island, 11<sup>th</sup> day, December, 2023.

**BY THE COMMISSION:**

(sgd. J. Scott MacKenzie)

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J. Scott MacKenzie, K.C., Chair

(sgd. Kerri Carpenter)

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Kerri Carpenter

## **NOTICE**

Subsections 26(2), 26(3), 26(4) and 26(5) of the *Rental of Residential Property Act* provides 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.