7.

TORONTO Michael Walker

St. Paul's, Councillor
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March 25, 2009

TO: **Tenant Defence Sub-Committee**

FROM: **Councillor Michael Walker**

RE: **50 Rosehill Avenue – Assistance to Defend Against Landlord's Court Appeal**

I am writing to the Tenant Defence Sub-Committee in support of the tenants of 50 Rosehill Avenue and to request that the City support their defence against their landlord's Divisional Court appeal of their successful Application to the Landlord Tenant Board (please see the attached letter from the solicitor for the tenants).

This property at 50 Rosehill Avenue was intensified by the property owner building 30-32 townhouses on the Pleasant Boulevard frontage in a treed open space; these townhouses have eliminated that green space. The tenants applied for a rent reduction because of this permanent loss of this treed space. The Landlord & Tenant Board ruled in their favour against the landlord (April, 5, 2007); the Landlord & Tenant Board also supplied a Reconsideration Decision (March 4, 2008) which confirmed their ruling in favour of the tenants. The Landlord & Tenant Board granted a 2.5% rent reduction.

The landlord appealed to Divisional Court the issue of the 2.5% rent reduction on account of the loss of the use of the said land. The tenants have raised enough money to pay their legal fees for their defence at the Divisional Court but, if they lose, the tenants do not have enough money to pay for the legal costs of the landlord if so ordered against the tenants. The costs of the landlord could be up to $10,000 – $15,000.

Recommendation:

1. **THAT the Tenant Defence Sub-Committee direct the appropriate City staff to report on the feasibility of the City providing a grant from the Tenant Defence Fund to the tenants of 50 Rosehill Avenue so they can pay the Landlord's legal costs should they lose the current Divisional Court Appeal by the Landlord of the Landlord & Tenant Board Decisions (April 5, 2007 and March 4, 2008) and the Divisional Court awards the legal costs of the Landlord against the tenants, and such report be to the next Tenant Defence Sub-Committee or the next Community Development Services, whichever is sooner.**

Sincerely,

Michael Walker
Councillor – St. Paul's

Attachment

Cc: Mr. Richard A. Fink

FINK & BORNSTEIN
PROFESSIONAL CORPORATION
BARRISTERS AND SOLICITORS*
RICHARD A. FINK B.A., LL.B., LL.M.** & ELINOR BORNSTEIN LL.B.
& ALAN McCONNELL B.A., M.A., LL.B.*

March 18, 2009

Michael Walker
Councillor
City of Toronto
100 Queen Street West
Toronto, Ontario
M5H 2N2

Dear Mr. Walker:

RE: TST-09942 & TST-09942-RV - 50 Rosehill Avenue, Apt. 1002, Toronto M4T 1G6
Liangrui Deng, Guizhi He, Dustin Yang, Jenny Yang and Yi Yang

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Please find enclosed the Decision of the Landlord & Tenant Board (herein called the "Board") of April 5, 2007, wherein Ms. Deng was granted a 2.5% rent abatement. Also, there is a Reconsideration Decision dated March 4, 2008, enclosed, which upheld the earlier Decision granting Ms. Deng a 2.5% rent abatement, on the basis that the first Decision was a reasonable result.

The Landlord has Appealed this Decision to Divisional Court, claiming that the reasoning of the Board was incorrect. The Board picked a figure, based on half of what Ms. Deng was originally asking for. Ms. Deng's loss was the use of recreational space, adjacent to the building wherein her children and herself enjoyed walking, sitting, playing on swings, etc..

Ms. Deng then brought another Application for an abatement of rent on account of noise, dust, and interference. The Tenants then brought an Application, based on loss of use of the land and interference. Please remember the land was lost because the Landlord built townhouses on it, pursuant to an agreement with the City of Toronto.

Ms. Deng succeeded in her Application regarding interference, but the final result of the Application, and the Tenants' Application were subsumed into an Agreement between the Tenants and the Landlord, whereby the Landlord paid all of the Tenants a lump sum for their various losses.

The original Landlord, however, continues to Appeal the issue of the 2.5% rent abatement on account of the loss of use of said land. This is an important precedent case. For instance at

**Recognized as a certified specialist by the Law Society of Upper Canada in the area of Workplace Safety & Insurance
466 DUPONT STREET, TORONTO, ONTARIO, M5R 1W6 • TELEPHONE: 416-537-0108 • FACSIMILE: 416-537-1604
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*PRACTICING IN ASSOCIATION

330 Spadina Avenue, another case where we are representing the Tenants. The Tenants are losing substantial space for the building of a condominium, directly adjacent to their current apartment building. I am told that there is one other building that this same Landlord is planning a further condominium built on top of the existing residential complex. There are also several other such projects now taking place around the City.

The Tenants have raised sufficient money to pay our fees to defend the Landlord's Appeal to Divisional Court, on the sole issue of the 2.5% rent abatement for loss of use of the said land. However the Tenants do not have enough money, should they lose, to pay for the legal costs of the Landlord ordered against the Tenants. I suspect that the legal costs of the Landlord would be approximately $10,000.00 to $15,000.00. We would ask that at least $10,000.00 be appropriated by the City, to be paid to the Tenants so that they can pay their legal costs to the Landlord should they lose. Of course we are quite hopeful that the Tenants will not lose the case, and the funds will not be required from the City.

However it is expected that the Landlord will Appeal this Decision to the Court of Appeal, and the Tenants may at that point have exhausted their legal funds, but I believe that as this issue is quite speculative at the moment, we should wait until a further time to make a further request to the City.

I trust the above explains what is transpiring in this matter. I have enclosed a copy of the Landlord's Divisional Court Appeal. As of the present time, he has not yet perfected the Appeal by filing a Factum, and has just under one month to do so (as his Appeal is dated April 2, 2008).

Yours very truly,

FINK & BORNSTEIN
PROFESSIONAL CORPORATION per:

Richard A. Fink
RAF/ph
Encl.
cc. D. Deng

G. Baboolal

Order under Section 142
Tenant Protection Act, 1997

Dated APR 0 5 2007 Landlord and Tenant Bo

File Number: TST-09942

In the matter of: 1002, 50 Rosehill Ave
Toronto ON M4T 1G6

COPY

Between: Liangrui Deng
Guizhi He
Dustin Yang
Jenny Yang
Yi Yang

Tenants

and

First Ontario Realty Cor. Ltd.

Landlord

Liangrui Deng, Guizhi He, Dustin Yang, Jenny Yang and Yi Yang (the 'Tenants') applied for a reduction of the rent charged for the rental unit due to a reduction or discontinuance in services or facilities provided in respect of the rental unit or the residential complex.

This application was heard in Toronto on April 4, 2007.

The Tenant, Liangrui Deng, and First Ontario Realty Cor. Ltd. (the 'Landlord') attended the hearing. The Landlord's personal representative was Paul Melady, and counsel for the Landlord was Joseph Hoffer. In addition, the Tenant called one witness, Victor L. Drevnig.

It is determined that:

1. The provision of tenant parking to the Tenants has not been reduced or discontinued.

2. The provision of visitor parking was temporarily reduced on August 1, 2006. However, the duration of the reduction is reasonable, and the effect of the reduction on the Tenants does not warrant a reduction in rent.

3. The provision of a common recreational facility, namely gardens, lawns and walkways, was permanently reduced on August 1, 2006. The Tenants are entitled to a rent reduction that is a reasonable proportion, based on the degree of the reduction, of the value of the facility. I find that in these circumstances the appropriate rent reduction is 2.5% of the rent charged.

4. The provision of cleaning and maintenance services has not been reduced or discontinued.

It is ordered that:

1. The Landlord shall pay to the Tenants $332.79.
2. The lawful rent is reduced to $1,466.89 effective May 1, 2007.
3. The Landlord shall also pay the Tenants $45.00 for the cost of filing the application.
4. If the Landlord does not pay the Tenants the full amount owing by April 16, 2007, the Tenants may recover this amount by deducting $377.79 from the rent owing for May, 2007.
5. The Tenants have the right, at any time, to collect the full amount owing or any balance outstanding under this order.

April 5, 2007
Date Issued

Ruth Carey
Member, Landlord and Tenant Board

Toronto South Region
2nd Floor, 79 St. Clair Ave. E
Toronto ON M4T 1M6

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

Landlord and Tenant Board
Ontario

COPY

I certify this is a true copy of the order

L. Sparks

Order under Section 21.2 of the **Statutory Powers Procedure Act** and the **Tenant Protection Act, 1997**

Dated MAR 0 4 2008 Landlord and Tenant Board

File Number: TST-09942-RV

In the matter of: 1002, 50 Rosehill Ave
Toronto ON M4T 1G6

Between: Liangrui Deng
Guizhi He
Dustin Yang
Jenny Yang
Yi Yang — Tenants

and

First Ontario Realty Cor. Ltd. — Landlord

Review Order

Liangrui Deng, Guizhi He, Dustin Yang, Jenny Yang and Yi Yang (the 'Tenants') applied for a reduction of the rent charged for the rental unit due to a reduction or discontinuance in services or facilities provided in respect of the rental unit or the residential complex.

This application was resolved by order TST-09942 issued on April 5, 2007.

On May 1, 2007, First Ontario Realty Cor. Ltd. (the 'Landlord') requested a review of the order.

The request was heard in Toronto on January 21, 2008.

The Tenants and the Landlord attended the hearing.

The Tenants were represented by Richard Fink and the Landlord was represented by Joseph Hoffer.

It is determined that:

1. I am not satisfied that there may be a serious error in the order or that a serious error occurred in the proceedings.

2. The application under review was filed under *the Tenant Protection Act* (TPA) 1997, therefore the TPA applies notwithstanding that the *Residential Tenancies Act 2006,* is the current legislation

3. It is the Landlord's position that the Member made serious errors in law and in fact. The serious errors of law are with respect to two basic arguments: (i) the land in question was not a service or facility and (ii) even if it were a 'service or facility', the Member made serious errors of fact and law in her determination of the quantum of rent reduction.

4. The Landlord also submitted that if the Member's decision is allowed to stand it will have a 'chilling effect on redevelopment…in the context of municipalities and property owners seeking to utilize existing space (infilling) for residential development…'

Finding regarding 'service or facility'

1. According to the Landlord the Member erred in her interpretation of section 1 of the *Tenant Protection Act 1997* (the 'Act') by finding that the site on which the apartment building was located constituted a 'facility' included in the rent.

2. In her decision the Member states that generally speaking a facility is "something that is built or installed upon to perform some particular function" and concluded that the portion of the rear garden, lawns and paths used by the Tenant and her children in the summer months to enjoy the lawn area on an "almost daily basis" were a "common recreational facility". The Member found that one of the common functions of a lawn was for 'children to run across and play'

3. Section 1 of the legislation (TPA) defines 'services and facilities' as including:

    (e) common recreational facilities

4. The Landlord holds that the land on which a building is located is not a "common recreational facility" "simply because the grass is cut and people can walk on it". According to the Landlord the land in question forms part of the "footprint of the building" and should not be treated as a recreational facility, unless it is "clearly designed as such". The Landlord stated that the land was a common 'passive' area with nothing that would convert it into a facility. Counsel for the landlord stated that the land should not be defined by the activity carried out on the space.

5. Counsel for the Tenants held that the land in question was a common area and a 'facility'. It included walkways and a lawn area with a fence around it. According to counsel for the Tenants the space 'invited people to frolic'. It provided an 'aesthetic pleasure' for the Tenants with its planted trees, grass and fences.

6. The Board will not normally review a reasonable interpretation of the statute by the Member, even if the interpretation differs from that of the reviewing member. I am persuaded by counsel for the Tenants that the space in question had been 'constructed' to the extent that it had been landscaped with walkways, lawns, trees and a fence. The Tenants and their children used the area for recreational purposes. They were not prevented from using the area as such.

7. Having considered the Member's decision, the Landlord's submissions and the evidence from Counsel for the Tenants, I find that the Member's interpretation of the statute was reasonably open to her based on the evidence before her.

Findings on reduction of facility

1. The Member found that the 'significant decrease' in the recreational area available to the Tenants 'is clearly a reduction'. She further found that the agreement with the Tenant's Association and the City was not relevant to the issue at hand, which is, was there a reduction in the service or facility?

2. Section 142 (1) states that a Tenant of a rental unit may apply to the Tribunal for an order for a reduction of the rent charged for the rental unit due to a **reduction** (emphasis mine) or discontinuance in services or facilities provided in respect of the rental unit or the residential complex.

3. Counsel for the Landlord submitted that the Member's finding that there was reduction in the facility was erroneous. Counsel stated that the facility still exists and that the Landlord had reached an agreement with the Tenant's association and the municipality to make enhancements to the existing landscape to the extent of $140,000.00 with a further agreement that the Landlord would not apply for an Above Guideline Rent Increase based on the expense. It is the position of Counsel for the Landlord that the Member ought to have considered the 'quality' of the facility and not restricted herself just to the issue of 'quantity'. Counsel stated that the area had been 'reconfigured' and 'enhanced'.

4. Counsel for the Tenants stated that the Tenants had to utilize a nearby park more often, it was not near the building and that the Tenants had lost a considerable amount of open space that was previously available to them. The Counsel for the Tenants held that the mere existence of the area did not compensate for the loss in the size of the area.

5. While it is clear that there remains an area that will be 'reconfigured' and maybe 'enhanced', although there are, as pointed out by Counsel to the Tenants, no plans in evidence, it is also equally clear that there is a loss or reduction in space from what was previously available, that has required the Tenants to use the neighbourhood park which was previously unnecessary. Framing the situation as an enhancement or reconfiguration does not obviate this simple fact.

6. The Member's finding that there has been a reduction in the facility on the basis of a reduction in size of the facility should not be disturbed. The Trier of fact is best placed to determine the facts. I am satisfied that the Member considered all of the evidence before her and that her findings were not unreasonable in light of all of the circumstances as was her finding that the agreement with the City was not relevant to the issue at hand.

Findings on quantum of rent reduction

1. With regard to the Landlord's position the Member made serious errors in fact and law in her determination of the quantum of rent deduction. The regulations cited by the Landlord

are incorrect when he refers to Regulation 516/06 under the RTA-the Member made her decision under Reg.194/98of the TPA.

2. Section 30 (1) of the regulations state: the provisions of this section are prescribed as rules for making findings relating to a reduction of the rent charged under section 142 of the Act, based on a discontinuance or reduction in services or facilities.

   (2) If a service or facility is discontinued, the rent shall be reduced by an amount that is equal to what would be a reasonable charge for the service or facility based on the cost of the service or facility to the landlord or if the cost cannot be determined or if there is no cost, on the value of the service or facility.

   (4)If a service or facility is reduced, the amount of the reduction of rent shall be reasonable proportion, based on the degree of the reduction of the service or facility, of the amount determined under subsection (2) or (3).

3. Counsel for the Landlord submitted that as there was no reduction in costs to the Landlord there were no savings to pass on to the Tenants. He further stated that there was no value in the context of monthly rent and that the Tenant was not paying for the strip of land outside. According to Counsel there were very large public grass (parks) just outside and the reduction in the service or facility did not warrant a decrease in rent.

4. Counsel for the Tenant stated that the legislation requires Members to look at costs and value.

5. The regulations are a means of determining the 'reduction' in rent if there has been a decrease in costs to the Landlord. As stated by the Landlord and found by the Member there was no decrease in costs to the Landlord, or the costs could not be determined. Therefore to determine what the reduction should be the regulations require that the reduction be determined by value which is what the Member proceeded to do.

6. Section 1 defines rent to include any consideration paid or given or required to be paid or given by or on behalf of a tenant to a landlord or the a landlord's agent for the right to occupy a rental unit and for any services and **facilities** and any privilege, accommodation or thing that the landlord provides for the tenant in respect of the occupancy, whether or not a separate charge is made for services and facilities or for the privilege, accommodation or thing...

7. Having found the area in question to be common recreational **facility,** in light of the above section of the legislation it is clearly included in the rent. Therefore the Landlord's position that there was no value in the context of the monthly rent and that the Tenant was not 'paying for the 'strip of land' must fail.

8. I am not satisfied that the Member used "incorrect reasoning' or failed to properly "exercise her jurisdiction", therefore there is no serious error.

9. I make the same finding with regard to the quantum of reduction. In the compendium of cases put before me by the Tenants' Counsel, I find the Members decision as to the quantum of reduction was arrived at with regard to all of the information before her and that it is was reasonable in the circumstances. If the Landlord wished the Member to consider a particular method of calculating the quantum of reduction I am satisfied that he had an opportunity to do so at the hearing.

10. According to the Landlord if the Member's interpretation of the statute in regard to the aforementioned issue is allowed to stand it will have 'chilling effect on redevelopment...in the context of municipalities and property owners seeking to utilize existing space (infilling) for residential development..."

11. The Board is a creation of its statute. Its mandate is circumscribed by and codified in the legislation. I am not satisfied that it is within the remit of the Board to consider public policy while making its decisions.

12. I find that there has been no serious error in law or in fact. Accordingly the Landlord's application to review order TST-09942 is dismissed.

It is ordered that:

1. The request to review order TST-09942 is dismissed. The order is confirmed and remains unchanged.

March 4, 2008
Date Issued

Yasmeen Siddiqui
Member, Landlord and Tenant Board

Toronto South Region
2nd Floor, 79 St. Clair Ave. E
Toronto ON M4T 1M6

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

Court File No.:

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

FIRST ONTARIO REALTY CORPORATION LTD.

Landlord/Appellant

- and -

LIANGRUI DENG, GUIZHI HE, DUSTIN YANG, JENNY YANG and YI YANG

Tenants/Respondents in Appeal

APPLICATION UNDER s. 142 and an appeal pursuant to s. 196 of the *Tenant Protection Act, 1997*, S.O. 1997, c. 24 (the "TPA") respecting the residential premises municipally known as 1002, 50 Rosehill Avenue, Toronto, Ontario, M4T 1G6

NOTICE OF APPEAL

THE APPELLANT APPEALS to the Divisional Court from the final Review Order of Member Yasmeen Siddiqui of the Landlord and Tenant Board (LTB) dated March 4, 2008; the Order of Member Olga Luftig in this proceeding dated May 7, 2007; and the Order of Member Ruth Carey of the LTB in this proceeding made April 5, 2007, all Orders having been made at Toronto.

THE APPELLANT ASKS that the Orders be set aside, varied or amended and that the following relief be granted:

a) an Order issue dismissing the Tenants/Respondents (Tenant) application;

b) alternatively, an Order remitting the application to the LTB, to be considered by a panel differently constituted, with the Court's opinion that the quantum of rent reduction be calculated based on the Appellant's cost of providing the facility if

same is found to have been reduced, or based on the value of the facility if the cost of the facility cannot be determined;

c) an Order for payment of costs by the tenant to the Appellant on a substantial indemnity basis; and

d) such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

(i) The Members of the LTB erred at law in their interpretation of the term "facilities" as that term is defined in s. 1 of the TPA;

(ii) The Members of the LTB erred at law in their interpretation and application of s. 142 (1) of the TPA and s. 142 (3) of the TPA;

(iii) The Members of the LTB erred at law in their interpretation and application of s. 30 (1), (2), and (3) of O. Reg. 194/98 to the TPA;

(iv) The Members of the LTB erred at law by concluding that the site on which the apartment building was located constituted a "facility" or "common recreational facility" included in the rent within the meaning of "services and facilities" as defined in the TPA.;

(v) The Members of the LTB further erred at law by concluding, unreasonably, that the facility had been "reduced";

(vi) The Members erred at law, breached s. 194 of the TPA, and denied the Appellant natural justice, by issuing an "Interim Review" Order May 7, 2007 without disclosing same to the parties under s. 178 of the TPA and the contents of which effectively fettered the discretion and objectivity of the Board Member charged with conducting the Review hearing;

(vii) The Members erred at law, and denied the Appellant a fair hearing, by determining, pursuant to the May 7 2007 Order of the LTB, legal issues that were properly the subject of the Review before Member Siddiqui January 21, 2008 and her Order made March 4, 2008;

(viii) The Members erred at law in failing to base the calculation of the permanent rent reduction awarded to the tenant on the cost to the landlord of providing the facility;

(ix) Alternatively, the Members erred at law in failing to calculate the quantum of permanent rent reduction based on the "value of the facility" as required by s. 30 (1) of O. Reg. 194/98;

(x) The Members erred at law in calculating the rent decrease based on the total claims of the Tenant (4 claims for a 10 % reduction) divided by the number of claims the tenant succeeded on (1), thereby resulting in a 2.5% rent reduction (1/4 of 10%) instead of calculating it in the manner prescribed by s. 30 (2) of O. Reg. 194/98;

(xi) The Members erred at law in placing the burden of proof on the landlord to establish the "value" of the reduced facility when the application and burden of proof of same rested with the Tenant;

(xii) Rule 29 of the LTB *Rules of Practice.*

(xiii) Section 21.2 of the *Statutory Powers Procedure Act*, RSO 1990, c. s. 22 (SPPA);

(xiv) Sections 1, 142, 157, 162, 188, 194 and 196 of the TPA and s. 30 of O. Reg. 194/98;

(xv) Sections 210 and 242 of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 (the RTA); and,

(xvi) Such further and other grounds as Counsel may advise and this Honourable Court may allow.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

(i) Section 196 of the TPA grants a party a statutory right of appeal from a final Order of the LTB on a question of Law;

(ii) The order appealed from is final;

(iii) Leave to appeal is not required;

(iv) Section 242 of the RTA provides that notwithstanding the repeal of the TPA, it shall be deemed to be continued in force for, *inter alia*, finally disposing of applications and appeals made under the TPA before it was repealed.

The Appellant requests that this appeal be heard at 130 Queen Street West, Toronto, Ontario.

DATED: April 2, 2008

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Solicitor for the Appellant

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Richard Fink
Solicitor for the Respondents

AND TO: **LANDLORD AND TENANT BOARD**
Legal Services Branch
777 Bay Street
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Toronto, Ontario
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Tel: 416-645-8080
Fax: 416-314-9567

Solicitor for the Landlord and Tenant Board

Court File No.:

FIRST ONTARIO REALTY CORPORATION LTD.

Landlord/Appellant

vs.

LIANGRUI DENG, GUIZHI HE, DUSTIN YANG, JENNY YANG and YI YANG

Tenants/Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO, ONTARIO

NOTICE OF APPEAL

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