CITY OF BURLINGTON, VERMONT
HOUSING BOARD OF REVIEW

In re: Request for Hearing of BRENDA BRAZIER)
Regarding Withholding of Security Deposit) Security Deposit Appeal
By 316 FLYNN LLC for Rental Unit at)
316 Flynn Avenue, #211)

DECISION AND ORDER

The above-named hearing came before the Housing Board of Review on November 2, 2020; the hearing was held virtually via Zoom. Board Chair Josh O'Hara presided. Board Members Patrick Murphy, Olivia Pena, Betsy McGavisk and Charlie Gliserman were also present. Petitioner Brenda Brazier was present and testified. Respondent 316 Flynn LLC was represented at the hearing by Glenn Von Bernewitz who testified.

Upon consideration of the evidence and the applicable law, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact

1. Respondent 316 Flynn LLC is the owner of a rental unit, 316 Flynn Avenue, Apt. 211, in the City of Burlington which is the subject of these proceedings. Glenn Von Bernewitz from Redstone manages the property.

2. Petitioner Brenda Brazier moved into the rental unit with a written lease which ran from June 1, 2018 to May 31, 2019. On March 25, 2019, the parties extended the lease to June 30, 2020 at which time it expired. Monthly rent was $1115.00.

3. Petitioner paid a security deposit of $1115.00 to respondent. Petitioner was to receive back her security deposit at the end of the lease minus any amounts withheld for damages.

4. Petitioner did not move out of the unit on June 30, 2020 when the lease expired, but stayed an additional month as the unit into which she was moving wasn't available. On July 27, 2020, petitioner gave notice to respondent that she was vacating the unit by July 31, 2020. Petitioner moved out of the unit on August 1, 2020.

5. On August 10, 2020, respondent sent petitioner an itemized statement in accordance with ordinance requirements. Said statement itemized deductions of $2980.00 from the deposit for unpaid rent and damages. Interest in the amount of $1.41 was credited to the deposit.

6. Both parties testified with respect to unpaid rent. Petitioner argued that she was charged double for July rent. Petitioner paid her rent for July, but the itemized statement indicated a deduction of $1115.00 for rent obligation.[1] Glenn Von Bernewitz pointed to the lease provision which states:

> In the event that the Tenant holds-over beyond the expiration date of this lease, then this Lease shall continue as a month-to-month tenancy at a rental rate that is 200% of the rental rate in effect during the term immediately preceding the holdover, terminable upon thirty (30) days written notice by either party.

The lease expired on June 30, 2020. Petitioner continued living in the unit until August 1, 2020. Therefore, according to Mr. Von Bernewitz, petitioner was liable for the "hold-over" rental rate of $2230.00, for both July and August. As petitioner only paid $1115.00 for rent in July (rather than $2230), there was unpaid rent of $1115.00 which was deducted from the deposit. (Respondent did not charge petitioner for rent for August.)

Conclusions of Law

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1 The statement also noted a rent obligation for August 2020, but the charge was credited back.

7. The City of Burlington's security deposit ordinance, Minimum Housing Code Sec. 18-120, took effect April 10, 1986 and governs any rental arrangements for dwelling units in the City of Burlington entered into or renewed after that date.

8. The State of Vermont's Landlord and Tenant Act, now codified at 9 V.S.A. Sec. 4451-68, applies to rental agreements for residential property entered into, extended or renewed on or after July 1, 1986. Its terms are to "be implied in all rental agreements" to which it is applicable. 9 V.S.A. Sec. 4453.

9. Under the city ordinance, as well as state law (the terms of which must be implied in the parties' rental agreement), a landlord must return the security deposit to a tenant within 14 days from the date on which the tenant vacated or abandoned the dwelling unit, with a written statement itemizing any deductions. City ordinance also provides that the written statement must inform the tenant of the opportunity to request a hearing before the Burlington Housing Board of Review within 30 days of receipt of the landlord's written statement. Minimum Housing Code Sec. 18-120(c). The statement and any payment must be hand-delivered or sent by mail. Minimum Housing Code Sec. 18-120(c). If a landlord fails to return the deposit with a statement within 14 days, the landlord forfeits the right to withhold any portion of the security deposit. See, Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e). Proper notice was provided.

10. City ordinance allows a deposit to be withheld for nonpayment of rent. Minimum Housing Code Sec. 18-120(c). Petitioner's lease expired on June 30, 2020, but she did not move out. Rather, petitioner lived in the unit until August 1, 2020. The written lease, signed by petitioner, is clear that a tenant who holds over beyond the expiration of the lease continues with a month-to-month tenancy with a rental rate that is

200% of the rental rate in effect during the term immediately preceding the holdover. When petitioner stayed in the unit after the lease expired she was subject to a new rental rate of $2230.00 per month. Petitioner paid $1115.00 for rent for July. Therefore, it was proper for respondent to withhold $1115.00 of the deposit for nonpayment of rent.

11. The dissent contends that the clause in the lease here creating a "month-to-month tenancy at a rental rate that is 200% of the rental rate in effect during the term immediately preceding the holdover" is an unlawful penalty on the Tenant. The dissent is mistaken. The principal case relied upon by the dissent, Highgate Assocs., Ltd. v. Merryfield, 157 Vt. 313, 597 A.2d 1280 (1991), discusses how Vermont courts determine whether a damages clause in a contract is a liquidated-damages clause or whether it is a penalty-creating clause. But that case has no usefulness for this matter because the damages versus penalties question is reserved for the breach of a contract, not what happens after a lease has expired and a tenant has held over. See Restatement (Second) of Contracts §§ 344-45, 356 (explaining that remedies enforce the expectation interests of the contracting parties, who may build into contracts the amounts of money damages available for a breach, but who may not build in amounts that penalize one another for a breach). Although the Tenant here may have breached her month-to-month hold-over lease by nonpayment of rent, she did not breach the immediately-preceding lease agreement, where one finds the 200% rent clause. Because there was no breach of that lease agreement, the question of damages is irrelevant.

12. Instead, the Tenant stayed beyond the term of the lease. As they are entitled to do, the parties bargained for this occurrence: holding over created a month-to-month lease terminable upon 30 days' notice at 200% of the previous rent. Restatement

(Second) of Property, Landlord & Tenant § 14.4(b). Presumably, in exchange for increased rent, the Landlord has forgone the power to terminate the lease in 14 days and the right to sue for ejectment, which can have profoundly negative effects on a tenant. 9 V.S.A. §§ 4467-68; 12 V.S.A. § 4851; and see In re McCarty, 2013 VT 47, ¶ 6, 194 Vt. 109, 75 A.3d 589 (observing because of tenant's sudden eviction, she suffered serious emotional and physical consequences, including post-traumatic stress disorder and intermittent homelessness) (quotations removed). The clause is neither a damages nor a penalty clause; it is a clause describing the terms of the hold-over rental.

13. For these reasons, the dissent is mistaken. As the dissent rightfully explains below, it is unseemly (at minimum) for the rent to double if a tenant (especially one who is a Burlington Housing Authority client) holds over during the COVID-19 pandemic. However, the Landlord's actions and the lease term were lawful.

Order

Accordingly, it is hereby ORDERED:

14. Petitioner Brenda Brazier's request for relief is DENIED.

DATED at Burlington, Vermont this 10th day of December, 2020.

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

/s/ Josh O'Hara
Josh O'Hara

/s/ Olivia Pena
Olivia Pena

/s/ Charlie Gliserman
Charlie Gliserman

We, Patrick Murphy and Betsy McGavisk, respectfully dissent from the majority's opinion.

We begin our dissent in this case by noting what has been omitted from the majority decision in its "Findings of Fact." First, several charges were applied as deductions from the petitioner's security deposit. These are admittedly difficult to parse out because of the respondent's lack of clarity and precision with their accounting, but they are as follows:

- "Holdover rent" for July 2020: **$1115**
- "Late fee" for July 2020: **$50**
- Pro-rated rent for one day in August (Aug 1st): net **$35.97** (Redstone invoiced for the entire month + late fee, but credited back 30 days and the late fee. This "rent" was calculated at the normal rental rate of $1115.)
- Cleaning fee: **$150**
- Carpet cleaning fee: **$125**
- Painting fee: **$100**
- Damage fee for burnt outlet and hole in door: **$275** (invoice submitted for $135 for the outlet, but no invoice for the door)

Total damages assessed by the respondent were therefore **$1850.97**, to which the respondent applied the petitioner's security deposit with interest ($1116.41) resulting in a "balance due to landlord" of **$734.56**.

Even if the deduction for "holdover rent" were upheld as permissible--we contend that it is not--the majority should have considered the validity of all of these charges. If none of the others were deemed legitimate deductions, the respondent would be entitled to at least the interest on her security deposit. We will therefore first address the question of the various "damages," before returning to the most critical issue of "holdover rent."

In *Mongeon Bay Properties, LLC v. Mallets Bay Homeowner's Ass'n*, the Vermont Supreme Court elaborated on the contours of the normal-wear-and-tear concept. The Court explained that the analysis will examine: 1) whether the tenant made reasonable use of the property; 2) the type of property, as well at its context and use; and 3) whether the tenant took reasonable steps to avoid damage to the property. 2016 VT 64, ¶¶ 32-37, 202 Vt. 434, 149 A.3d 940. Based upon the evidence provided by the landlord in this case, I find the deductions for "cleaning," "carpet cleaning," and "painting" to be unwarranted. Scuff marks and a couple of tacks/minor holes do not rise above the standard of "normal wear and tear." Indeed, a painting invoice which included the tenant's unit among many others seems to suggest that these expenses are routine and to be expected as the cost of doing business. The landlord also failed to demonstrate how the damage for the "burnt outlet" was caused by the tenant's negligent use of the premises, nor was an invoice provided for the "hole in door." To the contrary, the tenant submitted evidence documenting several issues shared by other tenants with the development itself, as well as her move-in checklist which noted paint on the door and other marks within the apartment. We find these deductions ($135 for the outlet, and what can only be assumed as $140 for the door) to be unreasonable.

In communications submitted to the Board as evidence, the petitioner does acknowledge that she was not able to move out at the end of July 2020, instead handing over possession of the unit on August 1, 2020. For this one day, the respondent has prorated rent for the month of August to $35.97, or 1/31 of the rental rate of $1115. We find this withholding to be reasonable.

Lastly, we will consider the two charges from July--"holdover rent" of $1115 and a "late fee" of $50--and whether they are permissible deductions from the tenant's security deposit. In the recent past, this Board has held that a late fee is not an allowable deduction, as Section 18-120(c) of Burlington's Minimum Housing Code is clear on what the landlord can withhold: "After the rental unit is vacated or abandoned by the tenant(s), the owner may retain all or part of the deposit plus interest for the actual cost to repair damage beyond normal wear and tear which is attributable to the tenant in order to maintain the condition and habitability of the unit, for nonpayment of rent, for nonpayment of utility or other charges which the tenant was required to pay directly to the landlord or to a utility, and for expenses required to remove from the rental unit articles abandoned by the tenant." Particularly in this case, where the late fee is linked to the "holdover rent" charge, we find the amount of the late fee to be wrongfully withheld.

It is a fact that the tenant stayed in the apartment a month and one day beyond the term of her lease. It is also a fact that the lease includes language which provides for a $50 late fee, as well as a "rent escalation" of 200% if a tenant stays beyond their lease term. Here we should consider the circumstances under which the tenant made this decision. The tenant testified that in the midst of a worldwide pandemic--the worst in a century--the Burlington Housing Authority was understandably unable to secure another unit for her in a timely manner. The petitioner relied on BHA to provide nearly 80% of the monthly rent to the landlord through its federal voucher program. COVID-19 clearly posed logistical, public health and financial issues for BHA, tenants and landlords across the city, state, and country. In fact, for these reasons, multiple jurisdictions temporarily banned evictions, late fees, rent increases and other forms of penalties. Many recognized the need for a home in which to quarantine.

The Board also ought to consider whether such an amount ("holdover rent" worth 100% of normal rent) is justified given the extent of damages arising out of the tenant's holdover status. The petitioner testified, without any dispute by the respondent, that the subsequent tenant came from within the same building, 316 Flynn Ave. She argued that because the tenant continued to rent their unit, and she continued to pay the normal rental rate for hers, the landlord suffered no financial damages. The majority has held that "holdover rent" is "rent" and can therefore be withheld from a tenant's security deposit. We respectfully disagree. Despite the landlord's choice of terms, the "holdover rent" or "rent escalation" cannot rightly be accepted as "rent" at all, but instead as a penalty used in a manner akin to the aforementioned "late fee." It is listed on the landlord's ledger as a separate line item ("holdover rent" being distinct from the normal rent). More than that, "holdover rent" is clearly a temporary amount, meant only to discourage a tenant from overstaying their lease. Not only did the subsequent tenant not pay $2230/month for the

same unit, but the landlord, in calculating the proration for one day of rent in August for which the petitioner was responsible, used the prior rental rate of $1115. The security deposit amount itself is limited by ordinance to one month's rent.

We might look to another example of lease language in a case before the Board at its November 16, 2020 meeting. In *Wood and Farr v. JH2 Investments,* the rental agreement contains the following:

> "3. Rent. Tenant shall pay to Landlord as rent for the initial term of this Lease, **$1380** per month, to be paid and due on the first of the month. For the first month of January 2020, the rent shall be due at lease signing together with security deposit of $1,380 for a total amount of $2,760. If rent is received after the **6th** day of the month, the monthly rental installment shall be increased to $**1480 until such time as all amounts owed have been timely paid**."

Here the landlord is calling "rent" what actually amounts to a late fee of $100 (or more). Were this amount to be withheld from a security deposit, Board precedent would suggest that we find such a deduction to be a wrongful withholding, *as it cannot rightly be considered "rent."*

Although presented in response to the landlord's deduction of a late fee, the petitioner's submission of the case *Highgate Associates, Ltd. v. Lorna Merryfield* is more relevant here than the majority may have contemplated. If what the landlord in this case (316 Flynn Ave LLC) has called "holdover rent" is really just a penalty in the same sense that the above landlord has dubbed his late payment penalty an increase in the "monthly rental installment," we should be able to evaluate whether the clause in this lease which allows for a "rent escalation" of 200% is appropriate or whether, like the late fee in *Highgate*, the "holdover rent" is an "unenforceable penalty." The Court used an established standard as described:

> We recently articulated three factors that should be considered in determining whether a contract provision is a reasonable liquidated damages clause rather than an unlawful penalty: [A] liquidated damages clause must meet three criteria to be upheld: (1) because of the nature or subject matter of the agreement, damages arising from a breach would be difficult to calculate accurately; (2) the sum fixed as liquidated damages must reflect a reasonable estimate of likely damages; and (3) the provision must be intended solely to compensate the non-breaching party and not as a penalty for breach or as an incentive to perform. (https://law.justia.com/cases/vermont/supreme-court/1991/op90-032.html)

In the matter before this Board, *Brazier v. 316 Flynn LLC (Redstone),* we would conclude that:

- damages are, in fact, able to be calculated;

- based on the testimony provided, the sum of $1115 for “holdover rent” (let alone the $50 late fee) does not reflect a reasonable estimate of damages to the landlord; and, lastly,
- the sum seems to be intended as “a penalty for breach or as an incentive to perform.”

Clearly, a uniform increase in rent to prevent holdover tenancies cannot be broadly applied to all circumstances, but more importantly cannot be applied to this particular circumstance. The landlord has not shown, or even attempted to estimate, damages as a result of the tenant remaining in her apartment for the 32 days beyond the term of their lease agreement. Indeed, she and the Burlington Housing Authority continued to pay rent in a timely manner in July. The standard lease language of a rent escalation for holdover tenancies, *no matter the circumstances*, seems to strongly suggest that the intent of the clause is to apply a penalty or use the threat of it as a significant incentive to leave at the end of the lease. It likewise implies a lack of correlation with the actual damages in particular and distinct cases, including this one. Because of the circumstances noted earlier, we find the amount of “holdover rent” to be an unenforceable penalty in the same vein as the landlord’s standard $50 late fee, and thus, wrongfully withheld from the petitioner’s security deposit.

Taken together, these findings would have required the respondent to return to the petitioner all but $35.97 for prorated rent in August, for a total security deposit return of **$1080.44**.

/s/ Patrick Murphy
Patrick Murphy

/s/ Betsy McGavisk
Betsy McGavisk