Dissent in *Brazier v. 316 Flynn LLC (Redstone)*

1. The dissent begins by noting what has been omitted from the majority decision in its "Findings of Fact." – namely, the several charges that the respondent in this case applied as deductions from the petitioner's security deposit. These are difficult to parse out because of the respondent's lack of clarity and precision in setting out its accounting in its security deposit transmittal, but they are as follows:

	Charge	**Amount**
1	"Holdover rent" for July 2020 (which is the equivalent of 50% of the amount of the holdover amount set out in the contract (which is double the amount (200% of) the rent paid by the tenant on a monthly basis over the preceding 12 month rental term), the other 50% of which the tenant paid in a timely manner in July 2020)	$1,115.00
2	"Late fee" for July 2020 (invoked by respondent as a result of petitioner's having paid her usual monthly rent amount but not the full holdover charge)	$50.00
3	Pro-rated rent for single day in August (Aug 1st). Respondent 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.	$35.97
4	Cleaning fee	$150.00
5	Carpet cleaning fee	$125.00
6	Painting fee	$100.00
7	Damage fee for burnt outlet and hole in door (Respondent submitted invoice of $135 for the outlet, but no invoice for the door.)	$275.00
Total charges assessed by respondent		**$1,850.97**
(Less petitioner's security deposit applied by respondent against its total charges claimed)		**-$1,116.41**
Total charges claimed by respondent as "balance due to landlord" after applying petitioner's security deposit		**$734.56**

As set out above, the total damages assessed by the respondent were therefore **$1,850.97**, to which the respondent applied the petitioner's security deposit with interest ($1,116.41) resulting in the respondent's assessment upon the tenant of a "balance due to landlord" of **$734.56**.

Notably omitted from these calculations by the respondent is the interest accrued on the security deposit to which tenants are entitled as a matter of law.

2. It is important to set out and consider the above charges claimed by the respondent because even if the deduction for "holdover rent" were upheld as permissible—the dissent contends that it is not--the majority should have assessed the validity of each of these charges. Such an assessment of the charges claimed by the respondent is relevant not only because the holdover rent is an invalid liquidated damages clause but also because the respondent has issued the petitioner with a bill in the sum of $734.56 in respect of items

in the chart above that exceed the sum of the security deposit. If none of the charges that the respondent has claimed were deemed legitimate deductions, the respondent would be entitled to at least the interest on her security deposit. The dissent will therefore first address the question of the various "damages," before returning to the most critical issue of "holdover rent." [see note below]

3. Clause 5 of the rental agreement signed by the parties (the petitioner and the respondent) in April 2018 (the "rental agreement") sets out the items against which the respondent may apply the tenant's security deposit. Amongst these items is "damages to the Premises unless the damage is the result of normal wear and tear". Similarly, Vermont state law (*see* 9 V.S.A. § 4461(b)(2)) provides that, "damage to property of the landlord, unless the damage is the result of normal wear and tear or the result of actions or events beyond the control of the tenant". The charges set out in the chart above numbered 3 through 7 are what the respondent purports to be such "damages". However, the respondent has failed to set out any valid argument as to why these fees ought to be regarded as more than mere "wear and tear" of the residential property. In *Mongeon Bay Properties, LLC v. Mallets Bay Homeowner's Ass'n*, the Vermont Supreme Court set out a three-part test for determining whether damages to a property may be considered "wear and tear". The Court explained that the criteria of the three-part test include: 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 respondent in this case, the dissent finds 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 suggests that these expenses are routine and to be expected as a landlord's 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, and neither an invoice nor an explanation was provided in respect of 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. The dissent finds these deductions ($135 for the outlet, and what can only be assumed as $140 for the door) to be unreasonable.

4. 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. The dissent finds this withholding to be reasonable. The dissent notes that it is inconsistent with the respondent's contention that the monthly rent during July and August should have been calculated at 200% or double the rate of $1115.

5. Lastly, the dissent considers 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. We consider these items (items 1 and 2 respectively in the chart set out above) to be invalid liquidated damages clauses. Recently, this Board 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, the dissent finds the amount of the late fee to be wrongfully withheld.

6. 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.

7. 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. Brazier argued that because the incoming tenant continued to rent their unit from Redstone, and Brazier 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. JH@ Investments* the rental agreement contains the following:

> "3. <u>Rent</u>. Tenant shall pay to Landlord as rent for the initial term of this Lease, **$<u>1380</u>** <u>per month</u>, to be paid and due on <u>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.</u> If rent is received after the **<u>6th</u>** day of the month, the monthly rental installment shall be increased to $**<u>1480 until such time as all amounts owed have been timely paid</u>."**

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."*

8. 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)*, I would conclude that damages are, in fact, able to be calculated, that 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, that 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 from 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, the dissent finds 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.

9. The majority has further argued that *Highgate Associates, Ltd. v. Lorna Merryfield* does not apply in this case because "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." However, this seems to imply the existence of two separate leases rather than one whose terms have been breached. Further, the majority argues that "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." Yet, in subsection (a) *i.* of the lease section 18, Default; Damages; Attorney's Fees," the Respondent had maintained its ability to provide "Fourteen (14) days written notice to Tenant to vacate the Premises." The dissent further notes the extreme imbalance of bargaining power between a major commercial landlord and a tenant who relies on federal housing subsidies through the Burlington Housing Authority to be able to secure a housing unit in an oligopolistic private housing market. Just as the petitioner in this case faced a dire choice in June/July 2020 of whether to holdover or become homeless during a pandemic, the petitioner likely faced a similar choice at the start of her tenancy—whether to accept the complex fine print offered in the lease by the respondent or to look

elsewhere in a local market with few alternatives for a tenant in the petitioner's position. This imbalance of bargaining power is another key consideration in whether a particular clause constitutes an unenforceable penalty. Here it should.

10. As one delves more deeply into the language of the lease in this case, a clear pattern emerges of the respondent attempting to comply with the letter of the law without having to comply with its intent, and where possible, to pass the costs of landlordism onto the tenant. In some instances, this seems to result in clauses included which actually appear to be in conflict with the law. For example, section 4 "Late Payments; Returned Checks" establishes a late fee of $50 for late payments after the fifth (5th) day of the month, despite case law discussed earlier in this dissent which seems to rule against such clauses. In the lease, the respondent considers this late fee "additional rent."

Section 5 "Security Deposit" goes beyond municipal ordinance and state law defining the four (4) categories of what can be appropriately withheld from a security deposit with an additional one "(e) any cleaning expenses." The Board has found in prior cases with this and other respondents that cleaning charges cannot automatically be deducted from the security deposit without first establishing that those charges were incurred because of damage exceeding the "normal wear and tear" standard. The addendum to this lease "Security Deposit Refunds" elaborates on the respondent's own requirements for tenants to complete before receiving their legally due security deposit. Many items appear to be in conflict with the Board's established precedent of evaluating the validity of claims against a tenant's security deposit.

Section 7 "Conversion to a Condominium" is written to serve as notice to the petitioner (and any tenant) that "the Landlord may, at its discretion, convert the Property, including the Leased Premises, from apartments to condominium units" while depriving the same of "the benefit of the notice provisions, purchase options, payment of relocation expenses, or any other provisions, rights, benefits or features of federal, state or municipal law related the conversion of apartment units to condominium units…" This language has been included despite Vermont state law which states that "No rental agreement shall contain any provision which attempts to circumvent or circumvents obligations and remedies established by this chapter and any such provision shall be unenforceable and void." (9 V.S.A § 4454) While not relevant to this particular case, the inclusion of this language demonstrates the respondent's intention to circumvent local ordinances and state statutes.

Burlington ordinance and Vermont state law have placed clear limitations on what can be withheld from a tenant's security deposit. In their lease, the respondent seems at pains to fit any possible charge into permissible deduction categories—whether including as "additional rent" late fees, *any* cleaning charge or or "all court costs and attorney's fees incurred by Landlord or Manager to enforce by legal action or otherwise, any of the Landlord's or Manager's rights hereunder including, without limitation, the costs of collecting rent, including holdover rent, and the costs of appearing before the Housing Board of Review or comparable regulatory agency when necessary." This broad conception of "rent" contradicts the Board's own established precedent when applying Burlington's ordinance governing security deposits, and would allow landlords to devise similar clauses disguising an array of penalties and fees in the language of "rent," "additional rent," or "rent escalation." The dissent finds acceptance of this overly broad application of the term "rent" to be untenable, and much more than "unseemly" given the particular circumstances of the

petitioner, the relative bargaining power of the respondent, and the gravity of the public health and economic risks posed by the COVID-19 pandemic.

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