1967

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TWENTY-FOURTH REPORT

from the

STANDING COMMITTEE

on

REGULATIONS AND ORDINANCES

(Being the Second Report of the 1967 Session, and the Twenty-fourth Report since the formation of the Committee.)

PERSONNEL OF COMMITTEE

Chairman:

Senator I.A.C. Wood

Members:

Senator R. Bishop
Senator J. L. Cavanagh
Senator G. S. Davidson
Senator D. M. Devitt
Senator A.G.E. Lawrie
Senator R. C. Wright

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

TWENTY-FOURTH REPORT OF THE COMMITTEE

Australian Capital Territory Ordinance No. 13 of 1967

City Area Leases Ordinance 1967

The Senate Standing Committee on Regulations and Ordinances has the honour to present its Twenty-fourth Report to the Senate.

2. This Ordinance No. 13 should be considered in the light of its history.

3. In the Canberra Times on May 8 1964, Professor Richardson, the Robert Garran Professor of Law and Dean of the Faculty of Law, Australian National University, published articles emphasising the arbitrary character of land control by means of lease covenant. On July 13 1964, an article was published from the Australian Planning Institute Journal emphasising the inequity of certain purchases of leases where covenants in leases were varied to the great advantage of commercial entrepreneurs.

4. In August 1964, clause 9A of the City Area Leases Ordinance was enacted which made it a punishable offence to use land comprised in a lease for a purpose not authorised by the lease. Sub-clause 4 provided :-

> "(4.) It is a defence if a person charged with an offence against either of the last two preceding sub-sections, being an offence that relates to a lease of land granted for residential purposes but no other purpose, proves that the use of the land -
>
> (a) does not constitute a substantial nuisance;
>
> (b) does not substantially disturb the occupier of any adjoining land;
>
> (c) does not substantially interfere with the nature or amenities of the neighbourhood; and
>
> (d) does not cause untidiness in the neighbourhood.

5. Ordinance No. 13 of 1967 operates to repeal sub-clause 4 and substitute the following provision :-

> "(4.) An offence against either of the last two preceding sub-sections shall not be prosecuted except with the consent in writing of the Minister or of a person authorized by the Minister, by writing under his hand, to give such consents.".

6. In response to the Committee's inquiry the Minister for the Interior, the Hon. J.D. Anthony, has written the following letter -

> "I refer to your letter of 28 August 1967 wherein you sought an explanation of the amendment to section 9A of the City Area Leases Ordinance 1936-1966.
>
> The City Area Leases Ordinance provides the legislative authority for the general leasing system within the city of Canberra. In general terms, neither the Ordinance nor leases issued under it confer upon lessees rights or liabilities inter se. Rather do the terms of the Ordinance and the lease

agreements/

agreements provide the basis of the relationship existing between each individual lessee and the Commonwealth of Australia as lessor. The relationship existing between lessees is governed by the ordinary rules of common law and the City Area Leases Ordinance does not derogate from these rules in any way.

The fundamental reason for the inclusion of section 9A of the Ordinance was to provide for a penalty for breach of the purpose clause in the lease so that lessees could not break their covenants with impunity. It was not intended that it should either add to or subtract from the rights and liabilities of lessees inter se.

Before the inclusion of section 9A in the Ordinance there was no offence for a breach of the purpose clause in a lease. The only right of the Commonwealth was to sue for damages for breach of the agreements, which procedure was useless. The provision for foreiture of leases is limited to three cases :-

(i) where rent payable under the lease remains unpaid for twelve calendar months next after the date appointed for payment;

(ii) where a building in accordance with the building covenant is not commenced and completed within the periods stipulated in the covenant; and,

(iii) where, after complotion of the building, the land is at any time not used for a period of two years for the main purpose for which the lease is granted.

Every lessee enjoys the benefit of his common law rights to take action against an adjoining lessee to abate a nuisance or to take such other action as might be necessary to protect his property. These rights have in no way been disturbed by the provisions of the City Area Leases Ordinance 1967.".

7. In the leasehold area of Canberra, control over land use is operated by inserting covenants in the leases. It is an elementary idea that such lease covenants are intended to benefit the neighbourhood. It is an alarming disclosure of arbitrary outlook to suggest that "neither the Ordinance nor leases issued under it confer upon lessees rights or liabilities inter se". That is no doubt the technical legal situation. But in the Committee's opinion it is wrong that the arbitrament as between neighbours on land use of leaseholds should rest in the arbitrary decisions of the Minister.

8. The Committee records its opinion disapproving of the repeal of objective grounds stated above as affording defence. It is no proper substitute for such objective grounds of defence to make the commencement of a prosecution dependent upon the Minister's consent. The uncontrolled discretion of the Minister to consent or to withhold consent is no proper substitute for rules which give the citizen a right to defence.

IAN WOOD,

Chairman.

Regulations and Ordinances
Committee Room,
Thursday, 5 October 1967.

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