



REPORT OF THE

STANDING COMMITTEE ON

CONSTITUTIONAL AFFAIRS

IN RELATION TO

A PETITION REGARDING THE ACTIONS OF

THE CITY OF FREMANTLE CONCERNING

OCEAN VIEW LODGE

Presented by the Hon Murray Nixon JP, MLC (Chairman)

STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS

Date first appointed:

21 December 1989

Terms of Reference:

1. The functions of the committee are to inquire into and report on:
 - (a) the constitutional law, customs and usages of Western Australia;
 - (b) the constitutional or legal relationships between Western Australia and the Commonwealth, the States and Territories,

and any related matter or issue;
 - (c) a bill to which SO 230 (c) applies but subject to SO 230 (d);
 - (d) any petition.

2. A petition stands referred after presentation. The committee may refer a petition to another standing committee where the subject matter of the petition is within the terms of reference of that standing committee. A standing committee to which a petition is referred shall report to the House as it thinks fit.

Members as at the date of this report:

Hon Murray Nixon JP, MLC (Chairman)
Hon Ray Halligan MLC
Hon Tom Helm MLC

Staff as at the date of this report:

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**Report of the Legislative Council
Constitutional Affairs Committee**

in relation to the

**A Petition regarding the actions of the City
of Fremantle concerning Ocean View Lodge**

1. Introduction

1.1 The Petition

1.1.1 On 21 August 1997, the Hon Barbara Scott MLC tabled a petition requesting the Legislative Council to investigate the actions of the City of Fremantle regarding Ocean View Lodge.

1.1.2 The petition specifically requested the Legislative Council to investigate:

- a. Why the City of Fremantle issued approvals under the *Health Act 1911* and why, under its Town Planning Scheme, it allows Ocean View Lodge to operate at 100 Hampton Road, Fremantle; and
- b. The parking problems and congestion caused by the owners and occupiers of 100 Hampton Road, Fremantle and why the City of Fremantle fails to enforce its parking by-laws.

1.1.3 On 19 August 1998, the Hon Barbara Scott MLC re-tabled the petition which again requested the Legislative Council to investigate the matters outlined in paragraph 1.1.2. The petition also commented that the "City of Fremantle appears to tolerate all of the activities of Ocean View Lodge and does not appear to enforce its own parking by-laws".

1.2 Background to the Petition

1.2.1 The principal petitioner, Mr Nikola Bacich, is the proprietor of land and residence at 83 Solomon Street, Fremantle. Mr Bacich has right of way to the property from Solomon Street and via Ashburton Terrace.

1.2.2 Mr Paul Hinkley and Mrs Susan Hinkley are the proprietors of the premises commonly known as the Ocean View Lodge ("the Lodge") situated at 100 Hampton Road,

Fremantle. The Hinkleys purchased the Lodge from the State Government on 21 May 1992 at which time it was commonly known as the Nurses Quarters Sites.

1.2.3 Mr Bacich has complained that the Lodge has been used for a purpose outside its permitted use. Mr Bacich has expressed concern that the procedures for the rezoning of the land on which the Lodge is situated were not adhered to by the City of Fremantle, and that as a result the Lodge is being operated in breach of the City of Fremantle's Town Planning Scheme. Mr Bacich also claimed that the land on which the Lodge is built:

"is zoned as residential by the City of Fremantle. It is not zoned for commercial use and when Mr Hinkley bought the building it was purchased according to the Town Planning Scheme No.3 - building to be knocked down." (letter from Mr Bacich to the Committee dated 16 March 1999.)

1.2.4 Mr Bacich has also complained to the City of Fremantle concerning obstruction to the right of way to his property in Solomon Street. According to Mr Bacich, the obstruction is as a result of inadequate parking for persons residing at the Lodge. In this regard, Mr Bacich has claimed that the City of Fremantle has failed to enforce the appropriate by-laws relating to parking at the Lodge.

1.2.5 As part of its investigations, the Committee heard evidence from a number of witnesses. The witnesses who appeared before the Committee were:

- Mr Nikola Bacich, the principal petitioner;
- Dr Michael Lees, resident of Solomon Street, Fremantle;
- Mrs Julie Dethridge, resident of Solomon Street, Fremantle;
- Mr Phillip Douglas, resident (and Councillor) of the City of Fremantle;
- Mr Paul Hinkley, company director of Scarpa Pty Ltd, the owner of Ocean View Lodge;
- Mrs Susan Hinkley, company director and secretary of Scarpa Pty Ltd, the owner of Ocean View Lodge; and
- Mr Russell Black, Accountant for Scarpa Pty Ltd.

1.2.6 The Committee conducted an on-site inspection at Ocean View Lodge on Monday, 8 March 1999 where the members met with Mr Bacich, the Hon Barbara Scott MLC and

Mrs Julie Dethridge. The Committee also met with representatives of the City of Fremantle at their offices and spoke with:

- Mr Richard Utting, Mayor of Fremantle;
- Mr Ray Glickman, Chief Executive Officer, City of Fremantle;
- Mr Geoff Broad, Director of Urban Management, City of Fremantle;
- Mr Bob Caporn, Manager of Urban Environment Control, City of Fremantle;
- Mr Phillip Douglas, Councillor of the City of Fremantle; and
- the Hon Barbara Scott MLC.

1.3 Issues raised by the Petition

1.3.1 The petition raises the following issues:

- a. permitted use; and
- b. parking.

1.3.2 This report will now deal separately with the above issues.

2. Permitted Use

2.1 Prior to the purchase of the Lodge by the Hinkleys on 21 May 1992, the lots known as the Nurses Quarters Sites were Crown land vested in the Minister for Works.

2.2 Prior to October 1991 the land was zoned "Public Purposes - Hospital" under the Metropolitan Region Scheme ("the MRS") and the City of Fremantle Town Planning Scheme No. 3 ("the TPS No. 3").

2.3 In or about October 1991 the MRS was amended to re-zone the land "Urban".

2.4 On 15 May 1992 an amendment to the TPS No. 3 was gazetted and the land was re-zoned "Development".

2.5 Pursuant to Clause 41(a) of the TPS No. 3 land and buildings may continue to be used for the purpose for which they were lawfully used when the TPS No. 3 came into force

- in 1987. The rights created by Clause 41(a) of the TPS No.3 are known as non conforming use rights.
- 2.6 At the time of the sale to the Hinkleys, the accommodation building on the property was being used as a Youth Hostels Association hostel and as such was registered as a lodging house for the purposes of the *Health Act 1911*.
- 2.7 It is the hostel use of the Lodge which enjoys the non conforming use rights. Any other use of the land and buildings would be beyond the protection afforded by Clause 41(a) of the TPS No. 3.
- 2.8 By September 1992 the Hinkleys were operating a short term budget accommodation facility under the name Ocean View Lodge.
- 2.9 No planning approval was obtained from the City of Fremantle prior to the establishment and operation of the Lodge. However the City of Fremantle has continued to issue certificates of registration for the Lodge to Mr and Mrs Hinkley since they purchased the land on the basis that the land and buildings comprising the Lodge enjoy non conforming use rights pursuant to Clause 41(a) of the TPS No.3.
- 2.10 The Hinkleys advised the Committee that the majority of their guests are short term visitors and that in the last year, of a possible 196 guests staying at the Lodge on any one night, approximately 20 had stayed for a continuous period of more than 12 months. It was not the Hinkleys' policy to take permanent guests.
- 2.11 Mr Hinkley advised that they do not operate a restaurant or cafe for the general public from the premises.
- 2.12 Mr Hinkley advised that there had been one private function held at the Lodge in the last 6 years and that had been for a family birthday celebration. Mr Hinkley advised the Committee that they did not hold seminars or functions at the Lodge in the normal course of their business.
- 2.13 Mr Bacich provided the Committee with a photograph dated 8 October 1993 which showed a sign advertising the use of the Lodge for, inter alia, permanents, seminars and function facilities.
- 2.14 The Committee acknowledges that there is a discrepancy in the evidence provided by the Hinkleys and Mr Bacich in this regard, however it does note that the photograph provided by Mr Bacich was taken over five years ago and that the use of the Lodge may have changed in that time.

- 2.15 In light of the evidence provided by the Hinkleys, the Committee is of the opinion that the Lodge is currently being used for the same purpose for which it was lawfully being used when the TPS No.3 came into force. As such, the Committee believes that the Lodge enjoys non conforming use rights and that the Hinkleys are not operating the Lodge contrary to the TPS No.3. See recommendation 4.1.1.

3. Parking

3.1 History

Mr Bacich first complained about the parking congestion at the Lodge soon after it was purchased by the Hinkleys in 1992. Mr Bacich is concerned that the cars parked at the Lodge do not necessarily belong to the guests at the Lodge and that the cars often block access to his property in Solomon Street.

3.2 Ombudsman's findings

- 3.2.1 Mr Bacich referred his complaint regarding the control of street parking adjacent to his property to the Ombudsman.
- 3.2.2 The Ombudsman found that the City of Fremantle had taken all reasonable steps to ensure that on-site parking at the Lodge was maximised for users and staff at the Lodge. The Hinkleys had been requested to instruct their guests to park on-site rather than in adjacent streets.
- 3.2.3 Further, it was found that the verge and road in front of Mr Bacich's property had been designated "*No Standing*" and that City of Fremantle Integrated Patrol Officers were available during weekdays and on Friday and Saturday evenings to assist in cases where parked cars were causing an obstruction.
- 3.2.4 The Ombudsman recommended to the City of Fremantle that the area adjacent to Mr Bacich's property be included in routine patrols, that infringement notices be issued when cars were illegally parked, and that records be kept of the extent of illegal parking. The Ombudsman did not consider that any further review of the planning background would lead to a significant decrease in the current demand for parking in the area around the Lodge.
- 3.2.5 The Committee notes that the City of Fremantle has followed the Ombudsman's recommendations and has also monitored and recorded car parking availability at the Lodge and written to the Hinkleys requesting that all car parking bays be clearly marked and conform with the Australian Standard size. Further, the City of Fremantle has provided Mr Bacich with after hours telephone numbers, including the Ranger's mobile

telephone number, to enable Mr Bacich to contact the City of Fremantle's Information and Compliance Officers in the event that there is a vehicle causing an obstruction to the rear access of his residence. The City of Fremantle has advised the Committee that Mr Bacich has not reported any obstructions for a very long time.

3.3 Number of car parking bays available

Mr Bacich has provided evidence to the Committee that the number of cars parked around the perimeter of the Lodge and on lots 32 and 33 Ashburton Terrace in the early mornings before guests depart for the day averages 55. Mr Hinkley estimated that on any one day the average number of cars parked in the parking areas at the Lodge running off Ashburton Terrace and Hampton Road is approximately 50. The Committee acknowledges that there is some discrepancy between these records. In this regard, it is possible that certain cars recorded by Mr Bacich were not owned by persons residing at the Lodge. Nevertheless, the Committee believes that it is unable to positively resolve the conflict in the absence of any independent evidence.

3.4 Abandoned cars

The Committee agrees that there are problems concerning abandoned cars at the Lodge. Mr Hinkley estimated that there were two (2) cars abandoned or left unattended in the parking areas at the Lodge. Mr Hinkley stated that there were complications with the application of current laws for removing abandoned cars. However he agreed with the Committee that a policy should be implemented by the management and staff at the Lodge as soon as possible to deal with the removal of abandoned cars. See recommendation 4.2.4.

3.5 Procedures for dealing with abandoned cars under the law

- 3.5.1 Pursuant to Regulation 1701 of the *Road Traffic Code 1975*, a member of the Police Force may remove an unattended vehicle from a road if, inter alia, it is an unlicensed vehicle, it is not fitted with an identification plate, it is apparently abandoned, or it is parked so as to cause an obstruction or to constitute a danger to traffic. Where a vehicle is moved under the provisions of Regulation 1701 the cost of removing the vehicle may be recovered from the owner of the vehicle on complaint in a Court of Petty Sessions.
- 3.5.2 Under Administrative Directive 56.15 of the Western Australian Police Service Commissioner's Orders and Procedures Manual ("the Manual"), a police officer must make every endeavour to locate the owner of an unattended vehicle before that vehicle is removed. Further, police officers are required to refer the matter to the local government authority in whose location the obstruction occurs and may take action to remove obstructing vehicles only in conjunction with the local authority.

- 3.5.3 Administrative Directive 56.16 of the Manual provides that in the case of an abandoned vehicle, police officers must advise the local authority. No further action is to be taken by the police.
- 3.5.4 The City of Fremantle's By-laws Relating to Clearing of Land and Removal of Refuse Rubbish and Disused Material ("the by-laws") provides that if on any land within the City of Fremantle there are any unregistered motor vehicles, motor vehicle bodies or parts which in the opinion of the Council are likely to adversely affect the health, comfort or convenience of the inhabitants of adjoining property, the Council may serve a notice on the owner or occupier of such land requiring them, within the time specified in the notice, to remove the unregistered motor vehicles, motor vehicle bodies or parts from the land.
- 3.5.5 The by-laws further provide that every owner or occupier of land on whom a notice is served shall comply with the notice within the time specified or give a satisfactory reason why an extension of time for compliance should be granted.
- 3.5.6 Where an owner or occupier fails to comply with a notice given by the Council, the Council may undertake the requirements of the notice itself at the expense of the owner or occupier to whom the notice was given.

3.6 Parking in Solomon Street

- 3.6.1 It was accepted that parking in Solomon Street was a problem and that the Hinkleys should use their best endeavours to instruct their guests not to park in Solomon Street but in the parking area provided at the Lodge. The Committee heard that the registration form guests at the Lodge are required to complete includes a provision for vehicle registration numbers. The Hinkleys provided the Committee with a copy of the Ocean View Lodge Guests Registration form.
- 3.6.2 The Committee noted that there appeared to be abandoned cars in Solomon Street. It was also agreed that as soon as it became apparent that a car had been abandoned in the parking area at the Lodge the procedures for abandoned cars referred to in recommendation 4.2.4 should be followed by the staff at the Lodge as expeditiously as possible.

4. Recommendations

4.1 Permitted Use

- 4.1.1 The Committee believes that the Lodge enjoys non conforming use rights and that the Hinkleys are operating the Lodge in accordance with the TPS No.3. However the

Committee is not a court of law. The Committee's function is to inquire into and report on the specific matters raised in the petition. The Committee has completed its inquiry into the question of permitted use and has published its findings in this report. The Committee believes that should the petitioners hold a contrary view, the proper course of action would be for them to commence a civil action in the courts to clearly determine the matter.

- 4.1.2 The Committee notes that, strictly speaking, under Standing Order 133(c)(vii) this petition should not have been referred to the Committee as legal remedies available to the petitioner have not been exhausted.

4.2 Parking

- 4.2.1 The Committee believes it is important for security and identification purposes that all guests who stay at the Lodge and who have a motor vehicle be required to register the details of that vehicle with the Hinkleys. Accordingly, the Committee recommends that the Hinkleys be meticulous in requiring guests, on registration at the Lodge, to register the make, model, colour and registration number of their vehicle to aid in the identification of vehicles should they be subsequently abandoned.

- 4.2.2 The Committee believes that guests staying at the Lodge should be required to park their vehicles in the car parks provided and not in the adjoining streets. The Committee recommends that when guests register at the Lodge, the Hinkleys assume responsibility for advising them that they are required to park in the car parks provided and that their vehicles may be removed by the local authorities if they park in the adjoining streets where parking is prohibited.

- 4.2.3 The Committee also recommends that the Hinkleys be required to post notices in the Lodge advising guests that they must park in the car parks provided and that if they park in the adjoining streets they may have their vehicle removed by the local authorities. The Committee believes that these notices should be posted in a prominent position on or near the registration counter and on all noticeboards throughout the Lodge.

- 4.2.4 The Committee believes that, although the Hinkleys should not have to bear the cost of removing abandoned vehicles from their land, they should be responsible for making initial inquiries to attempt to ascertain the owners of the vehicles. The Committee recommends that in the event that a car is abandoned at the Lodge or in the immediate vicinity or is parked so as to cause an obstruction to traffic, the following procedures be followed by the Hinkleys and/or the staff at the Lodge as expeditiously as possible:

- (i) every endeavour should be made to locate the owner of any apparently abandoned vehicle;

- (ii) in the event that the owner is not located, advise the City of Fremantle that a motor vehicle has been abandoned at the Lodge and that all attempts to locate the owner have been unsuccessful; and
- (iii) where the motor vehicle is causing an obstruction to traffic or preventing access to or egress from a right of way, passage or private driveway, notify the Police Service with a view to having the vehicle removed.

Hon Murray Nixon JP, MLC

Date:

