

CHANGE OF USER FROM AGRICULTURAL TO RESIDENTIAL,
COMMERCIAL AND INDUSTRIAL USER.

By Government Notice No.214 of 1950 the Governor appointed a Committee consisting of:-

The Special Commissioner of Lands, Chairman
The Hon.W.B.Havelock, M.L.C.,
The Hon.J.G.H.Hopkins, O.B.E., M.L.C.,
A.J.Millar, Esq.,
G.M.Roddan, Esq.,
K.W.S.Mackenzie, Esq.,

with the following terms of reference:-

- (a) to consider and report whether the existing formula whereby the Crown assesses the rent on Change of User.
 - (i) on residential plots at 3%; and
 - (ii) on industrial plots at 1% on the difference between the residential or industrial value of the plot on the one hand, and the agricultural value plus development charges on the other, is wholly appropriate, and if not, to submit alternative proposals;
- (b) to consider and report what items may properly be included in development charges.

2. The Committee submitted its report on the 23rd May, 1950; a copy is attached at Appendix A. Its recommendations appear at pages 8 to 10 of the report, and are repeated below for convenience together with the decision of the Government in each case.

3.

Recommendation (1)

On the grant of a Change of User, the land rent be assessed as a percentage of the agreed residential value of the plot.

The Government has accepted this, but, to avoid the possibility of fraud, the word "approved" will be substituted for "agreed". The value will have to be approved by the Special Commissioner of Lands. There will be an appeal to the Member against the refusal by the Special Commissioner to approve, with a further appeal to the Governor in Council.

Recommendation (2).

That land rent after the grant of a Change of User be assessed as 1% of the agreed residential value of the plot.

The Government considered that 1% would give the community an equitable share of the increased value, only if the rental were revisable. As will be seen below, the principle of revisable rentals has not been accepted, and the Government has decided, therefore,

that the rental be assessed as $1\frac{1}{2}\%$ of the agreed residential value of the plot.

Recommendation (3)

Revised ground rent to become payable from the time of the sale of each subdivision.

In certain cases advantage will be taken of the Change of User before the sale has taken place, and possibly without any intention of effecting a sale. This will be the case when a private holder of land seeks to develop his land on a residential basis without parting with his interests, or to effect a sub-lease and not to sell his property.

Government propose~~x~~, therefore, that the revised ground rent shall be payable as from the date of the sale, agreement of sale or sublease, or as from the date upon which advantage is taken of the Change of User.

Recommendation (4)

That land rents be subject to revision every 33 years from the date of the grant of Change of User subject to a maximum variation of 100% on each occasion.

The Government, with the approval of the Board of Commerce and Industry, has decided not to adopt the principle of revisable rentals for the following reasons:-

- (a) that it makes for instability if a contract is subject to change during its term, and so discourages development;
- (b) that, for a period, possibly 5 years, before each revision was due, there would be stagnation owing to uncertainty as to the future rental;
- (c) that appreciation in the unimproved site value was due mainly to the efforts of the local community through services provided by the Local Government Authority and not to the efforts of the Crown. The Local Government Authority claims its return through the periodic revaluation for rating purposes;
- (d) that the valuations in this Roll would be subject to challenge on a fairly wide scale during the period preceding the rent revision.

Recommendation (5)

That in all leases in respect of which a Change of User is granted the terms of the lease be 99 years from the date of the grant.

The Government accepts this recommendation.

Recommendation (6)

That normally the assessment of land rent to be made on the grant of a Change of User for industrial purposes be precisely as recommended in the case of residential purposes.

The Government accepts this recommendation, and proposes that it should be applied equally to the grant of a change of user to commercial or business purposes.

4. Government proposes that Change of User to other purposes (e.g. for use as a sports club or to ecclesiastical purposes) shall be on such terms as may be determined by the Governor in Council.

THE SECRETARIAT,
NAIROBI.
8th August, 1951.

R E P O R T

By Government Notice No.214 of February, 1950 it was notified that the Governor had been pleased to appoint a Committee consisting of -

The Special Commissioner of Lands (Chairman)
The Hon.Mr.W.B.Havelock, M.L.C.,
The Hon. Mr.J.G.H.Hopkins, O.B.E., M.L.C.,
A.J.Millar, Esq.,
G.M.Roddan, Esq.,
K.W.S.Mackenzie, Esq.,

with the following terms of reference:-

- (a) To consider and report whether the existing formula whereby the Crown assesses the rent on Change of User -
 - (1) on residential plots at 3%; and
 - (2) on industrial plots at 1% on the difference between the industrial or residential value of the plot on the one hand and the agricultural value plus development charges on the other is wholly appropriate and, if not, to submit alternative proposals.
- (b) To consider and report what items may properly be included in development charges.

2. Mr. F.E.Firminger was later appointed Secretary to the Committee.

3. The appointment and terms of reference of the Committee were advertised in the press and representations to the Committee from the public were invited. As a result memoranda were received from the following:-

W.T.Shapley, Esq., on behalf of the Kibagare Estate.
Messrs. Wheelock and Coates,
The Kabete/Kikuyu District Association,
H.Stanley Hex, Esq.,
The Nairobi Chamber of Commerce,
Alderman G.A.Tyson.

Oral evidence was heard from the following:-

H.Stanley Hex, Esq.,	}	Representing the Nairobi Chamber of Commerce.
W.T.Shapley, Esq.,		
Ald. G.A.Tyson,		
F.W.G.Bompas, Esq.,		
S.Tate, Esq.,	}	Representing the Kabete/Kikuyu District Association).

4. The Committee met on 21st March, 1950, 27th April, 1950, 5th May, 1950, 15th May, 1950 and 17th May, 1950.

5. It is to be observed that the evidence received represented only one side of the question, that of the Crown leaseholders who are, in fact, interested in getting a grant of Change of User on the cheapest possible terms. One witness asserted that any charge

with freehold land was "penalising the leaseholders". The Committee received no evidence from people who have purchased land for residential purposes. It might therefore appear that present land rents resulting from existing practice are not the subject of complaints on their part.

6. The Government's administrative practice in the matter of granting Change of User dates back certainly to 1928 and perhaps earlier. It was confirmed by a Select Committee of the Legislative Council in a Report in 1932. In general, the Government seeks to secure for itself 50% of the enhancement of value resulting from the grant of Change of User. That is to say, the Commissioner of Lands assesses the value of the land for residential purposes, deducts from it the agricultural value plus the cost of development, and imposes a land rent on the newly created residential plot in such a way as to secure the Government a value equal to half the increment brought about by the grant of Change of User. Thus, if a piece of land is considered to be worth £300 as a result of the grant of Change of User, as against an Agricultural value plus the cost of development of £100, the Government seeks to secure half of this increment of £200. It does this by imposing a land rent of 3% per annum on the full increment. The same result would ensue if the rent were assessed at 6% on half the increment. At the time when this practice was formulated 6% was regarded as a proper rate of annual interest to secure the Government's share.

7. This procedure was subjected to a number of criticisms:-

(a) It was argued that, whereas in 1932 in view of the general rates at which money could be borrowed at that time 6% could be regarded as a reasonable rate of interest, this was no longer true for the policy commonly encouraged by Governments all over the world had resulted in much lower rates of interest, particularly since 1945. The Committee found force in this argument; it was shown that the 3% formula might in effect mean that the Government takes 75% of the increment along the lines of the following calculation:-

Value of land after grant of	
Change of User.	£300
Agricultural value plus costs of	
development	£100
Increment	£200
Land rent at 3% = £6 per annum	

Now, £6 per annum capitalised at the ruling rates of interest, say 4%, is equal to a sum of £150, which is 75% of the total increment of £200, i.e., the developer gets £200 and the Government gets a further £150.

On the other hand, it was argued that 75% was not an unreasonable proportion for a community represented by its Government to take from the unearned increment in the value of land near the larger municipalities in view of social developments.

(b) Owing to the restrictions necessarily imposed on the sub-division of plots in various areas by the Public Health (Division of Lands) Board, people are obliged to buy larger residential plots than they need. Thus, if 10 acres is the smallest permitted subdivision of residential land in a particular area, a person who would not wish to buy more than 2 acres for his residence is nevertheless compelled to buy 10 acres if he wishes to reside in that area. There is no suggestion that the limitation of subdivision is in any way a wrong policy; it is in fact dictated by considerations of regional planning and the capacity from the point of view of public health of the necessary services, e.g., water supply, sanitation and roads. But the effect of the regulations on purchasers is to oblige them to pay land rent for a larger area of land than they require. It was represented to the Committee that this is a deterrent to purchasers. Against this argument it might be pointed out that since larger plots naturally fetch lower prices per acre than smaller plots and since the new rent is as a rule assessed on the figure at which the plot is actually sold, the system automatically makes allowance for these considerations. Moreover the purchaser of a large plot acquires the prospect of being able to make further sub-division at a later date, when the inevitable development of services makes this permissible, without any further increase in the total rent of the plot. The Committee on the whole found little merit in the argument that any deterrent element arises from these circumstances but, on the contrary, thought that the present policy would encourage purchasers to make investments in the Colony's development with every prospect of a substantial profit.

(c) It was represented to the Committee that the present land prices are unduly high and would fall so that the Government, by assessing its rents on the present high values, imposes burdens in the shape of future rent much greater than the future value of the land will justify. But the Committee could find no evidence to suggest that residential land values ever show a declining tendency over a considerable period of years. Fluctuations there may indeed be. But, since the potential supply of land cannot be materially increased and the demand for it constantly increases, the trend of land values must in the main be upwards. Furthermore, as land in respect of which a grant of Change of User to residential purposes is sought is invariably land on the boundaries of expanding towns, the possibility of a permanent decline in value is even more remote. It can be argued, moreover, that any reduction in the Crown rents is unlikely to be reflected in any corresponding reduction in the high prices at present being demanded for land. The reverse would indeed be more likely the large leaseholders with land to sub-divide increasing their shares at the expense of the community.

(d) It was said that the present 3% formula, involves three variable and possibly contentious calculations, as follows:-

(1) The assessment of agricultural value.

It might be difficult to put a realistic agricultural value on land which owing to its

sufficient conflict of views of this point to make it clear that it might be difficult for the Commissioner of Lands to arrive at a valuation which would not be subject to dispute.

(2) Development Costs.

Generally, the legitimate development costs to be allowed are held to be more or less confined to the provision of roads and water supplies. Farmers' accounts, we were assured, are not always easy to follow nor exhaustive in their compilation, so that the true cost of development might be hard to determine.

(3) The assessment of the ultimate residential value.

The practice of the Lands Department is to impose the new land rent not from the time of the grant of Change of User, but from the time of the subdivision and sale of plots. The actual sale price, where it is found reasonable, is taken as the residential value and the rent is assessed on that basis. There can consequently be little controversy as to the residential value in these circumstances.

On the other hand, where Crown Lands are granted direct on residential leases the amounts assessed as rents are considerably higher than the rents resulting from the application of the present formula to private leasehold land, but the Government stand premium is very much less than the prices obtained by the present developers.

There was clearly sufficient substance in these criticisms to make it desirable for the Committee to seek an alternative method of assessment. Various schemes were proposed; their essential differences were between some form of flat rate per plot or some form percentage of value.

8. In the past, it was pointed out, the Government had sometimes imposed a flat rate as the land rent irrespective of the size of the plot concerned. Thus, in Spring Valley a rate of 72/- had been imposed on all plots, though the size of the plots varied from $2\frac{1}{2}$ to 10 acres. This practice however dated from a time prior to 1928 and has not been followed since the Select Committee of 1932. It was argued that a purchaser is obliged to buy what is offered, and what is permitted by the Public Health (Division of Lands) Board, and that a flat rate per plot would iron out any differences arising either from official regulations or from the strength of the present sellers' position. (It will be observed that it would also have the effect of ironing out any appreciable participation by the community in the enhancement of land values). Even if the flat rates were such as to secure the interest of the community which the Government represents, the underlying principle is open to

certain objections.

9. In the first place, in the case of all subdivisions subsequent to the grant of Change of User, the Government would have to intervene on each occasion to impose the continuing flat rate on each subdivision. Thus, in an area where subdivisions of 10 acres are now permitted, it is reasonably certain that the Colony will develop through stages at which further subdivisions of 5 acres, and later no doubt, of one acre, will be allowed. If a flat rate of say, 200/- per annum per plot were to be charged, the first subdivision to 5 acres would result in two rents being collected where one was formerly paid. A later subdivision to 1 acre would result in ten rents of 200/- being collected from a piece of land formerly valued at 200/- as a whole. The likelihood of protest at apparently inequitable rents at the actual moments of these later subdivisions cannot be lost to sight. It may be said that those who put forward this point of view acknowledge that the Government is entitled to a substantial share in the increment arising from the grant of Change of User, but seeks to postpone the time at which the Government's share would become available until final subdivision has taken place. It would also have the effect of allowing the present leaseholder to secure almost the whole of the initial increment on Change of User and of imposing larger proportionate burdens on the purchasers of the smallest subdivisions who may be supposed to be the poorest persons concerned in the history of the particular plot and the least able to support such charges.

10. The Committee found some confusion of thought to exist amongst witnesses between the grant of a Change of User and the grant of permission to subdivide. In fact, the two are profoundly different. Permission to subdivide depends on the availability of services considered adequate by the Public Health (Division of Lands) Board. No other considerations apply in this case. But where an application is made for a Change of User the position is that the leaseholder seeks to alter his contract with the Crown. He possesses a lease in respect of land which the Crown granted him for the purposes of agriculture, and he is charged a ground rent which reflects the Government's policy of encouraging agricultural development by all means. The leaseholder who wishes to change his user so that he can now put his land to residential purposes, abandons altogether those former considerations in respect of which his rent was assessed. Clearly a new contract must be drawn up. At this moment the Crown may intervene effectively to secure for the community a value appropriate to this use, but once a grant has been made which recognises that the land is now leased for residential purposes, the detail of the manner in which those residential purposes should be pursued rests on entirely different considerations. The continued intervention of the Crown by way of re-assessing ground rents as smaller and smaller subdivisions are permitted and the land consequently becomes more and more valuable, if it is done at all, could only be done on the basis of its having been provided for by the covenant in the grant of these interventions might be held

of the land. Here again, the door would seem to be opened not only to litigation, but to continued representations, such as have brought the present Committee into existence, that the attitude of the Crown was unfair. The Committee does not believe that either the wish or the convenience of the general public, as opposed to the present leaseholders who are seeking grants of Change of User, would be met by these continual re-assessments. On the contrary, the Committee feels that when a Change of User is granted, the Commissioner should assess the value of the land once and for all over a long period and fix the rent for a period at any rate not less than 33 years. We therefore rejected the idea of a flat rate which should continue to be re-imposed on each subdivision not only because a flat rate cannot possibly be equitable at all points in the scale but because the considerations inserted into a grant of Change of User in respect of later subdivisions would constitute a departure from normal practice which it might not be easy to uphold.

11. Other witnesses sought to urge the imposition of a nominal rent of the nature of 10/-, 20/- or 30/- as a flat rate once and for all, not to be re-imposed on further subdivisions but to be divided pro rata with the land. There were two lines of argument in support of this of which the first consisted of the broad view that the Government was not entitled to any share in the incremental value. This was put forward by those who were unprepared to accept that the Government represents the community and that the increase in value arises largely as a result of the efforts of the community which is thereby entitled to share. Moreover, this view takes no account of the fact that the agricultural use, on which the Government places so high a value to the community as to impose a very low land rent, is now to be lost to the community. The Committee saw no reason why the whole of the increased value should accrue to any individual leaseholder as would be the case if a nominal ground rent were to be charged.

12. It was also argued that the imposition of a higher ground rent would make the land more expensive to the purchaser. If there is truth in this argument, it is a surprising criticism of the land-buying public and its professional advisers. Leasehold land, in respect of which alone a Change of User is required, sells on the open market in competition with freehold land. The effect of the imposition of a ground rent, therefore, is that the purchaser in addition to paying the purchase price, acquires a continuing liability to pay a ground rent, which would not be the case in respect of freehold land. It seems to the Committee self-evident, therefore, that a purchaser of leasehold land would not give more for it than he would for freehold land, but that on the contrary he, or the advisers he employs in the transaction, would make some such calculation as the following:-

Price of comparable freehold land	£500
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Ground rent to be paid in respect of leasehold plot per annum - £5	
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Capital value of £5 at 4%	=	£125
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Value of leasehold land = £500	
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minus £125	or	£375
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13. It is true that this procedure has the effect of lessening the value of leasehold land as compared with freehold land, and the suggestion that this is unfair constituted the basis of the second line of argument in favour of the imposition of a nominal rent. The facts are however, as is common to all communities in a state of rapid development, that at the time when original grants of land were made it was beyond normal human foresight to foretell the nature and shape of the development in detail that has since taken place. Freeholds were granted which might not have been granted had all the future been known. This does not appear to constitute a valid reason for abandoning what still remains - the share in the increment on leasehold land.

14. The Committee turned to the consideration of the suggestion that the best basis for the estimation of land rent would be a percentage on the agreed residential value of the land in respect of which a Change of User was granted. The Committee agreed that it was impracticable to arrange for continuing re-assessments on further subdivisions and that, if a percentage on the residential value is to be considered, the percentage will be fixed in the first place once and for all irrespective of subsequent subdivisions. The adoption of such a system would mean that there would be only one factor regarding which dispute could arise instead of three as in the present system.

15. The Committee was much indebted to Mr. Stanley Hex for the suggestions he made in this matter. Mr. Hex urged that any satisfactory formula for the assessment of ground rent must meet the following conditions:-

- (1) The Crown must retain a reasonable proportion of the enhancement in value resulting from the grant of Change of User.
- (2) There should be no burden on poorer persons.
- (3) The formula must be non-controversial in application.
- (4) The transaction should be capable of easy recording and should be foolproof.

16. The Committee fully accepted all these propositions. It has been seen that the formula on which present administrative practice is based is open to the objections that it now takes more for the Crown than the Crown set out to secure in the 1930's and that it is likely to be controversial in application. The Committee fully accepted the second criticism and recommended that in future the assessment of residential value should normally be, as it is now in administrative practice, on the actual sale price, and therefore beyond all controversy. It was suggested that this would open the door to fraudulent or doubtful transactions by which land would be sold at a fictitious low figure for the purposes of the Change of User so as to ensure a negligible

ground rent, and then later sold again at its true value. It is reasonable to assume, however, that the Lands Department would be able to detect such transactions through its ordinary routine examination of all land sales, and the Committee therefore employs the formula "agreed residential value" to ensure that the price is genuine and approved by the Commissioner of Lands.

17. The first criticism of the existing formula, that it takes more of the increase in value for the Crown than was aimed at in the 1930's is admitted to be valid as far as it goes. It is, however, open to argument whether 50% of the increase, in present conditions, is a sufficient share to be reserved to the community.

18. WE RECOMMEND THAT -

- (1) On the grant of a Change of User, the land rent be assessed as a percentage of the agreed residential value of the plot.

The Committee found very great difficulty in agreeing on an appropriate percentage which the Government should take as land rent on the agreed residential value. After lengthy discussion it agreed, by a majority, that the assessment should be at 1% of the agreed residential value of the plot. The Committee is advised that the Special Commissioner of Lands believes, from his knowledge of transactions over the past few years, that a rent of 1% on the residential value would have the effect of securing a share of the enhancement in value only slightly less than the Select Committee of 1932 contemplated.

AND SO WE RECOMMEND -

- (2) That land rent after the grant of a Change of User be assessed as 1% of the agreed residential value of the plot.

We have said that present administrative practice is to impose the new rent on the sale of the land as residential plots. The advantage of this system are, on the side of the Government, that there is a considerable saving in administration; on the side of the leaseholder there is a saving resulting from the fact that stamp duty is only charged once on the full transaction - the grant of the Change of User and sale of the plot. The Committee found that the disadvantages outweigh the advantages in the imposition of the new rent from the time of the grant of Change of User whether subdivision and sale follows immediately or not. It was thought that the developer, now obliged to pay the full residential ground rent on all his subdivisions whether they were sold or not, would dispose of them as quickly as possible. This seemed like to have a tendency to keep land prices lower, which the Committee thought desirable. The disadvantage, however, lies in the fact that the "agreed residential value" would become a matter of speculation and controversy. After considerable thought, the Committee decided that the present practice should be continued.

AND WE THEREFORE RECOMMEND THAT -

- (3) Revised ground rent become payable from the time of the sale of each subdivision.

As land is further subdivided the rent is also divided pro-rata with the land the Crown will be obliged to collect rents from a greater number of leaseholders. It is clearly not worth while if the ground rent in respect of any one plot is too low. This is already provided for in the Crown Lands Ordinance which lays down a minimum ground rent of 10/- per annum and the Committee sees no reason for altering this.

We have formed the opinion that it is best in the interests of all concerned to state clearly what the rent is to be for as long a period as possible. Increases in the value of the land which can be hoped for or actually foreseen at the time of the grant of Change of User will inevitably be reflected in the selling price of the land and consequently in the rent. Unforeseeable increments cannot, of course, be so reflected. Whilst, therefore, the purchaser must be given the maximum certainty possible, the Crown must on the other hand be protected against the situation in which its reasonably assessed rents become, in the course of time, no more than peppercorn rents as a result of inflationary changes in the values of currency or for other reasons.

WE RECOMMEND -

- (4) That land rents be subject to revision every 33 years from the date of the grant of Change of User subject to a maximum variation of 100% on each occasion.

Residential leases are for 99 years. Agricultural leases may be for 99 or 999 years. On the grant of Change of User at present in respect of farms held on a 99 year lease the practice is to grant the new lease for the period of 99 years less the number of years for which the old agricultural lease was in force. This may well result in a balance of only some 50 or 60 years remaining unexpired.

WE THEREFORE RECOMMEND -

- (5) That in all leases in respect of which a Change of User is granted the terms of the lease be 99 years from the date of the grant.

The Committee believes that these proposals are in harmony with the four principles which were suggested as fundamental to any agreed formula. It will be seen that the share of the Crown in the enhanced value resulting from the grant of Change of User has been reduced and the general procedure has been greatly simplified to the benefit of all concerned by the elimination of controversial calculations as to original agricultural values or development costs.

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The Committee found no reason to think that grants of Change of User for industrial purposes should be subjected to any different treatment. We believe that "agreed industrial value" would normally reflect all the considerations which ought to be taken into account, and that 1% on this value would represent a proper share to be taken in the form of rent. We make this recommendation in the full knowledge that in suitable cases, such as factories ancillary to the purposes of agriculture, the Governor-in-Council is able to make ad hoc decisions as to the rent to be charged.

WE THEREFORE RECOMMEND =

- (6) That normally the assessment of land rent to be made on the grant of Change of User for Industrial purposes be precisely as we have recommended in the case of residential purposes.

The nature of our recommendations makes it unnecessary to consider our second term of reference.

E.R. COUSINS

CHAIRMAN

A.J. MILLAR

MEMBERS

G. M. RODDAN

W.B. HAVELOCK

K.W.S. MACKENZIE

F.E. FIRMINER
SECRETARY