BRIEFING

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A LEGAL GUIDE FOR GARDEN COMMITTEES

Garden Committees in the Royal Borough of Kensington and Chelsea

INTRODUCTION

Since 2004, Robert Barham (formerly of Pemberton Greenish but now at Forsters) has acted as adviser to the committees which manage private garden squares in the Royal Borough of Kensington & Chelsea under a scheme set up by the Council. Under the scheme the Council pays for or subsidises legal advice to garden square committees to assist them in their role in managing their gardens and any legal issues that arise in respect of that. This guide is intended to give general guidance to garden committees on those legal issues and summarises some of the experience gained during the period that the scheme has operated. It is intended to be a general guide to the law and the information provided may not be relevant in every case. It may, therefore, be necessary for garden committees to take separate advice depending on the circumstances.

This guide applies specifically to those garden squares in the Royal Borough where Council Tax payers pay a precept for the management and upkeep of the garden and does not, therefore, apply to the many other private or public gardens in the Royal Borough which are either owned privately or are managed outside of the statutory schemes.

1. THE LEGISLATION

There are two Acts of Parliament which are relevant to the statutory schemes and the list of gardens currently managed under each scheme is set out in the boxes below.

1.1 Kensington Improvement Act 1851

This Act of Parliament was enacted specifically in relation to gardens within the former parish of St Mary Abbotts Kensington. At that time, the parish covered much of the Royal Borough and was a much larger area than the current Church of England parish of St Mary Abbotts.

The Act consolidated a number of previous local Acts and was also concerned with matters other than the maintenance of gardens in the Borough. Originally extending to some 61 sections much of the Act has over the years been repealed, and now only 16 sections survive, some of which have been amended from the original wording. A summary of the extant sections is available through the Royal Borough of Kensington and Chelsea's (RBKC) website. There are currently 37 Gardens in the Borough.

Garden square committees formed under the Kensington Improvement Act 1851:

- Addison Gardens
- Arundel Gardens and Ladbroke
- Avondale Park Gardens
- Barkston Gardens
- Bina Gardens (West)
- Bolton Gardens
- Bramham Gardens
- Brompton Square
- Campden Hill Square
- Campden House Court
- Clarendon Road and Lansdowne Road
- Collingham Gardens
- Cornwall Gardens
- Courtfield Gardens (East)
- Courtfield Gardens (West)
- Earls Court Square
- Edwardes Square
- Gardens
- Gledhow Gardens
- Hereford Square
- Holland Park Gardens
- Holland Road and Russell Road
- Hornton Street and Holland Street
- Iverna Court
- Kensington Square
- Lexham Gardens
- Moreton and Cresswell Gardens
- Nevern Square
- Norland Square
- Ovington Square
- Pembridge Square
- Philbeach Gardens
- Royal Crescent
- St James's Gardens
- Stanley Crescent
- Stanley Gardens (North)
- Stanley Gardens (South)
- Sunningdale Gardens
- Wetherby Gardens

1.2 Town Gardens Protection Act 1863

This Act was enacted in order to permit residents in garden squares to take over the management of a garden square where the freeholder or owner had failed to do so, and the garden had fallen into disrepair. It is a national piece of legislation and, therefore, does not just apply in the RBKC. As with the 1851 Act, parts of the Act have been subsequently amended or repealed. It is a much shorter document than the 1851 Act and extends only to 8 sections. A copy of the sections as they currently stand is also available through RBKC's website. There are nine gardens in the RBKC under the 1863 Act and these are all in the northern part of the Borough in the area which was not originally included within the parish of St Mary Abbotts.

Garden square committees formed under the Town Gardens Protection Act 1863

- Arundel Gardens and Elgin Crescent
- Blenheim Crescent and Elgin Crescent
- Emperor's Gate
- Hanover Gardens
- Ladbroke Grove
- Lansdowne Gardens
- Lansdowne Road and Elgin Crescent
- Montpelier Gardens
- Notting Hill

References in this guide to the "1851 Act" or the "1863 Act" are reference to the above Acts as appropriate.

2. THE ROLE OF GARDEN COMMITTEES

2.1 Composition of garden committees

The 1851 Act contains some detailed provisions about garden committees and subcommittees whereas the 1863 Act contains almost nothing on the subject.

Under the 1851 Act the garden committee comprises all those liable to pay council tax at any dwelling in the square and who have been resident in the square for at least a year together with the owner of the square himself. It is recognised that day-to-day management could not be left with such a potentially large group of people and therefore the 1851 Act goes on to provide for the creation of sub-committees which can consist of between three and nine inhabitants of properties in the square.

Under the 1863 Act, there is no provision for sub-committees and the Act simply refers to a committee which must consist of not more than nine or fewer than three of the inhabitants of the houses surrounding the square who are liable to pay council tax.

[*Section 43 of the 1851 Act*]

2.2 Calling meetings

The 1851 Act sets out specific procedures for calling meetings of the garden committee. Once a sub-committee has been created the procedure is that full meetings may be called by any five of the members of the sub-committee who must give at least seven days' notice of a meeting.

Notice of the meeting must be affixed to all the gates and every entrance to the garden but there is no obligation to circulate notice of meetings to all the residents of the properties surrounding the garden at their own addresses. If these procedures are not rigorously complied with any decision made at the relevant meeting will be invalid.

In order to form a quorum there must be at least three residents of the garden present at the meeting, whether or not members of the sub-committee, and each member has one vote whether or not they are members of the sub-committee. The chairman has a casting vote. Proper minutes should be kept of all decisions of the garden committee.

There is no formal procedure for calling sub-committee meetings prescribed by the 1851 Act. However normal practice would be for all members of the sub-committee to be given notice either in writing or by email.

The 1863 Act contains no specific provisions on meetings but it would be sensible for an Annual General Meeting to be advertised to residents in the same way as a full committee meeting under 1851 Act and for notice of regular committee meetings to be given to committee members in writing or by email as for sub-committee meetings under the 1851 Act.

[*Section 44 of the 1851 Act*]

2.3 Powers of the garden committee

Under the 1851 Act the full garden committee has the following powers:

- Appointment of a sub-committee.
- Removal of a sub-committee.
- To convene meetings of a sub-committee.
- To decide the total amount of money to call for from the RBKC in any one year.
- To issue an order for payment to the RBKC.
- To make and revoke or alter garden bylaws.

The first five of these matters can only be dealt with by the full garden committee and cannot be delegated to the garden sub-committee. Therefore, these matters will need to be dealt with at the Annual General Meeting of the garden committee or an Extraordinary General Meeting. The power to make, revoke or alter bylaws may be delegated to the subcommittee although in practice garden committees would ask any amendment to the bylaws to be sanctioned by an Annual or Extraordinary General Meeting.

1851 Act sub-committees are responsible for the maintenance, order, repair, management and regulation of the garden. These matters are generally dealt with at sub-committee rather than full committee level. The 1863 Act does not specify any particular matters to be covered at a meeting other than for making revoking or amending garden bylaws.

In practice however, most 1863 committees will divide up responsibilities along the lines set out in the 1851 Act with an Annual General Meeting to approve budget and funding requests with general maintenance matters being dealt with by normal committee meetings.

[*Sections 45-47 of the 1851 Act*]

2.4 Conduct of meetings

The Acts contain relatively few provisions about the conduct of meetings. The 1851 Act provides for the appointment of a chairman whether of the full committee of a subcommittee meeting and once a chairman is appointed he or she has a casting vote in the event of a tied vote. There is no equivalent provision in the 1863 Act. Without specific provisions it is only possible to apply general principles. Minutes should be kept of all meetings and should be made available to those present and to others on request. Voting will generally be by show of hands but there is no reason why a secret ballot could not be agreed on specific matters. Similarly there are no provisions for proxy votes but in practice some garden committees have adopted the principle of voting by proxy and there is no reason why this is prohibited if it has been agreed in principle by the relevant committee. There is some debate as to whether each person attending a general meeting should have one vote or whether it should be one vote per household responsible for the payment of council tax. There is no definitive view on this. We believe the better approach is for there to be one vote per household which we think is more likely to have been what was intended when the Acts were passed.

[*Section 44 of the 1851 Act*]

2.5 Rights and duties of a garden committee

The specific rights and duties prescribed in the Acts are referred to above but a more general list is set out below (in this case making no distinction as to whether this is to be fulfilled by the committee or the sub-committee, if present):

- To maintain the garden and everything in it.
- To hold regular meetings of the committee or sub-committee.
- To make, amend and enforce bylaws for the proper regulation of the garden.
- To set a budget for the expenditure on maintenance of the garden and to submit that budget to the RBKC.
- To account for funds received from the RBKC and to ensure the garden funds are properly spent on the needs of the garden.
- To regulate access to the garden and the issuing of keys to residents and others entitled to use the garden.
- To ensure that the garden and everything in it complies with relevant health and safety law and guidelines. This particularly applies to any play equipment in the garden.
- To take out public liability insurance to protect themselves against claims brought by users of the garden.
- To ensure regular inspection of trees and any other items in the garden likely to cause injury to users of the garden or damage to properties surrounding the garden.
- To preserve the physical integrity of the garden and to protect it from encroachment and unauthorised uses.

Note that not all of the above are statutory obligations imposed by the Acts but some relate to other legislation and regulations generally imposed upon those responsible for the management of property.

2.6 Removal of officers or committee members

Neither of the Acts contains any specific procedure for the removal of any of the nominated officers of the garden committee, any member of the committee nor indeed the entire sub-committee.

However, this can be achieved by calling a meeting of the general garden committee since it is this committee that has power to appoint a sub-committee or (in the case of the 1863 Act) committee members. The meeting would then simply appoint new members who would take over from and replace the existing officers and committee members. Provided the meeting was called correctly and all the correct procedures were followed the incumbent committee or its members could not refuse to stand down in those circumstances.

3. GARDEN OWNERSHIP

All garden squares have a freehold owner although surprisingly the identity is not always known.

Generally, the ownership of gardens which are managed under the Acts falls into three possible categories; those which have a known and registered external owner, those that are held by trustees who are in some way linked with the garden committee that run the garden and finally those where the freehold owner is not known at all. It is relatively easy to find out into which category a particular garden falls by carrying out an index map search at HM Land Registry.

This will reveal the title number and the name of the owner if the garden has a registered title and from that it will be easy to determine whether the garden falls within the first group or the second. If however there is no registered title, and title remains unregistered, then it is likely that the garden falls in the third category.

3.1 External freehold owner

It is relatively uncommon for a garden to have a registered freehold owner who is not in some way linked with the garden committee or at least is not an owner of a property in the garden square. Where this occurs, there can however be some confusion about the respective rights of the freehold owner and the garden committee. As noted elsewhere in this document, it is the garden committee that is given power under either the 1851 or 1863 Acts to manage the garden and in many respects the committee replaces the freeholder and takes over rights that would normally belong to a freeholder. For example, the 1851 Act is quite specific that everything in the garden including the trees, plants, structures, railings and anything constructed on it actually belongs to the garden committee. In effect therefore, the freeholders' rights extend only to ownership of the subsoil of the land.

The 1851 Act is however quite specific in saying that the rights of the freeholder to use the garden are unaffected by the Act and it is clear that the freeholder can use the garden even if he or she is not a resident of one of the properties surrounding the garden. The position is less clear in relation to those who have been granted rights to use the garden by the freeholder.

The 1851 Act specifically states that those who have already been granted rights continue to enjoy those rights but what is more questionable is whether the freeholder can subsequently grant rights to others once a garden has been taken under the management of the Acts.

There is no clear answer to this question and on occasions when it has been raised it has not been possible to give a definitive answer. Some garden committees are not prepared to issue keys to people authorised to use the garden only by the freeholder or have limited the number of keys issued to a freeholder to a relatively small number. The position is unresolved but hopefully common sense will prevail and a working arrangement will be agreed between the freeholder and a garden committee if and when this does arise.

HM Land Registry has agreed that it is possible for a garden committee to register a note against the title to a garden square to indicate that the garden is administered under the 1851 Act. Without this note it would not be obvious from a reading of the title. The purpose of the note is to bring to the attention of anyone interested that the garden is governed by statute and that the relevant party to contact in relation to the management of the garden will be the garden committee rather than the freeholder. The agreed wording of the note that HM Land Registry will be prepared to enter is as follows:

"There are excluded from this registration all structures and items expressed to be invested in [ ] Square Garden Committee in accordance with section 49 of the Kensington Improvement Act 1851".

Although this refers specifically to ownership of items it does in affect also draw attention to the development and management provisions in the 1851 Act. For any garden committee that runs a garden where there is an external freehold owner we would recommend that such a note be added to the freehold title to the garden registered at HM Land Registry.

3.2 Gardens owned by trustees connected with the garden committee

It is relatively common for the garden to be owned by a trust that has been set up specifically for that purpose. In many cases, this arises from the breakup of some of the family estates which own land in Kensington such as the Gunter estate and the Phillimore estate. When those estates had sold most of their properties surrounding garden squares, they generally sought to transfer the freehold to a group of residents who in many cases paid a premium to acquire the garden.

Typically, title was transferred to up to four trustees (the maximum number of owners that can be registered at HM Land Registry) and a declaration of trust was entered into to govern the ownership and use of the garden. Generally, the trustees hold the land on trust for all of those who are entitled under the 1851 or 1863 Acts to use it so that the class of beneficiaries fluctuates constantly as people come and go from houses surrounding the square. Whilst this is a generally satisfactory arrangement care needs to be taken to ensure that trustees resign and are replaced when they move out of the square or die. We have seen cases where this has not been dealt with for 30 or 40 years creating a considerable problem when it comes to the appointment and registration of new trustees.

"CARE NEEDS TO BE TAKEN TO ENSURE THAT TRUSTEES RESIGN AND ARE REPLACED WHEN THEY MOVE OUT OF THE SQUARE OR DIE."

Whilst it is possible for residents to set up a company to own the freehold of the garden this approach has generally not been favoured in respect of gardens administered under the two Acts. It is however relatively more common for gardens which lie outside the RBKC or are not covered by the Acts. There are some benefits to arranging a company but the main disadvantages are that the company needs to ensure that it keeps up to date with its filings at Companies House so as to avoid being struck off the register and that owners of properties forget to transfer their shares when they sell their properties.

3.3 Gardens with unregistered titles

Several of the gardens managed under the Act do not have a registered title. This is because no one has come forward to claim title and to seek to register it at HM Land Registry. While it is just possible that the owner may be known and has just not got around to registering title yet, that is now unlikely since it has been compulsory for titles to be registered on any change of ownership for many years. The more likely explanation is that no one actually knows who owns the garden and no one is in a position to claim documentary title to it.

"A MAP OF REGISTERED TITLES IN KENSINGTON SHOWS THAT NEARLY ALL OF THE MAJOR GAPS IN REGISTRATION RELATE TO GARDEN SQUARES."

This may be because the families or companies that originally laid out garden squares sometimes simply failed to deal with the freehold title to the garden itself and consequently ownership became "lost" probably towards the end of the 19th or in the early part of the 20th century.

A more satisfactory position would be if it were possible for the garden committee itself to claim title to the garden. HM Land Registry has stated its aim to try to complete the register of title in England and Wales so far as possible. If one looks at a map of registered titles in Kensington, nearly all of the major gaps in registration relate to garden squares. We are therefore hoping to persuade HM Land Registry that it should agree to register title to unregistered gardens in the name of the relevant garden committee and that to do so would not prejudice anyone. Clearly if someone did come forward with a documentary title then that would overrule the possessory title that might be registered by a garden committee. This project is ongoing.

4. RIGHTS OF ACCESS TO THE GARDENS

4.1 Statutory rights under the Acts

Under both the 1851 and 1863 Acts, it is the RBKC which decides which properties' owners and occupants have rights of access into garden squares.

The simplest way for a resident to determine whether they have access is to check whether they pay a precept for the maintenance of the garden as part of their annual Council Tax. The precept will appear as a separate line on the Council Tax bill. This generally provides a simple way for someone purchasing a property in a square to check whether, once they have completed the purchase of their flat or house, they will be entitled to access to the garden.

The 1851 Act is specific about who has a right to use a garden square and specifies that there are three classes of persons. First, the owner of the freehold of the garden square itself, secondly, those to whom the owner has specifically granted rights and thirdly the occupiers of the houses in and encompassing the square.

It provides guidance as to which properties are to be included and states that every house or building, the front or side of which faces or forms part of the line of the square, shall be deemed to be wholly situated within the square even if the Property may face another street.

[*section 42 of the 1981 Act*]

The interpretation of this section was considered in detail in the High Court case of Hermann v Royal Borough of Kensington & Chelsea and Ovington Square Garden Committee and Wainwright [2010] – see box.

It is the occupiers of the properties in the squares who are entitled to access and for this purpose that means those who have a right to use the house or flat in the square either as freeholders, long lessees or as tenants with a tenancy of a year or more. Tenants who have tenancies of less than a year are, therefore, excluded but their landlords are included. The situation is further complicated in respect of certain squares which are covered by a proviso to section 51 of the 1851 Act. This relates to gardens that are governed by various Acts of Parliament that were repealed with the 1851 Act and covers the following gardens:

- Brompton Square
- Earls Terrace
- Edwardes Place
- Edwardes Square
- Kensington Place East
- Kensington Place West
- Leonard Place
- Norland Square
- Royal Crescent
- St James's Gardens

Case Report Herrmann v Royal Borough of Kensington and Chelsea (2010)

Mr and Mrs Herrmann purchased 37 Ovington Square and were told by their advisors, Withers LLP, at the time of the purchase that the property should enjoy rights to use the garden in Ovington Square.

When they subsequently applied to the garden committee for a key they were told that the property was not on the list of properties in Ovington Square and that they were not entitled to a key. The reason for this is that 37 Ovington Square is on the road leading into the square but the property itself does not face the garden. The garden committee said that they were unable to provide a key in accordance with the 1851 Act but they were prepared to provide Mr and Mrs Herrmann with access to the garden under the provisions of the Open Spaces Act 1906. On that basis the Herrmanns were offered the right to use the garden for 50 years for a one-off premium of £25,000 which would be paid to the garden committee and utilised for the maintenance of the garden. The Herrmanns rejected this proposal and instead decided to sue for the right of access. Initially action was threatened against the garden committee itself but it was agreed that the correct party to take action against was the RBKC because it is the RBKC that determines the list of properties which enjoy rights to use a square in accordance with the 1851 Act.

The case was heard in the high court in June 2010 and involved detailed analysis of the wording of the 1851 Act, in particular Section 51 which determines the properties that have rights of access.
The judge held that because 37 Ovington Square did not face onto the garden it correctly did not enjoy rights under the 1851 Act and he was therefore unable to make the declaration that the Herrmanns sought.

The Herrmanns accepted that they did not have rights to use the square but decided to pursue a separate action against their advisers which led to a further high court case heard in February 2012 (Herrmann v Withers LLP). In that case the advisers were held to have been negligent in saying that the property had rights of access to the garden but consideration was also given to the offer made to the Herrmanns by the garden committee under the Open Spaces Act 1906 which they had rejected.

The case is important primarily because it determines that it will be the RBKC that is the relevant party to determine which properties enjoy access to a garden square under the 1851 Act (and by implication the 1863 Act) and that this is not a matter for the garden committee. This is consistent with the role of the commissioners referred to in the original wording of the 1851 Act, the commissioner's role subsequently having been taken over by the RBKC.

In those cases, it is the persons responsible for paying the Council Tax precept who enjoy access. Therefore, except in the case of these gardens it is not necessarily conclusive that an obligation to pay the precept will provide a right of access to the garden although there are likely to be relatively few cases where there is a differential between the occupier and the Council Tax payer.

The 1863 Act is less specific and refers only to the owners and occupiers of the houses surrounding the garden. It would, therefore, seem that anyone who actually occupies a house or a part of it fronting the garden whether under a freehold, a long leasehold interest or a tenancy can enjoy relevant rights to use the garden. Payment of the Council Tax precept is not, therefore, a requirement but will, of course, provide good evidence that the payer is resident and that the property is considered to be located in the garden.

[*Section 51 of the 1863 Act*]

4.2 Owners not enjoying rights

It is considered that businesses, schools, hotels and other institutions which occupy properties in garden squares do not enjoy rights of access to them. The wording of the 1851 Act is not absolutely conclusive in this regard but it is clear from the overall scheme of the Act that it was never intended that business occupiers should enjoy rights under the Act to use the garden. Specifically, there is no mechanism in the Act for business users to pay a precept for the maintenance of the garden and it seems unlikely that it could have been intended that business users

would be entitled to use the garden if they were not required to pay for its upkeep. This has always been the interpretation of the RBKC and there is no example in the RBKC of business users enjoying rights pursuant to the 1851 Act.

The 1863 Act is more specific in this regard in that it makes reference to "inhabitants" rather than "occupiers" (as in the 1851 Act) and, therefore, the qualification for enjoying rights is to actually live in the square. It is, therefore, certain that business users do not enjoy rights under 1863 Act.

4.3 Grant of rights by garden committee

It is possible for garden committees to grant rights to persons who do not enjoy statutory rights under either the 1851 or 1863 Acts. This is by virtue of a third piece of legislation, the Open Spaces Act 1906. That Act states that a garden committee can admit other persons to have access to the garden and gives the committee power to regulate the admission of those persons on such terms as the committee thinks proper. Generally this will be on the basis of some form of licence fee and typically would be an annual payment.

If such an arrangement is entered into then it will be separate from the precept scheme operated by the RBKC and the fee must be collected by the garden committee independently from the precept.

It may also be possible for garden committees to enter into longer term arrangements particularly where they also control or have a connection with a trust which holds the freehold of the garden for the benefit of the residents or where there is no known garden freeholder.

In practice, several gardens do use these rights either to enhance their annual income so as to subsidize the amount they need to collect from residents or to pay for specific improvements to the garden. In at least one case, substantial capital sums have been raised through the grant of long-term licence arrangements in order to pay for specific improvements to the garden such as the installation of new railings surrounding the garden.

These provisions apply to gardens operated under both the 1851 and the 1863 Acts.

[*See section 2(1)(d) of The Open Spaces Act 1906*]

5. GARDEN RULES AND BYLAWS

5.1 Drawing up garden rules

The 1851 Act contains specific provisions for the drawing up and enforcement of garden rules or Bylaws. The garden committee or the sub-committee has power to make bylaws for the proper management of the garden and for the preservation of the trees, shrubs, plants, rails, gates, seats, summer houses and other things in it. These rules must be approved by the full garden committee or the sub-committee and must be entered into the minute book and must be signed by the chairman of the meeting. Any amendment, replacement or revocation of the Rules must be dealt with in the same manner. While the 1851 Act seems to permit a sub-committee to make or revise garden rules by itself, our recommendation is that this being an important matter, it is considered by a full meeting of the whole garden committee (that is all residents entitled to attend) at either the garden committee's annual general meeting or an extraordinary general meeting.

The 1863 Act contains the same wording save that, of course, in the case of the 1863 Act there is no procedure for the formation of sub-committees.

Once drawn up garden rules must, in order to have legal effect as bylaws, be sanctioned by the court (see below) and it is customary for the rules (or a summary of them) to be displayed at the entrances to the garden (or be made available through the garden's website if it has one). There is actually no legal requirement that the rules be displayed in this manner.

5.2 Approval of the rules by the court

Both the 1851 and 1863 Acts require the rules to be approved or "allowed" by a Judge in order for them to have legal effect. The relevant Judge is the Recorder of Kensington & Chelsea who sits at Isleworth Crown Court and who is generally prepared to sanction the rules on an application made by or on behalf of a garden committee. Once the rules have been allowed in this way, they become local bylaws which are enforceable through the criminal courts. The 1851 Act specifies that a breach of the rules is punishable by a penalty not exceeding £5 whereas under the 1863 Act the penalty is not to exceed level 1 on the standard scale (currently a maximum fine of £200).

The 1863 Act includes a further specific offence of injuring the garden including throwing rubbish into it, damaging it and trespassing for which the penalty is a fine not exceeding level 1 or imprisonment of up to 14 days. This offence could be prosecuted even if no bylaws are in place.

It is, therefore, important that garden committees ensure that their garden rules are allowed by the court. This should be done every time they are amended or updated however small the update. The procedure is relatively simple and we can assist garden committees in making the relevant application to the court. No court fee is payable and the matter is dealt with by the judge in chambers (in other words no hearing is necessary).

5.3 Enforcement of bylaws

Where bylaws have been allowed by the court (or in the case of the 1863 Act, there is a breach of the specific penalties) the garden committee (or anyone else interested) can, at least in theory, enforce the bylaws through the criminal courts. There is some debate whether this is a criminal or a civil matter and, since there are no reported cases, it is difficult to determine this for certain. But since the bylaws are approved by a criminal court and the penalties imposed are by reference to the criminal code we conclude it must be a criminal matter.

On the basis it is a criminal matter it is potentially a matter for the police but it is unlikely that the police are going to be interested unless some other crime has been committed. It, therefore, seems likely that a private prosecution would need to be brought in a magistrates' court. While there are instances of such prosecutions being brought or threatened we are not aware of any actual convictions. However, it is not the fine that would concern offenders but rather the possibility that they might obtain a criminal record, something that they would be keen to avoid. In practice, warning letters from the garden committee, perhaps followed up by further letters from solicitors instructed on their behalf, ought to procure compliance with the rules.

"IT IS NOT THE FINE THAT WOULD CONCERN OFFENDERS BUT THE POSSIBILITY THAT THEY MIGHT OBTAIN A CRIMINAL RECORD"

6. GARDEN FINANCES

6.1 The garden precept

As will have been seen from Section 2 above, one of the principal duties of the garden committee is to draw up a budget for the forthcoming financial year commencing in April each year. This budget must then be presented to the RBKC in advance of the start of the year for approval by the Revenues Policy and Control section of the RBKC.

From April 2020 RBKC have required a copy of the previous year's accounts to be submitted together with the budget. The RBKC may query the budget, particularly if it indicates a substantial increase from a previous year but are likely to approve it as drawn if it appears to be reasonable.

The amount of money specified in the budget will then be raised from council taxpayers by way of a precept charged through their council tax. The RBKC will work out a fair split based on council tax bandings and the number of residential units benefiting from the use of the garden. The amount specified in the budget is then paid over to the treasurer of the garden committee by the RBKC in instalments.

The payment is independent of the collection of the precept so a refusal by residents to pay a precept would not make any difference to the amount actually received by the garden committee (but would almost certainly result in legal action by the RBKC to recover full payment of Council Tax).

It can therefore be seen that the precept arrangement provides a failsafe way for the garden committee to raise funds necessary for the maintenance of the garden and the committee never has to deal with the problem of a failure to pay maintenance charges by local residents.

[*Sections 46-48 of the 1851 Act*]

6.2 How can the precept be spent?

The 1851 Act charges the garden committee with the responsibility for the maintenance and improvement of the garden including keeping it "enclosed, laid out, fenced, planted, gravelled, maintained, repaired and embellished". It would appear that the intention was to be wide ranging to cover all expenses normally incurred in the maintenance of the garden at that time. There is no legal ruling on whether such expenditure might include the provision of more modern facilities such as children's play equipment and close circuit television systems, but it is not unreasonable to argue that such modifications are acceptable. The situation is therefore not clear and in those circumstances we would recommend that the garden sub-committee sound out opinion from local residents in the square before embarking on such expenditure and including it within the budget for the garden.

The 1863 Act is less specific and refers only to the expenses of the maintenance and management of the garden. The case for a committee managing a garden under that Act to incur the sort of expenditure referred to above, is therefore less strong but again we would recommend that consent be sought from local garden users before embarking on such expenditure.

In one way the 1863 Act is better in this regard because it includes the word "management" which does not appear in the 1851 Act. This implies there would be no problem under the 1863 Act in including management fees charged by managing agents or even other professional fees such as legal fees within the precept. However despite this, it is common for garden committees to collect all costs and expenses reasonably incurred by them in the maintenance of the garden, whether it is under the 1851 or 1863 Act, including management and professional fees and it seems unlikely that anyone would actually wish to challenge the collection of such sums.

[*See Section 41 of the 1851 Act and Section 1 of the 1863 Act*]

"PAYMENT IS INDEPENDENT SO A REFUSAL BY RESIDENTS TO PAY A PRECEPT WILL NOT MAKE ANY DIFFERENCE TO THE AMOUNT RECEIVED BY THE GAREDEN COMMITTEE"

6.3 Borrowing

As considered further in Section 7 below, the legal status of garden committees under the 1851 Act is uncertain. That Act does say that title to everything in the garden vests in the garden committee and goes on to say that the garden committee may sue and be sued as if it were a separate legal entity. However, the uncertainty as to its legal status does make it unlikely that a bank would be prepared to lend to a garden committee alone and it is likely a bank would only lend to individuals who were personally guaranteeing a loan. It therefore seems most unlikely that a garden committee would be in a position to take out a loan.

The position under the 1863 Act is even less certain and makes it even less likely that anyone would be prepared to lend money to a committee formed under that Act.

[*See Sections 49 and 52 of the 1851 Act*]

6.4 Retention of funds

The two Acts permit a garden committee to raise funds to meet expenditure as referred to above. They are silent on the subject of whether funds can be raised to meet anticipated future expenditure and to create a reserve or sinking fund. While there is nothing to say that a garden committee can do this, there is equally nothing to say that it cannot and in practice a number of garden committees do hold reserves either for anticipated expenditure or as some form of safeguard against emergencies.

In some cases, garden committees have raised considerable funds through the sale of access rights which may be used either to fund a specific project (for example the replacement of railings around the garden) or to form a general reserve. It seems that provided the committee's funds are properly accounted for and there is complete financial transparency, it is unlikely that anyone will object.

However, it is unlikely to be good practice for a garden committee to regularly collect in more funding that is required to meet expenditure and no doubt the RBKC would not approve of such practice.

7. LEGAL CAPACITY OF GARDEN COMMITTEES

7.1 Role of the chairman, treasurer and secretary

There are references at various points in the 1851 to chairman, treasurer and secretary. There is however no specific role of chairman other than in the context of meetings where provision is made for a chairman to be appointed as the first item of business at any meeting. In practice it has been the custom of all garden committees to appoint a chairman at the full committee annual general meeting whose role lasts for the following year.

The 1851 Act does make specific reference to the role of treasurer and secretary and says that a garden committee can sue and be sued in the name of its secretary or treasurer. This appears to give a committee a quasi-legal status but probably it cannot be considered to be a true legal "person" in the way that entities such as limited companies are.

In practice garden committees should and do appoint a chairman, secretary and treasurer to fulfil the roles of leadership, record keeping and financial control respectively.

Although the 1863 Act does not contain any provisions in this regard it would be sensible to follow the same guidelines.

[*Section 52 of the 1851 Act*]

7.2 Issues outside the garden committees' control

It should be noted that it is not within the garden committee's control to determine which residents are entitled to have access to the garden under either the 1851 or 1863 Acts. This is because it is the duty of the RBKC to determine which households are entitled to have access rights in accordance with the legislation (see 3 above) and in the case of any dispute it is for the RBKC to decide whether there should be an amendment to the list of qualifying properties that it holds. This was a particularly relevant point in relation to the Herrmann case (see Appendix 2) where it was determined that Mr Hermann needed to bring his action against the RBKC rather than the Ovington Square garden committee.

8. PROTECTING THE GARDEN FROM DEVELOPMENT

8.1 Planning law

Gardens are subject to normal planning laws and any "development" as defined in planning legislation will require planning permission in the usual way. In ruling on consent for any development within a garden, the RBKC will seek to apply Planning Policy CR5 which states "The Council will protect, enhance and make the most of existing parks, gardens and open spaces..." and "will resist development that has an adverse effect on garden squares and communal gardens, including proposals for basements".

8.2 The London Squares Preservation Act 1931

The gardens managed under the statutory schemes are additionally afforded the protection given by the London Square Preservation Act 1931. This legislation, which predates the planning acts and is not itself a planning act, prohibits development within garden squares which is not commensurate with the stated aim of the Act which is to protect the gardens as "an ornamental garden pleasure ground or ground for play rest and recreation". The Act does potentially permit subterranean development beneath a garden square but in practice the RBKC is likely to oppose such development. All of the gardens in the RBKC are specifically protected by the Act as indeed are nearly all squares and gardens in London. A full list is contained within the Act itself.

The 1931 Act was not well known, and was to some extent ignored, until the High Court case of Eliterank Limited v Royal Borough of Kensington and Chelsea and Secretary of Courtfield Gardens West Garden Committee and The Trustees of Courtfield Gardens West [2015] – see Box. That case proves that garden square committee and councils can and should resist development or encroachments into gardens and the RBKC is prepared to take that enforcement action should it be necessary.

Case Report: Eliterank v Royal Borough of Kensington and Chelsea (2015)

Eliterank, the owner of 25 Collingham Road, wanted to create a light well projecting into Courtfield Gardens West. A deed granted in the 1960s gave the owners of the property a legal right to carry out the excavation but the garden committee that runs the garden objected to the development.

The owner's application for planning permission to excavate the light well was agreed. However, the owner was warned by planning officials that the grant of planning consent did not constitute consent under the London Squares Preservation 1931 Act and the development could still be contrary to that Act.

The owner excavated the lightwell and then applied for permission to retain it under the 1931 Act. The RBKC refused consent on the basis that it had no power to grant such consent under the 1931 Act. The owner then sought judicial review of that decision.

The main argument in the case was whether the construction of the lightwell constituted underground works which the RBKC could then authorise under the provisions of the Act. The owner argued that "underground" meant beneath surface level and also that the construction of the light well would not constitute an undue interference with the use and enjoyment of the garden.

The RBKC argued that "underground" meant, literally, under the ground and that a development which removed part of the subsoil of the garden and left it exposed to the air and restricted access so that only the occupiers of the adjacent basement flat could use it could not be permitted under the relevant provisions in the Act. In his judgment, Mr Justice Supperstone agreed with the RBKC that they had no standing to consider an application of the nature submitted to them by the owner. He therefore rejected the owner's application on all five grounds on which they had sought to challenge the decision of the RBKC.

BRIEFING

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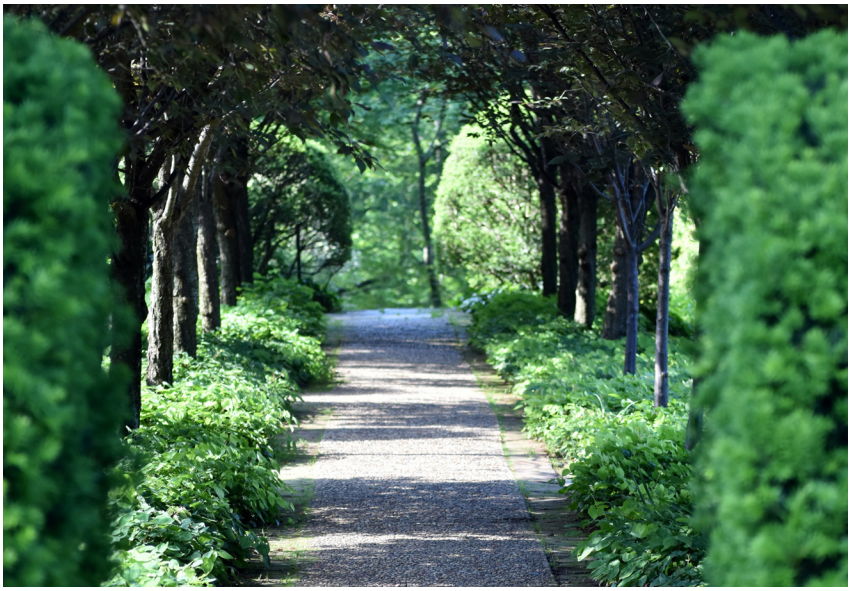
The case therefore confirmed:

- That the 1931 Act remained a valid piece of legislation and should be taken into account by all those contemplating development of a garden square and, most importantly, by the councils that are charged with enforcing its obligations.
- That the 1931 Act exists independently from planning legislation and planning consent does not constitute consent under the 1931 Act.
- That councils charged with enforcing the 1931 Act can only give consent to underground works and cannot consider applications for other works which fall outside the definitions contained within the 1931 Act.
- That works that have been carried out on land which once constituted protected gardens are unauthorised and are in breach of the 1931 Act and are therefore potentially subject to enforcement.

Subsequently the lightwell was removed and the garden reinstated.



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