Garden Square

Questions frequently asked by Garden Committee Officers

The replies given to the questions below are intended as a general guide to the law and may not necessarily apply in every case. It may therefore be necessary to take separate advice depending on your circumstances.

The answers vary depending whether the garden in question is governed by the regime imposed by the Kensington Improvement Act 1851 or the Town Gardens Protection Act 1863. In the replies, these Acts have therefore been referred to as "the 1851 Act" and "the 1863 Act ".

1. Who has the right of access to the garden square, eg, are occupiers of temporary accommodation and HMO's entitled to use the square?

The 1851 Act is reasonably specific on this point and provides that in most cases, the rights set out in the Act extend to the occupiers of every house or building, the front or sides of which face or forms part of the square in question. Occupation means those who have the right to use a house, flat or apartment 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 position is however complicated by a provision in the Act that states that in the case of some squares it is the persons responsible for paying the council tax surcharge for the upkeep of the square who enjoy access. The occupiers and taxpayers may not necessarily be the same, so in the case of a dispute, the matter would need to be considered individually.

The 1863 Act is less specific and refers only to the owners and occupiers of the houses surrounding the square. It would, therefore, seem that anyone who actually occupies a house or a part of it fronting the square, whether under a freehold, a long leasehold interest or a tenancy, can enjoy the relevant rights to use the square.

[*see sections 42 and 51 of 1851 Act and section 1 of 1863 Act*]

2. Can a garden committee permit non-residents to have access to the garden?

The 1851 Act limits access to a garden to three categories of people: the owner of the freehold, persons to whom the owner of the freehold has given rights and the occupiers of the houses encompassing the garden. However, a fourth category can be added by virtue of the Open Spaces Act 1906. That provision specifically provides that notwithstanding the 1851 Act, a garden committee can admit other persons to have access to the garden and gives them power to regulate their admission on such terms as the committee thinks proper. The garden committee can therefore grant annual licences or enter into longer term arrangements but it is not in a position to grant full legal easements as it does not enjoy legal title to the garden.

The same provisions would apply under the 1863 Act.

In practice, several gardens do use this provision to enhance their annual income or to pay for specific improvements to the garden. The income derived from licensing arrangements belongs to the committee and does not need to be taken into account when the Council Tax precept is set. Some garden committees use the income to offset the budget so as to hold the precept down and, in at least one case, substantial capital sums have been raised as a way of paying for improvements to the garden, such as the installation of new railings.

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

3. Who is the owner of the garden square?

The first way to check the identity of the freehold owners of a garden square is by checking the ownership at the Land Registry. This will either confirm that title to the garden is registered in which case it will then be possible to determine who the legal owners are, or it will show that the property is unregistered. If title is unregistered the likelihood is that the ownership is unknown, although this is not necessarily the case.

Where the freehold ownership is known the likelihood is that it is either owned by a trust or company comprised of some or all of the owners of properties surrounding the square or it is owned by an investor. It should be noted that even where ownership is with local residents who may even be committee members they will not be holding it in the same capacity as they operate under the 1851 or 1863 Acts. This is because those acts do not envisage that committees can hold land assets and a separate but perhaps parallel trust or other structure is likely to be in operation.

The freehold owners of the garden have relatively limited powers. While they enjoy rights of access to the garden themselves their ownership is, in effect, limited to the subsoil.

If the ownership of the garden is not known then it can only be established by proving documentary title. Where squares were developed in the latter part of the nineteenth century or earlier, this may now prove to be very difficult or even impossible to establish. In some cases, squares were owned by the individual or company which developed the adjoining streets and it is possible that at the end of the development scheme no steps were taken to deal with a transfer of the ownership of the garden freehold itself.

The Land Registry has confirmed that unless documentary title can be produced they are not in a position to register anyone as freehold owner. A garden committee is not in a position to establish possessory title to the garden through its collective use as the Land Registration Acts do not permit this.

4. Can the committee delegate decisions to a sub-committee?

The 1851 Act provides that every person who has the right to use the garden within a square (see above) and who is liable to pay council tax in respect of the square, shall constitute a committee, called a garden committee, which becomes responsible for the maintenance of the garden. In practice this is unworkable and the Act recognises this and provides that the committee has power to appoint a sub-committee who in practice will exercise the functions of the committee prescribed by the Act. The sub-committee is likely to have between five and nine members.

The 1863 Act envisages that the owners of the garden will appoint a committee consisting of not more than nine or fewer than three of the owners of properties in the square to manage the garden. This therefore comprises the committee for the purpose of management.

[see Section 43 of the 1851 Act and Section 1 of the 1863 Act]

5. What are the powers and obligations of the Garden Committee?

In practice, the powers of a garden committee constituted under the 1851 Act are likely to be delegated to a sub-committee (see "can the Committee delegate decisions to a sub-committee?"). For the purpose of this question it is therefore assumed that under the 1851 Act we are talking about a sub-committee and under the 1863 Act the Garden Committee.

The principle duties of the garden sub-committee or committee are as follows:

1. To maintain the garden and everything in it.
2. To hold regular meetings of the sub-committee.
3. To make byelaws for the proper regulation of the garden.
4. To set a budget for the expenditure on maintenance of the garden and to get that budget approved by a full meeting of the garden committee (usually at an Annual General Meeting).
5. To account for funds received from the Royal Borough and to ensure they are properly spent on the maintenance (and in the case of the 1863 Act also the management) of the garden.
6. To regulate access to the garden and the issuing of keys to residents and others entitled to use the garden.
7. To ensure that the garden and everything in it complies with relevant health and safety law and guidelines.
8. To take out public liability insurance to protect themselves against claims brought by users of the garden (this is not a statutory duty but practical advice).

9. To ensure regular inspections of trees and any other items in the garden likely to cause damage to users of the garden or properties surrounding the garden (again this is not a statutory duty but an annual inspection by a qualified arboriculturalist is recommended).

10. To preserve the physical integrity of the garden and protect it from encroachment and unauthorised use. (This is not a specific statutory requirement but is implied to the committee members in their fiduciary capacity under the statutes).

The duties of committee members under the 1863 Act are less specific but are in effect the same.

[See sections 43-46 of the 1851 Act and Section 1, 2 and 4 of the 1863 Act].

6. What are the procedures for calling meetings?

The 1851 Act sets out specific procedures for the calling of meetings of the garden committee. Once a sub-committee has been appointed the procedure is that 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 and 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 shall not be valid.

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 on all decisions of the garden committee.

In this day and age, we would suggest that all members of a garden sub-committee be written notice of all meetings to its members at least seven days before the relevant meeting and notice should be given at their home addresses. Notice of the annual general meeting of the garden should be given to all residents of the garden at their home addresses if possible.

The 1863 Act makes no specific provision about the holding of meetings and therefore we would suggest that the committee follows the procedures outlined in the preceding paragraph.

[*see section 44 of the 1851 Act*]

7. Who can take the decision to remove the Treasurer/Secretary? What are the procedures?

The 1851 Act makes no special rules for the appointment or removal of the Treasurer or Secretary of a garden square committee and therefore general rules for the conduct of meetings must apply. Provided that the appropriate rules are complied with for the calling of a meeting (see above) it will be a matter for open vote as to whether the Treasurer and Secretary are appointed or removed. In this connection, it should be noted that each occupier of a property in the garden, who is liable to pay council tax for the square, has one vote and has the same rights as a member of the garden sub-committee and therefore it is simply a matter of each occupier attending the meeting having one vote, subject to the chairman's casting vote. It should also be noted that the 1851 Act contains no provision for the use of proxy votes.

The 1863 Act makes no provision in this regard.

[*see section 44 of the 1851 Act*]

8. What can the money raised via the garden rate be used for, eg, can it be used for CCTV cameras, children's play equipment?

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 therefore to be wide ranging to cover all expenses normally incurred in the maintenance of a 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 closed circuit television systems but there are good arguments for saying that such modifications to the wording were intended when the Act was originally drafted. 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 the 1863 Act to incur such expenditure is therefore less strong but again, we would recommend that consent be sought from local owners and ratepayers before embarking on such expenditure.

The use of the word "management" (which does not appear in the 1851 Act) implies that it may be possible to change managing agents and even legal fees incurred by the committee.

[*see section 42 of the 1851 Act and section 1 of 1863 Act*].

9. Can the Committee raise money by way of a loan?

The legal status of the garden committees under the 1851 Act is uncertain. The 1851 Act makes it clear that the garden committee do not automatically become freehold owners of the garden but ownership of the railings, gates, fences and plants and trees within the garden does vest in them. The garden committee also has the power to sue and be sued as if it were a separate legal entity. The committee is not, however, recognised otherwise as a separate legal entity such as might be registered as the freehold owner of the land (see below) unlike a trust, company or an individual. Its legal status is therefore something of a hybrid and this is bound to affect its ability to raise money by way of a loan. In our experience, lenders are cautious and will only lend when the status of the borrower is clearly defined. It therefore seems to us unlikely that a bank would be prepared to lend money to a garden committee unless personal guarantors for the loan were provided.

The 1863 Act is silent on this subject, making 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*]

10. What are the procedures for making byelaws for the garden square?

The 1851 Act is quite specific on this point. It provides that the garden committee or the garden sub-committee has the power to make byelaws for the proper management of the garden under their care. Any rules must be approved at a general meeting of the full garden committee and be signed by the chairman of the meeting and in the same way they may be revoked or amended. The Act goes on to say that anyone who breaches such a rule commits an offence for which a penalty, not exceeding £25, may be imposed by a local magistrate but only if the rules have been "allowed" by a judge, who also has the power to disallow any rules if he thinks it inappropriate. Therefore in order to have proper effect, a set of new rules ought to be vetted and sanctioned by a court (in practice the local crown court) in order to have full force and effect.

The 1863 Act contains the same wording, save that the penalty for a breach of a byelaw is a penalty not exceeding Level I of 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 of imprisonment of up to 14 days. This offence could be persecuted even if no byelaws are in place.

Pemberton Greenish is able to assist garden committees in the drawing up and sanctioning of new garden rules.
[*see section 45 of the 1851 Act and sections 4 and 5 of the 1863 Act*]