

Notes From Residents' Forum – Registration of Garden Title – 26 April 2023

Robert Barham started by going through the main benefits of registering the garden title: it would protect the garden for the future but also make it easier to defend the boundaries and to seek removal of any encroachments into it. The aim is to assure that there would be no spurious challenges to ownership, whether from private interests or public entities.

He also went through the idiosyncratic parameters of Arundel and Elgin Gardens: the title was registered in 1903 and last updated in 1912. The proprietors listed are likely deceased. Had the title been passed on, an automatic update of the register would have followed. There is a caution that was registered against the legal title in favour of Colin Ferris in May 1997. Colin was chairman of the garden committee at the time and the purpose of his application was to preserve the garden by asserting that the committee may if required be described as having ownership according to section 5 of the Town Gardens Act 1863.

Mr Barham believes that it would be possible to make an application to the Land Registry to register the freehold of our garden in the name of a trust overseen by trustees (at least three or four of them) chosen by the residents by claiming adverse possession against the registered owners. He made the point that while the garden committee owns the trees, shrubs, and plants above ground within the garden, the freehold relates to the land itself.

An applicant has to claim the title through “exercised ownership”. This would require records proving that the Garden Committee has managed the garden for 12 years. The management must have been without consent or permission of the proprietors. Minutes of AGMs posted on the website alone go back 21 years. There is or was a minute book going back even further, but its current location is uncertain.

Mr Barham went through the list of the Communal gardens within the Ladbroke Estate that have contacted him about title registration. Most had decided to set up a trust although two have declined and another is undecided, one registration (Blenheim and Elgin) is already complete.

The process takes around 18 months from start to finish. If/when completed, the freehold of the garden would effectively be transferred to the trust. This might be challenged by claimants to the title, but that is unlikely, given the length of time that has elapsed, and the fact that notice of adverse possession would be sent to the registered proprietors at their last known address.

The title registration could be made to a trust or to a company. The administrative burden and associated costs of a company seemed to favour a trust setup. The start up costs would be around £3k, excluding VAT but including both registration and trust. Ongoing administration of a trust is not burdensome.

With the recent example of the Princes Square Gardens in mind (there, the directors of a company established to look after a garden square had first modified the company structure then tried to sell the square), a discussion followed on a number of points including how best to establish checks and balances on the trustees.

Mr Barham noted that the garden committee is actually all of the residents, and the smaller garden committee acts on authority delegated to it by the larger group. The garden committee

would be the group to appoint the trustees, and a good mix would be of long-time residents as well as long term ones (that is those intending to reside indefinitely). The number of trustees, the lengths of their terms, and other details could be worked out as discussion progresses, and would be fitted into a trust document. Trustees' exposure to liability would be no greater than the liability of committee members, and, like that liability, would be covered by insurance.

Follow-up questions & answers from Mr. Barham:

1. Does the fact that our Communal Garden is governed by the Kensington Improvement Act of 1863, as opposed to the 1851 one, make a difference in how to approach title registration? In particular in the matter of ownership, are there any differences between the acts that would make title registration more airtight with one but not the other?

There is a theoretical difference between the Kensington Improvement Act 1851 and the Town Gardens Protection Act 1863 in respect of applications for first registration. There is an arguing under the 1863 Act that it vests title with the garden committee, but it is unclear what that wording actually means. In practice the Land Registry treat applications as applications for adverse possessions in the same way in each case. However, your garden is different in any event because there is already a registered title and therefore it will be adverse possession against a named proprietor, rather than an unknown proprietor.

In your case all that we need to show is that no one has been able to make contact with the named proprietors of the garden, which is not surprising since they must now be deceased.

2. We will be probably vote on this issue at an AGM, who should be allowed to vote: apartment/house owners (freehold or leasehold) seems logical but what about tenants? There are some short-term tenants who may or may not care about the issue but also some long-term tenants in social housing who are heavily invested in the garden's life.

I think the people who could vote on this are those who are entitled to use the garden under the 1863 Act and have keys to it but on the basis of one vote per household.