

MEMORANDUM

TO: Alistair Campbell, Libraries & Museums Manager

COPY TO: Bob Stewart, Director of Environmental Services

FROM: Aileen Scott, Principal Solicitor (Commercial & Conveyancing)
Contact: Paul Nevin, Trainee Solicitor, Legal & Committee Services

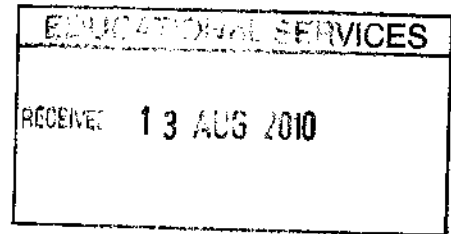
EXTENSION: 3640

EMAIL: paul.nevin@moray.gov.uk

DATE: 12 August 2010

SUBJECT: Grant Lodge: Potential Use

OUR REF: AS/JPHN/JD/P/352(1)
YOUR REF: GAC/CD/EP.059.05



Following our recent conversation regarding the possible use of Grant Lodge by Historic Scotland, I enclose a copy of a file review and title investigation along with options for future use.

In short, I believe your suggested use may run into problems in terms of the Trust. Specifically, any use of Grant Lodge which only allows the public to use the building "from time to time" will, in my view, be a direct breach of trust. The position is further complicated by a prohibition on the Trustees (The Moray Council) leasing or selling in whole or in part Grant Lodge.

Having said that, and hopefully on a more positive note, my view is that a Petition to the Court of Session as outlined in option 3 of the attached document could be used to free Grant Lodge from its current restrictions. This could include authorisation to lease or sell Grant Lodge and in this scenario your suggested use may well be considered to be in keeping with the spirit of the original Trust.

Please contact me if you have any queries.



Paul Nevin
TRAINEE SOLICITOR

Encs

ELGIN – CITY FOR THE FUTURE – TITLE INVESTIGATIONS

GRANT LODGE and COOPER PARK ELGIN

History

1750 (circa) – Grant Lodge built to designs by Robert Adam as the Elgin residence of the Earl of Seafield.

1790-91 – Grant Lodge extensively remodelled

1849 -1850 – Grant Lodge altered and extended

1903 (GRS 25th August) – Colonel George Alexander Cooper grants a Deed of Gift creating a Public Trust of Grant Lodge and its grounds ('Cooper Park'). The Trust purposes direct that Cooper Park is to be "a public park" and Grant Lodge "a public library and reading room and a museum of arts and industry for the use and benefit of the inhabitants of Elgin". The original plans envisage the library as containing "10,000 volumes suitable for a town with a population of 8,000 to 10,000". The Town Council (and their successors) become the Trustees who are to administer the Trust for the benefit of the inhabitants of Elgin as Beneficiaries.

1904 – Area at South end of Cooper Park conveyed (in terms of the 1903 Trust) to Third (Morayshire) Volunteer Battalion for erection of a Drill Hall.

1900's (early) – Grant Lodge opens as a library although the 'museum of art' seems to run into problems.

1920's – Alterations are made on the first floor of Grant Lodge to accommodate the 'museum of art', displaying a number of pictures, but very few objects.

1920-1950 – The library takes over the whole building providing a comprehensive range of services including adult and children's lending, information services and local studies using genealogical and archive materials.

1950 - Grant Lodge contains County Library as well as the Town Library for Elgin.

1956 – Early discussions regarding need for Alexandra Road/by-pass/relief road ('relief road') for Elgin

1960 – Elgin Burgh Library merges with Moray & Nairn County Library and thereafter Grant Lodge was functioning as a library only

1967/8 (circa) – North Port flats are built by the Elgin Town Council on the south end of Cooper Park in direct breach of Trust.

1970's (early) – Grant Lodge is no longer able to adequately function as a modern public library

1973 (circa) – At a Local Public Inquiry on the relief road for Elgin, the fact that the road would sever the southern portion of the park figures prominently in the objections. Some objectors attempt to have the acquisition "blocked" by Sir George Cooper's heirs.

1975 – The Moray District Council take over the former Town Council's recreation/parks function and Grant Lodge and Cooper Park are administered together and held on the Elgin Common Good account.

1979 (circa) – A portion of ground at the southern edge of Cooper Park is voluntarily conveyed by the Town Council (in breach of the Trust) to the Scottish Development Department as part of their land acquisitions for the construction of the Elgin Relief Road which in turn means that a further portion of the park was severed off by the road and is effectively lost to Cooper Park.

1979 (Sept) – Work on relief road commences.

1981 (April) – The relief road is opened.

1980's (late) – 1990's (early) – The Moray District Council works on plans for the provision of a new library as Grant Lodge no longer fit for purpose due to, structural weakness, lay out, damp, woodworm etc.

1991 – The former Drill Hall is reconveyed to The Moray District Council by Secretary of State for Defence.

1990-2 – Council Officers trace George Cooper's heirs to gain their views/consent for the new library proposals etc.

1992 – Professor J. A. M. English provides an opinion for The Moray District Council. He is asked whether The Moray District Council (to ensure the continued upkeep of Grant Lodge following its replacement as a library) could sell or lease to a third party or retain it for use by a Council department. Professor English is clear that this cannot be done and quotes the Deed of Gift which directs the Trustees “not to alienate or attempt to alienate in any way the whole or any part of the subjects hereby disposed”. He goes on to say: “A sale or lease would in my view constitute a clear breach of trust which would be open to challenge by either the heirs of Sir George Cooper or by the inhabitants [of Elgin]”.

1992 (Sept) – Work on Grant Lodge to eradicate dry rot, wet rot and woodworm is commenced.

1993 (18th March) – D W Cooper (grandson of George Cooper) confirms his view on behalf of the Cooper family that no sale or lease of Grant Lodge should be permitted.

1993 – The Moray District Council consults with the inhabitants of Elgin regarding proposals for a new library complex to be built largely on the ground occupied by the Drill Hall. Overall comments are favourable. Throughout this time correspondence with the Cooper family is ongoing and their major concern is not with the provision of the new library but rather with the residual use of Grant Lodge.

1993 (Sept) – Work on the new library is underway.

1993 (1st October) – Colin Tyre, Advocate states: “I doubt whether the court would even be prepared to approve a scheme under which the bulk of the building is used for, say, local studies, with one or more rooms being used for training or civic receptions. As I said in my earlier opinion, any administrative use should in my view be incidental to the main, public use, rather than a separate, non-public use ... use for meeting rooms for local groups carrying on recreational or educational activities would in my view be likely to be acceptable.”

1993 (20th December) – D W Cooper responds on behalf of the Cooper family agreeing that they are happy with Grant Lodge being used as a local study centre, it being made available for meetings by the community and public events including use by the Council. He states that the family could not agree to the suggestion that post-1996 Grant Lodge should become the local office of the Registrar of Births, Deaths and Marriages as they feel this would turn the Lodge into a Council office which would be a direct change from the Deed of Gift and nothing would stop it progressing to become a full Council office in the course of time.

1994 (30th March) – The MDC agrees to set aside any sale proceeds from 65-79 (odd only), North Port for Trust purposes.

1994 (21st Sept) – The Court of Session approve a scheme and power to sell heritage presented by The Moray District Council under Section 9 Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and Section 5 Trusts (Scotland) Act 1990 (copy attached). This authorises MDC to sell 65-79 (odd only) North Port under the right to buy legislation on condition that the sale proceeds are applied ‘for the purposes of the Trust’. Also authorised is the conversion/extension of the former Drill Hall Building into a Public Library and Reading Room. Grant Lodge is to be used as a local study centre with archival and genealogical services with the option of relocating the Registrars there alongside a wedding room. The remainder of the building is to be given to social use by individuals and groups with the rest of the Trust property to be maintained as a Public Park or Pleasure Ground.

1996 (18th November) – Library services are transferred to the new library. At this time Grant Lodge serves as a local studies facility.

1996 (onwards) – Grant Lodge operates as a local heritage centre with 14,000 books, pamphlets, local newspapers, genealogical records, maps, photographs, architect plans and some archival material.

2003 (26th July) – There is a serious fire starting in the basement of the building which spread upwards through the floors to the roof causing quite serious damage and leading to the removal of all materials from the building, following which the building is boarded up.

2004 (late) – Highland Buildings Preservation Trust are commissioned to carry out a feasibility study on Grant Lodge.

2007 – Maya Scott, Project Director, gives a presentation to Committee on the background and results of the feasibility study. She outlines the options for saving the building (post-fire) and what it could be used for and how much it would cost to restore it. The Committee note that the study identifies the potential use of Grant Lodge as an Arts Centre at a cost of approximately £4.4 million. It is noted that there is a shortfall in funding of approximately £2.4 to £2.6 million.

2007 (7th March) – In a Committee Report to Policy and Resources, it is reported that Grant Lodge could be used (in accordance with the granted Petition of 1994) as “(a) an institute maintained there [Grant Lodge] as a local study centre incorporating the provision of archival and genealogical services (for which a reasonable charge may be made), and the Council at their option include within the said centre the office of the local Registrar of Births, Deaths and Marriages and relative wedding room; (b) insofar as Grant Lodge is not in use as a local study centre, the Council must refurbish and make the rooms (including kitchen, toilet and other facilities) available for social use by individuals, clubs and community groups, and are responsible for the maintenance of the premises in good repair and decoration, and the Council may at its discretion charge a reasonable fee for use of the rooms.”

In the same report, it is noted that total costs of the project have been estimated at £4.4 million and that the cost of carrying out fabric repairs to the exterior of the building as a first phase approach would cost over £800,000.

Classification and Administration

Grant Lodge and Cooper Park ('Trust Property') form a Public Trust. The Moray Council ('Trustees') and their successors are the owners of the Trust Property. The Trustees are bound to administer the Public Trust in terms of the limitations set out in the 1903 Deed (attached) and the 1994 Scheme (attached). The Trust Purposes direct that Cooper Park is to be used as "a public park" and Grant Lodge "a public library and reading room and a museum of arts and industry for the use and benefit of the inhabitants of Elgin" ('The Beneficiaries'). The 1994 Scheme varied the Trust Purposes to authorise the use of Grant Lodge as a Local Studies Centre with the option of housing the Registrars and the remainder being used for local groups.

A trust by its very nature, severely limits the manner in which the Trust property may be held and applied. The relevant limitations in this case were selected by George Cooper almost 110 years ago and due to the relative success of the Trust for nearly a century these limitations could be said to have been well chosen. However things change and the Trust Purposes may be fulfilled by other means, or indeed become impossible.

Options for Grant Lodge

i) Administration within existing limitations

With this option it must be borne in mind that Grant Lodge is in serious disrepair with refurbishment costs estimated at £4.4m in 2007 and that TMC are responsible for the upkeep of the building (albeit that grants may reduce this burden). Possible uses under this option are limited to those noted above (e.g. local studies centre etc) and in reality this restriction has at least contributed to the total disuse of the building for almost a decade.

The existing limitations further prevent the Trustees from leasing or selling all or part of Grant Lodge.

ii) Breach of Trust

Since constitution The Moray Council's predecessors have seriously breached the Trust on at least two occasions by building flats on Cooper Park in 1968 and selling part of the Park for the by-pass in 1979. The consequences of these breaches were nil to minimal save for the embarrassment of explaining them after the event to the heirs of George Cooper and the Court of Session.

If the Trustees authorise a use or alienation of Grant Lodge in breach of Trust this could be challenged by the Beneficiaries or the heirs of George Cooper who could seek to have the transaction reduced. Consultation and consent from both/either group would obviously reduce the risk of challenge.

iii) Variation of Trust

In my view, this is the best option to provide a long term solution for Grant Lodge. Public Trusts are almost always varied by court application. Where the performance of a Trust has become impossible the court has a common law power to approve a Cy-près scheme, which will allow a variation of the Trust while maintaining the Trustor's intention as far as is possible. I think it would be stretching the argument to suggest to the Court that the Trust has become impossible to operate.

However, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 covers cases which fall short of the 'impossibility' requirement. This Act can allow variation of a Public Trust if the court is satisfied that the purposes whether in whole or part can no longer be given effect to either in accordance with the directions or spirit of the Trust Deed or that since constitution, the Trust purposes have ceased to provide a suitable/effective method of using [Grant Lodge] or the purposes of the Trust have been adequately provided for by other means. The Court will not approve a scheme unless it is satisfied that the Trust Purposes proposed will enable the Trust resources to be applied to better effect consistently with the spirit of the Trust Deed, having regard to changes in social and economic conditions since constitution.

The Court is unlikely to approve a scheme which does not provide for use of Grant Lodge primarily by the inhabitants of Elgin although clearly use of the subjects for administration incidental to public use will be permissible.

This method of variation was successfully used in 1994, albeit that the varied purposes were never fully applied by the Trustees. There is no prohibition on applying to the Court a second time under the legislation. A successfully argued petition could lead to authorisation for the lease or sale of Grant Lodge and such a goal has been achieved previously in 1994 with North Port and 1998 with Public Trust property lying to the west of North road and south of Borough Briggs road.

The petition would require to be prepared by an Advocate on instruction of a Council Solicitor and very rough costs may be in the region of £15k with a time frame of at least several months.

Options for Cooper Park

Options i) – iii) above largely apply to Cooper Park as it too is strictly limited in use by the Public Trust as 'a public park or pleasure ground' and the restriction on lease and sale equally applies. Therefore any change of use should be considered under the same heads as for Grant Lodge.