

RESPONSIBLE CARE FOR CHURCHYARDS

A brief practical guide for parishes

Introduction

This Guide was originally prepared by the Church Commissioners' Pastoral Division in 1993 and subsequently published under the title "Responsible Care for Churchyards – A brief practical guide for parishes", in association with the Council for the Care of Churches, as a companion guide to the 3rd Edition of The Churchyards Handbook in response to the difficulties many parishes were experiencing in making adequate provision for the churchyards in their care. It was hoped that the guide would help those responsible for churchyard maintenance to take account of some of the main considerations, especially the legislation affecting the closure of churchyards and how it operated in practice. For a more detailed study of churchyards, the reader should refer to the 4th Edition of The Churchyards Handbook edited by Thomas Cocke (ISBN 0715175831) and published by Church House Publishing in April 2001.

Responsibility for maintenance of churchyards

1. Although the legal ownership of a churchyard, either open or closed, is usually vested in the incumbent, his own rights and obligations in respect of it are very limited. Today, under Canon F13, responsibility for maintaining the churchyard in good condition and maintaining fences rests with the parochial church council (PCC), except in the case of a burial ground which has been closed by Order in Council and where the obligation has been passed to the local authority (see paragraphs 14-18), but the PCC can seek financial help from local authorities and other public bodies. The PCC, whatever the funds at its disposal, must take appropriate steps to deal with any dangerous situation, such as an unsafe monument. The incumbent and the PCC should be adequately covered by insurance against any damages which may be awarded in the event of an accident, but the insured will still be required to take all reasonable steps to remedy any defect which is discovered.
2. Individual tombstones remain primarily the responsibility of those who erected them and, after their death, of the heirs-at-law of those commemorated, but the PCC may be liable for injury caused by an unsafe tombstone. It is open to anyone to give money on trust for the upkeep of the churchyard as a whole, though not on trust for the upkeep of a particular grave. Where a monument becomes dangerous or derelict, or where its space is required for a new grave, a faculty may be sought for its removal or resiting. Reasonable efforts must be made to find the owner who must be given the opportunity to remove the monument. The parish should try to be aware of those relatives who regularly tend monuments and memorials as it is important that their concerns are taken into account before embarking on any rearrangements. Equal sensitivity is needed to ensure that churchyards are not cluttered with artificial flowers and inappropriate containers.
3. Cremation is an increasingly popular means for disposing of human remains. It is becoming common for part of a churchyard to be set aside as a Garden of Remembrance, perhaps with a central feature as a focus for meditation, to provide an appropriate place for the commemoration of those cremated and the interment of their ashes. The creation of such an area is a complex operation, involving both the practical requirements of commemoration and maintenance and the historical and landscape character of the churchyard. A faculty will certainly be needed. It is strongly advised to seek the advice of the Diocesan Advisory Committee as early as possible, which can guide the parish in all these aspects.

Fees

4. Any parishioner has the right of burial in the churchyard if there is room, and if it has not been wholly closed for burials by Order in Council. Tables of fees, made by the Church

Commissioners with the approval of the General Synod and Parliament under the Ecclesiastical Fees Measure 1986, govern the amounts payable in respect of burials and the erection of monuments and memorials. But the charge for a burial may be much greater than the statutory fee to cover the cost of "extras" such as digging the grave.

5. The statutory fees provide the only regular source of outside support for the maintenance of churchyards. However, in those cases where a faculty is sought for the erection of a monument of a kind which might make it more difficult to keep the churchyard tidy, or for the reservation of a grave space, it has become customary in many dioceses for a faculty to be granted subject to the payment of an additional sum to the PCC to help towards the maintenance of the churchyard. Permission may also be given, at the discretion of the incumbent, for a non-parishioner to be buried, normally on payment of an extra charge to be applied towards the maintenance of the churchyard. It is advisable for a PCC to set up a separate Churchyard Maintenance Fund for churchyard fees. In at least one diocese a special fund has been set up to assist in the repair of important churchyard monuments and it is to be hoped that this example will be followed elsewhere. Money for the purpose may also be obtained from some local authorities (see paragraph 12).

Protection of churchyards

6. Under the Faculty Jurisdiction Measure 1964 the land surrounding a consecrated church, whether or not it is consecrated, and also detached consecrated burial grounds, are subject to the jurisdiction of the Bishop, exercised by the Diocesan Chancellor in the Consistory Court. Where faculty jurisdiction applies, any but very minor alterations require a faculty from the court. A faculty may authorise parts of churchyards to be put to some appropriate and desirable secular use, permit the laying of cables or drains, or grant a right of way, so long as such provision is not inconsistent with the act of consecration.

7. There are, however, other important restrictions on what can take place in a churchyard. Under section 6 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 a PCC is, subject to faculty jurisdiction and guidance from the Chancellor, responsible for all the trees in a churchyard. This includes the felling, lopping and topping of existing trees and the disposal of their timber (any sale proceeds being applied for the maintenance of the church or churchyard) as well as the planting of new trees. (Previously the felling etc. of churchyard trees was subject to the consent of the Diocesan Parsonages Board under section 20 of the Repair of Benefice Buildings Measure 1972.) If a tree is subject to a Tree Preservation Order or located within a Conservation Area, the consent of the local authority is also required before felling, lopping or topping.

8. Any object or structure in a churchyard considered to be an ancient or interesting feature is not only subject to faculty jurisdiction but may also be listed as an Historic Building on its own account. A churchyard, or various features in it, will also be protected if in a Conservation Area or if the churchyard is either scheduled as an Ancient Monument or designated as an area of archaeological importance under the Ancient Monuments and Archaeological Areas Act 1979. Any significant alterations to the churchyard or to structures within it will require a faculty and may also require planning permission from the local authority or consent from the Secretary of State (via English Heritage) for any scheduled monument.

9. Historians have always valued the information they can collect from the monuments to be found in churchyards but conservation and environmental issues are becoming increasingly important. The whole or part of a churchyard may be notified by English Nature as a Site of Special Scientific Interest "by reason of any of its flora, fauna, or geological or physiographical features"; this prohibits any operation within the churchyard which is likely to cause damage. The churchyard is often one of the few areas that has not been affected by chemical fertilisers and pesticides and it is therefore rapidly becoming one of the few places where the environmental development of a locality can be traced.

Extensions to churchyards and new churchyards

10. If an existing churchyard becomes full or if a new church is being provided, there is no obligation upon the parish to provide an extension or a new churchyard. The normal course today is to rely upon the local authority, as the burial authority, to provide ground for burials, if possible next to the churchyard. In appropriate circumstances a burial authority may provide a secular cemetery adjacent to an old churchyard or a newly created church and arrange for part of it to be consecrated and supervised by the church authorities.

11. Where it is practicable for the PCC to extend the churchyard or open a new one, land may be acquired for this purpose by the Church Commissioners, under the New Parishes Measure 1943, to vest in the incumbent. The purchase price will have to be found by the parish unless the land is to be donated, and planning permission will be required. Each year the Commissioners make some 10-20 acquisitions of land for churchyards. Conversely, the New Parishes Measure gives authority to dispose of any unconsecrated churchyard which is no longer needed for its original purpose, unless the Chancellor wishes to deal with the disposal under the authority of a faculty. Consecrated land can normally be dealt with by a Scheme under section 30 of the Pastoral Measure 1983 (see paragraph 20).

Assistance from Local Authorities

12. The Local Government Act 1972 provides that "a burial authority may contribute towards any expenses incurred by any other person in providing or maintaining a cemetery in which the inhabitants of the authority's area may be buried" (section 214(6)). This allows for local authority assistance in the upkeep of churchyards in use. Local authorities and English Heritage also have powers under the Ancient Monuments and Archaeological Areas Act 1979 to contribute towards the expense of preserving ancient monuments and thus may provide assistance for features such as memorials, mausolea, sundials, stocks and lych-gates. The War Memorials (Local Authorities Powers) Act 1923 provides power to incur expenditure on the maintenance of war memorials. Local authorities also have general and specific powers under which they may provide help for the maintenance or improvement of the curtilage of a church which has not been used for burials.

13. Under the Open Spaces Act 1906, local authorities have power to agree to undertake the entire or partial care, management or control of a churchyard without laying it out as a public open space and while permitting burials to continue there. This could be appropriate for a burial ground still in use where there are inadequate funds for maintenance. Normally when a local authority takes over the maintenance and control of a churchyard under the Open Spaces Act, the churchyard will not be permanently transferred but will be maintained by the local authority under an agreement. It is advised that wherever possible such an agreement should be for a set period and should contain express provisions for termination since an agreement of indefinite duration may cause legal difficulties in any matters subsequently affecting the churchyard. Whatever the powers under the Act by which a local authority acquires control of a churchyard, section 10 requires the authority to maintain the churchyard in a good and decent state with a view to enjoyment by the public as an open space. A faculty is still required before the local authority may make alterations or exercise powers of management over such a churchyard but, subject to the terms of the faculty, tombstones may be removed and the ground laid out afresh.

Closure of churchyards

14. If an incumbent and PCC wish a churchyard to be closed, so that the responsibility for maintenance may be transferred to the local authority or so as to terminate the incumbent's responsibility for providing future burial space, an appropriate Order in Council under the Burial Act 1853 (section 1) has to be sought from the Home Office (50, Queen Anne's Gate, London, SW1H 9AT; tel: 0870 000 1585; email: public.enquiries@homeoffice.gsi.gov.uk). Nearly 500 such Orders were made during the last ten years. An application will be successful if one of the following conditions is met: the churchyard is full; the continuing use of the churchyard for burials may constitute either a risk to public health or be contrary to decency; or the discontinuance of burials

may prevent or mitigate nuisance. An application will not normally be considered if it relates to part of the churchyard only.

15. Closure by Order in Council does not remove the legal effects of consecration and the churchyard is still part of the freehold of the incumbent and under faculty jurisdiction. It may still be used for the interment of ashes provided that no human remains are disturbed and, if the Order permits, it may also be possible for further burials to take place in specified areas.

16. A burial ground closed by Order in Council is subject to the Disused Burial Grounds Act 1884 which prohibits building on such grounds except for the purpose of enlarging the church. This restriction is a major factor to be taken into account if a church extension is planned which encroaches on to the surrounding churchyard. A pastoral or redundancy scheme under the Pastoral Measure 1983 may, however, provide for development to take place in a churchyard where there have been burials, provided that in cases where burials have taken place within the previous 50 years, no relative or personal representative of the deceased has sustained an objection to the scheme.

17. Once a churchyard is closed the PCC concerned may apply to the local authority to take over its maintenance under the Local Government Act 1972. Section 215 of this Act provides a simple procedure for a PCC to request the local authority at three months' notice to take over the responsibility for future maintenance of the churchyard (including its boundary walls). In many cases, however, three months' notice is too short and can cause budgeting difficulties for the local authority. It has been agreed therefore that twelve months' informal notice should be given of the intention to serve the three months' statutory notice. It should be noted that the Act merely provides for a local authority to take over the maintenance of a closed churchyard at a PCC's request; the onus is on the PCC to ensure that the churchyard is "in decent order and its walls and fences in good repair" (section 215(1)) before responsibility passes to the local authority.

18. Closure under the Burial Act may be the prelude to a subsequent agreement and faculty for a disused burial ground's conversion by the local authority into a public open space under the Open Spaces Act 1906 (see paragraph 13). Transferring all or part of the PCC's maintenance and repair liability to the local authority does not mean that the churchyard itself is transferred; all other rights, powers, functions and liabilities remain under the control of the incumbent. Churchyards closed in this way may be disposed of under a pastoral or redundancy scheme.

Pastoral Measure 1983

19. A pastoral scheme under section 30 of the Pastoral Measure, prepared by the Church Commissioners on the basis of proposals initiated through the Diocesan Pastoral Committee, may provide for the appropriation of (a) the whole or any part of a churchyard or other land annexed or belonging to a church, (b) any burial ground vested in the incumbent of a benefice which is not annexed to a church, or (c) any other burial ground which is subject to the jurisdiction of the Bishop. The scheme may provide for the disposal of the land for specified uses or without such restriction and will generally remove the legal effects of consecration and free the land from faculty jurisdiction.

20. The Commissioners may also include in any redundancy scheme (or a pastoral scheme under sections 46 or 47 of the Measure) provisions dealing with the whole or part of the land annexed to a redundant church which is to be appropriated to a new use or demolished. Under such a scheme, the land and building (or the cleared site) may be disposed of by the Commissioners, together or separately, by sale, gift or exchange, or they may be leased by the Diocesan Board of Finance (DBF). Unless the scheme provides otherwise, the building and land will cease to be subject to the legal effects of consecration and, in particular, faculty jurisdiction. If the scheme does not specifically deal with the churchyard, it remains vested in the incumbent, in the care of the PCC and subject to faculty jurisdiction in the usual way, although it may be necessary to provide in the scheme for rights of way or other easements over or in the churchyard to be conferred on the new owner of the redundant church. Where a scheme provides for a redundant

church to be vested in the Churches Conservation Trust (or in the DBF) for care and maintenance, the churchyard may also be vested in the Trust (or DBF). Generally, however, it will only be vested in the Trust in exceptional circumstances, e.g. where there are important monuments or memorials or where having a part of the churchyard will greatly assist the Trust in preserving the church building or in presenting it to visitors. A redundant church or land vested in the Trust ceases to be subject to faculty jurisdiction, but otherwise the legal effects of consecration continue to apply to it.

21. Where a scheme provides for the appropriation of a churchyard which has been used for burials to another use, the provisions of section 65 of, and Schedule 6 to, the Measure about the disposal of human remains must be complied with. Notices must be published, as appropriate, setting out the proposals for dealing with human remains and tombstones, and drawing attention to the right of any relatives to undertake the removal of remains and the disposal of tombstones themselves in a manner other than that set out in the notice.

22. The Commonwealth War Graves Commission (2 Marlow Road, Maidenhead, Berks, SL6 7DX) is responsible for marking and maintaining the graves of the members of the forces of the Commonwealth who died in the two world wars. Many of those commemorated lie in special war cemeteries maintained by the Commission, but war graves are also to be found in many parish churchyards. Not all are commemorated by the Commission's distinctive headstones for some are buried in family graves, but the Commission is, nonetheless, concerned to see that they are maintained. In order to ensure that the Commission is aware of possible changes of ownership of churchyards, there is a provision in sections 6(3)(a) and 50(3) of the Measure for notice of draft pastoral and redundancy schemes to be served on the Commission.

Churchyards – future trends

23. Although the pressure on both church and secular burial grounds has been relieved this century by the gradual increase in the percentage of cremations, nearly a third of deaths still involves burial. In the present economic climate the resources available to the Church have become increasingly stretched and maintaining a churchyard, particularly in an urban area, may be regarded as a burdensome expense. If a church in an inner city area is designated under the Inner Urban Areas Act 1978, it may be possible for a re-ordering scheme to be made for part or the whole of the surroundings of the church in partnership with the local authority. If the churchyard is full, it may be particularly desirable for it to be closed formally by Order in Council and transferred to the local authority so that it may be looked after at public expense. Even if it has not been used for burials, the local authority may still be prepared to take over control and maintenance under the Open Spaces Act 1906; but the extent to which a local authority responds will depend on its available resources, often now very stretched, and the degree to which it is concerned with the appearance of its open spaces.