

## South Ribble Borough Council

### Closed Churchyards Management Policy 2021

#### **1. Introduction**

This management Policy produced by South Ribble Borough Council has been created to outline the management and maintenance practices carried out within closed churchyards in our District.

The principal aim of this operational management policy is to review current arrangements and to develop a robust system of inspection and maintenance to satisfy the Council's Statutory requirements. This will be approached in a way that is sensitive to the needs of the community and that recognises that churchyards are important places to our community and of historical importance.

Closed churchyards currently managed by South Ribble Borough Council are at the following locations:

- The Parish Church of St Mary's Penwortham, Church Avenue, Penwortham, PR1 0AH. (Approximately 1650 Headstones)
- The Parish Church of St Leonard's, Church Brow, Walton le Dale, PR5 4HJ. (Approximately 1030 Headstones)
- The Parish Church of St Saviours, St Saviours Close, Bamber Bridge, PR5 6EP. (Approximately 225 Headstones)
- The first is fully closed and the latter two are partially closed.

#### **2. Background**

A closed churchyard is a Church of England burial ground where, ordinarily, burials are discontinued and is therefore termed 'closed'. In certain circumstances permission is authorised in the provision of the Order for further burials which will be detailed in the specific Order. A Faculty would be necessary to authorise burial of cremated remains or cremated remains can be buried in an area already set aside in the churchyards designated 'Garden of Remembrance' which has been authorised by Faculty.

The Diocese of Blackburn is the administrative body of the Church of England that covers most of Lancashire and the whole of the South Ribble area; however, each individual churchyard and its burial records are owned by the local Incumbent and managed by its own Parochial Church Council (PCC). If an incumbent and PCC wish a churchyard to be closed an appropriate Order in Council under the Burial Act 1853 (section 1) must be sought from the Secretary of State (Local Government Act 1972 section 215(1)).

Once a churchyard is closed the PCC concerned may, under Section 215(2) of the Local Government Act 1972, serve a written request on the Parish Council to take over the maintenance of the churchyard. If the Parish Council rejects the request and gives written notice requiring the Borough Council to take over the responsibility, then the responsibility for maintaining the churchyard then becomes mandatory upon the Borough Council after three months' notice. It has been agreed by the Church of England that twelve months informal notice would be given of the intention to serve the three months statutory notice because of the potential budgeting difficulties for a local authority. The onus is placed on

the PCC to ensure that the churchyard is in decent order and its walls and fences are in good repair (section 215(1) (as far as it is able) before responsibility is passed over to the district authority.

Where a Church of England churchyard is closed to further burials in accordance with an Order in Council under the Burial Act 1853, responsibility for the maintenance may at the request of the Church be transferred to the relevant local authority. The transfer is compulsory, not dependant on the condition of the churchyard in question, and not dependant on the local authority's ability to meet the additional maintenance costs. In addition, the Church retains significant control over the management of the site.

This is a provision which continues a practice dating from the middle of the last century. It recognises that the Church of England has for centuries borne the burden of providing burial facilities for the community, that the Church of England, and parochial church councils, are not generally in a position to meet the costs of maintenance indefinitely and seeks to return the maintenance burden to the local community as a whole.

There is no Legal Transfer Deed transferring the closed churchyard as the ownership of the closed churchyard does not pass to the local authority. A plan identifying the extent of the area of maintenance responsibilities for a partially closed churchyard will be defined in the Order of closure. A fully closed churchyard will be wholly the responsibility of the Brough Council. The cost of maintenance has to be met exclusively by the local authority. The Church of England's document; "Responsible Care for Churchyards, A brief practical guide for parishes" provides further information, a copy of which is provided in appendix1.

### **3. Management**

Under section 215 of the Local Government Act 1972, the Council must: "maintain (the closed churchyard) by keeping it in decent order and its walls and fences in good repair" which extends beyond its cosmetic appearance. The Council's duty is of substantive maintenance and not of merely managing decline. It follows that there is nothing of a mandatory nature left for the PCC to do by way of Churchyard maintenance. Appendix 2 Legal Advisory Commission of the General Synod – The Maintenance of Monuments in Closed Churchyards, provides further information.

Appendix 1. Subsection 7 notes other important restrictions (passed from PCC to local authority) on what can take place in a Churchyard. After transfer, the local authority becomes subject to faculty jurisdiction and guidance from the Chancellor of the Diocese in respect to the local authority being responsible for all trees in a closed Churchyard. This includes the felling, lopping and topping of existing trees and the disposal of their timber as well as the planting of new trees. If a tree is subject to a Tree Preservation Order or located in a Conservation Area, the consent of the Local authority is also required before felling, lopping or topping. English Heritage may need to be consulted where a Registered Ancient Monument exists.

South Ribble Borough Council will arrange to cut the grass and keep any areas of vegetation generally tidy in line with its own maintenance regime's and policies and is responsible for most features in the churchyard. Boundary walls and upkeep of existing visible footpaths are included under the Council's responsibilities. The Council also needs to identify any risks associated with trees within the churchyard area and to carry out

safety work where necessary. This work will be undertaken in line with the Council's adopted Tree Policy. The safety of headstones and monuments remains with their owners who are usually the heirs of the persons commemorated, however where owners cannot be traced it is generally accepted that the responsibility will be that of South Ribble Borough Council.

There are some limitations as to what work can be carried out in a closed churchyard. There will be planning restrictions appertaining to buildings and trees. The land remains consecrated and the Council is required to obtain permission from the church authorities through Faculty from the Chancellor of the Diocese before making any changes or doing scheduled works. The Council also must take into consideration, Conservation Areas, Historic and Listed Buildings, The Commonwealth War Graves Commission (CWGC) and Tree Preservation Orders (TPO's).

### **Conservation Areas**

Conservation areas were introduced in 1967 and seek to preserve or enhance the character of the area and not just individual buildings within it. A conservation area is described as "an area of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance" therefore designating a Conservation Area does not remove or diminish other legislation that may apply in that area, including Listed Building Protection, protection for Ancient Monuments and Tree Preservation Orders. Development or works that are controlled by Conservation Area designation require applications for planning notification or permission for Conservation Area consent. Before carrying out routine tree work six weeks' notice must also be given the Planning Team.

### **Tree Preservation Orders**

Consent must be obtained from South Ribble Borough Council for any proposed works to protected trees unless the work is deemed to be exempt under the current Town and Country Planning Act.

It should also be noted that trees within Conservation Areas are also protected and any proposed tree works in these areas must not be carried out until South Ribble Borough Council have been put on notice that works may take place.

### **Historic and Listed Buildings**

A listed building or structure has special protection under the Planning (Listed Buildings and Conservation Areas) Act 1990 and allows for additional powers of protection. Owners have extra responsibilities; they need to obtain listed building consent for certain works and it is an offence to carry out works to a listed building without consent.

### **The Commonwealth War Graves Commission**

The Commonwealth War Graves Commission (CWGC) has a responsibility for all the war graves in the United Kingdom and others located across 152 countries. The headstone memorials belong to people from the Commonwealth who died when fighting in the two World Wars. The CWGC holds records of all Commonwealth War Graves and these can be accessed via their website.

#### **4. Risk Management**

In assuming responsibility for the maintenance of a closed churchyard a Local Authority assumes liability for public safety in accordance with the Public Liability Act 1951. In 2009, the Ministry for Justice introduced revised guidance for effectively managing the safety of headstones (and other risks) within cemeteries; “Managing the safety of Burial Ground Memorials – Practical advice for dealing with unstable memorials”.

The Legal Advisory Commission of the General Synod of the Church of England’s publication “The Maintenance of Monuments in Closed Churchyards” provides further legal advice on a local authority’s responsibility a copy of this can be found in Appendix 2.

A duty of care arises in the Occupiers Liability Act 1957 (those lawfully on the land – visitors) and 1984 Act (trespassers). South Ribble Borough Council also has a duty of care to control risks from memorials to their employees, contractors, volunteers and members of the public. Responsibilities are set out in various legislation covering burial grounds, including the Local Authorities’ Cemetery Order 1977. Where the operator is an employer they also have duties under The Health and Safety at Work Act 1974 and associated regulations such as the Management of Health and Safety at Work Regulations 1999.

#### **5. Maintenance**

**Grass Cutting** – Generally grass will be maintained to an amenity standard, keeping the area in an orderly and decent manner with several cuts per year, generally from late March to late October. The grass is maintained carefully to retain the rural character and to avoid damage to headstones and other structures. Grass cuttings are not removed.

The Grounds Maintenance Team are required to clean all arising’s which adhere to memorials and other grave furniture following cutting operations, methods include brushing, blowing, wiping or washing depending on weather conditions. Variations can be made depending on the requirements of each PCC to allow for different maintenance regimes.

**Hedges** – Hedges vary in terms of individual purpose, species, height, width and layout. All hedges are cut to a standard guided by good horticultural practise. Hedge cutting does not take place between April to September due to nesting birds and observed in accordance with the Wildlife and Country Side Act 1981.

**Weed Control** – As and when required. Chemical weed spraying should be avoided around headstone memorials.

**Litter Picking** – Litter picking within the churchyards is carried out as and when required.

#### **General Maintenance**

South Ribble Borough Council has an obligation to keep infrastructure features such as boundary walls, fences and footpaths in a good and safe state of repair. The arboriculture ‘duty of care’, rights and responsibilities formerly the responsibility of the PCC become that of the local authority after “transfer” of a closed churchyard.

**Walls/fences/paths** – When South Ribble Borough Council takes on a closed churchyard it must commission a structural survey of the site, including its boundaries and footpaths and work closely with Engineering and Conservation colleagues to identify hazards and carry out repairs.

**Site Furniture** – The safety of site furniture (e.g. seating, bins & signage) and its ultimate liability remains with the owner who installed it. If South Ribble Borough Council identify such an item as a hazard or that it requires repairing it will make every reasonable effort to identify the owner, to give them the opportunity to repair or remove the item. If the owner is unidentifiable or fails to repair/remove the item within 3 months of notification, South Ribble Borough Council (who hold the secondary liability as one aspect of their duty to keep the churchyard in decent order) will remove the item.

Any new proposed installations must first seek approval from the PCC and then South Ribble Borough Council. A faculty must be obtained before any removal or installation is carried out.

**Biodiversity** – Churchyards are valuable habitats for wildlife where longer grassed or wildflower areas exist. PCC's need to liaise with South Ribble Borough Council if they have any such areas which they wish to be managed accordingly. If appropriate, a conservation cut could be put in place with fewer cuts per year with cuttings collected, usually in July and late September.

**Trees** – Trees within the whole churchyard or in a partially closed churchyard the area identified on the site plan originally agreed, will be subject to the same inspection and maintenance regime as all other trees under the care of the Council as identified in the Council's Tree Management Policy in consultation with the Diocese.

### **Site Inspections**

A programme of two inspections per year has been integrated with normal maintenance duties in order to report defects or potential hazards requiring maintenance or repair to South Ribble Borough Council.

## **6. Safety Inspections of Graveyards and Memorials.**

Churchyards are set apart as consecrated, for the burial of the mortal remains of the dead - bodies or cremated remains - and such remains are in the custody of the Church for permanent safekeeping. It is a mark of respect that churchyards are kept tidy and well-looked after, but there are also legal responsibilities that arise in connection with them.

### **General Background**

1) It is usual for individual graves, to be marked with a headstone or other memorial, identifying the individual(s) whose remains are buried there. This custom has been observed for hundreds of years, (although many individuals have been buried with no permanent marker on their grave). Many of our older churchyards have such ancient memorials within them. Today, the vast majority of memorials are of modest size and shape (such matters being regulated by the Churchyard Regulations of the Diocese), but in past times they were often considerably larger and heavier,

as many of those dating from the Victorian period or earlier in our local churchyards will bear witness. The historic or heritage importance of certain individual memorials, may have resulted in their being 'listed' in their own right, by which they are protected by statute from unauthorised interference.

2) Over the years, damage may have occurred to some memorials from the effects of weather, or from subsidence or other ground movement, arising from trees and shrubs, or burrowing by animals, and from accident or vandalism. General deterioration of internal fixings may also have occurred. For various reasons therefore, the safety of a headstone or memorial may have been compromised, and not always in ways that are plainly visible.

3) People come to our churchyards for a variety of reasons, perhaps on their way to worship, or to remember family members and friends who have died, or perhaps simply as a quiet place to sit and rest for a while. They can also become an attraction for children as a place to play, or older individuals who may want a place to meet their friends. Unsafe memorials can potentially cause injury or death, and damage or loss, to a large number of people therefore, to those who are simply passing by or through the Churchyard, or those who are involved in other activities within its boundaries.

4) In a 'closed' Churchyard being maintained by the Borough Council, the Council owes duties to visitors to see they are reasonably safe for the purposes for which they are allowed to be there. A slightly lower duty is owed to those whose presence or activities may be somewhat less regular, or even unauthorised, provided that the Council is aware of the likelihood of their presence.

5) This is however not primarily a matter of legal liability. No one wants to see anyone exposed to risk of injury or death through dangers in a churchyard, with all the pain, distress, loss and worry that will follow after an accident of that type. Councils know of the potential for such dangers and need to know what steps they may and should take to minimise such risks.

6) The Borough Council would need to apply to the Consistory Court of the Diocese for a Faculty (formal permission) to carry out inspections of the memorials in those areas, and to take remedial or safeguarding action where potential sources of danger are identified. This may involve the use of warning tape, temporary supports or other means, and in extreme cases, laying the memorial flat. The Court would usually grant the faculty for a limited period.

7) Such formal permission is required because the legal situation in a churchyard can be complicated (see below), but also because families expect memorials to be kept undisturbed, and certainly not that Council authorities should interfere with the memorials on the graves of their loved ones, without their agreement or, at least, appropriate notice or warnings, and only where adequate reason exists.

8) The ground of the churchyard always belongs to the church, usually being formally vested in the parish priest, even after a burial or interment has been carried out in a particular place.

9) Ownership of a memorial vests in the first place in the person who erected it (i.e.

commissioned and paid for it), and after his or her death, 'the heir or heirs at law' of the person in whose memory it was erected. This is a method of inheritance that has been generally obsolete for nearly 100 years, and the passage of time over several generations, has in most cases rendered tracing the relevant individuals very difficult, if not impossible. Nonetheless, the important point to note is that the memorial is not vested in the parish priest, PCC, or Council, so it is not 'theirs' to deal with as they see fit, even if they can identify possible problems or dangers.

10) Primary responsibility for the upkeep and safety of the memorial remains with the owners(s). Because of the difficulty of identifying them (and possibly, of persuading them to meet their responsibilities), the Council (in a closed churchyard) must see that the churchyard is 'reasonably safe', may be obliged to act. It is not the Council's responsibility to undertake programmes of repair and restoration of defective gravestones, as opposed to inspection and making reasonably safe.

11) Where occasionally the Council nonetheless considers work to an individual grave needs to be undertaken by them, consent of the owner should be sought. If an owner withholds consent to necessary work, or cannot be found, a separate faculty may nonetheless be granted to the Council in respect of moving, demolishing, alteration or execution of other work to the memorial, provided the statutory process is followed. In case of emergency such action may be taken even if those steps have not been taken.

12) In the light of the above, the Council contemplating inspection and remedial action to memorials in a churchyard, will see that there are a number of potentially conflicting factors to consider: first, there is the need to take reasonable steps to keep the area free from danger; second, families and parishioners likely to be affected by such work, need to be kept aware such action is in contemplation, and have the opportunity to comment or object, in respect of 'their' family's grave(s); third, any action should be limited to what is PROPORTIONATE and REALISTICALLY NEEDED, and not be undertaken on the basis that it will prevent possible but unproven danger ever arising.

### **Testing and record keeping.**

South Ribble Borough Council will appoint suitable monumental mason contractors (NAMM/BRAMM approved) to carry out annual inspections of the memorials within the Churchyard.

Where danger or insecurity is identified during inspection, such that immediate remedial action to the memorial is required, proper record of what is found, together with photographs of relevant defects, should be made and securely retained.

Memorials should initially be visually assessed, on an individual basis, with consideration given to surrounding ground, foundations and joints, followed by a physical test. This requires a hand test to identify any significant looseness, and, second, the application of steady force or pressure with one hand to check for hidden instability. (Any sudden or violent blow may result in damage, and almost anything can be dislodged by enough pressure!) The height of a memorial, any obvious degree of lean or damage or defects or irregularities in the surrounding ground, may all be factors indicating potential dangers. The hand test should be carried out when standing to the side of the memorial, and not in

a place of danger, and the firm pressure should be applied in various directions. Any force measurement device should only be used by someone properly trained and conversant with its proper use.

It is best to record any findings by reference to the specific memorial. They should be categorised as:

GROUP 1.: forming an immediate danger, requiring immediate attention.

GROUP 2.: unstable, but unlikely to cause immediate danger.

Action will be needed in regard to group 1. If a memorial is to be laid flat, the inscription should be kept legible, and the stone should be kept as near the relevant grave as possible.

In group 2. warning or hazard tape round the memorial, or forming a barrier, together with a notice asking those interested in that memorial to contact the church or the council or some responsible individual, should alert families to the fact some problem has been identified. If no contact is made by the family within 3 months, then consideration needs to be given as to whether further action is required.

### **Safe Memorials**

Where a headstone is tested, and it is deemed safe no action will be taken with that memorial and it will be the subject of a re-inspection as part of an annual rolling programme. Any unsafe memorials detected by the parish church in the interim period must be reported to the Council immediately.

An owner/next of kin of a dangerous memorial, if known, maybe charged by South Ribble Borough Council for the cost of making a memorial safe and administration in organising the works.

South Ribble Borough Council is not responsible for maintaining the church building.

### **Re-Fixing**

The Council may have to re-fix a headstone by the most cost effective method (burying deeper in the ground) to prevent potential trip hazard and allow for effective and efficient mowing of the grass and to safeguard its workforce. This will also prevent an inappropriate re-fix by family or passerby and also negate a claim against the Council if an injury or worse occurred.

Headstones remaining flat long term, being under Faculty Jurisdiction, are unlikely to be approved by the Chancellor.

The inspections will help all parties build up a profile of memorials within the closed churchyards, prioritise potential risks and provide a focus for the future inspection and assessment processes. Records will be kept digitally.

PCCs should not usually carry out memorial testing themselves or engage a monumental mason to carry out such inspections in a closed churchyard. Ecclesiastical Insurance Group (the Insurance company often used by PCC's) may not cover the PCC for such testing in a



closed churchyard. The PCC could leave themselves open to legal action from a memorial owner. The PCC should refrain from laying memorials flat but should contact the Council and the Diocese Registry immediately if they perceive that there is a safety issue with any monument within the closed churchyard.

## **7. Communication**

Good communication regarding the memorial inspection and assessment process is required to maintain the support and understanding of the local community.

A Faculty Notice (obtained from the Diocese) informing the public about forthcoming memorial testing and taking remedial or safeguarding action where potential sources of danger is identified, will be displayed (not less than 28 days) prior to commencing the inspections at entrances and other prominent places about the churchyard as instructed by faculty notice. The PCC will notify its members/congregations and South Ribble Borough Council will also publish dates on its website.

A typical Faculty Notice would include:

Take notice that the Council intends to carry out an inspection of the memorials and monuments in the whole of the churchyard on a date not earlier than day. month. year.

The inspection is to identify defects or other possible sources of danger.

The responsibility to keep a headstone safe lies with the owner of the headstone, but the Council has a duty to keep this closed churchyard reasonably safe for those who visit it.

Where defects or possible dangers are found, the Council will take steps to remedy or safeguard the same, where possible, by the use of hazard tape, supports or by other means.

If a danger is significant and steps are urgently required to make the area safe, in the last resort, the memorial may be laid flat.

Queries, or any objection to the proposed work in regard to a particular memorial or monument, should be notified urgently to the Council and the Chancellor of the Diocese whose contact details are hereby noted.

## **Appendix 1**

## **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, 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 resitting.

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 considered 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.

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 mounts 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 (until 31 August 2010, after which the diocesan board of finance concerned), 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. 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 Ministry of Justice (Coroners Unit, 5th Floor, Steel House, 11 Tothill Street, London SW1H 9LH).

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 closure 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 Mission 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 closure 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.

## **Appendix 2**

### **Legal Advisory Commission of the General Synod – The Maintenance of Monuments in Closed Churchyards**

#### **LEGAL ADVISORY COMMISSION OF THE GENERAL SYNOD**

#### **THE MAINTENANCE OF MONUMENTS IN CLOSED CHURCHYARDS**

##### **Introduction**

1. The purpose of this Opinion is to provide advice upon the extent to which a local authority, taking over responsibility for the maintenance of a churchyard under Section 215 of the Local Government Act 1972, thereby becomes responsible for the safety of monuments within the churchyard.

2. Section 215 of the 1972 Act applies specifically to churchyards closed by an Order in Council. The procedure for making such Orders is contained in Section 1 of the Burial Act 1853. A churchyard may have been entirely disused for many years but it would not on that account be described as a closed churchyard, nor would a churchyard where all further burials have been prohibited by a local Act of Parliament. Where the requisite Order in Council has been made, section 215(1) provides that,

... the parochial church council shall maintain [the churchyard] by keeping it in decent order and its walls and fences in good repair.

A PCC which is liable to maintain a closed churchyard under subsection (1) may however serve upon the appropriate local authority a request under subsection (2)

... to take over the maintenance of the churchyard in which event, three months after service of the request

... the maintenance of the churchyard shall be taken over by the authority on whom the request is served ...

Subsections (2) and (3) contain additional provisions, irrelevant for present purposes, identifying the organ of local government which is actually to assume the maintenance responsibility.

##### **Relevant powers and duties of the parochial church council**

3. The PCC is a body corporate which is entirely the creature of legislation. Its powers are derived exclusively from statute, measure or canon. They do not extend to ownership of the churchyard, the legal interest in which is vested elsewhere. Specific powers and duties in relation to the churchyard (as outlined in the following paragraphs) have however devolved upon the PCC.

4. Before the passing of the Parochial Church Councils (Powers) Measure 1921, responsibility for the maintenance of churchyards was borne by the churchwardens pursuant to Canon 85 of 1603. In the case of closed churchyards, Section 18 of the Burial



Act 1855 (now repealed, with a saving in respect of the City of London) enabled the churchwardens to recover the resultant expenses from the poor rate.

5. As from 21 July 1921, by the successive operation of Section 4(1)(ii)(c) of the Parochial Church Councils (Powers) Measure 1921 and Section 4(1)(ii)(c) of the Parochial Church Councils (Powers) Measure 1956, there were transferred to the PCC all the powers and duties of churchwardens in relation to open or closed churchyards.

6. Canon 85 of 1603, in a modernised form, became Canon F 13 of the modern Canons of the Church of England:

- The churches and chapels in every parish shall be decently kept and from time to time, as occasion may require, shall be well and sufficiently repaired and all things therein shall be maintained in such an orderly and decent fashion as best becomes the House of God.
- the like care shall be taken that the churchyards be duly fenced, and that the said fences be maintained at the charge of those to whom by law or custom the liability belongs, and that the churchyards be kept in such an orderly and decent manner as becomes consecrated ground.
- Canon F 14 reflected the transfer of the churchwardens' responsibilities to the PCC by providing that:

The things appertaining to churches and chapels, and the obligations relating thereto, and to the care and repair of churches, chapels and churchyards referred to in the foregoing Canons shall, so far as the law may from time to time require, be provided and performed in the case of parochial churches and chapels by and at the charge of the parochial church council.

7. The drafting of Section 215(1) of the Local Government Act 1972 is consistent with Canon F 13.2, Canon F 14, and Section 4(1)(ii)(c) of the Parochial Church Councils (Powers) Measure 1956. Whether a churchyard is open for burials, or closed by Order in Council, precisely the same duty to maintain it falls upon the PCC concerned until the obligation to maintain has been taken over pursuant to Section 215(2) of the Act. The content of the duty is expressed throughout the legislation in almost identical terms, there being no material difference between a churchyard being kept 'in decent order' and 'in such an orderly and decent manner as becomes consecrated ground'.

### **The duty to maintain monuments**

8. Churchyard monuments, whether ancient tombs or modern memorials, are not annexed to the freehold but remain private property. The legal complexities concerning the devolution of title to monuments are identified in the Commission's Opinion, Churchyards: Ownership of Monuments and Trees. The owner of the monument is the party primarily liable for maintaining it in a safe condition, and may have to satisfy a claim for damages if injury is caused by a negligent failure to keep it in good order.

9. In the case of a churchyard maintainable by the PCC under Canon F 13.2 or Section 215(1) of the Local Government Act, a liability for personal injury (secondary to that of the owner) may arise by reason of the failure of the PCC to exercise its powers in relation to a dangerous monument.

These powers are also identified in the Commission's Opinion, Churchyards: Ownership of Monuments and Trees. They are ancillary to the duty to keep the churchyard 'in decent order' or 'in an orderly and decent manner', a concept which extends beyond its cosmetic appearance.

Safety to the public is one necessary aspect of what, in the context of a place of burial, amounts to 'decency'. Thus in *The Vicar and Churchwardens of St Botolph Without Aldgate v Parishioners of the Same* [1892] P 173, the Chancellor of London held that the filling and levelling of a dilapidated vault came within the duty to keep the churchyard in a sanitary and decent order.

10. The existence of the general duty to maintain the churchyard, coupled with the power (under faculty) to make safe any dangerous monument there, constitute a sufficient degree of control for the PCC to be liable as an occupier under legislation considered at paragraph 14 of this Opinion.

### **Consequences when maintenance is taken over by a local authority**

11. The drafting of Section 215 of the Local Government Act 1972 demonstrates that, after a request has been made for the appropriate authority to maintain a churchyard, the responsibility of the PCC will in its entirety pass to the authority leaving the PCC without any residual maintenance obligation in respect of that churchyard. So much is clear from the phrase 'the maintenance of the churchyard shall be taken over' which appears in subsection (2).

The words 'taken over' themselves signify a complete transfer from one entity to another. Their meaning is reinforced by the unqualified reference to 'the maintenance of the churchyard', which relates back to the expression 'the parochial church council shall maintain' in subsection (1). The remaining words in subsection (1), which appear after those just quoted, only serve to define the content of the statutory duty to maintain, and do not create separate self-standing duties with regard to walls or fences.

12. Where notice is properly served under Section 215, it is not open for the local authority to agree with the PCC to limit its maintenance liability or to confine it to particular areas in the churchyard whilst including liability in respect of others. The decision in *Lydbrook Parochial Church Council v Forest of Dean District Council* (heard in Gloucester County Court before District Judge Thomas in December 2003 and noted at (2004) 7 Ecc LJ 495), reinforces the legal position that the duty is one of substantive maintenance and not merely management of decline (see generally *R v Burial Board of Bishopwearmouth* (1879) 5 QBD 67 at 68) nor is it conditional on adequate funds being available.

13. By Section 215(2) the PCC is therefore wholly divested of its duties under subsection (1), which are also co-extensive with the duties imposed by Canons F 13.2 and F 14. The canonical obligation does not survive the transfer of function under Section 215(2) because the canon only operates 'so far as the law may from time to time require'. Thus the canon on its own terms is supplanted by the local authority's legal duty under the Act. It follows that there is nothing of a mandatory nature left for the PCC to do by way of churchyard maintenance.

14. The legal responsibility for injuries arising from the state of land, or property annexed to land, is predicated not upon ownership but occupation. The duty of care is articulated in two Occupiers' Liability Acts, that of 1957 in respect of those lawfully on the land (styled 'visitors'), and that of 1984 for trespassers. An occupier is someone who has control over the land in question. Since control may be shared (for example, as between a landlord and a tenant) two or more persons may simultaneously be occupiers. See *Wheat v E Lacon & Co Ltd* [1966] AC 552. The owner of a monument exercises control over it, and hence owes a duty of care under these statutes. Following a Section 215(2) transfer, the element of control which is the necessary foundation of an occupier's liability passes from the PCC to the local authority.

Even if in particular circumstances a PCC is found voluntarily to have retained some residual control over the churchyard, it is entitled to claim an indemnity or contribution pursuant to the Civil Liability (Contribution) Act 1978 from the local authority whose breach of duty occasions injury.

15. The operation of Section 215 of the Local Government Act 1972 has no effect upon the primary liability of the owner of a monument. The secondary liability, however, is taken over by the local authority under Section 215(2) as one aspect of the duty to keep the churchyard in decent order. The local authority thereby acquires sufficient standing to apply to the Consistory Court for a faculty empowering it to make safe dangerous monuments. See generally *Re Keynsham Cemetery* [2003] 1 WLR 66 (Bath and Wells Consistory Court), and *Re Welford Road Cemetery* (2006) Times 2 November (Court of Arches). Where there is an emergency involving interests of health and safety, the Consistory Court has special powers under Rule 13(10) of the Faculty Jurisdiction Rules 2000 to grant a faculty at short notice.

### **Employer's liability**

16. The law as outlined above has further consequences for a local authority whose workforce is engaged in churchyard maintenance. The churchyard thereby becomes a 'workplace' for the purposes of the Workplace (Health, Safety and Welfare) Regulations 1992. Under Regulation 4 of those Regulations the employer has duties in relation to the safety of any workplace under his control, while parallel duties are imposed upon any other person having control of a workplace.

17. Where the workplace is a closed churchyard the maintenance of which has been taken over by a local authority, the duty to maintain it, associated with the power to seek any necessary faculty from the Consistory Court, gives rise to the requisite control under Regulation 4. If a dangerous monument constitutes a hazard to the authority's workforce (whether directly employed or not) the duties under the Regulations require the authority to take the necessary steps to obviate the hazard. In doing so the authority has to plan and conduct its operations in such a way as to comply simultaneously with the Regulations, Section 215(2) of the Local Government Act 1972, and the requirements of the faculty jurisdiction. Compliance with each of these legal regimes is mandatory.

### **Conclusion**

18. The legal position may be summarised as follows. The primary responsibility for the safety of a monument in a churchyard closed by Order in Council rests with the owner of the monument. If the owner defaults, a secondary responsibility is imposed upon the body

having the duty to maintain the closed churchyard. This may be the PCC, pursuant to Section 215(1) of the Local Government Act 1972. Where, however, a local authority has taken over the maintenance of the churchyard under Section 215(2) its maintenance obligation extends to the safety of the monuments there. In that event the PCC is discharged from further liability as from the time of transfer and, if sued for injury caused by a dangerous monument it is entitled to seek indemnity or contribution from the local authority.