

**IN THE COMMISSARY COURT OF THE
DIOCESE OF CANTERBURY**

LYMINGE, ST MARY AND ST ETHELBURGA

JUDGMENT

1. This Petition seeks authorisation for the following works:

“Enhancement to the paths in the Churchyard including implementing new step-free access to the church for those with impaired mobility by laying new paths to the north door; re excavation of presumed Anglo-Saxon church in churchyard to allow long-term conservation and to facilitate creation of a management plan.”
2. The Petitioners are the Revd Jane Weeks, the Priest-in-Charge, and Messrs Philip Hawken, Churchwarden and Robert Baldwin, Project Manager.
3. As submitted, the Petition set out the following eleven itemised works:
 1. Remove the existing tarmac surface to the paths within the churchyard and the adjacent guttering at the base of the wall of the church;
 2. While the path surface is removed, use the opportunity to examine the archaeological remains that lie beneath and to either side of the paths, including the footings that lie beneath the south wall of the church, that were previously excavated by Canon Jenkins in the period from c. 1854 and were subsequently back-filled;
 3. Lay protective materials over the archaeology (as specified by Paul Bennett) and re-instate the path with a new water-permeable resin-bound surface, (subject to consultation) that is more free-draining and resistant to icing and a new continuous handrail from the gate to the church porch;
 4. Landscape the surroundings to the path and mark the outline of the archaeological remains in material compatible with 3 above;
 5. Lay new paths with handrail from i) the gate in the north churchyard boundary wall to the north door of the church, and ii) from the existing path by the Tower to the north door;
 6. Install a low ramp to cross the threshold of the north door;
 7. Extend the new path surface over the existing earth path in the churchyard extension as far as and to surround the War Memorial;
 8. Remove the modern brick pier at the gate in the north boundary of the churchyard to align with work to the public footpath (HE54) outside the churchyard (currently under

- discussion with and subject to permission from KCC) to reduce the angle of the bend in the path and provide access for mobility scooters;
9. Remove substructure of the path as it enters the churchyard at the north boundary in order to provide a more consistent gradient from the footpath into the churchyard and easier access for those with impaired mobility;
 10. Install a compacted surface (subject to approval by KCC) to the footpath (HE54) north of the churchyard from the gate west to Court Lodge Green (this path is believed to be part of the Glebe that was conveyed to become the churchyard extension between 1876 and 1890, but ownership is not currently registered);
 11. Install a touchscreen within the church (probably in the North Aisle but subject to consultation) to allow visitors to access reconstructions and other material generated as a result of the archaeological excavation and associated survey work in and around the standing church.

The Paul Bennet mentioned in Item 3 is the Archaeological Advisor to the DAC.

The estimated costs are considerable, at £161,904.

4. The sum is proposed to be met largely from the Heritage Lottery Fund, the balance from by PCC funds and a small grant from Kent County Council. The archaeological works are proposed to be undertaken by volunteers, professional archaeologists from the University of York and Canterbury Archaeological Trust aided by a team of enthusiasts working under supervision. The proposals form part of the "Pathways to the Past: Exploring the Legacy of St Ethelburga" project. There is an element of urgency, as the voluntary labour is only available between July and August 2019.
5. The PCC unanimously resolved to petition for the necessary faculty on 28th June 2018.
6. It is not expected that the work will affect any graves.
7. The DAC's advice is that the proposed works should be approved and that archaeological remains within the curtilage of the church are likely to be affected. The supporting materials explain that the projected archaeological works are potentially of international significance because the objective is to re-excavate a structure in the Churchyard found by a nineteenth century incumbent but re-buried in 1929. This structure is believed to be the remains of a very early church, either built by the Anglo-Saxon Saint, Queen Ethelburga or constructed very soon afterwards and containing her tomb. It is not known how the remains were re-buried in 1929 and it is feared that inappropriate practices from that time might be causing deterioration, together with the action of tree roots. This situation also lends urgency to the project.
8. The current main path giving access to the church is steep, uneven in places and ices in the winter. There are limited lengths of handrail. The result is that this path is difficult to use for those people who have mobility difficulties. Resurfacing in a porous material, as proposed, would ease the situation. The need to improve access occasions the opportunity for archaeological excavation to occur at the same time, as explained in Items 2 to 4 of the Schedule of works. Item 5 would be required as a consequence, together with the upgraded handrail. Items 6 and 7 are logically connected with the general improvement to the paths. Item 11 is intended as a lasting result of the historical research and is put forward as part of the public benefit required in order to gain HLF funding. Historic England has been consulted and does not object to the works. The Society for the Protection of Ancient Buildings has been consulted but has no comment to make. The Petition is strongly supported in a well-reasoned letter by Professor John Blair FBA, Oxford University Professor of Mediaeval History and Archaeology, explaining the potentially international significance of the work.
9. Public notice of the Petition attracted two objections. Ms Susan Kyte of 2 Kent Cottages, Church Lane, Lyminge objected by letter dated 30th May. Her property backs on to the churchyard. She objected generally to the lack of detail submitted in support of the Petition and, specifically, to Items 8, 9 and 10, together with "any work affecting the footpath and

adjacent to my lane and erroneously described 'grass verge'." She questioned the arrangements for heavy plant, spoil removal, working hours, noise, light and air pollution, and the lack of health and safety provision. She observed that there had been no acknowledgement of the fact that the main entrance to the church would be inaccessible with the effect that there would be greater pedestrian use of the lane past her house together with use of the land for burials. She concluded, stating that Mr Baldwin's "claim that a public right of way exists over my lane is incorrect and I am not prepared to allow unauthorised pedestrian access including use for funerals and machinery resulting from the proposed work at any time. I am currently in dispute with the Diocesan Board of Finance."

10. The other objection by letter dated 30th June 2019¹ was from Mrs Patricia Philip of the Croft, High Street, Lyminge. Mrs Philip's objections are similar insofar as she expressed concern about the impact of the works on her use and enjoyment of the lane, to which she claims a private law right. More generally, she referred to the Church's Grade I listing and its position in the North Downs Area of Outstanding Natural Beauty with the associated duties upon public bodies in the Countryside and Rights of Way Act 2000. Owing to what she described as the "thoughtless" planning of the works "without sympathy for the church's nearest neighbours", she strongly objected. She also queried ownership of the public footpath running between the churchyard and the lane and raised the issue of planning permission.
11. In response to these objections, the Petitioners (through Mr Baldwin) indicated in a letter to the Registry Clerk dated 10th June that they wished Items 8, 9 and 10 to be deleted from the Petition.
12. I should make clear that I have no jurisdiction to determine disputes as to land ownership or the existence or extent of public highway rights. Such matters are within the province of the civil courts and the fact that there are current proceedings in those courts is not my concern.
13. Much of the burden of these objections concerns the status and precise route of the lane and the public footpath just outside the churchyard. These matters are not within my jurisdiction. The Petitioners' indication that they wish to withdraw Items 8, 9 and 10 of the proposed works seems to me to be a sensible and conciliatory response to the objections. I formally grant permission for the amendment. Accordingly, I shall consider Items 1 to 7 and 11.
14. Both objectors have indicated to the Registrar that they do not wish to become Parties Opponent and are content for me to take their written objections into account in my determination. I am satisfied that I can determine this Petition on the papers before me, including the letters of objection.
15. There is no objection at all to Item 11. The objections to Items 1 to 7 do not appear to me to be based upon disagreement with the principle either of undertaking the planned access improvements or of the archaeological excavation/protection works.
16. I am utterly persuaded that Items 1 to 7 and 11 are all proposals which are in the interest of the church as a local centre of mission and ministry. Path improvements would enhance access to the church and churchyard by all, especially those for whom it is difficult to walk. These works are also clearly in the wider public interest:
 - (a) by improving physical access to elements of outstanding importance to the national heritage;
 - (b) by examining, recording and securing for the future archaeological remains of national and possible international significance for understanding the history of this part of Europe and the response of its people to the Christian gospel in the early centuries of the Church's existence;
 - (c) by providing interpretation of the Grade I listed building and its social and religious context.

¹ Though date stamped by the Registry "07 June 2019" so I think that its time date must have been 30th May.

There is no doubt in my mind that the setting of the Grade I listed building will be enhanced by the archaeological works and that its significance will be enhanced by means of the archaeological research and interpretation to be carried out by experts of the highest calibre. To the extent that the church and churchyard form part of the AONB, I consider that the purposes and enjoyment of that designation will also be enhanced, not harmed, by the proposals.

17. Inevitably, there will be disruption for two to three months for regular users of the church and churchyard and for neighbours. Having read all the supporting detailed submitted in support of the Petition and having regard to Mr Baldwin's response to the objections,² however, I do not agree that the project has been planned in a thoughtless or insensitive fashion.

18. Mr Baldwin answers the objectors' practical points as follows:

- there will be a one tonne mini-digger in the churchyard "for a few days" at the beginning of the works to remove tarmac, accessing from Church Road;
- the skip for tarmac disposal will be placed on the public highway in "the Rector's parking space"³;
- thereafter, all spoil will be retained and handled inside the churchyard;
- the new surface will be laid by hand.

These answers generally accord with the Method Statement prepared by Dr Gabor Thomas of Reading University.⁴

19. I consider the proposals set out by Mr Baldwin to be reasonable and largely⁵ capable of reflection in conditions on the Faculty, together with a condition governing hours of working. Conditioned in these ways, I find that the works would acceptably strike a balance between the strong public interest in the project and the interests of local residents for the duration of a two to three month programme.

20. In principle, therefore, I am persuaded that it would be right to grant a Faculty in respect of the amended Petition.

21. There is one further important matter, which is the secular planning position. Mr Baldwin has advised the Registry Clerk by email that the informal advice from officers of the Local Planning Authority ("LPA") is that no planning permission is required for removing the tarmac path surfaces or undertaking the archaeological excavation. Construction of new and replacement paths will, however, require planning permission. As this is simply officers' advice and not a Certificate of Lawfulness, this will not be definitive, but it gives a clear steer as to the way in which the LPA views the matter. Whilst I cannot prejudge the outcome of a planning application (and nor should anyone else) it is an indication that officers apparently have no in principle objection to the proposals. Normally, I do not determine petitions for projects requiring planning permission until such permission has been obtained; in general, the ecclesiastical courts act in a spirit of "comity with tribunals of different jurisdictions" (Re St Mary's Churchyard, White Waltham [2010] Fam 131 at 23) and my practice reflects this principle. There is, however, no rule of law forbidding me from granting a Faculty in advance of planning permission. In this case, whilst it is unfortunate that secular permission has not yet been obtained, there is a reasonably reliable indication of the likely outcome and, if the Petitioners are prepared to proceed on this footing, I do not consider it proportionate to hold up or possibly frustrate the project by refusing to grant a Faculty now, which would, I understand, mean that the generous offers of help over the summer would not be available. Instead I shall impose a condition requiring the details of path reconstruction to be lodged at

² Letter to Registrar 10th June 2019

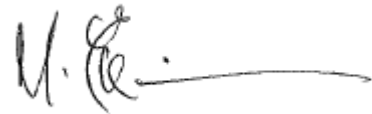
³ Though it should be noted that the Commissary Court has no jurisdiction over the highway

⁴ Though at para 5.2.2 he assumed a 5-tonne excavator (or similar) for tarmac removal.

⁵ See fn. 3 above

the Registry for my approval before that part of the works is undertaken. Such details should be consistent with any grant of planning permission. If planning permission is refused, then I must be informed at once.

22. I therefore direct that a Faculty be issued on the terms set out in this Judgment, together with a time limiting condition of 12 months, the standard conditions relating to insurance and to make proper provision for dealing with any human remains found during excavation, together with conditions limiting working hours to 8am to 6pm Mondays to Fridays, 9am to 1pm Saturdays and no working on Sundays and Bank Holidays, limiting use of a mechanical excavator to 5 days, with all other work to be undertaken by hand digging and requiring all soil handling to be confined to the confines of the churchyard. I have set out above the conditions to be applied in relation to the detailed works of path laying.
23. The costs of, and occasioned by, this Judgment are to be paid by the Petitioners.

A handwritten signature in black ink, appearing to read 'M. Ellis', followed by a horizontal line extending to the right.

MORAG ELLIS QC
Commissary General

4 July 2019