

Neutral Citation Number: [2019] ECC Wor 3

In the Worcester Consistory Court

Archdeaconry of Worcester: Parish of Ashton-under-Hill: Church of St Barbara

Faculty petition (18-48) relating to toilet and kitchenette facilities, with associated water supply and drainage

Judgment

Introduction

1. The church at Ashton-under-Hill, apparently one of only three in Britain dedicated to St Barbara, is the epitome of an attractive English country church. There has probably been a church on this site since the Saxon period, but the present building dates to the twelfth century, including a fine Norman south doorway. It also contains much fabric from subsequent centuries, the result of various restorations and improvements – in particular the north aisle, which was built in the 14th century and extended as part of a major restoration programme in 1867.
2. The pine pews, oak pulpit and reading desk were also installed during the 1867 restoration, and a west minstrels' gallery was removed. The tower screen, the organ and the lectern date from 1913, when a Georgian plaster ceiling was removed and the rafters revealed. And the oak cupboards at the back of the church were made by a local firm in 1994.
3. The church has been listed by the Secretary of State as a building of special architectural or historic interest, Grade II*, since 1959. It is within a conservation area and an area of outstanding natural beauty (AONB).

The proposals

4. Since 2002 a heating system has been introduced, along with a sound system and a hearing loop. And step-free access is available throughout the nave and the north aisle
5. As with many country churches, there is no water supply, and therefore no toilet or kitchen facilities. This is inconvenient both for the regular worshipping congregation and for visitors (including those attending weddings and funerals). It also limits the extent to which the church can be used for social events by the local community. Nor are there any such facilities elsewhere in the village.

6. The parish therefore proposes to install an accessible toilet in the western part of the tower, with a hand basin on the west wall and an extractor fan attached to the interior of a rarely used door on the south side – this would affect one of the existing glass panels. It would also be possible to introduce a wall-mounted baby-change facility in this area.
7. In the eastern section of the tower, the general cupboard along the north wall and the altar frontal cupboards along the south wall will be adjusted, and the floor safe relocated. The floor of the tower is known to be damp, so the partition between this area and the remainder of the tower would be designed and detailed to take account of this.
8. The pews have already been removed from the north side of the western part of the nave. The proposal is now to remove the pews also from the south side, to create an enlarged clear area, which would facilitate activities other than seated worship. Along the south wall of the new space, between the south door and the west end, there will then be introduced a tea-making cabinet, a moveable servery unit, and a chair store.
9. The water supply for the new facilities will be taken from the main under the village street, along the north side of the church and to the west of the tower. The drainage will be taken out under the southern door, to a trench arch drain in the churchyard to the south. The precise route of the pipes and drains will be chosen to avoid all known graves. Presumably care would be taken to deal in an appropriate manner with any other human remains discovered during the course of the works, and if necessary to redesign the works accordingly.
10. I understand that the first priority, as perceived by the parish, is the creation of the toilet in the tower area, and the installation of the associated water supply and drainage. I therefore refer to those works as “Phase One”, and the remaining works (the removal of the pews and the creation of the new facilities at the rear of the nave) as “Phase Two”.
11. There seems to have been some uncertainty as to which drawings show the proposed scheme. I should therefore make it clear that I have considered this matter on the basis of the following drawings:

D101/15A	165A E01	As existing	Part plan and elevation west end
D101/15B	165A E02	As existing	Part plan south-west churchyard
D101/15C	165A P02B	As proposed	Part plan and elevation west end
D101/15D	165A P03	As proposed	Part plan drainage south-west churchyard.
12. The works have been described in detail in a schedule by Mark Evans Architect Ltd, dated December 2014.

Assessment by the DAC

13. These proposals were recommended by the Diocesan Advisory Committee (DAC) as long ago as April 2015, subject to provisos as to:
 - (a) the approval by the DAC of the detailed design of the ventilation through the tower door;
 - (b) the approval of the stone for the new nave flooring; and
 - (c) archaeological supervision of the works.
14. At that time, the relevant procedural requirements would have been those in the Faculty Jurisdiction Rules 2013. Those Rules have since been replaced with the Faculty Jurisdiction Rules 2015, but not in respect of cases that were already being considered under the 2013 Rules.
15. Under rule 6.2 of the 2013 Rules, the recommendation of the DAC ceased to have effect in April 2017. The DAC therefore reconsidered the matter in January 2019, and stated that it was still recommending the works, subject to the same provisos; but it added a further proviso that an updated specification and schedule of works should be commissioned from the architect, in view of the passage of time (and possible changes in regulations and technology) since the proposed works were originally conceived.

Consultation with other bodies

16. Under rule 3.4, and paragraphs 3 to 5 of Schedule 1 to the 2013 Rules, a parish was required to consult English Heritage (or its successor Historic England), any relevant national amenity society and the local planning authority in respect of
 - (a) any works involving the alteration of a listed church to such an extent as would be likely to affect its character as a building of special architectural or historic interest, and
 - (b) any works likely to affect the archaeological importance of a building or archaeological remains within a building or its curtilage.

In the 2015 Rules, those provisions have become rule 4.4 and paragraphs 3 to 5 of Schedule 2; but the substance of them has remained unaltered.

17. The DAC observed that the proposals in this case would fall within both of the above categories. I agree with that assessment. It recommended that the parish consult Historic England and the Society for the Protection of Ancient Buildings (SPAB). Unfortunately, it did not at that stage recommend consultation with the planning authority.
18. When the papers came before me in 2019, I noted that the planning authority had not been notified of the proposals, as it should have been, and directed that it should be.

Responses to consultation

19. Historic England (in a letter of 30 October 2015, upon which it still relies) raised no objection to the proposed toilet in the base of the tower. It also supported the water supply (and, by implication at least, the drainage), subject to possible archaeological concerns. It did not mention the extract fan.
20. However, it observed:

“We are more concerned about the kitchen proposal, specifically about the loss of the bank of five pews and the pew platform here and the loss of what is a very attractive part of the church. Pews have already been removed from the rear of the nave and from the rear of the north aisle, which has created a children’s area and some social and circulation space.

“We are also concerned that, with the other four tall cupboards against the west wall, there will be an overdominance of modern storage; if the kitchen were to form part of the existing bank of cupboards or were to run adjacent to them along the north wall, this impact would be lessened. Taking account of the location of the water supply, the large cupboard to the north of the vestry screen could be converted into a kitchen or replaced with a kitchen unit and the other cupboards which have capacity be used to store the choir cloaks and sound equipment. There will also be space in the new toilet which perhaps could accommodate the cleaning equipment.

“We acknowledge there is a desire for more social space, however we consider that there is quite a lot of social space already in this church, arising from pew removal, but some of it has been eroded by stacked chairs, buckets and a table which would be redundant if the new servery unit is installed. Therefore we do not find the argument for the kitchen in the southwest corner convincing, given that it is premised on loss of historic fittings. We are however, as suggested above, open to its going elsewhere.”
21. It also noted that it was not opposed in principle to replacement of the existing stacking chairs with new ones. That was apparently discussed on site, but does not form part of the present proposals; it will therefore have to be the subject of a further petition if the pews are in due course removed.
22. The SPAB chose not to make any observations.
23. The local planning authority supported the principle of installing a water supply, as that could help sustain the church in the future. However, that approval was subject to the design and materials conserving and enhancing both the built and archaeological heritage. It continued:

“Whilst alterations to the inside of the church would normally fall under faculty jurisdiction, as per section 5b of the Ecclesiastical Law, England 2013 (p41). The local authority should however be consulted where works are likely to affect the “archaeological importance of a building or archaeological remains within the building or its curtilage

24. This is not entirely accurate, as alterations to the interior of a church will always fall under the faculty jurisdiction, by virtue of canon law. The reference to “section 5b of the Ecclesiastical Law, England 2013” appears to be to para 5(b) of Schedule 1 to the Faculty Jurisdiction Rules 2013, which contains the requirement (mentioned above) as to a planning authority being notified of faculty petitions for works with archaeological implications.

25. It continued:

“As St Barbara’s is an important heritage asset, any application would need to be accompanied by a full heritage statement.

“Drawing 165A P02B ... proposes that the extractor fan would be located within a trefoil light in a historic arched door. This would require the removal of the historic glass and dramatically alter the appearance of the door and thus this elevation of the tower. Furthermore the installation of the extractor fan in this location would result in the door no longer being operable. This location would not be supported from a heritage perspective. Alternative locations for the ventilation should be included if a full planning application is submitted.

26. The authority also raised concerns as to the proposed water supply and drainage. It concluded as follows:

“The works to install a new water supply and drainage to St Barbara’s would require the submission of a Listed Building Consent Application. The application would need to be accompanied by a detailed heritage statement explaining how the proposal has considered both the built and archaeological heritage and how this has influenced the design and proposed route of the pipework. The application should also state where the ground inside the church would be dug up or where the scheme may intersect archaeological remains.”

Procedure

27. It is a pity that this matter has dragged on so long, due to a combination of unfortunate circumstances.

28. The plans submitted with the petition show only the part of the church immediately affected by the proposed works – none of them show the internal layout of the whole of the church. Nor do the photographs on those drawings show the existing layout. So, for example, they do not make clear how many of the existing pews remain, and how much open space (referred to as “social

space”) there is. Nor is it clear from the plans what is happening in the north aisle.

29. This is important, as the concern expressed by Historic England, noted above, is on the basis that there is already enough open space – both for circulation purposes and to house catering facilities. I entirely understand the value of some un-pewed space in a church (as does Historic England); but it was not clear from the papers submitted with the petition how much space exists already; nor does the statement of needs justify why this much extra space is required.
30. Nor was I able to discern amongst the papers initially before me any response by the parish to the concerns raised by Historic England – nor any indication that alternative layouts had been explored, and with what result.
31. In a letter dated 13 March 2019, therefore, I invited the parish to supply to the Registry as soon as maybe the following further information:
 - (a) a plan of the whole nave and tower, as existing and as proposed, showing the layout of the seating and the existing and proposed uses of each part; and
 - (b) photographs of the whole of the interior of the church, particularly the western half of the nave and the north aisle (to avoid the need for a site inspection, which would lead to yet further delay).
32. I also invited the parish and its architect to consider carefully the suggestions made by Historic England, and either redesign the scheme accordingly; or else justify why that would not be possible or appropriate – possibly with the assistance of the DAC. The planning authority was at that stage not involved.
33. In the absence of any satisfactory response to this invitation, I visited the church myself in July 2019. Historic England did not wish to be present, so I chose to go ahead unaccompanied (other than by the Deputy Registrar). Following that visit, I am satisfied that it is expedient for the matter to be determined on the basis of written representations.

The law

34. The approach that should now be taken by a consistory court to considering a petition relating to proposed works to a historic church was explained by the Court of Arches in *Duffield, St Alkmund* 2013] Fam 158 at [87]. I recently set this out in slightly more detail in my recent judgment in *Worcester, All Saints* [2019] Wor 1, but for convenience I summarise it here.

- “(1) Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?
- (2) If the answer to question (1) is “no”, the ordinary presumption in faculty proceedings “in favour of things as they stand” is applicable,

and can be rebutted more or less readily, depending on the particular nature of the proposals. Questions 3, 4 and 5 do not arise.

- (3) If the answer to question (1) is “yes”, how serious would the harm be?
- (4) How clear and convincing is the justification for carrying out the proposals?
- (5) Bearing in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building, will any resulting public benefit (including matters such as liturgical freedom, pastoral well being, opportunities for mission, and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm? In answering question (5), the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be the case if the harm is to a building which is listed Grade I or II*, where serious harm should only exceptionally be allowed.”

35. In a subsequent decision, the Court of Arches noted that, in answering question (1), it is necessary first to consider what is the special architectural or historic interest of the church in question (*Penshurst, St John the Baptist* (2015) 17 Ecc LJ 393 at [22]). It also observed that the grade at which the church has been listed will be highly relevant.
36. Various decisions of consistory courts since then have followed the principles set out in *Duffield* and *Penshurst*; they are still good law. Most recently, three decisions of consistory courts – *Aston Rowant, St Peter and St Paul* [2019] ECC Oxf 3, and *Llanyblodwel, St Michael* [2019] ECC Lic 6 and *Wellington, All Saints* [2019] ECC Lic 7 – have highlighted the desirability of considering whether an identified need could be met in a way that caused less harm than the proposal forming the subject of a petition.

Need for other consents

37. In view of the comments made by the planning authority, it should be noted that the works associated with the introduction of the new water supply and drainage associated with the new facilities would be an engineering operation, and thus “development” under the Town and Country Planning Act 1990.
38. The insertion of an extractor fan in a glass panel of the door into the tower would be a building operation, and thus development, unless it is considered that it does not materially affect the external appearance of the building (see TCPA 1990, s 55(2)(a)(ii)). As to whether it would have such an effect – either at the proposed location or elsewhere – that is a matter of fact and degree, to be determined in practice by the planning authority; although I note in passing that Historic England has made no comment as to this matter, which suggests

that it is not of major concern. And the DAC has required that it be given a chance to approve the detailed design of this element.

39. The works in the churchyard and, possibly, the insertion of the fan, would therefore require planning permission. All of the other works affect only the interior, and would thus not require planning permission (TCPA 1990, s 55(2)(a)(i)). The need for such permission is in addition to the need for a faculty.
40. Listed building consent would not be required for any of the proposed works, by virtue of the ecclesiastical exemption (Planning (Listed Buildings and Conservation Areas) Act 1990, s 60(1)).

Discussion: Phase One

41. I note that no objection has been raised by anyone to Phase One of the proposed works. I too consider that this element of the works are, on their own, intrinsically desirable, both in principle and in detail. A faculty should therefore issue to authorise this.
42. I have noted that the insertion of an extract fan has concerned both the DAC and the planning authority. I am doubtful that a more suitable location could be found, as inserting it into an existing glazed panel in a timber door seems likely to be preferable to making an opening in a solid stone wall; but I fully accept that the fine details of the installation will be critical. A suitable condition will therefore be required to ensure that the detailed design of the fan is approved by the DAC. It may in practice be sensible for the parish to negotiate with the DAC and the planning authority to ensure that a design is achieved that satisfies everyone.
43. The archaeological implications of the associated works in the churchyard, to achieve water supply and drainage, are also understandably a matter of concern to the DAC and to both Historic England and the planning authority.
44. The principles underlying the approach to be adopted in such cases have been fully considered by the Advisory Panel on the Archaeology of Burials in England, a panel supported by the Church of England, the Ministry of Justice (responsible for non-consecrated burial grounds) and the Church of England. The Panel has produced a useful document entitled *Guidance for Best Practice for the Treatment of Human Remains Excavated from Christian Burial Grounds in England* (second edition, 2017), designed to assist “archaeologists, local authority planning departments, museums, clergy, and church organisations such as parochial church councils, diocesan advisory committees and consistory courts”.
45. The main recommendations of that Guidance, so far as relevant, were summarised as follows:

- “(a) If burial grounds, or areas within burial grounds, which may contain interments more than 100 years old have to be disturbed, whether for minor building work or larger scale development, to a depth that is likely to disturb burials, the relevant areas should be archaeologically evaluated beforehand. Any subsequent exhumations should be monitored, and if necessary carried out, by suitably qualified archaeologists.
- (b) The developer, whether a religious or a secular organisation, should be responsible for the cost, including study of excavated remains, archiving and publication of the results of that study, and the reburial or deposition of remains in a suitable holding institution.”

46. I will therefore impose a suitable condition as to archaeological supervision. However, I have noted above that this aspect of the works will undoubtedly require the submission of a planning application, and any permission that emerges may well be subject to more detailed conditions as to archaeological matters.

Discussion: Phase Two

47. As to Phase Two (the removal of the pews and the creation of the kitchen facilities), I share the concerns raised by Historic England. First, there seem to be a number of items in the church that could with advantage be rehoused elsewhere – or in some cases simply disposed of without further ado. Secondly, there are already a lot of cupboards, and more are proposed in the proposals for the tower area. I too consider that it might well be that some of these could be reconfigured and used to provide the desired catering facilities.
48. I also consider that the removal of the south-west block of pews would be unfortunate. It would significantly change the character of the church, which is currently that of a traditional, part-pewed interior, so as to be dominated by a large cleared area at the back. In particular, because of the sight lines within the church, the pews to be removed from the rear of the nave are more likely to be used than those in the north aisle. I also agree that the installation of modern serving and storage units as proposed is in danger of giving this part of the church an inappropriate domestic character.
49. I suspect that a satisfactory design could be arrived at, along the lines indicated by Historic England (in the passage from its representations that I have quoted earlier). It may be that the present proposals are indeed the most appropriate that can be achieved, but I have not yet seen sufficient evidence to enable me to arrive at that conclusion. I therefore consider that this element of the proposals should be reconsidered. On the basis of what is before me at present, it seems to me that the harm likely to be caused to the character of the church by the implementation of Phase Two is not outweighed by the identified need.

50. Historic England has suggested that Phase One could be approved first, while the works in Phase Two are refined further. It seems to me that in an ideal world it would be desirable for the proposals to be considered as a whole, as any decision as to the overall pattern of storage may have implications for the design and layout of the toilet enclosure. However, if the parish is keen to proceed with Phase One, I do not think that that is a sufficient reason to justify the withholding of a faculty.
51. It may also be appropriate for the parish to reconsider the design of Phase Two (and possibly Phase One as well) whilst seeking to obtain planning permission for the works in the churchyard.

Conclusion

52. I accordingly grant a faculty for the works to the tower area, including the creation of a fully accessible toilet facility, and the associated water supply and drainage, on conditions:
 - (1) that no works are carried out until a revised specification, including full details of the proposed extract fan, have been approved in writing by the DAC or, in default of such approval, by the court;
 - (2) that the works thereafter be carried out in accordance with the details thus approved; and
 - (3) that access be given at all reasonable times to the DAC archaeological advisor or another archaeologist approved in writing by the DAC, before, during and after the proposed works to enable the archaeological consequences of the works to be supervised and finds to be recorded.

Charles Mynors

Chancellor, Diocese of Worcester

17 November 2019