

Neutral Citation Number: [2021] ECC Bla 3



Faculty – Public Cemetery – Removal of existing hedgerow on consecrated land forming part of the cemetery and creation of new 1.8 metre wide footpath along the south side of the adjoining public highway - Faculty Granted

Faculty No: 34 of 2021

**IN THE CONSISTORY COURT OF
THE DIOCESE OF BLACKBURN**

Date: Sunday 6 June 2021

Before:

THE WORSHIPFUL DAVID HODGE QC, CHANCELLOR

In the matter of:

Scotforth Cemetery, Ashford Road, Lancaster

THE PETITION OF LANCASTER CITY COUNCIL

Determined on the papers and without a hearing

The following cases are referred to in this Judgment:

Re Holy Trinity, Hull [2018] ECC Yor 4, (2019) 21 Ecc LJ 129

Re Parish of Caister on Sea [1958] 1 WLR 309

Re St John's, Chelsea [1962] 1 WLR 706

Re St Mary the Virgin, Woodkirk [1969] 1 WLR 1867

JUDGMENT

1. By a petition dated 18 March 2021 Lancaster City Council apply for a faculty to remove an existing hedgerow on consecrated land forming part of Scotforth Cemetery, Ashford Road, Lancaster and to create (where space permits) a new 1.8 metre wide footpath along the south side of Ashford Road extending west from the main entrance to Scotforth Cemetery to slightly beyond the second entrance as shown on the “Potential Highway Improvements” plan attached to the petition. Details of the new boundary treatment to screen the public footpath from the cemetery land and the graves located within it have still to be agreed between the City Council and the relevant housebuilding company.

2. The petitioners, Lancaster City Council, own the freehold of Scotforth Cemetery in Lancaster. As landowners, the Council have been approached by a house building company which has a pending outline planning application to build new homes on land at Ashford Road. After consultation with both the City Council, as the relevant local planning authority, and Lancashire County Council, as the relevant highway authority, the house building company is looking into the potential of creating a footpath on the southern side of Ashford Road because it is too narrow or even non-existent in certain places. The land required for the footpath forms part of Scotforth Cemetery and, although owned by Lancaster City Council, it is consecrated ground and therefore falls within the faculty jurisdiction. There is an existing hedgerow which forms part of the cemetery with the council’s ownership and extends to the adopted highway. The proposal is to remove this existing hedgerow and to create a new 1.8 metre wide footpath (where possible) extending westwards from the main entrance to the second entrance to the Cemetery and slightly beyond. The City Council have yet to determine the pending planning application and they are exploring ways to improving connectivity links locally for the benefit of the community. The development is at present still at the proposal stage and nothing has yet been agreed with the housing building company; but if this matter were to proceed the relevant land would ultimately be transferred to Lancashire County Council and incorporated within the adopted highway network in the area.

3. Although there are no memorials in that area of the Cemetery, staff in the City Council’s Cemeteries Office have checked whether there have been any burials between the existing tree line and the hedgerow and they have confirmed that no graves were ever proposed in this area and no interments have ever taken place there. Should the development proceed, the City Council and the house building company will work closely together when any work is being carried out on site to ensure that any work in close proximity to the existing graves will be carried out with as little impact to visitors to the Cemetery as possible.

4. The City Council are in no doubt that there would be wider benefits for local residents and members of the public if a suitable footpath could be provided along this route. The photographs which accompany the petition show an existing grass verge separating the roadway from the existing hedgerow with no footpath protecting pedestrians from any vehicular traffic, thereby creating an apparent risk of injury to pedestrians proceeding along the southern side of Ashford Road.

5. The public notices were displayed from 7 April to 5 May 2021 (inclusive) at the entrances to the Cemetery and at the site of the proposed works, as duly certified by the City Council's Estates Manager on 21 May 2021. Emails of objection were received from five people within the public notice period. Each of these potential objectors was sent a written notice (pursuant to FJR 10.3) stating that they might become a party opponent to the proceedings by serving upon the petitioners and sending to the registrar particulars of objection in Form 5 or alternatively leaving me to take their emailed objections into account in reaching my decision without formally becoming a party to the proceedings. However, none of the potential objectors has responded to the Form 5 paperwork that was sent to them. One of the letters was returned by Royal Mail with a note that the addressee had 'gone away'. A sixth email objection was received some two weeks after the expiry of the notice period.

6. The email objections raise concerns about the loss of the hedgerow, the feasibility of providing a replacement hedgerow, the feasibility of providing alternative pedestrian access along the northern boundary of the cemetery, the effect on existing graves and cremated remains, the effect on the number of available grave and cremated remains spaces within the cemetery, and the ability to make these up by the acquisition of additional land.

7. At my direction, the Registry sent copies of these objections to the petitioners; and they asked the petitioners if they had any comments in response, and whether they were content for me to deal with the petition on the basis of their written representations.

8. The petitioners have responded to the comments raised in the email objections by way of a letter dated 2 June 2021. They have not objected to my disposing of the proceedings by written representations and, having considered the contents of the petitioners' letter, I am satisfied that it is expedient to do so having regard to the overriding objective of dealing with this case justly.

9. In response to the objections raised, the City Council's comments and responses are as follows:

(1) The loss of the hedgerow.

The petitioners attach to their letter a plan showing the location of the proposed new footpath and the planting of a new hedgerow. The developer is said to be well aware of the provisions of the Wildlife and Countryside Act 1981 (under which it is an offence to disturb any birds while they are nesting, or building a nest, or in or near a nest that contains their young.) If the works to the hedgerow are carried out in the nesting season, the existing hedgerow will be removed under the supervision of an ecologist to ensure that there is no impact on any nesting birds. The petitioners point out that they are at a very early stage in this matter and that no terms and conditions have yet been agreed for the transfer of any land.

(2) The provision of a replacement hedgerow.

A new hedgerow will be planted adjacent to the new footpath, parallel with its current position.

(3) The feasibility of providing alternative pedestrian access along the northern boundary of the Cemetery.

One of the objectors has suggested opening up all of the existing gates to the Cemetery and having a footpath going through the cemetery. This is something that the City Council, as the owner and manager of the Cemetery, could not accept or agree to. A proposal was considered

some years ago to open all the gates on to Ashford Road but this would have created Health and Safety issues as it would involve taking people back on to the road where there is a rise in levels and no footpath connection. Nor would it benefit or enhance the Cemetery. It might encourage anti-social behaviour. The City Council also have to consider users of the Cemetery and bereaved families. Whilst the main entrance is kept open all day and night, the City Council would not wish to encourage the Cemetery to be used as a cycle route. The Cemetery is not lit, the City Council would not want it to be lit, and people would not necessarily want to walk through an unlit cemetery at night or after dark. Therefore, this suggestion would not be appropriate.

(4) The effect on existing graves and cremated remains.

There will be no impact on existing graves or cremated remains. There are no grave spaces between the tree line and the hedgerow. Staff in the Cemeteries Office have checked whether any burials have taken place between the existing tree line and the hedgerow (despite no memorials being in place there) and they have not identified any. They have confirmed that no graves were planned in this area and, as a result, no interments have taken place there. There is only one row of graves in this area and this is well away from the hedge and the trees.

(5) The effect on the number of graves and cremated remains spaces in the future.

There is said to be no issue here at all. Given the location of the existing trees and the root protection areas, the area between the current hedgerow and the trees is unsuitable for grave or cremated remains spaces. On this basis, there will be no reduction in available cemetery space. The current grave allocation is now in other areas of the Cemetery.

10. The petitioners conclude by emphasising that their proposal has a significant highway safety benefit for Ashford Road and may represent the only feasible option for improving pedestrian access in this locality (although at this early stage in the development proposals, other options cannot be ruled out entirely).

11. I am satisfied that the City Council have satisfactorily addressed all of the concerns raised in the emailed objections. Subject to the inclusion of suitable conditions (as outlined below), the grant of the faculty sought will cause no harm to the Cemetery. The hedgerow will be replaced; there will be no negative impact on existing graves or cremated remains; and there will be no negative impact on the number of available grave or cremated remains spaces within the Cemetery. The proposal has positive benefits for pedestrians in terms of road safety.

12. I am satisfied that the Consistory Court has the necessary jurisdiction to grant this faculty even though it involves putting a small area of consecrated land to use for a secular purpose. In *Re Holy Trinity, Hull* [2018] ECC Yor 4, (2019) 21 Ecc LJ 129 Chancellor Collier QC (in the York Consistory Court) had to consider the jurisdiction of a consistory court to put a small part of a consecrated churchyard to use for a secular purpose, contrary to the terms of the sentence of consecration. At paragraphs 41 to 47 the Chancellor accepted that a faculty could be granted to permit a small part of a disused burial ground to be used for a road-widening scheme. Chancellor Collier QC cited observations of Deputy Chancellor Newsom in *Re St John's, Chelsea* [1962] 1 WLR. 706 to the effect that: "*Faculties can be granted for throwing small parts of a churchyard (whether still available for burials or not) into a highway, or for granting other rights of user in the nature of wayleaves. ... This part of the jurisdiction must be sparingly exercised and should not be extended.*" That case was cited and relied upon by Mr Owen Stable QC, sitting as the Deputy Auditor of the Chancery Court of

York, in the case of *Re St Mary the Virgin, Woodkirk* [1969] 1 WLR 1867 as conferring jurisdiction to allow a local authority to take from the churchyard of St Mary a strip of land some 260 yards in length and varying between approximately 7 yards and 20 yards (a total of 2,000 square yards) and to use the same for a road improvement scheme. Having decided that he had the necessary authority to deal with the matter, the Deputy Auditor went on to say: *"In my judgment I ought not to grant a faculty unless I am satisfied that considerations of the public interest require that the proposed road improvements should be carried out; that there is no reasonable alternative and that the public interest outweighs the interests of the objectors and the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated."* However, the case for any proposal must be proved conclusively or else it will fail, as happened in *Re Parish of Caister on Sea* [1958] 1 WLR 309, a case decided by Chancellor Ellison before either of the *Chelsea* or the *Woodkirk* cases had been decided; there it was held that the burden on the petitioners had not been discharged and the petition was therefore refused.

13. In the present case, no part of the consecrated land which is to be put to secular use as a footpath has ever been used for the burial of human or cremated remains, nor has there ever been any intention that it should be used for that purpose. Against that background, I am satisfied that the burden on the petitioners has been discharged and that this petition should be granted. I am satisfied that the petitioners have demonstrated that the safety of pedestrians traversing the southern side of Ashford Road will be enhanced by the creation of the proposed footpath. Although the petitioners have not conclusively demonstrated that there is no feasible alternative to the use of this particular land, none whatsoever immediately presents itself. In the special circumstances of this particular case I am satisfied that the petitioners have shown that the public interest in promoting the safety of pedestrians using the public highway outweighs the countervailing public interest that consecrated land should continue to be used for the sacred use to which it has been dedicated. That is because there is no present or foreseeable intention, and there never has been any intention in the past, to use this particular area of land bordering the public highway for any sacred purpose. There can therefore be no possible objection to releasing the land from the effects of its consecration (in the sense of authorising the use of the land for a secular purpose) in accordance with the wishes of the landowner to use it for improving the safety of users of the public highway.

14. I will therefore grant the faculty as asked on the following conditions:

- (1) The removal of the existing hedgerow must take place either (a) outside the nesting season (which starts in February and ends in September) or (b) under the supervision of an ecologist to ensure that there is no impact on any nesting birds.
- (2) No human or cremated remains, and no memorials, are to be disturbed during the course of the works.
- (3) A new hedgerow must be planted in place of the existing hedgerow adjacent to the new footpath and parallel to its current position.

I will allow two years for the completion of the works.

David R. Hodge

Chancellor Hodge QC

The First Sunday after Trinity 2021

