

Neutral Citation Number: [2022] ECC Nor 3

IN THE CONSISTORY COURT

DIOCESE OF NORWICH

IN THE MATTER OF:

DITCHINGHAM, ST MARY

-and-

IN THE MATTER OF:

**THE CONTESTED PETITION OF THE REVEREND CHRIS HUTTON (RECTOR),
SALLY ELLSON (CHURCHWARDEN) AND SIMON WILKIN (CHURCH FABRIC
OFFICER) AND THE OBJECTIONS OF ANDREW MORLAND (PARTY
OPPONENT) – *petition reference [2022-074386]***

-and-

IN THE MATTER OF:

**THE PROPOSED RE-LAYING AND LEVELLING OF THE PATH AT THE
CHURCH USING HOT BITUMEN AND GRAVEL AND THE PROVISION OF A
DISABLED PARKING SPACE WITHIN THE CHURCH CAR PARK USING
TARMACADAM**

Judgment of the Chancellor: November 18, 2022.

Petition to re-lay and level path – justification of the Petitioners for the works – reasons for opposition of the Party Opponent – justification for case being decided on the basis of written representations – final submissions of the Petitioners and Party Opponent – favourable recommendation of the Diocesan Advisory Committee – degree of consultation necessary – identification of potential beneficiaries of Petitioners’ proposals – true scope of works – balance between wider public interest and responsibility of the Petitioners for maintaining the churchyard and car park – proposals found to be justified by need and sensitive to the visual appearance of the churchyard – grant of faculty with appropriate conditions.

Etherington Ch:

1. This petition [2022-074386] was created on June 30, 2022, seeking to re-lay and level the path at Ditchingham, St Mary using hot bitumen and gravel and to provide a disabled car parking space within the church car park using tarmacadam.
2. I have seen photographs of both the path and the car park. I have been shown a photograph of the Earsham Path, which I am told the churchyard path will resemble.
3. The purpose of the petition in respect of the path is (a) renewal of the path (b) making it less of a trip hazard (c) lessening dangers of slipping and (d) making it more user-friendly for disabled users. In respect of the car park, its purpose is to make it more suitable for disabled visitors.
4. The PCC resolved to advance this petition on June 22, 2022 by a unanimous vote of those present.
5. Andrew Morland objects to these proposals and wished to become a Party Opponent. There are no other objectors.
6. Mr Morland's objections were set out in a letter dated August 24, 2022 which he copied to the editor of *The Eastern Daily Press*, the editor of *The Beccles and Bungay Journal* and the Bishop of Norwich.
7. Mr Morland refers to Form 4A (Faculty Jurisdiction Rules 2015, Rule 6.2 as amended – “FJR”) which was attached to the church and describes the works proposed as “concerning a proposed development of areas within the churchyard and adjacent car park.” He goes on to say that the “said notice makes reference to the laying of hot Tarmac on pathways and other areas within the churchyard.” Mr Morland also says he had difficulties in accessing the plans and documents in the church office, being informed by the occupant that she had no knowledge of the proposals. He concludes that no such documents exist or have ever existed.
8. Mr Morland says that, in his opinion, the proposed use of black hot-poured tar-based tarmac on pathways and other larger areas within a very rural country churchyard can only be described as grotesque and deeply offensive to the more sensitive people who live in the area. He recommends the use of flint shingle properly levelled and compacted which he says is much cheaper.
9. Since reference has been made to Form 4A by Mr Morland, it is correct I should make clear that the Notice *actually* says that the proposed works are “to re-lay and level the

path at Ditchingham Church using a hot bitumen and gravel, and to provide a tarmac disabled parking space within the church car park.” The same wording is used in the Petition (Form 3A) and the Notification of Advice (Form 2) in which the Diocesan Advisory Committee (“DAC”) recommended to me for approval the Petitioners’ proposals.

10. He goes on to say: “the ancient church and its surrounds belong to the whole community, not just a few people who use it twice-monthly in pursuit of their religion.” He says that, given the age of the congregation, it is likely to be redundant in ten years. He says there is no logic in catastrophically spoiling an important and valuable monument to the native heritage for such a relatively short remaining period of its practical life and comments that visitors of future generations will curse those who took it upon themselves to wreck the naturally acquired rural beauty and authenticity of the ancient churchyard for the sake of a bit of thoughtless self-gratification.
11. Mr Morland says that the Parochial Church Council (“PCC”) has apparently failed in its duty to seek competent advice before planning such destructive works to a treasured and historically important site and that they have made decisions they are not competent to make. He says there are many conservation groups in Norfolk who would willingly assist in such matters at little or no cost to the PCC.
12. He concludes by saying that he objects to the proposed development and intends to keep the wider community fully informed of all matters via the local press and otherwise.
13. In an earlier part of the letter, he explains he has wide experience of building conservation and restoration and has acquired a good level of knowledge and understanding regarding the design and use of materials which are sympathetic to the building and the environment in which it stands “both physical and cultural”.
14. On August 26, 2022 the Registry wrote to Mr Morland and attached the photographs and descriptions that the Petitioners had submitted with their application. Mr Morland was told he could either have his views taken into account or become a formal party to the faculty application. The relevant form and notes were attached. On the same day the Registry attached the details of Mr Morland’s objection in an email to the Rector.
15. The Rector responded to the Registry on August 31, 2022 by confirming that Mr Morland had sent it to him also and that he had also sent Mr Morland all of the documentation. I have read the letter he sent to Mr Morland, whom he says he knows well, in which he told him that the PCC had consulted experts and received several

quotes and that the relevant documentation had been in the church office. He apologised that he had been unavailable on the morning that Mr Morland had called to see the documentation. The Rector stated to Mr Morland that the church would not be redundant in ten years and also told him that the path would be similar to that at Earsham church which had also been photographed.

16. There was an email to the Rector from Mr Morland on September 8, 2022 in which he accused the Rector of being deliberately misleading in his response to the Registry and made observations about bringing the point to the attention of the church and the Consistory Court. The Rector replied the same day challenging Mr Morland's accusations and making the point that experts had been consulted as well as making the observation that whilst Mr Morland had a right to object to the plans, that did not give him a right to attack the characters of the PCC. He described Mr Morland's previous letter (that relating to the objections) as being "incredibly rude" in parts and commented that over the years "we have been very generous to you."
17. On September 16, 2022 Mr Morland submitted Form 5 (Particulars of Objection). This largely rehearsed his previous objections, commented on what he characterised as the failure "to seek competent advice from a detached expert" or "to instruct professionals to oversee the contractors so that the quality and integrity of any finished work can be verified". Somewhat more elliptically, Mr Morland continued by saying "they have recently demonstrated their inability to instruct and supervise contractors with disastrous consequences for other aspects of the Church. The consequence of that disaster is ongoing at this time". An issue arose as to whether Mr Moreland had a sufficiency of interest to become a Party Opponent in the proceedings. I considered this as a separate and preliminary question and in an earlier judgment decided that he did for the reasons I set out **[2022] ECC Nor 3**.
18. Observation since then has been made by the Petitioners that I did not seek proof from Mr Morland that he ordinarily resided in the parish. It was not suggested to me by the Petitioners in their submissions that he did not ordinarily live there, just that they did not know where he lived. I made the determination that Mr Morland was ordinarily resident in the parish but, given the common ground between the parties (although they view the desirability of it in very different ways) that he is a very frequent visitor to the church, I would have been likely to have exercised my discretion in his favour in any event even had I not been satisfied as to his residency; so nothing turns on the criticism, if criticism it be.

19. I admitted Mr Morland, therefore, as a Party Opponent and told him of his entitlement to take part in the proceedings, either by being heard in court or, if an Order was made under Rule 14.1 FJR, by making written representations. I made clear that this entitlement included a right to appeal against any Order or Judgment of the court subject to obtaining permission to appeal to the Court of Arches under Rule 22 and, in particular, Rule 22.2 of the FJR.
20. Having considered the Petition and all of the accompanying documentation, I formed a preliminary view that the case could be decided upon written representations instead of by an oral hearing under Rule 14.1. (1) — “Conditions for disposal by written representations — applying the overriding objective. I invited the Petitioners and the Party Opponent to submit their views on my deciding the case upon written representations which I said I would consider before making my final decision if they wished. I have not received any such representations and have now made the final decision to decide the petition on the papers.
21. I made clear that I would allow the parties to make any final written submissions (if they wished) by email to the Registry on or before November 11, 2022 on the central question of whether the Petition should be granted.
22. The Petitioners availed themselves of this opportunity and repeated they stood by their previous submissions and gave me a recent example of a pallbearer slipping on the existing path and twisting her knee, meaning that a family member had to assist in conveying the coffin to the grave.
23. Mr Morland also availed himself of the opportunity and said he did not wish to repeat himself but would emphasise the principal points on which he relied.
24. He relies particularly on his submission that the natural local material is flint and sand and says it has undoubtedly been used for many hundreds of years in Norfolk. He comments that roads were constructed from it and houses had their pathways laid with it, whether they were cottages or the great houses of the area. He submits that churches always had paths of shingle-based gravel. He says that, from his observations of the local rural churches in recent weeks, they are all laid in gravel perhaps topped with a layer of flint stone. He says that some of them have been renewed in very recent years and, in his opinion, look entirely appropriate. He says that none have been, to use his words “ripped up and had anything like grotesque black tarmac laid”.
25. He makes clear that he is not impressed by the example of the Earsham path and says: “evidence of another path offered in support of this application is of a church in the

- same group of parishes. This work was also promoted by the current Rector and went ahead unchallenged. There are four other churches in the group.”
26. I am not going to rehearse Mr Morland’s views as to what he sees as attempts by the Petitioners to exclude his views being taken into account as, first, I have already ruled on the issue of his sufficiency of interest and ruled in his favour and, second, because the issue of sufficiency of interest was an enquiry that I (rather than the Petitioners) initiated, given Mr Morland’s residence outside of the parish and absence of any entitlement by right to be a Party Opponent, prior to his clarification.
27. Mr Morland’s view is that the churchyard is suffering from neglect, but he says that “concreting over the area” is not appropriate, however convenient it may be. He says that its attraction to the Petitioners is that it is the “easy option”.
28. Mr Morland emphasises a specific observation namely that, by his assertion, the normal weekly congregation is eight people which he claims is simply the PCC. He says that his enquiries reveal that no member of the congregation has ever used a wheelchair, but, in the alternative, says that compacted gravel makes an excellent stable path for any wheelchair.
29. He reveals concerns he has about consultation, or lack of it. He says he has formally and repeatedly asked for evidence or other details of the advice the Petitioners claim to have received but they have provided none and complains he has been provided with no satisfactory details regarding the “independent advice” the Petitioners claim to have sought and received and is concerned that any assertion that the Petitioners have received independent advice may mislead the court.
30. Finally, he makes a broader point and I will quote his submission: “the church is an ancient historic site belonging, in my opinion, to the whole community. It is admired by many and will continue to be so admired for generations of the future but once damage is done by, perhaps well-meaning, people it will not be undone and will become an eyesore for future generations. The Petitioners should, at least, seek advice from conservation groups or other appropriate professionals regarding their proposals. This they have failed to do and have shown no interest in doing.”

Decision

31. In this case the Petitioners rely on the petition and accompanying documentation uploaded to the Online Faculty System as well as their brief submissions.

32. The Party Opponent relies upon his submissions and arguments to the court. He is the only person objecting to the proposals.
33. Neither side has sought to rely on independent expert evidence, that is evidence from a person who is expert in the field to which the evidence relates and who has no personal interest in the proposals of a kind that might cause a reasonable and properly informed person to doubt whether he or she is necessarily able to exercise autonomous judgment without fear or favour. I have not understood the Petitioners to say otherwise.
34. In an email to Mr Morland dated September 8, 2022, the Rev'd Christopher Hutton, on behalf of the Petitioners, wrote: "in making the decision we spoke to different companies (i.e. experts who know more than you or me) as well as Alan Nobbs who the PCC decided to go with. We have also had similar work done at Earsham and Denton, both Grade 1 listed churches, and so have been through the process before."
35. I conclude that the Petitioners were consulting potential contractors more about the best and most professional way to achieve what they had decided was necessary, than to assist with any broader debate as to whether rural pathways and car parks should be preserved in their historical form (albeit with maintenance and renovation) rather than using more modern solutions such as asphalt or tarmacadam. After all, the key to the expertise of Mr Nobbs of *A.N.D. Surfacing & Paving Contractors* presumably lies in surfacing and paving. Whether there should have been consultation on the broader questions raised by Mr Morland, and why I did not direct that it be sought, will be dealt with later in the judgment.
36. In recommending the proposals to me, the DAC was of the view that the works were *not* likely to affect the character of the church as a building of special architectural or historic interest but *were* likely to affect archaeological remains existing within the church or its curtilage, presumably as a result of disturbing the ground.
37. The intended beneficiaries of the works, in respect of the path, are said by the Petitioners to be everyone who uses it and who may trip up on the existing path particularly where stones are placed as illustrated in the Petitioners' photographs, anyone who may slip on it, and specifically disabled users navigating the path.
38. The intended beneficiaries of the limited works in respect of the car-park are said to be disabled visitors.
39. I acknowledge from the outset that Mr Morland, the Party Opponent, has a great interest in this church and its churchyard although I do not understand him to take part in divine service at the church and, indeed, he seems to have a rather dim view of those who do.

I found his observations about the construction of pathways in rural churches of this diocese interesting and informative. He is at the church very frequently and this is accepted by the Petitioners. Quite why he is there so often is unclear to me, particularly at night. He said that people have told him that he is known as the “night watchman” although the Petitioners did not give me the impression that they viewed his presence in a particularly positive light, at least as things stand at the present.

40. I detected a degree of misunderstanding sometimes by Mr Morland as to the intentions of the Petitioners. He says that the “said notice makes reference to the laying of hot Tarmac on pathways and other areas within the churchyard.” As I have already pointed out, the Public Notice actually says that the proposed works are “to re-lay and level the path at Ditchingham Church using a hot bitumen and gravel, and to provide a tarmac disabled parking space within the church car park.”
41. Tarmacadam (gravel, sand and tar) and asphalt (gravel, sand and bitumen) are different, if related, products.
42. The characterisation by Mr Morland of black hot-poured tar-based tarmacadam on pathways and other larger areas within a very rural country churchyard seems to me not to be an accurate representation of what the Petitioners intend. They do not say they are going to use tarmacadam on anything other than the proposed and limited car parking area. The pathway that is identified by the Petitioners will not have tarmacadam surfacing at all and the proposals ask for permission *only* in respect of those two areas.
43. I accept that Mr Morland’s preference comes from an honestly held, strong belief and he writes with passion and conviction in favour of retaining what he says is a traditional path for a rural church. The patent for both asphalt and tarmacadam was registered in 1902, so it was presumably not available as an option to earlier ages (which Mr Morland and others may think was a good thing) but churches and their surroundings have been subject to other, often substantial, alterations and adaptations over the centuries; some of which are now themselves recognised and welcomed additions – and some of which were less happy changes.
44. Where I depart from the Party Opponent’s reasoning is his assumption that the works are being proposed solely, or even mainly, for the present congregants, or PCC, or that the church necessarily has a relatively short time left as a functioning place of worship.
45. I judge the proposals to be designed first to improve the path and area for car parking and second to make access to the church and progress through the churchyard safe for everyone, taking particular account of those who may have more difficulty walking for

all the various reasons that such difficulties occur. The pool of people visiting the church is clearly much wider than the PCC and the range of potential difficulties are also much wider than those simply applying to wheelchair users. There are doubtless visitors who wish to view the church and its surrounds, the church being acknowledged by all to be a very fine Grade 1 listed building. There are those who come for particular services such as weddings or funerals. There are those who may come for special events and there is the regular congregation. I understand the challenges facing rural parishes but I have also seen successful efforts to re-invigorate churches suffering from declining congregation numbers, so I do not share Mr Morland's pessimism as to the future of this church, which was built as a church all those centuries ago.

46. I accept that there is a clear and wider public interest in the church than simply that of its regular users, but somebody has to maintain and care for these many fine church buildings and (except through the provision of grants from time to time) it is unlikely that national government will shoulder this burden and, where local authorities manage closed churchyards, it must be remembered that they do so out of limited funds which have to satisfy a great and increasingly expensive number of functions.
47. The Petitioners are responsible for this churchyard and are entitled to make judgments about its maintenance, provided those judgments are reasonable and proportionate. It is common ground that there is a need for renovation of the path and I am satisfied that the modest proposals for car parking are also to satisfy a legitimate need.
48. The one remaining issue is whether I should override the Petitioners' judgment as to how the renovation of the path should be achieved and the car park surfaced. Were I to conclude that the proposals would result in damage to the churchyard or turn it into an eyesore for generations then clearly it could not be permitted without the most exceptional need being demonstrated, but I do not consider that the proposals cause any damage to the churchyard or are any kind of eyesore. The path at Earsham does not stand out as being incongruent and this path will resemble that one. The car park provision is of a modest size and I judge the use of tarmac for that limited space will not have a detrimental effect overall, particularly as it will have cars parked on it in any event.
49. Although I understand that Mr Morland takes particular objection to the Petitioners not using more traditional techniques, he is the only objector and although I recognise his views are very strongly held, I consider that, looked at objectively, they overstate considerably the actual effect of these proposals. I sympathise with why this is so,

because I understand that he holds very strong feelings about the issue and indeed this church. There are a number of ways particular works can be carried out. It is my function not to impose my own personal preferences but to ask myself first whether the Petitioners have established a need. I find they have. Second, to ask myself whether the way the Petitioners propose to go about satisfying the need is proportionate and reasonable. I find it is. Finally, I must ask myself whether the Petitioner's chosen method will cause damage to the churchyard path/car park area and, if so, whether the need justifies such damage. I have concluded that it will not cause damage and that the appearance of the proposed pathway is, in fact, visually sensitive to its surroundings and the car park spaces for disabled users are justified and proportionate.

50. I have also concluded that there was no requirement for the Petitioners to consult in the wider way suggested by the Petitioner. I also find that there is no reason to suppose that the chosen contractor is not capable of carrying out the works and I bear in mind that the Rector has experience of these kind of paths and is therefore able to be better informed about the works that are required than might be the case otherwise.
51. In light of my conclusions, reached after very careful thought, I will grant this faculty as prayed.
52. I will impose two conditions: the first to deal with the potential area of difficulty in respect of the possible disturbance of remains and the second to reflect the proviso of the DAC.
53. I order that the faculty sought shall pass the Seal and I impose two conditions:
 - i. That the Petitioners agree a protocol with the DAC as to how they should manage the disturbance of remains, should that occur.
And
 - ii. A requirement that subsoil must be left on site and the Petitioners must ensure that, in respect of stones relaid outside of the tower, water running off will run away from the church.
54. Costs for the faculty petition will be borne by the Petitioners and I make no costs order(s) in respect of the Party Opponent. I will not order additional costs to be paid for the preparation of this judgment.
55. The judgment is final subject to the correction by me of any typographical errors and, if such exist, the parties are encouraged to draw them to the attention of the Registry within 14 days of receiving the judgment.