

NOVEMBER 2021

## **LTN 65 | CLOSED CHURCHYARDS AND DISUSED BURIAL GROUNDS**

### **Introduction**

1. This Note deals with the law relating to closed churchyards and disused burial grounds. A closed churchyard is a churchyard belonging (but not necessarily physically attached) to a parish or cathedral church of the Church of England which has been formally closed by an Order in Council made by the Privy Council. A disused burial ground is a place used, or intended to be used, for burial purposes by any other person or body and which is no longer used for such purposes (and may include a closed churchyard). “Consecrated” means consecrated in accordance with the rites of the Church of England. The Note should also be read in conjunction with NALC’s Legal Briefing L01-18 on financial assistance to the church.
2. The Church in Wales was disestablished in 1914. The law in Wales in relation to closed churchyards differs from that in England and is dealt with separately in paragraphs 20-21 below.
3. Parishes in England close to the Welsh border should also read paragraphs 20-21.

### **The closure of a churchyard (England only)**

4. Under common law a parishioner (a person resident in a parish or a person who dies there) has a legal right to be buried in the Church of England parish churchyard regardless of religious belief or lack of belief. When a churchyard becomes full, it is necessary for this right to be restricted or rescinded. Accordingly, under s. 1 of the Burial Act 1853, the Privy Council may make an Order in Council to close a churchyard for burial subject to any exceptions specified in the Order. An Order must be sought from the Ministry of Justice. The grounds for making an Order are –
  - a. that further burials would constitute a public health risk;
  - b. that further burials would be contrary to decency;
  - c. that burials should be discontinued for the prevention or mitigation of nuisance; or
  - d. there is no proper room for new graves.
5. Closure by Order in Council does not remove the legal effects of consecration. A churchyard closed by Order in Council may still be used for the interment of ashes provided that no human remains are disturbed. If the

Order permits, it may also be possible for further burials to take place in specified areas.

### **Responsibility for maintenance of a closed churchyard**

6. Once a churchyard is closed, responsibility for maintenance falls on the parochial church council (“PCC”) for the parish in which the churchyard lies (s.215(1) of the Local Government Act 1972 (“the 1972 Act”). The PCC is required to keep the churchyard in decent order and its walls and fences (including gates) in good repair.
7. By virtue of s.215(2) of the 1972 Act, a PCC may at any time serve a written request on the local council or, in a parish without a council, on the chair of the parish meeting, to take over the maintenance of the churchyard. Subject to s. 215 (3) of the 1972 Act (see next paragraph), the council or meeting takes over the maintenance three months after service of the request.
8. Within the three-month period referred to above, the council or the meeting can pass on the maintenance responsibility to the district council. The mechanism by which they can do that is by passing a resolution and then giving written notice of that resolution to the district council and to the PCC. At the expiry of the three months the district council must take over the maintenance. If the three months period expires without the parish council having made such a resolution, the district council can no longer be required to take over the maintenance of the churchyard although it has the power to enter into an agreement to do so pursuant to s.101 of the LGA 1972. Additionally (or alternatively) the district council has the power to make a financial contribution to the parish council towards the cost of maintenance pursuant to s. 214 (6) of the 1972 Act.
9. Whilst the statutory minimum period of notice under s.215(2) of the 1972 Act is three months, longer notice is usually given in practice with at least twelve months’ informal notice of the intention to serve the three months’ statutory notice recommended in Church of England guidance. Such notice enables the relevant local authority to budget and precept for any necessary expenditure. The onus is on the PCC to ensure that the churchyard is in decent order and its walls and fences are in good repair before responsibility passes to the parish council or chair of the parish meeting.
10. If a parish council or chair of a parish meeting is asked whether formally or informally, to take over maintenance of a closed churchyard, a request should always be made to see the relevant Order in Council. It sometimes

happens that the churchyard in question, although no longer used for burials, has not been formally closed. In such a case, the parish council/ chair of the parish meeting is not obliged to take over responsibility.

11. If a formal request is received from the PCC, there are advantages and disadvantages in resolving to hand on responsibility to the district council or county council. The advantages may include:
  - a. the parish council/parish meeting has no management responsibility for the upkeep of the churchyard;
  - b. the parish council/parish meeting does not have to use its own financial resources for maintenance; and
  - c. the parish council/ parish meeting does not have to employ staff or contractors to carry out maintenance work.
12. Some disadvantages may be:
  - a. the district council/ county council may (and probably will) treat the expense of maintenance of the churchyard as a “special expense” under section 35 of the Local Government Finance Act 1992 chargeable only on the council taxpayers of the parish;
  - b. the cost of maintenance by the district council may be higher than that which the parish council/ parish meeting would incur;
  - c. the standards and policies of the district council in relation to the upkeep of the churchyard may not be to the liking of the parish authority or to the local inhabitants.

### **The standard of maintenance for a closed churchyard**

13. There is no statutory guidance on the appropriate standard to which a closed churchyard should be maintained. Advice on the appropriate standard given in a nineteenth century guide for churchwardens provides as follows:

“... to see that the churchyard is kept in a decent and fitting manner, that is cleared of all rubbish, muck, thorns, shrubs and anything else that may annoy parishioners when they come into it ...”

14. Responsibility for maintenance includes the maintenance of paths which cross a churchyard up to the standard of “decent order” as well as cultivated and uncultivated areas. It is unclear whether the duty to maintain a churchyard in decent order extends to a requirement to ensure that tombstones and memorials do not present a danger to the public. The obligation to maintain memorials is likely to extend to a duty to ensure that

they do not topple over. Councils need to ensure that reasonable steps are taken to ensure the health and safety of employees working in churchyards pursuant to their duties under s.2 of the Health and Safety at Work Act 1974. Their duties may well extend to ensuring that tombstones and memorials do not present a hazard.

15. Under s.51 (1) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 the powers, duties, and liabilities of a PCC in relation to the care and maintenance of a churchyard which it is liable to maintain apply to trees in the churchyard and any proposed to be planted there.
16. Responsibility extends to the repair of walls and fences. Often, walls, railings and gates are listed under the Planning (Listed Buildings and Conservation Areas) Act 1990 as being of historic or architectural interest. Consequently, the cost of repairs and maintenance is likely to be high.
17. The ordinary maintenance of monuments and tombstones is not the responsibility of the PCC or the local authority but of the owners, who are usually the heirs of the persons commemorated. Where the heirs or other owners cannot be traced, the PCC or local authority will have to take responsibility for dealing with dangerous monuments, since safety is part of keeping a closed churchyard in decent order (see LTN 64 - Tombstones and Memorials). The removal of monuments, whether dangerous or not, requires the consent of the Church of England authorities (usually in the form of a faculty).
18. Responsibility for the churchyard does not include responsibility for any church, chapel, or other building (such as a shed) in or adjacent to the churchyard. The responsibility does not include an obligation to undertake improvements to the churchyard.
19. Whilst responsible for maintenance, the parish council or chair of the parish meeting is not the owner or tenant of the churchyard. It cannot therefore prevent the incumbent and the PCC from exercising their powers over the churchyard (e.g. to allow the interment of cremated remains).

### **Closed churchyards in Wales**

20. The position in Wales differs from that in England because the Church in Wales is not the established church. The procedure under s.215 (2) of the 1972 Act does not apply in Wales. Strictly speaking, that procedure applies to areas not subject to the Welsh Church Act 1914. NALC understands that a small number of parishes in England are subject to that Act and a similarly small number of parishes in Wales are not. Parish and community councils in areas along or close to the border between England and Wales

are advised to check the position if and when they consider the matter of closed churchyards.

21. In Wales, therefore, a community council cannot be put under an obligation to undertake the maintenance of a closed churchyard of the Church in Wales.

### **Disused burial grounds**

22. A burial authority (for the purposes of this Note a parish or community council and a parish meeting) has a general power under s.214 of the LGA 1972 to contribute towards the expenses incurred by any other person in providing or maintaining a cemetery in which the inhabitants of the authority's area may be interred. S.214 gives a general power to help financially with the maintenance etc. of a cemetery where local people have been, or will be, interred; the word "cemetery" being defined in s.214 to include a burial ground or any other place for the interment of the dead.
23. Under s.6 of the Open Spaces Act 1906 ("the 1906 Act") the owner of a disused burial ground may dispose of it (by conveyance of the freehold or by the grant of a lease) to a local authority (parish or community council, but not the parish trustees of a parish meeting) or may make an agreement with a local council for the purpose of providing public access to the ground. Whilst it is very rare (and perhaps unprecedented) for a Church of England closed churchyard to be transferred under s.6, it is not unknown for a burial ground of another denomination to be so transferred, particularly where the ground is vested in local trustees and the burden of maintenance has become too much for them. There is a corresponding power in s.9 of the 1906 Act to acquire a disused burial ground for use as a public open space.
24. S.11 of the 1906 Act provides that a local council may not use a consecrated burial ground for open space purposes without the license or faculty of a bishop. No games or sports are permitted in a disused burial ground without a licence or faculty from a bishop or, in the case of an unconsecrated ground, without the permission of the relevant person or body from whom the council acquired the freehold, the leasehold or management. The section also lays down detailed rules about the removal of tombstones and monuments in cases where the local council wishes to clear the ground, wholly or partly, to provide an open area for public recreation. In essence, the rules provide for public notice to be given by advertisement so that interested persons are made aware of what is proposed and can make representations to the council.

25. Under s.239 of the Town and Country Planning Act 1990, any land consisting of a burial ground (whether disused or not) acquired by a local authority (defined, so far as is relevant to this Note, as a precepting authority so also including the chair of a parish meeting) may be used in any manner in accordance with planning permission, notwithstanding any enactment relating to burial grounds or to any obligation or restriction imposed by ecclesiastical law or otherwise, but subject to compliance with prescribed rules relating to the removal and reinterment of human remains. The relevant rules are the Town and Country Planning (Churches, Places or Religious Worship and Burial Grounds) Regulations 1950. In essence, the Regulations are similar to the provisions in s.11 of the 1906 Act described above but are more elaborate because of the need to cover both the removal and reinterment of human remains.
26. Generally speaking, the erection of buildings in a disused burial ground is prohibited under the Disused Burial Grounds Act 1884. In relation to closed churchyards and disused burial grounds of the Church of England, authority is given by the Pastoral Measure 1983 to allow such land to be used for other purposes, including the erection of buildings, usually in connection with a church redundancy scheme. The Disused Burial Grounds (Amendment) Act 1981 gives authority to other churches and religious bodies to utilise their disused burial grounds for the erection of buildings, provided that either no interments have ever taken place there or, if there have been burials within the previous 50 years, the descendants of the deceased persons do not object. As with s.11 of the 1906 Act and the Planning Regulations 1950 (see above), public notice by way of advertisement is required and disinterred remains must be decently reinterred.

**Other Legal Topic Notes (LTNs) relevant to this subject:**

LTN	Title	Relevance
23	Health and Safety	Sets the obligations of councils to ensure the Health and Safety of their staff.
42	Occupiers' Liability	Sets out the responsibilities of occupiers of land.

64	Tombstones and Memorials	Sets out responsibilities in relation to churchyards and burial grounds
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