



ARTICLE

‘Juristecture’ and the regulation of normative space

Morag Ellis KC

Dean of the Arches and Auditor, UK

Abstract

Cathedrals have been described as ‘normative space’ insofar as their regulation both shapes, and is shaped by, their architecture. This article extends that description and applies it, by analogy, to listed Church of England churches and examines how the concept of ‘normative space’ relates to, and informs, their regulation within ecclesiastical and secular systems. The article goes on to outline the implications for (1) architectural and artistic innovation and (2) the worship and mission of the Church.

Keywords: Church of England; ecclesiastical exemption; faculty jurisdiction; listed buildings; normative space; planning control

Introduction

The idea of ‘reading’ theology in places of worship is well established. Newman’s sermon on his newly constructed church at Littlemore decoded the theology of its design for a post-Reformation audience. Whyte comments that later Victorians came to see ecclesiastical architecture:¹

as a mode of communication. They denatured architecture, in other words – just as Newman did – turning buildings into books.

Kieckhefer’s contemporary study, *Theology in Stone*, examines ‘the appropriation of churches by generations that view and respond to them, use them and often refashion them’, as well as the intentions of their builders, concluding that ‘what a church *has meant* and what a church *can mean* are related but not identical’.²

¹ W Whyte, *Unlocking the Church, The Lost Secrets of Victorian Sacred Space* (Oxford, 2017), 35, commenting on F McGrath (ed), *John Henry Newman Sermons, 1824–43: vol iv* (Oxford, 2011), 236–243.

² R Kieckhefer, *Theology in Stone: Church Architecture from Byzantium to Berkeley* (Oxford, 2004), 11 (emphasis in original).

Normative space

In *The Legal Architecture of English Cathedrals*,³ Doe extends these concepts to the reading of legal norms in cathedral fabric and suggests that:⁴

It may indeed be that a cathedral is normative, with its various segmented spaces, its private spaces within (basically) a public building, and its architecture itself eliciting or directing the conduct of its users. As a cathedral is imagined as ‘theology in stone’, so it might be worth exploring the cathedral as a form of ‘juristecture’ – the cathedral as a ‘builder of law’, a ‘law-building’, or ‘built law’.

The influence of law is not confined to the form and fabric of cathedrals. Three examples of *churches* physically affected by different kinds of regulation show that the application of Doe’s concept can illuminate not only material manifestations of, and reactions to (1) *external* regulation of church buildings by the State, but also (2) *internal* prescription of built form by ecclesiastical authorities, and (3) a combination of *both* forms of control.

External state regulation

From outside, the old Congregationalist church in Walpole, Suffolk resembles a seventeenth century house. Although used as an independent chapel from 1647, the prevailing politico-religious uncertainty meant that it was not extended and equipped with its large pulpit and pews until 1700, after the Toleration Act 1689⁵ had brought a measure of security for Protestant non-conformists. This building’s physical development reflects the *external* regulation of religion by the State, it being civil officers who were responsible for enforcing laws against dissenters. Historic England’s guide to listing dubs non-conformist churches ‘the architecture of dissent’, tracing their expansion by reference to legislative history, including the Toleration Act 1812, which, by allowing 20 people to gather for worship in an unregistered chapel, directly affected building sizes.⁶

Internal Church prescription

Many Anglican churches have a railed area at the east end, containing a ‘holy table’,⁷ positioned lengthwise north to south. Behind this layout lies a furious

³ N Doe, *The Legal Architecture of English Cathedrals* (Oxford, 2017), 3, 255–257.

⁴ *Ibid.*, preface and 256.

⁵ Historic England listing description, Old Chapel Walpole: available at <historicengland.org.uk/listing/the-list/list-entry/1030448?section=official-list-entry>; D Holmes, *How a Suffolk Farmhouse became a Chapel* (Historic Chapels Trust), available at <walpoleoldchapel.org/david-holmes-essay/>, both accessed 9 February 2023. Kieckhefer (note 2) also analyses this building, 44–45.

⁶ Historic England, *Places of Worship Listed Building Selection Guide* (December 2017 edition), 15, para 1.4.

⁷ Canon F 2 (1) ‘Of the holy table’ provides: ‘1. In every church and chapel a convenient and decent table, of wood, stone, or other suitable material, shall be provided for the celebration of the Holy Communion, and shall stand in the main body of the church or in the chancel where Morning and Evening Prayer are appointed to be said. Any dispute as to the position where the table shall stand shall be determined by the Ordinary’.

history of ecclesiastical regulation, which figured in the drift towards civil war. Archbishop Laud's ordinances of the 1630s, enforced through episcopal visitations and courts, required parishes to place holy tables altar-wise on the east wall of the chancel, replacing less prescriptive Elizabethan arrangements, such that pews often required realignment. The churchwardens of the parish of Beckington, Somerset refused to comply. Leading parishioners had funded the permanent placing of the table, east to west, in the chancel, with pew reordering which embedded the local social hierarchy; they were loath to undo these changes for what they saw as Popish innovations. These wardens became Puritan martyrs when they were excommunicated and imprisoned, eventually being forced to do penance in humiliating public ceremonies. Re-evaluating contemporary evidence of pew management, Reeks demonstrates that this case, conventionally cited as an exemplar of ideological resistance to Laud, also 'allows for a fuller understanding of the relationship between ecclesiastical policy and the social space of the parishes in which it was enacted'.⁸ Physical evidence of this legal history survives in the layout of many Anglican churches, in which it is possible to 'read' the results of the Church's regulation of parochial worship space via its internal norms and discipline.

A mixture of Church and State control

The case of *Re Rustat Memorial, Jesus College, Cambridge*⁹ is a contemporary example of the combined operation of internal Church and external State norms. The College sought a faculty to remove from their chapel a large memorial to their benefactor Tobias Rustat, an investor in slave trading. The petitioners argued that the presence of this memorial harmed the chapel's mission to students because of the offence given, particularly to those of Afro-Caribbean heritage. The chapel is a Grade I listed building; secular national heritage policy is to 'retain and explain' such artefacts.¹⁰ Statutory guidance issued by the Church Buildings Council and the Cathedrals Fabric Commission is less prescriptive, setting out a framework for assessing options.¹¹ Historic England, an important secular statutory consultee, did not support the proposal and there were numerous objections. After a vigorously fought hearing, a faculty was refused.

⁸ J Reeks, 'Fair Persuasions'? *The Implementation of Laudian Altar Policy in the Diocese of Bath and Wells* (2018 Reformation) 23(2), 175–190, doi.org/10.1080/13574175.2018.1519178, accessed 10 February 2023.

⁹ *Re Rustat Memorial, Jesus College, Cambridge* [2022] ECC Ely 2.

¹⁰ National Planning Policy Framework (Ministry of Housing, Communities and Local Government 2021), para 198: 'In considering any applications to remove or alter a historic statue, plaque, memorial or monument (whether listed or not), local planning authorities should have regard to the importance of their retention in situ and, where appropriate, of explaining their historic and social context rather than removal'.

¹¹ Dioceses, Pastoral and Mission Measure 2007, s 55(1)(d). *Contested Heritage in Cathedrals and Churches*, (The Church Buildings Council and the Cathedrals Fabric Commission for England, 2021), 17–24, available at: <https://www.churchofengland.org/sites/default/files/2021-06/Contested_Heritage_in_Cathedrals_and_Churches.pdf>, accessed 28 December 2023. The guidance is being reviewed, in the light of the *Archbishops' Commission for Racial Justice First Biannual Report, Spring 2022* (Church of England, 2022).

The decision itself has attracted criticism,¹² but so have the underlying legal procedures. The Archbishops' Racial Justice Commission commented:¹³

As a Commission our task is to seek to address the question raised by Archbishop Justin at Synod 'Why is it so much agony to remove a memorial to slavery...?' The answer must surely lie in the Church of England's processes and in the nature and operation of the Consistory Courts and in their approach and interpretation of the relevant law.

The scope of this article

It is not the purpose of this article to debate the merits of the *Rustat* judgment or the wider architectural or doctrinal questions that flow from the examples canvassed above. Rather, it is submitted that these examples show how regulation of religious practice and sacred space have influenced and still affect the physical fabric of churches, thus creating what can be described as a legibly 'normative spaces', which are informed by, and shape, their own legal, theological, social and historical contexts: their juristecture.¹⁴ This characteristic is capable of forming an aspect of heritage 'significance', a concept which is fundamental to contemporary regulation of designated heritage assets by State and Church, respectively. Some believe that contemporary heritage regulation may impede the mission and ministry of the Church. Others think that many consistory court decisions unduly subordinate heritage values to mission.¹⁵ Again, it is not the purpose of this article to engage in these debates. Nevertheless, I do contend that our understanding of how ecclesiastical and secular laws have shaped Christian built forms enriches our appreciation of the buildings concerned, and can help decision-makers to arrive at fully informed judgments when considering proposals for change.

The remainder of this article is structured into three parts. First, I provide an overview of the applicable regulatory frameworks which prescribe the way in which Church of England buildings can be altered. Secondly, I analyse the concept of 'significance' as it applies to the regulation of both secular and ecclesiastical heritage. Finally, I turn to consider the implications that the concept of 'juristecture' poses for architectural and artistic innovation, and the worship and mission of the Church of England.

Part I: Frameworks of regulation

Canons prescribe the basic physical requirements for Church of England churches—rules for the provision of fonts, holy tables, reading desks, pulpits,

¹² See, for example, A Taylor, 'The Case of the Rustat Memorial—Does Duffield Pose all the Right Questions?' (2023) 25 Ecc LJ 38–51.

¹³ Archbishops' Commission for Racial Justice *First Biannual Report* (note 11), 22.

¹⁴ cf. Doe (note 3), 254–256.

¹⁵ The Victorian Society opposes the current system of regulation by chancellors under the faculty system, as noted by C George, 'Do We Still Need the Faculty System?' (2020) 22 Ecc LJ 281–299, 294.

seats, bells, alms boxes and for fencing churchyards.¹⁶ Generally, construction and adaptation of churches is subject to secular regulation via the planning system and building regulations.¹⁷ In *Re Holy Trinity, Eccleshall*,¹⁸ the Court of Arches accepted that the legislative policy of providing disabled access as close as reasonably possible to the standard normally offered to the public at large ‘applies to any church’. Moreover, although the public sector equality duty now contained in the Equality Act 2010¹⁹ does not apply to ecclesiastical courts, ‘consistory courts should generally give effect’ to it.²⁰

Simply phrased contemporary Canons belie the intensely polemical interest of earlier ages in the physical form and furnishing of churches. The 1603 Canons²¹ prescribed, not only provision, but also *repair* of the communion table and the times when it should be moved, as well as requiring that ‘the Ten Commandments be set up upon the East-end of every Church and Chapel’. The extant Canon F2 engages in less micro-management and reflects legislative change, expressly permitting ‘a convenient and decent table, of wood, stone or other suitable material’.²² The Holy Table Measure

¹⁶ Canons F1 (font), F2 (holy table), F6 (reading desks and pulpit), F7 (seats), F8 (church bells), F10 (alms box) and F13 (care and repair of churches).

¹⁷ In particular, Part M of the Buildings Regulations 2010, and Approved Document M, prescribe requirements for access to public buildings and facilities within them: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901517/Manual_to_building_regs_-_July_2020.pdf>, accessed 20 April 2023.

¹⁸ *Re Holy Trinity, Eccleshall* [2010], Court of Arches, para 68; *Re Holy Cross, Pershore* [2002] Fam 1, para 105; *Re St Christopher Walworth* [2016] ECC Swk 14 and D Pocklington, ‘Issues of equality in the consistory courts’ in *Law and Religion UK*, 23 December 2016: available at <lawandreligionuk.com/2016/12/23/issues-of-equality-in-the-consistory-courts/>, accessed 20 April 2023; *Re St Giles, Exhall* [2021] EACC 1, para 8.12.

¹⁹ Equality Act 2010, s 149.

²⁰ *Re Holy Trinity, Eccleshall* [2010], Court of Arches, at para 68.

²¹ Canon LXXXII: ‘A decent Communion-table in every Church’: “Whereas we have no doubt, but that in all Churches within the Realm of *England*, convenient and decent Tables are provided and placed for the Celebration of the holy Communion, We appoint that the same Tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered in time of Divine Service with a Carpet of Silk or other decent Stuff thought meet by the Ordinary of the place, if any question be made of it, and with a fair Linen Cloth at the Time of the Ministration, as becometh that Table, and so stand, saving when the said holy Communion is to be Administered. At which Time the same shall be placed in so good sort within the Church or Chancel, as thereby the Minister may be more conveniently heard of the Communicants in his Prayer and Administration, and the Communicants also more conveniently and in more number may communicate with the said Minister: and that the Ten Commandments be set up upon the East-end of every Church and Chapel where the people may best see and read the same, and other chosen Sentences written upon the Walls of the said Churches and Chapels in places convenient: And likewise, that a convenient Seat be made for the Minister to read Service in. All these to be done at the Charge of the Parish.” Available at: <anglican.net/doctrines/1604-canon-law/>, accessed 20 April 2023.

²² Canon F2:

1. In every church and chapel a convenient and decent table, of wood, stone, or other suitable material, shall be provided for the celebration of the Holy Communion, and shall stand in the main body of the church or in the chancel where Morning and Evening Prayer are

1964,²³ widening the permissible range of materials to include stone, provoked controversy in Parliament, a century after the nineteenth century liturgical cases, one opponent arguing that constitutional principles were being undermined.²⁴ As the Bishop of Chichester observed in *Re St Stephen, Walbrook* (sitting in the Court of Ecclesiastical Causes Reserved), part of the underlying purpose of the Ecclesiastical Jurisdiction Measure 1963 was to free the Church from the binding effect of decisions of the Judicial Committee of the Privy Council in ecclesiastical cases, enabling the new Court of Ecclesiastical Causes Reserved to consider theological issues in relation to church buildings afresh, in the light of more recent legislation, historical research and ecumenical developments.²⁵ The court's decision illustrates this principle. Departing from Arches Court and Privy Council decisions holding stone tables to be unlawful,²⁶ they granted a faculty for a large, immovable, circular marble altar designed by Henry Moore to stand in the centre of the Wren church.

Changes to consecrated Church of England churches and cathedrals are regulated via secular and ecclesiastical systems. Significant external alterations require planning permission from the (secular) Local Planning Authority. Many internal changes to listed buildings are, in principle, subject to statutory control, but the combined effect of secular and Church of England legislation is to remove from secular listed building control buildings²⁷ which are for the time being used for ecclesiastical purposes, whose primary use is as a place of

appointed to be said. Any dispute as to the position where the table shall stand shall be determined by the Ordinary.

2. The table, as becomes the table of the Lord, shall be kept in a sufficient and seemly manner, and from time to time repaired, and shall be covered in the time of divine service with a covering of silk or other decent stuff, and with a fair white linen cloth at the time of the celebration of the Holy Communion.

²³ Repealed by the Church of England (Worship and Doctrine) Measure 1974, Schedule 2 which now authorises provision for such matters by way of Canon.

²⁴ HL Deb 24 March 1964, vol 256, cols 1131–1136: Earl Alexander of Hillsborough, opposing the Motion for seeking Royal Assent, said: 'I was brought up in the Church of England. I love so much of it, especially its Prayer Book, that when I begin to see these alterations in the Prayer Book, which set up the first true basis of civil and religious liberty in this country (it had not existed until then), and the example which, in religious and civil and political life, has had so much to do with the growing greatness of this country in the last 300 years; the setting up of its Commonwealth, as well as the examples that have been given over and over again by those who hold our belief in civil and religious liberty according to the reformed Church of England, I find it a sad sight to see Prelates hurrying to get through this kind of Measure which is upsetting the doctrine.'

²⁵ *Re St Stephen Walbrook* [1987] 2 All ER 578, 580h-j.

²⁶ *Liddell v Westerton* (1857) 29 LTOS 54; *Faulkner v Lichfield and Stearn* (1845) 1 Rob Eccl 184, 163 ER 1007; *Re St Stephen, Walbrook* [1987] 2 All ER 578, 581a and 600c–610b.

²⁷ Planning (Listed Buildings and Conservation Areas) Act 1990, s 60(1); Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010. Secular listed buildings require listed building consent for material external or internal changes under Planning (Listed Buildings and Conservation Areas) Act 1990, s 7.

worship.²⁸ Government guidance explains that this exemption is limited to buildings:²⁹

[W]ithin the care of specified denominations which have demonstrated that they operate acceptable internal procedures for dealing with proposed works to listed ecclesiastical buildings and unlisted buildings in conservation areas ... *Equivalence of protection is a key principle* underpinning the Ecclesiastical Exemption and will be kept under review by the Department for Culture, Media and Sport...

Modern church procedures for regulating changes to its places of worship and their closure, although based on ancient foundations,³⁰ reflect this arrangement. Specifically, the statutory faculty and Cathedrals fabric systems, and the Mission and Pastoral Measure 2011, prescribe consideration of heritage interests.³¹ Demolition of listed churches within the exemption is covered by the non-statutory 'Skelmersdale Agreement', whereby the Secretary of State can, in certain circumstances, intervene,³² in exchange for a measure of

²⁸ 'Building' in the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010 has the same meaning as 'building' in the Planning (Listed Buildings and Conservation Areas) Act 1990, s 91(2), which is incorporated from the Town and Country Planning Act 1990, s 336. For the purposes of the 2010 Order a reference to a 'building' or a 'church building' includes reference to (a) any object or structure fixed to that building, and (b) any object or structure within the curtilage of that building which, although not fixed to that building forms part of the land. For cathedrals, the exemption applies to buildings used for ecclesiastical purposes, structures and monuments included inside a red line agreed between the Department for Culture, Media and Sport and the relevant cathedral.

²⁹ *The Operation of the Ecclesiastical Exemption and related matters for places of worship in England* (Department for Culture, Media and Sport, July 2010), paras 9–11 (emphasis added). Specified denominations are the Church of England; the Roman Catholic Church; the Methodist Church; the Baptist Union of Great Britain (and on occasions the Baptist Union of Wales); and the United Reformed Church.

³⁰ The 1237 Constitution of Otho forbade rectors to 'pull down ancient consecrated churches without the consent and licence of the bishop of the diocese': *Halsbury's Laws of England*, vol 34, 5th edn (London, 2011), para 1068, n 1. See now Canon F13(3).

³¹ See e.g. Cathedrals Measure 2011, ss 2, 8, 9 and 22; the Faculty Jurisdiction Rules 2015, Parts 4 (Consultation and Advice before starting Faculty Proceedings) and 9 (Special Notice of Petition, Consultation etc.), and rr 10.1 (Interested persons) and 27.7 (Interveners). See also the Mission and Pastoral Measure 2011, ss 55, 57, 62, 63 and 65.

³² In a debate on the Housing and Planning Bill in 1986, Lord Skelmersdale explained the four essential components of this compromise agreement, which applies specifically to the Church of England: HL Deb 13 October 1986, vol 480, cols 608–611. In short:

- (1) When a scheme under (as it then was) the Pastoral Measure 1983 (now the Mission and Pastoral Measure 2011) proposes demolition of a listed church (or a non-listed church in a conservation area), and reasoned objections have been received from (a) the Historic Buildings and Monuments Commission, (b) the Advisory Board for Redundant Churches, (c) the local planning authority or (d) a national amenities society, the Church Commissioners agreed to ask the Secretary of State whether they wish to hold a non-statutory local public inquiry;
- (2) The Church Commissioners undertook to accept a recommendation from the Secretary of State following such an inquiry that the church is of sufficient importance to be vested in

Government funding for the care of Grade I and II* redundant churches.³³ This collection of norms based on the principle of equivalence of process (as required by the ecclesiastical exemption) is, itself, expressive of the place of formal religion within English constitutional arrangements and, as exemplified in the *Rustat* case, influences the physical form of many church buildings.

Part II: ‘Significance’ – the unifying conceptual tool

Consideration of the concept of ‘significance’ by the secular courts

Secular legislation lists and protects buildings for their ‘special architectural or historic interest’.³⁴ Modern planning policy on ‘heritage assets’, however, is couched in terms of ‘heritage significance’, defined as:³⁵

The value of a heritage asset to this and future generations because of its heritage interest. The interest may be archaeological, architectural, artistic

the Redundant Churches Fund or, in cases where the recommendation was not that the building should go to the fund, to make further efforts to find an alternative use and to engage in further consultation with the Secretary of State before using the pastoral measure powers to demolish;

- (3) The Church Commissioners were assured that the Government would maintain their commitment to the Redundant Churches Fund and ensure that, at each quinquennial review, it ‘receives adequate resources to continue its important work’. In considering what recommendation to make following a non-statutory inquiry, the Secretary of State agreed to take into account the financial implications of retaining a church building as well as the architectural and historic interest of the church and other planning and social factors; and
- (4) The Historic Buildings and Monuments Commission, the local planning authority and the national amenities societies were to be represented in the membership of diocesan advisory committees.

The compromise was summed up by Lord Skelmersdale as follows: ‘These proposals – across the whole country – have not been arrived at without difficulty. The Church Commissioners and the Churches Main Committee are very concerned with the financial implications, while the Historic Buildings and Monuments Commission have expressed some disappointment that the Government chose not to seek to repeal more of the existing [exemptions]. Clearly, the effectiveness of the proposals will depend in large measure on a great deal of co-operation between planning authorities and Church bodies’: HL Deb 13 October 1986, vol 480, col 611. For further background as to the operation of this convention today, see *The Operation of the Ecclesiastical Exemption* (note 29), paras 45–51.

³³ Mission and Pastoral Measure 2011, Part 6. *The Mission and Pastoral Measure 2011 Code of Recommended Practice, Vol 2: Dealing with Consecrated Church Buildings Guidance Note* (Church of England, July 2012), para 12.21 explains: ‘... the Churches Conservation Trust has as its object “the preservation, in the interests of the nation and the Church of England, of churches and parts of churches of historic and archaeological interest or architectural quality” (together with their contents) which have been vested in it by pastoral church buildings or pastoral (church buildings disposal) schemes under Part 6 of the Measure’.

³⁴ Planning (Listed Buildings and Conservation Areas) Act 1990, ss 1 and 7; Department of Culture Media and Sport Circular, *Principles of Selection for Listed Buildings* (Department for Culture, Media and Sport, November 2018).

³⁵ *National Planning Policy Framework* (Department of Communities and Local Government, December 2023), Glossary.

or historic. Significance derives not only from a heritage asset's physical presence, but also from its setting.

Historic England guidance³⁶ on assessing significance recognises that historic interest can include and symbolise values such as 'faith and cultural identity'. As some 13,000 of the Church of England's c. 16,150 churches are listed,³⁷ understanding and applying 'significance' is important for the life of the Church and its relations with the State, specifically for retaining the ecclesiastical exemption, as the Court of Arches highlighted in *Re St Alkmund, Duffield*.³⁸

National planning policy requires the application of a graduated scale of justification depending upon whether any harm to significance is 'substantial' or 'less than substantial'.³⁹ This approach reflects the leading case, *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council & Ors*,⁴⁰ where a planning inspector's decision to permit a windfarm in the setting of a listed building and registered garden was quashed; he had misapplied the statutory and policy tests in finding less than substantial harm since the 'reasonable observer' would be able to distinguish between the windfarm and the listed building, such that the former would not 'dominate' the latter. Parliament's intention, the Court of Appeal held, was that decision-makers should give 'considerable importance and weight' to the desirability of preserving listed buildings and their settings.⁴¹ The judgment also discusses 'significance', stating that the public's ability to appreciate a heritage asset is 'one, but by no means the only factor to be considered when assessing the contribution that setting makes to the *significance* of a heritage asset'.⁴²

Whilst setting will not usually be relevant to decisions in ecclesiastical jurisdictions,⁴³ this ruling is pertinent, due to the nature of the heritage assets

³⁶ *Statements of Heritage Significance, Analysing Significance in Heritage Assets, Historic England Advice Note 12, 16*, available at: <historicengland.org.uk/images-books/publications/statements-heritage-significance-advice-note-12/heag279-statements-heritage-significance/>, accessed 22 April 2023.

³⁷ *Listed Building Selection Guide* (note 6), 2, para 1.1. The Church of England website gives slightly different but similar figures: <[³⁸ *Re St Alkmund, Duffield* \[2013\] Fam 158, para 37: '... the Church of England does not have the faculty jurisdiction in order to benefit from the ecclesiastical exemption; it only has the ecclesiastical exemption because the Government's understanding is that the faculty jurisdiction does, and will continue to, provide a system of control that meets the criteria set out in guidance issued by the relevant department of state in relation to the ecclesiastical exemption. That exemption is of importance to the Church as it permits it to retain control of any alteration that may affect its worship and liturgy'.](http://churchofengland.org/about/our-churches#:~:text=)

³⁹ *National Planning Policy Framework* (note 35), paras 199–202.

⁴⁰ *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137, [2015] 1 WLR 45.

⁴¹ *Ibid*, at [29].

⁴² *Ibid*, at para 37, emphasis added.

⁴³ *Re St Peter, Shipton Bellinger* [2016] Fam 193, at para 41, where the court said that considerations of setting are unlikely to be determinative in faculty cases and the matter should have been considered already by the Local Planning Authority, although they left the point open. In *Christ Church, Spitalfields Open Space Limited and Others v the Governing Body of Christ Church Primary School and Others* [2019] Fam 343, at para 112, the court agreed with counsel's concession that the effect

in *Barnwell* and because of the principle of equivalence (as defined above). The windfarm would have formed the backdrop to a building called Lyveden New Bield and its gardens, conceived by Sir Thomas Tresham (1543–1605), a fervent Roman Catholic, who suffered recusancy fines and imprisonment under increasingly harsh Elizabethan statutes.⁴⁴ He designed ‘New Bield’ to stand as a symbol of defiance, dominating the surrounding landscape; its cruciform shape, metopes and garden display Catholic symbolism in cypher.⁴⁵ Eburne identifies Tresham’s faith and experiences as a recusant as major influences on the architectural expression of both building and gardens.⁴⁶ The structure exemplifies the concept of normative space–‘juristecture’–a form of architecture of dissent–as a physically prominent, yet coded, protest against contemporary religious laws. Relevant expert evidence was adduced at the inquiry, but the court found that the inspector had misunderstood it:⁴⁷

... the question was not whether the turbine array would dominate the outlook from Lyveden New Bield, but whether Lyveden New Bield would continue to be dominant within its rural setting ... guidance nowhere suggests that the question whether the harm to the setting of a designated heritage asset is substantial can be answered simply by applying the ‘reasonable observer’ test ... applying the Inspector’s approach, the more obviously modern, large scale and functional the imposition on the landscape forming part of the setting of a heritage asset, the less harm there would be to that setting because the ‘reasonable observer’ would be less likely to be confused about the origins and purpose of the new and the old.

‘Significance’, therefore, is intrinsic and does not simply lie in the eye of the beholder. Following *Barnwell*, it is necessary for the decision-maker, by means of expert evidence, to take account of architectural meaning in its historic context and assess the effect of proposed change upon it.

on the setting of the listed church was relevant to the exercise of discretion under the predecessor to Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 72(4) (restoration orders), and her submission that the *Duffield* guidelines were not engaged in relation to the effect of removing an unlawful building in the churchyard.

⁴⁴ Acts of Uniformity 1552, 1559. Tresham’s eldest son, Francis, not content with mere architectural protest, was executed in 1605 for his part in the Gunpowder Plot.

⁴⁵ See the Historic England listing description: ‘The New Bield (listed grade I) ... was a proud and visible statement of the family’s adherence to the Old Faith, its theme the Passion and Faith of Our Lord. Of stone, and with a Greek cross plan overall c 21m square, it is of two storeys above a service basement. The quality of the masonry is high, and the whole building is extremely decorative: deep bay windows project from each wing, two-tone stonework emphasises detail, while inscriptions and symbols proclaim the building’s religious symbolism’; available at: historicengland.org.uk/listing/the-list/list-entry/1001037?section=official-list-entry, accessed 18 April 2022.

⁴⁶ A Eburne, *The Passion of Sir Thomas Tresham: New Light on the Gardens and Lodge at Lyveden* (2008) 38 *Garden History* 114–134; this analyses the relationship between Tresham’s experiences as a protester against and recusant under the legislation and his architectural expression in the building and its gardens.

⁴⁷ *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137, [2015] 1 WLR 45, at paras 38–44.

Consideration of the concept of ‘significance’ by the ecclesiastical courts

Three Arches Court decisions have considered the role of significance in the faculty jurisdiction.

In *Duffield*, the Court formulated ‘guidelines’ to assist chancellors in faculty petitions involving listed buildings. Questions (1) and (3), ‘harm to the significance of the church as a building of special architectural or historic interest’ and seriousness of harm, form the yardstick for (5), whether ‘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) outweighs the ‘strong presumption’ against adversely affecting the character of a listed building.⁴⁸

The court developed the *Duffield* guidelines further in *St John the Baptist, Penshurst* stating:⁴⁹

Question (1) cannot be answered without *prior consideration of what is the special architectural and/or historic interest of the listed church ...* In answering Questions (1) and (3), the particular grading of the listed church is highly relevant ... Questions (1), (3) and (5) are directed to the effect of the works on *the character of the listed building*, rather than the effects of alteration, removal or disposal on a particular article.

The Faculty Jurisdiction Rules⁵⁰ require a ‘statement of significance’ to be sent to the Diocesan Advisory Committee and included within the petition for any proposal involving changes to a listed building, the purpose of which, the court held in *St Peter, Shipton Bellinger*, is:⁵¹

to describe the significance of the church in terms of its special architectural and historic interest ... and any significant features of artistic or archaeological interest that the church has, so as to enable the potential impact of the proposals on its significance, and on any such features, to be understood.

Stressing that designation reflects the ‘special’ national interest of listed buildings and the consequent importance of the statement of significance and advice of specialist statutory consultees, the court held that the secular statutory approach, as enunciated in *Barnwell*, should be applied in the faculty jurisdiction, whether or not the ‘guidelines’ are used to inform the exercise.⁵²

As *Barnwell* demonstrates, applying this approach correctly can require considerable sophistication on the part of the decision-maker. Guided by the statement of significance and, if necessary, expert witnesses, s/he must identify

⁴⁸ *Re St Alkmund, Duffield* [2013] Fam 158, at para 87.

⁴⁹ *Re St John the Baptist, Penshurst* [2015] WLR (D) 115, at para 22 (emphasis added).

⁵⁰ Faculty Jurisdiction Rules 2015, rr 4.4(1) and 5.5(3).

⁵¹ *Re St Peter, Shipton Bellinger* [2016] Fam 193, at para 7.

⁵² *Ibid*, at paras 34–37 and 41–48.

the special interest–significance–of a listed building and assess the effect of proposals upon it. Lyveden New Bield is a highly unusual building and in many faculty cases the territory will be more straightforward, but chancellors need assistance to ensure that they discharge their duty. The Dean characterised *Shipton Bellinger* as a case where ‘almost everything that could go wrong did go wrong’, partly because significance had not been properly addressed at any stage of the process.⁵³ ‘Reading’ the building, understanding the reasons behind its form and features, is essential and will sometimes require an accurate appreciation of its ‘juristecture’, as well as the liturgical architecture–indeed, frequently, as Doe observes, they will coincide.⁵⁴ *Duffield* and *Penshurst*, which concerned rood screens, are cases in point. In both, the hearing was held in the church and the court felt able to exercise its power of re-determination, having experienced the architecture at first hand.⁵⁵

The petitioners in *Duffield* argued that chancel screens were contrary to ‘the orthodox, traditional theological position of the Church of England’ and therefore removal was necessary for pastoral wellbeing:⁵⁶

... [C]hurch architecture and church furnishings are seldom, if ever, theologically neutral ... Recognition needed to be given to its theological and doctrinal symbolism, and the impact that had on the present worshipping congregation. Such a screen was not a mere piece of furniture, however good its craftsmanship or aesthetics, and it was contrary to the mission this church was seeking to project.

Having reviewed the evolution of clerical doctrinal subscription, the court rejected the submission on theological orthodoxy. Then, by reference to works on post-Reformation liturgical architecture and Hooker, Phillimore and Cripps on the law, they traced the theological and liturgical significance of screens from Tudor times through Tractarian church ordering schemes to arrive at their conclusion on the current legal position.⁵⁷ Although they held that the lawfulness of a ‘mere’ chancel screen was ‘incontestable’, they concluded that the Chancellor ‘too readily dismissed’ the parishioners’ theological sensitivities. Commenting, *obiter*, they distanced themselves from Cripps’ suggestion that roods and chancel gates were unlawful.⁵⁸ The *ratio* of the judgment, however, was that the Chancellor erred in not assessing the effect of removal upon ‘the character of the church as a building of special architectural and historic interest’ and, by focusing on the effect upon the chancel, failed to identify ‘what was the special architectural character and historic interest of this church as a whole ... and then to consider whether there would be an overall adverse effect...’⁵⁹

⁵³ *Ibid*, at paras 3, 4, 7, 9–10, 18–19, 77–82.

⁵⁴ Doe (note 3), 255.

⁵⁵ *Re St Alkmund, Duffield* [2013] Fam 158, at para 55; *Re St John the Baptist, Penshurst* [2015] WLR (D) 115, at paras 18 and 86.

⁵⁶ *Re St Alkmund, Duffield* [2013] Fam 158, at paras 19 and 28.

⁵⁷ *Ibid*, at paras 22–36.

⁵⁸ *Ibid*, at para 27.

⁵⁹ *Ibid*, at para 52, emphasis added.

In *Penshurst*, the Chancellor's refusal to permit removal of a chancel screen was overturned, essentially, for failures of reasoning in his assessment of the special architectural character or historic interest of the church and the effect of removing the screen upon it. While the court did not expect that 'in every case chancellors will need to go into as much detail' as they did in *Duffield*, nevertheless, 'a rigorous analysis' was required.⁶⁰

In both cases, the court granted faculties on re-determination. These results demonstrate that assessment of effects by reference to significance, whilst legally required, is, essentially, a procedural step rather than a normative rule dictating outcome. It is clear, however, that proper assessment of the interest of the listed church is fundamental; this must be rigorous and the effects of the proposal must then be related to it. The status of furnishings under ecclesiastical law and related theological questions may be relevant to this assessment; if they are, then chancellors must take them fully into account in determining significance, from which the other steps towards an overall judgment proceed.

The physical results of operating the faculty jurisdiction – petitions granted and refused – can be seen as the embodiment of legal process culminating in the articulation of each building's legal architecture, or 'juristecture'.⁶¹ Henry Moore's altar stands in St Stephen's, Walbrook; the Duffield screen has gone;⁶² Rustat's memorial remains in place. Restoration orders, introduced into the jurisdiction in 1991,⁶³ provide further tangible examples: the unlawfully erected school next to Hawksmoor's Christ Church, Spitalfields, ordered to be demolished by 2029,⁶⁴ is the most extreme example, but there are others concerning pews⁶⁵ and paint.⁶⁶ Law has been described as 'the melody of the symphony of landscape'⁶⁷ and it is obvious, from the distribution of parish churches, that the Church's parochial governance has had a profound effect on the rhythm of English landscape and townscape. The 'saving' or 'loss' of Grade I and Grade II* listed churches under the Skelmersdale Agreement leaves a physical legacy based on constitutional convention.⁶⁸ Every Church of England cathedral is listed and sits within a Conservation Area designated under secular planning legislation. Conservation Area designation, as well as listing, engages the *Barnwell* setting duty in relation to development proposals.⁶⁹ Via secular

⁶⁰ *Re St John the Baptist, Penshurst* [2015] WLR (D) 115, at para 57.

⁶¹ cf. *Doe* (note 3), 256.

⁶² The *Penshurst* screen had a reprieve because the proposed arrangement for its transfer to another church fell through.

⁶³ Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 13(5). Now Care of Churches and Ecclesiastical Jurisdiction Measure 2018, s 72.

⁶⁴ *Christ Church, Spitalfields Open Space Limited and Others v the Governing Body of Christ Church Primary School and Others* [2019] Fam 343, at para 140.

⁶⁵ *In the Matter of Maidstone, All Saints* (2015) (unrep.).

⁶⁶ *In the Matter of SS. Peter and Paul, Pettistree* [2017] ECC SEI 6.

⁶⁷ C Jessel, *A Legal History of the English Landscape* (London, 2011), foreword by Dame F Reynolds, Director General, National Trust.

⁶⁸ See above, note 32.

⁶⁹ Listed Buildings and Conservation Areas Act, s 72; *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137, paras 16–29.

planning law, listed churches and cathedrals therefore exert a considerable physical influence over their surroundings. For example, recent major planning applications for housing development within the setting of Guildford Cathedral have been refused for failing to ‘achieve the exceptional and innovative design quality required to respond to the sensitive setting of the Grade II* cathedral’,⁷⁰ whereas a scheme for a railway station in a more remote part of the setting was permitted on appeal, in part because the planning inspector found that ‘the proposals would preserve the setting’ of the Grade II* listed cathedral.⁷¹

Part III: ‘Juristecture’, mission, ministry and innovation

One of the Principles of Canon Law Common to the Churches of the Anglican Communion is that:⁷²

Ecclesiastical authorities must hold and administer church property to advance the mission of a church, and for the benefit and use of its members, from generation to generation, in accordance with the law of that church.

As a matter of principle, therefore, ecclesiastical ‘juristecture’ is inextricably linked to the mission of the Church.

Faculty jurisdiction

In *Duffield*, the court stated that the faculty system should operate so as not to preclude future doctrinally and mission-inspired changes;⁷³ ‘reversibility’ is also a relevant consideration in the evaluation of heritage harm,⁷⁴ as is the conservation value of retaining heritage buildings in the use for which they were designed.⁷⁵ In terms of ecclesiastical law, the principle of missional flexibility reflects a post-Worship and Doctrine Measure 1974 approach to liturgy.⁷⁶ Historically, medieval cathedral law, Acts of Uniformity, Canons,

⁷⁰ See ‘JTP’s “harmful” Guildford cathedral housing proposals blocked—again’: available at <architectsjournal.co.uk/news/jtps-harmful-guildford-cathedral-housing-proposals-blocked-again>, accessed 2 May 2023.

⁷¹ Appeal decision 3161412 by David L Morgan, *Guildford Station and Car Park, Station Approach, Guildford, Surrey GU1 4UT* (22 January 2018), paras 17–32, which provides an exemplary assessment of heritage significance of the Cathedral, its setting and the effect of development proposals upon it.

⁷² Principle 80(4), *The Principles of Canon Law Common to the Churches of the Anglican Communion*, 2nd edn (Anglican Consultative Council, 2022), 107.

⁷³ *Re St Alkmund, Duffield* [2013] Fam 158, at para 25; see also *Re St Stephen, Walbrook* [1987] 2 All ER 578, 598b-c.

⁷⁴ *R (Richard Buxton) v Cambridge City Council* [2021] EWHC 2028, para 50; *Historic England Advice Note 2: Making Changes to Heritage Assets* (Historic England February 2016), para 43; *Re St Alkmund, Duffield* [2013] Fam 158, at paras 92–94.

⁷⁵ *Conservation Principles, Policies and Guidance for the Sustainable Management of the Historic Environment* (English Heritage, April 2008), para 45: ‘The use and appropriate management of a place for its original purpose, for example as a place of ... worship ... illustrates the relationship between design and function, and so may make a major contribution to its historical values’.

⁷⁶ Worship and Doctrine Measure 1974 and the B Canons made under it.

diocesan injunctions and visitations, and court judgments, enforced building norms as a matter of ecclesiastical regulation, complementing strict liturgical norms. These norms were subject to limited relaxations which have, for example, allowed the survival of medieval cathedral choirs.⁷⁷ Modern liturgical freedoms and a less prescriptive approach to doctrinal subscription⁷⁸ perhaps mean that heritage law, implementing the policy instrument of significance, is now a – if not *the* – principal regulatory constraint shaping places of worship.

Harte⁷⁹ and Petchey⁸⁰, commenting on the discussion in *Walbrook* of artistic and architectural questions, adopt the court's description of them as 'aesthetic', but they both recognise that such matters are not purely subjective and must be based on evidence and analysis of expert opinion. Sir Ralph Gibson in *Walbrook* accepted that the petitioners' missional objectives were relevant, along with the artistic excellence of the altar:⁸¹

I see force in the points made by the witnesses called for the petitioners to the effect that the presence in the church of such an artefact is likely to 'say' things both to worshippers and to visitors to the church and that the Christian message may be proclaimed not only through liturgy and teaching but also through the buildings and their contents ... the undisputed and exceptional excellence of the altar as a work of art is a factor of separate and substantial weight which should properly have disposed the chancellor to grant a faculty ... unless there was some sufficient reason for rejecting it.

Doubtless this recognition of the ability of buildings to convey the numinous would have pleased Newman. Harte comments that in *Walbrook*,⁸²

[t]he role of the church as a patron of the arts both in the past and in the present was certainly vindicated ... the case emphasises the importance of beauty in church buildings as part of the living witness of the church, rather than as something static, or indeed dead, and merely to be conserved for secular academics or voyeurs.

More generally, section 35 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, links missional objectives and the care of church buildings, providing:

A person carrying out functions of care and conservation under this Measure, or under any other enactment or any rule of law relating to churches, must have due regard to the role of a church as a local centre of worship and mission.

⁷⁷ Reflected in the rubric in the Book of Common Prayer, 'In Quires and places where they sing...'.

⁷⁸ Worship and Doctrine Measure 1974, s 2 and Canon C15 Of the Declaration of Assent.

⁷⁹ J Harte, 'Doctrine, Conservation and Aesthetic Judgment in the Court of Ecclesiastical Causes Reserved' (2008) Ecc LJ 22–32, 28–32.

⁸⁰ P Petchey, *Five Faculty Cases from the City*, Ecclesiastical Law Society Lecture, 11 January 2018, 11–12, available at: <[Petchey-Jan-2018-1.pdf](https://www.ecclawsoc.org.uk/Petchey-Jan-2018-1.pdf) ([ecclawsoc.org.uk](https://www.ecclawsoc.org.uk))>, accessed 1 May 2023.

⁸¹ *Re St Stephen, Walbrook* [1987] 2 All ER 578, at 596h.

⁸² Harte (note 79), 28.

The Court of Arches held in *Re St Luke the Evangelist, Maidstone* that the predecessor provision did not apply to chancellors.⁸³

In the absence of words expressly limiting the wide jurisdiction long enjoyed by chancellors, that section cannot be said to apply to chancellors since they are not persons carrying out functions of care and conservation. Rather ... chancellors are to ‘hear and determine ... a cause of faculty ...’

Nevertheless, pastoral considerations are frequently cited in consistory court judgments, not least when considering the final *Duffield* question in cases involving heritage harm.

Cathedrals

Section 1 of the Care of Cathedrals Measure 2011 requires those who are exercising functions of care and conservation under the Measure to have ‘due regard to the fact that the cathedral church is the seat of the bishop and a centre of worship and mission’.⁸⁴ The Cathedrals Fabric Commission, any Cathedral Fabric Advisory Committee and any Commission of Review must—without prejudice to the general duty contained in section 1 of the 2011 Measure—‘have regard to the desirability of preserving the fabric of the cathedral church and any features of architectural, archaeological, artistic or historic interest which it possesses’, as well as its setting, and buildings and remains in the precincts.⁸⁵

Decision making for cathedrals (by contrast with the faculty jurisdiction) is not undertaken by judicial process. This means that determinations are not accompanied by detailed reasons, and concrete examples are less transparent than decisions in the secular and faculty frameworks. On the face of it, this appears odd given that cathedrals are among the highest heritage status buildings in the country. Nevertheless, some principles are discernible. For example, in the missional context of visual art, the application for a suspended, translucent sculpture in Chichester Cathedral is instructive. This was refused due to its ‘unacceptably detrimental impact on the architectural character of the Cathedral interior’, as it ‘would come to dominate ... the totality of visitors’ and worshippers’ experience of the Cathedral interior’.⁸⁶

Mission and Pastoral Measure 2011

There is also a general duty on persons carrying out functions under the Mission and Pastoral Measure 2011 (including closure and disposal of churches) ‘to have

⁸³ *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, 7A–B.

⁸⁴ Care of Cathedrals Measure 2011, s 1. The same duty is imposed on decision-makers under the Cathedrals Measure 2021 (a Measure that makes provision about the governance, management, property and financial affairs of cathedrals). Such individuals must also have due regard to ‘the importance of each cathedral’s role in providing a focus for the life and work of the Church of England in the diocese’: Cathedrals Measure 2021, s 1.

⁸⁵ Care of Cathedrals Measure 2011, s 22.

⁸⁶ Form 10 (Rule 7) Notice, Chichester Cathedral, Plensa sculpture, 15 December 2011.

due regard to the furtherance of the mission of the Church of England'.⁸⁷ The ecclesiastical exemption is not directly relevant to this jurisdiction, although closure of a building for public worship removes the effects of consecration, specifically taking that building out of the faculty jurisdiction.⁸⁸

Net-zero 'juristecture'

Section 35 of the 2018 Measure has recently been amended by the addition of a requirement for the relevant persons to 'have regard to the importance of environmental protection...'.⁸⁹ New procedural requirements were also inserted into the Faculty Jurisdiction Rules in 2022, requiring petitioners to have regard to the Church Building's Council's statutory net-zero guidance.⁹⁰ Several recent consistory court judgments have considered relevant petitions.⁹¹ Although some decisions display a difference of approach as to the margin of parochial appreciation,⁹² the general thrust is favourable to the 'green' agenda. In the recent, high-profile case of *Re Chapel of King's College to Our Lady and St Nicholas, Cambridge*, Chancellor Leonard KC granted a faculty for the installation of solar panels on the southern roof of this Grade I listed building 'of worldwide significance'. He noted the Church of England's desire to 'respond ethically and in a socially responsible way to combat climate change thereby fulfilling the fifth mark of mission'.⁹³ This mission objective was weighed against the Chancellor's conclusion that there would be less than substantial harm to significance.⁹⁴ These developments suggest that the modern approach to the exercise of judicial discretion is more influenced by policy norms, or 'soft law'⁹⁵ than it was in 1995, when *Re St Luke's, Maidstone* was decided.

The Cathedrals Fabric Commission has authorised prominent solar panel installations on the roofs of Salisbury Cathedral and York Minster, but, as we have seen, their published decisions contain little reasoning, so it is impossible to see how they dealt with the balancing of heritage harm versus public benefits.⁹⁶

⁸⁷ Mission and Pastoral Measure 2011, s 1.

⁸⁸ Mission and Pastoral Measure 2011, s 74.

⁸⁹ Church of England (Miscellaneous Provisions) Measure 2023, s 14.

⁹⁰ Faculty Jurisdiction (Amendment) Rules 2022.

⁹¹ See *Re Chapel of King's College to Our Lady and St Nicholas* [2023] ECC Ely 1; *Re Holy Trinity Headington Quarry* [2023] ECC Oxf 4; *Re St Mary the Virgin Dedham* [2022] ECC Chd 2; *Re St Leonard, Southoe* [2022] ECC Ely 4; *Re St Peter's, Walsall* [2021] ECC Lic 4; *Re St Michael and Angels, Blackheath Park* [2020] ECC Swk 1; *Re St Mark's Church, Mitcham* [2020] ECC Swk 5; *In the Matter of the Church of St Mary the Virgin, Welling* [2022] ECC Swk 3; *Re St Thomas and St Luke, Dudley* [2021] Ecc Wor 2.

⁹² In the Southwark cases (*ibid*), the Chancellor regarded it as adequate that the petitioners had asked themselves about the implications of non-net-zero proposals, whereas in the Worcester case (*ibid*), the Chancellor took the view that the judgment as to appropriateness fell to her.

⁹³ *Re Chapel of King's College to Our Lady and St Nicholas, Cambridge* [2023] ECC Ely 1, at paras 1 and 73. The Fifth Mark of Mission of the Anglican Consultative Council is 'To strive to safeguard the integrity of creation and sustain and renew the life of the earth', The Five Marks of Mission (Church of England, version 2, November 2017), available at: <[churchofengland.org/sites/default/files/2017-11/MTAG%20The%20Five%20Marks%20of%20Mission.pdf](https://www.churchofengland.org/sites/default/files/2017-11/MTAG%20The%20Five%20Marks%20of%20Mission.pdf)>, accessed 2 May 2023.

⁹⁴ *Re Chapel of King's College to Our Lady and St Nicholas, Cambridge* [2023] ECC Ely 1, at paras 83–90.

⁹⁵ See further M Hill, *Ecclesiastical Law*, 4th edn (Oxford, 2018), 15, para 1.34.

⁹⁶ Form 10 (Rule 7) Notice, Salisbury Cathedral photovoltaic panels, 25 March 2020. The York Minster decision from 2023 is not yet published.

Net-zero ‘juristecture’ – solar panels, ground source heat pumps and heated pew cushions – is innovative, introducing new technologies and non-traditional physical forms and furnishings to churches and cathedrals. The *Duffield* test, preserving equivalence of process as required by the ecclesiastical exemption, has produced decision making more overtly concerned with the broad missional objectives of the national church, as well as local concerns of the petitioning congregation. Tying legal duties to guidance which is easier to change than statute means that the faculty and cathedral fabric jurisdictions should be able to keep pace with technological development.⁹⁷

Conclusion

Without doubt, there is much legal history embodied in the Church of England’s places of worship. Understanding it is important for appreciating the buildings and making informed decisions about their use and care. But the relationship between law and the built environment is not purely historic; it continues to develop, in secular and ecclesiastical jurisdictions, manifesting what Doe identifies as the ‘symbiotic relationship’ between law and architecture.⁹⁸ As doctrinally and liturgically led regulation has relaxed, other normative influences have grown in importance, culminating in new forms of ‘built law’. Specifically, the policy instruments of ‘significance’ and the balancing of harm against public benefit are now critical to the regulation of changes to listed churches, which form the majority of the Church’s stock. Decision making for cathedrals is, by contrast, not undertaken by judicial process and determinations are not accompanied by detailed reasons, meaning that they are less transparent than decisions in the secular and faculty frameworks. The balance test enables missional priorities such as care for creation, racial justice and creating accessible and beautiful churches, expressed in both ‘soft’ and ‘black letter’ law, to influence the legacy which is handed on to future generations: contemporary ‘juristecture’.

Acknowledgements. The author is grateful to Professor Norman Doe for his inspiration and encouragement to write this article, which started life as an essay for the Cardiff LLM degree. She also wishes to thank Dr David Knight of the Church Buildings Council and the editor of this *Journal*, Mr Ben Harrison, for their assistance. Any remaining errors are the responsibility of the author.

⁹⁷ The Church’s response to the Racial Justice Commission has, similarly, been led by ‘soft law’; the Church Buildings Commission is reviewing its statutory guidance on contested heritage with the assistance of a racially diverse new committee, in the light of recent consistory court decisions: *Second Biannual Report of the Archbishops’ Commission for Racial Justice* (Church of England Winter 2022–2023), 25–26, available at <https://www.churchofengland.org/sites/default/files/2023-02/rjr2_final-digital.pdf>, accessed 29 December 2023.

⁹⁸ cf. Doe (note 3), preface.

Cite this article: M Ellis KC, ‘“Juristecture” and the regulation of normative space’ (2024) 26 *Ecc LJ* 129–146. <https://doi.org/10.1017/S0956618X24000012>