13 Serpentine Court
Bletchley
Milton Keynes
MK2 3QP

September 25th 2014

Dear Planning Committee Councillors,

Crossbones Disused Burial Ground,
Opposite 22 Redcross Way, SE1 1HG
Planning Application number 14/AP/2757
Case Officer Jonathan Payne

I write as a former resident in the area and for the following reasons:-
(1) to support this planning application;
(2) to uphold the law in connection with the cultural heritage of Cross Bones;
(3) to draw your attention to your Council's legal responsibilities, in connection with all of those parts of the land bordered blue in the planning application, where burials exist or once existed, so that if further planning applications are received in connection with the same land, no planning consents are issued, for the construction of any buildings which Southwark Council is legally required to prevent or have demolished, under its duty as the statutory enforcement authority for disused burial grounds in its own area;
(4) in view of (3) above and (5) and (6) below, to invite councillors to call for a thorough survey of the locations of all graves, before any future planning applications for the construction of any buildings are decided;
(5) one or more planning consents were issued in the past and at least one upheld on appeal, without Southwark Council staff at any level being aware that it is the statutory enforcement authority, for preventing the construction of unlawful buildings on disused burial grounds in its area and forcing the demolition of any which are constructed;
(6) the Planning Inspectorate was not made aware of points (3) to (5) and (7) to (8) when it considered the last planning appeal in connection with Cross Bones;
(7) my understanding that legally valid exhumation licences cannot be issued for this site;
(8) as an alternative to exhumation licences, "directions" cannot be issued by any Secretary of State under the Disused Burial Grounds Acts, solely for exploratory, scientific or other investigative work or the construction of any buildings which would be illegal.

I will now address some of the above points.

It took a year to persuade Southward Council that it is the statutory enforcement authority for disused burial grounds within its own area. However that fact has yet to filter through to all relevant staff, as proven by an email of the 19 September 2014 from Alison Brittain, Manager for Monitoring & Compliance. She states the Ministry of Justice (MoJ) has that responsibility. That lack of knowledge of Southwark Council being the statutory enforcement authority means decisions were previously taken on one or more planning applications, without knowledge of Southwark Council's legal duty to protect all disused burial grounds in its area, from illegal building developments.

There is a need to be clear about any differences between buildings erected and/or demolished, before and after the Disused Burial Grounds Acts came into force. For example, you may not

know if it makes any legal difference, whether or not a disused burial ground has been built over for some decades and those buildings are later demolished. Even when graves have been cleared, you need to know whether that makes a legal difference. Do you have information on the legal position when planning consents have been issued and previously unknown graves are discovered when foundations are being dug? Do you know whether that means that as the statutory enforcement authority for disused burial grounds, Southwark Council would have to prevent some planning permissions from being implemented or relied upon in such circumstances? A cautionary note is normally added to planning permissions, warning that other laws and/or restrictive covenants may prevent the implementation of planning permissions. It may be thought necessary to add to that warning, that Southwark Council may have to prevent the implementation of planning consents, if former burial grounds are discovered.

I have attached a plan, showing the whole of the area bordered in blue in the planning application and where burials are known or thought to have taken place. My conclusions are based on considerable research, including maps from 1702 to the present. I am currently working on the third edition of my report on Cross Bones - formerly known as St. Saviour's burial ground.

The eminent Prof. Brickley et al have mentioned that the public health reformer Edwin Chadwick estimated in 1843 that Cross Bones was the largest of three burial grounds in Southwark. The College Ground was estimated at 1,040 square yards, the Churchyard 2,700 square yards and Cross Bones 4,500 square yards. However, they assert that **Cross Bones was at least 9,000 square yards.** Their estimate may be based on archaeological discoveries. It is highly probable, that burials expanded into adjacent fields over the centuries, with knowledge of older graves having been lost from local cultural memory. My attached plan shows details on where it seems that graves are most likely to be found.

The extent of the land which the Bankside Open Spaces Trust desires to lay out as a “temporary meanwhile” garden is shown as 892.8 square metres in its method statement. That seems to be an error. Its plan shows 802.6 square metres but if the scale of that plan which I have is accurate, the true figure may be closer to 749.72 square metres. My own plan is not to scale. The total size of the Cross Bones site is "at least" 9,000 square yards according to professor Brickley et al. That is "at least" 7,525 square metres. That means, if the area to be protected for 3 years is 749.72 square metres, it is only one tenth of "at least" 7,525 square metres and just over one ninth, if 802.6 square metres.

What is certain is that the proposed temporary garden would only cover a very small section of the total burial area. More significantly, whatever the true area, the protection is only intended to be temporary and for as little as 3 years.

It is most likely that the majority of graves will be west of the ancient "boundary" line shown on my attached plan, in areas A, B, C and D but there is still the possibility that they will be found in area E. On 18th century maps, that boundary line appears to have been a virtually straight track or lane. On later maps that line is not straight but small sections of what may have been a track can still be identified.

I am confident that all councillors will agree, that no individuals and no organisations are free to pick and choose which laws to respect and which to break. As no law can be subverted, any further planning applications to build on any part of the land bordered in blue, must be considered alongside Southwark Council's unquestionable statutory responsibility to prevent illegal building developments on any disused burial ground.

Before any further planning applications are decided, for any of the land bordered blue, councillors may consider it essential to require that a thorough survey be conducted, to discover exactly where burials have taken place, without removing any human remains. I mention below and in my Appendices, my certainty that it is legally impossible to obtain valid exhumation licences to remove such remains. Even so, you will be keen to ask whether an area cleared of graves is still a disused burial ground, which cannot be developed?

As the statutory enforcement authority for the Disused Burial Grounds Acts 1884 & 1981, Southwark Council is required by Parliament to ensure that apart from the erection or extension of a religious building, nothing is erected on any disused burial ground, unless it is not regarded as a "building" according to the Acts and legal precedents. It may be lawful to erect certain types of buildings, to enhance an area used solely as public open space.

The duty to enforce is imposed by Section 56 of the Metropolitan Board of Works (Various Powers) Act 1885 and best illustrated by the judgment in Re St Luke's, Chelsea [1967] 1 All ER 624. More recent legislation has made Southwark Council responsible for that duty. Chancellor GH Newsom QC said *"… the 1884 Act (meaning the DBG Act) is not to be treated as an anachronism and it would be wrong if, now that these matters have been aired, any of the enforcement authorities in this diocese were to be remiss in the exercise of its duties and powers of enforcement*".

In 1928 the London County Council (LCC) was then the statutory enforcement authority, when its attention was drawn to a welfare centre, being constructed on a disused burial ground. The offender was the Borough of Greenwich. Court action then ensued and the LCC obtained a mandatory injunction, to force the Borough of Greenwich to pull down, what it had already built, [*The Times 8 Dec. 1928*]. The LCC was awarded costs.

As the LCC was prepared to litigate against another local authority, to have demolished a welfare centre, it is unclear why it did not stop the building of small-scale workshops or whatever structures were erected on Cross Bones, after the 1884 Act came into force, or have them demolished. The two schools were erected long before then. Those would have been lawful unless graves were disturbed or destroyed, as that has been a very serious common law offence since time immemorial - see details in my Appendices about the prosecution in 1880, of a builder in another part of London. All buildings were eventually demolished on the Cross Bones site but I have been unable to discover, whether or not that was a direct result of the enforcement of the Disused Burial Grounds Acts. It is my understanding that no structures remain on the site, other than the electricity sub-station. That may have been erected lawfully under statutory undertaker powers but whether the disturbance or removal of human remains was lawful is a separate question. As I have asserted elsewhere, I am in no doubt that it is legally invalid (ultra vires) to issue exhumation licences under S.25 Burial Act 1857. That would only be possible if that aspect of law is explicitly applied by the statutory undertaker legislation. Even then, the use of licences would be limited to the central role of the statutory undertaker and could not be used for anything else. Why S.25 Burial Act 1857 licences do not apply to places such as Cross Bones, is dealt with in more detail in my Appendices.

Southwark Council is now the statutory enforcement authority for its own area. Perversely, had the Borough of Greenwich been the enforcement authority in its own area in 1928, it would have encouraged its staff to break the law. It would have continued with the illegal construction of the welfare centre, which would not then have been demolished, unless some other form of litigation had intervened. In connection with the Cross Bones site, Southwark Council must not be in the position of encouraging its own staff to break the law or anyone else to do so.

Southwark Council will need to be certain, about the law on buildings erected on disused burial grounds before 1884, before 1981, after 1981 and the legal position when such buildings have been demolished. It will also need to be certain, whether or not the 1981 Act applies to Cross Bones. I am certain that it does not apply. In April 2013 a lawyer for Southwark Council agreed that it may require a court decision to be absolutely certain. The Council could liaise with the relevant London boroughs which are also enforcement authorities in their own areas, to jointly fund such a case in the courts - a judicial review.

All councillors but particularly those on the planning committee, may think it wise to ask their legal advisers for a summary on relevant law. If certain words within the law are ignored, it might be concluded that the 1981 Act applies to Cross Bones. However, such words cannot be ignored and brief detail of my own interpretation of the law is set out in the Appendices.

There can be no doubt that illegal building developments have taken place on the Cross Bones site but that does not mean, ipso facto, that any other buildings can now be erected.

I turn now to the set of Burial Acts, which have no relevance to Southwark Council's responsibilities. I only mention them because one of those Acts contains the procedure, for obtaining a licence to carry out one or more exhumations, in some but not all types of property.

Those Acts must be read as one Act but they are completely separate from the 1884 and 1981 Disused Burial Grounds Acts. In other words and as already mentioned, the Burial Acts have no relevance to Southwark Council's legal duty to protect all disused burial grounds within its area.

When lawful religious buildings are erected on disused burials grounds and exhumations need to take place, "directions" and not licences are issued by the Secretary of State, under the 1981 Disused Burial Grounds Act, i.e. licences should never be issued.

The Ministry of Justice stated in a letter to my MP dated 21 July 2014, that my understanding and that of the Alice Barker Trust and John Bradfield, (an acclaimed writer on the subject), is wrong, about when legally valid exhumation licences can and cannot be issued, under S.25 Burial Act 1857. We will be seeking retractions on that assertion and the Ministry's claim that a Court of Appeal decision in 2010 means that funeral pyres are now illegal. The Alice Barker Trust was a party to that case and John Bradfield advised before and after the funeral pyre, which resulted in that successful decision from the Court of Appeal. It would be absurd if that Trust did not understand the judgment which it helped to obtain, especially when it advises on bereavement issues and law.

In 1898 the Home Secretary refused to sanction the removal of human remains from Cross Bones, stating that the land could not be used as a building site. It is not clear if the Home Secretary realised that the courts had determined in 1867 and 1880, that the law on exhumation licences did not apply to places such as Cross Bones. However, as licences have been issued in connection with that land in the last couple of decades and as recently as last August, I have sketched out relevant events and case law in the Appendices.

I must reiterate that it remains my understanding that all exhumation licences issued for Cross Bones were and are legally invalid. Exhumations in any places which relied upon invalid licences were criminal offences. On those there are no time limits on when prosecutions would have to start and no maximum penalties.

I am reasonably confident that it is legally possible to dig in search of grave locations, as long as actual burials are not disturbed. It may be lawful to collect scattered bones. Thus it should be possible for Southwark Council to require, that a lawful survey be conducted of the area, to determine the positions of graves, before any further planning applications are considered, within the area bordered in blue or indeed, adjacent and nearby land.

The current planning application states that the area of the proposed temporary garden is a former "work site". In terms of Southwark Council's enforcement responsibilities, the application may need to be amended to show that it is within a small part of a much larger disused burial ground, which is legally protected as such. That would then accurately record the true legal status of the land.

It is also indicated that the land is "contaminated". That may be so if a consequence of industrial processes. However, burials would not cause contamination or pollution. The Environment Agency has stated that there is no evidence of any burials ever having caused any pollution. Thousands of burial grounds were legally forced to close in the mid-19th century, based on pseudoscience and the myth that they were a threat to the living.

According to the site location plan submitted with the application, the proposed garden cannot be at the address shown, which is seen to be on the opposite side of the road.

Yours faithfully,

Teresa Evans.
Former resident of Redcross Way, Borough, Southwark, London SE1

Enclosures:-
Appendix 1 - When the Disused Burial Grounds Act 1884 and the Disused Burial Grounds (Amendment) Act 1981 do and do not apply.
Appendix 2 - Recent court cases - what the courts were not told.
Appendix 3 - Exhumation licences & summary of case law
Appendix 4 - Details provided to the applicant for planning permission.

Attached
My plan of the area and most probable positions of graves.

When the Disused Burial Grounds Act 1884 and the Disused Burial Grounds (Amendment) Act 1981 do and do not apply.

The Disused Burial Grounds (Amendment) Act 1981 does not apply to burial grounds which have always been secular. It does not apply to all those which were religious and now have secular owners. The change in 1981 does not allow the wholesale destruction of disused burial grounds. If the change had been intended to allow them to be treated like any other land, it would in effect have revoked the 1884 Act and completely done away with any need for Southwark Council to be the statutory enforcement authority in its own area.

If that was the case it seems to me that there would not be any further need for an enforcement authority for disused burial grounds. Lawyers for Southwark Council said in a letter dated April 5th 2013, that, "…the Council accepts that it is the "enforcement authority" in relation to buildings which are erected in breach of the Disused Burial Ground Act". That statement appears to suggest that the Council agrees that there are types of buildings which would still breach the law, but the lawyer didn't specify exactly what types of buildings are proscribed.

When the Courts interpret the law they cannot consider any statements made during debates in the Houses of Parliament prior to the passing of an Act. They must interpret the wording of the Act according to the grammatical or common sense meaning, unless that would result in an absurdity. Thus the Courts would look at the specific meanings of words, such as "building" v "buildings" and "disposes" v disposed". The plural would include the singular and vice versa unless the context otherwise requires and the context does otherwise require. "Building" and "buildings" are used in distinct ways in the two Acts.

Section 3 of the Amendment Act 1981 states that "Where a church or other, religious body disposes of (the word "disposes" indicating future and not past tense) an interest in a disused burial ground, then the owner for the time being of that interest shall have the same rights and powers and be subject to the same obligations, restrictions, duties and liabilities conferred or imposed by this Act on that church or other religious body, as if that interest had not been so disposed of". This does not mean that Section 3 applies to a former religious burial ground with a secular owner before 1981. As stated above, it does not mean that the 1884 Act is rendered meaningless, or that the whole place can be destroyed or sold as building land and the enforcement authority has no role to play. On April 16th 2013, a lawyer for Southwark Council correctly said that, "… it would ultimately be for a court to decide upon the correct interpretation of the law".

I am sure councillors will agree that we are discussing rather unusual circumstances. Yes Cross Bones was originally owned by a religious organisation for what is reported to be legally unconsecrated land but that was pre 1892 and before a railway company bought the property at auction. On that basis and when combined with the wording of the 1981 Act, I am not convinced that the 1981 Act has any role to play.

That only leaves the 1884 Act. On its own, it does not allow the construction of a religious building from scratch. It only allows an extension to a pre-existing religious building. Unlike the 1884 Act, the 1981 Act when it applies, allows the construction of a whole new religious building. Thus, even if the 1981 Act applies to Cross Bones, only a religious building could be lawfully constructed. **If the 1981 Act allowed any type of development, it would in effect have revoked**

the 1884 Act. Thus, even if the 1981 Act applies to Cross Bones, only a religious building could be lawfully constructed.

S.25 Burial Act 1857
Exhumation licences do not apply to Cross Bones.

Recent court cases - what the courts were not told.

I have sketched out below, what happened in relation to the two recent cases on exhumation licences. I disprove the MoJ's assertion that the judgments from those fully endorse the past and present pattern of decision making on when licences can be issued. I also touch upon warnings from parliament, that we are moving to a situation in which the government can expect to manipulate the courts, into giving the decisions which it wants. For that reason, how the courts arrived at their decisions on the two exhumation cases, needs to be scrutinised through a parliamentary process. A Parliamentary Select Committee might serve that purpose, not least as it would be conducted in public. That needs to be done before Magna Carta celebrations next year and to ensure our judges and our courts remain entirely neutral and work to the highest analytical standards, especially at the Court of Appeal and UK Supreme Court levels.

As mentioned in my covering letter, the MoJ asserted in its letter dated 21 July 2014 to my MP., that my understanding is wrong, on law relating to exhumation licences. My understanding is the same as that of the Alice Barker Trust and John Bradfield. In due course we will seek a retraction of that assertion. I have also mentioned that the MoJ will be asked to retract its assertion that funeral pyres are now known to be criminal. Neither of those MoJ assertions is proven by recent decisions from the courts. As a volunteer, I have assisted the Trust with much of its technical advice work but also have my own website on a wide range of bereavement issues. We have pointed out to the MoJ., many basic errors in its literature and on its website, e.g. it may still be saying in its application form and guidance notes, that exhumation licences can be obtained, "from the Secretary of State or, in certain circumstances, the Church of England". The CoE never issues exhumation licences.

The MoJ has stated in guidance on law connected with so-called "natural" burial grounds, that land burial registers are legally required but in an email to John Bradfield that they are not, (MoJ email 11 July 2012). John Bradfield replied, "So, where, exactly, does the MoJ stand in relation to the stark contradiction of its own making? Does the left hand know what the right hand is doing on the MoJ?", (email 13 July 2012). For the avoidance of doubt, it is illegal to create a grave in England & Wales and not make and protect a land burial register. Damage to or destruction of a register still carries a maximum penalty of life imprisonment. The MoJ has failed to replace the Registration of Burials Act 1864, which is unlawful, e.g. by imposing one religion on another. The MoJ has been seen to act incompetently, by rarely clarifying with due care and attention, its position on very fundamental issues on law. It is unfit for purpose and needs to be knocked into shape by competent politicians.

In its letter of the 21 July 2014 the MoJ asserts that:-

(a) staff " believe (their) policy and practice in relation to the issuing of exhumation licences is correct and (their) position has been supported by the senior judiciary in recent (court) cases";

(b) the outcome of the King Richard III case, "provides clear authority for the lawfulness of archaeological licences granted by the MoJ", for exhumations from car parks and other places which are no longer active burial grounds;

(c) "The Alice Barker Trust attempted to intervene in the (King Richard III case) but the Administrative Court saw **no merit** in (its application) and ... refused permission to become involved", (my emphasis);

(d) the MoJ refuted my allegation that it had given "misleading information in response to parliamentary questions". I regret that those are recorded in Hansard, as corrections and clarifications cannot be made, to put the record straight. One can only wonder how many other PQs result in false and misleading answers.

So as not to overwhelm councillors with technical information, I will not address here, the point in (d).

I will start with (c) and sketch out what the records prove, about the extent of the information withheld from the courts by the Secretary of State for Justice, in connection with court cases over King Richard III (2013-2014) and another immediately before, about the exhumation of a RC priest (2011-2012).

Definitive proof on exactly why the Administrative Court refused permission for the Alice Barker Trust to intervene, in the King Richard III case, is to be found in the wording of the order issued by that court. That mentions that the Alice Barker Trust sought to be made a friend of the court (amicus curiae). That has been defined in a law dictionary as, "one who calls the attention of the court to some point of law or fact which would appear to have been overlooked". As the court decided the Trust could not be given that role, an application was made to formally intervene. **The MoJ is entirely wrong** to assert that the court then decided that there was "no merit" in the application of the Alice Barker Trust. It was refused permission because the court concluded, that the Trust would not be affected by the outcome. The Trust requested a review of that decision because, (a) it has created permanent graves within nature reserves and was keen to prove that none of those could be destroyed with exhumation licences and (b) it advises on and has helped with exhumations in other settings. By contrast, the Trust was made a party to the successful proceedings on the funeral pyre case which ended in the Court of Appeal in 2010. As the Trust would not have been affected by the outcome of that case, the contrasting decisions of the courts on when the Trust can and cannot intervene, appear incoherent. I cannot begin to see how that could possibly be explained, in terms of the primacy of consistent decision making and the fair and just application of sound legal principles.

In the cases of the RC priest and King Richard III, the Alice Barker Trust had pressed for an assurance from the MoJ., that it would reveal to the courts the whole truth and nothing but the truth, on long established case law and a crucial hiatus within the MoJ between 2007 and 2008. It was only because that assurance was not given, that the Alice Barker Trust sought permission to be made a friend of the court (amicus curiae) and later a party in the legal proceedings in the case of King Richard III.

In that case, one of the judges the Hon. Haddon-Cave, formally reminded the Secretary of State for Justice, that he had a "duty of candour". In other words, there is a duty on public services to provide full details on relevant matters and not to mislead the courts. Despite that reminder, crucial information was knowingly withheld. As mentioned, the Alice Barker Trust had pressed for nothing more than an assurance that crucial information would be given to the courts. That

assurance was not given and that crucial information was, as feared, withheld from the courts by the Secretary of State for Justice.

(Adapted quote from an unrelated case)

"They must not only tell the truth. They must tell the whole truth. They must not misrepresent by words. They must not misrepresent by silence. They must make a full disclosure, of everything they know is relevant"

The most important case law on the subject was withheld from the courts. Consequently, that means it was not examined in the two recent court cases. It was not analysed. It was not modified. It was not revoked. It was not replaced. That seems to have been the deliberate intention of the Secretary of State for Justice. Had he submitted that information as required under the "duty of candour", it would almost certainly have undermined his position. That long established and crucially important case law, was based on a thorough examination of the law by very senior judges at the time, including the Lord Chief Justice. Even he, the highest judge in the land, had one case double-checked for accuracy, yet staff in the MoJ have before and after the Richard III case, persistently acted as though they are above the law and can defy what those judges decided.

In the recent case of King Richard III, the Alice Barker Trust did warn the Administrative Court that unless it made crystal clear in its judgment, that it had not been asked to decide, whether or not licences can be issued for car parks, the MoJ would in all probability misconstrue the court's eventual judgment. That is exactly what has happened and why I am having to address the point here.

For the avoidance of doubt, in the recent case of the RC priest, the courts were only asked to consider whether a religious order can trump the nearest relative, when making an application for an exhumation licence. At the Court of Appeal stage, one of the highest judges in the land, the then Master of the Rolls, honourably admitted that he could not understand the significance of R -v- Jacobson - about which see Appendix 3. How can a sound decision be issued at an appeal stage, when there is a crucial lack of understanding on the legal principles by which to judge an earlier decision? In the case of King Richard III, the administrative court was only asked to decided, whether the law requires a wider consultation on the destiny of his remains.

In neither case were the courts explicitly asked to decide if licences can be issued for the types of properties in question, i.e. the grounds of a former RC school and a car park.

Because of the above mentioned hiatus within the MoJ between 2007 and 2008, 40 professors of archaeology asked the Law Commission to examine the issues and make recommendations for a new law. The Alice Barker Trust made the same request. The Law Commission's hands were tied, because the Secretary of State for Justice withheld consent, i.e. he has to give consent for the MoJ's practices to be investigated in that way. Prof. Mike Parker-Pearson in the Archaeology Department at the UCL., wrote to the Law Commission, stating that prior to 1980, exhumation licences had never been issued for ancient graves. Although they started being issued in or around 1980, the law had not changed. If it was lawful over 123 years not to issue exhumation licences for such graves, then it must have been unlawful to issue them after 1980, i.e. because

there had been no change in the law. This was another crucial fact which the Secretary of State for Justice did not mention to the judges in the two recent exhumation cases.

What is surprising, is that the Secretary of State for Justice, is responsible for the administration of the courts, decisions on their level of funding and has considerable influence over the appointments and promotions of judges. Thus when he faces any court as the Defendant, the judges are in an untenable position, because they are immediately exposed to conflicts of interest. The danger of the Secretary of State being the piper calling the tune, has been mentioned in the House of Lords, (e.g. UK Legal Systems Debate, 10 July 2014). Before that, former president of the UK Supreme Court, Lord Phillips, said the Ministry of Justice has tried to gain as part of its empire, the UK Supreme Court, (UCL speech 08 Feb 2011). Put simply, it appears that the Secretary of State for Justice stands accused of trying to gain control over judges and the decisions which they make. If that has happened in the recent exhumation cases or if it were to happen in other cases, court decisions would be biased and prejudiced in favour of the Secretary of State, when facing the courts as the Defendant. Has that happened in the recent exhumation cases, as the decisions issued by the courts conflict with the earlier legal precedents which were ignored and left unchanged?

I hope this summary makes clear, that archaeology professors and the Alice Barker Trust had pressed for all relevant information to be openly examined, in a fair and just way. By contrast, the Secretary of State for Justice acted to conceal from the courts, essential information, in order to ensure that justice would not be done and would not be seen to be done. If this were to be examined by an investigative journalist and/or a Parliamentary Select Committee and/or the House of Lords, it might be concluded that the MoJ and/or the Secretary of State did not act in good faith, consciously obstructed justice and may even have acted unlawfully in relation to their duties to the courts.

EXHUMATION LICENCES & SUMMARY OF CASE LAW

During extension works to her house in Potters Bar, Catherine McGuigan found Quaker burials under a floor. She said, "I am staggered that the local council wrote to me saying ... I did not need a licence to exhume the bodies", (Daily Mail, 21 April 2008). Responding to a question posed by John Bradfield, MoJ civil servant Paul Ansell replied on the 14 October 2010. He agreed that no licence had been issued for the exhumations which took place at Catherine's home. That was during 2007 and 2008, when the MoJ decided that licences could not be lawfully issued in such circumstances.

What was the legal basis for the MoJ's decision at that time? Why did the MoJ tell archaeologists that they would no longer be issued with exhumation licences and that there would be no going back? Why then did the MoJ later go back on its decision? Why were the courts not asked in 2008 to clarify the law, if civil servants were unhappy with previous case law decisions? The MoJ has always refused to give an explanation. It also refused to mention these events in the recent court cases over the RC priest (2011 to 2012) and King Richard III (2013 to 2014). An explanation may only be obtained, if examined in public by a Parliamentary Select Committee.

The Alice Barker Trust, John Bradfield and myself have reasonable cause to suspect, that the reason why clarity was not sought from the courts in 2007 or 2008 and the issues were not raised in the recent court cases, is very simple. It appears that the MoJ was keen to avoid exposing the possibility, that somewhere in the region of 30,000 legally invalid licences had been issued, since about 1980. Rather than start with a clean slate, when the MoJ took responsibility from the Department of Constitutional Affairs in 2007, the MoJ appears to have decided to cover-up mistakes of the past, by carrying on as before. It also seems to have been assumed that the Secretary of State for Justice would be able to mislead the courts between 2011 and 2014, or rely on the judges to assist with the cover-up, e.g. see elsewhere concerns expressed about the Secretary of State for Justice attempting to pull the strings of the courts. If that is the true position, there could in theory be at least 30,000 prosecutions for illegal exhumations and counting. Clearly that will not happen but it is necessary for all public services and all judges to stay on the right side of the law at all times in all circumstances.

What then is the law?

Exhumation licensing law states that it applies to "any place of burial", when ecclesiastical law is not relevant. Those words are from Section 25 of the Burial Act 1857. The word "any" is continuously taken out of context by the Secretary of State for Justice, to justify licences for "any" burials in "any" graves in "any" places, not protected by ecclesiastical law. Why then doesn't the word "any" literally apply to "any" place? As the words are from the Burial Act 1857, the first question to ask, is whether or not that Burial Act applies to "any" land?

In 1867, in the case of Foster -v- Dodd, judges decided that the former Bridewell Hospital burial ground in London, which had been operated by the local authority under leasehold arrangements on private land between 1679 and 1844, did not come within the controls of any of the Burial Acts.

The 1867 case arose because of actions taken by local church wardens (what would now be local authority staff) as a consequence of instructions received from Her Majesty The Queen. They were ordered to enter that private property, (which had until 1844 been an active burial ground)

to carry out works which the landowner had not undertaken. However, the court decided that the church wardens were **guilty of obeying Her Majesty The Queen**.

The judges made clear that neither the Secretary of State nor Her Majesty, had powers to bring such a former burial place within the controls of the Burial Acts. They decided that burials in private land, especially where burials have ceased and even when the last were created within living memory, do not come within the controls of the Burial Acts.

How those Acts are worded is now irrelevant in connection with such properties, because the courts decided that they do not apply.

The judges ended with a severe warning, which they were not obliged to give. They made very clear, that although graves in private land are not protected by the exhumation licensing law, they do have the robust protection of "common law". Exhumations in breach of common law carry no maximum penalty, and no time limit on when prosecutions would have to start. What the judges did not go on to say, is that there appears to be no way of obtaining common law permissions, to carry out any exhumations from any land. In other words, graves in private land have permanent protection under common law.

In 1864 and 1865, a builder by the name of Jacobson, received from the Secretary of State, instructions issued under the Burial Acts, to tidy up a former Methodist burial ground, which he purchased in London, in the parish of St. Pancras. Burials had continued there until 1853. In that place and the above hospital burial ground, many of the burials had taken place within living memory. The builder ignored those instructions and in 1879, received the same instructions from Her Majesty The Queen. He then took the matter to court. One of the highest judges in the land, the Master of the Rolls, agreed in view of the 1867 judgment that, "the Burial Acts (do) not apply to grounds like this one" and that the instructions from Her Majesty The Queen were legally invalid. The matter did not end there.

Prior to the above 1867 case, Jacobson had been found guilty in 1863 of exhuming without a licence. In 1880 he was prosecuted again for exhuming without a licence. On the second occasion, the case was thrown out, because it had been decided in 1867, that the exhumation licensing law has no relevance to such properties. However, he should have known from the above warning issued at the end of the 1867 judgment, that he would instead, face a common law prosecution. The case was regarded as so important, that an instruction was issued, to transfer responsibility from the Old Bailey to a higher court. The hearing was then presided over by the highest judge in the land, Lord Chief Justice Cockburn. He conducted the trial on the 30 June 1880 and arranged for the verdict to be checked for legal validity. It was upheld and delivered by other judges on the 20 December 1880, coincidentally, the day on which Lord Chief Justice Cockburn died.

What is most shocking is that the government has issued and presumably continues to issue, legally invalid exhumation licences to destroy graves created within living memory. In and before 1993, the government issued exhumation licences to another builder, to destroy another former Methodist burial ground, even in the face of objections from WWII veterans. They and many others owned the perpetual "burial rights" in their family graves. Because of the government's mishandling of the matter, those graves were destroyed with a JCB., as relatives looked on in horror and as reported by the news media.

The Secretary of State for Justice was bound by the "duty of candour" to put this information to the courts in the recent exhumation cases. Had that been done, the judges would then have

considered the matter based on the truth, the whole truth and nothing but the truth. Instead, all of this essential information was withheld from the courts, despite the sterling efforts of the Alice Barker Trust to ensure that justice would be done by the Secretary of State for Justice. By its refusal to comply with the "duty of candour" the MoJ mislead the courts.

What matters in terms of Cross Bones, is that the MoJ cannot issue legally valid exhumation licences, in view of the details provided here, to Southwark Planning Committee councillors.

Appendix 4

DETAILS PROVIDED TO THE APPLICANT FOR PLANNING PERMISSION

Email sent to Bankside Open Spaces Trust (BOST) on September 4th 2014

"BOST makes reference in its "method statement" which accompanies its planning application to Southwark Council that "A burial license had been obtained from the Ministry of Justice". I am sure you will be interested to know that licences are only issued for exhumations and not burials. It is important that I reiterate that such a licence cannot be lawfully issued to exhume or disturb human remains from properties like Cross Bones as human remains buried in places such as those, are legally protected under common law and not statute law.

I hope to be able to prove very soon that the Ministry of Justice (MoJ) has exceeded its powers (ultra vires) by issuing legally invalid licences to exhume human remains from properties to which Section 25 of the Burial Act 1857 does not apply. The MoJ may argue that a licence can be issued for "any place of burial". Those words are found in the licencing statute. However the following case law from 1867 and 1880 clearly state that the statute in question has no relevance whatsoever to places like Cross Bones. Interestingly, those two cases were about burial grounds in London.
For the avoidance of doubt if a licence is obtained and events prove that the licence is legally invalid, a common law prosecution could then take place. There is no time limit on such a prosecution and no limitation on the penalty which can be imposed.

BOST might think it vital to consult with its legal advisor as to when a licence can and cannot be issued. To that end I would strongly recommend that the legal advisor read the cases of Foster v Dodd 1867 and R v Jacobson 1880. I can provide full legal references and more detailed information than is readily available through legal encyclopaedias. If the MoJ attempts to assure you that a licence would be legally valid, based on two recent court cases your legal advisor would want to check what those cases were about. One was about the exhumation of a Roman Catholic priest and the court was only asked to consider in connection with a licence whether or not a religious order can trump the nearest relative. In the case of Richard III, the court was only asked to consider whether the government should conduct a broad consultation on what to do with the exhumed remains. In neither of those two cases were the courts asked to consider whether or not valid exhumation licences could be issued for the types of properties in question and the 1867 and 1880 case law was neither modified nor overturned".