

**ADELAIDE HILLS COUNCIL
ORDINARY COUNCIL MEETING
Tuesday 23 July 2024
CONFIDENTIAL AGENDA BUSINESS ITEM**

Item: 19.1

Responsible Officer: David Waters
Director Environment and Infrastructure

Subject: Land Management Agreement – Burial on Private Land

For: Decision

1. Land Management Agreement – Burial on Private Land – Exclusion of the Public

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except:

- Chief Executive Officer, Greg Georgopoulos
- Director Environment & Infrastructure, David Waters
- Director Corporate Services, Gary Lewis
- Acting Director Community & Development, Jess Charlton
- Governance and Risk Coordinator, Zoë Gill
- Minute Secretary, Skye Ludzay
- IT Support, Tom Portas

be excluded from attendance at the meeting for Agenda Item 19.1: (Land Management Agreement – Burial on Private Land) in confidence.

The Council is satisfied that it is necessary that the public, with the exception of Council staff in attendance as specified above, be excluded to enable Council to consider the report at the meeting on the following grounds:

Section 90(3)(a) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead), the disclosure of which could provide information regarding financial affairs and health status.

Accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

2. Land Management Agreement – Burial on Private Land – Confidential Item

SUMMARY

When Council receives requests for burials on private land, they are assessed under Council's Burials Outside of Cemeteries Policy (the Policy).

A burial on private land at 38 Woodcock Road, Balhannah SA 5242 has been assessed under the Policy and has been approved. A condition relating to the approval is that a Land Management Agreement be entered into between Council and the Landowner in order to note the location of the burial on the Certificate of Title for the property.

The Council has the power under S192 of the *Planning, Development and Infrastructure Act 2016* to enter into a Land Management Agreement of this nature for this purpose.

RECOMMENDATION

Council resolves:

- 1. That the report be received and noted.**
- 2. To enter into a Land Management Agreement to be registered on the whole of the Land comprised in Certificate of Title Volume 5165 Folio 293, commonly known as 38 Woodcock Road, Balhannah SA 5242 pursuant to Section 192(1) of the Planning, Development and Infrastructure Act 2016, as contained in Appendix 1.**
- 3. To authorise the Chief Executive Officer to execute all documentation to give effect to this resolution.**
- 4. To authorise the Chief Executive Officer to make any formatting, nomenclature or other minor changes to the draft Land Management Agreement, as contained in Appendix 1.**

1. BACKGROUND

Council's *Burials Outside of Cemeteries Policy* (the Policy) establishes how applications for burials outside of cemeteries are to be assessed. The Policy and approval process consider the requirements of the *Burial and Cremation Act 2013*, the *Burial and Cremation Regulations 2014* and information provided by SA Health.

Section 5.3 of the Policy contains Conditions of Approval and states:

5.3 Conditions of Approval

If the Council approves the burial of bodily remains on private land, the Council may impose conditions of the approval including, but not limited to, the following:

- the burial must be undertaken by a funeral director
- written confirmation from the Applicant and the funeral director that they understand and will comply with the requirements of the *Burial and Cremation Act 2013* and the *Burial and Cremation Regulations 2014*
- the address of the property, the certificate of title reference of the property and the GPS coordinates of the burial site (exact location of the grave) must be submitted to the Registrar of Births Deaths & Marriages and Council
- a Land Management Agreement, pursuant to section 57 of the *Development Act 1993*, be entered into between Council and the owner of the land and noted on the certificate of title of the property detailing the exact location of the burial as evidenced by map and GPS coordinates, at the cost of the applicant

2. ANALYSIS

➤ Strategic Management Plan/Functional Strategy/Council Policy Alignment

Strategic Plan 2020-24 – A brighter future

Goal Community Wellbeing

Objective C4 An active, healthy, thriving and resilient community

Priority C4.1 Support community wellbeing through our contribution to public health planning disaster recovery activities and the implementation of strategies that aim to measure and enhance wellbeing.

➤ Legal Implications

Section 8 of the *Burial and Cremation Act 2013* (the Act) provides for bodily remains to be interred in a prescribed area outside of a cemetery or natural burial ground but only with the permission of the owner of the land and the Council for the area.

The Act defines a prescribed area as being outside a township or Metropolitan Adelaide, or an area defined by the regulations.

Under the Act, a site which consists of a single interment site where only the remains of one deceased person or the remains of two or more members of the same family are interred, is not defined as a cemetery.

The *Burial and Cremation Regulations 2014* require interment of bodily remains in a prescribed area outside a cemetery or natural burial ground to be at a depth of at least one metre from the surface of the ground and at a distance of at least 20 metres from any building, structure or water well on the land.

➤ Risk Management Implications

Entering into a Land Management Agreement (LMA) between Council and the owner of the land will assist in mitigating the risk of:

The exact location of the burial not being noted on the Certificate of Title of the property leading to bodily remains being disturbed in the future.

Inherent Risk	Residual Risk	Target Risk
Medium (2C)	Low (2D)	Low (2D)

Whilst the consequence to Council is minor, the consequence to the family and potential new owners of the property would be significant if the bodily remains were to be disturbed.

➤ **Financial and Resource Implications**

There are no financial resource implications for preparation and lodgement of this LMA as a template Land Management Agreement for Private Burials was prepared by lawyers in 2022. The applicant will pay an agreed \$550 fee for preparation of the LMA and is responsible for the lodgement fees.

➤ **Customer Service and Community/Cultural Implications**

Community wellbeing is enhanced by the support that Council can provide to community members when navigating this process during a difficult time.

➤ **Sustainability Implications**

Not applicable

➤ **Engagement/Consultation conducted in the development of the report**

Consultation on the development of this report was as follows:

<i>Council Committees:</i>	Not Applicable
<i>Council Workshops:</i>	Not Applicable
<i>Advisory Groups:</i>	Not Applicable
<i>External Agencies:</i>	Norman Waterhouse Lawyers
<i>Community:</i>	Not Applicable

➤ **Additional Analysis**

A LMA is to be entered into between Council and the owner of the land located at 38 Woodcock Road, Balhannah SA 5242 to note the location of the burial on the Certificate of Title of the property. Council's lawyers prepared a template LMA to use for this purpose.

Under Section 192(1) of the *Planning, Development and Infrastructure Act 2016*.

Adelaide Hills Council Instrument of Delegation: ***Instrument A - Instrument of Delegation under the Planning, Development and Infrastructure Act 2016, Regulations, Planning & Design Code and Practice Directions of Powers of a Council as a Council; a Designated Authority; a Designated Entity*** stipulates that the elected body have the delegated powers under Provision S192(1) as follows:

The power pursuant to Section 192(1) of the PDI Act to enter into an agreement relating to the development, management, preservation or conservation of land with the owner of the land or a designated entity.

This report is presented to Council for authorisation to enter into the attached LMA agreement.

3. OPTIONS

Council has the following options:

- I. To enter into the attached LMA agreement (Recommended)
- II. To not enter into the attached LMA agreement resulting in the location of the burial not being noted on the certificate of title of the land in question, risking future disturbance of the burial site (Not Recommended)

4. APPENDICES

- (1) Draft Land Management Agreement

Appendix 1

Draft Land Management Agreement

Land Management Agreement

Adelaide Hills Council

The Person described in Item 1 of the Schedule

DATE

PARTIES

Adelaide Hills Council of 63 Mount Barker Road, Stirling SA 5152 (**Council**)

The Person described in Item 1 of the Schedule (Owner)

BACKGROUND

- A. The Owner is the registered proprietor of an estate in fee simple in the Land.
- B. The Owner has sought permission from Council to inter Bodily Remains on the Land (being land other than a cemetery or natural burial ground outside of township boundaries) pursuant to section 8(2) of the Burial and Cremation Act (**Application**).
- C. Council has subsequently approved the Application, subject to the Owner and Council entering into a Land Management Agreement to be noted on the certificate of title of the Land detailing the location of the interment and additional requirements.
- D. The rationale for the parties entering into this agreement is to ensure that the interment of Bodily Remains on the Land is appropriately managed and that a record of the interment is kept and noted on the certificate of title of the Land.
- E. In considering whether to enter into this agreement, Council has had regard to the relevant mandatory considerations under section 192(4) of the PDI Act.
- F. Council and the Owner agree that the obligations under this agreement are intended to be complied with by all occupiers and persons having enjoyment from time to time of the Land and that it is the Owner's responsibility to ensure that all such persons comply with the terms of this agreement.
- G. Pursuant to section 192(1) of the PDI Act the Owner has agreed with Council to enter into this agreement relating to the development, management, preservation or conservation of the Land.
- H. Council is a designated authority with the power to enter Land Management Agreements pursuant to section 192(19) of the PDI Act.

AGREED TERMS

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this agreement:

Bodily Remains has the same meaning as in the Burial and Cremation Act.

Burial and Cremation Act means the *Burial and Cremation Act 2013* (SA).

Burial and Cremation Regulations means the *Burial and Cremation Regulations 2014* (SA).

Business Day means a day that is not a Saturday, Sunday or public holiday in South Australia.

Council includes any agent or employee of Council who is authorised by Council.

Interment Location means the location on the Land where Bodily Remains have been (or will be) interred, as identified in Item 3 of the Schedule and by reference to the Interment Location Plan.

Interment Location Plan means the plan attached to this Agreement and marked Annexure A.

Land means the whole of the land described in Item 2 of the Schedule, and includes any part or parts of it.

PDI Act means the *Planning, Development and Infrastructure Act 2016* (SA).

PDI Regulations means the *Planning, Development and Infrastructure (General) Regulations 2017* (SA).

1.2 Interpretation

In this agreement, unless the context otherwise requires:

- 1.2.1 headings do not affect interpretation;
- 1.2.2 singular includes plural and plural includes singular;
- 1.2.3 words of one gender include any gender;
- 1.2.4 a reference to a party includes its executors, administrators, successors and permitted assigns;
- 1.2.5 a reference to the Owner includes each person registered or entitled to be registered as a proprietor of an estate in fee simple of the Land;
- 1.2.6 a reference to a person includes a partnership, corporation, association, government body and any other entity;
- 1.2.7 an agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- 1.2.8 an agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- 1.2.9 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;
- 1.2.10 a provision is not construed against a party only because that party drafted it;

- 1.2.11 an unenforceable provision or part of a provision may be severed, and the remainder of this agreement continues in force, unless this would materially change the intended effect of this agreement;
- 1.2.12 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions;
- 1.2.13 an expression defined in the Burial and Cremation Act or the Burial and Cremations Regulations has the meaning given by the Burial and Cremations Act or Burial and Cremations Regulations at the date of this agreement;
- 1.2.14 an expression defined in the PDI Act or the PDI Regulations has the meaning given by the PDI Act or PDI Regulations at the date of this agreement;
- 1.2.15 expressions defined in the Background have those meanings.

1.3 Background

The Background forms part of this agreement and is correct at the date of this agreement.

1.4 Legislation

The requirements of this agreement are to be construed as additional to the requirements of the PDI Act and any other legislation affecting the Land.

2. OWNER'S OBLIGATIONS

2.1 Interment of Bodily Remains on the Land

The Owner must:

- 2.1.1 ensure that the Interment Location is, and continues to be:
 - (a) located at a depth of at least 1 metre from the surface of the ground;
 - (b) located at a distance of at least 20 metres from any building, structure or water well on the Land; and
 - (c) maintained in a neat and orderly condition;
- 2.1.2 comply with any conditions imposed by Council in approving the Application;
- 2.1.3 comply with any provisions of the Burial and Cremation Act, as applicable from time to time; and
- 2.1.4 advise Council within a reasonable timeframe if an event occurs where, or if the circumstances are such that, the Interment Location no longer complies with the requirements of this clause.

2.2 Other obligations of the Owner

The Owner must provide a copy of this agreement to any person:

- 2.2.1 intending to purchase a portion of the Land – prior to signing any contract for the sale and purchase of a portion of the Land; and

- 2.2.2 commencing occupation of the Land – prior to the commencement of that occupation.

3. RESTRICTION ON LEASING AND OTHER DEALINGS

Excluding the acquisition by a statutory authority of any statutory easement or other interest in the Land, the Owner must not grant any lease licence easement or other right which may give any person the right to possession or control of or entry on to the Land which right would enable such person to breach any of the obligations imposed on the Owner by this agreement unless such grant:

- 3.1 is expressed in writing;
- 3.2 is made with the previous written consent of Council; and
- 3.3 contains as an essential term a covenant by the grantee not to do or omit to do (or suffer or permit any other person to do or omit to do) any act matter or thing which would constitute a breach by the Owner of the Owner's obligations under this agreement.

4. COUNCIL'S POWERS OF ENTRY

- 4.1 Council may at any reasonable time enter the Land for the purpose of:
 - 4.1.1 inspecting the Interment Location;
 - 4.1.2 exercising any other powers of Council under this agreement or pursuant to law.
- 4.2 If the Owner is in breach of any provision of this agreement, the Council may, by notice served on the Owner, specify the nature of the breach and require the Owner to remedy the breach within such time as may be nominated by the Council in the notice (being at least 28 days from the date of service of the notice unless the circumstances otherwise require). If the Owner fails so to remedy the breach, the Council or its servants or agents may carry out the requirements of the notice and in doing so may enter and perform any necessary works upon the Land and recover any costs thereby incurred from the Owner.
- 4.3 If in a notice referred to in clause 4.2 the Council requires the removal of the building or structure from the Land, the Council and its servants or agents are authorised and empowered by the Owner to enter and remove the building or structure from the Land and to dispose of it in any manner determined by the Council provided that if the building or structure has any monetary value then the Council must use its best endeavours to realise that monetary value and must after the disposal account to the Owner and pay to the Owner the realised value less all expenses incurred.
- 4.4 The Council may delegate any of its powers under this agreement to any person.
- 4.5 The Owner agrees that a breach of this agreement may cause loss or injury for which compensation is not an adequate remedy. If the Owner is in breach, or is threatening a breach of any provision of this agreement, by word or actions, the Council may obtain an injunction restraining the Owner from committing the breach without proving any actual damage has or will be occasioned by the breach.

- 4.6 Clause 4.5 does not limit the Council's ability to obtain any other remedy against the Owner under this agreement or the PDI Act.

5. NOTATION OF THIS AGREEMENT

Each party must do and execute all acts documents and things necessary to ensure that as soon as possible after the execution of this agreement by all necessary parties this agreement is noted by the Registrar-General on the Certificate of Title for the Land pursuant to section 192(12) of the PDI Act.

6. MISCELLANEOUS

6.1 Consideration

In consideration of the Owner's obligations under this agreement, Council must pay to the Owner the sum of 10 cents if demanded.

6.2 Alteration

This agreement may be altered only by an agreement or deed in writing signed by the parties.

6.3 Approvals and consents

Unless otherwise provided, a party may in its discretion give (conditionally or unconditionally) or withhold any approval or consent under this agreement.

6.4 Entire agreement

This agreement:

6.4.1 constitutes the entire agreement between the parties about its subject matter;

6.4.2 supersedes any prior understanding, agreement, condition, warranty, indemnity or representation about its subject matter.

6.5 Waiver

A waiver of a provision of or right under this agreement:

6.5.1 must be in writing signed by the party giving the waiver;

6.5.2 is effective only to the extent set out in the written waiver.

6.6 Exercise of power

6.6.1 The failure, delay, relaxation or indulgence by a party in exercising a power or right under this agreement is not a waiver of that power or right.

6.6.2 An exercise of a power or right under this deed does not preclude a further exercise of it or the exercise of another right or power.

6.7 **Survival**

Each indemnity, obligation of confidence and other term capable of taking effect after the expiration or termination of this deed, remains in force after the expiration or termination of this deed.

6.8 **Consents**

The Owners warrant that no person has a legal interest in the Land except the persons whose consents to this agreement appear in Annexure B.

6.9 **Counterparts**

This agreement may be executed in any number of counterparts. All executed counterparts constitute one document.

6.10 **Governing law**

6.10.1 This deed is governed by the law in South Australia.

6.10.2 The parties irrevocably submit to the non-exclusive jurisdiction of the courts in South Australia.

7. **NOTICES**

7.1 A notice, demand, consent, approval or communication under this deed (**Notice**) must be:

7.1.1 in writing, in English and signed by a person authorised by the sender; and

7.1.2 hand delivered or sent by pre paid post or electronic mail to an address of the recipient specified below, as varied by any Notice given by the recipient to the sender, or affixed in a prominent position on the Land.

7.2 At the date of this deed, the postal and electronic mail addresses for Notices to the Owner are at the address listed in Item 4 of the Schedule.

7.3 A Notice is deemed to be received:

7.3.1 if hand delivered or affixed in a prominent position on the Land, on delivery or affixing;

7.3.2 if sent by pre paid priority post two Business Days after posting (or seven Business Days after posting if posting to or from a place outside Australia);

7.3.3 if sent by pre paid standard post:

(a) four Business Days after posting

(b) seven Business Days after posting if posting from a city outside the city of the recipient;

(c) 12 Business Days after posting if posting to or from a place outside Australia;

- 7.3.4 if sent by electronic mail, at the time and on the day shown in the sender's electronic mail delivery report, if it shows that the Notice was sent to the recipient's electronic mail address last Notified by the recipient to the sender.

However if the Notice is deemed to be received on a day that is not a Business Day or after 5:00pm, the Notice is deemed to be received at 9:00am on the next Business Day.

- 7.4 If two or more persons comprise a party, Notice to one is effective Notice to all.

- 7.5 Each party authorises its solicitor to sign Notices on its behalf.

8. COSTS

The Owner must pay to Council on demand Council's reasonable costs and expenses (including legal costs and expenses) of preparing, negotiating and noting this deed.

EXECUTED as an agreement

Signed for **Adelaide Hills Council** by its
authorised delegate pursuant to Section
192(1) of the *Planning, Development and
Infrastructure Act 2016* in the presence of:

.....
Signature of witness

.....
Signature of authorised delegate

.....
Name of witness (print)

.....
Name of authorised delegate (print)

.....
Position of authorised delegate

Executed by **Wilstar Pty Ltd** pursuant to
section 127 of the *Corporations Act 2001*

.....
Signature of Director

.....
Signature of Director/Company Secretary

.....
Name of Director (print)

.....
Name of Director/Company Secretary (print)

Signed by **James Ryan Findlay** in the
presence of:

.....
Signature of witness

.....
[NAME OF OWNER]

.....
Name of witness (print)

Schedule

Item 1	Owner	Jane Ryan (The Estate of) & James Ryan Findlay Wilstar Pty Ltd
Item 2	Land	The whole of the Land comprised in Certificate(s) of Title Volume 5165 Folio 293, commonly known as 38 Woodcock Road, Balhannah SA 5242
Item 3	Interment Location	Bodily remains interred at single depth (1400mm) below surface level at 38 Woodcock Road, Balhannah on 27 June 2024 in paddock area marked with a pink pin on Interment Location Plan (Annexure A) – GPS Coordinates: Latitude -34.990250, Longitude 138.811278
Item 4	Contact details	James Ryan Findlay 38 Woodcock Road Balhannah SA 5242

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Annexure A Interment Location Plan



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Annexure B Consents

Beyond Bank Australia being a person with a legal interest in the Land by registered Mortgage No. 12716301 consents to the Owner/s entering into this agreement.

Executed by **Beyond Bank Australia** pursuant to section 127 of the *Corporations Act 2001*

The Owner certifies pursuant to section 192(11) of the PDI Act that no other person has a legal interest in the Land.

Signed for Wilstar Pty Ltd by an authorised representative in the presence of:

Signature of authorised representative

Name of authorised representative (print)

Signed for James Ryan Findlay by an authorised representative in the presence of:

Signature of authorised representative

Name of authorised representative (print)

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3. Land Management Agreement – Burial on Private Land – Duration of Confidentiality

Subject to the CEO, or his delegate, disclosing information or any document (in whole or in part) for the purpose of implementing Council's decision(s) in this matter in the performance of the duties and responsibilities of office, Council, having considered Agenda Item 19.1 in confidence under sections 90(2) and 90(3)(a) of the *Local Government Act 1999*, resolves that an order be made under the provisions of sections 91(7) and (9) of the *Local Government Act 1999* to retain the Items in confidence as detailed in the Duration of Confidentiality Table below:

Item	Duration of Confidentiality NB: Item to be reviewed every 12 months if not released
Report	Until further order
Related Attachments	Until further order
Minutes	Until further order
Other (presentation, documents, or similar)	Until further order

Pursuant to section 91(9)(c) of the *Local Government Act 1999*, the Council delegates the power to revoke the confidentiality order either partially or in full to the Chief Executive Officer.