

Our Ref: DJH:237746

18 February 2013

The General Manager
Penrith City Council
PO Box 60
PENRITH NSW 2751

Dear Sir

**Development Application DA 11/1445 – Lawn Cemetery and Crematorium
2209 – 2223 Elizabeth Drive, Luddenham**

We act for the applicant for the abovementioned development application which is to be determined by the JRPP (the Applicant).

At the meeting of Sydney West Region Joint Regional Planning Panel Meeting held at Penrith City Council on Tuesday 27 November 2012 the panel requested:

“detailed information about the long term management and financing of the operation”.

In order to address this issue Applicant proposes the following in relation to proposed Long Term Maintenance and its funding:

1. Licence Agreements

The Applicant, as owner/operator, proposes to enter into License Agreements with the customers as licensee of the burial site. The Licence Agreements are to contain provisions that the customer:

- (a) pays an amount towards an appropriate long term maintenance component to be called the Long Term Maintenance Fee, and
- (b) shall be responsible for the upkeep of the burial site and if the Licensee does not upkeep the burial site to the standard required by the Applicant then the Applicant shall do the work and charge the Licensee.

2. Luddenham Lawn Cemetery and Crematorium Long Term Maintenance Program (the Program):

The Applicant proposes to establish the Luddenham Lawn Cemetery and Crematorium Long Term Maintenance Program (the Program) subject to receipt of Development Approval. See letter of EFM to Stimson Consulting dated 1 February 2013 and Long Term Maintenance Budget (per annum)

3. Positive Covenant for the Long Term Maintenance Program (Positive Covenant):

The Applicant, as registered proprietor of the land comprising the Luddenham Lawn Cemetery and Crematorium, agrees , subject to receipt of development approval condition to do so, to register a Positive Covenant on the title to the subject lot pursuant to section 88E(3) Conveyancing Act 1919. The Positive

Brisbane
Canberra
Melbourne
Norwest
Sydney

Covenant burdening the lot in respect to the Long Term Maintenance Program to contain the following covenants:

- (a) Maintain and review the Long Term Maintenance Program to ensure proper maintenance of the Cemetery Grounds as approved by Penrith City Council as set out in Development Approval and as varied from time to time.
- (b) Maintain and repair at the sole expense of the registered proprietor the Cemetery Grounds in accordance with the Long Term Maintenance Program.
- (c) Permit the Council or its authorised agents from time to time and upon giving reasonable notice (at any time and without notice in the case of an emergency) to enter and inspect the land for the compliance with the requirements of this covenant.
- (d) Comply with the terms of any written notice issued by the Council in respect of the requirements of this covenant within the time stated in the notice.

In the event that the Registered Proprietor fails to comply with the terms of any written notice issued by Council the Council may enter the land and carry out any work which the Council in considers reasonably necessary The Council may recover from the Registered Proprietor and/or the Luddenham Lawn Cemetery and Crematorium Long Term Maintenance Program Trust.

The covenant as registered on title to the Cemetery burdens the title and thereby carries with the land and binds the current and subsequent registered proprietors.

4. The Luddenham Lawn Cemetery and Crematorium Long Term Maintenance Program Fund (the Fund):

The Applicant proposes to licence the burial sites and charge a licence fee and in relation to the crematorium to charge a service fee for the cremation (the Licence Fees). The Licence Fees in both instances will take into account operating and management costs in providing the type of maintenance outlined above. The Licence Fees shall include an appropriate long term maintenance component (Long Term Maintenance Fee)

The Long Term Maintenance Fee shall be paid by the Applicant to the Fund which will earn interest on those funds for the benefit of the Fund thereby adding to the funds available to finance the Program.

The objective of the Fund will be to provide funds for Program works including the maintenance of roads, paths, gardens, signage fences, buildings, services, security and other items identified as needing maintenance as the Program is reviewed on a periodic basis.

The Fund will commence funding the Program at the time when the Cemetery has reached capacity and it is closed to further interments and the Crematorium has ceased to operate. Prior to that point in time, the Applicant will be responsible for the maintenance of the Cemetery. At all times, the customer will be responsible for the upkeep of the burial site

The constitution which will governs the operation of the Fund will be established for the sole purpose of receiving funds from the Applicant, banking the funds to a Fund account and paying funds upon request from the Applicant for financing the Program or upon receipt of service of a Notice from Council for reimbursement for maintenance carried out by Council. The Fund upon request from the Beneficiary shall pay such amount as is needed to meet the expenses of the Program to carry out the maintenance required by the Program or in the event that the Applicant fails to carry out the maintenance required by the Program and Council carries out the Program works then Council may seek reimbursement from the Applicant, as it is entitled to do under the terms of the Positive Covenant or the terms of the Fund.

Subject to taxation advice in order to ensure appropriate and adequate compliance with relevant taxation and trust laws and regulations, it is envisaged that the proposed Fund constitution contain the terms set out in the Terms Sheet **attached** for your information

This is not represented to be the final terms and conditions of the proposed Fund and is subject to change and finalisation.

5. Consent Condition:

The Applicant proposes that the JRPP impose the following conditions to the Development Consent:

Long Term Maintenance Program condition:

"A long term maintenance program to ensure the long term maintenance of the cemetery grounds is to be created which provides for sufficient funds from the licence of burial rights and cremation services to be set aside in a fund. The Long Term Maintenance Program and fund documentation is to be submitted and approved by Council prior to the issue of a construction certificate".

Council will be aware that the Sydney West Joint Regional Planning Panel imposed a similar condition in the conditional approval of application 2010SYW027 – Liverpool Cemetery and associated works- 321 Greendale Road, Greendale.

Positive Covenant:

"Prior to the Use Commencing a Positive Covenant is to be created on the property title under the provision of the Conveyancing Act 1919 to ensure that the required Long Term Maintenance Program will be adequately maintained."

Council will be aware of the extensive use of conditions requiring registration of positive covenants for stormwater detention and other works in development projects.

Should Council require further information or clarifications in relation to this submission please do not hesitate to contact Denis Hall at the contact details set out below.

Yours faithfully
HWL Ebsworth


Denis Hall
Partner

Writer: Denis Hall | (02) 9334 8451 |
E-mail: dhall@hwle.com.au
Postal: PO Box 6584 Baulkham Hills Business Centre, New South Wales 2153
Address: Suite 310 Level 3 Norwest Central, Building 12, Norwest Business Park, 12 Century Circuit,
Baulkham Hills, New South Wales 2153
Facsimile: 1300 369 656 (Australia) | +61 2 9037 0055 (International)
DX: DX 18507 Castle Hill

Terms of the Fund

| | |
|----------------------------------|---|
| Structure of the Fund | <p>The Fund should be established as:</p> <ul style="list-style-type: none"> • a not-for-profit company limited by guarantee; • a wholly owned subsidiary of the local council and exempt from tax under section 24AM of the 1936 Act; or • another qualifying exempt entity. <p>A private ruling will be obtained to confirm the tax status.</p> |
| Purpose of the Fund | <p>The applicant proposes to establish the fund (the Fund) for the long-term maintenance and operation of a cemetery and crematorium (the Facility).</p> <p>The objective of the Fund will be to provide funding for works including the maintenance of roads, paths, gardens, signage, fences, buildings, services, security and other items identified as needing maintenance as the program is reviewed on a periodic basis.</p> |
| Management | Where a wholly owned subsidiary of the local council is established, the board of the Fund will include representatives from the applicant and representatives from local council (as required) |
| Term/Life of the Fund | The term of the Fund will expire 100 years from the earlier of the date of the licence of the last burial site or the closure of the cemetery/crematorium. |
| Termination | All funds on termination of the program will be returned to the local council or registered charity. |
| Long Term Maintenance Fee | TBA |
| Property | 2209 – 2223 Elizabeth Drive, Luddenham. |
| Constitution | The constitution for the Fund will need to contain all appropriate clauses to obtain not for profit/tax exempt status and in addition should contain appropriate protections to ensure that only eligible entities can hold shares in the Fund. |
| Confidentiality | <p>All parties to keep confidential the terms of the Fund and the content of all negotiations leading to its preparation and will not disclose or discuss any of that information without the prior written approval of the other party except as:</p> <ul style="list-style-type: none"> • permitted or required by law; • to the extent required by a party's financiers; or • to the extent required to instruct the party's professional advisers. |