

**Heritage of Western Australia Act 1990
Section 29**

HERITAGE AGREEMENT

between

SHIRE OF BUSSELTON

and



in respect of

FERNBROOK
(HCWA Database No. P19926)

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HERITAGE AGREEMENT

Fernbrook 663 Rendezvous Road Vasse

THIS AGREEMENT is made between the following parties:

1. **THE SHIRE OF BUSSELTON**, of Southern Drive, Busselton, Western Australia, 6280 (the "Shire"); and
2. [REDACTED] of [REDACTED]
[REDACTED] (the "Owner").

RECITALS:

- A. The Shire's functions include the control and management of planning and development within Busselton. The Shire seeks to preserve and protect the unique character of Busselton while balancing the need for growth and development. The Shire's objects are to identify, conserve and, where appropriate, enhance those historic houses that are of significance to the local cultural heritage; facilitate development that is in harmony with the cultural heritage; and to promote public awareness and knowledge of the Shire's cultural heritage.
- A. The Owner is the Registered Proprietor of the Land.
- B. The Historic House has been identified as being of local cultural heritage significance.
- C. The Shire and the Owner wish to enter this Agreement to provide for the conservation of the Historic House so as to retain its cultural heritage significance for present and future generations.

AGREEMENT:

The Parties agree with each other as follows:

PART 1 DEFINITIONS & INTERPRETATION

1.1 Definitions

In this Agreement, unless the contrary intention appears:

"Act" means the *Heritage of Western Australia Act (WA) 1990*;

"Agreement" means this Agreement as it may from time to time be varied as permitted by its terms;

"Conservation Works" means the works specified in Item 4 of the Schedule;

"Construction Completion Date" means:

- (a) in the case of "Urgent Works" as described in Item 4 of the Schedule, the first anniversary of the Effective Date;
- (b) in the case of "Medium-Term Works" as described in Item 4 of the Schedule, the fifth anniversary of the Effective Date; and

- (c) in the case of "Long-Term Works " as described in Item 4 of the Schedule, the tenth anniversary of the Effective Date.

"Damage" means losses, costs, damages, liabilities, expenses, actions, suits or claims of any kind;

"Development" means the development or use of the Historic House, including:

- (a) any demolition, erection, construction, alteration of or addition to any building or structure on the Land;
- (b) the carrying out on the Land of any excavation or other works;
- (c) any act or thing that is likely to change the character of the Historic House or the external appearance of any building;
- (d) any act or thing that would constitute an irreversible alteration of the Significant Fabric; and
- (e) a material change in the Use of the Historic House;

"Effective Date" means the date on which this Agreement is certified by the Minister pursuant to Section 32(1) of the Act;

"Event of Default" is defined in clause 5.1;

"Historic House" means the Historic House described in Item 1 of the Schedule;

"Land" means the land described in Item 3 of the Schedule;

"Maintenance" means the continuous protective care of the Significant Fabric as specified in Item 5 of the Schedule;

"Minister" means the Minister responsible for the administration of the Act;

"Owner" means:

- (a) subject to clause 2.2(d), [REDACTED] for so long as [REDACTED] is the registered proprietor of the Land; and
- (b) the Owner or Owners of the Land from time to time, as the expression "owner" is defined in the Act;

"Significant Fabric" means the physical material of the Historic House specified in Item 2 of the Schedule, which may include without limitation components, fixtures, contents and objects, including those that are temporarily removed for repair, safekeeping, exhibition or other purposes; building interiors, sub-surface remains and excavated material; and natural material such as the landform, vegetation, streams, soil and rock; and

"Use" means the functions of the Historic House as well as the activities and practices that may occur at the Historic House.

1.2 Interpretation

In this Agreement, unless the contrary intention appears:

- (a) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws varying, consolidating or replacing them, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
- (b) a covenant or agreement by more than one person binds, and is enforceable against, those persons jointly and each of them severally;
- (c) no rule of construction applies to the disadvantage of a party on the basis that the party was responsible for drafting this Agreement or any part of it;

- (d) a reference to this Agreement or any other document or instrument includes the Agreement, document or instrument (as the case may be) as varied or replaced, notwithstanding any change in the identity of the parties;
- (e) a reference to the Owner doing or refraining from doing anything includes a reference to the Owner causing a person to do, or causing a person to refrain from doing, that thing (as the case may be);
- (f) a reference to any thing is a reference to the whole and each part of it; and
- (g) words and phrases having defined meanings in the Act, unless otherwise defined in this Agreement, have the meanings so defined in the Act.

PART 2 COMMENCEMENT, DURATION AND SCOPE OF THIS AGREEMENT

2.1 Commencement and Duration of this Agreement

- (a) This Agreement is made pursuant to Section 29 of the Act and is conditional upon the Minister
 - (i) being satisfied that this Agreement is necessary for the purposes of, and complies with, the Act; and
 - (ii) certifying that fact upon each executed copy of this Agreement.
- (b) This Agreement commences on the Effective Date and shall be of permanent effect unless terminated with the written consent of the Shire.

2.2 Scope of this Agreement

- (a) This Agreement:
 - (i) applies to the Land and the Historic House;
 - (ii) binds the Land and the Historic House; and
 - (iii) binds the Owner.
- (b) All of the obligations of the Owner under this Agreement dealing with development or use of the Land or any part of the Land or the conservation or care of any building, natural feature or other object on the Land are covenants made pursuant to section 29(10) of the Act and are intended to run with the Land.
- (c) The rights and obligations of the Owner under this Agreement are not assignable by the Owner without the prior written consent of the Shire, which consent shall not be unreasonably withheld.
- (d) Subject to clause 2.2(e), on the person who is at the time the Owner ("Outgoing Owner") transferring the whole of that person's interest in the Historic House to another person, the Outgoing Owner is released from all personal liability under this Agreement. For the avoidance of doubt, this clause 2.2(d) operates only to release the Outgoing Owner personally and does not release, vary or otherwise affect the obligations of the Owner under, or in connection with, this Agreement.
- (e) The provisions of clause 2.2(d) will not apply in respect of any liability or claim which arose prior to the date of registration of the transfer of the whole of the interest of the Outgoing Owner to another person.

PART 3 DEVELOPMENT AND CONSERVATION

3.1 Conservation Works

The Owner must undertake the conservation of the Historic House and is required to carry out the Conservation Works by the Construction Completion Date. All such works must be referred to the Shire for approval prior to the works actually being undertaken.

3.2 Development

Unless approved in advance in writing by the Shire, the Owner shall not:

- (a) carry out any Development;
- (b) without prejudice to the generality of clause 3.3(a), do or permit to be done anything on or in relation to the Historic House which adversely affects the cultural heritage significance or characteristics of the Historic House; or
- (c) sub-divide or make application to sub-divide the Land.

3.3 Conservation Consultant

The Owner must appoint a consultant approved in advance in writing by the Shire to supervise the Conservation Works and any Development of the Historic House or other action which requires the approval of the Shire under clause 3.2.

3.4 Reporting

- (a) All reports required in this clause shall be prepared on behalf of the Owner by the consultant appointed pursuant to clause 3.4, or such other person with the necessary skills approved in writing in advance by the Shire.
- (b) The Owner must ensure that a proper, detailed and comprehensive written report describing the completed Conservation Works is provided to the Shire within 30 days after the Construction Completion Date of each category of Conservation Works (i.e., "Urgent Works", "Medium-term Works" and "Long-term Works", respectively).
- (c) The Owner must ensure that a proper, detailed and comprehensive written report is provided to the Shire within 60 days after receipt of a written request from the Shire for a report describing
 - (i) all Conservation Works, Maintenance, or Development activities which the Owner has undertaken pursuant to this agreement since the later of the Effective Date or the date of any previous report;
 - (ii) the condition of the Significant Fabric at the time of the report; and
 - (iii) any other matters regarding the conservation of the Historic House as specified in the written request;provided that no more than one such report shall be required within any 12-month period.

- (d) In the event that the Shire requires further information, detail, explanation or other clarification beyond that provided in a submitted report, the Shire will notify the Owner in writing of the particular information required and the time in which the Owner is to provide that information, which shall not be less than 30 days from the date of receipt of the written notice from the Shire.
- (e) The Owner's failure to provide any report or additional information required under this Clause 3.5 shall constitute an Event of Default.

3.5 Insurance

The Owner will maintain an insurance policy with a reputable insurance company approved in advance in writing by the Shire, sufficient to enable full and proper replacement, reinstatement or restoration of the Significant Fabric in the case of damage or destruction and provide a copy of such a policy and a Certificate of Currency to the Shire. In the event of damage the Owner shall, using monies recovered from its insurance policy and its own monies, fully and properly replace, reinstate or restore the destroyed or damaged fabric. In the event the Historic House is completely destroyed and the destruction is not subject to arson but rather "an act of god", the Owner shall be liable to prepare a Report by a qualified and registered heritage Practitioner to identify the extent of any requirements to rebuild in order to inform the Shire.

3.6 Compliance with Statutes

The provisions of this Agreement are in addition to the Act and any other applicable written laws and nothing in this Agreement removes, limits or modifies the obligations on the Owner to comply with all relevant statutory and other requirements in connection with the Development of the Land, and the Owner is responsible for obtaining all approvals consents and licences required for Development of the Land, including planning approvals and building licences, from all relevant bodies and authorities including the local authority.

PART 4 SHIRE'S RIGHTS OF ENTRY AND POWERS OF INSPECTION

4.1 Shire's rights of entry and powers of inspection

- (a) Subject to clause 4.1(b) the Shire shall, through its nominated representative or nominated officer from time to time, have the power to enter the Historic House at reasonable times, and on reasonable prior notice, for any purpose related to the provisions of this Agreement, including without limitation to inspect the Historic House with a view to ensuring compliance with the provisions of this Agreement.
- (b) Subject to clause 4.1(c), the Shire will comply with any reasonable requirement imposed by the Owner for the purpose of exercising the rights of the Shire under clause 4.1(a).
- (c) The Owner must do all things necessary to enable the Shire to exercise its rights of inspection as set out in clause 4.1(a), including without limitation, ensuring that reasonable access is provided to all parts of the Historic House and ensuring access to and use of any facility at the Historic House which is necessary to facilitate inspection.

PART 5 DEFAULT

5.1 Events of default

An Event of Default occurs if:

- (a) the Owner is in breach of, or does not comply with, any of its obligations under this Agreement and the breach or non-compliance continues for 30 days, or such longer period as is reasonable for rectification having regard to the nature of the breach or non-compliance, after receipt of written notice from the Shire to effect compliance; or
- (b) the Owner repudiates or commits a fundamental breach of this Agreement.

5.2 Rights and remedies of the Shire

In the event any Event of Default occurs, the Shire shall be entitled to exercise any one or more of the following powers:

- (a) through its agents, contractors or employees enter the Historic House and take such actions as are in the Shire's opinion necessary to rectify the Event of Default (including attending to any construction or other works) together with or separately from;
- (b) any rights and remedies which may be available to the Shire at law or in equity, including applying to the court for an order for specific performance, together with or separately from;
- (c) the rights, powers and remedies available to the Shire under the Act,

and nothing in this Agreement limits or prejudices or shall hinder the exercise by the Shire or the Minister or any other person of any of the rights, powers or remedies available to the Shire, the Minister or that person under the Act if an Event of Default occurs, or any other event occurs which is a breach of any provision of the Act.

5.3 Land and Historic House at risk of Owner

- (a) The Land and the Historic House shall remain at the risk of the Owner in all respects, notwithstanding any provisions in this Agreement dealing with the Development or maintenance of the Land or the Historic House. Without limitation, all Development and maintenance of the Land or the Historic House shall be conducted entirely at the risk of the Owner and the Owner shall, subject to clause 5.3(b), indemnify and keep indemnified and save harmless the Shire, the Minister, the State of Western Australia and any of their respective servants or agents (each an '**Indemnified Party**') against all Damage incurred or suffered by any of them arising from or in connection with the Development, maintenance or occupation of the Land or the Historic House by the Owner or any person acting through, on behalf of, or under the direction of the Owner.
- (b) The indemnity provided by the Owner in clause 5.3(a) shall be reduced proportionately to the extent that it can be shown any Damage has been caused by a negligent or deliberately malicious act or omission by an Indemnified Party.

5.4 Interest on overdue money

If the Owner becomes liable to pay any amount of money to the Shire pursuant to this Agreement or arising from any matter the subject of this Agreement, the Owner shall pay to the Shire interest on that amount from and including the due date for payment of the amount to but excluding the actual date of payment of that amount. The interest is to be paid on demand by the Shire, is to be calculated on daily balances, and is to be at the rate then payable on judgment debts pursuant to the provisions of the *Supreme Court Act (WA) 1935*.

PART 6 NOTICES

6.1 Any notice, report or other communication which must be given, served or made under or in connection with this Agreement:

- (a) must be in writing in order to be valid;
- (b) is sufficient if executed by the Party giving, serving or making the notice, or if executed on such Party's behalf by any officer, director, attorney or solicitor having the authority to so act for such Party;
- (c) is sufficient, in the case of the Owner's obligations under clause 3.5, if executed by the relevant consultant appointed pursuant to clause 3.4;
- (d) will be deemed to have been duly served, given or made in relation to a person if it is delivered or posted by prepaid post to the address, or sent by facsimile or sent by email to the address of that person identified in clause 6.2 or at such other address or number as is notified in writing by that person to the other Parties from time to time; and
- (e) will be deemed to be served, given or made:
 - (i) if delivered by hand, on delivery;
 - (ii) if sent by prepaid post, on the second day after the date of posting;
 - (iii) if sent by facsimile, on receipt of a transmission report confirming successful transmission; and
 - (iv) if sent by email, on receipt of confirmation of successful delivery.

6.2 The details of each Party for the purposes of giving notice are as follows:

(a) the **Shire**:

Shire of Busselton
Southern Drive
Busselton WA 6280

Phone: (08) 9781 0444

Fax: (08) 9752 4958

Email: shire@busselton.wa.gov.au

ATTENTION: Mr. Pete Malavisi, Planning Officer

(b) the **Owner**:



Phone: (08) [REDACTED] Mobile: [REDACTED]

ATTENTION: [REDACTED]

PART 7 GENERAL

7.1 Variation to be in writing

No variation of this Agreement will be effective unless in writing and executed by the Shire and the Owner.

7.2 Governing Law

This Agreement is governed by the Laws of the State of Western Australia and the parties submit to the jurisdiction of that State.

7.3 Further assurances

Each party shall do all things and execute all further documents as are necessary to give full effect to this Agreement.

7.4 Extension of time by Shire

The Shire may, at its discretion and by written notice to the Owner, extend any time period for performance by the Owner of any of its obligations under this Agreement.

7.5 Costs

- (a) The Owner shall pay or reimburse the Shire on demand for all costs and expenses incurred by the Shire in relation to:
 - (i) the exercise or enforcement by the Shire of any right, power or remedy under this Agreement, at law, in equity or otherwise; and
 - (ii) any act or omission by the Owner causing Damage to the Shire, including (without limitation) the Shire's legal costs and expenses.
- (b) Each party shall pay all its own legal costs and expenses in relation to the preparation, execution and stamping of this Agreement.

THE SCHEDULE

- Item 1: Historic House**
Fernbrook (HCWA Place No. 19926), located at 663 Rendezvous Road, Vasse, WA 6059 and consists of:
- (a) the Land;
 - (b) all buildings, structures and works on the Land from time to time; and
 - (c) any thing in connection with the Land, entered or deemed to be entered in the Register.
- Item 2: Significant Fabric**
The significant fabric of the Historic House consists of hand made bricks laid in Flemish bond courses on limestone rubble footings.
- Item 3: Land**
Lot 181 on Plan 250114 being the whole of the land contained in Certificate of Title Volume 1856 Folio 671.
- Item 4: Conservation Works**
The schedule of works described in Annexure A.
- Item 5: Maintenance**
The schedule of maintenance activities described in Annexure B.

EXECUTED AS A DEED

THE COMMON SEAL of the SHIRE OF BUSSELTON is affixed in the presence of



Signature of authorised person

Signature of authorised person

Mayor

Office held

Acting CEO

Office held

Ian Stubbs

Name of authorised person

Matthew Smith

Name of authorised person

20/9/12

Date signed

20/9/12

Date signed

THE OWNER:

Barbara Dons Home

Date signed

Signature of witness

Print name of witness

Occupation of witness

Date signed

**CERTIFICATE UNDER SECTION 32
OF THE HERITAGE OF WESTERN AUSTRALIA ACT (WA) 1990**

I, the Hon. G M Castrilli, MLA, Minister for Local Government; Heritage; Citizenship and Multicultural Interests, hereby certify that this Agreement is necessary for the purposes of, and complies with, the *Heritage of Western Australia Act (WA) 1990*.

Dated the 19th day of November 2012.



Minister for Local Government; Heritage;
Citizenship and Multicultural Interests

Annexure A

Conservation Works

Urgent Works (to be completed within twelve months of the Effective Date)

1. Repair rising damp problems.
2. Repair guttering and extend downpipes to direct water away from the building.

Medium-Term Works (to be completed within five years of the Effective Date)

3. Repair flashing around the kitchen chimney.
4. Re-instate weatherboards on the gable end on the west side of the building.
5. Re-instate suitable guttering in the Ogee profile.
6. Remove damaged fretting bricks from the front wall of the house, and replace like for like, using lime-based mortar.
7. Rake out cement mortar and replace with suitable lime-based mortar on the front wall of the house.

Long Term Works (to be completed within ten years of the Effective Date)

8. Obtain engineer's report on the structure and underfloor subsidence, implement recommendations in the time frames provided.
9. Replace necessary infrastructure support for flooring when necessary with like for like.
10. Return the front verandah to its original form including reinstating the timber verandah posts and removing the damaged wall to open up the eastern end.
11. Remove cement render from both internal and exterior walls and re-coat with lime render.

Annexure B

Maintenance

The Programme below will form part of the maintenance regime for this Historic House. The programme will be the responsibility of the Owner or the Owner's nominee. Should the property be sold the new proprietor shall nominate the person responsible for carrying out this maintenance schedule. The Shire should be notified of any change of the person responsible.

This schedule is concerned with the significant heritage fabric and the presentation of the Historic House. It does not aim to cover all the statutory requirements concerning plant and machinery. The required inspection of these items should form part of a broader more comprehensive schedule prepared by the proprietor or building manager.

This schedule should be regarded as provisional and should be adapted by mutual agreement to suit circumstance and experience. This schedule should be regarded as a minimum standard. The schedule should be adhered to in any period where the Historic House is wholly or partially unoccupied.

It is not envisaged that structural monitoring will be required.

Should the Historic House be subject to damage by fire, infestation, seismic or building activity or alteration of the foundation, an inspection of the building frame by a qualified structural engineer will be required and any recommendations implemented.

Periodic Maintenance Schedule

As needed:

- Keep grass and other vegetation on the perimeter of the house trimmed short.
- Maintain ground levels around the building to ensure that the wall of the foundation is visible by 300mm in the clear.

Annually:

- Sweep chimneys and clean fireplaces.
- Inspect house and outbuildings for termites and other potentially damaging pests; treat as necessary.
- Inspect exterior painted timber for deterioration; repaint as necessary.
- Clean gutters and downpipes for free flow, prior to winter.
- Inspect for rising damp or water penetration and repair immediately as necessary.

Five Yearly:

- Inspect metal roofing, fixings, wall flashings, box gutters and downpipes for corrosion and repair as necessary
- Inspect and repair external glazing as necessary.