

THE OFFICE OF THE SCOTTISH CHARITY REGULATOR

Inquiry report made under section 33 of the Charities and Trustee Investment (Scotland) Act 2005

Scottish Borders Council Common Good Funds – SC031538

31 March 2023

Introduction

As a result of an inquiry made under section 28 of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) it appears to the Office of the Scottish Charity Regulator (OSCR) that Scottish Borders Council Common Good Funds does not meet the charity test. OSCR therefore took the decision to remove Scottish Borders Council Common Good Funds from the Scottish Charity Register (the Register) on 31 March 2023 in terms of section 30(1)(b) of the 2005 Act.

Background

Scottish Borders Council Common Good Funds (the Fund) was entered in the Register on 1 April 2006 under section 99(1) of the 2005 Act; that is, as a body entitled by virtue of section 1(7) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 to refer to itself as a ‘Scottish charity’ immediately prior to the commencement of the 2005 Act.

Decision

It appears to OSCR that the Fund does not meet the charity test. As a result, OSCR removed the Fund from the Register in terms of section 30(1)(b) of the 2005 Act on 31 March 2023.

How OSCR reached its decision

The charity test

A charity is a body entered in the Register.

OSCR may enter a body in the Register, and allow a body to remain in the Register, only if it considers that the body meets the charity test as set out in sections 7 and 8 of the 2005 Act.

A body meets the charity test if:

1. its purposes consist only of one or more of the charitable purposes listed in section 7(2) of the 2005 Act: and
2. it provides (or, in the case of an applicant provides or intends to provide) public benefit in Scotland or elsewhere.

Assessment of whether the Fund is a 'body'

Common Good generally comprises land and/or other assets historically vested in Scottish burghs and then vested by legislation in successive local authorities.

Section 15 of the Local Government etc. (Scotland) Act 1994 (the 1994 Act) provided for the vesting of Common Good property in the newly created unitary authorities. Article 12 of the Local Authorities (Property Transfer) (Scotland) Order 1995 provided for the Fund to be transferred to and vested in Scottish Borders Council with effect from 1 April 1996.

Common Good land and assets are vested in and owned by the Council itself. The assets of the Fund are held in trust by Scottish Borders Council but this arrangement does not involve the creation of a trust or any other form of body that is separate in identity from Scottish Borders Council. While the financial accounting for Common Good funds is carried out separately from the Council's main accounts, this is for the improved transparency regarding the use and treatment of the Common Good funds and does not denote a distinct body.

As such, we concluded that the Fund is not a 'body' with a constitution distinct from Scottish Borders Council that is capable of being entered in the Register.

Assessment of whether the Fund has only charitable purposes

Section 15(4) of the 1994 Act provided for any Common Good property vesting in a new unitary authority to be administered, in the case of Scottish Borders Council, 'having regard to the interests of the inhabitants of the area to which the Common Good formerly related'. We conclude that while Scottish Borders Council may apply the Common Good for charitable purposes, it is not confined to doing so. In having regard to the interests of the inhabitants of the former Burghs of the Scottish Borders, Scottish Borders Council may apply the Common Good for any purpose consistent with its functions as a local authority.

As such, we concluded that the Fund does not meet the charity test because it does not have purposes that consist only of one or more of the charitable purposes in section 7(2) of the 2005 Act.

Assessment of whether the Fund provides public benefit

OSCR determines whether a charity provides public benefit by considering the activities it undertakes in furtherance of its charitable purposes. Because we concluded that the Fund does not have wholly charitable purposes we did not carry out an assessment of whether the Fund provides public benefit.

OSCR's duties and powers

OSCR maintains the Register. Where it appears that a charity does not meet the charity test we must, in terms of section 30(1) of the 2005 Act, either:

1. direct the charity to take such steps as we consider necessary for the purposes of meeting the charity test: or

2. remove the charity from the Register.

We decided to remove the Fund from the Register, as opposed to directing it to take steps to meet the charity test, because we concluded that the Fund is not a 'body' and, as such, it cannot be entered in the Register.

Removal from the Register – protection of assets

Section 19 of the 2005 Act makes provision for the protection of assets held by a body immediately prior to its removal from the Register. A body is under duty to continue to apply those assets for the charitable purposes it had immediately before it was removed from the Register.

However, because we determined that the Fund is not a 'body' we concluded that section 19 of the 2005 Act did not apply to it. The Fund is not under duty to account to OSCR and we will not monitor its use of the assets now that it has been removed from the Register.

Right of review

When a charity disagrees with OSCR's decision to remove it from the Register under section 30(1)(b) of the 2005 Act it can request a review of the decision. To do so the charity must contact the Review Officer at OSCR in writing within 21 days of the date of our decision. The Fund did not request a review.

The effect of removal

The Fund was removed from the Register on 31 March 2023. It may no longer refer to itself as a 'charity' or use its former registered charity number.