

8 December 2022

**BY EMAIL ONLY**

Treasury Business Partner, Scottish Borders Council

**Scottish Borders Council Common Good Funds SC031538  
Advance notice of removal from the Scottish Charity Register**

I am writing to you as the Principal Contact of the Scottish Borders Council Common Good Funds (SC031538) (the Charity) to give you advance notice that the Scottish Charity Regulator (OSCR) intends to remove the Charity from the Scottish Charity Register (the Register). Please bring this letter to the attention of the charity trustees.

This letter explains the reason for our decision, the process by which the Charity will be removed from the Register and the effect of removal. Please treat this as a courtesy letter, to give advance notice of our intention in order that Scottish Borders Council (the Council) can make any preparations it thinks necessary before the removal takes effect. Formal notice of our decision will follow in due course as explained below.

**The reason for our 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 Charities and Trustee Investment (Scotland) Act 2005 (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 Charity is a 'body'**



The Charity 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.

We have considered whether the Charity is a ‘body’ capable of being entered in the Register.

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 themselves. Article 12 and Schedule 2 of the Local Authorities (Property Transfer) (Scotland) Order 1995 provided for the various burgh funds that comprise the Scottish Borders Common Good to be transferred to and vested in Scottish Borders Council with effect from 1 April 1996.

Common Good land and other assets are therefore vested in and owned by the Council itself. The assets of Scottish Borders Common Good are held in trust by the Council but critically this arrangement does not involve the creation of a trust or any other form of body that is separate in identity from the 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 conclude that Scottish Borders Common Good is not a ‘body’ with a constitution distinct and separate from the Council that is capable of being entered in the Register.

### **Assessment of whether the Charity has only charitable purposes**

We also considered whether the Charity meets the charity test in terms of having only charitable purposes.

Section 15(4) of the 1994 Act provides for any Common Good property vesting in a new unitary authority to be administered, in the case of the Council, ‘having regard to the interests of the inhabitants of the area to which the Common Good formerly related’. We conclude that while the 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 that comprise the Scottish Borders, the Council may apply the Common Good for any purpose consistent with its functions as a local authority.

As such, we conclude that the Charity 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 Charity provides public benefit**

OSCR determines whether a charity provides public benefit by considering the activities it undertakes in furtherance of its charitable purposes. As our [published guidance \*Meeting the Charity Test\*](#) explains, ‘not everything that is of benefit to the public will be charitable. Public benefit in a charitable sense is only provided by activities which are undertaken to advance an organisation’s charitable purposes’. Because we have concluded that the Charity does not have wholly charitable purposes we have not carried out an assessment of public benefit.

### **Our 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 have taken the decision to remove the Charity from the Register, as opposed to directing it to take steps to meet the charity test, because we have concluded that the Charity is not a ‘body’ and, as such, it should not be in the Register.

### **The process of removal**

The decision to remove the Charity will be made under section 30(1)(b) of the 2005 Act.

We will give formal written notice to the Charity of our decision under [section 72\(2\)\(c\)](#) of the 2005 Act setting out the reason for our decision (as set out above) and advising the Charity of its right to request a review under [section 74](#) of the 2005 Act. Section 30 decisions are reviewable upon written request by the person or body that is the subject of the decision but there is no third party right to make representations.

[Section 73\(2\)](#) of the 2005 Act provides that a decision is of no effect unless the required notice is given and either:

1. the period of 21 days within which OSCR must, on request, review the decision expires without a request being made; or

2. where a review is requested, the review and any subsequent appeal is concluded with the original decision being confirmed.

On the date that OSCR's decision takes effect, the Charity will be removed from the Register. At the same time, we will publish on our website an inquiry report as required by [section 33\(1\)\(a\)\(i\)](#) of the 2005 Act. For the avoidance of doubt, I should explain that the Charity will still be searchable in the Register after the date of removal but only under the 'ceased charities' part of the Register.

It is our intention that the removal will take effect from 31 March 2023 to coincide with the end of the Charity's financial year. We will therefore issue formal notice to the Charity in early March in order to allow for the statutory review period to expire.

### **Removal from the Register – protection of assets**

[Section 19](#) of the 2005 Act provides for the protection of assets held by a body immediately prior to its removal from the Register. Because we have concluded that the Charity is not a 'body', we are of the view that the provisions of section 19 do not apply to it.

The Charity will not be under duty to account to OSCR and we will not monitor the use of its assets once it is removed from the Register. We will also not require the Charity to provide us with final accounts for the financial year ending on 31 March 2023. I include this information only for the sake of completeness and to avoid any doubt.

### **Effect of removal**

Once removed from the Register, the Charity will not be entitled to refer to itself as a 'charity' or to use its former registered charity number. We ask the charity trustees to take steps to ensure that any references to its charitable status are removed from new publications intended for issue after the date of removal and from websites and other digital platforms.

If the Charity has a Tax Reference number we recommend that the trustees contact HMRC to advise them of the removal. Loss of charitable status can in some instances constitute a 'disposal' triggering a liability for Capital Gains Tax. We are advised that local authorities are exempt from Capital Gains Tax under section 271 of the Taxation and Chargeable Gains Act 1992 but the charity trustees may wish to satisfy themselves on this point.

We also recommend that the charity trustees give consideration to the effect of removal upon any relief from non-domestic rates currently enjoyed by the Charity.

### **Right to review**

As explained above, the Charity will have a right to request a review of our formal decision during the 21 day period commencing on the date that our formal notice is issued in March 2023. The procedure for requesting a review will be set out in the formal notice.

In the meantime, if you or the charity trustees have any questions or require clarification of any of the points set out in this letter please do not hesitate to raise them with me.

Yours sincerely

**Steve Kent**  
**Policy Manager**