

Registration Decision: HoodStreet.co.nz Trust Board

The facts

1. HoodStreet.co.nz Trust Board (the Applicant) was incorporated as a board under the *Charitable Trusts Act 1957* on 16 July 2010. On 26 July 2010, the Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the *Charities Act 2005* (the Act).
2. The Applicant's purposes are set out in clause 3 of its deed:

3.1 Primary Charitable purposes or objects

The Society exists to fulfil and the Trust Fund is held for all or any of the following Charitable purposes (or objects), each being independent of any other in New Zealand, particularly being:

- (a) *Purposes related to municipal betterment which are beneficial to the Hood Street community and the wider Hamilton community; and*
- (b) *to promote, facilitate and support the provision of appropriate participatory development projects or programmes for the benefit of the Hood Street and wider Hamilton community in a manner which meets with the criteria recorded under clause 3.3(a) below.*

3.2 General Provisions:

For the benefit of the implementation of the Purposes of the Society, it may:-

- (a) *support, assist, financially and/or otherwise collaborate with, other charitable organisations, bodies, groups, trusts, incorporated or not, whose objectives are similar to those of the Society and or whose existence could be deemed by the Trust Board, in its absolute discretion, to be a help and benefit to the Society in achieving the objectives of this Society.*
- (b) *carry on any other object which is capable of being conveniently carried on in conjunction with the foregoing objects that directly or indirectly advances those objects (or any of them).*
- (c) *provide or maintain any facility, property or corporate entity to meet or satisfy any or all of the above purposes.*

3.3 Directions

For the benefit of the implementation of the objects of the Society the Trustees are to:

- (a) *exercise their powers, authorities and discretions in respect of the Society and Trust Fund in a manner that:-*
 - *is as wide as possible with the minimum of restriction or limitation, save having consideration for the key values and collaborative philosophy as recorded in the introduction to this Deed.*

- works towards a healthy future for the Hood Street and wider Hamilton community, and is NOT limited to the physical street.
 - honours the uniqueness, and diversity of Hood Street within.
 - seeks to ensure a sustainable future through gaining and maintaining:-
 - positive relationships community wide;
 - the environments, cultural, economic and social viability and stability of the area.
- (b) Communicate, collaborate and consult with the Members, Hamilton City Council, NZ Government, local and national Government and community leaders in carrying out the Society's aims and powers.
- (c) ensure the Trust maintains its aims effectively and efficiently through continually improving its managerial and organisational systems.
- (d) facilitate, coordinate, promote and support, projects and activities that contribute to the implementation of current and future projects as nominated from time to time consistent with the purposes recorded in these Rules
- (e) ensure that all decisions taken by the Trustees and all work undertaken in the name of the Trust are to:-
- reflect the precept of visionary leadership;
 - reflect the principles of sustainability; and,
 - be implemented with integrity and compassion.

3.4 Concessionary Tax Treatment

- (a) It is intended that this Society will apply for exemptions, under sections CW41, CW42, CW43, LD1 and RE27 of the Income Tax Act 2007; section 73(1) of the Estate and Gift Duties Act 1968, and relevant provisions of the Goods and Services Tax Act 1985 applicable to non-profit bodies.
- (b) To ensure that the Society secures, and retains, charitable status approval the following limitations shall apply to the application of the terms of this Deed:-
- i. No personal profit: No part of the income or the capital of the Trust Fund may be paid or directly or indirectly transferred by way of profit to any Member.
 - ii. Limited to New Zealand: the Trust Fund may not be applied for the benefit of any person or organisation outside New Zealand where that part is derived from business income (as defined by section CW42 of the Income Tax Act 2007), unless the Society has secured the written approval of the District Commissioner of Inland Revenue to so apply any part of the Trust Fund for a specific purpose or purposes outside New Zealand.
 - iii. Associated Person Rules: No person within the ambit of paragraphs 5(b)(i), (ii), (iii), or (iv) of Section CW42 of the Income Tax Act 2007 may be involved in the carrying on of any business of the Society, if that person is able by virtue of that capacity (as Trustee, Member, shareholder, director or associated person) whether directly or indirectly to determine or materially influence in any way the determination of the nature or amount of the benefit or advantage or the income or the circumstances in which it is, or is to be, so received gained, achieved, afforded or derived.
 - iv. Restrictions on winding up: On the winding up of the Society no Member shall be permitted to personally benefit directly or indirectly

- v. Registration and other requirements: *the Trustees must ensure that any registration or other requirements necessary for the Society to be eligible for the benefit of the above sections is met, including preparing, retaining or filing with any relevant person, including the Commissioner of Inland Revenue pursuant to any revenue legislation and the Charities Commission pursuant to the Charities Act 2005, all necessary tax accounts, returns, reports, declarations, applications, notices, certificates, reconciliations, forms and other information.*

PROVIDED HOWEVER that nothing in these provisions may prevent any payment to any such person:

- *For services rendered; or*
- *For goods supplied; or*
- *By way of interest on monies borrowed, or rent for premises let or leased to the Society,*

where that payment can be made without causing the income of the Society, or any part thereof, which would otherwise be exempt from income tax, to become liable for income tax.

3. Membership provisions are set out in clause 4:

4.1 Numbers

There is no restriction on the number of Members.

4.2 Members

Any person, partnership, corporation, Society or club:-

- (a) being a tenant in a premises in Hood Street; and,*
- (b) signifying a wish to do so*

may become a member. The Hamilton City Council is authorised to nominate a Member.

4.3 Term

A Member shall cease to be a member by:-

- (a) resignation;*
- (b) death, or in the case of an incorporated body by dissolution by failing for a period deemed by the Trust Board;*
- (c) termination of their tenancy in Hood Street; or*
- (d) expulsion upon the resolution of the Trust Board.*

4. Winding up provisions are set out in clause 10:

10 Winding up

- a) *The Society may be wound up voluntary by a Special Members Resolution passed in a general meeting of its Members requiring the Society so to be wound up and the resolution is confirmed by a subsequent general meeting called together for that purpose and held not earlier than thirty days after the date on which the resolution so to be confirmed was passed.*

b) *if upon the winding up or dissolution of the Society there remains after the satisfaction of all costs debts and liabilities any property or assets whatsoever the same shall not be paid to or distributed among the members but shall be given or transferred to the Board or some other body, institution or trust having objects similar to the objects of the Society and which shall prohibit the distribution of its or their income or property among its or their members to an extent at least as great as is imposed on this Society such body, institution or trust to be determined by the members of the Society at or before the time of dissolution or in default thereof by a Judge of the High Court of New Zealand or in the absence of any appropriate body, institution or trust to such public charity or public charities as the said judge may determine.*

5. The Commission analysed the application for registration and on 20 September 2010 sent the Applicant a letter requesting further information about the identity of the Applicant and the Applicant's activities pursuant to section 18(3)(a) of the Act.

6. The Applicant's solicitor responded by email on 26 October 2010 with the following information:

- a. *the application is by the board; who are subject to the general rules of the society; and bound to carry out and pursue the purposes therein.*
- b. *The name, Hoodstreet.co.nz is correct; and has been accepted by the registrar of societies.*

*The society is new, and is on hold pending registration so there is little we can provide by way of current activities.
It is slightly unusual as it is really about social conscience and community betterment driven by business.*

7. The Commission considered the information and on 8 November 2010 sent the Applicant a notice that may lead to decline on the basis that:

- the Applicant has non-charitable purposes which do not provide sufficient public benefit
- the winding-up clause does not restrict the distribution of surplus assets to charitable purposes
- the deed does not provide sufficient prohibition of private pecuniary profit
- the application name does not match the Applicant's legal name as it appears on the Companies Office register.

8. The Applicant's solicitor responded by letter on 17 November 2010. She agreed that the Applicant's name should be amended to be consistent with the name as it appears on the Companies Office Register, but in relation to the other issues raised by the Commission she wrote:

*In our view, the underlying issue in relation to all the concerns of the Commission (bar the valid comment regarding the need to amend the legal name) relate to the challenge of distinguishing between the **purposes** of a charitable trust, and the **means** by which those purposes are to be achieved.*

... many charitable trusts utilise businesses and collaborate with government to achieve their purposes, but this does not render their purposes to benefit businesses or government. Rather those ventures are the means by which the charities generate revenue.

In the case of the Hoodstreet.co.nz Trust Board, the rationale behind the type of events currently represented on the Trust's website (which changes regularly) relates to the finances of the Trust, which cannot seek the requisite funding to host sponsored community events until it obtains its charitable status.

In the interim, the intention is to maintain the momentum which has already been created in order to sustain the growing sense of community fostered thus far. In this regard, the Trust has worked closely with the Hamilton City Council and various Waikato Events holders to attract community based events to the area. These include: Balloons Over Waikato; the Bridge to Bridge Street Race; the V8 race pre-events; Fielddays; the new Hamilton event 'The Criterium'; local rugby and cricket events (e.g. the street cricket event as advertised).

The Trust wishes to host it's own community events such as art exhibitions, buskers festivals, music, wine and food festivals, **good community events which can be used as mechanisms to contribute to the fulfilment of it's purposes**, but cannot afford to do so until it is able to seek funding for its activities once it has received its charitable status. ...

1. Exclusive Charitable Purposes

1.1 We submit that you have correctly referred us to Section 13(1)(b)(i) and section 18(3)(a) of the Charities Act 2005, but we at a loss to understand why you then refer us to the hoodstreet.co.nz website as opposed to the Deed of Trust:

(a) The website is not a legal document, let alone the trust instrument, and has no legal standing. It is one tool by which the Trust hopes to promote revenue to better achieve its purposes. The provision of entertainment is not the purpose of establishing the trust, it one of the means by which it achieves its purposes.

(b) A careful reading of Travis Trust v Charities Commission quoted by you in your letter will indicate that the purposes of the Trust and the means by which it intends to achieve those purposes are consistent with the Joseph Williams J statement "... **where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable.**"

(c) The Trust Deed in clause 3 provides for the objects of the trust ... It is these provisions, and not the website, to which regard must be had in ascertaining whether or not the purposes of the Trust are charitable. ...

1.2 The fact that the charitable purposes referred to above are being promoted by the businesses in Hood Street, Hamilton, should not detract from the fact that the **purposes** themselves are charitable. There is nothing in the Act which precludes cooperation between business and charity. If anything, this cooperation is one to be

encouraged due to its relevance in promoting sustainable communities.

(a) The reality in Hamilton is that the inner city has been in a slow state of decline, malls are being erected on the outskirts of the city, and unless particular efforts are made to sustain the pleasant atmosphere within the city, thus attracting the general population of Hamilton to the area, there will be no momentum within the community to resist the unsavoury elements in society which typically creep in to inner cities, breeding crime and decay, impacting negatively on the economy of the city and the social health of the community in general. This is why one of the purposes of the Trust is ... 3.3(a) ...

(b) Instead of abandoning the inner city to take up residence in the sprawling shopping malls springing up around the outskirts of town, these business have elected to stay and strive to keep Hamilton City a healthy, safe, and welcoming place for the benefit of the Hood Street and Broader Hamilton Community. This in turn has the knock-on effect of reducing crime in the area. The benefit of the Trusts activities is clearly visible in the general Hood Street area already, and once the Trust is permitted to operate as a registered charity, it is expected that the Trust will be able to impact positively in ever increasing geographic circles of influence. It should further be noted that one of the purposes of the trust is to collaborate with various levels of government to the extent that this will further the overall purposes of the trust: 3.3(b) ...

2. Winding Up Provisions

We note that the Commission does not consider that clause 10(b) restricts the distribution of surplus assets to charitable purposes. However, clause 10 (b) expressly prohibits that surplus assets be distributed among the members, and expressly requires that surplus assets be transferred to some other body or institution have similar objects as the Trust. Since the objects of the trust are charitable, we would appreciate further explanation of the Commission's position in this regard.

3. Insufficient Prohibition of Private Pecuniary Profit

3.1 We note that the restriction of membership to Hood Street businesses and tenants is a concern to the Commission. There are two issues here. First, membership is distinct from purpose or benefit. Accordingly, the decision by the founders to restrict membership to those who have a vested interest in, and proven commitment to their Community was a tactically intentional decision which had no material impact on the public benefit issue raised. The concept of "public benefit" need not be applicable to the country nationally, but may be applied to a particular community. The members of the Trust wish to start addressing the problems in their "small corner" of the city, in the hope that their influence will expand and have a positive effect on the surrounding area.

3.2 It would surely be unreasonable to expect that this Trust should take on the problems of the entire inner city, and open up membership to stakeholders whose private interests may not necessarily coincide with a determination to resist the decline of the inner city, and whose sheer weight of numbers might enable

them to hijack the organisation and render it redundant in relation to its purposes.

(a) The restriction on membership is designed to keep the focus of the Trust on the Hood Street area and the surrounding community in a coordinated, manageable way.

(b) There is nothing to preclude others from taking similar initiative, nor are the benefits limited to these members.

3.3 *The purposes of the Trust ... do not include "the private pecuniary profit of any individual", or the members of the Trust Board. No provisions of the trust deed provide for the payment of trust income to the coffers of the individual members.*

3.4 *The case law quoted by you (Hadaway v Hadaway, CIR v Oldham, In Re Canterbury) is addressing trusts whose purposes were, in the view of the courts, to confer benefits on individual business owners. However, the purposes of the Hodstreet.co.nz Trust Board are clearly stated above and do not include benefit to individual businesses. We do not see the relevance of these cases to our client's circumstances.*

9. The Commission analysed the response received from the Applicant and on 17 January 2011 sent a second notice that may lead to a decline on the basis the purposes and activities were not charitable under the fourth head of charity and the winding up clause did not restrict distributions to exclusively charitable purposes.

10. The Applicant's solicitor responded on 15 February 2011 stating:

In our view, the activities of the trust and the purposes of the trust should be distinguished very clearly. Activities are a function of powers or discretions, and purposes are the beneficial objects. We get the impression that the Commission has had regard of the current activities of the trust and come to view these activities as a purpose of the trust. The activities of the trust are intended to raise funds for the trust, and such funds are to be used to contribute towards municipal betterment in the Hood Street in adjacent areas. The activities of the trust should not be confused with the purpose for which the trust was established.

However, even if the Commission held that engaging in such activities was a purpose of the trust, then such a purpose could not be more than ancillary to the main purpose of the trust and ought not in terms of section 5(3) of the Act to preclude the registration of the trust. ...

Furthermore, as regards the MK Hunt case quoted by you ([1961] NZLR 405, 407-498) and the related 1932 Keren Kayemeth case ([1932] 2 KB 465) are not applicable because they do not refer to the 2005 Act. The 2005 Act does not contain the phrase "for charitable purposes only" and provides in clause 5(3) that ancillary non charitable purposes do not preclude registration with the Charities Commission as a charity. This position was not an option prior to the 2005 Act. ...

The purposes of the trust are charitable per se, and not merely because they are stated to be so. Your state that "... the Commission does not consider that the attracting of 'community based events' to the area... will necessarily amount to a charitable purpose" appears to be based on an understanding that attracting community based events to the area is the purpose of the trust, when it is in fact one mechanism by which the trust intends to achieve its purpose, i.e. municipal betterment.

11. In addition the Applicant's solicitor proposed amendments to clause 3.1 and clause 10(b):

3.1 Primary Charitable purposes or objects

The Society exists to fulfil and the Trust Fund is held only and exclusively for all or any of the following Charitable purposes (or objects), each being independent of any other in New Zealand, particularly being:

- (a) Municipal betterment purposes beneficial to the (Hood Street) community; and*
- (b) to promote, facilitate and support from the Hood Street community for the provision of appropriate participatory development projects or programmes for the benefit of the wider Hood Street community in a manner which meets with the criteria recorded under clause 3.3(a) below.*

...

10(b) if upon the winding up or dissolution of the Society there remains after the satisfaction of all costs debts and liabilities any property or assets whatsoever the same shall not be paid to or distributed among the members but shall be given or transferred to the Board or some other charitable body, institution or trust having charitable objects similar to the objects of the Society and which shall prohibit the distribution of its or their income or property among its or their members to an extent at least as great as is imposed on this Society such body, institution or trust to be determined by the members of the Society at or before the time of dissolution or in default thereof by a Judge of the High Court of New Zealand or in the absence of any appropriate body, institution or trust to such public charity or public charities as the said Judge may determine.

The issues

12. The issue the Commission must consider is whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* ("the Act"). In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act and whether the Applicant will provide a public benefit.

The law on charitable purpose

13. Under section 13(1)(a) of the Act a trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.

14. In order to be a valid trust at law, a trust that is for charitable purposes must be exclusively charitable or it will be void for uncertainty.
15. In order for a purpose to be charitable, it must fall within the definition of charitable purpose set out in section 5(1) of the Act. Section 5(1) of the Act states:

charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
16. In addition, to be charitable at law, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
17. Section 5(3) of the Act provides that any non-charitable purposes must be ancillary to a charitable purpose.
18. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to the entity's activities at the time the application was made, the entity's proposed activities, and any other information that the Commission considers relevant.

Charities Commission's analysis

Name of Applicant

19. Section 13(1)(c) of the Charities Act specifies that an entity will qualify for registration if it has a name that complies with section 15 of the Act. Section 15 states:

The name of an entity complies with this section if-

- (a) *the entity is incorporated under that name under the Incorporated Societies Act 1908; or*
- (b) *the entity is incorporated under that name under the Charitable Trusts Act 1957; or*
- (c) *the entity is incorporated under that name under the Companies Act 1993; or*
- (d) *the entity is established, or constituted, by an Act under that name; or*
- (e) *in any other case, in the opinion of the Commission, the name is not-*
 - (i) *offensive; or*
 - (ii) *liable to mislead the public.*

¹ See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

20. On its application form the Applicant stated that its legal name was "HoodStreet.co.nz". The deed provided to the Commission at the same time however, variously stated:
- *The name of the Society shall be the **HoodStreet.co.nz Trust** (clause 1)*
 - ***Society** means the **HoodStreet.co.nz Trust** created on terms recorded in these rules (clause 2)*
 - *The name of the Trust Board shall be the **HoodStreet.co.nz Trust Board Incorporated** or such other name as the Trustees may from time to time determine. (clause 11.2)*
 - *There is established by this Deed a Trust Board to be known as the **HoodStreet.co.nz Trust Board** (clause 13.1)*
21. The Commission raised these discrepancies with the Applicant in its letter of 20 September 2010 and noted that an entity with the same rules had been incorporated as a board under the Charitable Trusts Act 1957 under the name "HoodStreet.co.nz Trust Board".
22. On 26 October 2010 the Applicant's solicitor responded, stating "The name, Hoodstreet.co.nz is correct; and has been accepted by the registrar of societies."
23. The Commission raised this matter again in its letter of 8 November 2010 seeking the Applicant's permission to amend the application name to match the name as it appears on the Companies Office register.
24. On 17 November 2010 the Applicant's solicitor stated "We concur with your comments regarding the legal name of the trust and agree that it should be amended to be consistent with the name as it appears on the Companies Office Register, and have attended to this."
25. The Commission now considers that the Applicant's name will now meet the requirements for registration under section 13(1)(c) of the Act.

Applicant's purposes

26. The Commission does not consider that the purposes outlined in clauses 3.1(a) and (b) of the Applicant's deed indicate an intention to relieve poverty or advance education or religion. These purposes have therefore been assessed under "other matters beneficial to the community". First, however the Commission has considered the effect of clause 3.1 and clause 3.4(b) and the extent to which the Commission can have regard to the Applicant's activities.

Effect of clauses purporting to limit purposes

27. The introductory wording to clause 3.1 of the Applicant's deed states:

The Society exists to fulfil and the Trust Fund is held for all or any of the following Charitable purposes (or objects), ...

28. Clause 3.4(b) states:

To ensure that the Society secures, and retains, charitable status approval the following limitations shall apply to the application of the terms of this Deed:-

- i. No personal profit: No part of the income or the capital of the Trust Fund may be paid or directly or indirectly transferred by way of profit to any Member.*
- ii. Limited to New Zealand: the Trust Fund may not be applied for the benefit of any person or organisation outside New Zealand where that part is derived from business income (as defined by section CW42 of the Income Tax Act 2007), unless the Society has secured the written approval of the District Commissioner of Inland Revenue to so apply any part of the Trust Fund for a specific purpose or purposes outside New Zealand.*
- iii. Associated Person Rules: No person within the ambit of paragraphs 5(b)(i), (ii), (iii), or (iv) of Section CW42 of the Income Tax Act 2007 may be involved in the carrying on of any business of the Society, if that person is able by virtue of that capacity (as Trustee, Member, shareholder, director or associated person) whether directly or indirectly to determine or materially influence in any way the determination of the nature or amount of the benefit or advantage or the income or the circumstances in which it is, or is to be, so received gained, achieved, afforded or derived.*
- iv. Restrictions on winding up: On the winding up of the Society no Member shall be permitted to personally benefit directly or indirectly*
- v. Registration and other requirements: the Trustees must ensure that any registration or other requirements necessary for the Society to be eligible for the benefit of the above sections is met, including preparing, retaining or filing with any relevant person, including the Commissioner of Inland Revenue pursuant to any revenue legislation and the Charities Commission pursuant to the Charities Act 2005, all necessary tax accounts, returns, reports, declarations, applications, notices, certificates, reconciliations, forms and other information.*

PROVIDED HOWEVER that nothing in these provisions may prevent any payment to any such person:

- For services rendered; or*
- For goods supplied; or*
- By way of interest on monies borrowed, or rent for premises let or leased to the Society,*

where that payment can be made without causing the income of the Society, or any part thereof, which would otherwise be exempt from income tax, to become liable for income tax.

29. In *M K Hunt Foundation Ltd v Commissioner of Inland Revenue*,² Hardie Boys J cited with approval the comments Lawrence LJ made in *Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue*.³ In that case, the statute under consideration contained the phrase 'for charitable purposes only', and Lawrence LJ said in the Court of Appeal that "it is not enough that the purposes described in the memorandum should include charitable purposes. The memorandum must be confined to those purposes".⁴ Hardie Boys J further wrote that:

*In so holding, Lawrence L.J. makes it clear in his judgment that he had in mind, not merely the phrase "charitable purposes only", but also the cases which show that non-charitable objects will prevent recognition of the body in question as a charitable trust.*⁵

30. In *Commissioners of Inland Revenue v White*,⁶ the Court considered limitations in the constitution of the Clerkenwell Green Association. The court noted that the constitution showed a clear intention that this object was exclusively charitable but went on to say:

*The charitable intention, clear as it is, is not conclusive in establishing charitable status, however, because clause 2(b) limits the field in which the charitable intention is to be effectuated. If the objects specified in clause 2(b) are of such a nature that there is not charitable purpose which will assist their achievement, then there is no charitable purpose within the specified field and the Association would not be entitled to registration as a charity. In other words, the mere insertion of the word "charitable" in clause 2(b) is not by itself enough to establish that the objects of the Association are charitable.*⁷

31. Finally, in *Canterbury Development Corporation v Charities Commission*,⁸ Ronald Young J wrote:

*... the mere fact that the constitution says that CDC's objects are charitable does not make CDC charitable although such a declaration is relevant in assessing whether they are. However as with Oldham TEC in the end, the objects and operation of the organisations either support a charitable purpose or they do not.*⁹

32. For these reasons, the Commission does not consider that clause 3.1 and clause 3.4(b) of the deed provide conclusive evidence that the Applicant's purposes are in fact charitable.

² [1961] NZLR 405, 407.

³ [1932] 2 KB 465.

⁴ [1931] 2 KB 465, 481.

⁵ [1961] NZLR 405, 408.

⁶ (1980) 55 TC 651.

⁷ (1980) 55 TC 651, 653.

⁸ HC WN CIV 2009-485-2133 [18 March 2010].

⁹ HC WN CIV 2009-485-2133 [18 March 2010] at para 56.

Applicant's activities

33. In her letter of 15 February 2011 the Applicant's solicitor stated:

In our view, the activities of the trust and the purposes of the trust should be distinguished very clearly. Activities are a function of powers or discretions, and purposes are the beneficial objects. We get the impression that the Commission has had regard of the current activities of the trust and come to view these activities as a purpose of the trust. The activities of the trust are intended to raise funds for the trust, and such funds are to be used to contribute towards municipal betterment in the Hood Street in adjacent areas. The activities of the trust should not be confused with the purpose for which the trust was established.

34. As indicated above, section 18(3)(a) of the Charities Act specifically requires the Commission to have regard to:

- (i) *the activities of the entity at the time at which the application was made; and*
- (ii) *the proposed activities of the entity; and*
- (iii) *any other information that it considers is relevant.*

35. In *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Ltd*¹⁰ Gresson P stated:

*This aspect of the question before us seems to us to invoke similar (though not identical) considerations to those which exercised the mind of Lord Greene in the course of his judgment in *Royal Choral Society v Commissioners of Inland Revenue* [1943] 2 All ER 101 (though that was the case of the objects of a charitable institution, not the objects of a charitable trust). He said:*

'It is true that you have to find the purpose of the alleged charitable establishment. It may very well be that a purpose which, on the face of it looks to be the real purpose, on close examination, is found not to be the real purpose. A body of persons may purport to set themselves up for educational purposes; but on a full examination of the facts, it may turn out that their purpose is nothing of the kind, and is one merely to provide entertainment or relaxation to others, or profit to themselves. In other words, the presence of the element of entertainment or pleasure may be either an inevitable concomitant of a charitable or educational purpose, or it may be the real fundamental purpose, and education may merely be a by-product. Whether a case falls within one class or the other is, no doubt, a question of fact, save and so far as it may depend on the construction of written documents' (ibid., 106).

*So in this case what must be decided is whether the real fundamental purpose of this trust is charitable.*¹¹

36. In *Auckland Medical Aid Trust v Commissioner of Inland Revenue*¹² Chilwell J stated "[t]he law would resist finding a charitable purpose if a

¹⁰ [1963] NZLR 450.

¹¹ [1963] NZLR 450, 456.

¹² [1979] 1 NZLR 382, 395.

trust were dressed up within a cloak of charitable purposes that cloak being in fact used for non-charitable purposes.”

37. In *The Law of Charity*, Gino Dal Pont wrote:

*It is possible that non-charitable objects that appear of importance on paper, when viewed in the context of the association's actual activities, are in fact directed to forwarding objects that are clearly charitable. Alternatively, an association's activities may serve to indicate that a power in its constitution to carry on non-charitable activities is in truth not subsidiary but rather its main purpose.*¹³

Other matters beneficial to the community

38. In order for a purpose to qualify as “any other matter beneficial to the community”, the purpose must be beneficial to the community and must be within the spirit and intendment of the purposes set out in the Preamble to the *Charitable Uses Act 1601* (the Statute of Elizabeth)¹⁴ namely:

- relief of aged, impotent, and poor people
- maintenance of sick and maimed soldiers and mariners
- schools of learning
- free schools and scholars in universities
- repair of bridges, ports, havens, causeways, churches, sea banks, and highways
- education and preferment of orphans
- relief, stock or maintenance of houses of correction
- marriage of poor maids
- supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
- relief or redemption of prisoners or captives and
- aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

39. In relation to the first limb of this test (beneficial to the community), in *Vancouver Society of Immigrant and Visible Minority Women v MNR* Gonthier J wrote that: “There must be an objectively measurable and socially useful benefit conferred; and it must be a benefit available to a sufficiently large section of the population to be considered a public benefit.”¹⁵

¹³ *The Law of Charity*, Australia, LexisNexis Butterworths, 2010 at 323.

¹⁴ *Re Jones* [1907] SALR 190 at 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667-669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

¹⁵ *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10 at para 41 per Gonthier J dissident. *Gino Dal Pont, Charity Law in Australia and New Zealand*, Oxford, Oxford University Press, 2000 at 174-175.

40. Analysing further what is meant by that test, Gonthier J wrote that although the public benefit requirement applies to all charitable purposes, it is of particular concern under the fourth head of Lord MacNaughten's scheme in *Pemsel*.¹⁶ "This is so because under the first three heads, public benefit is essentially a rebuttable presumption, whereas under the fourth head it must be demonstrated".¹⁷

41. In *Inland Revenue Commissioners v Baddeley*,¹⁸ Lord Simonds doubted that providing benefits for the inhabitants of a particular street would provide sufficient public benefit. He wrote:

*In the case under appeal the intended beneficiaries are a class within a class; they are those of the inhabitants of a particular area who are members of a particular church: the area is comparatively large and populous and the members may be numerous. But, if this trust is charitable for them, does it cease to be charitable as the area narrows down and the numbers diminish? Suppose the area is confined to a single street and the beneficiaries to those whose creed commands few adherents: or suppose the class is one that is determined not by religious belief but by membership of a particular profession or by pursuit of a particular trade. These were considerations which influenced the House in the recent case of *Oppenheim*.¹⁹ That was a case of an educational trust, but I think that they have even greater weight in the case of trusts which by their nominal classification depend for their validity upon general public utility.*²⁰

42. In order to fall within under "any other matter beneficial to the community", the benefits must be to the community rather than to private individuals. Any private benefits arising from the Applicant's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.²¹ In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.²²

43. In relation to the second limb of the test, all organisations, which have purposes that benefit the community, will be charitable under this head. In *Williams Trustees v Inland Revenue Commissioners*,²³ Lord Simonds wrote:

Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean to say that every object of public general utility must necessarily be a charity. Some may be and some may not be. ... Lord Macnaghten did not mean that all trust for purposes beneficial to the

¹⁶ *Commissioner for Special Purposes of Income Tax v Pemsel* [1981] AC 531.

¹⁷ *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10 at para 41.

¹⁸ [1955] AC 572.

¹⁹ [1951] AC 297.

²⁰ [1955] AC 572, 591

²¹ *Inland Revenue Commissioners v Oldham Training and Enterprise Council* (1986) STC 1218; *Travel Just v Canada Revenue Agency* 2006 FCA 343 [2007] 1 CTC 294.

²² *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

²³ [1947] 1 All ER 513, [1947] AC 447.

community are charitable, but that there were certain beneficial trusts which fell within that category: and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here, it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare: you must also show it to be a charitable trust.²⁴

44. Similarly in *Travis Trust v Charities Commission*,²⁵ Joseph Williams J noted that:

... regard must be had to the particular words of the preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy.²⁶

45. His Honour also held:

In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth.²⁷

46. Clause 3.1 of the Applicant's deed states:

3.1 Primary Charitable purposes or objects

The Society exists to fulfil and the Trust Fund is held for all or any of the following Charitable purposes (or objects), each being independent of any other in New Zealand, particularly being:

- (a) Purposes related to municipal betterment which are beneficial to the Hood Street community and the wider Hamilton community; and*
- (b) to promote, facilitate and support the provision of appropriate participatory development projects or programmes for the benefit of the Hood Street and wider Hamilton community in a manner which meets with the criteria recorded under clause 3.3(a) below.*

47. In her letter dated 15 February 2011 the Applicant's solicitor proposed that clause 3.1 be amended to:

3.1 Primary charitable purposes or objects

The Society exists to fulfil and the Trust Fund is held only and exclusively for all or any of the following Charitable purposes (or objects), each being independent of any other in New Zealand, particularly being:

²⁴ [1947] 1 All ER 513, [1947] AC 447, 455. (Applied by Kennedy J *In re Cumming* [1951] NZLR. 498.)

²⁵ (2009) 24 NZTC 23,273.

²⁶ (2009) 24 NZTC 23,273 at 23,276-23,277 at para 20.

²⁷ *Ibid* at 23,281, para 52.

- (a) Municipal betterment purposes beneficial to the (Hood Street) community; and
- (b) to promote, facilitate and support from the Hood Street community for the provision of appropriate participatory development projects or programmes for the benefit of the wider Hood Street community in a manner which meets with the criteria recorded under clause 3.3(a) below.

48. Based on the case law cited above, the Commission does not consider that the current and proposed clauses 3.1(a) and (b) will restrict the Applicant to carrying out purposes that will provide benefits for a sufficient section of the public or that are within the spirit and intendment of the purposes set out in the Preamble and subsequent cases. The Commission has therefore considered information provided by the Applicant about its activities and information available on the Applicant's website in order to determine whether it is in fact carrying out charitable purposes.

49. The Applicant's home page on its website states:

Welcome to Hood Street

With over 16 bars and restaurants to choose from in one destination, Hood Street is the heart of entertainment in Hamilton, it's a superb place to dine, drink, dance or have coffee, relax and watch the world go by.

Open from breakfast till late Hood Street hosts regular events to add to the vibrant environment that it is renowned for.

Subscribe to our website and receive regular newsletters and information on upcoming events. Event photos, menus and entertainment will be regularly updated so please enjoy and make sure you visit Hood Street, Hamilton's Entertainment Edge.²⁸

50. Events listed on the website have included:

- *Bridge to Bridge Ski Race – "The event starts on Friday night in central Hamilton, on Hood Street with the Ebbett Prestige Show & Shine. This runs from 5pm until 7:30pm and is a static display of the hottest powerboats that will be competing in the event. Come check out the horsepower, the airbrushing, the shiny bits and the entertainment."*
- *Melbourne Cup at Rodeo Rodeo – "Melbourne Cup at Rodeo Rodeo has it all. Drinks, Nibbles, large screens, Prizes for Best dressed lady/man plus best hat. We will have runners to take your bets & all races playing live from 1pm."*
- *Melbourne Cup Carnival at House – "Enjoy cup day in style at House. Secure your social or work groups places now. \$14 per head gets you a complimentary drink on arrival, an easy bet and shared platter for the table. We'll have loads of screens so you wont miss any of the action plus our own on-site TAB if you feel like a flutter."*

²⁸

<http://www.hoodstreet.co.nz/> (accessed 20 April 2011).

- *Hood Street Tiki Tour – “In Hood Street Tiki Tour style you and your friends or workmates have the option of dressing up or creating a theme for the night and will be taken on a tour to experience Hood Street from one end to the other. ... Meeting at Diggers for Champagne and nibbles. ... Moving onto House for dinner ... Then for a short walk over the road to Cullens for a delicious desert tasting platter ... and its off to Gothenburg for cheese boards and Belgium beer matching. ... After dinner and dessert you will be ready for the Kiwiana Cocktails at CBD and you will end your Tiki Tour of Hood Street with a shot of Tequila and dancing the night away at Rodeo Rodeo.*
- *Downtown Special @ Momento – “Kicking off at 7pm, with the turntables and PA set up on the pavement outside Momento, it’s hard to miss - and Momento is the ideal place to unwind, sip fine coffee and enjoy great food to a soundtrack of the finest in reggae music.”²⁹*

51. In response to the Commission’s request to provide further information about the Applicant’s activities, the Applicant’s solicitor stated, in an email dated 26 October 2010:

*The society is new, and is on hold pending registration so there is little we can provide by way of current activities.
It is slightly unusual as it is really about social conscience and community betterment driven by business.*

52. In a letter dated 17 November 2010 the Applicant’s solicitor then stated:

In the case of the Hoodstreet.co.nz Trust Board, the rationale behind the type of events currently represented on the Trust’s website (which changes regularly) relates to the finances of the Trust, which cannot seek the requisite funding to host sponsored community events until it obtains its charitable status.

In the interim, the intention is to maintain the momentum which has already been created in order to sustain the growing sense of community fostered thus far. In this regard, the Trust has worked closely with the Hamilton City Council and various Waikato Events holders to attract community based events to the area. These include: Balloons Over Waikato; the Bridge to Bridge Street Race; the V8 race pre-events; Fielddays; the new Hamilton event ‘The Criterium’; local rugby and cricket events (e.g. the street cricket event as advertised).

*The Trust wishes to host it’s own community events such as art exhibitions, buskers festivals, music, wine and food festivals, **good community events which can be used as mechanisms to contribute to the fulfilment of it’s purposes**, but cannot afford to do so until it is able to seek funding for its activities once it has received its charitable status. ...*

53. While the Commission considers it is possible that “hosting sponsored community events” could include some charitable activities, balloon festivals, power boat races, V8 motor races, and food and wine festivals are unlikely to be considered charitable.

²⁹

<http://www.hoodstreet.co.nz/events/> (accessed 8 November 2010).

54. The Commission does not consider that the Applicant has provided any evidence that its activities will be restricted to those that are within the spirit and intendment of the purposes set out in the Preamble and subsequent cases or that any specific public benefit will result from these activities. The Commission therefore concludes that the Applicant is not carrying out charitable purposes.

Applicant's submissions

55. In her letter of 17 November 2010 and 15 February 2010 the Applicant's solicitor has submitted that the Applicant's activities are merely intended to raise funds for its charitable purpose:

The activities of the trust are intended to raise funds for the trust, and such funds are to be used to contribute towards municipal betterment in the Hood Street in adjacent areas.

56. The Commission does not consider that the Applicant has provided any evidence to show that its activities are charitable in themselves or that any funds raised from these activities have, or will, be applied to exclusively charitable purposes.
57. In her letter of 17 November 2010, the Applicant's solicitor has submitted that the hoodstreet.co.nz website has no legal standing and it is "one tool by which the Trust hopes to promote revenue to better achieve its purposes." She has stated that the Commission must have regard to the trust provisions and not the website in ascertaining whether the Applicant's purposes are charitable.
58. As indicated above, section 18(3)(a) of the Charities Act requires the Commission to consider the current and future activities of an applicant and any other relevant information. In this regard the hoodstreet.co.nz website appears designed to generate revenue for business owners in the Hood Street area in Hamilton rather than any charitable purpose.
59. Cases such as *Commissioners of Inland Revenue v Yorkshire Agricultural Society*,³⁰ *Crystal Palace Trustees v Minister of Town and Country Planning*,³¹ *Hadaway v Hadaway*,³² *Commissioners of Inland Revenue v White*,³³ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*,³⁴ and *Canterbury Development Corporation v Charities Commission*³⁵ clearly show that conferring providing benefits on individual business owners is not a charitable purpose.

³⁰ [1928] 1 KB 611.
³¹ [1951] 1 Ch 132.
³² [1955] 1 WLR 16 (PC).
³³ (1980) 55 TC 651.
³⁴ (1996) 69 TC 231.
³⁵ HC WN CIV 2009-485-2133 [18 March 2010].

60. In her letter of 17 November the Applicant's solicitor has submitted:

(a) *The reality in Hamilton is that the inner city has been in a slow state of decline, malls are being erected on the outskirts of the city, and unless particular efforts are made to sustain the pleasant atmosphere within the city, thus attracting the general population of Hamilton to the area, there will be no momentum within the community to resist the unsavoury elements in society which typically creep in to inner cities, breeding crime and decay, impacting negatively on the economy of the city and the social health of the community in general. This is why one of the purposes of the Trust is ... 3.3(a)*

(b) *Instead of abandoning the inner city to take up residence in the sprawling shopping malls springing up around the outskirts of town, these business have elected to stay and strive to keep Hamilton City a healthy, safe, and welcoming place for the benefit of the Hood Street and Broader Hamilton Community. This in turn has the knock-on effect of reducing crime in the area. The benefit of the Trusts activities is clearly visible in the general Hood Street area already*

61. In cases such as *Re Tennant*³⁶ and *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation*³⁷ courts have held that providing essential services for remote, rural, or disadvantaged communities can be charitable under "other matters beneficial to the community".

62. The Commission does not consider that the Applicant has shown how attracting people to events in an inner city street of bars and restaurants, rather than a shopping mall on the outskirts of town, is analogous to any purposes previously held to be charitable under this head.

63. In her letter of 15 February 2011, the Applicant's solicitor submitted that even if the Applicant's current activities were purposes of the trust, then "such a purpose could not be more than ancillary to the main purpose of the trust and ought not in term of section 5(3) of the Act to preclude registration of the trust".

64. In *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand*,³⁸ Simon France J held:

I agree that ancillary must have a quantitative component, and do not consider that the applicants in the present case have demonstrated these activities are ancillary. Factually no information is provided as to what proportion of expenditure they represent. Conceptually, under the Constitution, the expenditure could be 100% of the general funds. Realistically that cannot amount to a charitable purpose.

65. Similarly, the Commission considers that in the current case the Applicant's deed would allow it to spend 100% of its funds on non-charitable purposes therefore the Commission does not consider the non-charitable purposes can be considered to be ancillary to a charitable purpose under section 5(3) of the Act.

³⁶ [1996] 2 NZLR 633.

³⁷ [2005] 59 ATR 10 (Australian Federal Court of Appeal) at 25-26, para. 59-60.

³⁸ HC WN CIV-2009-485-2633, 23 September 2010 at paras 49-52.

66. In her letter of 15 February 2011, the Applicant's solicitor has stated that cases cited by the Commission are not applicable because they do not refer specifically to the Charities Act 2005.
67. The Commission notes that the definition of "charitable purpose" set out in the Charities Act is based on the long established definition in common law, dating back to at least 1891.³⁹ A specific reference to the Charities Act is therefore not required in each case in order for that case to be applicable.

Conclusion

68. The Commission concludes that the purposes set out in the current and proposed clauses 3.1(a) and (b) are not charitable for the reasons stated above.

Section 61B of the Charitable Trusts Act 1957

69. In order to be a valid trust at law, a trust for charitable purposes must be exclusively charitable or it will be void for uncertainty. Section 61B of the *Charitable Trusts Act 1957* however, can operate in two situations to "save" a trust that has both charitable and "non-charitable and invalid" purposes. The first is where the entity's **stated purposes** include charitable and non-charitable purposes (in which case the non-charitable purposes may be "blue pencilled out"). The second is where the stated purposes are capable of both a charitable and a non-charitable **interpretation** and the primary thrust of the gift is considered to be charitable (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).
70. In *Re Beckbessinger* Tipping J held:
- In the case of designated and identifiable organisations it may well be necessary to have evidence as to whether or not they are charitable to determine the flavour of the gift. The Court cannot in my judgment say...that because a gift might have been applied for charitable purposes, s 61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose.⁴⁰*
71. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and its activities (as directed by section 18(3)(a) of the Charities Act). The Commission does not consider that these provide evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting. The Commission does not consider that the purposes and activities indicate an intention to create a substantially charitable trust.

³⁹

Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531.

⁴⁰

Re Beckbessinger [1993] 2 NZLR 362, 376.

72. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the Charitable Trusts Act cannot operate to validate the trust.

Winding up

73. The Applicant's current winding up provisions are set out in clause 10:

10 *Winding up*

a) The Society may be wound up voluntary by a Special Members Resolution passed in a general meeting of its Members requiring the Society so to be wound up and the resolution is confirmed by a subsequent general meeting called together for that purpose and held not earlier than thirty days after the date on which the resolution so to be confirmed was passed.

b) if upon the winding up or dissolution of the Society there remains after the satisfaction of all costs debts and liabilities any property or assets whatsoever the same shall not be paid to or distributed among the members but shall be given or transferred to the Board or some other body, institution or trust having objects similar to the objects of the Society and which shall prohibit the distribution of its or their income or property among its or their members to an extent at least as great as is imposed on this Society such body, institution or trust to be determined by the members of the Society at or before the time of dissolution or in default thereof by a Judge of the High Court of New Zealand or in the absence of any appropriate body, institution or trust to such public charity or public charities as the said judge may determine.

74. The Commission does not consider that the current clause 10 will meet registration requirements because it does not restrict distributions to charitable purposes. "Charitable purpose" has a special meaning in law, therefore even if the Applicant was considered to have charitable purposes, another organisation with similar purposes may not necessarily be considered to have charitable purposes.

75. In her letter dated 15 February 2011 the Applicant's solicitor proposed that clause 10 be amended to:

10(b) if upon the winding up or dissolution of the Society there remains after the satisfaction of all costs debts and liabilities any property or assets whatsoever the same shall not be paid to or distributed among the members but shall be given or transferred to the Board or some other charitable body, institution or trust having charitable objects similar to the objects of the Society and which shall prohibit the distribution of its or their income or property among its or their members to an extent at least as great as is imposed on this Society such body, institution or trust to be determined by the members of the Society at or before the time of dissolution or in default thereof by a Judge of the High Court of New Zealand or in the absence of any appropriate body, institution or trust to such public charity or public charities as the said Judge may determine.
[Emphasis added]

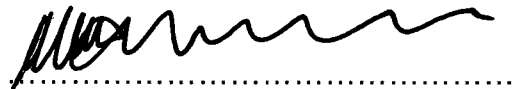
76. The Commission considers that the distributions in the proposed clause 10 may meet registration requirements, but some clarity regarding transfer of surplus assets to "the Board" might be required in the future.

Charities Commission's determination

77. The finding of the Commission is that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not established and maintained exclusively for charitable purposes, as required by section 13(1)(a) of the *Charities Act 2005*.

For the above reasons, the Commission declines the Applicant's application for registration as a charitable entity.

Signed for and on behalf of the Charities Commission



Trevor Garrett
Chief Executive

5/5/11

Date