



**GREYTOWN
TRUST LANDS**

Growing the Community since 1871

Community Lands Briefing Pack

July 2022

Memorandum

To: Trustees
From: Paul Broughton, Property Advisor to the Trust
Date: 30 June 2022
Subject: Community Lands Lease Restructure Proposals



Trustees of the Greytown District Trust Lands Trust (the Trust) are being asked to vote on the attached Community Lands Lease restructure proposals with respect to lands owned by the Trust. The lands are situated at 123 East Street, 55-59 East Street, 10 McMaster Street, and 175-177 Main Street, all of which are located in the town of Greytown.

Current Status

Commonly known as the Community Lands Assets, each site is subject to a perpetual ground lease, with market-based ground rental provisions applying.

The accepted methodology in assessing ground rentals is typically based on a percentage of the land value eg, 5-6% of the market value (or in some cases, the rateable value) of the land. The Community Lands are currently zoned residential, which results in a higher value than would be ascribed in the event zoning reflected the actual long-term use of the sites.

With the rapid increase in residential land prices over the last 10 years rentals assessed for these sites has seen unprecedented growth.

By way of example: 123 East Street (Greytown Rugby Club) - when the current lease was signed in July 2014 the annual rental was set at \$45,000 per annum. The most recent valuation of this site has seen the value increase to \$3.3m which translates to a rental of \$165k pa or 367% increase over the last eight years.

In each case, the rentals charged in accordance with the ground leases have, in turn, been matched (more or less) with a grant from the Landlord (the Trust). Effectively the lessees occupy the sites rent free and while this arrangement is not guaranteed, Trustees have made such grants over a considerable number of years (upwards of 140 years in the case of 123 East Street).

Summary of the Proposals

The proposals before Trustees aim to put in place arrangements that will provide certainty for the existing Lessees, while broadening local community utilisation of the majority of the sites concerned.

The proposals are consistent with the Trust's own Act and Strategic Plan, ensuring the long-term opportunity to provide a positive impact in respect to the general wellbeing of the Greytown community.

Essentially, the proposals remove the circular treatment of rental that is currently in place and remove the perpetual nature of the leases that are in place with the existing tenants. The proposal includes new perpetual leases to South Wairarapa District Council over parts of 2 sites, enabling multi-code/recreational use by the community.

The current valuations for these sites do not take the circular arrangements into account as these arrangements are non-binding, despite the fact they have been in place for some considerable period of time. In the event the proposals are put in place, the existing valuations will reflect the lack of “rental income” and reduce to a zero or near value in most cases.

In terms of the Trust’s cash flow, there is no change to the bottom line – rentals won’t be charged, and matching grants won’t be made. The money-go-round will cease.

The Proposals context in terms of the Greytown District Trust Lands Trust Act 1979, Trusts Act 2019, the Trusts Strategy and its SIPO

- **Greytown District Trust Lands Trust Act 1979**

The proposal acknowledges the Greytown District Trust Lands Trust Act, in particular it accords with one of the very foundations upon which lands are to be held – Section 13(b)(ii) & Section 13(c).

The Trust’s legal advisors have confirmed the proposals are not in breach of the Act.

- **Trust Act 2019**

The Trust’s legal advisors have confirmed the proposal is not in breach of the Trusts Act 2019.

In addition, the Trust’s auditors have confirmed that subject to the correct treatment in the accounts, the proposal will not result in any issues from an audit perspective.

Please refer to the attached Legal & Audit opinions for further details on the above.

- **The Trust’s Strategic Plan**

The proposal recognises and, where appropriate, is linked to the Trust’s published 2021-2024 Strategic Plan, in particular:

- **Our Purpose:**

Providing a return to our community – this can be financial or non-financial. The proposal is based on ensuring wider community usage of the community lands. This will provide a greater level of community return than the current arrangements.

- **Our Vision:**

The proposal provides guaranteed inter-generational and broadened community use of the community lands (assuming Trustees elect to retain all spaces for recreational use etc), supporting the growth and vibrancy of our community.

Statement of Investment Policies and Objectives (SIPO)

The proposal before Trustees is concerned with the long term occupational and usage arrangements of what are referred to as the “Community Lands”. As it currently stands, these community focussed assets derive notional income purely on the basis that the Trust funds such income by making a matching annual grant to the incumbent tenants, each of whom occupy the lands on perpetual ground leases.

Given the long-established circular nature of income from these sites, the community lands cannot be viewed, nor be treated, as being the same as the balance of the Trust’s assets which do derive genuine income and therefore a resultant investment return to the Trust.

The Trust has put in place a Strategic Plan and Statement of Investment Policy (SIPO) to ensure its commercial assets meet minimum investment return thresholds.

The Trust’s SIPO is not an appropriate framework to apply to non-commercial community land assets.

Summary

The proposals before the Trustees look to resolve the longstanding structural issues with the Community Lands leases while at the same time enabling wider community utilisation. In doing so they formalise what has been in effect for some considerable time.

While the proposed arrangements are very much about the long-term, it must be born in mind that should circumstances change or opportunities arise, all parties to these arrangements have the ability to look at resetting terms etc. should the desire to do so exist at that time. These proposals do not preclude this from occurring.

A copy of SWDC’s response to the proposals is also included in the attachments, this would form the basis of the lease negotiations between the parties.

Paul Broughton
Technical Property Advisor

Appendix One

Community Lands Proposals



Community Lands Proposals - amended 30 June 2022

Cobblestones Museum Trust (CMT) – 175-177 Main Street

- Greytown District Trust Lands Trust (**GDTLT**) write a new non-assignable ground lease with CMT– term to be 99 years maximum.
- Ground rental to be \$1pa.
- Tenure to be contingent on the existing use (historic/cultural/educational) remaining as per current. In addition, CMT undertake to broaden the existing use to enable a greater level of community focused events and activities on site, contributing to the general wellbeing of the Greytown community.
- In the event the existing use ceases, the lease will terminate.
- Naming – GDTLT to retain naming rights – as a suggestion, the site to become known as:

Greytown District Trust Lands Trust Historic Precinct

With appropriate signage facing SH2 both directions, on that part of the site owned by GDTLT.

- Given the proposed nominal rental and tenure, from a valuation perspective, the commercial value of the site will effectively become zero until such time the lease is terminated.

Greytown Bowling Club (GBC), 55-59 East Street

- Effect the subdivision, carving off No. 2 Green from the existing site (which comprises land under the clubrooms, No1 Green, access way and ancillary areas).
- Write a new non-assignable ground lease with GBC, term to be 99 years maximum.
- Ground rental to be \$1pa. Tenure to be contingent on existing use remaining as per current. (Lawn Bowls & associated Bowling Club activities) In the event the existing use ceases, lease will terminate.
- GDTLT will incur legal & subdivision fees.
- Trustees to decide the ultimate use of the No.2 Green – community or otherwise, however subdivision can progress prior to any agreement as to the final use.
- In the event Trustees agree that community use as being the most appropriate outcome for the No.2 Green, GDTLT to engage with South Wairarapa District Council to further progress their in principle willingness to take a perpetual lease over the No.2 Green.
- Lease term would to be perpetual, rental set at \$1pa, no rental reviews.
- SWDC (in consultation with GDTLT and the local community), to develop a greenspace facility that will provide Greytown with an additional recreational asset, contributing to the general wellbeing of the Greytown community.
- In the event Trustees elect to retain the No. 2 green for community use and lease same to SWDC, given the nominal rental and tenure, from a valuation perspective, the commercial value of the site will effectively become zero until such time the lease(s) is (are) terminated.
- GDTLT to retain naming rights for the entire site, i.e. for both titles resultant from the subdivision.

Greytown Rugby Football Club (GRFC) 123 East Street

- Effect a subdivision whereby the land under GRFC's clubrooms is separated from the balance of the site. GDTLT will incur the legal & subdivision fees.

GRFC Ground Lease

- GDTLT lease the land directly under the Rugby Clubrooms to GRFC, term to be 99 years maximum.
- Ground rental to be \$1pa, no rental reviews and no change to zoning.
- GRFC retains full ownership and responsibility of its clubrooms. Tenure to be contingent on existing use remaining as per current.

SWDC Ground Lease

- GDTLT lease the remainder of the land under a separate title to SWDC. Perpetual Lease term, rental set at \$1pa, no rental reviews.
- Under the lease with SWDC, the permitted use to be public recreation/green space, enabling a wider community focus and contributing to the general wellbeing of the Greytown community.
- Additionally, as part of the permitted use, SWDC & GRFC to put in place long term arrangements that enable GRFC to use the playing fields for practice and games. Suggest this would be the same arrangement that SWDC has in place with rugby clubs elsewhere in the district.
- No change to existing zoning.
- Tenure to be contingent on the permitted use being maintained. In the event the site is no longer used/required for the permitted use, the lease will terminate.

Other

- Naming – GDTLT to retain naming rights – as a suggestion, the site to become known as:

Greytown District Trust Lands Trust Sport & Recreation Grounds

- Given the nominal rental and tenure, from a valuation perspective, the commercial value of the site will effectively become zero until such time the proposed lease(s) is (are) terminated.

Plunket New Zealand (PNZ)– 10 McMaster Street

- Leave current arrangements in place, actively assist PNZ as they look to re-assess their requirements moving forward.
- In the event PNZ wish to relocate or terminate the ground lease, propose the site either be developed as residential by GDTLT or on-sold for residential development, with proceeds being retained for reinvestment.

Paul Broughton

Technical Property Advisor

Appendix Two

Legal Opinion

Memorandum

30 June 2022

To Paul Broughton and Phil Holden
Greytown District Trust Land Trustees

From Doran Wyatt and Rachel Robertson **Reference** 2712146-1

Greytown District Trust Land Trustees – Grant of ground leases

Introduction

- 1 We refer to our memorandum dated 12 May 2022 (*12 May memo*) and your further instructions received earlier this week.
- 2 In the 12 May memo we provided advice about a proposal (*proposal*) for the Greytown District Trust Land Trustees (*Trust*) to surrender existing perpetually renewable ground leases (*existing leases*) on three sites (as described in the 12 May memo), subdivide the land on two of the sites, and grant new ground leases of parts of the land to the South Wairarapa District Council and to the existing lessees. The new leases would be on largely the same terms as the existing leases, the rent payable would be a nominal rent.
- 3 We provided particular advice in the 12 May memo about whether the proposal would be contrary to section 33 of the Trusts Act 2019 (*Trusts Act*) and whether the proposal otherwise would adhere to the Trust's obligations under the Trusts Act, the Greytown District Trust Lands Act 1979 (*Greytown Act*) and the Public Bodies Leases Act 1969 (*Leases Act*). Our conclusion was that, provided that the Trust complied with its obligations under the three Acts, the proposal, of itself, was not contrary to those Acts.
- 4 Since providing the 12 May memo, you have received a query about the effect of the case of *Vogel v Commissioner of Crown Lands* 2018 NZHC 953, in relation to whether the Trust should grant the new leases at a nominal rent. The Trust has also received a query about whether the proposal could breach the following discretionary duties that the Trust has under the Trusts Act:
 - (a) the duty to exercise the care and skill that a prudent person of business would exercise in exercising any power to invest trust property (section 30, Trusts Act);
 - (b) the duty not to bind or commit trustees to a future exercise or non-exercise of a discretion (section 33, Trusts Act); and
 - (c) a duty to act impartially in relation to the beneficiaries of the trust and not to be unfairly partial to one beneficiary or a group of beneficiaries to the detriment of the others (section 35, Trusts Act).
- 5 You have asked us to advise specifically about whether the case mentioned above, or any of the duties above change our view about the Trust considering the proposal.
- 6 We set out our advice below.

Conclusion

- 7 We consider that, provided that the Trust acts in good faith, in accordance with the purposes in the Greytown Act and also complies with its obligations under the Leases Act and the Trusts Act, the proposal is not, of itself, in breach of the three Acts.
- 8 For the reasons set out below, our review of the duties set out above and the *Vogel* case has not altered our view set out in the 12 May memo. Indeed, the decision in *Vogel* supports the view that, depending on the circumstances and having regard to the purposes or objectives sought to be achieved, a trust may decide that selling (or in this case, leasing) land for a nominal figure is appropriate.
- 9 As we set out in the 12 May memo, in making a decision about the proposal, the Trust will need to ensure that it:
 - (a) acts within its authority and powers of trust, as set out in the Greytown Act;
 - (b) is making the decision at the right time;
 - (c) takes into account all relevant advice and considers all relevant facts and does not consider irrelevant facts; and
 - (d) acts for a proper purpose.
- 10 In the Trust considering whether or not to proceed with the proposal, it will consider a number of factors. One of those factors will be the financial implications and return on investment of the proposal. Having regard to the purposes of the Trust, under section 13 (b) and (c) of the Greytown Act and the duties in relation to investment in section 59 of the Trusts Act, the Trust may take a number of factors into consideration; financial considerations are not the only, or necessarily the primary factor that the Trust may consider.
- 11 For completeness, we note that the proposal will also be contingent upon the Trust being able to obtain subdivision consent for two of the three sites, on terms and conditions that are satisfactory to the Trust.

Discussion

- 12 As trustees will be aware, the Trust holds its lands on trust for the specific purposes set out in section 13 of the Greytown Act. It is the Trust's legal objective to fulfil these particular purposes, and trustees must ensure that this occurs having regard to applicable legislation, including the Greytown Act, the Trusts Act and the Leases Act.

Section 30, Trusts Act

- 13 Under section 30 of the Trusts Act, the Trust is required, in exercising any power to invest trust property, to exercise the care and skill that a prudent person of business would exercise in managing the affairs of others. The Trust will be required, to the extent that it is relevant, to take account of this duty in deciding whether to proceed with the proposal. We note, in this regard, that section 59 of the Trusts Act sets out a non-exhaustive list of matters that a trustee may consider in exercising a power to invest. These include:

- (a) the objectives of the Trust or the permitted purpose of the Trust;
 - (b) the nature of existing Trust investments in other trust property;
 - (c) the likely income return;
 - (d) the probable duration of the Trust;
 - (e) the aggregate value of the trust property; and
 - (f) the trustees' overall investment strategy.
- 14 It is clear from section 59 that there are a number of matters a trustee may consider in exercising a power to invest. These factors are not limited to the return on investment for that particular trust property or the value of the investment, but are much holistic.
- 15 In this regard, a particular factor under section 59 that a trustee may consider in exercising a power to invest is the objectives of the Trust or its permitted purpose. Under sections 13(b) and 13(c) of the Greytown Act, the Trust is required to:
- "hold, . . . the trust lands for the following purposes:
 . . .
(b) promoting and fostering in the district, or among persons who are or who at some time have been, resident in the district, education generally, including (but not by way of limitation)—
 . . .
(ii) the imparting of knowledge, proficiency and skill in—
 art, science, technical subjects, literature, *physical welfare, and other cultural purposes:*
(c) *for the purposes of public utility and for the purposes of maintaining and promoting in the district the general well-being of the public.*" [our emphasis]
- 16 It is clear from the purposes set out above, that the Trust is required to hold the trust lands for a number of purposes and that financial considerations are not expressly stated as being the only or primary purpose for holding those lands.
- 17 We therefore consider that, in the Trust making a decision about the proposal, although the trustees must "exercise the care and skill that a prudent person of business would exercise in managing the affairs of others", this does not preclude the Trust from considering granting the new ground leases at a nominal rent.
- 18 Under section 9 of the Leases Act, the Trust may "offer any land for leasing, after calling for public applications, **at a rent determined by the leasing authority**". The Trust has received a query about whether this provision (despite the emphasised words above) allows the Trust to grant a lease at a nominal rent. The query that the Trust received cited the *Vogel* case as supporting the view that a Trust should not grant a lease at a nominal rent.
- 19 The *Vogel* case related to the sale of Crown property, under a provision of the Land Act 1948 that is worded similarly to section 9 of the Leases Act. In the judgment in *Vogel*, Justice Mander held that:

"[74] In such situations, the land may be sold for a much reduced price or for a nominal sum that reflects the lack of any market for such land and the preference of the Crown to divest itself of responsibility for the land, *or to achieve social objectives*. Arguably, in the former situation the price agreed for the land, token or otherwise, will reflect the lack of a market, *but in the latter category of case the reduction will represent a deliberate discount. There would, however, be nothing unreasonable in the Commissioner agreeing to such a price in such circumstances.*

.....

[78] I accept that the flexibility available to the Commissioner to set the price for the sale of Crown land may extend to the ability to include a reduction to reflect the circumstances relating to the sale. *So long as the price fixed can be considered reasonable in the circumstances, that reduction may extend to the setting of a nominal price.*" [our emphasis]

- 20 We therefore consider that the decision in *Vogel* supports the view that, depending on the circumstances and having regard to the purposes or objectives sought to be achieved, a Trust may decide that selling (or in this case, leasing) land for a nominal figure will be appropriate.

Section 33, Trusts Act

- 21 We have already provided advice in relation to section 33 of the Trusts Act in the 12 May memo and have no further advice to provide in this regard. We do not consider that section 33, of itself, prevents the Trust from considering the proposal.

Section 35, Trusts Act

- 22 Under section 35 of the Trusts Act, a trustee must act impartially in relation to the relevant beneficiaries and must not be unfairly partial to one beneficiary or group of beneficiaries to the detriment of the others. In these circumstances, the Trust holds the trust land for specific purposes under the Greytown Act, and not for beneficiaries. We therefore do not consider that this particular section of the Trusts Act is relevant to the decisions to be made by the Trust.
- 23 We would be happy to discuss this advice further with you.



Rachel Robertson
Principal



Doran Wyatt
Partner

Memorandum

12 May 2022

To Paul Broughton
Greytown District Trust Land Trustees

From Doran Wyatt / Rachel Robertson **Reference** 2644113-6

Greytown District Trust Land Trustees – Grant of ground leases

Introduction

- 1 Thank you for your instructions in this matter.
- 2 You have asked us to consider whether the Greytown District Trust Land Trustees (*Trust*) may grant perpetually renewable ground leases under its leasing powers in the Greytown District Trust Lands Act 1979 (*Greytown Act*) or whether this power is restricted by the Trusts Act 2019 (*Trusts Act*), specifically section 33. That section prohibits trustees from binding or committing trustees to a future exercise or non-exercise of a discretion.
- 3 We have also considered whether the Public Bodies Leases Act 1969 (*Leases Act*), which applies to the Trust, could impact on the Trust granting a new ground lease to any person.

Background

- 4 You have advised that the Trust has put forward a proposal to South Wairarapa District Council (*SWDC*) for the Trust to grant SWDC new perpetually renewable ground leases in relation to three Trust properties (*properties*). The properties are as follows:
 - (a) 55-59 East Street, that is currently leased under a perpetually renewable ground lease to Greytown Bowling Club (*GBC*);
 - (b) 123 East Street, that is currently leased under a perpetually renewable ground lease to Greytown Rugby Club (*GRC*); and
 - (c) 175-177 Main Street, that is currently leased by Cobblestones for educational and historical purposes under a perpetually renewable lease,

(collectively, the *existing leases*).
- 5 We understand that the Trust initially proposed that the existing leases would be surrendered and that SWDC would be granted perpetually renewable 21-year ground leases for the properties. In turn, SWDC would then grant subleases to the current tenants GBC, GRC and Cobblestones, on the same or similar terms as are included in the existing leases (except at a peppercorn rent). It was further proposed that, in relation to the subleases of the two East Street properties, GBC and GRC would lease some, but not all of their current sites, and that the balance land that is currently not being used or is

under-utilised at these sites would then be free for SWDC to use for other sporting and recreational activities for the local community.

- 6 We further understand that since the Trust provided the initial proposal to SWDC, SWDC has indicated that it may not wish to be granted a ground lease in regard to the Cobblestones site, but SWDC may be interested in leasing some or all of the East Street properties.
- 7 You have asked us to advise on the question above, to ensure that the Trust meets its obligations under section 33 of the Trusts Act.
- 8 As a related issue, we also provide advice on the impact of the Leases Act.

Conclusion

- 9 We consider that, provided that the Trust decides to grant the proposed perpetually renewable ground leases in accordance with its powers and duties under the Greytown Act and the duties under the Trusts Act 2019 (*Trusts Act*), and reaches the decision in good faith and in accordance with the terms of trust in the Greytown Act, section 33 of the Trusts Act does not preclude the Trust from granting the proposed leases.
- 10 In accordance with the Greytown Act, the Public Bodies Leases Act (*Leases Act*) applies to leases or tenancies that the Trust grants. However, section 5 of the Leases Act allows the Trust to grant a lease to the Crown, a local authority, or another public body for a term, at a rent and on such other conditions as it thinks fit.
- 11 Therefore, to the extent that any of the new leases will be granted to SWDC, the more prescriptive leasing provisions in the Leases Act will not apply to those leases. However, if the Trust were to grant a new ground lease to any other third party, including any new lease to GBC, Cobblestones or GRC, the more restrictive provisions of the Leases Act will apply to the grant of that lease.
- 12 One effect of this is that the Trust would be unable to grant a new lease to a party that is not the Crown, a local authority or a public body at a nominal or peppercorn rent (and with no rent reviews), unless the term of the lease is no longer than 99 years (with no rights of renewal). This restriction would apply also to any new lease to GBC, GRC or Cobblestones.

Discussion

Powers under the Greytown Act

- 13 The Trust has a general power under section 15 of the Greytown Act, to grant leases and tenancies of the Trust land or any part of that land. Under section 16 of the Greytown Act, the Leases Act will apply to any lease that the Trust grants and, for that purpose, the Trust is considered a "leasing authority" for the purposes of the Leases Act. We note in passing that the Greytown Act specifies that certain provisions of the Leases Act, that relate mainly to offering leases by public auction and in relation to setting of rent, do not apply to the Trust.
- 14 There are no other provisions in the Greytown Act that restrict the Trust's ability to grant new perpetually renewable leases of the properties.

Leases Act

- 15 As noted above, any lease that the Trust grants must be on terms authorised by the Leases Act. However, section 5 of the Leases Act allows the Trust to grant a lease to the Crown, a local authority or any other public body, on any terms, and subject to any conditions, as the Trust thinks fit. If, however, any of the properties above are leased under new leases to GRC, GBC or Cobblestones, or to any other third party, these leases would need to be granted in accordance with the terms authorised by the Leases Act, particularly in relation to term, rent and rent reviews.
- 16 Due to the restrictions in the Leases Act, any new lease to GRC, GBC or Cobblestones, or to any other third party could only be granted with a nominal or peppercorn rent if the term of the lease is no longer than 99 years (with no rights of renewal). The Trust could not grant a perpetually renewable lease of all or part of the properties to those parties at a peppercorn rent. However, the Trust would not be required to include rent reviews in any new lease, so the strict rent review mechanisms in the Leases Act would not need to apply.
- 17 For completeness, we note that:
 - (a) section 23(1)(a) of the Leases Act permits the Trust to accept the surrender of an existing lease, as to the whole or any part of a property, on the terms and conditions that the Trust thinks fit; and
 - (b) the Leases Act permits the Trust to enter into leases at market rentals with perpetual rights of renewal and to agree to reduce rents payable; despite this, it would, in our view, not be possible for the Trust to grant such a new lease and then agree to reduce the rent payable beyond the first rent review date – to do so would risk breaching obligations under both the Leases Act and the Trusts Act.

Duties under the Trusts Act

- 18 The Trust is an express trust for the purposes of the Trusts Act and that the Trusts Act applies to the Trust.
- 19 There are two types of trustee duties that trustees must comply with under the Trusts Act, being mandatory duties and default duties. A trust is not able to contract out of the mandatory duties under sections 23 to 27 of the Trusts Act. In contrast, the default duties in sections 29 to 38 of the Trusts Act are able to be modified or excluded by the terms of the relevant trust.
- 20 Therefore, the Trust must comply with the mandatory duties, but the default duties may not automatically apply to the Trust. Although we consider that the majority of the default duties would apply to the Trust, there are some default duties that may not apply to the Trust, on the basis that the Greytown Act provides for powers that modify or exclude one or more of the default duties in the Trusts Act.
- 21 In accordance with the Trusts Act mandatory duties, the members of the Trust must:
 - (a) know the terms of the trust set out in the Greytown Act;
 - (b) act in accordance with those terms of trust in the Greytown Act;

- (c) act honestly and in good faith;
- (d) further the permitted purpose of the trust; and
- (e) exercise their powers for the proper purpose.
- 22 The default duties in the Trusts Act include the duty set out in section 33. We understand there may be concern that this duty potentially limits the Trust's ability to grant new perpetually renewable leases.
- 23 Section 33 provides as follows:
- 33 **Duty not bind or commit trustees to future exercise of discretion**
A trustee must not bind or commit trustees to a future exercise or non-exercise of a discretion.
- 24 This section codifies the common law rule relating to trusts, that a fiduciary (or trustee) cannot bind themselves as to how they will exercise a discretion in the future. This is because to do so would fetter the future discretion of the trustees.
- 25 As the Trusts Act has been in force for a short time, there is no case law on how section 33 may be interpreted by the Courts. However, the section is drafted using similar language to the common law "non-fetter" rule and therefore the existing case law relating to fettters of discretion is relevant.
- 26 Based on existing case law, we consider that the New Zealand courts are likely to interpret section 33 in a relatively limited manner so that, provided the relevant decision has been appropriately reached, it does not constrain trustees from reaching a commercial agreement or entering into a contract, even if that arrangement is long-term or permanent in nature (and, to that extent, technically prevents future trustees from making a different decision regarding that matter in the future). If the section were to be interpreted too widely, in our view this would unreasonably restrict trustees from making any decisions that would apply into the future.
- 27 We note that legal commentary also supports this assessment. As, for example, David Pollard observes in his 2014 article:
- A fetter implication can be over-ridden by the exercise of a contrary power – for example the exercise of a power of sale is valid, even though it 'fetters' the ability of the trustee to sell the same property later.
 - This means that it is clear that any rule should be described as a 'no improper or unlawful fetter', rather than just 'no fetter'.¹
- 28 It is worth noting that the author records that "The New Zealand Law Commission's recent (2013) proposals [*largely now reflected in section 33 of the Trusts Act*] to enact a general overriding 'no fetter' default rule falls into this trap." – i.e. that any fetter is prohibited. However, as Pollard observes, it is axiomatic that any disposal prevents

¹ *Trustees and Fiduciaries: the Limits on any 'No Fetter' Rule: Part 1*, David Pollard, page 192, Trust Law International, Vol. 28, No. 3, 2014.

trustees from making future decisions in respect of the relevant interest, and we do not think that the Courts would support such a restrictive interpretation.

- 29 In our view this concern is also answered in the current context by section 33 imposing a default duty only; that is, one which may be modified or excluded by the express or implied terms of a trust. To that extent, we think that the Trust's express powers, such as that to grant leases under clause 15 can, to the extent they are properly exercised, be said to modify the application of section 33 of the Trusts Act.
- 30 We also think it is relevant the Greytown Act applies the Leases Act generally to the Trust and specifically modifies the Leases Act in some respects. In our view, this confirms that the Trust is empowered to enter into leases of land of the type authorised by the Leases Act (refer section 7(1) of that Leases Act generally) and that these must therefore be within the scope of potential arrangements contemplated by the Greytown Act. Had it been intended that certain leases of land not be permitted, then the Leases Act would have been specifically modified to that extent (in the same way that the application of provisions of the Leases Act to the Trust is modified by the Greytown Act).
- 31 The case law also makes clear that the non-fetter rule (as is included in section 33 of the Trusts Act) is intended to restrict *unlawful* or *improper* fettering of trustee discretion, and is not intended to mean that trustees cannot fetter the exercise of future discretion at all. The courts have held that, provided that trustees make a decision, taking into account the following duties, then the decision made should be a valid one, and not be in breach of the "non-fetter" rule:
 - (a) trustees must act within their authority and powers of trust, as set out in the relevant trust instrument or statute;
 - (b) trustees must make decisions at the right time;
 - (c) trustees must take all relevant advice and consider all relevant facts and not consider irrelevant facts; and
 - (d) trustees must act for a proper purpose.
- 32 Therefore, in this instance, our view is that if the Trust has made its decision to grant the new ground leases:
 - (a) in accordance with the Greytown Act, the Trusts Act and the Leases Act;
 - (b) on the basis that it is the right time to grant these leases; and
 - (c) having considered all relevant facts and advice, and not having considered irrelevant facts,we do not consider that section 33 of the Trusts Act would apply.
- 33 On this basis, if the Trust decides to grant the proposed new ground leases in accordance with the factors in paragraph 26, above, then this decision should not be a breach of section 33 of the Trusts Act, as it is not an invalid fetter on the future exercise or non-exercise of a Trust discretion.

- 34 We note that, although we do not consider that the grant of the proposed new leases would be a breach of section 33 of the Trusts Act, the Trust will need to ensure that the terms of the new leases do not fetter the future exercise or non-exercise of members' discretion in relation to those leases. For example, special consideration would need to be given to provisions that bind the Trust to take a particular action in the future, such as granting a lessee a right of first refusal to purchase a property, at a price and on terms that are pre-agreed.
- 35 We would be happy to discuss this advice further with you.



Rachel Robertson
Principal



Doran Wyatt
Partner

Appendix Three

Auditors Opinion

4 May 2022

Helga Perry
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Dear Helga,

Greytown District Trust Lands Trust

We refer to Greytown District Trust Lands Trust's request of 6 April 2022 for our opinion in relation to accounting for land and buildings.

Currently, the land and buildings associated with the rental income in question re recognised under PBE IPSAS 16: *Investment Property* on the basis that it is held as an investment, deriving rental income for the trust (Regardless of the fact that the Trust then grants the cost of the rental back to the renter organisations).

If the Trust were to proceed with their planned changes, reducing rental income to \$1 per annum, this may constitute a change in use. The evidence of this change being that the property is no longer being used to derive rental income and is being charged well under the market rates for similar rental properties.

If we refer to IPSAS 16 p.66 and p.71 below it outlines that a change in use would constitute a transfer from investment property to owner-occupied property (defined as property held (by the owner or by the lessee under a finance lease) for use in the production or supply of goods or services, or for administrative purposes).

This would in turn require a change in accounting policies to recognise the properties under PBE IPSAS 17: Property, Plant and Equipment.

Transfers

66. **An entity shall transfer a property to or from investment property when, and only when, there is a change in use. A change in use occurs when the property meets, or ceases to meet, the definition of investment property and there is evidence of the change in use. In isolation, a change in management's intentions for the use of a property does not provide evidence of a change in use. Examples of evidence of a change in use include:**

- (a) **Commencement of owner-occupation, or of development with a view to owner-occupation, for a transfer from investment property to owner-occupied property;**
- (b) **Commencement of development with a view to sale, for a transfer from investment property to inventories;**
- (c) **End of owner-occupation, for a transfer from owner-occupied property to investment property; and**
- (d) **Inception of an operating lease (on a commercial basis) to another party, for a transfer from inventories to investment property.**

71. For a transfer from investment property carried at fair value to owner-occupied property or inventories, the property's cost for subsequent accounting in accordance with PBE IPSAS 17 or PBE IPSAS 12, shall be its fair value at the date of change in use.

As stated in p.71 above, this would be accounted for at fair value at the date of the change in use.

If we refer to IFRS 13 Leases: Fair Value Measurement hierarchy, in the first instance the properties would be measured at market value (level 1 input). Therefore, recorded at the valuation amount as of (or as close as possible) the date of change in use.

IFRS 13

Fair value hierarchy

- 72 To increase consistency and comparability in fair value measurements and related disclosures, this NZ IFRS establishes a fair value hierarchy that categorises into three levels (see paragraphs 76–90) the inputs to valuation techniques used to measure fair value. The fair value hierarchy gives the highest priority to quoted prices (unadjusted) in active markets for identical assets or liabilities (Level 1 inputs) and the lowest priority to unobservable inputs (*Level 3 inputs*).

Level 1 inputs

- 76 Level 1 inputs are quoted prices (unadjusted) in active markets for identical assets or liabilities that the entity can access at the measurement date.
- 77 A quoted price in an active market provides the most reliable evidence of fair value and shall be used without adjustment to measure fair value whenever available, except as specified in paragraph 79.

This change would mean that annual valuations (and revaluations) would no longer be required, rather, the buildings would be depreciated over their useful life unless opted to be recorded on a revaluation basis.

If recorded under the revaluation basis, valuations would instead need to be made with sufficient regularity to ensure that the carrying amount does not differ materially from that which would be determined using fair value at the reporting date (IPSAS 17 p.44). Land of course would not be depreciated.

A note to explain the above changes in accounting policy would need to be adequately detailed and disclosed within the financial statements.

We trust this is useful information about the accounting consequences of management's commercial actions.

If we can be of further assistance, please advise.

Kind regards
Moore Markhams Wellington Audit



Michael Rania
Partner
Email: michael.rania@mooremarkhams.nz

Appendix Four
South Wairarapa District Council
Response to Proposal



SOUTH WAIRARAPA
DISTRICT COUNCIL
Kia Reretahi Tātau

5th of May 2022

Phil Holden
Chairman
Greytown Trustlands Trust

South Wairarapa District Council Proposal to Greytown Trustlands Trust
for the provision of Greenspace for the community of Greytown

Dear Phil,

Please see attached a proposal that South Wairarapa District Council would like to present to the Greytown Trustlands Trust board.

We hope the board sees this favourable and that both parties can work together to achieve a positive outcome for the benefit of the Greytown Community.

If you require any further information, please do not hesitate to contact me.

Regards

A handwritten signature in black ink, appearing to read "H. Wilson".

Harry Wilson
Chief Executive Officer
South Wairarapa District Council
06 3069611

5th of May 2022

Proposal to Greytown Trustlands Trust

for the provision of Greenspace for the Community of Greytown

Introduction:

Greytown currently suffers from a deficit of Community greenspace, South Wairarapa District Council (SWDC) is pleased to provide Greytown District Trustlands Trust (GDTLT) this proposal for the benefit of the Greytown Community.

Background to the Proposal:

GDTLT owns two sites in central Greytown that are considered recreational assets by nature, due to the long-term use:

1. 55-59 East Street (leased by Greytown Bowling Club)
2. 123 East Street (leased by Greytown Rugby Club)

Sites one and two comprise some 7.7 acres (3.1 hectares) of land. The land is utilised by two sporting codes on a seasonal basis resulting in significant underutilisation of centrally located greenspace.

The current issues with the two sites stem from the existing leases arrangements. Held via perpetual leases, these single use sites not freely available for wider community recreational use and, for most part, are significantly underutilised at various times of the year.

The land is owned by GDTLT, for the benefit of Greytown Residents. SWDC proposal seeks to ensure the widest possible community utilisation of the sites through re-engineering the existing occupational arrangements with the agreement of GDTLT.

Proposal overview:

GDTLT's current assets located at 55 & 123 East St. Greytown are two key sites that when combined have the potential to provide significant additional community focused usage that currently is available. It is proposed that SWDC and GDTLT agree to the following arrangements to enable full community utilisation of these centrally located sites.

SWDC proposes leasing the two sites from GDTLT. Existing perpetual leases would need to be surrendered by GDTLT and new leases put in place to reflect arrangements as set out below. The aim is to provide an enduring solution that is capable of remaining relevant in terms of greenspace provision for the local community.

Lease one

55 East Street (Bowling Club)

SWDC proposes that GDTLT lease the Bowling Club No.2 land to SWDC, rental to be \$1.00 per year, 21year renewal terms.

GBC retains the clubhouse, all out buildings outside the marked area below and is responsible for all maintenance of its clubrooms and outbuildings.

The balance of the site (currently referred to No 2 green) to be held by SWDC for public greenspace. Under the lease agreement with GDTLT, permitted use to be public recreation space, no change to existing zoning.

This decision on the greenspace available can be presented to the community via consultation at the same time as SWDC consult over the West Street/ Menz Shed property.



Lease Two

123 East Street (Greytown Rugby Club)

SWDC proposes that GDTLT lease the partial site (playing fields and carpark) to SWDC, rental to be \$1.00 per year, 21year renewal terms.

Under the lease, permitted use to be public recreation space with long term arrangements in place between SWDC & Greytown Rugby Club Football Club (GRFC) to enable GRFC to use playing fields for practice and games. This would align with similar arrangements SWDC has in place with rugby clubs elsewhere in the district. No Change to the zoning.

Rental to be a \$1.00 per year, with renewals at 21years.

GRFC retains full ownership and responsibility and maintenance of its clubrooms.

SWDC will work with GRFC on other users of the ground by mutual agreement thru the sub-lease

SWDC will maintain the grounds including grass and fertiliser when required thru their Parks and Reserves contract with City Care. GRFC will be responsible for marking of their fields.

Finer details can be discussed between SWDC and GRFC held within their sub lease.



Greytown Sport and Leisure Society (GSL)

Funding the Greytown Sport and Leisure (GSL) \$65,000 places SWDC in a difficult position as we represent the whole of the South Wairarapa District. This really needs to represent the whole district such as **South Wairarapa Sports and Leisure Society** and SWDC believe this can be made possible over time. We would like to place this on hold.

If this total proposal is accepted SWDC will endeavour to look at all avenues to make South Wairarapa Sports and Leisure Society achievable thru grants and business sponsorship as it has been successful for Greytown Sports clubs.

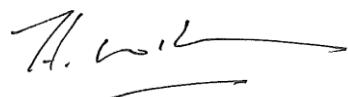
Summary

This proposal to GDTLT from SWDC is a positive step for both parties and a huge boost for the community showing that we can work together for the benefit of the community. This proposal gives clear certainty that the greenspace has been secured which allows parties involved a clear future ahead. It will bring long term benefits to the Greytown community with an increase in usable green space with minimal costs. Additionally, in agreement to this proposal it allows the potential for SWDC a chance to secure part of the farmland adjoining 123 East Street if it becomes available which will cover a lot of the future demand of greenspace for all sports in an expanding Greytown.

SWDC will refine the working details to each party involved through the sub-lease if this proposal is accepted.

I hope GDTLT looks at this proposal in a positive way for the benefit of all involved and the overall future of the Greytown community.

Regards

A handwritten signature in black ink, appearing to read "H. Wilson".

Harry Wilson

Chief Executive Officer
South Wairarapa District Council

06 3069611