

THE GENERAL POWER OF COMPETENCE: An introduction to key facts for local councils¹

Local councils in England were given a 'general power of competence' (GPC) in the Localism Act 2011, sections 1 to 8. This paper explains the freedom granted by the general power, the criteria to be met before a local council can use it and some restrictions on using the power. It notes the CILCA questions and pass criteria (see also the Portfolio Guide 2012) and some useful weblinks. The power does not apply to parish meetings or to local authorities in Wales.

The freedom of the GPC

Councils no longer need to ask whether they have a specific power to act. The GPC (LA 2011 s1(1)) gives local authorities, including eligible local councils, *"the power to do anything that individuals generally may do"* as long as they don't break other laws. It is a 'power of first resort'; this means that when searching for a power to act, the first question you ask is whether you can use the GPC. To find the answer, you ask whether an individual is normally permitted to act in the same way. For example:

- An individual can't put someone in prison – and neither can a local council (although, like an individual, the council can press for a prosecution).
- An individual can't impose taxes on other people – so a local council can't use the GPC to raise taxes.

On the other hand, an individual

- could run a community shop or post office (provided they abide by relevant rules) – so a local council can do likewise;
- can set up a company to provide a service. The GPC clearly permits a local council to engage in commercial activity as long as it sets up a company or co-operative society (s4) for this purpose.

Sometimes a council can do things that an individual can't do – such as creating byelaws, raising a precept or issuing fixed penalty notices - but it must do so using the specific original legislation. The GPC does not mean that the council can delegate decisions to individual councillors – this is a procedural matter that remains enshrined in law.

The Government hopes that the GPC gives local councils confidence in their legal capacity to act for their communities. It encourages councils to use this power to work with others in providing cost-effective services and facilities in innovative ways to meet the needs of local people. The council can lend or invest money; it can trade; it can even sell energy to the National Grid. If another authority has a statutory duty, then it remains their duty to provide that service (eg education, waste collection, social services) but local councils can still help out. For example, a local council can support a school in many ways, just as an individual might. It could even help a community trust to run a local school.

The council can undertake activities using the GPC anywhere – not just in the parish (s1(4a)). It isn't necessary to worry whether the activity is for the benefit of the council, the area or the community (s1(4c)) although, in practice, parishioners might object if they can't see the benefit! And unlike the Local Government Act 1972, s137, it doesn't matter whether there

¹ Parish, town and neighbourhood councils in England

are any other specific powers permitting the council to take action (s1(5)). So, for example, a council can use the GPC to build a sports facility even though there is another power enabling it to do the same thing (Local Government (Miscellaneous Provisions) Act 1976 s19).

As always, the council is expected to act in accordance with the general principle of 'reasonableness' established by the Wednesbury court case in 1948. The judgement made it clear that a council can exercise reasonable discretion when interpreting legislation provided that it justifies its decision in terms of relevant, rather than irrelevant, matters.

Criteria for eligibility

The freedom of the GPC is available to local councils that meet two criteria for eligibility (LA 2011 s8) set out in a statutory instrument known as the *Parish Councils (General Power of Competence) (Prescribed Conditions) Order 2012* that came into force in April 2012.

A local council must decide, at a full meeting of the council, that it meets the criteria for eligibility at that particular point in time. A resolution to this effect must be written clearly in the minutes of that meeting. The council is then required to revisit that decision and make a new resolution at every 'relevant'² annual meeting of the council to confirm that it still meets the criteria (if it does). This means that eligibility remains in place until the first annual meeting of the council after the ordinary election even if the condition of the eligibility criteria has changed. The two criteria are:

Elected councillors At the precise moment that the council resolves that it meets the criteria, the number of councillors elected at the last ordinary election, or at a subsequent by-election, must equal or exceed two thirds of its total number of councillors.

Elected councillors include all councillors who stood for election whether or not the election was contested. Co-opted or appointed councillors do not count as they are not elected.

The total number of councillors means the number of seats on the council including those that might be vacant.

If two thirds is not a whole number, then it must be rounded up to the next whole number. For example, if the number of councillors in total is 8 and two thirds is approximately 5.3, then the number of councillors that must be elected is 6.

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| Total council seats | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| Two thirds | 4 | 4 | 5 | 6 | 6 | 7 | 8 | 8 | 9 | 10 | 10 | 11 | 12 | 12 | 13 | 14 |

² A 'relevant' annual meeting is the annual meeting of the council after the ordinary election that normally takes place every four years. The confirmation does not have to take place every year.

The qualified clerk The clerk must hold at least one of the sector-specific qualifications and should have completed the relevant training designed as part of the National Training Strategy for local councils. From April 2012, this training is undertaken as part of a clerk's preparation for one of the recognised sector-specific qualifications. Where a clerk studied for one of these qualifications before April 2012, they undertake the relevant training and must pass the short section 7 of CiLCA 2012 in order to be fully qualified for the purposes of the GPC (see below)³.

The recognised sector-specific qualifications are:

- The Certificate in Local Council Administration (CiLCA) awarded by the Monitoring and Verification Board (or previously by the AQA)
- The higher education qualifications for clerks awarded by the University of Gloucestershire or its predecessor institutions, namely:
 - The Certificate of Higher Education in Local Council Administration
 - The Certificate of Higher Education in Local Policy
 - The first level of the Foundation Degree in Community Engagement and Governance (the Level Four course)
 - Any equivalent successor qualification

It is important that the council pays attention to the advice of its trained and qualified clerk when taking decisions to ensure that it acts lawfully.

Since the GPC can be used for most of the activities of the council rather than for unusual one-off projects, the council cannot employ a clerk on a short-term contract specifically for using the power. If the council loses its qualified clerk or has insufficient elected councillors, then it must record its ineligibility at the next 'relevant' annual meeting of the council (after the ordinary election). If it has already started an activity under the GPC for which there is no other specific power, it remains eligible for the purpose of completing *that* activity, but it can't start anything new under the power until it is in a position to make the formal decision that it meets the criteria. The council must go back to identifying whether it has a specific power to act and use the restricted s137 if there is no appropriate specific power. When entering into a contract under the GPC, a council should be cautious if the contract lasts beyond the next annual meeting when the council might no longer be eligible to use the GPC. There is a risk of legal action if the council ends the contract unexpectedly. It is wise to seek legal advice when setting up the contract.

Risks and restrictions limiting the GPC

There are some risks associated with using the GPC. Inadequate community support or insufficient funding are significant risks while there are several statutory or legal restrictions

³ A clerk who studied the University of Gloucestershire module covering law for local councils before the academic year 2012/13 (but who doesn't have CiLCA 2012) must also pass Section 7 of CiLCA 2012.

that a local council should consider before using the power. Clerks and councillors should be aware of the following restrictions that potentially could limit the use of the GPC.

- If a council is already subject to a statutory duty, then that duty remains in place. So, for example, a local council that is eligible to use the GPC must continue to abide by its duties. For example:
 - The council has a duty to act with regard to the likely effect on crime and disorder and to do all it can to prevent crime and disorder in its area (Crime and Disorder Act 2006 s17).
 - The Natural Environment and Communities Act 2006 s40 imposes a duty on local councils to consider conserving biodiversity in exercising its functions.
 - The Smallholding and Allotments Act 1908 s23(1) gives councils a duty to provide allotments if they are of the opinion that there is a demand for them.
- There are also many procedural and financial duties that remain in place for regulating the governance of a local council.
- Furthermore, the council must comply with employment law, Health and Safety legislation, equality legislation and duties related to data protection and freedom of information for example.
- The council must set up a company or co-operative society if it wishes to trade. If the council sets up a company or co-operative society it must abide by company law. Councils are advised to refer to more detailed Government guidance on trading and on charging (see links below). The council can charge for services provided under the GPC⁴.
- If the council wants to invest in a local business to support the local economy, it should follow Government advice on investment (see links below). If it wishes to support a community enterprise, an economic development grant might be a sensible option.
- Remember, if another authority has a statutory duty, then it remains their duty to provide that service (eg education). If you are worried that you might be encroaching on another authority's duty, then ask whether an individual, a private company or a community trust might be able to step in and help. If they can, then so can the local council (although it might need to set up an appropriate delivery body first).
- If the action the council wishes to take is also covered by a specific power then any restrictions that apply to the overlapping power are still in force. So if existing legislation requires the council to ask permission before acting, then it must do so. For example, the council asks permission from the Highways Authority before doing work on roadside verges.

⁴ If councils have a statutory duty to provide a service **free of charge**, they cannot charge for that service. This provision applies to principal authorities but does not affect local councils as they are **not required by law** to provide **any** services free of charge

The GPC is a power and not a source of money. It cannot be used to raise the precept and if loans are needed then normal procedures apply. The council can seek other sources of finance such as the Community Infrastructure Levy, grant funding, sponsorship, commercial activity and agreements with other authorities. As always, the council should ensure support from local taxpayers.

So councils cannot use the GPC primarily to raise money but they can receive income as a consequence of using the power for a different primary purpose. For example, a council could give financial assistance to a struggling local enterprise by purchasing share capital just as any individual could. Similarly the council could lend money to support a local activity and earn interest on the loan and it can raise sponsorship for a community project.

Although councils are encouraged to be innovative, they should be aware of the risks involved in using the power in addition to a lack of money or community support. For example:

- There is a risk of being challenged
- Trading activities could damage competing local activities
- The council risks its reputation and public money if a project goes wrong

S137 and the power of well-being (PWB)

How do these two powers relate to the GPC?

- The money that can be spent under the Local Government Act 1972 s137 is limited while the power is restricted by regulations for use and scope; for example, councils must keep specific accounts for s137, they cannot use the power to give money to individuals and spending must be commensurate with the benefit gained. In addition a council can't use s137 if another specific power exists. A council that is eligible to use the GPC can no longer use s137 as a power for taking action for the benefit of the area or its community (Sch 1(1))⁵.
- The PWB (Local Government Act 2000 s2) offered councils more opportunity to improve and promote the economic, social and environmental well-being of an area and its community with no restrictions on spending. However, in England it has now been replaced by the general power of competence which offers even more freedom to act. Transitional arrangements allow councils to complete projects started under the PWB.

Further changes affecting the GPC

The Secretary of State for Communities and Local Government has the power to change the enacted legislation (s5) so it is important to keep up to date with legal advice. Changes will not be made without consultation and should therefore come as no surprise. The Government is keen to know whether there are any additional restrictions affecting the use of the GPC so that it can consider removing them. Contact the Society of Local Council Clerks or the National Association of Local Councils (via your County Association) if you wish to draw attention to any legislative constraints affecting the use of the power.

⁵ Note that s137(3) which permits the council to contribute to UK charities, public sector funds and public appeals remains in place.

The CiLCA Questions

Clerks are required to respond to these tasks correctly in order to pass CiLCA. They write a paragraph of approximately 200 words:

- What is the general power of competence and where is it found?
- What criteria must local councils meet to be eligible to use the general power of competence and when must a council confirm that it is eligible?
- List four restrictions to consider before using the power for a specific purpose.
- List three activities that your council might undertake using the general power of competence giving any restrictions that might apply to these activities

Pass criteria

- A clear understanding of the general power of competence
- A clear explanation of the eligibility criteria and arrangements for confirming eligibility
- A list of four possible restrictions to consider before using the power
- A list of three activities with appropriate restrictions

Useful web links

The Localism Act 2011 <http://www.legislation.gov.uk/ukpga/2011/20/contents/enacted>

Parish Councils (General Power of Competence) (Prescribed Conditions) Order 2012
<http://www.legislation.gov.uk/ukdsi/2012/9780111519868>

The Localism Act 2011: Explanatory notes
<http://www.legislation.gov.uk/ukpga/2011/20/notes/division/5/1/1>

Charging guidance
<http://www.communities.gov.uk/documents/localgovernment/pdf/151291.pdf>

Trading guidance
This guidance is in two documents. The second document is an addendum.
<http://www.communities.gov.uk/documents/localgovernment/pdf/133628.pdf>
<http://www.communities.gov.uk/documents/localgovernment/pdf/323153.pdf>

Investment guidance
<http://www.communities.gov.uk/documents/localgovernment/pdf/1501971.pdf>