



Radyr & Morganstown Community Council Cyngor Cymuned Radur a Threforgan

Agenda Item 10

Meeting: Full Council
Date: 21 July 2022
Report Author: Clerk to the Council

Local Government and Elections (Wales) Act 2021: General Power of Competence

Introduction

1. The Local Government and Elections (Wales) Act 2021 allows eligible town and community councils in Wales to resolve eligibility and adopt the General Power of Competence.
2. This report proposes that the Council adopts the power.

Key Issues

3. The freedom to exercise the power is available to local councils that meet three criteria for eligibility:
 - (i) at least two thirds of the total number of councillors of the council have been declared elected.
 - (ii) a qualified clerk.
 - (iii) the council has unqualified accounts which have been received by the council during the previous twelve-month period ending on the day that the resolution to adopt GPC is considered by the council.
4. The Council currently meets these criteria.
5. Members may find the attached Guidance helpful. It explains many of the issues associated with the power in further detail.

Financial Implications

6. None at this stage. Any expenditure would come from approved resources. There is no financial “cap” on expenditure incurred using this power.

Links to Corporate Objectives

7. The Council’s Annual Report confirms that the Council’s objectives include delivering:

A Prosperous Community. A Resilient Community. A Healthier Community.
A More Equal Community. A Cohesive Community. A Community of Vibrant Culture & Thriving Welsh Language. A Globally Responsive Community.
8. The issues described in this report will help the Council deliver these Wales-wide sustainability goals.

Staffing Implications

9. The Clerk took part in an on-line training session arranged by the Society of Local Clerks on 24 June 2022.
10. This will be followed up by the Clerk undertaking an additional CiLCA Module which relates to the power in isolation and leads to a further formal accreditation.

Risk Management Implications

11. The Council is in the process of reviewing its Risk Management Strategy, which refers to the use of this power

Legal Implications

12. The Local Government and Elections (Wales) Act 2021 allows eligible town and community councils in Wales to resolve eligibility and adopt the General Power of Competence.
13. Members considered Welsh Government Guidance relating to the wider provisions of the Act at a meeting held on 23 June 2022.

Recommendation

14. It is **recommended** that the Council resolves itself to be an eligible Council under the General Power of Competence as it meets all the criteria set out in legislation being:
 - (i) at least two-thirds of the total number of members of the Council have been declared to be elected whether at an ordinary election or at a by-election
 - (ii) the Clerk to the Council holds such qualification or description of qualification as may be specified by the Welsh ministers by regulations.
 - (iii) the Council satisfies the audit condition.

L07 General Power of Competence (Wales)

An introduction to key facts for town and community councils in Wales

The *Local Government and Elections (Wales) Act 2021¹ (the Act 2021): Part 2* allows eligible town and community councils (local councils) in Wales to resolve eligibility and then to adopt the general power of competence (GPC). GPC is available to parish and town councils in England, but different criteria apply.

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 2021) and some useful weblinks.

What is the general power of competence?

Local councils no longer need to ask whether they have a specific power to act. *The Act 2021: Part 2 (s24)* gives the “power to do anything that individuals generally may do” as long as other laws aren’t broken. 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.

However, there are conditions that a local council must consider when initiating commercial activities, such as running a local shop. *The Act 2021: Part 2 (s27:1)* allows a local council to “do things for commercial purpose, only if they would do them **other than** for a commercial purpose”. If a local council does undertake a commercial activity it must do so through a company². *The Act 2021: Part 2: (s27:2)*. Also in relation to commercial activities *Section 2 (2) of The General Power of Competence (Commercial Purpose)(Conditions)(Wales) Regulations 2021³* states that a local council must “prepare a business case in support of the proposed exercise of the general power” and it “must approve that business case.”

The business case must set out:-

- “the aims and objectives of the proposed exercise of the general power,
- the costs, investments and other resources required to achieve those aims and objectives,
- the financial outcomes that are expected to be achieved by the proposed exercise of the general power
- any other relevant outcomes that are expected to be achieved
- any risks associated with the proposed exercise of the general power including an assessment of the severity of those risks and any actions that may be taken to mitigate those risks
- the impact (including on the terms and conditions of employment) on any staff that it intends to supply to a company through which it is exercising the general power to do things for a commercial purpose and

¹ The Local Government and Elections (Wales) Act 2021 was passed by Senedd Cymru on 18th November 2020 and received Royal Assent on 20th January 2021.

² A company is defined within the meaning of section 1 (1) of the Companies Act 2006 (c.46) or a registered society within the meaning of the Co-operative and Community Benefit Societies Act 2014 (c14) or the Co-operative and Community Benefit Societies Act (Northern Ireland) 1969 (c.24 (NI)).

³ A statutory instrument in force from 1st November 2021.

- the intended arrangements for the staffing of the company through which it is exercising the general power to do things for a commercial purpose, including the proposed terms and conditions of employment of any staff to be employed.”

Sometimes a local 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.

GPC gives local councils confidence 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. 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. *The Act 2021: Part 2 s 24 (2)*. It isn't necessary to worry whether the activity is for the benefit of the council, the area or the community although, in practice, parishioners might object if they can't see the benefit! Unlike the *Local Government Act (LGA) 1972, s137*, it doesn't matter whether there are any other specific powers permitting the council to take action. 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*).

Criteria for eligibility and reaffirming eligibility

The freedom of the GPC is available to local councils that meet three criteria for eligibility *The Act 2021:Part 2:s30*.

- (iv) That at least two thirds of the total number of councillors of the council have been declared elected.
- (v) A qualified clerk.
- (vi) The council has unqualified accounts⁴ which have been received by the council during the previous twelve month period ending on the day that the resolution to adopt GPC is considered by the council.

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 Act 2021: Part 2 (s30:6)* The council is then required to revisit that decision and make a new resolution at every 'relevant'⁵ 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.

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 (including at a bye-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.

⁴ Unqualified accounts are those where the Auditor General for Wales has not expressed any dissatisfaction.

⁵ 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.

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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 |

The qualified clerk⁶

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 council. 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 May 2022, they are advised to undertake additional training to confirm that they understand how the general power of competence operates. The Society of Local Council Clerks provide the standalone unit for assessment. Clerks who hold a CiLCA certificate without this module would benefit from completing this prior to the council passing a resolution that it is an eligible community council.

The recognised sector-specific qualifications are:

- "The Certificate in Local Council Administration (CiLCA)
- A Certificate of Higher Education in Community Governance
- A Certificate of Higher Education in Community Engagement and Governance
- A Certificate of Higher Education in Local Policy." *The Eligible Community Councils (General Power of Competence) (Qualifications of Clerks) (Wales) Regulations 2021 (s2)*

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.

Unqualified accounts - The local council must confirm that the last two sets of accounts is unqualified in the opinion of the Auditor General for Wales and that the most recent set of accounts was received by the council during the period of 12 months ending on the day the council will (if it passes a resolution) become an eligible community council.

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 *LGA 1972 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 and restrictions associated with using the GPC. Inadequate community support or insufficient funding are significant risks while there are several statutory or legal restrictions 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.

⁶ The accepted qualifications are set out in the Eligible Community Councils (General Power of Competence)(Qualifications of Clerks) (Wales) Regulations 2021 in force from 5th May 2022.

- One restriction for undertaking a commercial venture in Wales is the need to comply with legislation within the *Act 2021* and to be clear that an activity is not just being done for commercial reasons, ie there is a benefit to the community. Any commercial venture must be delivered through a company and must have a business case covering specific items (see above) which has been approved by the council. The council can charge for services provided under the GPC.⁷
- 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 Environment (Wales) 2016 s 6* 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.
- 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.

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 local 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 – how does this relate to GPC?

⁷ 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

- 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 (*Localism Act 2011: Sch 1(1)*)⁸. The money that can be spent under the LGA 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.

Useful web links

The Local Government and Elections (Wales) Act 2021 <https://www.legislation.gov.uk/asc/2021/1/contents>

The General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021

<https://www.legislation.gov.uk/wsi/2021/1166/made>

The Eligible Community Councils (General Power of Competence)(Qualifications of Clerks) (Wales)

Regulations 2022 <https://www.legislation.gov.uk/wsi/2021/1403/note/made>

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⁸ Note that s137(3) which permits the council to contribute to UK charities, public sector funds and public appeals remains in place.