

## LINDSEY PARISH COUNCIL

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Paper prepared by: Clerk to the Parish Council for meeting of 8<sup>th</sup> September 2021

### General Power of Competence

Local councils in England were given a 'general power of competence' (GPC) in the Localism Act 2011, sections 1 to 8. In using the GPC, Council must be aware of 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.

#### Why use 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 do not break other laws in so doing." <sup>1</sup>

As such it is a "power of first resort" and requires a Council when looking for the power to act, to first ascertain whether it could use the GPC. Council is advised to first ask whether an individual is normally allowed or permitted to act in the same way. <sup>2</sup>

Council must ensure that where there is specific legislation it should still use that power to carry out its functions. <sup>3</sup>

The GPC does not mean that the council can delegate decisions to individual councillors – this is a procedural matter that remains enshrined in law. If another authority has a statutory duty, then it remains their duty to provide that service (e.g. education, waste collection, social services) but local councils can still help out.

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!

Unlike the Local Government Act 1972, s137, it doesn't matter whether there 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).

Council must be aware that it 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

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<sup>1</sup> Examples:

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.

<sup>2</sup> Examples :

An individual could run a community shop or post office (provided they abide by relevant rules) – so a local council can do likewise

An individual could set up a company to provide a service. The GPC 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.

<sup>3</sup> Examples:

Creating byelaws, raising a precept or issuing fixed penalty notices.

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**

Local councils must 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'<sup>4</sup> 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 meeting at which 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.<sup>5</sup> Elected councillors include all councillors who stood for election whether or not the election was contested. The total number of councillors means the number of seats on the council including those that might be vacant.

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.

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<sup>6</sup>

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.

### **Risks and restrictions limiting the GPC**

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<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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
- Any equivalent successor qualification

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 that a local council should consider before using the power.

The following restrictions 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.<sup>7</sup>
- The GPC does not take the place of the many procedural and financial duties that remain in place for regulating the governance of a local council.
- 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. Councils are advised to refer to more detailed Government guidance on trading and on charging.<sup>8</sup>
- If another authority has a statutory duty, then it remains their duty to provide that service.
- 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.<sup>9</sup>

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

#### **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

The Localism Act 2011: Explanatory notes

<http://www.legislation.gov.uk/ukpga/2011/20/notes/division/5/1/1><http://www.legislation.gov.uk/ukdsi/2012/9780111519868>

**Proposal by the Clerk to the Council for consideration at the meeting of 8<sup>th</sup> September 2021:**

**Council to consider whether it fulfils the eligibility criteria for using the GPC and that, having satisfied itself that it is eligible to use the power, resolves at the meeting of 8<sup>th</sup> September 2021 to adopt the power and use it when there is no specific legislation to be used to carry out its functions.**

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<sup>7</sup> 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).

<sup>8</sup> 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

<sup>9</sup> For example, the council asks permission from the Highways Authority before doing work on roadside verges