

1. Chapter 1 - General power of competence and eligible community councils

Applying the General Power of Competence

- 1.1. The general power of competence (GPoC) permits qualifying authorities to do “anything that an individual generally can do”. It is a power of first resort which means that a qualifying authority does not need to rely on specific powers in legislation to do something, so long as what is intended is not otherwise prohibited. The use of the GPoC is subject to restrictions and legal requirements which are described in this guidance. Where there are restrictions on the use of an existing specific power, those restrictions will also apply to the use of the GPoC.
- 1.2. An ‘eligible community council’ is a qualifying authority is defined in section 24(1) of the 2021 Act.
- 1.3. The GPoC enables eligible community councils to act in their communities’ best interests, generate efficiencies and secure value for money outcomes. Eligible community councils will also be able to raise money by charging for discretionary services and to trade for commercial purposes and in their ordinary functions.
- 1.4. The general power of competence gives eligible community councils the same powers to act that an individual generally has, thus enabling them to do similar sorts of things. For example, an individual *could not* impose taxes on other people – so a community council *could not* use the GPoC to raise taxes. However, an individual *could* run a community shop or a post office, so a community council *could* also set up a shop.
- 1.5. The GPoC allows an eligible community council to engage in commercial activity if it sets up a company or co-operative society for this purpose. This is explained more fully in the section on exercising the GPoC for a commercial purpose.
- 1.6. The kinds of activities that the GPoC could be used for include:
 - Lending or investing money e.g. to support village or town activities, or to support and generate local businesses;
 - Providing discretionary support and activities e.g. taking over youth facilities or offering organised support (such as reading/numeracy assistants to schools);
 - Generating and selling green energy;
 - Building and providing a range of community facilities.
- 1.7. However, if another authority (i.e. the principal authority) is under a statutory duty to provide that service (e.g. library services, education, waste collection), then while it shall remain the principal council’s duty, eligible community councils can still help.

Eligibility conditions

- 1.8. The 2021 Act sets out the conditions which community councils must meet to become an '*eligible community council*' with access to the GPoC. Only councils which meet the eligibility conditions can use this general power. The three conditions are specified in the 2021 Act, section 30 (2)-(4) and are set out below:
- At least two-thirds of the total number of members of the council have been declared to be elected (including unopposed), whether at an ordinary election or at a by-election (section 30(2)).
 - The clerk to the council holds such named qualification or certification as may be specified by the Welsh Ministers by regulations (section 30(3)).
 - The two most recent Auditor General for Wales (AGW) opinions on the council's accounts are unqualified. The most recent must have been received in the previous 12 months (section 30(4)).
- 1.9. The three conditions, collectively, serve as indicators that a community council represents the views of its electorate, that the council has a recent history of sound governance and that its clerk has the core knowledge, skills and understanding to support a community council in the exercise of the new general power. This provides a level of confidence in a council's ability to execute the GPoC appropriately.
- 1.10. Where a community or town council wishes to exercise the GPoC it must resolve itself eligible through a formal resolution. A community council must meet the eligibility conditions set out above and pass a resolution at any full meeting confirming that it meets those conditions. It then resolves itself as an eligible community council able to exercise this general power. In accordance with paragraph 26ZA of Schedule 12 to the Local Government Act 1972 ('the 1972 Act') – as inserted by Schedule 4, Part 1 of the 2021 Act – the outcome of the decision to become an eligible community council *must be published on the council's website within seven working days of the resolution being passed*.
- 1.11. These conditions will be kept under review and there is scope, under section 35 of the 2021 Act, for the Welsh Ministers to amend the conditions. Any proposed changes to these conditions would be made by the Welsh Ministers making regulations and subject to consultation prior to being made.

The Three Conditions

Condition 1: Proportion of elected members

- 1.12. This condition reflects the principle that a council which exercises the GPoC should reflect the democratic views of the community. Local services are best provided within a democratic framework of local accountability. People who use local services should have as much say as possible in the way they are managed and delivered.
- ✓ 1.13. The condition is for at least two-thirds of members to be elected. This includes those elected at by-elections and those elected unopposed. This means that the minimum number of elected councillors must be a whole number equal to,

yes

or higher than, two-thirds of councillors. For example, a council with nine councillors must have at least six elected councillors.

1.14. Where this is not a whole number, then it must be rounded up. The table below confirms the number of elected councillors required to meet this condition.

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

Condition 2: Relevant clerk qualification

1.15. This condition reflects the importance that any council which exercises the GPoC needs to be sufficiently supported when doing so.

1.16. The Certificate in Local Council Administration (CiLCA) is widely recognised by the sector as providing a broad knowledge of all aspects of the community council clerk's work, role and responsibilities, including the law, council procedures, finance, planning and community involvement. *yes.*

1.17. In accordance with the Eligible Community Councils (General Power of Competence) (Qualifications of Clerks) (Wales) Regulations 2021 ('the 2021 Regulations') which came into force on 5th May 2022, the clerk to the community council must have obtained at least one of the following, at the time, or before the council passes a resolution that it meets the criteria and is an eligible community council:

- The Certificate in Local Council Administration (CiLCA)
- The Certificate of Higher Education in Community Governance
- The Certificate of Higher Education in Community Engagement and Governance
- The Certificate of Higher Education in Local Policy.

1.18. At the time of the council passing a resolution to be an eligible community council, it would be insufficient to declare that the clerk is currently undertaking one of the above; or intending to undertake one at a future date. It will also be insufficient to say that a deputy clerk holds CiLCA. It must be the recognised proper officer of the council that holds the CiLCA qualification.

1.19. Clerks who gained any of the above sector specific qualifications before May 2022 are advised to undertake additional training to confirm that they understand how the GPoC operates. The Society of Local Council Clerks provide a standalone training module GPoC. 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.

1.20. The clerk qualification is only required for those councils who wish to resolve themselves as eligible to exercise the GPoC. There is no general requirement for community or town council clerks to be qualified, although clerks are encouraged to attain CiLCA for the benefit of supporting the council.

Condition 3: Audit opinions

1.21. Principles of transparency, professionalism and public accountability should be followed in all financial procedures of community councils. Adherence to an appropriate audit regime and the production of an annual financial statement should be cornerstones of a council's financial management practices.

1.22. To meet this condition, the council must have received two unqualified auditor's opinions for two consecutive financial years from the Auditor General for Wales (AGW) – the latest of which must have been received during the 12 months ending on which the community council's resolution is passed.

yes

1.23. Community councils which have recent qualified audits will not be eligible to exercise the GPoC.

1.24. By way of illustration, at the community council annual meeting in May 2022, the council would normally have confirmation of the outcome of the AGW's audit opinion for the financial years 2019-20 and 2020-21. This is subject to the council providing the external auditor with all the co-operation, relevant information and evidence, in a timely manner, for the AGW to provide an audit opinion.

1.25. Therefore, provided that the audit opinion is unqualified for both financial years 2019-20 and 2020-21, this condition would be satisfied. If either of the opinions is qualified, then the condition cannot be satisfied, and the council *cannot pass a resolution* that it is an eligible community council.

1.26. In future years, annual consideration of the third condition means that the relevant audit opinion taken into account will continue to change. For instance, in 2023, consideration of this condition would rely on the audit opinions from 2020-21 and 2021-22.

Future changes to the audit regime

1.27. Audit Wales has given notice that the audit regime is due to change in 2022. This does not affect the way in which the third condition is assessed as audit opinions will continue to be issued each year by the AGW. This is subject to the absence of major governance and record-keeping problems in councils, and councils providing the AGW with all necessary co-operation, relevant information and evidence, in a timely manner, for AGW to provide the audit opinion.

Exercising the general power of competence for a commercial purpose

1.28. An eligible community council may use the GPoC to carry out an activity for a commercial purpose. However, the council may only do so if it would also rely on this general power to carry out that activity for a non-commercial purpose i.e. it could not charge for an activity that it is required, by legislation, to carry out. For example, a council which currently maintains its own lawns and grounds may want to use the GPoC to be able to offer their services to local sports grounds for a fee.

- 1.29. An eligible community council is required to undertake any trading operations through a company (as defined in section 1(1) of the Companies Act 2006 or a registered society as defined under the Co-operative and Community Benefits Societies Act 2014). Those companies must meet the requirements for establishing and running a company.
- 1.30. Eligible community councils must take adequate steps to consider the implications of their proposed exercise of the power for a commercial purpose. The specific conditions are set out in the General Power of Competence (Commercial Purpose) (Conditions) (Wales) Regulations 2021 as amended by the General Power of Competence (Commercial Purpose) (Conditions) (Wales) (Amendment) Regulations 2022 ("the 2022 Regulations") and provide that:
- Before exercising the power, an eligible community council must prepare and approve a business case in support of the proposed exercise of the power. The above regulations set out the requirements for the business case.
 - Where the eligible community council has supplied anything to the company through which the GPoC is being exercised for a commercial purpose, the council must recover its costs from that company.
 - The business case must be published as soon as practicable after the decision is taken to approve it.
- 1.31. For instance, a council may wish to open a local shop or café. While an eligible community council might reasonably support the start-up of a company for this purpose, it should recover the costs of doing so. These costs could include accommodation, goods, services, staff or anything else to help set-up the shop or café. Ongoing subsidy or funding could both distort the market unfairly and could also lead to public funds being placed at undue commercial risk.

Power to trade in ordinary functions

- 1.32. The Local Government (Relevant Authorities) (Power to Trade) (Wales) Order 2022 ("2022 Order") came into force on 5 May 2022 to extend to eligible community councils. This provides eligible community councils with a power to trade in all services, so long as they are not required by law to provide them. An authority's power to trade in their ordinary functions is provided for in section 95 of the Local Government Act 2003.
- 1.33. As with exercising the general power for a commercial purpose, where an eligible community council intends to use the power to trade in its ordinary functions, it must prepare, approve and publish a business case.
- 1.34. The ordinary functions of a community council are the functions set out in Acts of Parliament, and Measures or Acts of the Senedd, e.g. powers to provide allotments, to provide and maintain bus shelters, and the power to promote local energy saving schemes. They do not include delegated functions that some community councils operate under agreement from their principal council e.g. library services.

The business case

- 1.35. A business case must be prepared prior to a community council using the *general power for commercial purposes* or the *power to trade in their ordinary functions*. The purpose of the business case is to be transparent that a reasonable assessment of the proposal has been made and agreed by the council.
- 1.36. Business cases should be proportionate to the complexity of each case and the scale of investment being considered. There should be a clear audit trail showing that the community council has acted within its powers. All business cases must be published as soon as practicable following the council decision to approve it.
- 1.37. Appropriate guidance on preparing a business case will depend on the nature of the proposal, and ‘no one size’ will fit all circumstances. However, under the 2022 Order, a business case must include the following elements:
- The aims and objectives of the proposed exercise of the GPoC;
 - The costs, investments and other resources required to achieve those aims and objectives;
 - The financial outcomes that are expected to be achieved;
 - Any other relevant outcomes that are expected to be achieved;
 - Any risks associated including an assessment of the severity of those risks, and any mitigating actions;
 - The impact (including on the terms and conditions of employment) on any staff that it intends to supply to a company to do things for a commercial purpose.
- 1.38. The regulations do not specify an individual accountable for approving the business case – only that it is for the council to provide that approval. The matter is to be decided locally. However, it is recommended that it is made clear to members as well as the public how the approval process works, for example, through the council's standing orders or schemes of delegation.

Boundaries of the general power of competence

- 1.39. The GPoC does not allow community councils to bypass prohibitions, limitations or restrictions contained in existing legislation. The need for due diligence and robust, transparent decision-making remains. Moreover, councils will want to ensure they have sufficient community support and funding before using the power.
- 1.40. When exercising the GPoC, eligible community councils must act in accordance with the principle established in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223* (known as the *Wednesbury case*). The judgement in that case 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.
- 1.41. Where a council is already subject to a statutory duty, then that duty remains in place. The GPoC For instance, section 6 of the Environment (Wales) Act 2016 imposes a duty on public authorities, including community councils, “...to

maintain and enhance biodiversity in the exercise of their functions, promote the resilience of ecosystems (known as the Biodiversity and Resilience of Ecosystems duty). . A comprehensive list of statutory duties which apply to community and town councils can be found in the *Good councillor's guide: for Community and Town Councillors*.

- 1.42. The council must continue to comply with existing legislation such as employment law, health and safety legislation, equality legislation and the duties relating to data protection and freedom of information.
- 1.43. Eligible community councils cannot use this GPoC primarily to raise money, but they can receive income as a result of using the power for a different primary purpose. For example, the council could lend money to support a local activity and earn interest on the loan and it could also raise sponsorship for a community project.
- 1.44. Through the 2021 Act and associated subordinate legislation, there are other appropriate constraints on the use of the GPoC, including the following:
- The requirement for a company structure when using the general power for a commercial purpose, and a business case which considers the costs, benefits and risk of each proposal;
 - Limitations on fees and charges for discretionary services; and
 - Checks for pre- and post-commencement limitations (whereby a specific power may be identified). For example, the GPoC power cannot be used to re-write or ignore any parts of express statutory powers and duties.

Annual review of eligibility

- 1.45. Under section 31(1) of the 2021 Act, once a community council has resolved itself to be an eligible community council, it will need to reaffirm on an annual basis that it continues to meet the eligibility criteria. A council can do this by passing a resolution to this effect at its annual meeting.
- 1.46. In the case of a council which has appropriately resolved itself to be eligible at the first available annual meeting following commencement of the 2022 Regulations on 5 May 2022, it will retain that status until its next annual meeting. This would provide the council, and those they deal with, certainty as to the extent of their powers.
- 1.47. Part 1, Schedule 4 to the 2021 Act amends paragraph 26ZA of the 1972 Act to require councils to publish the outcome of decisions within seven working days of the council meeting. Therefore, the outcome of the decision to continue either as an eligible community council, or not, must be published on the community council's website to the same timetable. This provides clarity for the council, and those it deals with, on its ability to exercise the general power.

Ceasing to be eligible

- 1.48. A community council may decide that, despite meeting the conditions, it no longer wishes to be an eligible community council. An eligible community council may pass a resolution at any meeting of the council that it is no longer eligible. The council would then cease to be an eligible community council at

the end of the day following the meeting at which the resolution was passed. In which case it must publish its decision that it is no longer an eligible community council within seven working days of taking the decision (Section 32 of the 2021 Act).

- 1.49. Under section 31(2) of the 2021 Act, if the council does not pass a resolution at the appropriate annual meeting that remains an eligible community council then it ceases to be one at the end of the day following the annual meeting in question. It will not be able to exercise the GPoC until it resolves itself eligible, which may be at the next council meeting.

What happens to agreements entered into by an eligible community council and then the council ceases to be eligible?

- 1.50. Section 33 of the 2021 Act provides that, if an eligible community council which ceases to be an eligible community council (and so loses the general power competence) can continue to rely on the GPoC in relation to things it has done in the exercise of that power while it was an eligible community council, e.g. to deliver services or undertake activities, even though it had ceased to be eligible.

- 1.51. However, the council could not enter into a new contract or change an existing arrangement so that it became qualitatively different from how it was while the council was still eligible.

Common Community Councils

- 1.52. Under sections 27E and 27F of the 1972 Act, communities have the power to apply for an order grouping its community with other communities under a common community council.
- 1.53. In circumstances where such a common community council is formed after 20 January 2021 following an Order made under section 27F of the 1972 Act, it is in effect a new council.
- 1.54. In this case, a newly formed common community council could potentially meet two of the three eligibility conditions relating to:
- The proportion of elected members - since the order made by the principal council would make provision for an election under the 1972 Act, section 27F(5)(a); and
 - Employment of a clerk who holds one of the relevant qualifications specified in the 2021 Regulations.
- 1.55. However, they would be unable to satisfy the third eligibility condition regarding the two most recent opinions of the Auditor General for Wales for at least two years.
- 1.56. To address the anomaly, this condition does not apply to the common community council where at least half of the communities grouped together to form the new common community council had separate community councils immediately beforehand which met this third condition.

- 1.57. However, if the first opinion of the Auditor General for Wales of the common community council is a qualified audit opinion, then the common community council ceases to be an eligible community council with immediate effect.

Section 137 of the Local Government Act 1972 and Community and Town Councils

- 1.58. Section 137(1) of the 1972 Act has been retained for community councils that do not wish to resolve themselves as eligible community councils, or are not yet able to satisfy the eligibility conditions.

- 1.59. A community council which does not resolve itself as an eligible community council will still be able to use the current power under section 137(1) of the 1972 Act. This power permits community councils to spend a limited amount of money on activities for which it has no other specific powers. They may only do this if the council considers that it will be for the direct benefit of its area, or part of its area, or all or some of its inhabitants. Community councils are also permitted under section 137(3) to incur expenditure for certain charitable and other purposes.

- 1.60. The maximum expenditure is calculated annually. The appropriate sum for the purposes of section 137(4)(a) is calculated by applying the formula set out in Schedule 12B to the 1972 Act.

- 1.61. Once a council resolves itself an eligible community council, section 137 of the 1972 Act no longer applies to the council as the GPoC – under section 24 of the 2021 Act – is less limiting. If a council ceases to be eligible to exercise the GPoC, section 137 of the 1972 Act will once again apply to that council.

- 1.62. It should be noted that neither the GPoC nor section 137 of the 1972 Act can be used to circumvent a statutory prohibition on a community council carrying out a particular function.

- 1.63. Section 137 of the 1972 Act is more constrained than the GPoC because it covers activities incidental to community councils' functions. More fully, this means that section 137 of the 1972 Act limits a community council's expenditure to areas which, in their opinion, is in the interests of and will bring direct benefit to, their area or any part of it or all or some of its inhabitants.

- 1.64. As noted in the previous section, in order for section 137 of the 1972 Act used as the basis to undertake an action, the direct benefit accruing to the community council's area (or any part of it or to all or some of the inhabitants of its area) has to be commensurate with the expenditure incurred. Expenditure is subject to existing financial restrictions. There is no spending limit when relying on the GPoC.

- 1.65. While the GPoC requires qualifying criteria to be met by the community council before it can resolve itself eligible to exercise that power, section 137 of the 1972 Act does not require specific criteria to be met before a community council is eligible to exercise the power.