

# **Income Generation for Local Authorities**

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Presenter:

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# Overview

- The Big Picture: Context
- Powers to charge and trade
- Scenarios
- Setting up Alternative Service Delivery Bodies/Trading Companies
- Procurement and State Aid
- Developing a strategy for income generation

## The Big Picture: Context

- Coalition aims to deal with the deficit (funding reductions) & re-balance the economy
- Supportive of social enterprise; mutuals; alternative delivery vehicles; trading companies
- Lowest Public sector employment since ONS started (1999) Private 25m; Public 5.4m; LA 2.36m (1.77m FTE) down 570k since 2007 (406k FTE)
- LG still has £230BN capital assets; spends £20BN capital pa; with £22BN invested by LGPS; & spends £160BN revenue pa

# Fact or Urban Myth?

True or False?

- There are no explicit powers for local authorities to trade
- If you want to trade then you must set up a company
- You can only recover costs not make a profit
- Local authorities are unable to sub-contract to the private sector

# Powers for Income Generation

Discussion:

What is charging?

What is trading?

**What do you want to do and why?**

**What are your purposes/motives?**

# Commercial Approach

- Using charging and trading to:
  - drive behaviour change
  - Influence demand for services
- Market factors
  - Maturity of market; displacement of jobs; community benefit?
- Assess and address risks
- Powers follow purposes
  - Exercise powers properly, in right circumstances

# Municipal Trading: Timeline

- Surplus capacity late 19<sup>th</sup> century
- Stigma – attitude of auditors
- Cross boundary tendering
- 1995 – Stephen Richards QC Opinion
- 1997 – Yorkshire Purchasing Organisation v British Education Supplies
- **Additional** powers in the Local Government Act 2003
- **Additional** powers in the Localism Act 2011

# Powers

- Powers v Duties
- The key types of powers
  - Specific
  - General
  - Implied
  - Incidental
- Find the relevant power and exercise properly with relevant audit trail



# Proper Exercise of Powers

## Twin pillars of ultra vires:

- Existence of power or duty; and
- Proper exercise of power
- Without both, there could be successful challenge

## Exercise of powers:

- In good faith
- For a proper purpose
- Through proper procedures, ie Constitution/Procurement Rules
- Each case on its merits – don't follow policies blindly

# Proper Exercise of Powers

- Relevant considerations taken into account
- Reasonable (i.e. not irrational)
- No fetter of discretion
- Fiduciary duty – public stewardship of assets and resources
- May be a duty to consult and/or give reasons
- Overarching duties, i.e. equalities/best value/crime and disorder/biodiversity/energy measures/health and wellbeing strategy/social value

## **Local Authorities (Goods and Services) Act 1970**

- Power to provide any 'public body' with:
  - Supply of goods or materials
  - Provision of any administrative, professional or technical service
  - Use of vehicle, plant/apparatus & appropriate staff
  - Works of maintenance
- Not limited to spare capacity – YPO case
- Express charging power, but must be public body
- Can make a profit – YPO case
- Separate account

## Examples of Charging and Trading Powers

- Civic Restaurants Act 1947
- Section 45 Environmental Protection Act 1990
- Local Government (Miscellaneous Provisions) Act 1976:- Section 11 (Renewables); Section 19 (Leisure); Section 38 (surplus computer capacity)
- Section 145 Local Government Act 1972
- Section 150 Local Government and Housing Act 1989
- Section 45 Road Traffic Act 1988

## Examples of Charging and Trading Powers

- Buy & sell land including Local Government Act 1972  
Town & Country Planning Act 1990; Housing Act 1985
- Local Authorities (Land) Act 1963 (development)
- S24/26 Local Government Act 1988
- Section 97 Building Act 1984
- Section 32 Local Government (Miscellaneous Provisions) Act 1976
- Powers to Invest s12 Local Government Act 2003
- Staff secondment s113 Local Government Act 1972
- Section 139 Acceptance of gifts and incidental works

# Incidental Powers

- Section 111 Local Government Act 1972
- “Calculated to facilitate or conducive or incidental”
- Must be linked to another primary power
- Dicta Lord Templeman Hazel v LBHF, not just “convenient, desirable or profitable”
- Incidental power can only be used once – no incidental to the incidental – LAML/ Allerdale

# Charging for discretionary services

- Section 93 Local Government Act 2003
- “A Best Value authority may charge a person for providing a service” if:
  - The authority is authorised, but not required by an enactment to provide the service;
  - S/He has agreed to its provision
- Section 93(6) must have regard to guidance
  - *General Power for Best Value Authorities to Charge for Discretionary Services*

# Calculating the Charges

Limitation to cost recovery in s93, but flexibility

- Definition of “each kind of service”
- Time period for calculation “taking one year with another”
- Corporate and Democratic Core included
- Charging discretion
  - Differential charging



## Trading: What are you trying to achieve?

- Collaboration between authorities/other public bodies – sharing of expertise/cost sharing/reduction?
- Trading for profitable exploitation of assets, skills or location to provide income generation
- Trading in partnership with the private sector
- Traditional trading or small scale trading to dispose of surpluses (unwanted goods) or to reduce costs

PWC report of 2004 reviews these in the context of education services.

# Commercial trading through a company

Section 95 Local Government Act 2003: doing for a “**commercial purpose**” ... any of their ordinary functions

- Not where “required” to do something
- Not where existing commercial activity
- Must be through a company or Society registered under the Co-operative Community Benefit Societies Act 2014 or Industrial and Provident Societies Act (Northern Ireland) 1969
- Trading Guidance

# Developing a Business Case

Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009

Business Case must contain:

- Objectives of the business
- Investment and other resources needed
- Risks and how significant these are
- Expected financial results and other outcomes expected to achieve

No subsidy – recover staff and other costs etc.

Members approve?

# Developing the business plan

What, when, why, how

- Purposes
- Markets
- Likely to be share based company if s95 trading co
- Council as shareholder
  - Other stakeholders/investors – private sector?
- Funding
  - Start up capital
  - Running costs
  - Level of recourse back to Council?

## Other key questions/issues

- Prudential accounting and balance sheet treatment
  - Tax/VAT (transactions between the LA and the Company – how are they treated?)
- Staff and assets
- Control and influence: flexibility through constitution & representation i.e. Shareholders & Board of Directors:
  - Grants, leases and contracts
- Building in democratic accountability?
  - Propriety issues – Part V LGHA 89 (revision under LGPIH Act 2007?) PIR under LDED&C Act 2009
- Exit routes?

# General Power of Competence

- Concerns after LAML judgment: [2009] All ER (D) 109 (Jun) and [2008] EWHC 692 (Admin)
- Local authority has “power to do anything that individuals generally may do” including things “unlike anything” that public bodies do
- Something extra – run a car dealership? Manufacture furniture? Set up a tourist retreat in the Amazon Rain Forest? Open a town centre plant shop? Make widgets in China? Design and sell clothes?

# General Power of Competence

- Power may be exercised in any way whatever:
  - Anywhere in United Kingdom or abroad
  - For a commercial purpose or otherwise, for a charge or without charge
  - For the benefit of the authority and its area or persons resident/present or otherwise
- Not limited by powers that overlap... but

## Boundaries and Limits on GPOC

- Restrictions and limitations on existing/new powers
- Power to charge (s3) may not be used if: under a duty; for a commercial purpose; and power to charge outside this section and s93 Local Government Act 2003, BUT
  - limited to cost recovery
  - definition of service
- Power to trade for a commercial purpose (s4) may only be exercised through a company/society under s 1 Companies Act or Co-operative & Community Benefit Societies Act 2014



## Boundaries and Limits

- No wider powers to delegate functions
- Secretary of State may amend, repeal or revoke legislation which restricts the exercise of the general power
- Secretary of State may constrain by regulations
- Still retain ultra vires rule

## Tricky Charging/Trading Areas

- Licensing eg door supervisors/taxis etc
- Regulatory Services - Provision of Services Regulations 2009
- Public Health functions – distinguish individuals and corporate arrangements
- Regeneration

## Interesting Cases

- Hazell v LBHF
- Manchester City Council v King
- Barnet CPZ charging
- R (Hemming & others) v Westminster City Council 2013
- R (Western Riverside Waste Authority) v Wandsworth LBC
- Davis v ICO and Health and Social Care Information Centre January 2013
- Greater Manchester County Council – Manchester Trusts case
- Leeds CC allotments

## Barriers to usage?

- Political – job substitution?
- Need for staff to focus on core areas
- Capacity?
- Corporate support/direction
- Reluctance of users to pay for services?
- Cost of collection is greater than benefits
- Concerns about risk and inability to manage, e.g. reduction in value or loss of contracts

## Conclusion on Powers

- Explore all avenues and fit powers with purposes
- General Power of Competence is **additional** to Local Government Act 2003 & **additional** to wide ranging existing powers (e.g. Goods and Services Act)
- Issues around exercise of powers still remain
- Ensure effective audit trail
- Bring stakeholders on board
- Develop a clear process with checks and balances

# Scenarios on powers

# Options for service delivery

- In house
- Collaboration – formal/informal
- Shared services with LA/public sector
- Controlled company
- JV/JVC with public sector
- JV/JVC with private sector
- Outsourced through contract
  - Employee mutual/social enterprise/charity/co-op
  - Social Impacts Bonds/Payment by Results

Discussion:

Why have a separate legal entity?



## Examples of LA companies/corporate vehicles

- Service Delivery companies e.g. education
- Shared Services companies e.g. South Holland/East Lindsey DCs
- Leisure Trusts
- Housing Companies
- Asset Vehicles
- Sure Start companies
- Economic regeneration vehicles, LEPs
- Adult Care
- LIFT/PFI companies
- Social Enterprises/Mutuals

# Advantages of a Separate Legal Entity

- Effective in isolating risk, assets or liabilities
- Changes in membership do not affect its existence
- The operations, rights, obligations and legal status can be tailored to the particular requirements of the project
- The Council can still maintain control of business decisions
- Separate accounts for the function for which the entity has been created
- Branding/image?
- It can be sold or transferred easily

## Disadvantages of Separate Entity

- Increased administrative burden and legal regulation
- Additional tier of complexity in the establishment, operation and management - the Council will also need contracting arrangements (e.g. leases/service agreements) with the entity
- Limits on the extent to which functions may be delegated
- May require a procurement process
- Directors duties could (in certain circumstances) lead to personal liability for breach
- A separate entity may be liable to pay taxes (e.g. corporation tax and VAT) on its activities

## Common Features: Separate Legal Entities

- Business is managed by directors
- Has interests distinct from its owners; directors owe separate fiduciary duties to the entity
- Some decisions require the approval of members (matters governed by the CA 2006 and constitution)
- A corporate vehicle will not generally be subject to any legal or contractual restrictions imposed on its owners (unless built into the constitution)
- Must be solvent itself (or be supported by its owners to allow directors and auditors (if relevant) to be comfortable as to its solvency)
- Most corporates can be set up as for-profit or not for-profit

# Types of Entity

- Unincorporated association/contractual partnership
- Companies limited by:
  - Shares
  - Guarantee
- Community Interest Companies
- Limited Partnerships
- Limited Liability Partnerships
- Industrial and provident Societies
- Charities
  - Charitable Incorporated Organisations

**Form Follows Function**

# Directors Duties

- To act within powers
- To promote the success of the company
- To exercise independent judgement
- To exercise reasonable care, skill and diligence
- To avoid conflicts of interest
- Not to accept benefits from third parties
- To declare interest in existing/proposed transactions
- To comply with record keeping/notification requirements
- Confidentiality & health & safety duties
- To avoid wrongful, fraudulent trading and look after the interests of creditors

# Director Conflicts within the Council

- To act within the Members'/Officers Code avoiding/declaring conflicts of interest
  - Finance, licenses, permissions etc
  - Common law bias
- To promote the Council's objectives
- To exercise personal judgement
- To exercise reasonable care, skill and diligence
- Not to accept significant benefits from third parties
- To comply with Council requirements, i.e. reporting etc
- To comply with Part V LGHA 1989 etc

## Finance & Tax

- Local authorities operate through the Local Government Act 2003; the CIPFA Prudential Code and other legislation/guidance
- Private Companies/vehicles are separate legal entities and are subject to private sector financial reporting and taxation inc SDLT, corporation tax, VAT and capital gains tax
  - LLPs are tax transparent
- Both follow Financial Reporting Standards (FRS) and Statements of Standard Accounting Practices (SSAP) issued by the Financial Reporting Council (FRC)
- Register for tax/VAT/with ICO etc



## Procurement and State Aid

- Procurement for works, supplies, services (thresholds) & development to Council specification/benefit
- Obtaining business from the local authority
  - EU regime
  - Lack of track record/financial standing
- LA providing services to the company – market rate?
- The company as a “contracting authority” – not if s95
- Teckal not available if s95

# Procurement and State Aid

- Teckal Tests:
  - Control
  - Greater part of activities for parent(s)
- Competition Issues
  - “Public Bodies and Competition Law” OFT Guide December 2011
  - State Aid (Art 87)

Important to distinguish “social” and “commercial”  
purposes

# Procurement changes on the horizon

- General principles: equal treatment; non-discrimination; and transparency remain
- The new Directives:
  - Formally agreed in Jan/Feb 2014 with **2 years** for member states to implement
- Thresholds
- Timescales
- Most Economically Advantageous Tender
- Greater use of competitive negotiating procedure

.....amongst other changes

## The New Directive – Time limits

	PCR	New Directive
Open	52(40) days	35(30) days
Restricted	PQQ: 37(30) ITT: 40(35)	PQQ: 30(25) ITT: 30(25)
Competitive Dialogue/ Negotiated	Request to Participate 37(30)	Request to Participate 30

# Public Sector Collaboration

The *Teckal* rules have been included in the New Directive and are more favourable

- In order to benefit the following 3 conditions must be met:

*(1) the contracting authority exercises over the legal person concerned a control which is similar to that which is exercised over its own departments*

# Public sector collaboration

*(2) more than 80% of the turnover of that legal person are carried out in the performance of tasks entrusted to it by the controlling authority or by other legal persons controlled by that contracting authority*

- Contracting authorities may still act together
- Can be applied to 'sister' companies owned by the same parent(s)

*(3) There is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation...which do not exert a decisive influence on the controlled legal person*

# Developing a strategy for income generation

- What do we want to do and why?
- How does this fit with corporate plans/strategies?
- How can this be achieved?
  - A proposal/business case
- An approvals process?
- What support is required?
  - Team approach
  - Relaxation of Standing Orders or a new Code?
- Reporting requirements and other internal rules
- Audit trail for action

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