

Forward Plan reference number: FP/835/10/20

Report title: Concessionary Fares Settlement 2021/22	
Report to: Councillor David Finch, Leader	
Report author: Andrew Cook, Director, Highways and Transportation	
Date: 24 November 2020	For: Decision
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County Divisions affected: All Essex	

1. Purpose of Report

- 1.1. The English National Concessionary Travel Scheme legislation requires each Travel Concession Authority (TCA) to have a concessionary bus pass scheme in place by 1 March before the start of each financial year. To do this it must also issue an initial scheme no later than 1 December in the preceding year.
- 1.2 This report authorises ECC to publish a default calculator schedule on 1 December 2020 and delegates authority to the Cabinet Member for Education and Skills to consider the options following Department for Transport (DfT) guidance with the final decision following negotiations with operators to be returned to Cabinet for approval.

2. Recommendations

- 2.1 Authorise the Director, Highways and Transportation to publish a draft default scheme based on the DfT Calculator Scheme on or before 1 December 2020.
- 2.2 Agree to keep the same discretionary elements of concessionary fares in 2021/22 as set out in paragraph 3.14.
- 2.3 Agree that a further report to the Cabinet Member for Education and Skills with respect to reimbursement arrangements be made once the Department for Transport have issued guidance or changed the law.
- 2.4 Agree that if the Cabinet Member authorises negotiations with operators and a final negotiated scheme is recommended then this is the subject of a report to Cabinet or the Leader

3. Summary of issue

Background

- 3.1. Operating the National Concessionary Fare Scheme is a statutory duty placed on the County Council by the Transport Acts 1985 and 2000 and the Concessionary Bus Travel Act 2007.
- 3.2. The legislation for the Scheme requires that each responsible local authority (known as a Travel Concession Authority or TCA) must compensate bus operators who carry Concessionary Pass Holders (the customers) with a level of reimbursement such that they are neither better or worse off than they would have been had the scheme not existed.
- 3.3. Setting the reimbursement arrangements is a two stage process:
 - We must publish a draft scheme no later than 1 December before the start of the relevant financial year
 - We must then publish a final scheme no later than 1 March, with the scheme coming into effect on 1 April
- 3.4. If bus operators are dissatisfied with the reimbursement arrangements they can appeal to the Secretary of State for Transport or, in some circumstances, seek a judicial review.
- 3.5. The Council has historically set the reimbursement arrangements by reference to a fixed pot agreed with the operators. This means that the cost is known at the start of the year, regardless of passenger numbers. This has managed risks for the Council and for operators. However, the impact of Covid-19 as set out further in this report means that we are not yet able to say whether we should do that for 2021/22.
- 3.6. As a result, it is proposed to issue the default calculator scheme on 1 December 2020. This would mean that the cost of the scheme would depend on actual activity levels during 2021/22.

Impact of COVID-19

- 3.7. The impact of COVID-19 on concessionary bus pass use, and indeed on all bus travel, has been significant following the restrictions placed on people during the initial COVID outbreak, and once those restrictions were lifted, the public were advised to only travel when it was essential. Then, once there was no advice against travelling on public transport, social distancing measures significantly reduced capacity.
- 3.8. Therefore, the 'fixed cost' reimbursement arrangements previously agreed for 2020/2021 and based significantly on numbers of concessionary passenger journeys, though legally binding on the Council for 2020/21 will result in a significant over-compensation of bus operators.

- 3.9. During wave one of the COVID-19 pandemic, the Department for Transport advised councils to maintain payments to bus operators at current levels, which the Council has done. However, under the current law it is not possible to set reimbursement arrangements for 2021/22 based on passenger numbers originally anticipated for 2020/21 as this will mean that operators are better off, contrary to the principles set out in legislation.
- 3.10. There is financial instability in the market as a result of the effect of COVID and the reduction in passenger numbers, which fell by over 80% during lockdown and even after this was relaxed, has still only recovered to between 60% and 70% of pre-COVID level. The replacement of the guaranteed arrangements - which amounts to an estimated 40% of operators' revenue - with a scheme based on actual usage would place significant additional risk on the market. This seems particularly difficult when usage of concessionary fares is low. However, other authorities do use the calculator schemes and have found a way to manage the impact on operators without needing to use a fixed pot scheme
- 3.11. The Department for Transport has, for some months, been promising to issue guidance as to how it sees the scheme working in 2021/22 allowing for these impacts. This has not yet been issued. The Department may also seek to change the law, but it has not yet done so.
- 3.12. Usually the Cabinet would be asked to consider a report to publish a concessionary fare reimbursement scheme and then set negotiating parameters for an agreed scheme. At present we are not able to set negotiating parameters. It is therefore proposed that we publish a default calculator scheme, as normal, on or before 1 December 2020 and then a further report is made to the Cabinet Member to decide whether or not to authorise negotiations on a fixed cost scheme.
- 3.13. It is, however, clear that if we end up with a calculator scheme then unless passenger numbers revert to pre-COVID levels by 1 April 2021 – which currently appears extremely unlikely – the loss of financial support to this industry which carries large fixed costs will cause very significant problems unless the funding can be replaced in another way. At present, however, there are too many unknowns to speculate whether this would be necessary or how it would be justified within state aid rules/best value principles. Therefore, a further report is proposed to be put forward to the Cabinet Member for Education and Skills for approval with regards to the reimbursement arrangements following DfT's updated guidance.

Basis of the Concessionary Fares Scheme

- 3.14. The mandatory scheme requires provision of free travel for eligible older and disabled people between the hours of 09:30 and 23:00 Monday to Friday and all day at weekends and on bank holidays. The current Essex County Council scheme covers the mandatory scheme but also provides:
- Concessionary travel between 09:00 and 09:30 Monday to Friday
 - Concessionary travel between 23:00 and 00:00 Monday to Friday

- Provision of a companion pass for those disabled pass holders who require additional support when travelling.

3.15. There is no proposal to change the discretionary elements of the scheme. Changing the start time of the concessionary fares scheme to 09:30 for example could potentially lead to a sharp increase in passengers at 09:30 which could result in additional claims from operators for the cost of introducing extra capacity at that time under a calculator scheme.

Process

3.16. The Council is required to publish a default scheme by **1 December 2020** and publish a final scheme, preferably one agreed with bus operators, by **1 March 2021**.

4. Options

4.1. The Council has a statutory duty to issue the reimbursement arrangement by 1 December 2020. The Council has considered the following three options:

Option 1: Issue a final scheme based on variable costs determined by actual numbers of passengers (with or without a hybrid option of fixed payments to single operators) (a 'calculator' scheme).

- 4.2. This would follow the previous guidance set by the Secretary of State with reimbursement being directly related to passenger numbers and fares foregone. This guidance applies to schemes from 1 April 2020 (until new guidance is issued). This option is often referred to as a 'floating scheme' or 'Calculator Scheme'. This model is set out in the Department for Transport's model reimbursement calculator and is the principal basis used by some other county authorities (including Southend and Suffolk). It is also the basis that the Secretary of State is likely to follow if one or more operator submits an appeal.
- 4.3. The advantage is that the Council would benefit from reduced passenger levels (including those due to the impact of COVID-19 on passenger numbers). However, whilst the base passenger cost could be less, the other scheme allowable costs (including Peak Vehicle Requirement claims and Marginal Operating Cost claims) are difficult to predict and therefore their impact on financial expenditure is unknown, although the overall cost would be lower than the fixed costs of the 2020/21 scheme. In addition, there would be a significant impact on the viability of the commercial network. Given the fall in passenger numbers created by the COVID-19 situation, an unamended Calculator scheme would be likely to result in a significant fall in revenue for the commercial network.
- 4.4. Should a 'Calculator' Scheme be implemented, the authority would still need to continue to negotiate with bus operators individually to agree elements that can be adjusted within the calculator, such as Marginal Operating Costs and

Fare Calculation (national or local values).

Option 2: Fixed Total Cost Reimbursement Scheme (with or without risk share) based on the likely cost of concessionary fares to the Council in 2021/22

- 4.5. This would be based on similar principles to a calculator scheme except that the overall cost of the scheme would be capped. The fixed reimbursement sum would be shared between participating operators based on activity levels and average fares. This means that the Council bears the risk that activity is less than anticipated and that operators bear the risk that activity exceeds their expectations.
- 4.6. Under this type of scheme bus operators would also collectively bear any risk of cost increases if they need to provide additional capacity if additional capacity claims also have to be met out of the fixed cost of the cap. In practice this may deter operators from providing additional capacity - since they are foregoing any additional capacity claims through the fixed reimbursement scheme. Essex County Council mitigates this risk by offering the 09:00-09:30 extension, which effectively spreads the morning concessionary pass peak travel (first journey) across the first hour of travel times.
- 4.7. If operators are dissatisfied with the reimbursement arrangements then they can appeal. It appears from appeal decisions published by the Secretary of State that the Secretary of State would be unlikely to support any kind of fixed cost scheme on appeal, meaning that in practice this type of scheme can only be achieved if there is agreement between operators and the Council.
- 4.8. Given the huge uncertainty with respect to passenger numbers in 2020/21 arising from the impact of COVID-19, it is not considered likely that an agreed outcome could be reached for 2021/2022. If there is no agreed outcome then operators can appeal.

Option 3: Issue a scheme based on variable costs determined by actual numbers of passengers (with or without a hybrid option of fixed payments to single operators) (a 'calculator' scheme) and bring back a report to the Cabinet Member following guidance issued by DfT (Recommended Option)

- 4.9. As outlined in this report, a calculator scheme is the recommended option with respect to a draft scheme issued on 1 December 2020 and a report will be brought back to the Cabinet Member for Education and Skills following updated guidance from DfT. These recommendations will allow the Council to fulfil its statutory obligations, with allowing the final decision over the shape and cost of the scheme to be made taking into account DfT guidance and we can then decide whether or not to negotiate with bus operators.

5. Links to Essex Vision

5.1. This report links to the following aims in the Essex Vision

- Enjoy life into old age
- Develop our County sustainably
- Connect us to each other and the world

5.2. This links to the following strategic aims in the Organisational Plan:

- Enable inclusive economic growth
- Help people get the best start and age well
- Help create great places to grow up, live and work
- Transform the council to achieve more with less

5.3. The decision contributes to the Local Bus Service Priority Policy 2015 to 2020 by supporting the following outcomes:

- Providing access to schools, colleges, and training, work, health and leisure services
- Providing access to health services, shopping, leisure activities, employment, reducing isolation and increasing independence.
- Providing access to learning and training opportunities, supplier workforce training and apprenticeships.
- Providing access to care services and providing safe transport for access to health, education, work and leisure services, reducing the number of people killed or seriously injured (KSIs).
- Attracting inward investment by offering improved connectivity, access to work and leisure opportunities and reducing congestion
- Reducing congestion, air quality and CO2 emissions.
- Enabling access to key services, improving community involvement

6. Issues for consideration

6.1. Financial implications

6.1.1. The total budget for Concessionary Fares in 2021/22 is £18.214m.

6.1.2. As noted, ECC is statutorily required to negotiate and provide a scheme each year for the re-imbusement to operators for carrying concessionary fares on their services. By changing the approach from previous years and adopting the DFT's default calculator scheme, there is opportunity that ECC could make financial savings whilst adhering to the principle of an operator being no better no worse off for providing a concession.

6.1.3. It could reasonably be estimated that the impact of issuing a default calculator scheme for 2021/22 could yield annual savings in the region of £10m. This is based on payments levied on passenger numbers only (at depressed levels

due to COVID of around 46% of 2019/20 numbers) and does not take into account any additional claims operators may make due to peak vehicle requirements and marginal operating costs as these are unknown both in absolute number and potential value. The estimation will vary depending on actual passenger numbers and is made in isolation from further government guidance that might require that LTA's make operator payments based on pre-COVID levels.

- 6.1.4. This paper does not set out a final value for the scheme as this will depend on the type of scheme adopted and on guidance from the Department for Transport. If the DfT's position upon publishing its guidance is that LTA's must support operators at pre-COVID levels, then ECC would not expect that the maximum value of support exceeds £17.649m being the value of the fixed pot negotiated arrangement in 2020/21. A full analysis of the costs of the potential options will be set out in subsequent papers as indicated in 2.3 and 2.4 above.

6.2. Legal implications

- 6.2.1. Essex County Council as the Travel Concession Authority is required to issue a proposed scheme by 1 December 2020. The proposed scheme can be amended – but only in a way which is more favourable to operators - no later than 1 April 2021, when the scheme takes effect. The operators can appeal to the Secretary of State no later than 27 May 2021, 56 days after the commencement date. Operators will not, however, appeal if a scheme is agreed with them.

- 6.2.2. The Council is required by law to make reimbursement arrangements which ensure that every operator:

- (a) is financially no better and no worse off as a result of providing a concession; and
- (b) receives appropriate reimbursement for providing concessions to the persons eligible.

- 6.2.3. The proposal to issue a draft default scheme as set out in this report is in line with legislation.

7. Equality and Diversity implications

- 7.1. Public Sector Equality Duty applies to the Council when it makes decisions. The duty requires us to have regard to the need to:
- (a) Eliminate unlawful discrimination, harassment and victimisation and other behaviour prohibited by the Act. In summary, the Act makes discrimination etc. on the grounds of a protected characteristic unlawful
 - (b) Advance equality of opportunity between people who share a protected characteristic and those who do not.

- (c) Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.

- 7.2. The PSED is a relevant factor in making this decision but does not impose a duty to achieve the outcomes in s.149, is only one factor that needs to be considered, and may be balanced against other relevant factors.
- 7.3. By providing the English National Concessionary Travel Scheme, the County Council meets its requirements under legislation to provide a concessionary travel scheme.
- 7.4. In addition to this, the County Council also provides discretionary elements to the scheme including extended start and finish times and companion passes for disabled people who require assistance with their journey due to their disability.
- 7.5. An equality impact assessment has been undertaken. No adverse impact has been identified on any protected group by the current scheme which is similar to that which has been in force since 2010. It is proposed to continue with a concessionary travel scheme for a further year.

8. List of appendices

Equality impact assessment

9. List of Background papers

None

I approve the above recommendations set out above for the reasons set out in the report.	Date
Councillor David Finch, Leader of the Council	27 November 2020

In consultation with:

Role	Date
Executive Director Place and Public Health	25 November 2020
Mark Carroll	

Executive Director for Finance and Technology (S151 Officer)	25 November 2020
Stephanie Mitchener on behalf of Nicole Wood	
Director, Legal and Assurance (Monitoring Officer)	25 November 2020
Susan Moussa on behalf of	
Paul Turner	

I agree that it is interests of the Council for this decision to be implemented urgently and that it should therefore be exempted from call in (paragraph 20.15(xix)(a) of the constitution applies).

Cllr Mike Mackrory
Chairman of the Corporate Police and Scrutiny Committee

Date: 30 November 2020