

Forward Plan reference number: FP/218/11/21

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| Report title: Concessionary Fares Settlement 2022/23 | |
| Report to Councillor Lee Scott, Cabinet Member for Highways Maintenance and Sustainable Transport | |
| Report author: Andrew Cook, Director, Highways and Transportation | |
| Date: 10 January 2022 | For: Decision |
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| County Divisions affected: All | |

Confidential Appendix

This report has a confidential appendix which is not for publication as it includes exempt information falling within paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972, as amended.

1. Everyone's Essex**1.1** Everyone's Essex sets out the following strategic priorities for Essex County Council ECC):

- Has a strong, inclusive and sustainable economy
- Has a high-quality environment
- Offers health wellbeing and independence for all ages
- Is a good place for children and families to grow

1.2 The concessionary bus pass scheme contributes to all of these objectives as:

- It is inclusive. Bus services are disproportionately used by older people and those with disabilities. The concessionary bus pass scheme enables those who qualify on grounds of age or disability to travel free outside travel times making it easier for them to connect to key services and amenities. Bus operators are themselves major employers and a strong bus network is good for the economy both this way and by encouraging inward investment. Buses also help reduce congestion by offering an alternative to private car use, helping to reduce business costs.
- It helps to produce a high-quality environment by encouraging more people to use public transport in preference to private car journeys. Well-used public transport is a very sustainable mode of travel and increasing its use helps to reduce carbon emissions and therefore to achieve our net zero ambitions.
- Bus pass users include many of the most disadvantaged people in our society and the scheme helps our residents to go about their daily lives, attending education, going shopping, visiting health and other facilities without having to pay the cost of travel. This support independent living and helps people to

explore new opportunities outside their everyday environment, visit friends or family and build their self-confidence.

- Families in general are facing increased costs of living and this is particularly true for families with children who have disabilities. Nearly all products, services and equipment designed to help people with disabilities live full lives are both expensive both in comparison to everyday equivalents and in general. By reducing the cost of travel, for pass holders the concessionary bus pass scheme reduces their cost of living, allowing them to redirect resources to other areas of their life.

2 Recommendations

- 2.1 Authorise the Director, Highways and Transportation on behalf of ECC to undertake negotiations with commercial bus service operators in order to reach an agreed settlement for the English National Concessionary Travel Scheme (ENCTS) in Essex for the financial year 2022/2023 within the parameters set out in Option 3 in the confidential appendix attached.
- 2.2 That the authorised negotiations are consistent with the terms set in sections 2.1 to 2.3 of Cabinet Paper FP/138/08/21 in particular that:
 - the scheme should be consistent with the guidance issued by DfT and hence with Government policy on the level of reimbursement payments;
 - the scheme should be consistent with legislation or proposed changes to legislation made or committed to by DfT;
 - the reimbursement level should not exceed the reimbursement level for 2021/22 of £16.943m.
- 2.3 That following the negotiations, if the terms set out above are met, a further report to the Cabinet Member for Highways Maintenance and Sustainable Transport is made asking for approval for the final scheme to be published on or before 1 March 2022.
- 2.4 That if the terms above cannot be met, a further report will be made to Cabinet to seek further authority for the settlement.

3 Background and Proposal

- 3.1 The provision of the English National Concessionary Travel Scheme (ENCTS, also called the bus pass scheme) in Essex is a statutory duty placed on the County Council through the Transport Acts 1985 and 2000 and the Concessionary Bus Travel Act 2007 (as amended). The legislation requires that each responsible local authority (known as a Travel Concession Authority or TCA) must compensate bus operators who carry ENCTS pass Holders (the customers) with a level of reimbursement intended to leave them 'neither better nor worse off' than they would have been had the scheme not existed. If bus

operators are dissatisfied with the reimbursement arrangements, they can appeal to the Secretary of State for Transport who will issue a binding decision on the level of reimbursement to be paid.

- 3.2 There are two main methods for determining the level of reimbursement to be paid to the bus operators. The first is the use of a variable payment scheme (varying according to the level of use) using a spreadsheet calculator developed by the Department for Transport for this purpose. This is commonly referred to as a 'Calculator Scheme'. The second is to negotiate an agreed fixed payment to bus operators, for the whole year. This is commonly referred to as a 'Fixed Pot Scheme'. Each methodology has its own advantages and risks. The Council has historically set the reimbursement arrangements through 'Fixed Pot' agreements negotiated annually with the bus operators. This has managed risks for the Council and for operators. For 2021/22 the value of the agreed fixed pot scheme was £16.943m.
- 3.3 The Covid-19 outbreak resulted in significant financial instability across the bus market. Concessionary fare reimbursement normally amounts to an estimated 30% to 40% of operators' revenue. Although overall passenger numbers are recovering, they are currently plateauing at an estimated 70% of pre-Covid levels although there are significant geographical variations. The recovery in concessionary pass use has also lagged behind the recovery in fare paying passenger numbers and has been estimated at around 55% of pre-Covid levels. This means that most of the bus network remains commercially unviable.
- 3.4 To help manage this risk for the 2021/22 scheme, the Government issued guidance in November 2020, asking local authorities to maintain payments at pre-Covid levels for concessionary fares. ECC has complied with this guidance. Statutory Instrument 2021 No. 205, The Mandatory Travel Concession (England) (Amendment) Regulations 2021 temporarily change Regulation 6(a) of the Mandatory Travel Concession (England) Regulations 2011 to remove the requirement that travel concession arrangements should aim not to leave an operator financially better off as a result of providing a concession. The Mandatory Travel Concession (England) Regulations 2021 therefore allow LTAs, in principle, to pay concessionary fares funding to operators at a higher level than due through actual journeys by pass-holders. This amendment will cease to have effect at the end of the 2021/22 financial year and the requirements to leave operators "no better" a position will be reinstated unless further amendments are brought forth.
- 3.5 In preparation for the 2022/23 scheme DfT issued guidance on 1st November 2021, asking local authorities to pay reimbursement levels above those strictly due based on pass use. This was to give more time for passenger numbers to recover to pre Covid 19 levels and help to avoid the risk of significant service withdrawals while that is happening. This guidance establishes what DfT term a Concessionary Travel Recovery Period from April 2022. DfT are initially asking authorities to continue to pay out concessionary fares at 90% of pre-Covid levels. However, they are then proposing that authorities should gradually decrease their reimbursement payments to bus operators by 5% every other

month until these payments meet the percentage of pre-Covid pass passenger use.

- 3.6 DfT has also recognised that the Statutory Instrument which temporarily removed the requirement that authorities should not leave an operator financially better off as a result of providing a concession, expires at the end of March 2022. DfT have signalled their intention to extend this SI until the end of the 2022/23 financial year, to enable local authorities to pay concessionary fares funding to operators at a higher level than strictly use-based reimbursement would require.
- 3.7 ECC's intention is therefore to propose a scheme which fits the terms agreed in the paper considered at November Cabinet (FP/138/08/21) and as set below. The options for doing so are discussed below and are explained in further detail the **Confidential Appendix** as is financial modelling to support them.
- 3.8 ***Retention of discretionary elements:*** 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 ECC scheme covers the mandatory scheme but also provides discretionary elements and the Cabinet decision agreed the continuation of these. The discretionary elements are:
 - 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 allowing one additional person to travel in company with the pass holder available to disabled pass holders who require additional support when travelling.
- 3.9 ***Consistency of scheme with the guidance issued by DfT and hence with Government policy on the level of reimbursement payments:*** The concessionary travel recovery scheme guidance proposes a sliding scale of payments set at a percentage of the pre-Covid value of reimbursement as follows, reducing every two months until percentage recovery in the number of pass holder journeys that are being undertaken matches the percentage of reimbursement offered, at which point they will drop no further:
 - 06 April 2022 90%
 - 01 May 2022 90%
 - 01 June 2022 85%
 - 01 July 2022 85%
 - 01 August 2022 80%
 - 01 September 2022 80%
 - 01 October 2022 75%
 - 01 November 2022 75%
 - 01 December 2022 70%
 - 01 January 2023 70%
 - 01 February 2023 65%

- 01 March 2023 65%

3.10 However, DfT have also indicated they may vary these rates – for example increasing them should further lockdowns occur. In order to follow DfT guidance, ECC will need to retain a negotiated approach. This will mean that it is required to reach agreement with operators. If it cannot do so the default scheme authorised by the November Cabinet paper will be implemented.

3.11 ECC would also propose the following small variations to the scheme for administrative purposes, to minimise costs for taxpayers and operators:

- That payments are made from 1 April 2022
- That the current mechanism where payments are made quarterly is retained and the percentage paid is adjusted as follows:
 - April/May/June 90%
 - July/August/September 80%
 - October/November/December 75%
 - January/February/March 65%

3.12 This would mean that ECC were consistent with the principle and outcome of the sliding scale of payments but reduces the additional administrative burden on operators and the taxpayer.

3.13 *Consistency of scheme with legislation:* DfT have signalled their intention to amend legislation to allow these payments. Any negotiation with operators will make clear that this legislative change is a condition of these higher payments being made.

3.14 *The reimbursement level should not exceed the reimbursement level for 2021/22:* the reimbursement level for 2021/22 is £16.943m. This is the maximum amount ECC will reimburse operators for 2022/23.

3.15 Maintaining payments to bus operators in this way is also an investment in the bus network, buying time to enable passenger numbers to recover and minimising the risk of significant service withdrawals. This will help maintain longer term commercial viability for the network and help reduce carbon emissions by enabling people to make sustainable journeys. A significant reduction in the bus network would be likely to result in additional carbon emissions as people switched their journeys to car.

4 Links to our Strategic Ambitions

4.1 This report links to the following aims in the Essex Vision:

- Enjoy life into old age
- Provide an equal foundation for every child
- Strengthen communities through participation
- Develop our County sustainably
- Connect us to each other and the world
- Share prosperity with everyone

4.2 Approving the recommendations in this report will have the following impact on the Council's ambition to be net carbon neutral by 2030: it will help support the bus network and therefore help mitigate carbon emissions from transport.

4.3 This report links to the following strategic priorities in the emerging Organisational Strategy 'Everyone's Essex':

- A strong, inclusive and sustainable economy
- A high-quality environment
- Health wellbeing and independence for all ages
- A good place for children and families to grow

5 Options

Four options are set out in the Confidential Appendix

- **Option 1 (not recommended):** Continue with a calculator-based scheme from 1st March 2022 with the potential benefits as set out above and the accompanying service, and economic risks. ECC would negotiate at an individual level with bus operators over the value of the marginal cost, generation and other factors. This approach would risk appeals and the ensuing costs. Moreover, while in previous years it would have been the likely approach adopted by the Secretary of State if one or more operator submits an appeal, it is possible that this year ECC would be directed to follow the DfT preferred sliding scale methodology in this circumstance. Should this option be implemented, ECC 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).

The main strategic risk of this option is that concessionary journeys take longer to recover due to the ongoing effects of Covid and operators withdraw routes because they are no longer commercially viable because of the falling levels of concessionary payments.

- **Option 2: (not recommended): to seek to negotiate a scheme for 2022/23 following the DfTs preferred 2 monthly reducing balance sliding scale approach as set out in Table 4 of the Confidential Appendix.**

ECC seeks to negotiate a scheme with operators that takes the 2021/221 payments (adjusted pre-Covid levels) they received and then applies the 'sliding scale' proposed by DfT. On this basis, over the year payments would reduce until the percentage of pre-Covid reimbursement being paid equals the percentage of concessionary bus passenger journeys being undertaken. Each operator's reimbursement

level would need to be calculated separately and the appropriate level of reimbursement allocated. For each payment period ECC would need to check with the DfT for any alteration they have made in the proposed reimbursement percentage sliding scale. This means that neither we nor operators will have full certainty about payment levels – other than our commitment to remain at or below reimbursement levels from 2021/22. However, it does mean that the impacts of low passenger numbers are in effect ‘cushioned’, while taxpayers are not expected to fund full pre-Covid levels of reimbursement when those are no longer strictly merited.

- **Option 3 (*recommended*): to seek to negotiate a scheme for 2022/23 following a quarterly reducing balance sliding scale approach as set out in Table 4a of the Confidential Appendix.**

This approach is very similar to **Option 2** but reduces the need to recalculate payments and frontloads reimbursement toward the beginning of the year, giving more time for passenger numbers to recover. Across the year, as noted in Table 4a of the confidential appendix, the cost to ECC would be the same as for Option 2 above.

This would see operators being reimbursed for each quarter of 2022/23 at the highest of – the tapering percentage of pre-covid activity and actual activity levels (subject to the cost of the scheme not exceeding pre-covid levels).

| Quarter of 2022/23 | Pre-covid percentage |
|--------------------|----------------------|
| Q1 | 90% |
| Q2 | 80% |
| Q3 | 75% |
| Q4 | 65% |

It should be noted that even reimbursement on this basis would lead to a significant reduction in revenue to bus operators and could lead to service reductions.

This could mean that ECC as Transport Authority for Essex could be asked by passengers or operators to replace withdrawn services, particularly if the service withdrawals left people without bus services at all.

- **Option 4 - Do Nothing (Not recommended).** Doing nothing would place ECC in breach of its statutory obligations. This option is not recommended

6 Issues for consideration

6.1 Financial implications

6.1.1 The value of the fixed pot for 2021/22 was negotiated to be £16.943m. The expectation is that any negotiation for a fixed pot in 2022/23 would not exceed this level.

6.1.2 The recommended scheme and the estimated budgetary requirement are detailed in the Confidential Appendix to this report.

6.2 Legal implications

6.2.1 ECC, as the TCA, was required to issue a proposed scheme by 1 December 2021. The proposed scheme can be amended - but only in a way which is more favourable to operators - no later than 1 April.

6.2.2 The operators can appeal to the Secretary of State no later than 27 May 2022, 56 days after the commencement date. Operators will not, however, appeal if a scheme is agreed with them.

6.2.3 The general legal requirement that the Council must apply is 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.

6.2.4 There was a temporary change in the law for reimbursement in 2021/22 which removed the “no better off” requirement, but that change was a one-off and does not, as written, apply to 2022/23. The Department of Transport will need to change the law for 2022/23 if they want local authorities to reimburse at a level which over-compensates bus operators for the concessionary passengers they have carried. It is likely, but not guaranteed that the law will change for 2022/23. Negotiations should be conducted with this information in mind.

6.2.5 The DfT has published supplementary guidance requesting that for 2022/23 TCAs pay concessionary fares at the highest of (a) actual usage and (b) a tapering percentage of pre-COVID levels. The taper starts at 90% in April 2022 and reduces to 65% in March 2023. However this recommendation is not in line with the law applying in 2022/23 and any payment by TCAs must of course be lawful.

6.2.6 The DfT has agreed to review the legislative position in order to allow TCAs to reimburse operators at the requested level and has advised it will provide an update following this review. Any negotiation must be undertaken in line with the applicable law because the guidance issued does not override existing legislation.

6.2.7 Failure to negotiate and agree a lawful scheme means that the operators can appeal to the Secretary of State, who can then impose a scheme. This would result in significant legal costs being incurred and, if the operators were successful, would result in a scheme which is more expensive. However, to date, the Secretary of State has decided appeals by imposing a calculator

scheme, which does not offer bus operators any reimbursement above pre-covid levels. Given that a calculator scheme doesn't comply with DfT advice, the outcome of any appeal must be uncertain.

6.2.8 An agreed scheme, if it can be achieved at acceptable cost, reduces the likelihood of any legal challenges.

6.2.9 It is important to note that by paying more than the revenue foregone the Council will be allowing operators to receive more money from carrying concessionary fare passengers than the money they are losing. This potentially amounts to a subsidy to the bus operators falling within the European Union (Future Relationship) Act 2020. The aim of paying in a way which seeks to do no more than limiting the damage caused by the pandemic, is likely to be an acceptable subsidy. The Council is likely to have to publish the final scheme as a potential subsidy. Such publication is likely to have to be placed on the website of the Department for Business Energy and Industrial Strategy. In negotiations, it is advisable to consider the ability to obtain any necessary information from operators to allow full review of any subsidy issues and publication of the final scheme.

7 Equality and Diversity Considerations

- 7.1 The 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 protected characteristics are age, disability, gender reassignment, pregnancy and maternity, marriage and civil partnership, race, religion or belief, gender, and sexual orientation. The Act states that 'marriage and civil partnership' is not a relevant protected characteristic for (b) or (c) although it is relevant for (a).
- 7.3 Concessionary travel enables older people and those with a disability to make taxpayer funded bus journeys. Therefore, the scheme directly benefits these protected groups. Buses services are disproportionately used by older and younger people, people with a disability, those on lower incomes and women. Therefore, the proposal to negotiate reimbursement levels at higher than they are strictly due in order to protect the sustainability of the network means that these groups will also directly benefit from this approach even if they are not entitled to concessionary travel themselves.

- 7.4 The equality impact assessment indicates that the proposals in this report will not have a disproportionately adverse impact on any people with a particular characteristic.

8 List of Appendices

Appendix A: Confidential appendix
Appendix B: EQIA

9 List of Background papers

Covid-19 Recovery Guidance Concessionary Fares Funding October 2021

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| I approve the above recommendations set out above for the reasons set out in the report. | Date |
| Councillor Lee Scott, Cabinet Member for Highways Maintenance and Sustainable Transport | 14.01.22 |
| Andrew Cook, Director, Highways and Transportation | 14.01.22 |

In consultation with:

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|--|-----------------|
| Role | Date |
| Executive Director, Corporate Services (S151 Officer) | 12.01.22 |
| Stephanie Mitchener on behalf of Nicole Wood | |
| Director, Legal and Assurance (Monitoring Officer) | 12.01.22 |
| Paul Turner | |