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Report title: Negotiations for concessionary fares 2020/21	
Report to: Cabinet	
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County Divisions affected: All Essex	

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This report has a confidential appendix which is not for publication as it includes exempt information falling within paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972, as amended.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

- 1.1. The English National Concessionary Travel Scheme legislation requires each Concessionary Travel Authority to have a concessionary bus pass scheme in place by 1 March before the start of each financial year.
- 1.2. Given the scale and scope of the concessionary fare agreement, authority to negotiate and agree a scheme with bus operators is required from Cabinet.
- 1.3. This report outlines the options for negotiating a scheme of reimbursement including any legal challenges that might arise and requests that the Cabinet Member for Education and Skills in association with the Director, Highways and Transportation is given authority by Cabinet to issue a default scheme on 1 December 2019 and negotiate and agree a final scheme within the parameters set out in the paper.

2. Recommendations

- 2.1. Authorise the Director for Highways and Transportation to negotiate on behalf of Essex County Council over the 2020/21 English National Concessionary Travel Scheme within the parameters laid out in option 3 set out in the confidential appendix to this report.
- 2.2. Authorise the Cabinet Member for Education and Skills to approve and publish the final scheme, provided any settlement falls within the upper limit as set out in option 3 of the confidential appendix.

2.3 If it is not possible to achieve the outcome set out in 2.2 then a further report to Cabinet be brought back on the future of the scheme, based on the issues identified in the confidential appendix.

2.4 Authorise the Director, Highways and Transportation to publish a default scheme based on the DfT Calculator Scheme on or before 1 December 2019.

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.

Policy Context

3.3. The Organisation Strategy sets out the Council's aims. Although we have no option but to provide the mandatory concession, this report sets out how we can achieve best value for the scheme and hopefully achieve more with less and minimise risk for the Council.

3.4. The Concessionary fares scheme and its discretionary elements also help achieve the aims of:

- Enable inclusive economic growth
- Help our residents to age well

3.5. 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

About the Current Concessionary Fares Scheme

- 3.6. 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 24:00 Monday to Friday
 - Provision of a companion pass for those disabled pass holders who require additional support when travelling.
- 3.7. There is no proposal to change the discretionary elements of the scheme. Changing the start time of the concession fares scheme to 09:30 for example could 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.
- 3.8. The 2019/20 agreement (current scheme year) is for a base fixed cost of £18.2m. There is no allowance for additional funding relating to increased passenger patronage within this scheme.
- 3.9. In 2018/19 some 13,783,048 passenger journeys were undertaken. In 2019/20 it is currently estimated that some 13,537,093 journeys will be undertaken. This is a reduction of 245,955 or 1.78%
- 3.10. There are a number of factors associated with these changes. These include:
- bus service reliability
 - the commercial withdrawal of some bus services
 - weather factors.

Reimbursement of bus operators' costs

- 3.11. The Council is required to publish draft reimbursement arrangements at least four months before the start of the financial year. The principle of reimbursement is that bus operators must be neither better nor worse off than they would have been had the scheme not existed. It is for the Council to determine the scheme and how reimbursement arrangements will operate, but in doing so it must work within statutory parameters and follow the statutory process.
- 3.12. Operators have a statutory right to appeal to the Secretary of State for Transport if they feel that the scheme does not adequately reimburse them. They can also seek a judicial review directly through the high court if they feel that the Council has acted unlawfully in setting the reimbursement arrangements if an appeal could not remedy this. Operators can also agree the scheme with the Council. Essex County Council has managed to reach

successful agreement with operators every year since assuming responsibility for concessionary fares in 2011.

3.13. Operators are entitled to receive payments calculated according to the following formula:

$$\text{Payment} = \text{Gross revenue foregone} - (\text{generated revenue} + \text{additional costs})$$

3.14. There are two main variables which affect the cost of the scheme:

1. The number of additional passenger journeys generated by the scheme (because passenger numbers are larger when people do not have to pay) and operators should not be better off because of the scheme. This factor affects the 'revenue foregone' element of the formula; and
2. The additional network capacity costs resulting from the scheme – in effect how many additional buses and how much other infrastructure (depot space etc.) is required to cope with the increased passenger numbers.

3.15. Any reimbursement scheme is complex and must make allowances for:

- The number of additional journeys which are generated by the scheme (i.e. people travelling by bus just because they can travel for free)
- Current passenger journey figures
- Current pass holder numbers
- Operators' cost pressures and fares increases
- Anticipated weather for the year
- Anticipated passenger growth
- Possible changes to the network
- Any major schemes to promote the use of public transport
- Large scale developments in the County proposed for the period of the agreement.

3.16. The Secretary of State has issued guidance on reimbursement schemes. An operator who disagrees with the Council's scheme can appeal to the Secretary of State. Appeals are in general decided in accordance with the guidance. The guidance principally refers to a 'calculator' scheme whereby the level of reimbursement reflects actual activity levels. This involves an element of risk for the local authority and for bus operators.

Benchmarking

3.17. In 2018/19 ECC undertook an in-depth review of the scheme in comparison with similar schemes (geographical and socio-economics) in which we identified that there are similar trends and behaviours contributing across the country. It is considered that this review is still relevant.

3.18. Essex has long recognised that there is an impact on fares in Essex because of the high costs reflected by London. Essex also has high concessionary passenger numbers in comparison to other Authorities in the region.

- 3.19. As noted above passenger numbers continue to fall and should be expected to continue to drop by around 1.78% over the next 12 months. At the same time, with increases in fuel prices and fluctuations in the value of the pound, we anticipate that fares could increase by 3.4%.
- 3.20. Any real terms reduction to the level of reimbursement received by operators would affect the commercial viability of a number of services which are currently marginally commercial. Some marginally viable commercial services are already likely to be under review and operators would be likely to begin to evaluate these services future if no agreement can be reached.

Process

- 3.21. The Council is required to publish a default scheme by **1 December 2019** and publish a final scheme, preferably one agreed with bus operators, by **1 March 2020**.

4. Options

- 4.1. The Council has two primary options when setting the reimbursement arrangements:

Option 1: 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 Guidance set by the Secretary of State (through the Department for Transport – DfT) with reimbursement being directly related to passenger numbers and fares foregone. This option is often referred to as a 'floating scheme'.
- 4.3 The advantage is that the Council would fully benefit if activity levels are less than anticipated. However, whilst the base passenger cost could be less, the other costs (including Peak Vehicle Requirement claims and Marginal Operating Cost claims) could be significantly more than the difference of a 'fixed pot' scheme.
- 4.4 The claims could be challenged but any appeals to those challenges could result in the authority having to pay all of the claim as well as the associated legal costs.
- 4.5 The disadvantage is that if activity levels exceed those anticipated then the costs can increase without limit. 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. Councils who use this type of scheme are also at risk of

additional cost claims being submitted by bus operators. The final costs of a scheme are unlikely to be known before July of the following financial year.

- 4.6 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). This can lead to additional administrative and officer resource costs.

Option 2: Fixed Total Cost Reimbursement Scheme (with or without risk share)

- 4.7 This would be based on similar principles to a floating 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.
- 4.8 Under this type of scheme bus operators also collectively bear any risk of cost increases if they need to provide additional capacity. This is because 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.
- 4.9 A fixed total reimbursement scheme can also operate on the basis that some variances from the cap are shared between the council and the operator.
- 4.10 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.
- 4.11 The current scheme operates on the basis of a fixed total reimbursement scheme without risk share.
- 4.12 **It is recommended that we attempt to negotiate a fixed total reimbursement agreement approach for all operators.** It is proposed that the Cabinet Member is authorised to determine the final scheme unless it falls outside of the parameters agreed by Cabinet (the proposed parameters are set out in the Confidential Appendix). Meanwhile, pending the conclusion of the negotiations, a default scheme will be published on or before 1 December 2019. The default scheme will be prepared with the aim of minimising any increase as far as is consistent with the Department for Transport Guidance and maintaining the discretionary elements.

- 4.13 Due to uncertainties in the current economic climate, rising fuel costs and falling passenger numbers it is recommended that the County Council remains agile in its approach and only makes an agreement covering the year 2020/21.

5 Financial implications

- 5.1 The organisation is statutorily required to negotiate and provide a scheme each year. The recommended scheme and the estimated budgetary requirement are detailed in the Confidential Appendix to this report.

6. Legal implications

- 6.1. Essex County Council as the Travel Concession Authority is required to issue a proposed scheme by 1 December 2019. The proposed scheme can be amended – but only in a way which is more favourable to operators - no later than 1 April 2020, when the scheme takes effect. The operators can appeal to the Secretary of State no later than 27 May 2020, 56 days after the commencement date. Operators will not, however, appeal if a scheme is agreed with them.
- 6.2. The Council is required by law to make 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.
- 6.3. Failure to negotiate 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.
- 6.4. An agreed scheme, if it can be achieved at acceptable cost, reduces the likelihood of any legal challenges.

7. Equality and Diversity implications

- 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 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 similar scheme for a further year.

8. List of appendices

Equality impact assessment
Confidential appendix

9. List of Background papers

None