

Forward Plan reference number: FP/988/02/21

Report title: Final agreement for the Essex Concessionary Fare Scheme Reimbursement Arrangements for 2021/22	
Report to Councillor David Finch, Leader of the Council	
Report author: Andrew Cook - Director, Highways and Transportation	
Date: 1 March 2021	For: Decision
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County Divisions affected: All Essex	

1. Purpose of report

- 1.1 This report asks the Leader of the Council to authorise the publication of a final concessionary fares scheme for the financial year 2021/22 following discussions with Essex bus operators.

2. Recommendations

- 2.1 Agree to publish a fixed pot concessionary fares reimbursement scheme with a value of £16,943,040 for 2021/22 with reimbursement rules determined in accordance with the principles set out in this report to come into force on 1 April provided that the law is changed as set out in the report before that date.
- 2.2 Agree to publish a calculator scheme for the discretionary elements of the scheme regulated by the Transport Act 1985 in a manner so that the fixed pot applies to the combined mandatory and discretionary elements of the scheme.
- 2.3 Use the saving which is realised from this decision, estimated to be £700,000, to mitigate against existing non-deliverable savings within the Medium Term Resource Strategy of £344,000, split across the Education & Skills (£284,000) and Infrastructure portfolios (£50,000).
- 2.4 Note that if, at the time of the 2022/23 budget setting process. it is anticipated that a residual saving is realised beyond 2021/22 it will be brought forward for consideration at that time.
- 2.5 Note the advice from the monitoring officer provided under section 5 of the Local Government and Housing Act 1989 in the legal implications section of the report.
- 2.6 Instruct officers to work to formulate a strategy for concessionary fares in future years given that the current easement only lasts for 2021/22 and

passenger numbers are unlikely to return to pre-covid levels by 1 April 2022 and ensure that operators are aware that appears that the situation is unlikely to be maintainable beyond 2021/22.

3 Summary of issue

Background

- 3.1 The Concessionary Bus Travel Act 2007 requires each authority responsible for a concessionary travel scheme (known as a 'Travel Concession Authority' or TCA) to compensate operators who carry Concessionary Pass Holders with the broad aim of offering a level of reimbursement such that the operators are neither better or worse off than they would have been had the scheme not existed. The aim is not to subsidise bus operators, but to compensate them for the revenue they have foregone by not charging pass holders and to pay for any increased costs that they have incurred.
- 3.2 Essex County Council is the TCA with responsibility for the English National Concessionary Travel Scheme for the administrative area of Essex.
- 3.3 In law each TCA must issue a default scheme by 1st December of each year and then enter negotiations with bus operators over the outcome. Essex issued its default scheme for 2021/22, which is a calculator scheme, on 1st December 2020.
- 3.4 The DfT have issued a suggested scheme by publishing a 'Reimbursement Calculator' spreadsheet for working out each individual operator's level of reimbursement. Schemes employing the calculator (which is the DfT's recommended method) are referred to as 'Calculator Schemes'.
- 3.5 An alternate method is for the TCA and the Operators to agree a voluntarily agreed 'Fixed Pot' scheme whereby a fixed amount is paid into the scheme pot by the TCA and allocated by an agreed method between the operators. This is the approach that has been agreed between Essex County Council and the bus operators for every year since ECC assumed responsibility for the scheme in 2011.
- 3.6 A fixed pot scheme offers increased certainty, with the TCA and operators both knowing what the overall outcome of the scheme will be. It also has a lower administrative burden. A fixed pot scheme cannot be unilaterally imposed on all operators by the TCA because they have the right to appeal and every appeal against a fixed pot scheme has been successful and resulted in the imposition of a calculator scheme.
- 3.7 There is a significant degree of uncertainty about the outcome of a calculator scheme. The County Council does not know how much the scheme will cost during the year. The operators will not know what revenue they will receive. This could lead to commercial service withdrawals, particularly when passenger numbers are depressed.

- 3.8 In addition, the Covid 19 outbreak of 2020 caused significant disruption and financial instability across the bus market creating a national crisis in the bus industry which could have led to its widespread collapse. To address this risk the Government sent out guidance asking local authorities to maintain payments at pre-COVID levels for contracts and concessionary fares, has maintained its own 'Bus Service Operators Grant' (BSOG) at pre COVID levels and has introduced the COVID Bus Service Support Grant Restart' package that compensates bus operators for on-bus (but not concessionary fare) revenue during the crisis. This is specifically stated to have been shaped around the continued reimbursement of bus operators for concessionary fares at pre COVID levels. These measures have stopped the immediate collapse of the industry but have left operators reliant on public funding and as a condition of the COVID Bus Service Support Grant (CBSSG) unable to make profits while claiming it.
- 3.9 The DfT and the Cabinet Office issued several guidance notes to cover these requests. The latest was on 20 November 2020, when the DfT issued guidance notes for the calculation of Concessionary Fare Payments, including how to approach the impact of COVID 19 for financial year 2021/22 (See 'Background Papers' below). This reiterates their request that local authorities continue to reimburse bus operators at pre COVID 19 rates and stated that Cabinet Office advice, originally set out in Advice note PPN04, should still be considered as valid, even though it had an expiry date of 31 October 2020, however this was caveated with the recommendation that local transport authorities seek their own legal advice.
- 3.10 The current law, requires the Council to set reimbursement arrangements for concessionary fares having regard to the principle that operators are no better or worse off than they would have been had the scheme not existed. This effectively rules out a fixed pot scheme set at pre-Covid levels. The current law sets out the same principles for the mandatory and discretionary elements of the scheme, but it does so in different regulations. The Government reviewed legislation and on 1 March 2021 laid the Mandatory Travel Concession (Amendment) (England) Regulations 2021 before Parliament.
- 3.11 This prospective change in law will temporarily remove the objective of reimbursement arrangements preventing an operator from being no worse off with respect to the mandatory scheme under the Transport Act 2000. It is important to note that:
- (a) This does not amend the Travel Concession Schemes Regulations 1986 which relates to the discretionary concessionary fares scheme operated by the Council.
 - (b) This will only provide a solution for the 2021/22 financial year.

However, the legislative change does remove the UK law obstacle to reimburse operators for the main elements of the scheme in line with the

request by DfT to pay at pre-COVID levels. See legal implications for more details.

- 3.12 On 24 November 2020 the Essex County Council published decision FP835/10/20 authorising the issuing of a default scheme based on the Department for Transport's 'ENCTS Calculator Model' to come into effect in the event that no acceptable negotiated agreement could be reached and authorising the Cabinet Member for Highways and Transportation to enter into negotiations with operators.
- 3.13 On 8 February 2021 Essex County Council published decision paper FP900/12/20 authorising officers to enter negotiations with bus operators on the basis of a fixed pot scheme set at 4% below 2019/20 levels to reflect the long term trend of a reduction in passengers.
- 3.14 Also on 8 February 2021, the County Council sent bus operators an offer letter as set out **Appendix A** below. The offer was for a fixed pot arrangement with a value of £16,943,040. This was based on the fixed pot payment for 2020/21 adjusted for long term passenger trends as follows:

2020/21 Fixed Pot	£17,649,000
Reduction of 4% to allow for long term passing trends	(£705,960)
Proposed fixed pot for 2021/22	£16,943,040

- 3.15 Normally a 'fixed pot' scheme is designed to compensate the operators for carrying concessionary fares. However, in 2021/22 it is anticipated that bus passenger numbers will remain severely depressed. At the time of writing the public are advised against non-essential travel and social distancing measures have severely restricted the number of passengers who can be carried. Whilst vaccination news is encouraging, social distancing measures are likely to be in place for a significant part of 2021/22 and even when they are lifted, passenger numbers will not make an immediate return to pre-Covid levels. This means that a fixed pot based on actual journey numbers in 2021/22 is unlikely to work. Accordingly, the proposal sent to operator was for a fixed pot which would work on the following basis: -
- A fixed pot scheme where operators are required to collect full information about use of concessionary fares as in previous years way.
 - A fixed pot 4% below the 2020/21 fixed pot. This is based on modelling of long-term trends in reduction in the number of concessionary fare journeys as allowed for in the DfT guidance.
 - The proposal for redistribution of the fixed pot would be to allocate each operator the same percentage of the fixed pot as they received in 2019/20, subject to adjustment for operators who enter or leave the market before 31 March 2022.
 - The adjustment for entering operators would see the new operator being allocated a sum based on modelling what we believe they would have achieved in 2019/20 had they been in operation for the same part

of 2019/20 as they were for 2021/22 with the same network. That sum will be collected from other operators on a pro rata basis.

- The adjustment for exiting operators will be by removing their allocation for the proportion of the financial year during which they are not operating and allocating this to remaining operators on a pro rata basis

- 3.16 This offer has been accepted by the operators. This allows a new fixed pot scheme to be issued for 2021/22, to replace the default calculator scheme issued on 1 December 2020.

4 Options:

4.1 Option 1: Do nothing and allow the calculator scheme published on December 2020 to come into force for 2021/22

- 4.1.1 The County Council has a statutory duty to provide a concessionary bus pass scheme as outlined above. It cannot therefore avoid offering a scheme. If no formal decision is made the default calculator scheme would come into effect from 1 April 2021. This would lead to a short term saving because reimbursement would depend on passenger numbers which, for 2021/22 are likely to be significantly lower than in 2019/20. However, if the Council does not pay at pre-covid levels then it will be withdrawing money from bus operators, who are already hit by a reduction in the number of paying passengers. This will adversely affect the bus industry, possibly leading to service withdrawals and business failures. This is not the recommended option

4.2 Option 2: Formally adopt a fixed pot scheme for 2021/22 with a value of £16,943,040 over the year.

- 4.2.1 This is the recommended option as it is simple and provides certainty to operators. It is a slightly 'rough and ready approach.

4.3 Option 3: Set a calculator scheme and then pay any covid related compensation separately.

- 4.3.1 This option is the most sophisticated but would require work to design a scheme and ensure that is robust. It would also potentially require significant unnecessary analysis to determine what operators are entitled to as part of the concessionary fare scheme and also as part of the separate scheme, meaning that it would be complex to operate.

5. Policy context

- 5.1 Operating a 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.

- 5.2 The Secretary of State has issued guidance on reimbursement schemes. Appeals are in general decided in accordance with the scheme. This guidance is important because an operator who disagrees with the Council's scheme can appeal to the Secretary of State and/or launch a Judicial Review challenging the Council's assumptions regarding the use of default values for the calculator.

6. Issues for consideration

6.1 Financial implications

- 6.1.1 The financial commitment of £16,943,040 is within the Medium-Term Resource Strategy (MTRS) budget allocation for 2021/22. Full consideration of the financial implications is set out in the Confidential Appendix per the published decision FP900/12/20.
- 6.1.2 Agreeing the fixed pot scheme at this value will result in a financial saving in 2021/22. A saving of £700,000 will be realised against the budget for provision of concessionary travel subject to any emerging pressures arising as a result of covid-19.
- 6.1.3 There are a number of historic budget savings that are no longer deliverable and these are creating a revenue pressure within the Integrated Passenger Transport Unit (IPTU) for 2021/22 which could be permanently mitigated by use of part of the residual saving arising from this approach. These historic savings total £334,000 in 2021/22 split across the Education & Skills (£284,000) and Infrastructure (£50,000) portfolios and approval to apply part of the £700,000 anticipated saving is sought as a recommendation of this report.
- 6.1.4 Any remaining saving after the mitigation of revenue pressures within IPTU will be expected to be brought forward for consideration as a permanent budget saving as part of the 2022/23 budget setting process.

6.2 Legal Implications

- 6.2.1 Essex County Council as the Travel Concession Authority was required to (and did) 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. In practice Operators will not, however, appeal if a scheme is agreed with them.
- 6.2.2 Concessionary fares are governed by the Transport Act 1985 and the Transport Act 2000 (as amended). Both pieces of legislation leave it to regulations to regulate how reimbursement works.

6.2.3 Although they have different regulations the position is the same for both. Regulation 6 of the Mandatory Travel Concession (England) Regulations 2011 says

6. *It must be an objective of a travel concession authority when formulating reimbursement arrangements for an operator to provide that such 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 to receive those concessions*

Regulation 4 of the Travel Concessionary Schemes Regulations 1986 says:

4. *It shall be an objective (but not a duty) of an authority when formulating reimbursement arrangements to provide that operators both individually and in the aggregate are financially no better and no worse off as a result of their participation in the scheme to which the arrangements relate.*

6.2.4 This would clearly be interpreted as meaning that the Council should determine arrangements which aim to ensure that the operator does not benefit from the arrangements. The reference to this not being a duty simply refers to the fact that the arrangements have to be based on assumptions about future costs and activities which can only ever be a forecast.

6.2.5 This is also important as a result of state aid which was in the Treaty of Rome and which applied in the UK under the European Communities Act 1972, which has been replaced by a very similar system of 'subsidy control' under the international agreement with the EU which has legal effect in the UK under the European Union (Future Relationship) Act 2020.

6.2.6 These regulations remain in force. Whilst regulations have been laid to amend the duty with respect to the mandatory scheme, they have not yet been formally made. It is very likely that they will be made and if they are made then their effect will be to allow the reimbursement arrangements for the mandatory scheme to be set in a way which results in benefit to bus operators. The regulations will not impact on the discretionary elements of the scheme and the Council remains under a duty to set those with the objective of making participation cost neutral.

6.2.7 If the law is changed as expected then the proposed reimbursement arrangements will be lawful. Bus operators will be reimbursed by more than the income lost as a result of carrying concessionary fares but they will be reimbursed by the same amount that they are likely to have received had the Covid related reduction in passenger numbers not occur.

6.2.8 The risk of legal challenge appears low:

- * it is lawful across Europe to fund organisations to repair damage caused by Covid.
- * the Department for Transport has asked local authorities to maintain funding for bus operators at pre-covid levels
- * the Department for Transport is changing the law to make this approach lawful by the time the scheme comes into effect

- * no bus operators have disagreed with the proposals and it is not in their interests to do so.

6.2.9 Nonetheless as monitoring officer I am required to report under section 5 of the Local Government and Housing Act 1989 that if the law is not changed then the proposed reimbursement arrangements for the mandatory elements of the scheme will be unlawful as they have not been formulated with the statutory objective. The decision maker will need to take this into account when considering the recommendations in this report. Given the requirement to publish final arrangements 28 days before the scheme and the likelihood that it would have been lawful to determine the arrangements as recommended, the decision maker may consider this to be the best option. Adoption of the recommendations is not, however, without any legal risk.

7. Equality and Diversity implications

- 7.1 In making this decision ECC must have regard to the public sector equality duty (PSED) under s.149 of the Equalities Act 2010, i.e. have due regard to the need to:
- (a) Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
 - (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 The PSED is a relevant factor in making this decision but does not impose a duty to achieve the outcomes in section 49, is only one factor that needs to be considered, and may be balanced against other relevant factors.
- 7.4 By providing the English National Concessionary Travel Scheme, the County Council meets its requirements under legislation to provide a concessionary travel scheme.
- 7.5 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.

- 7.6 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

Appendix A Offer letter to bus Operators
Appendix B 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	3 March 2021

In consultation with:

Role	Date
Andrew Cook, Director, Highways and Transportation	2 March 2021
Executive Director, Finance and Technology (S151 Officer)	2 March 2021
Stephanie Mitchener on behalf of Nicole Wood	
Director, Legal and Assurance (Monitoring Officer)	2 March 2021
Paul Turner	

I agree that it is in the interests of the Council for this decision to be implemented urgently and accordingly this decision may not be called in. Paragraph 25.19(xix) of the constitution applies.

Cllr Mike Mackrory
Chairman of Corporate Policy and Scrutiny Committee

3 March 2021