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Report title: Concessionary Fares Settlement 2022/23	
Report to: Cabinet.	
Report author: Councillor Lee Scott, Cabinet Member for Highways Maintenance and Sustainable Transport	
Date: 24 November 2021	For: Decision
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County Divisions affected: All Essex	

1. Everyone's Essex

- 1.1 A strong bus network is a core part of Everyone's Essex. It helps to encourage public transport use which reduces carbon emissions and helps achieve our net zero ambitions. It helps our residents to go about their daily lives in a sustainable way.
- 1.2 A strong bus network complements our ambitions to improve public transport as part of the 'Bus Back Better' plans, including Essex's Bus Service Improvement Plan, which was published in October 2021. Concessionary journeys are also disproportionately made on local bus services that are supported by ECC.
- 1.3 This report sets out how ECC will decide how much to pay bus operators for carrying those concessionary fare passengers in 2022/23. Passengers using the national concessionary fares represent a third of all bus journeys so they provide a major part of bus operators' income. Concessionary fares also help improve health, wellbeing and independence for all ages
- 1.4 This report, and the proposal elsewhere on the agenda for this meeting to continue to support services for a further two years are complementary. ECC is continuing to work with bus operators to enhance the network and promote the good quality sustainable travel options it provides, including through the Enhanced Partnership proposals which are being developed which include proposals for joint marketing, measures to start to improve ticketing and better information.
- 1.5 Bus services are disproportionately used by older people, younger people, women, and those with a disability. A key way in which we fund bus services is the concessionary bus pass scheme which enables those who qualify on grounds of age or disability to travel free at certain times, with the costs of the revenue foregone by the bus operators met by taxpayers.

- 1.6 Bus operators are carrying fewer passengers because of the impact of the pandemic. To protect the bus network from large scale service withdrawals and, subject to a temporary change in the law, the Council is likely to follow Government guidance and invest in services by paying at rates that are based on pre-Covid levels of patronage and revenue foregone so that services are supported to give passenger numbers the opportunity to recover.

2 Recommendations

- 2.1 Agree to proceed as in option 3 below and that for 2022/23 we will keep the same discretionary elements of concessionary fares in as for 2021/22.
- 2.2 To authorise the publication of a draft reimbursement scheme for concessionary bus fares in 2022/23 based on the DfT default Calculator Scheme on or before 1 December 2021.
- 2.3 To agree that ECC's preference is to agree a fixed cost scheme that is consistent with Government advice, subject to this being lawful.
- 2.4 Agree that a further report be made to the Cabinet Member for Highways Maintenance and Sustainable Transport with respect to negotiation of reimbursement arrangements once the Department for Transport guidance on concessionary fares payments for 2022/23 has been assessed in order to set out our negotiating parameters for the scheme.
- 2.5 Agree that if the Cabinet Member authorises negotiations with operators and a final negotiated scheme is recommended and it meets the terms set out in Option 3 then he is authorised to make a final decision on issuing the final scheme.

3 Background and Proposal

- 3.1 Operation of 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 has in essence broken the link between the level of reimbursement and passenger numbers. With respect to the 2021/22 financial year DfT issued guidance and changed legislation to allow 2021/22 reimbursement levels to be set at pre-Covid levels despite passenger numbers being significantly below pre-Covid patronage levels.
- 3.6 In late October 2021 DfT published guidance recommending that authorities reduce guaranteed support to operators over 2022/23 so that in April 2022 support is at least 90% of pre-covid levels, ending in March 2023 with support being guaranteed at 65% of pre-covid levels. The guidance leaves it to authorities and operators to agree what pre-covid levels means and makes it clear that this can reflect a change in the services provided by an operator, although most operators are maintaining services at 90% of pre-covid levels.
- 3.7 If we follow the advice then it's expected that at some point during the year the number of concessionary journeys will exceed the guaranteed minimum of pre-covid levels.
- 3.8 Any final scheme will therefore need to
- Agree general principles of what 'pre-covid levels' means for each operator
 - Agree how to reimburse operators when concessionary fare usage is less than pre-covid levels
 - Agree how to reimburse operators if/when concessionary fare usage exceeds pre-covid levels – which is likely to occur at different times for different operators and most likely not to occur at all
 - Agree how to measure the recovery of concessionary fare usage
- 3.9 In order to achieve this there will need to be a change in the law for 2022/23. DfT guidance has only recently been published and ECC will need to assess the options before making a recommendation for a 2022/23 scheme, which raises complex legal financial and computational issues.
- 3.10 In the meantime, we need to make a decision on the 'default' scheme to issue before 1 December before we can decide what scheme we would actually like to negotiate with the operators. It's proposed to issue a default calculator scheme based on the DFT model. A calculator scheme would mean that the cost of the scheme would depend on actual activity levels during 2022/23. This is the type of scheme that the Secretary of State has historically applies if bus

operators appeal against the final scheme determined by the council. It is not clear what approach will be taken for the 2022/23 financial year, but the DfT guidance encourages for this year encourages local agreement and discourages appeals.

- 3.11 The Council has historically preferred to have a fixed pot scheme. For 2021/22 year we have agreed a fixed pot with operators based on a reduced version of the 2020/21 scheme.
- 3.12 It is therefore proposed that a further report will be prepared to the Cabinet Member once we have had chance to work up options following receipt of the guidance in late October. If the recommendations in this report are approved, the Cabinet Member will be authorised to agree the negotiating position for the authority if the recommended option meets the terms set in paragraphs 5.10, 6.1.8 and 6.2.4 of this report; and the Cabinet Member is authorised to approve a final scheme if that scheme continues to meet those terms.

Impact of COVID-19

- 3.13 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 first three waves of COVID, 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. Those measures have now been relaxed but with many people continuing to work from home and to return cautiously to previous travel patterns, patronage across the network and particularly amongst concessionary passengers has remained significantly lower than before Covid.
- 3.14 With respect to 2021/22, DfT issued policy guidance asking TCAs to continue to pay concessionary fares reimbursement at pre-Covid levels. They changed the law to allow this. ECC followed this guidance and as a result the 'fixed pot' reimbursement arrangements agreed for 2021/2022 will result in an over-compensation of bus operators for the concessionary journeys actually provided, but they will have received less than they received in pre-pandemic times. This measure has ensured that the network continued to operate at least 80% of pre-Covid levels.
- 3.15 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 because DfT have only just issued their guidance. It is therefore proposed that we publish a default calculator scheme, as normal, on or before 1 December 2021 and then a further report is made to the Cabinet Member to decide on the detailed negotiation parameters once the DfT guidance has been assessed. In order to provide some assurance to Cabinet, however, these detailed parameters would have to meet the terms set out in paragraphs 5.10, 6.1.9 and 6.2.4 below.

- 3.16 Further, if, following negotiation in accordance with the terms set out below and also with the parameters set by the Cabinet Member then it's proposed that the Cabinet Member may take the decision to implement that scheme.
- 3.17 There is a potential difficulty with the anticipated requirement to allow operators to over-recover the costs of concessionary travel which is that the only way of doing it is to pay people using activity levels in 2019/20 as a base level. This means that:
- As time progresses the 2019/20 base level will become increasingly inaccurate. The published DfT guidance provides helpful guidance on how to deal with this
 - Guaranteed levels of reimbursement provides no incentive for operators to carry concessionary passengers as they will get the money regardless of how many such passengers they carry. Bus operators are required by law to carry concessionary passengers but some operators may no longer run services which attract such passengers.
 - Different bus companies are expanding or contracting operations at different rates and the number of passenger journeys is not changing at a uniform rate meaning that the approximation benefits some bus operators more than others – and this disparity increases the longer we rely on 2019/20 figures.

Proposed remit within which the Cabinet Member is authorised to set the 2022/23 negotiation parameters and final scheme

- 3.18 It is recommended that the parameters within which the Cabinet Member is authorised to a) approve negotiations with operators and b) approve a final scheme are as follows:
- 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.
- 3.19 If the recommended negotiating position and/or final scheme cannot meet these parameters, then the decision cannot be taken by the Cabinet Member.
- 3.20 The DfT guidance recommends payment continue at above actual levels of concessionary patronage and at a percentage of pre-Covid levels throughout the year. It should be noted that ECC are therefore likely to need to negotiate some form of fixed pot scheme because there is no historic data to make a calculation of what pre-Covid reimbursement rates would have been under a calculator scheme had one been in place. If a fixed pot scheme cannot be negotiated on this basis then the default calculator scheme this report authorises for publication, would become the scheme for 2022/23.

- 3.21 The DfT guidance proposes that the scheme starts at 90% of pre-covid levels reducing to 65% over the course of 2022/23, so it is likely that ECC will need to agree a series of fixed pots over that period. This means that ECC is likely in effect to need to agree a fixed pot maximum which sets reimbursement rates for monthly phases. We will need to consider what happens if concessionary fare use increases beyond size of the pot. These more detailed parameters will be set out in the report to the Cabinet Member once the impact of the guidance has been assessed. However, if the recommendations to Cabinet are approved they would need to be within the parameters set above or a further report to Cabinet would be required.

Basis of the Concessionary Fares Scheme

- 3.22 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.
- 3.23 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

- 3.24 The Council is required to publish a default scheme by **1 December 2021** and publish a final scheme, preferably one agreed with bus operators, by **1 March 2022**.

4 Links to our Strategic Ambitions.

- 4.1 A strong bus network serves to support all areas of Everyone's Essex. Bus services offer access to education, employment, health and shopping and are heavily relied upon by those on lower incomes and more vulnerable residents. Bus services in rural areas in particular can act as a focal point for community interactions and a good public transport network can help attract inward investment in Essex's economy, by making Essex a more attractive location for businesses and employees. Promoting bus use also helps to reduce the pressure on the road network for both existing and new communities.
- 4.2 The ENCTS Bus pass scheme supports the commercial viability and stability of the network by drawing more passenger on to it and in doing so also helps to reduce congestion.

4.3 Approving the recommendations in this report will have the following impact on the Council's ambition to be net carbon neutral by 2030: while it is not possible to quantify a direct impact, the bus pass scheme by giving taxpayer funded bus travel to a significant proportion of the population, encourages them to make use of bus journeys instead of making use of private car journeys. A journey made by bus is recognised as (on average) having a lower carbon emission level per person than an equivalent journey made by private car. As such, by promoting the use of bus services this proposal will help to reduce carbon emissions across the county. Additionally travel by bus reduces congestion, ensuring those journeys that can only be made by car are done so more efficiently – also reducing carbon emissions.

4.4 This report links to the following strategic priorities in '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

5.1 The Council has a statutory duty to issue the reimbursement arrangement by 1 December 2021. The Council has considered the following three options:

Option 1: Issue a final scheme on 1 December 2021, 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).

5.2 This would follow the pre-Covid guidance set by the Secretary of State with reimbursement being directly related to passenger numbers and fares foregone. 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.

5.3 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 2021/22 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 and hence significant route withdrawals to re-establish financial sustainability.

- 5.4 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).
- 5.5 A calculator scheme would not meet the Government policy objective of continuing to reimburse operators for at least some period at pre-Covid levels. Therefore, while it is recommended that this is published as the default scheme, it is unlikely to be the recommended final scheme.

Option 2: Issue Fixed Total Cost Reimbursement Scheme on 1 December 2021 (with or without risk share) based on the likely cost of concessionary fares to the Council in 2022/23

- 5.6 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.
- 5.7 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.
- 5.8 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.
- 5.9 Given the huge uncertainty with respect to passenger numbers arising from the impact of COVID-19, it is not considered likely that an agreed outcome could be reached for 2022/2023. If there is no agreed outcome, then operators can appeal. It is also unlikely that this approach would achieve the Government policy objective of re-establishing the link between concessionary passenger numbers and reimbursement in a phased way over the course of the year.

Option 3: Issue a scheme based on variable costs determined by actual numbers of passengers (a 'calculator' scheme) on 1 December 2021 and bring back a report on the final scheme to the Cabinet Member following assessment of guidance issued by DfT, to be issued for 1 March 2022 (Recommended Option)

- 5.10 As outlined in this report, a calculator scheme is the recommended option with respect to a draft scheme issued on 1 December 2021 and a report will be brought back to the Cabinet Member for Highways Maintenance and Sustainable Transport following consideration of the updated guidance from DfT. These recommendations will allow the Council to fulfil its statutory obligations, while allowing the final decision over the shape and cost of the scheme to be made taking into account DfT guidance. Given the high levels of uncertainty any decision by the Cabinet Member would need to be within the parameters set in paragraphs 6.1.9 and 6.2.3 below.

6 Issues for consideration

6.1 Financial implications

- 6.1.1 The Medium Term Resource Strategy (MTRS) indicative budget for concessionary fares for 2022/23 is £17.949m. The table below sets this out together with prior year expenditure and demonstrates how much of the total expenditure relates to the negotiated fixed pot arrangements:

	2018/19 (Actual £'000)	2019/20 (Actual £'000)	2020/21 (Actual £'000)	2021/22 (Budget £'000)	2022/23 (Budget £'000)	2023/24 (Budget £'000)
Concessionary fares total expenditure	18,451	18,376	17,986	17,949	17,949	17,950
Concessionary fare fixed pot operator re-imbursement	18,100	18,200	17,649	16,943	TBC	TBC

Note: Concessionary fares on Park and Ride services were removed from the re-imbursement scheme per decision FP/637/02/20 between 2019/20 and 2020/21 reducing the fixed pot by £574,000.

Financial implications of option 3 (recommended)

- 6.1.1 Implications of a calculator scheme are set out as per option 1 below. Negotiation will need to take place within the confines of the parameters set out in paragraphs 3.10, 6.1.9 and 6.2.3. Clear demonstrable value for money will be difficult in such an uncertain environment.

Financial implications arising from option 1 (not recommended)

- 6.1.2 During 2021/22, ECC negotiated a fixed pot arrangement in line with the DfT's issued policy guidance that requested TCAs to pay concessionary fare re-imbursement at pre-Covid levels. Operators were consequently re-imbursed in excess of the principle of an operator being no better, no worse off for carrying a concessionary passenger.
- 6.1.3 If ECC was to revert to the pre-Covid guidance and issue a calculator scheme, there is the potential for significant financial savings to be crystallized, the exact level of saving being subject to actual passenger numbers. Minimum expected

passenger number levels are at around 50% of pre-COVID levels and whilst this is expected to improve, there remains uncertainty in this respect.

6.1.4 DfT have recently published guidance that proposes to re-establish the link between passenger numbers and re-imbursement levels phased over 2022/23. However, legislation will need to be changed and a staged adjustment will need to take place to enable that to happen which would reduce any saving. Using reasonable, consistent assumptions with prior years regarding average fare price, an estimation of the calculator scheme liability can be made. In 2022/23, if passenger numbers fell to 6.3m, a calculator scheme would estimate payments at £8.56m. This would represent a substantial saving for ECC of over £8.3m on the 2021/22 fixed pot value of £16.943m.

6.1.5 Applying sensitivities to these estimates, even if passenger numbers were to increase by 50% to 9.5m, the calculator scheme would estimate payments of £12.84m, which still represents significant savings for ECC.

6.1.6 Due to the impact of COVID-19 on bus service use, there is significantly greater uncertainty than in previous years over passenger number forecasts. However, as the sensitivity analysis implies, there remains a significant financial saving opportunity from implementing a calculator scheme given the continuing large suppression in passenger numbers that is expected to continue in 2022/23.

6.1.7 Should this option be implemented, it should be noted that this would not be in line with the policy direction issued by DfT which outlines a transition to the link between reimbursement levels and passenger numbers over the 2022/23 financial year. Additionally, 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) which could impact upon the calculated payments.

6.1.8 Note that in previous years, ECC's position in respect of the fixed pot is negotiated with the understanding that fixed pot settlements are generally higher than that which a calculator scheme would enforce in a usual year as this serves to support the stability of the network. There is the risk that a reduction in payments from a move to the default calculator scheme could cause operators to withdraw currently un-commercial bus services across the network and the County Council coming under pressure to replace them with associated cost.

Financial implications of option 2 (not recommended)

6.1.9 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.

6.1.10 In October 2021 the DfT published guidance for ENCTS re-imbursement in 2022/23. ECC needs to assess the options within the guidance in order to negotiate effectively with all counterparties within this uncertain environment.

Clear demonstration of value for money would be very difficult with such uncertainty.

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 2021. It is proposed to publish a 'calculator' scheme as its draft. 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 Under the law as it currently stands, 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.

6.2.4 There was a temporary change in the law for reimbursement in 2021/22 which removed this requirement, but that change was a one-off and doesn't 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.

6.2.5 The DfT has published supplementary guidance requesting that TCAs pay concessionary fares at pre-COVID levels, however this recommendation is not in line with the current law so any payment by TCAs must be lawful. The DfT has agreed to review the legislative position in order to allow TCAs to reimburse operators at the pre-COVID levels as requested and has advised it will provide an update following this review. Any negotiation must be undertaken in line with the applicable law.

6.2.6 Failure to negotiate a 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 in line with the calculator scheme.

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

6.2.8 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.

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 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. As the ENCTS (Bus Pass) scheme offers free travel to older people and people with disabilities, it has an overall beneficial impact on them and has a neutral impact on all other protected groups.

8 List of Appendices

Appendix 1 – Equality Impact Assessment

9 List of Background papers

None