

**DECISION TITLE: APPROVAL IS SOUGHT FOR SPEND ON REIMBURSEMENT TO BUS OPERATORS FOR ENCTS (ENGLISH NATIONAL CONCESSIONARY TRAVEL SCHEME) FOR THE FINANCIAL YEAR 2019/20**

**COUNCILLOR PETER HILLER – CABINET MEMBER FOR STRATEGIC PLANNING AND COMMERCIAL STRATEGY AND INVESTMENTS**

**JUNE 2019**

**Deadline date: 30<sup>th</sup> June 2019**

Cabinet portfolio holder: Responsible Director:	Councillor Peter Hiller – Cabinet Member for Strategic Planning and Commercial Strategy and Investments Dave Anderson – Interim Development Director
Is this a Key Decision?	YES If yes has it been included on the Forward Plan: YES Unique Key decision Reference from Forward Plan: KEY/07JAN19/01
Is this decision eligible for call-in?	YES
Does this Public report have any annex that contains exempt information?	YES – Annex 1 This Annex should be treated as exempt in accordance with paragraph 7 of Schedule 12A of Part 1 of the Local Government Act 1972, as it provides commercially sensitive information regarding reimbursements and agreements with specific operators. The information provided by operators to allow discussions to take place is commercially sensitive and has been provided to us on the understanding that it is exempt.
Is this a project and if so has it been registered on Verto?	N/A

**R E C O M M E N D A T I O N S**

The Cabinet Member is recommended to approve:

1. The carrying out by the Council of the Cambridgeshire and Peterborough Combined Authority's statutory duties to agree and administer Concessionary Fare reimbursements rates to individual Bus Operators for the 2019/20 financial year in the Peterborough area, in line with guidance from the Department for Transport, on behalf of and under the delegated authority of the Cambridgeshire and Peterborough Combined Authority (CPCA); and

2. The Council's Concessionary Fare reimbursement rates to Bus Operators for the 2019/20 financial year (detailed in Annex 1), up to the total value of £3,060,343 per annum

## **1. PURPOSE OF THIS REPORT**

- 1.1 This report is for the Cabinet Member for Strategic Planning and Commercial Strategy and Investments to consider exercising delegated authority under paragraph 3.4.3 and 3.4.6 of Part 3 of the constitution in accordance with the terms of their portfolio at paragraph (b)
- 1.2 The attached annex is not for publication in accordance with paragraph 7 of Schedule 12A of Part 1 of the Local Government Act 1972 in that it contains information relating to financial or business affairs of particular companies (including the authority holding the information). The public interest test has been applied to the information contained within the exempt annex and it is considered that the need to retain the information as exempt outweighs the public interest in disclosing it as to do so would significantly weaken the bus operators' position in a competitive environment by revealing market-sensitive information, or information of potential usefulness to competitors, giving them an unfair advantage. In addition the disclosure of the information does not provide any public benefit regarding accountability.

## **2. TIMESCALES**

Is this a Major Policy Item/Statutory Plan?	<b>NO</b>	If yes, date for Cabinet meeting	<b>N/A</b>
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## **3. BACKGROUND AND KEY ISSUES**

- 3.1 The Council have been carrying out the CPCAs duties as a Travel Concession Authority (TCA) under an informal delegation arrangement since 1<sup>st</sup> April 2019 (and previously for the financial year of 2018/19) and the CPCAs have now decided to extend the delegation of these Travel Concession Authority functions (amongst other functions detailed in their Annual General Meeting Minutes of 29<sup>th</sup> May 2019) to the Council for the entirety of the current financial year 2019/2020.

Delays in making putting formal arrangements in place have been occasioned by (a) the Combined Authority late decision to delegate the functions, which decision was in two separate stages (the second board decision in relation to the period from May 27<sup>th</sup> for the remainder of the financial year, having only taken place on May 29<sup>th</sup> 2019); and (b) subsequent attempts by the Council to clarify details of the financial arrangements between the authorities in relation to the delegation.

- 3.2 The Concessionary Bus Travel Act 2007 entitles eligible people who are resident in England to travel on any eligible service within England. Travel Concession Authorities/TCAs are required by law to reimburse bus operators for carrying concessionary passengers. In respect of the mandatory concession, TCAs must reimburse bus operators for all concessionary journeys starting within their boundaries, regardless of where the concessionary pass-holder making the journey is resident. In addition to the national statutory minimum scheme Peterborough also allows blind or partially sighted pass holders to travel during peak hours (before 9.30am).

The Cambridgeshire and Peterborough Combined Authority Order 2017 (CPCA Order 2017) conferred the local transport planning powers on the Combined Authority creating CPCAs as the local transport authority, whilst Cambridgeshire County Council and Peterborough City Council remain the local highway authorities. The conferred powers included Transport Authority powers (including the responsibilities of Travel Concession Authorities (TCAs) which in turn include concessionary travel provision).

The CPCPA have involved the Council in discussions throughout the year on the impact of this and the Transport Levy and whilst the CPCPA accept that the Transport Levy needs to be set this year, they confirmed at their Board meeting on 30th January 2019 that the most effective way to operate in 2019/20 would be to base this on existing budgets for the Council and for the Council to continue to discharge the related functions in the Peterborough area and so minimise the impact of the change whilst the options for the future are considered. At that Board Meeting, however, the arrangements were only extended until May 27<sup>th</sup> 2019, following which a subsequent extension was decided upon by the CPCPA at their Annual General Meeting on May 29<sup>th</sup>.

It is therefore now proposed that for the entire financial year 2019/2020 Peterborough City Council will continue to exercise the TCA's powers in relation to the reimbursement of concessionary fare to bus operators in the Peterborough area under the delegated authority of the CPCPA.

The funding for such reimbursements will remain with the Council (as detailed in section 8.1 below) to allow the Council to continue to reimburse operators for concessionary travel in 2019/20.

- 3.3 Approving this Cabinet Member Decision Notice will give Council officers the required authority to complete agreements with Bus Operators to ensure compliance with the Concessionary Travel Act 2007.
- 3.4 Approval of the budget allocation, proposed will allow the Council and its relevant officers, acting under express delegation from the CPCPA, to reimburse operators in the area, at an appropriate level, for concessionary passengers carried, in accordance with the Act.

#### **4. CONSULTATION**

- 4.1 Discussions and information sharing have been progressing, and suggested values in Annex 1 need to be approved before formal agreements on reimbursements can be reached with the bus operators.
- 4.2 The discussions are expected to result in mutual agreements between the Council and the operators concerned. Failure to reach mutual agreement will lead to operators appealing to the Secretary of State for Transport and a financial settlement being imposed on both parties.

#### **5. ANTICIPATED OUTCOMES OR IMPACT**

- 5.1 Provision of Concessionary Fare Reimbursement to operators will ensure compliance with the Concessionary Travel Act 2007 by the Council and will permit free travel on buses in the Peterborough area for those holding entitlements to Concessionary Travel.

#### **6. (OTHER STATUTORY BACKGROUND) REASONS FOR THE RECOMMENDATION**

- 6.1 There is a statutory requirement for Travel Concession Authorities (TCAs) to reimburse bus operators for carrying concessionary passengers. Regulations relating to (a) State Aid and (b) Procurement have been considered in the context of this reimbursement and it has been advised that neither apply for the following reasons:
  - (a) State Aid: State Aid occurs whenever state resources are used to provide assistance that gives one or more undertakings, which are engaged in economic activity, an advantage over others and distorts or has the potential to distort competition and affects trade between EU States. Such aid needs to be notified to and approved by the European Commission.

However, Regulation EC 1370/2007 recognises that compensation for public services may prove necessary in the inland passenger transport sector as a

special category of services of general economic interest within the meaning of TFEU and therefore state aid given for these purposes is exempted from the usual rules of notification and approval.

The Concessionary Fares Reimbursement Scheme proposed by the Council for years 2019-2022, falls within the express scope of Regulation 1370, provided that the fare reimbursements are reimbursed in accordance with the provision of Regulation 1370 (see Regulation 1370 Annex 1) and on this basis they are not subject to the usual rules relating to State Aid under the Treaty..

- (b) Public Procurement Regulations: As the Scheme does not constitute the award of contracts for services, but rather the discharge of a statutory obligation under the Concessionary Bus Travel Act 2007 (and other legislation), it is not the subject of the Public Procurement Regulations 2015, which define "procurement" as "the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators.....". In addition to this the "eligible" bus operators who can benefit from the scheme are predefined by Statute (Travel Concessions (Eligible Services) Order 2002/amended 2009). There is therefore no element of competition.

6.2 Provision for travel concessions in England is at present contained in five separate pieces of primary legislation (in addition to Regulation EC 1370/2007): the Transport Act 1985, the Greater London Authority Act 1999, the Transport Act 2000, the Travel Concession (Eligibility) Act 2002 and the Concessionary Bus Travel Act 2007, and the reimbursement of bus operators by TCAs for carrying concessionary passengers is governed by European regulation No 1370/2007 as well as the domestic legislation.

6.3 The reimbursement guidance produced by the Department for Transport (DfT) states that by requiring operators to use their assets to provide a free service for a proportion of the population, this constitutes a major market intervention. The legislation requires that requirement to provide reimbursement to the operators on the basis that they are 'no better off, no worse off' than if the free travel scheme had not existed.

6.4 The methodology used to calculate reimbursement with individual operators uses the DfT's preferred approach through its reimbursement calculator. The calculator has been developed by DfT, economists and academics, and is reviewed regularly, taking into account changes in the economy to ensure that it continues to enable calculation of reimbursement under the 'no better off, no worse off' principle. The principle of 'no Better and no worse off' is in relation to what the situation would have been in the absence of the scheme.

This means that Travel Concession Authorities need to compensate operators for the revenue forgone – i.e. the revenue they would have received from those concessionary passengers who would otherwise have travelled and paid for a (full fare or discounted) ticket in the absence of a scheme. This approach calculates the average fare foregone per passenger journey but recognises that the free concession generates travel, so only reimburses a proportion of concessionary passenger journeys undertaken.

However, TCAs also need to pay operators any additional costs they have incurred as a result of the scheme. This is the cost of carrying additional generated passengers (i.e. concessionary pass holders who would not have travelled in the absence of the scheme), or other costs that would not have been incurred in the absence of the concession such as scheme administration costs or the provision of additional vehicles to meet any peaks in demand caused by concessionary passengers generated by the scheme.

6.5 Legally, TCAs are free to use their choice of methodology in estimating reimbursement, and the DfT acknowledge that in specific certain circumstances it may be appropriate to deviate from them in order to give effect to the 'no better, no worse off' principle.

- 6.6 EU Regulation Number 1370/2007 states that an allowance for ‘reasonable profit’ must be made in the reimbursement of bus operators. There is an implicit allowance for operator profit within the revenue forgone element of reimbursement through the average fare forgone. In addition, the guidance recommends that a profit allowance be made, in the form of rate on return on capital employed for additional peak vehicle requirements (additional buses required to meet the demand presented from pass holders), should these apply.
- 6.7 In the event of appeals by any bus operators, the Secretary of State (or decision makers appointed on his behalf) will apply the law relating to the compensation of operators and will be guided by the DfT reimbursement guidance. The Secretary of State will also consider any evidence brought forward by parties when determining appeals. The Secretary of State will impose a financial settlement on both parties.
- 6.8 Reimbursements to individual bus operators are anticipated to be, cumulatively, within the budgeted value of £3,060,343 for the year.

However, it should be recognised that this will be dependent on the number of passengers travelling throughout the period. Officers will undertake regular budget forecasting to monitor spend against budget and follow the necessary governance procedures should there be any significant deviation.

## **7. ALTERNATIVE OPTIONS CONSIDERED**

- 7.1 Not to comply with the requirements of the Concessionary Travel Act 2007, following delegations from the CPC, would result in a breach of the Combined Authority’s statutory duties, for which, on the facts, it is likely the Council would be liable.
- 7.2 To provide a smaller budget for the Concessionary Fares scheme : Peterborough City Council would be unable to reimburse operators at the appropriate rate encompassing the ‘no better, no worse off’ principle, and would be the subject of appeal and legal challenge.
- 7.3 7.1 or 7.2 would also have an adverse effect on public relations, and introduce financial risk to the authority.

## **8. IMPLICATIONS**

### **Financial Implications**

- 8.1 The council’s budget includes a total sum of £3.631m in respect of Passenger Transport functions. Of this sum, £3.060m relates to the Concessionary Fare re-imbursements to operators, made under the Travel Concession Authority arrangements.

Now that the powers governing these arrangements sit with the CPC, the budget sum is “levied” on PCC by CPC, meaning that it would be paid by the Council to the CPC to enable the CPC to fund the delivery of these services.

However, the CPC has decided to delegate these functions back to the Council for 2019/20, which includes returning the “levy” funding to the Council.

PCC needs to account for the expenditure differently under this arrangement – the levy expenditure, and the funding from CPC both need to be shown separately in the accounts, in addition to the direct service expenditure – but overall the total effect is as if PCC continued to fund the service as before devolution.

In the event that actual expenditure differs from the levy sum, the levy may be adjusted accordingly, as would the sum paid to PCC by CPC. Clarification is being sought from CPC

as to the practical operation of the levy (i.e. the location and movement of funds), since no gains or losses are expected to arise through this arrangement.

#### FINANCIAL BACKGROUND:

The transport functions transferred to CPCPA under the Cambridgeshire and Peterborough Combined Authority Order 2017 have so far been delivered through previously existing arrangements with Cambridgeshire County Council and Peterborough City Council, but the CPCPA Board has (in November 2017 and December 2017), considered options available to deliver these functions in future.

The Transport Levying Bodies (Amendment) Regulations 2018, which came into force on 1st October 2018 now enables the Combined Authority to levy the upper tier authorities (CCC and PCC) for the cost of delivering the transport functions.

The Order sets out the following regulations for the "calculation and apportionment of levies issued by the Cambridgeshire and Peterborough Combined Authority".

1. That the Combined Authority shall apportion its 'estimated relevant expenditure' for the financial year in such proportion as the upper-tier authorities agree.
2. In default of such agreement, the Combined Authority shall apportion its 'estimated relevant expenditure' in the same proportion that each of the upper-tier authorities has spent on the transport functions mentioned in the CPCPA Order 2017 in the financial year ending 2018.
3. Adjustments would then be made for any financial year if the apportionment of actual expenditure differs from that estimated, so that the proportions in which relevant expenditure is met by levies payable, reflect the actual expenditure.

In October, Finance representatives from CPCPA, CCC and PCC met to discuss possible levying arrangements for 2019/20 and for 2020/21 onwards.

Until such time as the Combined Authority makes a decision on future delivery arrangements, it was proposed that for 2019/20 the CCC and PCC budgets for 'relevant' functions be used as a basis for the calculation of the 2019/20 levy. These amounts would then be 'passported' back to CCC and PCC in order for them to continue with the existing provision of services.

The levy sum for PCC has been set at £3,630,691.

#### Legal Implications

- 8.2 Failing to reimburse operators under the Concessionary Travel Act 2007 would result in a breach of statutory duties by the Combined Authority and it is likely (despite the ongoing negotiation of the exact terms of the delegation of these duties by the Combined Authority) that the Council could be liable.
- 8.3 The Council have not yet received a formal legal delegation instrument (i.e. contract) from the Combined Authority. In the absence of a proper legal instrument detailing the arrangements, there is a lack of legal certainty i.e. enforceable contractual terms, between the Combined Authority and the Council.

For example there are no legal terms governing exactly which authority would be responsible/liable for any overspend (over the agreed budget based on the Levy) and how the Council would recover this e.g. (a) relating to greater numbers of concessionary passenger claims than anticipated; or (b) resulting from any legal disputes e.g. Secretary of State settlements.

The late (29<sup>th</sup> May) date of the Board Decision by the CPCPA in which it was decided that the Council should continue to perform the CPCPA's statutory travel functions for an additional financial year, also meant whilst the Council had previously agreed to perform these until May 27<sup>th</sup> 2019 (again with no previous legal instrument in place), it had very short notice of the

CPCA's formal decision to delegate the functions for the remainder of this financial year and to put in place a delegation document.

The Council is therefore asked to approve the CMDN ahead of such a legal delegation instrument being finalized, but on the basis that the Council is endeavouring to negotiate and obtain this.

### **Equalities Implications**

- 8.3 Failure to reimburse operators under the Concessionary Travel Act 2007 could result in bus operators withdrawing from the scheme and resulting in elderly, disabled and blind/partially sighted bus pass holders unable to use their bus passes.

## **9. DECLARATIONS / CONFLICTS OF INTEREST & DISPENSATIONS GRANTED**

- 9.1 None

## **10. BACKGROUND DOCUMENTS**

Used to prepare this report, in accordance with the Local Government (Access to Information) Act 1985) and The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.

- 10.1 Department for Transport Concessionary travel for older and disabled people: guidance on reimbursing bus operators (England) – November 2018.
- 10.2 This is the link to the CPCA Annual General Meeting on 29<sup>th</sup> May 2019 at which the Combined Authority decided to delegate their Travel Concessionaire functions to the Council in the Peterborough Area for a further year and the agreed Transport Levy arrangements were confirmed:

<https://cambridgeshirepeterboroughcagov.cmis.uk.com/Meetings/tabcid/70/ctl/ViewMeetingPublic/mid/397/Meeting/855/Committee/63/SelectedTab/Documents/Default.aspx>

## **11. APPENDICES**

- 11.1 Annex 1 – Exempt Information