

**DECISION TITLE: APPROVAL IS SOUGHT FOR SPEND ON REIMBURSEMENT TO BUS OPERATORS FOR ENCTS (ENGLISH NATIONAL CONCESSIONARY TRAVEL SCHEME) FOR THE FINANCIAL YEAR 2020/21**

**COUNCILLOR PETER HILLER – CABINET MEMBER FOR GROWTH, PLANNING, HOUSING AND ECONOMIC DEVELOPMENT**

**Deadline date: 31<sup>st</sup> March 2019**

Cabinet portfolio holder: Responsible Director:	Councillor Peter Hiller – Cabinet Member for Growth, Planning, Housing and Economic Development.  Steve Cox - Executive Director for Place and Economy
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/2MAR20/01
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 3 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 to individual Bus Operators for the 2020/21 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 (referred to in this report either as the Combined Authority or CPCA); and

2. The Council's Concessionary Fare reimbursement rates to Bus Operators for the 2020/21 financial year (detailed in Annex 1), up to the total value of £3,120,343 per annum

## 1. PURPOSE OF THIS REPORT

- 1.1 This report is for the Cabinet Member for Growth, Planning, Housing and Economic Development 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- 1.2 The attached annex is not for publication in accordance with paragraph 7 of Schedule 12A of Part 1 of the Local Government Act 1972 in that it contains information relating to financial or business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 CPCA's duties as a Travel Concession Authority (TCA) under an informal delegation arrangement since 1st April 2019 (and previously for the financial year of 2018/19) and the CPCA have now decided to extend the delegation of these Travel Concession Authority functions (amongst other functions detailed in their Combined Authority Board meeting of 29th January 2020 and recorded in section 4.4 of the associated Decision Log to the Council for the entirety of the financial year 2020/2021.
- 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 CPCA 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 CPCA and the Council carried out discussions in 2019 on the impact of this and the Transport Levy and have agreed that the most effective way to operate in 2020/21 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 continue to be considered.

It is therefore now proposed that for the entire financial year 2020/21 Peterborough City Council will continue to exercise the TCA's powers in relation to the reimbursement of concessionary fares to bus operators in the Peterborough area under the delegated authority of the CPCA.

The funding for such reimbursements will remain with the Council (as detailed in section 8 below) to allow the Council to continue to reimburse operators for concessionary travel in 2020/21.

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 Bus 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 CPCA, 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 with the bus operators, and the proposed values in Annex 1 need to be approved before 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 Bus 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 AND 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 the TFEU (Treaty on the Functioning of the European Union) 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 year 2020/21, 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.

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 involved in the operation of the Scheme.

- 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.

The statutory legal background regulating concessionary fares and their reimbursement will change, at least in its form, following Brexit, although it is not yet known what form this will take. Meanwhile, although the UK left the EU on 31 January 2020, the UK will, of course, continue to be treated for most purposes as if it were still an EU member state during the transition period, and most EU law (including as amended or supplemented) will continue to apply to the UK. The transition period will end on 31 December 2020 (unless extended for up to one or two years before 30th June 2020) and could therefore end during the 2020/21 financial year during which the council performs this delegated function.

- 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.

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.

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

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.

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.

Reimbursements to individual bus operators are anticipated to be, cumulatively, within the budgeted value of £3,120,343 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 CPCA, would result in a breach of the Combined Authority's statutory duties, for which the Council could 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 £3.849m in respect of Passenger Transport functions. Of this sum, £3.120m 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 CPCA, the budget sum is "levied" on PCC by CPCA, meaning that it would be paid by the Council to the CPCA to enable the CPCA to fund the delivery of these services.

However, the CPCA has decided to delegate these functions back to the Council for 2020/21, 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 CPCA 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 CPCA.

#### FINANCIAL BACKGROUND:

The transport functions transferred to CPCA 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.

The Transport Levying Bodies (Amendment) Regulations 2018, which came into force on 1st October 2018 now enables the Combined Authorities 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 CPCA 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.

Until such time as the Combined Authority makes a decision on future delivery arrangements, it was proposed that for 2020/21 the CCC and PCC budgets for ‘relevant’ functions be used as a basis for the calculation of the 2020/21 levy. These amounts would then be ‘passported’ back to CCC and PCC respectively, in order for them to continue to perform these functions of the Travel Concessionary Authority (on behalf of the CA).

The levy sum for PCC has been set at £3,849,906. (This figure is made up of supported bus services, community transport, Real time passenger information, Concessionary Fares and bus stop infrastructure)

#### Legal Implications

**(See also section 6).**

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 there is a risk despite the ongoing negotiation of the exact terms of the delegation of these duties by the Council and the Combined Authority) that the Council could be liable.

8.3 The Council provided the CPCA with formal legal delegation document (i.e. contract) documenting the delegation of the TCA functions for the current financial year (2019-20) on September 5<sup>th</sup> 2019 by CPCA. The CPCA did not respond. However, in the absence of a signed legal instrument detailing the arrangements, it is likely this would be the presumed contractual basis on which the delegated function was accepted. This is the anticipated likely extent of the legal formality the Council can expect in relation to the delegated function going forward. However, the proposed arrangement is documented in Item 4.4 and Annex `1 of the CPCA’s Board Minutes of the CPCA’s Board Meeting on 29<sup>th</sup> January 2020.

The Council is therefore asked to approve the CMDN ahead of such a legal delegation instrument being signed by the CPCA ed, but on the basis that the Council is still endeavouring to obtain this for 2020-21

#### Carbon Implications

- 8.4 This is anticipated to have a neutral impact because the requirement to reimburse operators continues existing arrangements and therefore emissions will not change.

### **Equalities Implications**

- 8.5 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 2019.
- 10.2 This is the link to the CPCA Board Meeting on 29<sup>th</sup> January 2020 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 (see Item 4.4 and Appendix 1 sections 2.8 and 2.14):

<https://cambridgeshirepeterboroughcagov.cmis.uk.com/Meetings/tabid/70/ctl/ViewMeetingPublic/mid/397/Meeting/851/Committee/63/SelectedTab/Documents/Default.aspx>

## **11. APPENDICES**

- 11.1 Annex 1 – Exempt Information