



Subject: Access to Sherkston Shores Under Easement

To: Council

From: Office of the Chief Administrative Officer

Report Number: 2023-99

Meeting Date: June 13, 2023

Recommendation:

That Chief Administrative Office Report 2023-99 be received for information.

Purpose:

This report has been prepared in response to a motion brought forward by Councillor Aquilina at the April 25, 2023, Council meeting regarding residents of the L0S 1R0 Sherkston hamlet gaining access to the Sun Retreats Sherkston Shores resort through the existing easement.

Background:

Prior to 2018, residents living in the hamlet of Sherkston (property owners/tenants within the L0S 1R0 postal code) were permitted to enter the campground currently known as Sun Retreats Sherkston Shores to access the beaches along Lake Erie. While there were no formal agreements in place prior to 2018, this longstanding arrangement allowed local residents to pass through the resort and access the beaches alongside owners and vacationers at Sherkston Shores.

In 2018, the City entered into a formal agreement with the owners of the Sun Retreats Sherkston Shores property to “Stop Up and Close” parts of Empire Road and Michael Road, transfer ownership of the roads to Sherkston Shores, and include an access easement to allow residents in the Sherkston hamlet to continue having access to the beaches. The easement is registered on title to the property.

The easement agreement (attached as Appendix A) noted a number of terms and conditions, including defining the use of the easement as pedestrian access, restricting the hours and dates of access, and clarifying that the agreement was for using the

easement only and not for using any of the other lands, building, services, or amenities at the resort.

This agreement was signed in 2018 and, until recently, the organization(s) managing the Sherkston Shores property have permitted local residents to enter the campground via motorized golf carts or on foot.

In 2022, Sherkston Shores management indicated they had reviewed the original easement agreement and, as a way to limit the volume of traffic within the park and address safety concerns for its residents, it would begin enforcing the “pedestrian access only” restriction laid out in the original easement agreement.

As a result, City staff obtained a legal opinion on the validity of the decision to allow only pedestrian access. The solicitor’s opinion was that Sun Retreats Sherkston Shores’ management was within their legal rights to restrict access under the easement to pedestrian use only.

Recently, a number of residents have appealed to individual Council Members (both former and current), staff, and the former Regional Council Member for support in resolving the matter of resort access. Staff have facilitated meetings with Sun Retreats Sherkston Shores to find a resolution, however the company has indicated it is firm in its decision to enforce the pedestrian only aspect of the easement agreement.

Management at Sun Retreats Sherkston Shores have recently informed the City that they are currently prepared to allow residents of the L0S 1R0 postal code to park in their staff parking area and walk into the resort to access the beach. They have also offered to transport any individuals with mobility issues from the staff parking area to the beach using their security vehicles.

Discussion:

Councillor Aquilina’s motion from the April 25, 2023, Council meeting included a number of questions in the following six areas:

1. Initial intent vs. signed easement agreement
2. Historic access vs. golf cart access
3. Changes in Sun Retreats practices under the easement
4. City/Sun Retreats communications
5. Estimated number of users
6. Access to Shisler Cemetery

Initial intent vs. signed easement agreement

While it is difficult to establish intent, staff have communicated with the solicitor who advised on the original easement agreement in 2018. The solicitor has noted he has no recollection of the issue of allowing golf cart access in discussions with staff and can find no record of it in any emails he had received on the matter from City staff.

Prior to entering into the agreement to “Stop Up and Close” parts of Empire Road and Michael Road and transfer ownership of the roads to Sherkston Shores, the City held a Public Meeting on June 11, 2018. The minutes of the Public Meeting indicate staff advised Council that the land sale agreement “would include a requirement that residents within the L0S 1R0 postal code would have access in perpetuity to the beach.”

Some members of the community noted they believed the agreement would provide them with full access to the resort, just as any owner in the resort would have, in return for living nearby and experiencing nuisances such as increased noise, litter, traffic, speeding, etc. Some residents have shared with staff that they believe the intent of the easement agreement was to maintain access of all kinds, including that by motorized golf cart.

A recording of the [June 11 Public Meeting](#) shows former City staff explaining the potential agreement and noting it would maintain beach access for residents under the same terms they have enjoyed in the past. The staff member goes on to explain further, by sharing his interpretation of those same terms, stating residents will be able to “walk from the outside of Sherkston down to the beach”.

Current staff believe that the original intent to maintain beach access for residents in the Sherkston hamlet was captured accurately in the original easement agreement as negotiated.

Historic access vs. golf cart access

Sun Retreats Sherkston Shores was permitting residents to access the beach prior to 2018. In 2018, the City negotiated for permanent access to the beach under the easement agreement. This access was written into the agreement to be “pedestrian access only”.

It is possible that at the time this easement was negotiated, staff was not aware that the beach was being accessed using motorized vehicles. In any event, the final wording of the easement refers to pedestrian access, however golf cart access was allowed to persist until 2022.

Changes in Sun Retreats practices under the easement

Many residents have pointed out to City Council and staff that the issue before Council is not a 'golf cart' issue but rather it is an 'access' issue. Sun Retreats management has advised City staff that they have not restricted access to individuals under the easement and that the only change since 2018 has been the restriction of external golf carts.

In 2022, Sun Retreats Sherkston Shores informed the City that they would no longer permit access under the easement via golf cart.

The City is not privy to the rationale for this decision.

However, Sherkston Shores management cited exponential growth in attendance at the resort which has resulted in safety concerns and long lines to access the resort. In turn these issues have adversely affected people's enjoyment of the facilities and put a considerable strain on their infrastructure.

City/Sun Retreats communications

Given the community's attention and interest in this matter, staff has continued to seek a meeting with Sun Retreats Sherkston Shores to find a compromise. The company has indicated it is firm in its decision to enforce the pedestrian only aspect of the easement agreement and has declined to participate in a meeting.

In late May 2023, Sun Retreats Sherkston Shores sent the City a letter (attached as Appendix B) noting that it was prepared to permit the following:

1. Residents of LOS 1R0 may park in Sherkston Shores' staff parking area and walk into the resort to access the Beach; and
2. If a resident of LOS 1R0 has a mobility issue, the resident may park in the aforementioned lot and call Park Security, who will transport them from their vehicle to the Beach and back to their vehicle.

The letter also notes that the company will review this arrangement each year and may choose to adjust it and will provide notice to the City if it chooses to do so.

Estimated number of users

In April 2023, City staff approached management at Sherkston Shores to request data related to the number of users accessing the resort under the easement.

They were unable to provide a number due to the fact that the park had not opened for the season yet.

Staff have extracted data from the parcel fabric of the city. There are approximately 605 properties in the LOS 1R0 service delivery area for Canada Post. Many of those

properties are vacant residential lots, agricultural, or other non-residential uses. Staff estimate there are approximately 400 properties with residents who would be entitled to access under the easement agreement.

This does not imply that all property owners would seek access to the beach through the easement agreement. Staff have no knowledge of the actual number of current or past users and Sherkston Shores management has not provided that information in 2023.

Access to Shisler Cemetery

Residents in the Sherkston hamlet have brought up additional issues related to access at Sun Retreats Sherkston Shores, including continued access to the Shisler Cemetery for relatives of those buried at the cemetery (during regular business hours), access for residents who are disabled and couldn't realistically get to the beach without some type of motorized transportation, and concerns about the need to evacuate during an emergency without a golf cart.

Sun Retreats Sherkston Shores has promised continued access to the cemetery and has also offered to transport any residents with accessibility needs to the beach using its security vehicles.

Easement agreement – “in common” clause

There has also been discussion over other aspects of the easement agreement as it relates to use of designated roadways “in common” with tenants, subtenants, invitees, customers, guests, and others who are permitted to use the roadway.

Some of the residents from the Sherkston hamlet believe the “in common” phrasing means that their access rights under the easement agreement are the same as the other groups noted in the easement agreement (i.e., tenants, subtenants, guests, etc.). Therefore, they believe they should also be permitted to drive golf carts on the roadways within the resort.

Staff sought legal advice to help shed light on this aspect of the easement agreement. The solicitor's opinion was that the reference to “in common” meant that the rights to use the roadways are not exclusive, and that the roadways are to be shared with others at the same time. The solicitor further noted that the rights of the hamlet residents are not identical to the rights of the other groups, and that it's not possible to even know what the full scope of the rights of those other groups are.

Options

The City's solicitor has provided a legal opinion on Sun Retreats' interpretation of the easement, specifically as it pertains to pedestrian use only. This legal opinion was

presented to Council in closed session in the past and paraphrased in a report that was presented in open session.

Based on this legal advice, staff recommend maintaining the status quo. No action is required on Council's part to pursue this option.

Alternatively, Council could direct the City Solicitor to pursue a court challenge to Sun Retreats' interpretation of the easement. A successful challenge to the easement interpretation would establish whether or not Sherkston hamlet residents could access the beach by additional means than pedestrian access. Based on the legal opinion provided by the City Solicitor, staff believe a legal challenge of this type would not be successful. In order to pursue this course of action, Council will have to amend the recommendation in this report to provide the City Solicitor with direction to that effect. For the purpose of this report, staff would label this course of action as Option #2.

Another alternative would be for a private citizen or group of citizens to undertake a legal challenge of the easement on their own to provide access by means other than pedestrian access only. This would be done at arm's length from the City and the City would not be a party to this legal action. There is no action required by Council in order for this to take place.

Internal Consultations:

The Chief Administrative Officer has consulted with the Fire Chief and external legal counsel in order to gather information to assist in the preparation of this report.

Financial Implications:

There are no financial implications from receiving this report. If Council chooses to proceed with legal action against Sun Retreats Sherkston Shores, the City will incur legal fees and staff time will be attributed to the issue.

Public Engagement:

Some residents of the Sherkston hamlet have grouped together to pursue this issue with City Councillors and staff. There are three residents that have emerged as the leaders of this group. Councillor Aquilina and staff have communicated with these group leaders a number of times over the last few months and in the course of preparing this report.

Strategic Plan Alignment:

The initiative contained within this report supports the following pillar(s) of the strategic plan:

- Governance: Communications, Engagement, and Decision-Making
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Conclusion:

Given the signed easement agreement providing beach access for residents of the Sherkston hamlet clearly states that access is of a “pedestrian only” nature, and Sun Retreats Sherkston Shores has compromised to allow local residents to drive into the park and use the staff parking facilities before walking to the beach, staff recommend taking no further action in this matter.

Appendices:

- a. Appendix A – Port Colborne Beach Access Easement
- b. Appendix B – Letter from Sun Retreats to Mayor Steele

Respectfully submitted,

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Report Approval:

All reports reviewed and approved by the Department Director and also the City Treasurer when relevant. Final review and approval by the Chief Administrative Officer.