

Special Parks and Recreation Advisory Committee Meeting to be held via Zoom

**In-person attendance is prohibited at this time. If you'd like to watch or listen to the live Committee meeting, please email Committees@Penticton.ca 24-hours prior to the commencement of the meeting for the Zoom meeting participation details. You will have an opportunity to ask questions related to the agenda at the end of the meeting.*

**Monday, March 22, 2021
at 3:00 p.m.**

1. **Call Special Committee Meeting to Order**
2. **Adoption of Agenda**
3. **New Business**
 - 3.1 Skaha Lake Park East Plan – Marina Implementation
4. **Next Meeting**
5. **Public Question Period**
6. **Adjournment**

Committee Memo

Date: March 22, 2021 File No:
To: Parks and Recreation Advisory Committee
From: Jim Bauer, CFO/General Manager, Finance and Administration
Anthony Haddad, General Manager, Community Services
Subject: **Skaha Lake Park East Plan –Marina Implementation**

Staff Recommendation

THAT the Parks and Recreation Advisory Committee recommend that Council seek a community mandate to establish a long-term agreement with a private operator to help fund the capital improvements and operate the Skaha Marina by including a question on the spring 2021 by-election ballot;

AND THAT the Committee recommend that Council select Option #2 for the Community Opinion Question on the by-election ballot;

AND THAT the Committee recommend that Council pass a resolution committing Council to abide by the results of Community Opinion Question on the by-election ballot;

AND THAT the Committee recommend that if there is community support through the by-election, the proposed operating agreement will be brought back to the Committee for review and a recommendation prior to being presented to Council for a decision.

Executive Summary

At their meeting on March 11, 2021 the Parks and Recreation Advisory Committee members were invited to consider recommending the Skaha Lake Park East Plan for approval by Council and to support including a question in the upcoming by-election to seek community opinion for a long-term arrangement of up to 25 years for the provision of marina services. The members of the Committee unanimously endorsed the recommendation to approve the Skaha Lake Park East Plan but did not support the recommendation relating to the question to be posed as part of the by-election. Members expressed concerns with the proposed question, and indicated that more information and time was needed in order to properly consider this recommendation.

Since this meeting, staff presented the recommended Skaha Lake Park East Plan to Council which received unanimous approval at their meeting on March 16, 2021. Staff have also taken steps to meet with Committee Members to further understand their concerns and consider their feedback in order to advance the recommendation in the adopted plan to explore a long-term agreement as a mechanism to fund the

recommended marina operations and improvements. Staff have now prepared additional information to continue this important conversation with the Committee and move this element of the plan forward.

Background

The City recently wrapped up a 19-month process to involve the community in the development of a plan for Skaha Lake Park East. The need for a plan overseeing Skaha Lake Park was first identified in the Parks and Recreation Master Plan which Council approved in 2018. After recognizing the park was functioning well overall, attention shifted to the east-end section where the following needs included:

- providing direction for maintenance, operation and renewal of aging facilities and amenities like the marina, docks, spray park and boat house;
- improving connections across the park;
- addressing ecological vulnerabilities;
- identifying opportunities to recognize the Indigenous relationship to the area;
- gauging support for existing commercial uses in the park, like the marina and café;
- and align on options fund the marina improvements

With these needs in mind, the City kicked-off a multi-step process to develop a plan. Each step of the process included opportunities for residents to learn more about the work and provide feedback on the direction of the plan and the recommendations. Council approved the plan at their meeting on March 16, 2021.

Alignment on Options to Fund the Marina Improvements

One of the needs to be addressed through the development of the plan was to determine an appropriate source of funding for the marina improvements. Historically, the marina has been run by private operators under short-term licenses. As a result of these short-term licenses, necessary repairs have been delayed and the City's taxpayers have carried the burden of maintenance and upgrades to the marina facilities. Over the next 20 years, the Skaha Marina building and docks will require a capital investment of approximately \$1.5M to maintain the current structures, with a large portion of the repairs required within the next 3-5 years. As part of the master planning process, the City wanted to understand the community's preference for funding these improvements and invited participants to understand and consider the options throughout the process. These options were as follows:

1. Taxpayer Funding - Continue with short-term license arrangement, in which tax payers would continue to fund any required infrastructure upgrades (estimated at \$1.1M over next 3-5 years)
2. Private Investment - Consider a longer-term agreement, in which a private operator would be able to bear the burden of some or all of the required infrastructure upgrades.

In the second phase of the four-phase engagement process, participants were invited to share their preference for funding the capital costs to make the marina improvements if it was approved. The City received feedback from 279 people in this phase of the process and 59 percent selected private funding with a lease (long-term) as their preferred option, 19 per cent preferred taxpayer funding and 22 per cent chose 'other' with most comments recommending a combination of taxpayer funding and private investment. Based on this support, Council directed staff to complete the evaluation and analysis of the legal processes and financial implications of the option for a long-term lease for the marina building and moorage and prepare the necessary materials to further pursue the assent of the electors in accordance with the Park

Dedication Bylaw 2018-37 and Park Land Protection and Use Policy for Council's consideration as part of the upcoming by-election.

Analysis

Following Council's direction, the evaluation and analysis of the option for a long-term lease was completed concurrently with process to finalize the Skaha Lake Park East Plan. In order to conduct the analysis, the City reviewed the Park Land Protection and Use Policy, and consulted with legal counsel on the requirements of the *Community Charter* and the City's Parks Dedication Bylaw. The City's Park Land Protection and Use Policy specifically outlines two main processes to permit private uses in Parks, the first being short term licenses-to-use, and the second being long-term leases. Through the completion of this analysis the City became aware of a new option that had not yet been specifically discussed through the engagement or development of the policy. This third option is the ability of the City to enter in to a long-term Management Operating Agreement as a way of obtaining private investment without the need for a lease and better maintaining public ownership and protection of these lands. The following analysis provides an overview of the advantages and disadvantages of each option for consideration by the Committee.

Lease option:

The first option that was considered in the analysis was the option to enter into a long-term lease for the marina operation as directed by Council. This option would allow the City to rely on the operator to pay for all costs to operate the marina and all or some of the upgrades, repairs and maintenance. It would also provide the lessor with the security needed to secure financing to support investment in the capital upgrades.

As per the Parkland Protection and Use Policy and the 2018 Park Dedication Bylaw, prior to granting a lease of all or part of the land dedicated as park under this Bylaw, the City shall first obtain the approval of the electors as a lease is considered a disposition of park land. Through the analysis, the City learned that full details of a lease agreement would be required to conduct this approval of the electors. This approach would require the City to undertake a competitive process, negotiate an agreement and have a proposed lease agreement ready to execute before having confirmed approval of the electors.

Given the history and sensitivity of this site, staff were reluctant to recommend going through the negotiations to prepare an agreement for approval without confirming interest in this option with the broader community first. Through the analysis, the City also learned that in order for the lessor to finance the investment, they would likely want to secure a mortgage against the lease and in order to do so, the lease would need to be registered with Land Title Office. City staff were concerned with registering a lease on the property.

As a result of the analysis, staff are not recommending the City pursue the option to lease for the following reasons:

- A full lease agreement is not yet available to fulfill the requirements of the assent voting process and would require detailed negotiations prior to confirming support of the community;
- Registering a lease against park property is not in the community's best interest;
- Without the operator financing capital improvements, there is limited benefit to proceed with a lease agreement for a long-term operator; and

- A long-term lease provides the least amount of control and influence by the City and the public between these two options.

Management Operating Agreement option:

The alternate option that was considered in the analysis is the option to enter into a long-term Management Operating Agreement of up to 25 years. This option would also allow the City to rely on the operator to pay for all costs to operate the marina and all or some of the upgrades, repairs and maintenance. It would also provide the tenant with the long-term certainty required to contribute funding capital improvements. Staff had suggested the term “up to 25 years” as there is the possibility these objectives could be reached with a shorter term, but this will not be known until the City goes through the competitive selection process.

A Management Operating Agreement would layout the arrangement that would exist between the operator and City regarding the operations of the marina. The agreement would dictate items such as:

- Length of the agreement,
- Specific boundary of land the operator can use,
- Responsibilities of operator and city i.e. operating and maintaining the buildings,
- Specific services provided by the operator,
- How prices would be set i.e. moorage fees,
- Process to modify services (add or remove),
- How the performance of the operator would be evaluated by the City, and
- Fees paid to the City both for operating fees and a capital contribution.

This option would provide the tenant with some long-term certainty, would not be registerable, and would not require park subdivision. It would also allow the City to maintain more control of the operation and necessary upgrades required for the marina. As this is not considered a “disposition” of the land, this option is preferred by staff over the lease option. However, this option is not contemplated by the Park Land Protection and Use Policy, and under the *Community Charter*, this option does not require approval of the electors. This option would also require an accompanying license to use.

As public ownership of the park is protected with the option of a Management Operating Agreement, assent of the electorate is not required under the *Community Charter* nor in the Park Land Protection and Use Policy. Given the sensitivity of an agreement for a private business to operate in the park for a term of up to 25 years, staff are recommending the City confirm broad community support for the option by including a question as part of the spring 2021 by-election ballot.

As per section 83 of the *Community Charter* this is defined as Community Opinion. As the question is not legally binding according to the *Community Charter*, the Committee expressed concern about the City following through on the direction provided through this process. Therefore, staff are recommending that Committee recommend to Council that a resolution be passed by Council, committing Council to honor the outcome of the community opinion results. If the question should fail, the City would proceed to continue to invest taxpayer funds in the capital improvements and enter into short-term license to use agreements for the marina operations.

As a result of the analysis, staff are recommending the City pursue the option for a Management Operating Agreement for the following reasons:

- Aligns with Parkland Protection and Use Policy by protecting public ownership;

- Enables the City to receive private funding to support publically-owned capital upgrades;
- Enables the City to rely on the operator to fund operating and maintenance cost; and
- Provides more control to the City to ensure City standards and expectations of the operator are met.

Staff believe that the purpose and guiding principles of the Park Land Protection and Use Policy are much better supported with this approach, as opposed to a long-term lease. A key purpose of the policy developed in 2018 is to protect parks as public assets of the City of Penticton and ensure that city parks remain in the public domain. A future Management Operating Agreement for the subject lands for a longer term, if supported by the community, meets the five policy tests of the Park Land Protection and Use Policy:

- Support recreational opportunities, healthy living and enhance public enjoyment of parks
- Safeguard public access and community affordability
- Protect public ownership
- Protect, preserve and promote park land
- Engage the community in park governance and decisions

Terms of the Management Operating Agreement

If there is interest in the option of the Management Operating Agreement, the following are some of the key terms of the long-term agreement that could be considered as the agreement is developed, prior to the City issuing a request for proposal:

- Period - Up to 25 years
- Maintains existing property and water boundaries
 - Provincial License of Occupation & Sub-Licensed Area
 - City of Penticton Owned Land - License to Use Area



- Maintain similar dock configuration
- Operates using similar sized building footprint
- Marina Services
- short-term and long-term moorage both on water and vertical dry dock storage
- marina repairs
- marina accessories retail store

- gas dock with fuel sales
- watercraft and equipment rentals
- Defines how service changes are handled/approved
- Responsibilities of Operator vs City
- Operation of café and/or licensed restaurant
- Operating Fee - determined through competitive process
- Capital Contribution - determined through competitive process
- Performance Reviews – Potentially review and confirmation of performance standards every 3-5 years-specifics to be determined prior to finalizing agreement

Commitment for Further Community Involvement

To support community confidence in the option to enter into a Management Operating Agreement, if the question is successful through the by-election, staff are proposing to provide the draft Management Operating Agreement to the Committee for review prior to issuing the request for proposal, and a second time subsequent to the RFP process and prior to it returning to Council for final approval. This will ensure the Parks Committee and public has two opportunities to access and review the Management Operating Agreement prior to its adoption by Council.

Proposed Question on the Ballot

In order to advance efforts to seek approval of the electors as part of the upcoming by-election, staff proposed the following question for the consideration of the Committee at their meeting on March 11, 2021, which was not accepted.

Do you support the City of Penticton entering into a long-term contractual arrangement of up to 25 years for the development, operation and management of the marina and related facilities and amenities (such as short-term and long-term moorage, marina repairs, marina retail store, gas dock with fuel sales, watercraft and equipment rentals and café/licensed restaurant) located at the marina area in Skaha Lake Park, 3885 South Main Street? YES or NO

Feedback from the Committee at this meeting suggested that the proposed question was ambiguous and did not meet the threshold of clarity. Further, there have been submissions to the local media and emails amongst interest groups that affirm the confusion. As a result of this feedback, staff have proposed some alternatives for the Committee to consider.

Community Opinion Question Option #1

Do you support the City selecting a private operator and entering into a long-term agreement of up to 25 years in order to fund the marina improvements and provide marina services (such as short-term and long-term moorage, marina repairs, marina retail store, gas dock with fuel sales, watercraft and equipment rentals and café or licensed restaurant) located at the marina area in Skaha Lake Park, 3885 South Main Street?

YES or NO

Community Opinion Question Option #2

Staff have also proposed an alternate question to simplify what is being asked of the community for the Committee to consider:

Do you support the City selecting a private operator and entering into a long-term agreement of up to 25 years in order to fund the marina improvements and provide marina services at Skaha Lake Park?

YES or NO

The committee may also wish to recommend an alternative or amended question to Council.

Consideration of the Provincial Lease

Presently, a portion of the marina property is part of Provincial land that the City has a License of Occupation until 2026. Any agreement the City enters into with an operator cannot exceed the Provincial license/ lease term. In addition, the City is unable to enter into a lease if only a license exists with the Province. As a result, the City will need to secure a long term Provincial lease/license. Staff have had initial discussions with the Province on the intent to move in this direction. Alternatively, a new building would need to be constructed outside of the provincially owned area, in order to give the City full jurisdiction over a long-term agreement for the building.

Next Steps

The following are the next steps should the Committee support the recommendation.

- Late March - Council considers approval of the proposed by-election question, and appoints Chief Election Officer and Deputy Chief Election Officer
- March – June - Community Information on Community Opinion Question

Provincial Lease

- Spring-Summer 2021 - Council Resolution to negotiate with Province
- Fall 2021 - Negotiate provincial lease Operator Selection
- Fall 2021 – Develop agreement details (Review by PRAC) and Issue RFP
- Jan 2022 - Select Operator – (Review by PRAC)

Alternatives

Alternate #1

THAT the Parks and Recreation Advisory Committee receive into the record the Skaha Lake Park East Plan – Marina Implementation Committee Memo, dated March 22, 2021;

AND THAT the Committee wait until the Special Committee meeting on March 29, 2021 to make a decision whether to recommend support to Council and include a question on the spring 2021 by-election ballot.

Alternate #2

THAT the Parks and Recreation Advisory Committee does not recommend that the City seek community support to confirm a mandate to establish a long-term agreement for a private operator to operate the Skaha Marina by including a question on the spring 2021 by-election ballot;

AND THAT the marina operations continue to be managed through short-term license-to-use agreements, and that the required marina improvements be city funded.

Attachments

Attachment A – Summary of Legal Considerations

Attachment B – Lease vs License

Respectfully submitted,

Jim Bauer, General Manager, Finance and Administration
Anthony Haddad, General Manager, Community Services

Concurrences

GM Infrastructure	Director, Development Services	CAO
<i>KD</i>	<i>BL</i>	DvD

Attachment A - Summary of Legal Considerations

Below is a summary of the legal considerations the City received related to a long-term agreement for the Skaha Lake Marina.

Skaha Lake Park, including the property at 3885 South Main Street (legally described as Lot 1 District Lot 189 Similkameen Division Yale District Plan EPP50612, PID: 029-633-818) (the “Property”) which is the site of the Skaha Marina and related facilities (the “Marina”), is dedicated for park purposes pursuant to the Parks Dedication Bylaw No. 2018-37 (the “Bylaw”).

The City is considering whether to enter into a long-term contractual arrangement for the development, operation and management of the Marina and originally intended to do this by way of a lease. The City planned to take advantage of the upcoming by-election to seek elector approval by of the lease, as s. 4 of the Bylaw requires the City to obtain the approval of the electors prior to granting a lease of all or part of the Property. However, staff now believe that it is premature to seek elector approval of a lease for two reasons.

First, section 96 of the *Community Charter* requires that the proposed lease and all records relating to the proposed lease that are in the custody or control of the City must be made available for public inspection during the time when the approval or assent process is underway. It is not possible for the City to fulfill this requirement at this time as a full lease agreement will not be available until completion of the Skaha Lake East Plan and of an RFP to select an operator.

Second, there remains significant uncertainty at this time regarding the nature and terms of the proposed contractual arrangement. It may be preferable for the City to enter into different form of agreement, such as a management or operating agreement, rather than a lease. The preferred form of agreement and the process required to enter into such an agreement will depend on a number of factors, for example:

- The City needs to decide what type of arrangement it wishes to have with the Marina tenant/operator.
 - If the City is seeking to have a developer design and construct improvements and develop and operate the Marina and related services on its own behalf instead of operating it as a service on behalf of the City, then lease of the Property may be the form of agreement to pursue.
 - If the City is looking to have an operator operate the Marina and related services on behalf of the City, then a management or operating agreement may be the preferred form of agreement.
 - If in addition to operating existing works, the City wants the contractor to design and build improvements on behalf of the City, then the City may wish to pursue a separate construction agreement from the operating agreement. If design, construction and operation are combined in a single agreement that has a term of longer than 5 years, then elector approval may be necessary if under the agreement the City would incur a liability of a capital nature per section 175 of the *Community Charter* unless exempt from elector approval under the *Municipal Liabilities Regulation*.
 - If the City is proposing to lease the land or improvements or any interest or right in or with respect to them for less than market value to a business, then the agreement would have to take the form of a partnering agreement for the

provision of a service on behalf of the municipality per sections 21 and 24 of the *Community Charter* and council would have to give notice in accordance with section 94.

- A lease would give the tenant exclusive use of the area while a licence of occupation is generally non-exclusive. A lease would be a disposition of land, but a non-exclusive licence would not. Before council disposes of land or improvements, it must publish notice of the proposed disposition in accordance with sections 26 and 94 of the *Community Charter*.
- The City does not own the foreshore and its right to use or allow others to use the foreshore will depend on the terms of the City's agreement with the Province. The City currently has a Licence to Occupy the foreshore from the Province. The City cannot lease the foreshore to a third party unless it obtains a lease from the Province, which it is currently seeking. Even if the City obtains a lease from the Province, it will likely still need further permission from the Province to construct any improvements within the foreshore or to licence, sublicense or sublease the foreshore. Usually with foreshore licences of occupation and foreshore leases, the Province requires a management plan as a term of the agreement.
- Depending on the form and terms of agreement(s) the City decides to pursue for both the upland park land and foreshore, there may be multiple aspects that require elector approval and instead of seeking approval or assent in relation to each matter, Council may seek approval or assent to the related matters as if they were a single matter per section 87 of the *Community Charter*.
- If the City wants private capital invested to develop Marina infrastructure, then a proponent would likely be seeking a long-term lease registered against title as security for its investment and possibly in order to mortgage its lease interest. However, registration of a lease will only be possible if the lease is granted for the entire Property or if the relevant part of the Property is subdivided, which is not preferred by staff or Council.
- The City will have to consider whether the proponent's proposed use of the park land is consistent with park purposes per s. 30(5) of the *Community Charter*. If the City wishes to allow the developer to use the land for a non-park use (or manage the risk that a proposed agreement could be challenged as not consistent with park use), then Council may wish to remove park dedication from the relevant part of the park. This would require a bylaw adopted with the approval of the electors per section 30(3) of the *Community Charter*.

In light of this uncertainty and the City's inability to comply with the requirements of s. 96 of the *Community Charter* at this time, staff propose that Council seek community opinion under s. 83 of the *Community Charter* which provides as follows:

Council may seek community opinion

83 (1) A council may seek community opinion on a question that the council believes affects the municipality, by voting or any other process the council considers appropriate.

(2) The results of a process under this section are not binding on the council.

This will allow the City to take advantage of the upcoming by-election to seek formal public input and political approval of the proposed arrangement without committing the City to using a certain form of agreement. If the City determines at a later date that a lease is the preferred form of agreement, then it will be necessary to obtain elector approval at that time.

Attachment B - Lease vs License

A lease is an agreement that provides the tenant with an exclusive interest in the property. So long as the tenant operates within the terms and condition of the lease the tenant has some right to ownership of the property, including the right to keep any person, including their landlord off of the property. A lease can be transferred to another party, and therefore is usually for a longer term. The tenant has control of what is being done on the property for the term of the lease. A lease over 5 years is considered a disposition and needs to follow specific requirements contained within the community charter. A lease can be registered against the property in the Land Title Office.

A license to use agreement provides the tenant only with the right to utilize or act on the property for a specific reason. A license cannot be transferred to another party. A landlord has significantly more control over how their property is being used. A license is usually shorter term. A license cannot be registered in the Land Title Office.