



Municipality of Northern Bruce Peninsula Council Report

Report Number: PW-22-01

Subject: Cabot Head Road Temporary Road Closure By-law and Project Review

From: Troy Cameron, Public Works Manager
Peggy Van Mierlo-West, CAO

Date: February 14, 2022

Recommendation:

That, Council receives the report titled, Cabot Head Road Temporary Road Closure By-law and Project Review;

And, that Council supports the passage of By-law No. 2022-06 at its February 28, 2022, Council meeting;

And that, Council respectfully decline the request of the Bruce Peninsula Bird Observatory, Friends of Cabot Head Lighthouse and Bruce Peninsula Biosphere Association to sign the work permit application for the structural repair of Cabot Head Road.

Background:

The Cabot Head Road washed out due to high water and major storm activities in the winter/fall of 2019/2020. In the spring of 2020, the municipality placed a locked cable across the entrance to restrict access and signage was also placed to warn the public that the road was closed due to wash outs. In August 2020, Council authorized staff to conduct a temporary repair on the road to allow The Bruce Peninsula Bird Observatory (BPBO) and its contractor to conduct maintenance on one of the Observatory's cottages. This temporary repair also allowed artifacts and other valuables in the care of the Friends of Cabot Head to be retrieved from the lighthouse property. Public Works Department

staff completed the work in September, and the BPBO was granted access to complete their work; however, the road remained closed, gated and signed. In 2021, Council allocated funds and authorised staff to install a more permanent gate structure at the entrance.

At the September 2, 2020, Council Meeting Council supported the following resolution;

Moved by J. Mielhausen
Seconded by D. Myles

Resolution #34-04-2020

THAT, Council receives report titled Trillium Grant Application – Cabot Head Road Lighthouse, AND;

THAT, Council supports in principle the collaborative submission of an Ontario Trillium Fund application submitted by the Bruce Peninsula Bird Observatory, Friends of Cabot Head Lighthouse and Bruce Peninsula Biosphere Association pending conversations and further information being brought back to Council.

The definition of approval in principle is “with regard to fundamentals although not concerning details”. Hence Council supported the concept of the project however understood that there were requirements in receiving full approval.

The report further stated that.

“Unfortunately, information surrounding this project is minimal as the group has only provided the Municipality with its draft budget documents. As of yet, there is no design completed for this project. Should the group be successful with funding they would include collaboration with all stakeholders including focus groups, public meetings and develop a business plan for social enterprise to maintain costs of the trail.

The group has been made aware that there would be a requirement to enter into an agreement with the Municipality to complete this project should they be successful in receiving the Trillium grant.”

At the July 12th, 2021, Council meeting the collaborative did present an update surrounding the project. This included.

“...that the design and engineering for the plan need to be completed by the end of the year, along with developing cost projections, finalizing the trail management plan, planning for the lighthouse, and continuing community consultations.”

The CAO presented a report to Council on December 20, 2021, with regards to ownership of the Cabot Head Road, which included information that was provided by the Municipal Solicitor. From this investigation and review it appeared that the Municipality did not own the Cabot Head Road, except for the small portions that crosses original road allowances. However, it was determined that the Municipality did build Cabot Head Road with help from funds that were contributed by the Federal Ministry of Transportation and the provincial Department of Highways. It was also concluded that an expropriation by-law for the Cabot Head Road was passed by the formal Lindsay Township but was never registered and no records of any payment to the property owners for the expropriated lands could be found.

At the January 24th 2022 Council meeting, the collaborative presented an update of the project. This included an update on the engineering plans and costs for the project. However, the trail management plan, plans for the lighthouse and results of community consultations have been stalled as to waiting for the construction permit to be signed. There request was for the Municipality to sign an application for works permit and to confirm that Cabot Head Road would be

Comments:

At the time of the washouts when the road was initially closed, gated and signed, the status of the road ownership was not clearly known. Therefore, the temporary measures were put in place to protect public safety. With this new information now available, it can be concluded that the municipality likely cannot restrict the access to the road without formally closing the Cabot Head Road by bylaw.

Staff have met with the collaborative regarding their concerns surrounding ownership and their request of Council on January 24th, 2022. These concerns included;

1. Municipality Responsibility to Provide Access in Perpetuity

The Municipal Act does state that;

“Without limiting sections 9, 10 and 11, a municipality may pass by-laws removing or restricting the common law right of passage by the public over a highway and the common law right of access to the highway by an owner of land abutting a highway.”

This would include the closure of any road way for the requirement of safety concerns. Section 9, 10 and 11 include a municipality having; powers of a natural person, and broad authority.

2. Road Ownership

As stated within CAO Report CAO 21-54;

“Administration directed Middlesbro and Stevens LLP to review the file and history. The Municipality did build Cabot Head Road, based upon further review the Federal Ministry of Transportation and the provincial Department of Highways contributed funds to the project. The Federal Funds were accepted via By-law 750. Historic maintenance to the road occurred prior to 2001, this is referenced in a 2006 opinion letter from lawyer Don Greenfield.

Despite this background, none of Cabot Head Road is owned by the Municipality except a small portion that cross original road allowances. However, By-law 782 is an expropriation by-law which was passed but not registered. Usually when an expropriation by-law is passed there is some record of payment to the property owners.”

3. Engineered Drawings

Administration have reviewed these plans and have no concerns regarding the approach to the repair of the road. Administration also received comments surrounding SON review and they are supportive of the project.

4. Work Permit Application

We have provided this request to our legal representative to provide guidance providing a work permit to this project. Until appropriate measures are completed it is not in the best interest of the Municipality to sign the application. This has been attached.

5. Steps to Convert Road to a Trail

We have provided this request to our legal representative to provide guidance surrounding the steps of this conversion. This has been attached.

6. Road Closure

Should Council approve the bylaw today Administration would still provide access to the property owners as current practice. The Municipality limited access to the public as per PW Report 20-49 in which the DBA request to install a permanent gate to prevent vehicular traffic on Cabot Head Road.

Administration remains that the original approval to receive stakeholder approval is the appropriate direction for this project to move forward. Administration has received communications from impacted property owners who are not in favor of this project or who are indifferent as access has not been impacted for their needs, this also includes members of the DBA.

The transition to the trail has been considered also by our municipal legal representative in which their comments are attached. At the January 24th, 2022 Council meeting it was requested that Administration provide a report surrounding the feasibility of the trail being constructed within the timeframe of the Trillium Funding.

As per the request of the collaborative surrounding the signing of the application and approval of the conversion of the trail, Administration believes that the Municipality is not able to complete the requirements under the Municipal Act to transition Cabot Head Road into a trail for the collaborative to continue with this funding request.

Attachments:

- 1) By-law 2022-06 and Schedule A
- 2) MIDDLEBRO' & STEVENS LLP – Re: Cabot Head Road

Budget Implications:

As of yet, budget impacts for the municipality has been through legal review of this matter. Should Council wish to move forward regarding this project staff will provide updated costs at that time.

Municipal Strategic Commitment:

Respectfully submitted:



Troy Cameron, Public Works Manager
Chief Administrative Officer

Peggy Van Mierlo-West, CAO

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Barristers & Solicitors

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10 February 2022

Municipality of Northern Bruce Peninsula Council
56 Lindsay Road #5 RR#2
Lion's Head, Ontario
N0H 1W0

Dear Council:

Re: Cabot Head Road

We are writing pursuant to a request for an opinion on potential options for Cabot Head Road considering it needs significant capital improvements to allow the safe passage of vehicles.

While this letter contains information subject to solicitor-client privilege, and legal advice to Council, and thus ordinarily would be received in closed session, we understand that Council intends the letter to be received in open session.

Background

Our review of municipal records indicates that Cabot Head Road was constructed by the former Township of Lindsay sometime in the 1960s. It is unclear whether any funds were received from the Federal or Ontario governments but at the very least, grants were sought by the Township of Lindsay.

Cabot Head Road is currently the only road access for the Cabot Head Lighthouse and several parcels of land which are partially or wholly owned by other levels of government.

Cabot Head Road is not currently located on land owned by the Municipality of Northern Bruce Peninsula save a few instances where the travelled road passes over the original road allowances.

Over the years, the Municipality has spent funds on maintaining Cabot Head Road.

Recently, severe storms and weather have rendered portions of the road unsafe for vehicle passage and the road has been closed to vehicles for some time.

Status as a Highway

The *Municipal Act, 2001* defines a highway as including all highways that existed on 31 December 2002. Historically, a highway could come into existence through a specific by-law incorporating a road into the municipal highway system or through implied dedication. Implied dedication and acceptance are usually demonstrated through the spending of municipal funds on the road's maintenance or upkeep. When considering Cabot Head Road, municipal records indicate funds were spent maintaining the road prior to 2003 and in fact, the road was apparently built by the Township of Lindsay. Accordingly, it is our opinion that Cabot Head Road is a highway within the meaning of the *Municipal Act, 2001*.

Requirements

Section 44 (1) of the *Municipal Act, 2001* requires municipalities to keep the highway in a "state of repair that is reasonable in the circumstances, including the character and location of the highway." Regulations made under the *Municipal Act, 2001* provide specific maintenance requirements depending on the "class" of highway. Accordingly, the Municipality has a current and ongoing requirement to maintain Cabot Head Road for vehicular traffic as it is a highway.

Future Work

We understand that the Municipality is currently evaluating the status of Cabot Head Road and has received a request from third parties to convert the highway into one or more trails which would provide pedestrian and non-motor vehicle access to the Cabot Head Lighthouse. For Council's discussion, we have prepared a summary of potential options and our recommended legal action that would follow from each option.

Option 1 – Repair the Road

Aside from the obvious need to fund reconstruction and capital improvements to the road, any long-term repairs should involve attempts to negotiate transfer of the ownership of the travelled portion of the road from other government entities and/or private owners. Failing successfully negotiating a transfer, we recommend that the Municipality either expropriate the land or commence litigation to establish ownership through historic use to obtain clear title to the entire travelled road. This would incur expense to the Municipality for legal fees, transfer fees (if any) and surveyor costs. The exact amount would depend on the success of negotiations and the nature and extent of any litigation making the total costs uncertain.

While the Municipality is deemed to own the road pursuant to the *Municipal Act, 2001*, this claim is subject to any registered interests in the land i.e., the registered landowners. It would be prudent to secure any significant investment of public funds by acquiring all the travelled road to prevent any future legal claims against the Municipality.

Option 2 – Close the Road and Remain Neutral on any Trail

As Cabot Head Road is a highway under the *Municipal Act, 2001*, closing the road would require the Municipality pass a by-law which would then be registered in the Walkerton Land Registry Office. However, this option will require the consent of the Federal Government. The Cabot Head Lighthouse is owned by the Department of Fisheries and Oceans. As such, section 34 (2) of the *Municipal Act, 2001*, requires that:

(2) A by-law permanently closing a highway shall not be passed without the consent of the Government of Canada if the highway,

(a) abuts on land, including land covered by water, owned by the Crown in right of Canada; or

(b) leads to or abuts on a bridge, wharf, dock, quay or other work owned by the Crown in right of Canada. 2006, c. 32, Sched. A, s. 18.

Accordingly, Cabot Head Road cannot be closed by by-law until the consent of the Federal Government is obtained.

If the highway is closed, any trail activities would be subject to agreement by the landowners and third parties. However, most of the lands are owned by the Government of Ontario and may be subject to the *Public Lands Act* which may allow public travel via a trail system.

Option 3 – Convert the Road to a Trail

This option would require passing a by-law under section 35 of the *Municipal Act, 2001* to limit any use of Cabot Head Road to pedestrians or non-motor vehicles. Section 35 provides:

Without limiting sections 9, 10 and 11, a municipality may pass by-laws removing or restricting the common law right of passage by the public over a highway and the common law right of access to the highway by an owner of land abutting a highway.

Ordinarily, the Municipality would be required to maintain the road for vehicular traffic and an exclusive trail use is inconsistent with this. As such, restricting motor vehicles from Cabot Head Road would be a necessary pre-condition to conversion to trail and allow construction of a trail system without violating the Municipality's obligations to maintain the highway for vehicular traffic.

Thereafter, as with option 1, we would strongly recommend that ownership of the road be rectified prior to any significant investment by the Municipality with the associated time and costs.

Other Legal Obligations to Maintain Cabot Head Road

At this time, there is insufficient evidence to confirm whether the Municipality has any legal obligation to maintain Cabot Head Road beyond those found in the *Municipal Act, 2001*. There is a reference to permanent maintenance of Cabot Head Road in a letter from the Federal Department of Transportation dated 29 March 1962 as a condition of receiving a grant of \$2,500.00 to build Cabot Head Road.

However, there is insufficient evidence to determine whether this letter represents a final agreement between the parties, and whether the funds were actually paid. Moreover, it is arguable whether these terms represent a binding and enforceable promise. It is also arguable that any agreement that does exist entitles the Federal Government to actual maintenance and not simply a return of the \$2,500.00. Finally, it is arguable whether the current repairs represent ongoing maintenance of the road or new capital investment.

Given the significant work required, we are of the opinion that this work is more capital improvement than regular maintenance.

If, however, this did represent a binding contract, options 2 and 3 would be violations of the agreement. The letter clearly contemplates a road not a trail. Closing Cabot Head Road to vehicles would therefore violate the letter.

Access Consequences of Closing the Road

If Cabot Head Road is closed, future access to the Bird Observatory and Cabot Head Lighthouse may be impeded but those issues would be subject Provincial and Federal decision-making. If the road is closed, any issues of access would be left to the owners of the properties leading to the Bird Observatory and lighthouse. As noted above, public bodies are owners or part owners of the properties and as such public access rights can continue. However, we cannot predict the actions of these agencies.

Legally, Cabot Head Lighthouse would still be publicly accessible via Georgian Bay as there is a public right of navigation over all waterways; however, this is likely impractical for most individuals.

Permitting Requirements

As portions of Cabot Head Road pass through shorelands, any work done to repair the road or convert it to a trail, in those areas, will require a permit from the Ministry of Northern Development, Mines, Natural Resources and Forestry pursuant to the *Public Lands Act*. The person receiving a "direct benefit" from the work done must either apply for the permit or authorize an agent to do so on their behalf.

If the Municipality intends to repair the road, it would be receiving the direct benefit and be responsible for the permit. Similarly, under option 3, the Municipality would be receiving a direct benefit and responsible for a permit. However, under option 2, we are of the opinion that there is no direct benefit conferred to the Municipality and therefore a subsequent construction of a trail would not require the Municipality to apply for the necessary permits.

Yours very truly,

MIDDLEBRO' & STEVENS LLP



NICHOLAS A. G. LOVELL, e-signature

NAGL:nagl

The Corporation of the Municipality of Northern Bruce Peninsula

By-law No. 2022-06

A By-law to delegate authority to temporarily close or restrict the common law right of passage over and access to certain portions of the Cabot Head Road in the Municipality of Northern Bruce Peninsula

WHEREAS sections 23.1 (2) 5 and 23.2(5) of the Municipal Act, 2001 S.O. 2001c. 25, as amended, provides the Council may delegate some of its powers and duties, including the power to close a highway temporarily;

And WHEREAS Section 35 of the Municipal Act 2001 authorizes a municipality to pass by-laws removing or restricting the common law right of passage over and access to a highway;

AND WHEREAS Council has determined that it is appropriate to delegate the authority to temporarily close or to remove or restrict the common law rights of passage over and access to a portion of the Cabot Head Road from 7 to 806 Cabot Head Road, due to the erosion and damage to the road, from high water and weather conditions;

NOW THEREFORE the Council of The Municipality of Northern Bruce Peninsula hereby enacts as follows:

1. The Manager of Public Works is hereby delegated the authority to temporarily close and/or remove or restrict the common law right of public passage and the right of adjoining owners to access such portion(s) of a section of the Cabot Head Road from 7 Cabot Head Road to 806 Cabot Head Road – Schedule “A” attached to this by-law.
2. This By-law shall come into force and effect on the day of its final passing.

Read a first and second time this 28th day of February, 2022.

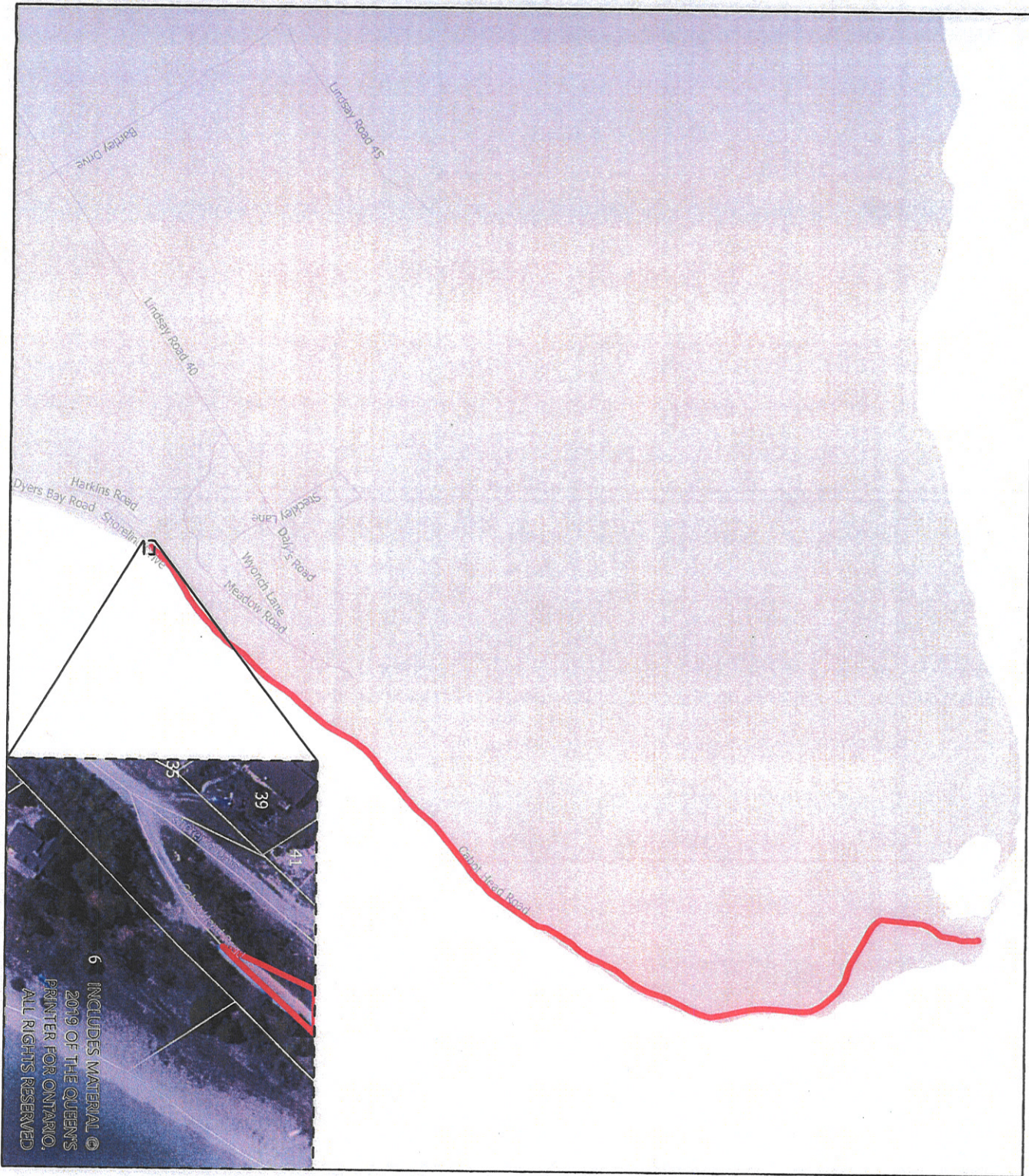
Read a third time, finally passed, signed, and sealed this 28th day of February, 2022.

Mayor Milt McIver

Clerk Cathy Addison

Bylaw 2022-06 - Schedule A

Closure of Section of Cabot Head Road



Produced by: Municipality of Northern Bruce Peninsula (KS)
Date: January 5, 2022
Source: Bruce County, Municipality of Northern Bruce Peninsula, SWOOP
Projection: NAD83 UTM Zone 17N
Software: ArcGIS Pro 2.7.3



Description: The coloured line represents the section of Cabot Head Road to be closed by By-Law 2022-06.
All information shown is approximate and based on the best available information.

The information contained herein is provided by the Municipality of Northern Bruce Peninsula. This map is for illustrative purposes only. Do not rely on this map as a precise indicator of routes, features or for surveying purposes. May contain cartographical errors or omissions. An accessible format of this document is available upon request