



**THE CORPORATION OF THE
MUNICIPALITY OF KINCARDINE
REPORT**

Subject: Mystic Cove Gate
Director: Infrastructure & Development
Manager: Operations
Report Number: Operations-2023-14
Meeting Date: Monday, July 10, 2023

Recommendation:

That Council direct staff to amend By-law No. 2011-068 to permit the opening of the Mystic Cove gate from December 1 through February 28 annually; and

Further, that Council repeal Policy TP 3.1 – Emergency Access to The Bruce Nuclear Power Development; and

Further, that Council make their decision at the August 14, 2023, meeting to allow further engagement amongst Council and the community on the recommendation.

Date to be considered by Council: Monday, August 14, 2023

Report Summary:

Staff brought forward considerations related to the existing policy and management of the Mystic Cove gate. Council directed staff to complete community engagement. Staff have completed a public survey and held an information session. From those efforts, staff have put together a summary of the feedback and presented a variety of options below for Council to consider. Staff are recommending Council amend By-Law No. 2011-068 to allow the gate to be opened from December 1 through February 28 and further to rescind Policy TP 3.1 – Emergency Access to The Bruce Nuclear Power Development. Staff recommend a decision be made at a regular meeting in August to provide time for Council to consider staff's recommendation related to the gate.

Origin: Council direction

Existing Policy: TP 3.1 – Emergency Access to The Bruce Nuclear Power Development

Background/Analysis:

Staff brought report Operations-2023-09 to Council on April 12, 2023, to share information about challenges with the existing policy related to the gate in Mystic Cove. The gate is situated at the midpoint of a 5.5km stretch from the intersections of Victoria Street & Bruce Road 15 in Inverhuron and Bruce Road 23 & Lorne Beach Road. The gate is typically closed to prevent vehicles from travelling over the public road.

Council passed the following on April 12:

Resolution #04/12/23 COW – 02 *THAT Committee of the Whole recommend that Council direct staff to hold a public meeting to hear community feedback on the potential opening/removal of the Mystic Cove Gate.*

Actions completed to address the direction of Council included a community survey and hosting of a public information session. The survey was released to over 400 property owners directly impacted by the gate and road network and closed on July 12. A total of 352 people responded to the survey. The full survey results are appended to this report. The public meeting took place on Friday June 30 from 12:30pm-3:30pm and was held in Underwood. Several members of Staff and Council were in attendance to answer questions and share details with community members in attendance. There were approximately 100 people in attendance to discuss the topic of the gate.

By-law to Assume Road

The gate originated as the result of a subdivision development that entered into agreement with the Municipality in 2007. In 2011 the Municipality assumed the road known as Upper Lorne Beach Road by By-Law No. 2011-068. The By-law incorporates provisions around “Restricted Access” and the allowances for opening of the gate. Policy TP 3.1 – Emergency Access to The Bruce Nuclear Power Development was also established to address the process by for opening the gate.

If the gate were to be opened or removed the section of the By-Law that assumes jurisdiction of Upper Lorne Beach Road as a public highway would need to remain. Legal has advised that they do not recommend repealing and replacing the By-Law as the only way to repeal a By-Law establishing a highway is to pass a closing By-Law under section 34 of the Municipal Act, 2001. The Municipality would be required to give notice of our intention to pass the By-Law. In this case, the intent is to continue to maintain Upper Lorne Beach Road as a public highway therefore, in either instance Kincardine needs to pass a By-Law amending By-Law No. 2011-068.

If the gate were to be removed, the “Restricted Access” section of the By-law would need to be removed, as well as the recitals referencing section 35, and establishing regulations for the use of Upper Lorne Beach Road. If the gate was to be opened, then the amendments to the By-law will need to reflect the details of what having a gate open involves. Depending on what opening the gate means, reference to section 35 may still be required.

Legal Considerations

In 2018 the Municipality sought out a legal opinion pertaining to the gate. A couple of the key points to share with Council are below:

“There have been court cases that consider the use of section 35 by Municipalities to restrict the common law right of passage in various instances; however, our research has not revealed a similar fact scenario as presented here. This is a novel situation. We are not aware of other “gated communities” where a Municipality has ownership of, and maintains, the road contained within the gated community.”

“Also, a By-Law may be found void if it is discriminatory and unconstitutional. To restrict some individuals over others does not necessarily imply discrimination; however, there is possible argument that there is discrimination being applied based on classes of ‘persons’. This argument remains untested by the courts.”

As noted, the situation of having a gate opened during severe winter weather is unique as other examples of gates on roadways are there to prevent traffic from travelling during periods when the road is closed.

Engagement Results

A targeted engagement approach was undertaken to get feedback from the community. The survey results show that of those who submitted their input on the removal of the gate:

- 74% (257 respondents) do not want the gate removed
- 22% (78 respondents) are in support of the removal
- 3% (11 respondents) are neutral

Response to the question on preference for the gate were as follows:

- 43% (143 respondents) prefer that the gate is only open when Bruce County Road 23 is closed
- 23% (79 respondents) prefer the gate is closed permanently
- 20% (72 respondents) prefer the gate is removed
- 16% (54 respondents) prefer that the gate is open from November through April

The survey data includes written responses on why respondents are either in favour or why they have concerns pertaining to the opening. Refer to the attached results to see those details.

Road Design

One of the current and historical concerns relates to the road design for Victoria Street from Bruce Road 15 to the gate. The road is narrowed by tree vegetation that requires maintenance brushing regardless of the gate. The original road would have been constructed and designed to a lesser standard than today's municipal design standards. There are no sidewalks or streetlights and poor sight lines in some locations due to the curvature of the road.

There are approximately three locations where the horizontal radii along the road is below the current accepted range for a local urban roadway and would be considered deficient at a design speed of 40 km/hour. There is minimal design guidance available for roads operating at less than 40 km/hour and further evaluation would be required to determine how the standards would be impacted if a lower posted speed (e.g. 30 km/hour) was utilized. It is important to note that the road conditions and uses here are not unlike other locations throughout the Municipality and along the shoreline where gates do not exist.

Staff shared previously that their opinion was to open/remove the gate. This reflects the typical approach to a public highway being intended for public use, as well as the challenges within the current policy. Leadership is also concerned with staff being pulled from the work of clearing roadways to safely get staff to the site to open and close the gate, in addition to bussing challenges experienced. It was also reflective of comments from the OPP that a public highway should be considered either opened or closed for all. Given all, the existing framework is flawed and thus staff are of the opinion that Council should rescind Policy TP3.1.

Outside of the policy, there are many options that exist related to the gate. Council could elect to:

1. Permanently close the gate and consider disconnecting the road by way of adding tree vegetation. We would need to maintain a corridor to allow users of the KIPP trail through the area. Concerns related to this option are that the purpose of establishing a public road through the approved development design are not met.
2. Permanently open the gate or remove the gate. Concerns related to this option relate to additional traffic volumes on the through road and the existing design of Victoria Street. If this option were selected the road should be evaluated and confirmed that the appropriate speed limit and traffic calming devices are in place strategically throughout. A longer-term consideration is the reconstruction of Victoria Street however this would be a significant undertaking in cost and possibly require land acquisition to address the horizontal deficiencies.

3. The gate could be opened during certain winter months only. This would address the current challenges during storm events and would remove the need to redirect staff from road clearing during winter weather events. It would fulfill the original purpose of establishing a public road and provide Bruce Power staff an option for travel and reduce the barriers that are present around bussing as well. Notice of the road being opened and closed would be sent out to The Municipality would no longer need to hold the servicing and maintenance agreement with Bruce County that allows us to maintain Bruce Road 23 from Kincardine to Lorne Beach. If supported, we would forego any further renewals of the lapsed maintenance agreement arrangement. This could be selected as a permanent option or done as a trial for the upcoming season with a follow-up report to Council post winter operations season.
4. Open the gate from November 1 through April 30. This would align with the minimum maintenance standards where it is anticipated that weather conditions may exist that require winter operations deployment. Over the past several winters many of our storm events have occurred in December through February and therefore staff feel this window may be a longer time period than required.
5. Open and close the gate when declaring and ending of our significant weather events. These events are declared through observation of forecasted weather conditions that could impose a reduced level of service on our road network throughout the event. Staff would open and close the gate during maintenance or winter route patrols of the area. This option would ensure the gate is opened during periods of inclement weather, however, would reduce the overall frequency of use of the area roads compared to it being opened for a set period.

For options 3, 4, and 5, notice about the opening and closing of the gate would be required for the public, emergency responders, school bus providers, etc., and updates to mapping information would be required each time the gate is opened and closed. There is a greater risk and liability of the notice not being communicated to all parties appropriately with option 5, as the process would be weather dependent and may lead to confusion.

6. An automated gate opener has been suggested through the public survey feedback. Staff would need to explore this option further to understand the cost and considerations with our climate conditions and who would be able to trigger the opener. Additionally, there is risk and liability associated with this option given the potential for failure and the implications if emergency responders expected to be able to get through the gate but could not open it using an automated system.

Overall, there are options that exist for Council and while each has merit for consideration, in order to address the identified concerns of all stakeholders, staff are suggesting that if the road is not being opened that option 3 be considered as the preferred approach. Should Council wish to support a pilot opening could be conducted for the 2023/2024 winter season. Staff would suggest to Council if the gate is opened that traffic data be collected prior to the change and during the period that it is open so we have metrics to analyze and assess the motorists' usages and behaviours.

Integrated Strategy 2020 - 2025 Goal CW7: Enhance community safety and wellbeing in the Municipality of Kincardine

Financial Implications: N/A

Attachments: Mystic Cove Gate Survey report

TP.3 1 Emergency Access to BNPD

Emergency Access Gate Map

By-Law 2011-068

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Submitted by: Adam Weishar – Director of Infrastructure & Development