



COMMUNITY PLANNING & DEVELOPMENT DEPARTMENT

Monday, December 20, 2021

Subject: Webber, Farr and River Road Drainage Issues

Recommendation:

BE IT RESOLVED THAT Council receive Report #2021-0211 Webber, Farr and River Road Drainage Issues, for information; and

AND THAT Council direct staff to hold a community meeting with property owners in the Webber, Farr and River Road area to discuss drainage issues, identify possible solutions and provide options to property owners.

Background:

The Webber, Farr and River Road area is located in the southwest corner of the Town and properties in this area have been experiencing drainage issues from development and from other property owners altering drainage flows. Development in the area is associated with lots that were created through testamentary devise on both the east and west side of Farr Road between Webber and River Road. The original creation of these lots were created over the objection of the Town, which lost a court case over the issue (which in turn resulted in changes being made to the Planning Act, as the decision was universally regarded as a poor one with terrible implications). Importantly, the development occurred without site plan control, and so the municipality was not able to ensure that the drainage for the private properties was appropriate.

Town staff have received a number of complaints from property owners on Webber Road between Victoria and Farr Roads, complaining about excess water on their properties. Property owners on River Road have also complained about drainage issues from development. Also, recently, a farmer constructed a berm on a farm field to block water from coming across the road and over their farm property; this resulted in water backing up in the roadside ditch. While flooding of Farr Road did not occur, the berm could potentially cause flooding over Farr Road. The farmer has since opened up the berm to allow the flow of water over his lands and has indicated that this is a temporary measure and will close the berm in the spring if the drainage issues are not resolved.

Analysis:

Context

The Webber, Farr and River Road area is located in the rural agricultural area of the Town in an area that is not planned for development, is not serviced and is located where non-agricultural development is not permitted by provincial, regional and local planning policies. Nevertheless, a number of rural residential lots were created legally through the testamentary devise process, i.e., through a 'will' not through a plan of subdivision. Although changes were made to the *Planning Act* in the early 1990s that no longer allow for the creation of lots by 'will', those lots that were created by 'will' prior to July 26th, 1990 are legal lots. It is noted that the Town did not provide approvals for the creation of lots created through testamentary devise and these are not lots created through a plan of subdivision.

On the east side of Farr Road 57 lots were created with 20 of the lots fronting on Farr and River Roads and the remainder of the lot being interior lots that do not have public road frontage. On the west side of Farr Road, 64 lots were created with 46 lots fronting on Farr, Webber, River and Victoria Roads and the remainder being interior lots with no public road frontage.

The aerial imagery below illustrates the location of this area and the lots that were created by testamentary devise in this area from the Preston Estate.



The Town is currently in litigation with the developer and builder of the lots on the east side of Farr Road whereby the applicants are seeking a court decision to compel the Town to issue building permits for the interior lots in this area. No decision has been rendered on this court application. The court application was to be heard in March and then again in September of this year and is now scheduled to be heard on February 28, 2022.

Because this area consists of unplanned development, there has been no overall drainage and stormwater management plan developed to address how drainage and stormwater will be managed that is typical when subdivision plans are approved. The Town has no authority to compel the developer to develop a stormwater management plan for this area. While builders are required to provide individual lot grading and drainage plans at building permit stage that illustrate how the individual lot will be graded, there is no comprehensive drainage and master stormwater management plan that identifies where the storm outlets are, how stormwater is to be managed and there is no requirement that post development flow rates do not exceed pre-development flow rates; these are typical requirements of a stormwater management plan.

The Town is aware that the developer on the west side of Farr Road did alter the location of an intermittent stream to follow along the rear lot lines of the lots fronting on Webber Road approximately 6 years ago so that the stream would align with the rear property line of those properties fronting on Webber Road, rather than bisecting two thirds of the way through the lots.

This year the amount of rainfall that was received in the spring, summer and fall months has also contributed significantly to the increase in drainage issues in this area.

Natural Watercourse

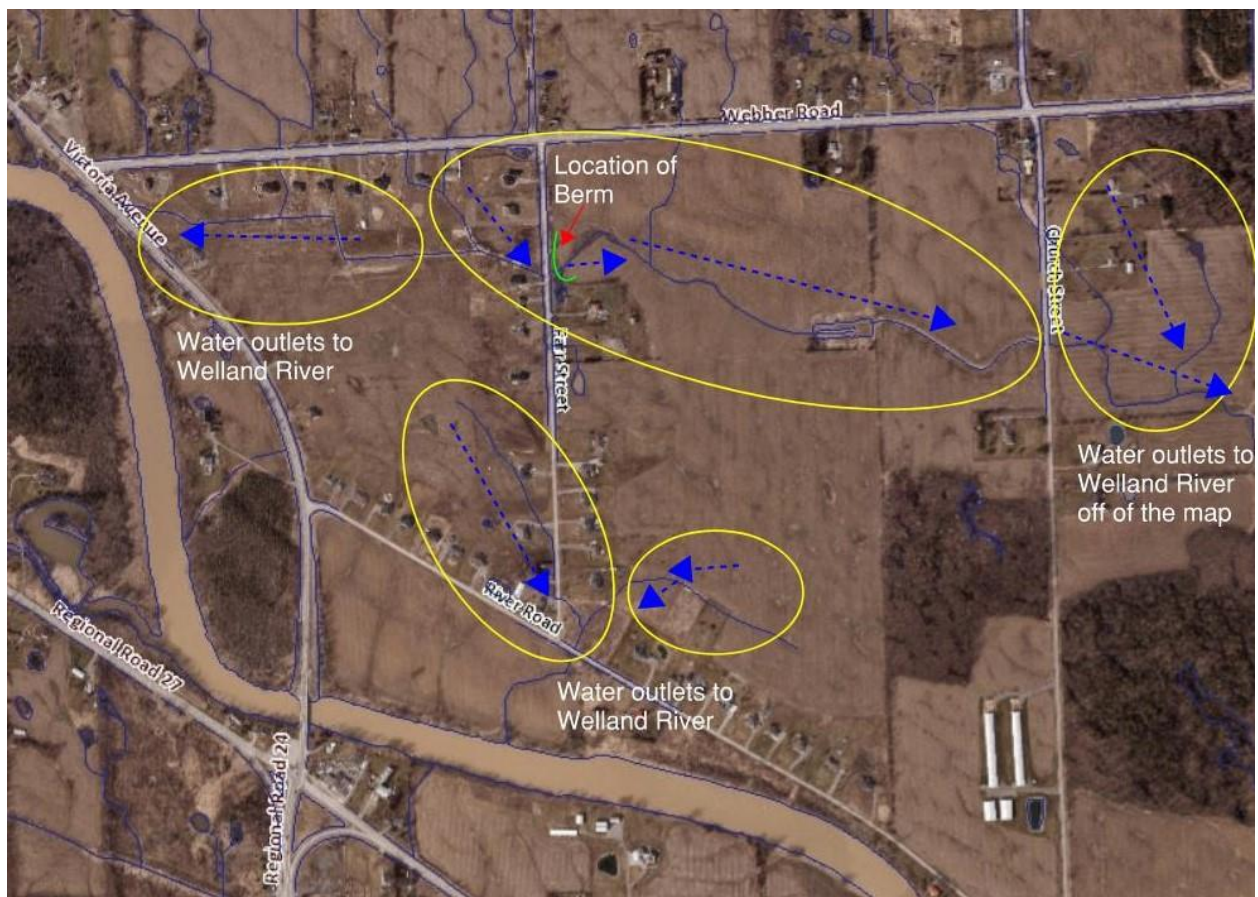
With respect to drainage, a natural watercourse is generally described a natural channel with defined banks or sides, where water flows either seasonally or all year round. There are 3 types of natural watercourse: ephemeral, intermittent and perennial streams. Ephemeral streams flow on an irregular basis and generally in response to a storm event. Intermittent streams do not flow throughout the year, but may flow for several months when there is a source of water, i.e. snow melt, spring thaw. Perennial streams/watercourses flow throughout the year.

Surface Drainage

Surface water is water that is not contained and percolates into the ground or flows on the surface as sheet flow or flow through small rivulets or surface runs across

low areas and these are not considered a natural watercourse for drainage purposes.

For context, the aerial image below illustrates the drainage watercourses that exist in the Farr/Webber and River Road area and their general direction of drainage flow and identifies the location of the berm that the farmer installed on his property to block the flow of water.



The ephemeral and intermittent streams are illustrated in blue lines in the aerial image with their directional flow illustrated in the dashed blue arrow. The Welland River is considered a perennial watercourse and is the outlet for ephemeral and intermittent streams at various locations.

Common Law for Surface Water

In most cases, under common law, owners of lands of higher elevation do not have an inherent right to drain surface water onto neighbouring properties of lower elevation. Where a landowner drains surface water onto an adjacent property that is lower in elevation, the owner of the lower property can either accept the surface water or take steps to exclude or repel the surface water flow. However, landowners cannot block natural watercourses that run across their property. Once

surface water reaches a natural watercourse it must be allowed to continue to flow through all properties. Property owners can drain their lands into a natural watercourse but not in a way that exceeds the capacity of the watercourse or that causes damage to downstream properties.

The construction of the berm by the farmer to block water from intermittent stream and blocked a natural watercourse, appears to be inconsistent with the principles of common law. However, when common law drainage disputes arise, only a judge can determine if the dispute involves a natural watercourse or surface water. It is important to note, that this watercourse that the farmer blocked is also regulated by the Niagara Peninsula Conservation Authority (NPCA) and any alteration to the watercourse, such as the construction of the berm, requires permit approval from that agency.

Constructed Drainage

Constructed drainage includes drainage works built to improve surface and subsurface water flow and remove excess water using channels, land grading, pipes and surface inlets. Subsurface drainage removes excess soil water from the soil using a perforated pipe, i.e. tile drainage installed on farm fields.

Municipal Roadside Ditches

Municipal roadside ditches are a form of constructed private drainage that are meant to handle surface drainage from the road. Road authorities are not obligated to receive water from adjacent properties and are entitled to take steps to prevent surface water from flowing onto municipal roads. There is no right of drainage of surface water from surrounding lands to a roadside ditch unless the roadside ditch is part of a municipal drain.

Other Private Drainage Works

Private drains, channels or ditches are built and owned privately. Property owners are responsible for privately-owned drains, channels or ditches on their properties. Adjoining property owners have no right to drain into a private drainage system or perform work on a private drainage system without obtaining the permission of the owner of the drainage system and adjoining property owners have no right to demand the owner of private drainage system maintain or repair the system to their benefit.

Options to Address Drainage Issues

If private property owners are experiencing drainage issues they can work together as good neighbours to resolve the drainage issues, but it should be noted that

impeding the flow of water in a watercourse and/or draining into roadside ditches is not permitted.

If neighbours are unable to work together to resolve drainage issues, then one option is to seek a resolution through the courts. As mentioned previously, only the courts, i.e. a judge, can determine if water flowing from one property to another is surface water or not, only the courts can rule if a prescriptive right of drainage over a property exists or not, or if a property owner is subject to damages from flooding on their property.

Another option is to seek a solution through the *Drainage Act* through either a mutual agreement drain or petition drain. Mutual agreement drains are private drains constructed and cost shared through an agreement with two or more property owners; the agreement is registered on title on each property; and provisions of the agreement are enforced through legal action.

A petition drain results in what is commonly known as a municipal drain. Petition drains are initiated by a property owner or group of property owners through a petition submitted to a municipality. Petition drains once approved and constructed become municipal infrastructure and the municipality through the Drainage Superintendent is responsible for the management of the drain. There are 4 ways a petition for drainage under Section 4(1) the *Drainage Act* can be considered valid:

- The petition is signed by the majority in number of property owners (more than 50%) in the area require drainage;
- The petition is signed by property owners representing a minimum of 60% of the area requiring drainage;
- The petition is signed by a road authority, i.e. Town Director of Public Works, where a road requires drainage;
- The petition is made by the Director (appointed by the Minister of Agriculture, Food and Rural Affairs) where drainage is required for agricultural lands.

The petition is a legal document and the original petitioners have responsibilities under the *Drainage Act*, for example, if people withdraw their name from the petition and the petition is no longer valid, the original petitioners pay costs incurred to date.

The Town can only initiate a petition for a municipal drain as the road authority and only where a road requires drainage. To date, the Town has not experienced drainage issues on Farr or River Roads and roadside ditches are available to drain these roads, as a result it is not appropriate that the Town initiates a petition as drainage does exist for the municipal roads. Webber and Victoria Roads are under

the jurisdiction of the Region of Niagara and the Town is not aware that the Region is experiencing any drainage issues on these roads either.

If the Town receives a petition for the establishment of a municipal drain, and the petition is accepted, then Council would appoint an Engineer to conduct an on-site meeting and undertake the necessary work to prepare an Engineer's Report that would include plans, profiles and specifications for the proposed drainage system and also include an assessment schedule that would distribute the costs of the drainage system among the benefitting property owners. If the Engineer's Report is adopted by by-law, the construction of the drainage work(s) is authorized, including on private lands and the assessed property owners must pay their share of the costs whether they signed the petition or not. This process could realistically take multiple years.

There are a number of appeal mechanisms available to property owners with respect to the findings of the Engineer's Report as follows:

- The Court of Revision hears appeals on assessments;
- The Agricultural, Food and Rural Affairs Tribunal hears appeals on the Court of Revision decisions on assessments;
- The Tribunal also hears appeals on technical aspects of the drainage works, i.e., the design of the works; and
- The Drainage Referee hears appeals on legal aspects of the work.

It is important to note that the Town has no legal authority to enter on private property to conduct works to resolve private drainage issues where the Town has no easement or right of access for such purposes. The Town is not obligated by law to resolve drainage disputes between private property owners and only the courts can determine legal remedies. However, as a best practice, the Town can attempt to bring private property owners together in an attempt to identify and negotiate a possible solution or outline options available to the parties.

While not recommended, Council could direct staff to undertake a drainage study of the area to confirm the drainage flows. This would require staff preparing terms of reference for a study; hiring a consulting engineering firm to review the overall drainage watershed which is larger than the Farr, Webber and River Road area, confirm the drainage flows and discuss the solutions to resolve drainage issues that are discussed in this report. It is anticipated that such a study would cost \$50,000.

Also, Council is reminded that the Town is in litigation with the developer and builder of the lots on the east side of Farr Road, accordingly, the Town should exercise caution and be mindful of its legal authority and responsibility to resolve these disputes.

Next Steps

It is recommended that Town staff, including the Drainage Superintendent and Public Works staff, hold a community meeting with property owners in the Farr/Webber and River Road areas to discuss the drainage issues, identify possible solutions and options available for the property owners.

Financial Considerations:

There are no financial considerations with hosting a community meeting, other than staff time. Should Council direct staff to undertake a drainage study, it is estimated that such a study would cost \$50,000.

Alternatives Reviewed:

The alternatives are outlined in this report

Strategic Plan Relationship: Risk Management

In terms of managing the risk to the Town, it is important for Council to understand what the municipal responsibilities are with regards to resolving drainage issues on private property. There are no fast, procedurally correct resolutions by the Town to this situation.

Consultation:

The Town Solicitor, Drainage Superintendent and Director of Public Works were consulted on the preparation of this report.

Other Pertinent Reports/Attachments:

n/a

Prepared and Recommended by:

Barbara Wiens, MCIP, RPP
Director of Community Planning and Development

Prepared and Submitted by:

David Cribbs, BA, MA, JD, MPA
Chief Administrative Officer