

Subject: Municipal Drain Process

Recommendation:

BE IT RESOLVED THAT Council receive Report #2023-0117 Municipal Drain Process, for information.

Background:

On April 19th, 2023, Council received a report on the Drainage Study for the Farr, River and Webber Road area prepared by AHYDTECH Geomorphic Ltd. along with presentations from the consultants and the public. The Drainage Study identified the drainage issues that are occurring along the northern unnamed watercourse in the area due to changes that have occurred because of development. It also provided modelling to determine the flooding extent and recommended mitigation measures. Council requested that Staff provide a report on options on how to proceed with a municipal drain in the study area.

Analysis:

Surface Water Drainage Requirements

Surface water is water that is not contained within a natural channel or constructed drainage works and that flows over the surface of the land. The Town has no legal obligation to provide surface water drainage or drainage facilities. As a landowner, the Town is not required to accept surface water flowing from adjacent properties onto its lands. Private property owners do not have a right to drain their surface water onto Town property, including into roadside ditches. These principles should be kept in mind when considering the drainage options discussed below.

Drainage Works Created by Statute

There are four types of drainage works created under statute in Ontario:

- Award drains
- Mutual agreement drains
- Requisition drains
- Petition drains.

An award drain is for drainage works constructed under the *Ditches and Watercourses Act*. This act was repealed in 1963 and the establishment of new award drains is no longer possible. Existing award drains may be brought under the provisions of the *Drainage Act* by petition.

Mutual agreement drains are constructed under Section 2 of the *Drainage Act*, and are private drains constructed and cost shared through agreement between two or more property owners. The agreement associated with a mutual agreement drain is registered on title with each property to ensure the agreement is binding on the property regardless of current or future property ownership.

A requisition drain is for drainage works constructed under Section 3 of the *Drainage Act* prior to 2010. New requisition drains can no longer be constructed, however. A municipality is responsible for maintenance and repair of existing requisition drains and costs are assessed in accordance with the assessment schedule in the Engineer's Report for the requisition drain.

A petition drain is for drainage works constructed under Section 4 of the *Drainage Act* and is what is commonly referred to as a municipal drain. Once a municipal drain is constructed it becomes part of a municipality's infrastructure and a municipality's drainage superintendent is responsible for the management of the drain. There are four ways to petition for a municipal drain under the *Drainage Act* as follows:

- The petition is signed by the majority in number of property owners (more than 50%) in the area requiring 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.

Any property owner that is experiencing drainage issues can initiate a petition for a municipal drain, using a prescribed form from the Ministry of Agriculture, Food and Rural Affairs which can be found at the following link:

<https://forms.mgcs.gov.on.ca/en/dataset/003-0173> .

The petition must describe the land area/properties that require drainage improvements. The Town can sign a petition for a municipal drain as a property owner. If the Town signs as a property owner, it must represent 60% of the area requiring drainage or if that threshold cannot be met, the petition will require the signatures of other property owners representing at least 50% of owners in the

area requiring drainage. However, it is noted that it is the responsibility of the Drainage Engineer to confirm after an on-site meeting has occurred if the petition is valid, not the Town. Anyone that initiates a petition as a property owner may be required to circulate the petition to other property owners and request their signatures as well to attempt to meet the thresholds for a valid petition.

If the Town signs a petition as the road authority requiring drainage, the Town will need to state what the drainage issues are and why the road requires drainage. In this area, only Farr and River Roads are municipal roads and the other roads are under the jurisdiction of the Region of Niagara. At present Farr and River Roads do not appear to have drainage issues and Public Works Staff have indicated that historically the municipal roadways have not experienced drainage issues in this area and that the roadside ditches provide suitable drainage for the roadways. Council is advised that if the Town signs a petition as the road authority, the Town will be assessed a larger proportion of costs than the other benefitting property owners are assessed for any of the proposed drainage works.

Section 4(1)(c) of the *Drainage Act* states that a road authority may file a municipal drain petition "*where a drainage works is required for a road or part thereof*". This section authorizes a road authority to petition for a municipal drain where drainage work is needed for the proper maintenance of roads and ditches in a specified area. The *Drainage Act* will generally be interpreted broadly to accomplish its purpose of promoting land drainage and there is a recognized community or public interest in adequate drainage of municipal roads. However, this does not expressly authorize a road authority to petition for a drain if road drainage is not part of the works.

A petition made by the Director where drainage improvements are required for agricultural land does not occur often.

Petitions for a municipal drain need to be received by the Town Clerk. The Town Clerk would notify Council and staff would prepare a report for Council to lay out the process under the *Drainage Act* that is required to be followed and recommend that Town proceed with developing terms of reference to appoint a Drainage Engineer for the purposes of undertaking the appropriate engineering consulting services required for the establishment of a municipal drain and to undertake that process in accordance with the requirements of the *Drainage Act*. Council would appoint a Drainage Engineer by By-law following the request for proposal process and in accordance with the Town procurement policy vs. direct appointment. Note that there are certain time limits for Council to make decisions as established in the *Drainage Act* i.e., within 30 days of receipt of a petition Council must decide it will proceed with the request and within 60 days of deciding to proceed appoint a Drainage Engineer. One of the first steps that the Drainage Engineer undertakes

after reviewing the petition and available drainage mapping of the area, is to hold an on-site meeting.

Area property owners and other required agencies, i.e., Ministry of Natural Resources, Forestry and Parks, Niagara Peninsula Conservation Authority, utilities, railways, etc. are invited to the on-site meeting and are informed that the Town has received a petition for a municipal drain in an area. Anyone attending the on-site meeting would be able to explain to the Drainage Engineer the drainage issues that they may be experiencing. During the on-site meeting the Drainage Engineer will ask if there is anyone else who wants to add their name to the petition or anyone who wants to remove their name from the petition. It is only after the on-site meeting has occurred will the Drainage Engineer determine if the petition is valid (or not) in accordance with the requirements of the *Drainage Act*.

The petition is a legal document, and 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 any costs incurred to date. If the petition is determined not valid, no further work will be undertaken and the costs incurred to date, which are minimal and generally are associated with costs incurred to have the on-site meeting, are borne by those that signed the petition.

If the petition is determined to be valid, the Drainage Engineer will proceed with the work to:

- evaluate the drainage issues,
- conduct the surveying work,
- confirm the drainage watershed boundary,
- identify the drainage works required to address drainage issues,
- undertake the design and prepare plans, profiles and specifications for the drainage works,
- undertake the preparation of appropriate assessment schedules,
- identify suitable allowances or compensation for those that may receive damage from the municipal drain,
- conduct the required meetings, and
- complete the Engineer's Report in accordance with the *Drainage Act*.

Once the Engineer's Report is prepared, there is typically further consultation with the community and an information meeting is held to get feedback from the community on the draft Engineer's Report. The Engineer's Report is finalized after community consultation and presented to Council at a meeting to consider the final Engineer's Report. At that time, petitioners will be given another opportunity to remove or add names to the petition. If names are removed and the petition is not valid, then there will be no further work and those petitioners who signed the original petition will be responsible for the costs incurred to date, i.e., costs

associated with preparing the Engineer's Report. If the petition remains valid after meeting to consider the Engineer's Report, Council will then be able to provisionally adopt the Engineer's Report by giving first and second reading of the by-law to adopt the Engineer's Report. After provisional approval is given, Council must appoint a Court of Revision.

There are certain 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.

The Court of Revision would hear any appeals on assessments within 20-30 days of sending notice of provisional approval of the Engineer's Report to all property owners and agencies. After all appeals have been heard, or if there are not appeals when the time for filing appeals has expired, Council can provide third and final reading of the by-law to approve/adopt the Engineer's Report. Once the Engineer's Report is adopted by by-law, the construction of the drainage work(s) is authorized, including works on private lands, tendering for the construction works may take place and then construction of the drainage works may commence. The Engineer's Report would also identify which properties are compensated and the value of the compensation because of loss of land or damages incurred on land from having drainage works on their property. The assessed property owners within the watershed of the municipal drain will be required to pay their share of the costs of the drainage works, compensation costs and the costs associated with the preparation of the Engineer's Report whether they signed the petition or not; the costs are shared by all property owners that benefit from the works.

Establishing a municipal drain can take a few years from the beginning of the process to the end.

Conclusion

Council is reminded that the drainage issues that have been occurring to date in the Farr, Webber and River Road area have been on private property, not municipal property, yet the private property owners appear to be reluctant to sign and/or circulate a petition for a municipal drain to property owners and they appear to want the onus to be on the Town; this is unusual as the private property owners are experiencing the drainage issues, not the Town, and having the petition initiated by the Town is not a guarantee that the petition may be considered valid.

Also, if the Town signs a petition as the road authority where it does not have a drainage issue, could set a precedent for similar requests in other areas of the Town. It would also appear to be inconsistent with the absence of any legal requirement for the Town to provide surface water drainage.

If Council wishes to proceed with a municipal drain in this area, staff recommends that Council direct staff to initiate a petition for a municipal drain and sign the petition as a landowner and further that staff is directed to hold a meeting with property owners in the area with the express purpose of informing property owners that the Town has initiated a petition for a municipal drain and request property owners in the area to sign the petition as well. Following that, the petition will be delivered to the Town Clerk and the process will commence. To initiate a petition as a road authority requiring drainage for a road when the road does not require drainage may not comply with the requirements of the *Drainage Act*.

Financial Considerations:

If the Town petitions for a municipal drain as a road authority and the petition is not deemed valid, the Town is responsible for the costs incurred to that point. If the Town signs the petition for a municipal drain as the road authority requiring drainage and the petition is considered valid and the Engineer's Report is approved and the drainage works are constructed, the Town will be assessed a greater proportion of the costs.

If the Town signs a petition for a municipal drain as a landowner, the Town along with other landowners that signed the petition would be responsible for costs incurred if the petition is not valid.

If the Town signs a petition for municipal drain as a landowner, and the petition is deemed to be valid by the Drainage Engineer, then the Town (along with any other signatories to the petition) is responsible for costs associated with the preparation of the Drainage Engineer's Report if Council does not approve the Engineer's Report. If the Engineer's Report is approved by Council, then the costs of the Engineer's Report are shared among all the benefitting property owners, including those that signed the petition, within the drainage watershed.

If the drainage works as authorized by the approved Engineer's Report proceed, the Town will be assessed a portion of the costs of the drainage works along with all other benefitting property owners in the watershed. However, if the Town signs the petition as the road authority, the Town will be assessed a larger proportion of the costs of the drainage works than compared if the Town signs as a property owner. In all cases, the Town's costs are borne by the taxpayer.

Any future maintenance works undertaken on a municipal drain once established are shared by the benefitting property owners, including the road authorities in accordance with the assessment schedule in the Engineer's Report.

If the Town does not sign a petition for a municipal drain and the petition is valid and the drainage works are authorized, the Town will be assessed a portion of the costs along with all other benefitting property owners in the watershed.

Alternatives Reviewed:

The alternatives to a municipal drain are mutual agreement drain which is a private drain constructed and cost-shared through an agreement between two or more property owners. The agreement associated with a mutual agreement drain is registered on title of each property to ensure the agreement is binding on the property regardless of property ownership.

Strategic Plan Relationship: Infrastructure Investment and Renewal

A municipal drain once established is municipal infrastructure, and the Town through the Drainage Superintendent is responsible for the management of the drain.

Consultation:

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

Other Pertinent Reports/Attachments:

Report 2021-0212 dated December 20th, 2021.

Report 2023-0097 dated April 19th, 2023.

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