

Title: Duties of the Landowner Under the Drainage Act

Division: Agriculture and Rural

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Introduction

This Factsheet summarizes the responsibilities and information which a landowner should review when involved in the decision-making process for a new drainage works or with maintenance work undertaken under the Act. For more specific subject matter information, refer to the list of current Factsheet topics included at the end of this Factsheet.

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Obtaining an Outlet Using the Drainage Act

The three methods (1) Petition; (2) Mutual Agreement; and (3) Requisition, are covered in detail in Factsheets. This discussion relates primarily to the "petition" procedure but the same information would be useful for the other methods.

The "petition" method is a procedure established by provincial statute (The Drainage Act) whereby a municipality may; (a) upon "petition" consider the initiation of a new drainage works for "an area requiring drainage"; or (b) upon maintenance work on a drain previously constructed under the Drainage Act. Where a new drainage works is proposed, the Drainage Act provides for the preparation of either a "preliminary" or a "final" report. Where there is either a "preliminary" or a "final" report. Where there is some doubt about the total costs, and the benefit of an improved drainage outlet to the area, council and landowners should consider a preliminary report to determine the value of the proposal. Costs of the preliminary report are less since little detail is included in arriving at an estimate. Further, costs of the preliminary report are assessed equally to all petitioners. The preliminary report provides the landowners an opportunity to review total costs before the final report procedure is commenced. Council also has an opportunity to hear the landowners concerns from within the "area requiring drainage" before being more formally involved in a final report. Landowners within the "area requiring drainage" have an opportunity to add or remove their names from the original petition at the meeting to consider the preliminary report. Thus, when a landowner has received a "preliminary report", that owner is in the "area requiring drainage". The owner should show interest in future discussions of the preliminary report since some portion of the costs will be charged to the owned property. Similarly, if a report is prepared, the landowner has an interest in the financial and physical details of the

proposed drain.

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"Mutual Agreement"

The Drainage Act also provides a method whereby landowners may "agree" on a drainage works. When the required information is documented and registered against the properties party to the agreement, the agreement has legal status. The landowners are responsible for maintenance and the apportioning of costs for maintenance. See OMAF Factsheet "Mutual Agreement Drains", Agdex 555, for more detail.

"Requisition"

The Drainage Act also provides a "requisition" method which may be used by an owner requiring drainage when adjoining landowners are not sympathetic to drainage needs, providing the owner can meet certain criteria itemized in The Drainage Act. See OMAF Factsheet "Drainage Legislation", Agdex 752, for more information.

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Responsibilities

Owners must realize that the Act provides for a means of acquiring a drainage outlet through participation, understanding and negotiation between landowners. The engineer and council provide the "vehicle" for obtaining the "outlet" under statute law.

When a petition is circulated, landowners in an "area requiring drainage" determine the "value" of a proposed drainage works for their own property and anticipated management practices. On this basis, the owner may either support a petition or decline to sign.

The landowner should discuss drainage needs required to provide improved management practices or a more profitable cropping system with neighbors and others. Landowners signing the petition will be financially responsible for some portion of the costs depending upon the extent of the report, and subject to whatever appeals may arise.

In return for outlet drain assessment, landowners assessed for outlet are provided with a drain having an outlet free of common law liabilities. Landowners assessed for benefit will have an improved property. OMAF Factsheet "Understanding Drainage Assessment", Agdex 557, gives more information.

The landowner should recognize that a Drainage Act report may be activated when a petition by; (1) a simple majority of owners; (2) an owner of more than 60% of the area in the area requiring drainage; or (3) the road superintendent of the municipality is submitted.

Landowners in an existing defined drainage watershed under a by-law are fiscally responsible "pro-rata" for maintenance work undertaken according to the current by-law and report.

The municipality or municipalities are responsible for undertaking maintenance activities which maintain the drain to the design and specifications of the current "drainage report".

As the Drainage Act procedures are carried out, the landowners may appeal decisions. Landowners must also realize that their own concerns may not be those of their neighbors and that the proposal should be viewed for the "common economic good" of the broader "watershed community".

The Drainage Act evolves in procedure from an owner to owner informal discussion, to petition to the "on-site" meeting with the engineer for informal discussion. This is the best time to put forth personal concerns. Further into the procedure, it becomes more difficult to make changes in location, material, or specifications. Once a report is written and presented to council and landowners, concerns must be formalized as appeals. Thus the individual landowner has less and less direct impact through discussion! It is therefore important to attend, or be represented at all meetings commencing with the on-site meeting to voice opinions.

Appeals are possible to: (1) The Court of Revision; (2) The Drainage Tribunal; (3) The Drainage Referee; and (4) The Civil Courts (see OMAF Factsheet "Drainage Act Appeals", Agdex 557). The landowner must decide "if" an appeal is relevant based on facts, and of what economic future importance it may be to landowners on the drain. The landowner must make the proper appeal in the proper time period. A missed appeal time period means that the appeal opportunity on a matter has been forfeited!

Appeals may add costs and time delays to final construction. A landowner should thus consider the further

costs which may accrue to the drain before carrying appeals to the next jurisdictional level.

A by-law passed under The Drainage Act R.S.O. 1980 obligates landowners within the watershed to meet the costs of construction and/or maintenance on a pro-rata basis as set out in the by-law. Charges for drainage are placed against the property and are due and payable as municipal taxes. New rural landowners should always request drainage information.

Landowners retain ownership of the property subject to the statements in a drainage report. Such items as buffer strips, working area, access to the drain, bridges, pumps and various erosion control structures are examples of items covered in the specifications and discussion in a drainage report. Recognize that the "working area" specified in the report is expected to be available for maintenance work.

To cover present construction damage if any, and future maintenance damage, if any; most reports contain a schedule of "Allowances". The landowner should recognize that the allowances shown cover present construction and future maintenance - being established for land area permanently taken out of production or for crop damages.

The onus is on the landowner to attend or be represented at all meetings where notification has been received. Non-attendance implies acceptance of the report as presented.

As a landowner who has land in the "area requiring drainage", you will receive formal notice of the time and place of the "on-site" meeting. While your attendance (or that of your representative) is not mandatory, it is the best opportunity to discuss your drainage requirements. Consider wetland areas which would benefit from drainage, closed or open drain preference, (if open drain, location of material from drain construction), crossing requirements - location, width, maximum loads, seasonal or year-round use: surface water entry to the drain, erosion problems, unstable soil conditions, fencing, location and condition of existing subsurface drains, special concerns such as grass buffer strips, windbreaks, and many others.

The landowner should read the entire report when received. Get help from the municipal drainage superintendent, the local agricultural engineer, or some other knowledgeable person if you do not understand. Review all items which may affect your lands and crops e.g. location, fencing, buffer strips, crossing type and width.

The landowners must be aware of any special statements delegating responsibility to them during construction, e.g. cattle management, crop harvesting, tree, stump, or stone removal; fence replacement, provisions for working area access to the working area, etc.

The landowners must be aware of the method of disposal of excavated material - both now and in the future - so crops may be planted to limit anticipated problems.

Landowners should review the schedule of allowances, the assessment schedule and the maintenance clauses in the report. The Factsheets, "Understanding Drainage Assessment", Agdex 557, "*Drainage Benefits*", Agdex 555, and "Drainage Act Appeals", Agdex 557, all provide additional information. Review the full report before attending the "meeting to consider" - a notice which landowners receive when they own lands within the defined watershed.

The landowner should maintain inspection after construction to ensure the integrity of the drain is maintained - report concerns to the drainage superintendent.

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Maintenance: On "Petition" or "Requisition" Drain

The municipality is responsible for the maintenance of a drainage works construction under the Drainage Act, RSO 1980 to the extent of the work and structures specified in the current report. To this extent, landowners within the defined watershed of the drainage works, are also responsible for the cost of repairs or maintenance as set out in the maintenance clause of the report. Consequently, the landowner should do periodic inspection of the drainage works and notify the drainage superintendent whenever the drainage works is out of repair so minor maintenance work can be undertaken to maintain the integrity of the drain. When the current report does not cover many of the more recent environmental concerns, a landowner can accomplish many minor erosion control measures without involving other landowners.

Keep cattle access limited by fencing and providing cattle crossings - grant programs may be available for erosion control systems through the Ontario Ministry of Agriculture and Food.

Provide erosion structures for surface water if not part of the report having regard to suitability and durability of structure. Be aware that structural failures which cause blockage in the drains are the responsibility of the constructor.

Provide outfalls for sub-surface drain systems which do not impede channel flow, are durable, and do not erode the bank of an open drain.

Maintain a grassed buffer strip along open drain banks to aid bank stability. If spraying to eliminate weeds,

make sure that overspraying into drains with moving water does not occur.

Where necessary maintenance is not undertaken by the municipality, the landowner may formally appeal to the Drainage Referee for damages caused by the lack of maintenance which occurred after the date of the formal appeal.

Recognize that maintenance costs are borne by the upstream ratepayer in proportion to the pro-rata maintenance assessment.

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Reconstruction

Where an improved outlet is required which is beyond the specifications of the current report or other structures are desired, recognize that the most prudent procedure may be to obtain a new report incorporating the desired features or requirements. The procedure for adopting the new report is almost the same as for a new petition drain. Landowners have the same privilege to express concerns at the on-site meeting and to appeal as previously discussed.

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On-going Responsibilities!

While the municipality has the responsibility to maintain the drainage works, it is still the landowners who must frequently notice functional changes in the drainage works. Landowners should inspect the drainage works and bring any concerns to the attention of the municipality or the drainage superintendent.

When a severance occurs within the watershed, the municipality should have the seller and purchaser determine new values for the maintenance schedule in the current report - or have an engineer appointed to reapportion the maintenance schedule so the report remains current.

If lands from outside the defined watershed are accepted by council for outlet in the drainage area, the lands being brought in are liable for a cost of outlet use. This action increases the volume of water conveyed by the drain and the owner is liable for a portion of the costs of constructing and maintaining the drainage works. The owner should approach the municipality before constructing the connection so proper action for updating the maintenance schedule to account for the increased land area.

Similarly, if a change in the nature or extent of use of the drainage works is anticipated, the landowner should discuss the proposal with the municipality, to ensure the continuing integrity of the drain for all landowners involved.

If the current report does not show severances or if there is a lack of maintenance information on the current report, landowners must recognize that the municipality may find it necessary to appoint an engineer to prepare an updated maintenance schedule or a totally new report. Thus, landowners should make sure the current report is updated whenever changes occur.

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Abandonment of the Drain

If a notice proposing abandonment of all or a portion of a drain in which property has been assessed is received, the landowner should review present and future drainage needs relative to the current and future use of the property. Be aware that "abandonment" returns the drain to the status of a "natural watercourse" subject to riparian rights and obligations. Also, landowners not abutting the watercourse lose access to an outlet and are again subject to "common law". Appeals against "abandoning" are possible. See the Factsheet "Common Law Aspects of Water" for more information.

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Summary

The Drainage Act provides a procedure whereby the municipality may, with a valid petition of landowners in the "area requiring drainage", provide a legal outlet for surface and subsurface waters not attainable under common law. In return, the landowners within the defined drainage watershed pay for the privilege of the drainage outlet. Future maintenance costs are covered as part of the drainage report.

The engineer provides the design information and the maintenance schedules from information obtained in

the field and from conversations with landowners. The engineer's experience with other similar projects is valuable in preparing the design, determining necessary structures, and specifying materials, writing a comprehensive description of work requirements, estimating costs, determining a cost share based on traditional drainage engineering concepts, and preparing necessary tender documents. The drainage report forms a basis for further discussion of a drainage proposal. Factsheet "Understanding Drainage Assessment", Agdex 557, discusses drainage assessments. Factsheet "Drainage Act Appeals", Agdex 557, outlines appeals which are possible.

Under the Drainage Act, the municipality is responsible for maintaining the drainage works after construction. The municipality may appoint a drainage superintendent to supervise maintenance work on all municipal drains within the municipality. When the drainage report is "current", maintenance work can be undertaken without preparing a new drainage report. The drainage superintendent is responsible to the municipality and the landowners for inspecting the drain or local problems on the drain, discussing necessary maintenance with landowners, and supervising the maintenance work. The costs for maintenance are distributed amongst the landowners in the watershed according to the maintenance clauses contained in the current report.

Landowners involved in a drainage works proposal are urged to participate in the procedures of The Drainage Act so the end result will be an outlet drainage system which is adequate, of reasonable cost and maintenance free. You, as a landowner, can help this occur!