

Title: Municipal Drains and the Landowner

Division: Agriculture and Rural

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Introduction

Do you feel that the procedures of the Drainage Act are beyond your control? Then read on! This Factsheet outlines the landowner's input to the proposed drainage works. Your interest, comments and questions can help council and the engineer determine the value and need for a drainage project. This Factsheet summarizes the decisions of the landowner for each step of the procedures outlined in the Drainage Act. Remember, landowners are the "initiators" of new or improved drainage works. The municipality (council) is the "facilitator".

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Background

In Common Law, an owner is liable for damages when surface water is artificially collected and discharged on lower lands. Common Law does not permit outlet for non-riparian owners (those owners not abutting a natural watercourse). For more information see OMAF Factsheet Common Law Aspects of Water, Agdex 557. The Drainage Act accepts the liability but allows non-riparian owners to recompense the riparian owner through assessments for "outlet liability" and "injuring liability": The payment of an injuring liability assessment relieves a non-riparian property from future charges under common law for damages caused by water artificially collected. A discussion of assessments may be found in OMAF Factsheet *Understanding Drainage Assessment*, Agdex 557. The Drainage Act provides interested non-riparian landowners with a method of obtaining a "legal outlet".

Three methods of outlet are set out in the Drainage Act and are commonly known as:

- (a) Mutual Agreement
- (b) Requisition
- (c) Petition

Factsheets entitled *Mutual Agreement Drains*, Agdex 555 and *Drainage Legislation*, Agdex 752 explain outlet procedures.

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The Drainage Report

A new municipal drain is initiated by petition. A municipal drain on which landowners wish improvements is frequently initiated by council. A new drain or an improvement to a drain requires the preparation of a drainage report by a registered engineer. Interested landowners are financially responsible for a portion of costs incurred when the proposal is accepted by council and an engineer is appointed.

The drainage engineer has the obligation to prepare an unbiased drainage report based on information presented in written form, orally, and from visual inspection; in accordance with currently accepted design criteria. Council and/or the drainage superintendent should have a copy of *Performance Guidelines for Services of the Engineer Acting Under the Drainage Act*, published by the Association of Professional Engineers of Ontario.

An "on-site" meeting will be held by the engineer to gather information, view the site and hear landowner concerns. A survey crew will collect the necessary field information for the drainage system.

Taking all the available information into consideration, a drainage report is then prepared by the engineer and presented to council for review, prior to the "meeting to consider".

When the drainage report is received by a landowner, there will be a meeting notice attached, requesting the ratepayers to meet and discuss the proposed work. Providing the proposed work is accepted, council will proceed to set a date for the Court of Revision where ratepayers may appeal assessments. The Factsheet entitled *Drainage Act Appeals*, Agdex 557 provides more information.

If you do not understand the report, assistance can be obtained from the drainage superintendent, the municipal clerk, or other knowledgeable persons.

It is the landowner's responsibility to review and understand the report and to attend or be represented at all the meetings for which notification is received. Non-attendance implies acceptance of the report as received. Similarly, if a "time frame" for an appeal is missed, the opportunity to appeal is forfeited unless a special situation exists. Appeals may add costs and time delays to the project. Thus it is very important that the landowner review the report and carefully consider the value of appeals relative to the overall cost of the drainage works.

The tabular information identifies "activities" taking place and "decisions" which can be made by the landowners and others. Reference to the applicable sections of the Drainage Act is given in numerals. This table is not "all encompassing" as circumstances may present alternatives not covered. This information follows the procedures as if a new drain was being undertaken. When a new drainage report is prepared for an existing municipal drain, the petitioning procedure may not be necessary. In this case, enter the tabular information at "the On-Site Meeting" under the sub-title "(b) Petition is Valid". Where the action is not noted, reference should be made to knowledgeable persons for advice.

Also note that as you move down through the procedures, decisions move from the owners involved, to other groups such as the Court of Revision and the Drainage Tribunal.

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Maintenance of Drains According to Current By-Law

The municipality is responsible for the maintenance of any drainage works constructed under the Drainage Act RSO 1980 or its predecessors to the extent of the work and structures specified in the current by-law. All upstream landowners, from the commencement of the maintenance work, are assessed for the cost of the maintenance work "pro-rata" as per the maintenance assessment schedule. 74

Landowners can reduce maintenance costs by undertaking management practices which reduce or eliminate degradation of the drain. Some practices to consider are:

1. Limiting cattle access by fencing and providing adequate cattle crossings.
2. Providing erosion control structures for surface water entry to open drains and for subsurface drain outfalls.

3. Maintaining a grass buffer strip along the top of the bank on open drains to aid bank stability and to provide a sediment filter.
4. Inspecting the drainage works for bank failure, obstructions, recent damage, structural failures, and surface water chutes or subsurface outfall durability.
5. Alerting the municipality (drainage superintendent) of concerns found from the inspection.
6. Discussing changes such as severances and land use with the municipality to ensure that the current drainage report reflects changes that influence expected flows. 65. 66
7. Encouraging frequent inspection and minor maintenance by the municipality to reduce long-term maintenance costs.

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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. 84 Be aware that returns the watershed to Common Law Status, subject to riparian rights and obligations. Also, landowners not abutting the watercourse lose access to an outlet. Appeals against "abandoning" are possible. See OMAF Factsheets *Common Law Aspects of Water*, and *Drainage Act Appeals*, Agdex 557.

Activities

Informal Discussion				
Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
Discussion prior to petition.	Can we use improved outlet drainage?	Owner & Neighbours		
	Will I have benefit from improved drainage?	Owner		

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Names on Petition				
Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
Signing of Petition. 4 (1)	Am I in "area requiring drainage"?	Owner		
	Am I ready to assume financial responsibility?	Owner	When owner signs petition, will incur financial obligation. Cannot withdraw from petition until meeting to consider either preliminary or final report. Petitioners are responsible for costs incurred if petition fails.	

	Will my business benefit from the project?	Owner		
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Petition Considered by Council

Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
Council considers petition. 5 (1)	If rejected, do I want to appeal council's decision?	Petitioner(s)	Petitioner(s) may appeal council's rejection to the tribunal by notifying municipal clerk. May be future financial obligations if Tribunal orders council to proceed.	Drainage Tribunal
	If council accepts - no decision to make.	Petitioner(s)	If name on petition, will have financial obligation if council proceeds.	
	If council does not inform of decision within 30 days of filing petition, 5 (2) (b), do I want further action on petition?	Petitioner(s)	If wish to appeal, owner(s) must request appeal through municipal clerk; may be future financial obligations if Tribunal orders council to proceed.	Drainage Tribunal
When petition accepted, council may appoint engineer, after 30 days notice to Conservation Authority. 6 (1), 8 (1)	Did council appoint?	Petitioner(s)	If engineer not appointed within 60 days of council's decision to proceed, may appeal through municipal clerk. 8 (3) Once engineer has been appointed, petitioners have financial obligations.	Drainage Tribunal
Council decides on 11 preliminary" or "final" report. 10 (1)	Do I want to encourage council to request a preliminary report?	Petitioner(s) & Council	Request a preliminary report if mainly interested in estimated cost or unsure of project costs.	

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The On-Site Meeting

Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
On-Site Meeting. 9 (1)	Do I attend the on-site meeting?	Petitioner(s)	Attend meeting and participate in discussion as owner of lands in "area requiring drainage".	

(a) If engineer decides petition not valid. 9 (2) (b)	If your name is on petition, and you are in the "area requiring drainage" - no decision to make.	Engineer & Petitioner(s)	Procedure stops and petitioners will share costs unless a valid petition is filed within 60 days. 9 (4)	
(i) Engineer will establish requirements for petition to comply. 9 (2) (c)	If your name is not on petition, but you are in the "area requiring drainage" - decide if wish to add name. 9 (4)	Owner(s)	Realize that drainage project may "fail" or proceed, depending on one or more signatures. Jointly owned property requires all signatures to count as one vote on the petition.	
(ii) Engineer will inform council of petition deficiency and set fee for meeting.	If your name is not on petition but you are in the "area requiring drainage" - decide if you wish to add name. 9 (4)	Owner(s)	May add name to petition. Realize that there may be a financial obligation. Owner(s) in "area requiring drainage" have up to 60 days after engineer sends statement to council to add name.	
(b) Petition is valid. 9 (3)	What are my needs and concerns for the drainage proposal?	Petitioner(s) & Engineer	Participate in discussion regarding your drainage needs and concerns; e.g. crossing, fencing, subsurface outlets, spreading of spoil, land area involved, bank stability, surface water entry, etc. If after on-site meeting, have more comments, should relay through Drainage Superintendent to engineer before engineer completes preliminary or final report.	

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The Engineer's Report and Council Consideration

Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
Engineer prepares preliminary or final report. 8 (1) or 10 (1)		Engineer	Council may extend time for filing report beyond 6 months. 39 (1)	

Engineer files with council:

(a) A statement that the work cannot be constructed under Section 4.	Should I appeal?	Petitioner(s)	Review reason for engineer's statement. Is the additional cost of legal counsel warranted? Appeal is served upon council within 40 days.	Drainage Referee 47 (1)
(b) A statement that work is not required or is impractical. 40	Should I appeal?	Petitioner(s)	Review reasons for engineer's decision. Can I justify appeal to the Drainage Tribunal?	Drainage Tribunal 48 (1) (a)
(c) A preliminary report.	Does the report cover anticipated drainage needs?	Petitioner(s)	Petitioners attend meeting to consider and participate in discussion.	
A "meeting to consider" is called by council. 10 (2)	Is the estimated cost acceptable?		Note that "validity" of petition may be in jeopardy if delete name.	
	Do I add or delete my name from petition?		If delete name, still financially responsible. If petition validity fails, petitioners responsible in equal portions for costs to date.	
	Do I want to move to a full report?		Present your concerns to council and other petitioners, whether report should proceed or stop.	
If council does not proceed to final report.	Do I want council to proceed?	Petitioner(s)	May appeal if council does not proceed to final report.	Drainage Tribunal
(d) A final report.				
(i) If council decides not to proceed. 41 (1)	Should the drainage report proceed to the "meeting to consider"?	Petitioner(s)	Must file appeal with municipal clerk. If report is not considered by council, the costs to date will have to be paid.	Drainage Tribunal 45 (2)
(ii) Council decides to proceed and call a "meeting to consider". 41 (1)	Does the report cover anticipated drainage needs?	Council	Council should decide if the report is of value to the drainage area.	

Report is mailed to landowners with a notice of the date for "meeting to consider". 41 (1)	On receipt of report, landowner(s) decide if requests for drainage have been met.	All owners assessed.	<p>If want to object to procedures, owner(s) apply to Drainage Referee within 40 days of mailing of notice to ratepayers. 47 (1)</p> <p>Before attending the "meeting to consider", review the report for location drain length, depth, crossing size, pipe or drain dimensions, and environmental features such as rock chutes for surface flow, berms, bank protection, seeding, fencing, disposal or spreading of excavated material, etc.</p> <p>Owners should review allowances, estimated costs, and determine if proposal is "cost effective" for current or anticipated land use.</p>	Drainage Referee
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Consideration of Report by Landowners - At "meeting to consider":

Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
(a) Council will provide opportunity for owners to discuss report.	Question details and review specifications or report.	Petitioners & affected Owners	<p>If owners desire changes and council is in agreement, report may be referred to engineer for further consideration. 57</p> <p>If report is "referred" there will be another "meeting to consider".</p>	

<p>(b) Council will provide opportunity for owners in "area requiring drainage" to add or delete name from petition. 43</p>	<p>As petitioner or owner in "area requiring drainage", must decide if report is acceptable.</p> <p>Add name?</p> <p>Delete name?</p>	<p>Petitioners & Owners in "area requiring drainage".</p>	<p>For a report prepared under Section 4, owners in the "area requiring drainage" may decide if: a) allow name to remain on petition; b) withdraw name from petition; c) add name to petition.</p> <p>Note that with a "final report", under Section 4, all petitioners are financially responsible on pro-rated basis according to assessment schedule regardless if petition remains valid.</p> <p>Where work is proposed under Section 78 and is stopped by landowners, the costs to date would likely be borne by the owners assessed in the last by-law.</p>	
<p>(c) Council decides if it will give two readings to by-law - containing report, thus creating a provisional by-law. 44,45</p>	<p>Landowners can discuss, with engineer and council, if location, design, and structures are adequate and suitable.</p>	<p>Owner(s)</p>	<p>If petition remains valid, council may proceed to adopt a provisional by-law.</p> <p>Acceptance of report without comment at "meeting to consider", implies that owner is satisfied with engineer's design.</p> <p>If not satisfied with engineer's design, and council does not refer report back to engineer, owner should decide if have grounds for appeal as set out in 48 (1) (a) (b) (c) (d).</p>	<p>Drainage Tribunal</p>
<p>(d) Council does NOT adopt provisional by-law because:</p>				
<p>(i) Petition is not valid.</p>	<p>Who pays?</p>	<p>Petitioners</p>	<p>Original petitioners pro-rata according to assessment in report. 43</p>	
<p>(ii) Council uncertain if should proceed. Petitioners decide if want report to proceed:</p>				
	<p>(a) Yes</p>	<p>Any Petitioner</p>	<p>File formal request for appeal with township clerk if council does not adopt by-law.</p>	<p>Drainage Tribunal</p>

	(b) No		<p>If report prepared under Section 4, council will likely be responsible for costs since no by-law exists for collection.</p> <p>If report prepared under Section 78, council will likely pro-rate costs to date as per current by-law.</p>	
Council, after adopting provisional by-law, sets date for "Court of Revision", 46 (1), and mails notices to landowners.	Owner decides if proportion of estimated costs for construction and maintenance relative to the total estimated costs are acceptable:			
	(a) Yes	Owner(s)	Acceptance of proposed costs need no further action but realize that no appeal to the Court of Revision implies acceptance of the proposed proportion of cost.	
	(b) No	Owner(s)	<p>File formal notice of appeal with municipal clerk at least 10 days before hearing. 52 (2)</p> <p>Grounds for appeal are: 52 (1)</p> <p>(a) Lands of appellant or other owner or road are assessed too low. (b) Lands of appellant or other owner or road are assessed too high. (c) Lands or roads not assessed that should have been assessed. (d) Type of land or use of land not considered.</p> <p>Verbal appeals may be heard if the court passes a resolution at the first sitting.</p>	Court of Revision

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Court of Revision

Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
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Court of Revision decides if assessment appeals are worthy of consideration.	Owner(s) present appeals on grounds stated. 52 (1) NOTE: Allowances may only be appealed to Drainage Tribunal. 48 (1) (c)	Owner(s) and members of Court of Revision (Legal counsel not required)	Appellant should identify lands or roads which should receive transferred assessments. 53	Court of Revision
(a) If appeal is accepted by Court of Revision.	Owner who receives transferred assessments decides if acceptable. 53			
	(a) Yes	Owner	No further action; amended proportion of cost of works acceptable.	
(b) If appeal is NOT accepted by Court of Revision.	(b) No	Owner(s) to whom assessment transferred	Owner receiving transferred assessment has opportunity to consider change at meeting, or at reconvened Court of Revision, if not present. 53	Court of Revision
	Owner decides if want to appeal to Tribunal.			
(b) If appeal is NOT accepted by Court of Revision.	(a) Yes	Owner	Owner files formal appeal notice with municipal clerk within 21 days of Court of Revision decision.	Drainage Tribunal 54 (1)
	(b) No	Owner	No further action required; proportion of cost in report accepted.	

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Appeals to Drainage Tribunal or Drainage Referee

Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
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Drainage Tribunal Hearing	What is appeal? See sections 48 (1), 52, 53 and 54.	Owner (Legal Counsel may be utilized if owner desires)	Hearing of Tribunal is semi-formal. Decisions have moved from local level to Drainage Tribunal. Appeals are to be made within prescribed time periods. Have presentation organized on prescribed grounds. See 48 (1) or 52, 53, 54 (1) Fee for any legal assistance is owner's responsibility. Recognize that Tribunal decisions are final for many appeals. See Appeal factsheet. Tribunal can award costs 98 (7) (10) (11), to owner or drainage works. 73 (1)	Drainage Tribunal
Drainage Referee	Should I appeal to the Referee on legal or procedural matters? 47 (1), 58 (1) NOTE: Competent legal counsel is suggested.	Legal Counsel & Owner	Appeals are to be made within prescribed time period. Decisions have moved to Drainage Referee. Legal counsel, owner, and witnesses prepare pertinent testimony. Costs are awarded by the Court. Owner may appeal Drainage Referee decision. 121	Divisional Court of Ontario

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Contract over Estimate				
Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body

A review of the contract price when exceeds 133% of the estimated construction price. (Meeting is called by council) 59 (1) (2)	Does the additional cost exceed the benefits to be gained?	All Owners & Council	(1) State interest in project. (2) If owner is one of original petitioner, can leave on or withdraw name from petition.	
	If an original petitioner - should I withdraw name?	Petitioner	NOTE: If sufficient names are withdrawn, petition may not be valid and original petitioners would pay costs to date on a pro-rata basis. If petition remains valid, then procedure towards construction continues.	

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Adoption of Report

Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
Council may give third reading to provisional by-law after all appeals have been decided. 58 (1)	Will I accept the report as amended or updated?			
	Yes	Owner	No further action required.	
	No	Owner	Owner gives notice of "intention" to make application to "Quash" the by-law, to the clerk, within 10 days of third reading. 58 (1) (2)	Drainage Referee
Where appeals have been decided and council does not give third reading to by-law. 58 (5)	Do I want the drainage works to proceed?	Petitioner	If Yes - and council not willing to give third reading, petitioner may file appeal with clerk. 58 (5) If No - and council does not proceed, provisional by-law may be dropped. Costs of report to date may be the responsibility of council. 58 (3)	Tribunal

Where notice of "intention" to quash is filed with clerk, 58(1) or "application to quash" is made to Drainage Referee. 58 (2)	Is the report flawed such that legal counsel can make case before Drainage Referee?	Legal Counsel & Owner	Owner, after giving notice of intention, has three months to make formal application. Legal Counsel should make application. Legal counsel and owner prepare necessary testimony for hearing. Costs are at the discretion of the Drainage Referee. 108, 109 Realize that interest costs for outstanding account for drainage report continue until construction completed or by-law quashed.	Drainage Referee
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Construction

Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
After by-law has been given third reading and all appeals have been decided, construction of drain may proceed. 58 (1)	Is construction as per plans and specifications in report?	Owner(s) & Construction Supervisor & Contractor	If not constructed according to plan, bring concern to attention of municipality.	
After construction	Is quality of construction adequate? 64	Owner(s) & Municipality	Bring concern to attention of municipality. Tribunal may order work to be done and charged to the appropriate party.	To Drainage Tribunal within one year of certified completion.

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Drain Maintenance

Activity	Owner's Decisions	Interested Parties	Obligations of Owner	Appeal Body
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Council is responsible for maintenance of the drain. 74	Is the drain out of repair and requiring brushing, sediment removal, etc.?	Owner(s)	Maintenance work is encouraged to keep drain functioning properly. Landowners should keep municipality (drainage superintendent) informed of necessary maintenance work. Maintenance costs are assessed pro-rata upstream. 74	
	Is the list of owners in the assessment schedule up to date? 65, 66	Council & Owner(s)	Drainage reports must reflect current ownership and land use to be acceptable for maintenance.	

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Other Legislation

Any works under the Drainage Act should take into consideration other statutes such as the Lakes and Rivers Improvement Act, the Environmental Protection Act, the Ontario Water Resources Act and federal statutes such as the Fisheries Act and the Navigable Waterways Protection Act. Federal statutes take precedence over provincial statutes.

Concerns

Environmental issues and capitol costs are of the greatest concern when dealing with drainage matters. The agricultural industry recognizes that drains may have an impact on water quality. A design which mitigates the impact should be considered. There are provisions in the Drainage Act for interested agencies to comment on the drainage proposal. Agriculture and the environment can and must co-exist!

Summary

The Drainage Act provides a procedure whereby the municipality may provide a legal outlet for surface and subsurface waters not attainable under Common Law. In return, the landowners within the defined drainage watershed pay pro-rata for their share of the drainage outlet.

The engineer provides the drainage report containing cost estimates, specifications and maintenance schedules from design criteria, 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, 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 the basis for further discussion of a drainage proposal. If the proposal is accepted, it is adopted by by-law and the work is constructed.

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 by-law 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, discussing necessary maintenance with landowners, and supervising the maintenance work. The costs for maintenance are distributed upstream amongst the landowners in the watershed according to the maintenance clauses contained in the current by-law.

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 easy to maintain. You, as the landowner, can help this occur!

