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Ontario

BLACK CREEK DRAINAGE WORKS 2014
Town of Fort Erie

IN THE MATTER OF THE *DRAINAGE ACT*, R.S.O. 1990, CHAPTER D.17, AS AMENDED.

AND IN THE MATTER OF: Appeals to the Agriculture, Food and Rural Affairs Appeal Tribunal by **Dan Dayboll et al.** of Stevensville, Ontario; and **Margaret Plyley et al.** of Stevensville, Ontario under section 54(1) of the *Drainage Act* from the decision of the Court of Revision on the **Black Creek Drainage Works 2014** in the **Town of Fort Erie.**

Before: John O'Kane, Vice-Chair; Edward Dries, Member; Arnold Strub, Member

Appearances:
Dan Dayboll – Appellant
Judith Wood – Appellant
Sterling Wood – Representative for Margaret Plyley, Judith Wood and Susan Ward
Neal Morris, P. Eng. – K. Smart Associates, Engineer who prepared the Report
Dave Maiden – Drainage Superintendent, Town of Fort Erie

DECISION OF THE TRIBUNAL

This hearing was held in the Town of Fort Erie (the "Municipality"), on January 12, 2016. Dan Dayboll et al. and Margaret Plyley et al. appealed to the Tribunal under section 54(1) of the *Drainage Act* (the "*Act*") with respect to their assessments in the Engineer's Report dated July 31, 2014 for the Black Creek Drainage Works 2014 (the "Report") prepared by K. Smart Associates (the "Engineer") and signed by Neal Morris, P. Eng.

Laura Bubanko, Clerk of the Municipality, performed the duties of the Clerk of the Tribunal.

Preliminary Matters

Prior to the hearing, the Tribunal issued an Order making all landowners assessed in the Report parties to this hearing. The Municipality filed Affidavits of Service with the Tribunal as proof that all parties had been served with the Notice of Hearing dated November 13, 2015.

Overview

The Report prepared under Section 76 of the *Act* for the Black Creek Drainage Works 2014 provides a new schedule of assessment for future maintenance work on the Black Creek Drainage Works which includes several tributaries. The Black Creek Drainage Works consists of the Black Creek Drain, Marsh Drain, Henry Drain, Fred Pietz Drain and the John Pietz Drain. No physical work on these drains is authorized under this Report. The Town of Fort Erie initiated the works by resolution in By-Law No. 5996/102/13 which includes lands in the City of Port Colbourne and the City of Niagara Falls.

The total drainage area affected by the Black Creek Drainage Works is 4,806.5 ha. The current by-laws governing the distribution of costs were prepared through the period of 1951 to 1978. Significant development has occurred within these watersheds over time and the current by-laws do not accurately or equitably address the property changes within the watersheds. Further, inaccuracies in the defined watershed around the boundaries of some of the drains has been identified.

The Appellants, owners of large, primarily undeveloped properties in the Town of Fort Erie disagree with the relative apportionments of the Benefit assessment that would apply to their lands should maintenance be done downstream of or adjacent to their lands.

Issues

1. Should Benefit and Outlet assessments be considered when developing an assessment schedule for future maintenance or should only Outlet be considered?
2. Should lots be grouped and equally assessed or should each property be considered individually?
3. Should improved lots be assessed the same as unimproved lots?
4. Should the assessment to Dan Dayboll et al. (Roll No. 29-28-00) be revised?
5. Should the assessment to Margaret Plyley et al. (Roll No. 30-107-00) be revised?
6. Should the assessment to D. Plyley (Roll No. 30-272-00) be revised?

Evidence

Margaret Plyley et al.

Sterling H. Wood (husband of appellant Judith Wood) presented evidence on behalf of Margaret Plyley et al. Mr. Wood filed a comprehensive document brief which provided a good deal of history of the properties in question as well as other related documents supporting the appeal.

Roll No. 30-107-00 is described as an 8.3 ha parcel of primarily vacant land that abuts the Black Creek Drain along its southern boundary. The property has been in the same family for generations and the land use has not changed in decades. The zoning maps indicate that a portion of the property adjacent to the drain and along a watercourse through the property is zoned (EP) Environmental Protection and (H) Hazard. However, the majority of the property is vacant and has developable potential. The property is

provided access to Stevensville Road by way of Pirson Street which does not meet current municipal standards for a public road.

Roll No. 30-272-00 consists of a very small (590 m^2) parcel on the south side of Black Creek Drain. The parcel is essentially land locked with the only access to it over the Drain. Mr. Wood testified that the appellants have been in the process of having that small parcel absorbed into Roll No. 30-107-00 but this has not been completed to date. This parcel is also vacant and lies wholly within the EP or H zones.

Mr. Wood argued that the appellants' lands should not be assessed any Benefit assessment and that only Outlet assessments should be applied in the development of a revised assessment schedule. In the alternative, Mr. Wood argued that if a Benefit assessment was deemed appropriate, the Benefit assessment against the appellants' lands should be equivalent to that of a single developed lot.

Mr. Wood referenced the decision on the Little Creek Drain in the Town of Lakeshore. In that decision, the Tribunal ordered that the distribution of maintenance costs be based only on the Outlet assessments. That decision referenced quotes from a paper that outlines the 'Todgham Method' of assessment and offered interpretation of those quotes as they related to the issues in that appeal. Mr. Wood admitted that he had no background knowledge of the characteristics of the Little Creek Drain other than that described in the decision.

Generally, Mr. Wood argued that the extent of any maintenance work on Black Creek Drain is unknown and, therefore, cannot be identified with any particular property. Further, he contends that the future drain repair will only maintain the existing outlet and not provide any new Benefit, as defined in the *Act*, to the adjacent lands. Therefore, no Benefit assessment should be considered on any property.

He also expressed the understanding that all properties within an assessment interval as described in the Report would be liable for assessment regardless of the location in the interval the work takes place.

Mr. Wood understood that the assumed total Benefit cost in Interval No. 1 was generally divided to apply 1/3 against the Roads, 1/3 against the large lots, and 1/3 against the small lots. The four large lots were grouped and assessed equally as were all small lots which were grouped and assessed equally. While he agreed that it may be reasonable and expedient to group the very numerous small lots and assess them equally, he felt this approach is not applicable to the large lots as they all may be very different. The differences may relate to size, frontage on the drain, assessed value, potential for development, current land use and other factors. He contends that the equalized assessments against the large lots are not in keeping with the intent of the legislation.

Mr. Wood expressed the view that improved lots should not be assessed in the same manner as unimproved lots. He argued, among other things, that there was not the same need for, or value to, an undeveloped lot from drainage maintenance and repair.

He contended that properties with higher assessed value should incur higher Benefit assessments as opposed to undeveloped lands. He made reference to Section 25(1) of the *Act* which relates to Block Assessments but also recognizes that this approach was not applied in this case.

Mr. Wood offered a plan of the immediate area of the appellants' property that showed the appellants' lands and a mirror image of that area on the opposite side of the Black Creek Drain. He contended that the sum of the Benefit assessments identified on the small lots within the mirror image on the south side of the drain was less than the Benefit against the single large lot of the appellant. This, Mr. Wood argued, highlights the inequity of the Benefit assessment as between developed and undeveloped lands. He contended that, if a Benefit assessment were to be levied against the appellants' large property, it should be equivalent to a single developed lot.

Mr. Wood submitted a drainage report for the repair and improvement of the Black Creek Drain in 1951. He pointed out that the appellants' lands were not assessed for Benefit in that report. He contends that no work along this reach of the drain has occurred since that time and, therefore, no Benefit should be considered now.

Mr. Wood stated that, if a Benefit assessment is justified against the appellants properties, it should not be equal to that of the other large lots within Interval No. 1, more specifically, the Town of Fort Erie owned lands to the west. He contended that although these lands are not developed, they are larger, more valuable and have a greater potential for development. Further, he stated that any Benefit levied on the large lots, including those of the appellant should take into consideration their size, and frontage on the drain.

Dan Dayboll et al.

Dan Dayboll presented evidence supporting his own interests as one of the joint owners of the property described as Roll No. 29-228-00. Generally, the points he wished to make paralleled the arguments offered by Mr. Wood regarding Roll No. 30-272-00.

Mr. Dayboll confirmed that a large portion of his property is undeveloped. Further, he expressed no intent or interest in developing this property for 'generations to come'. Although he offered no evidence to support his argument, he expressed the opinion that he should only be assessed the equivalent assessment value levied against one developed lot on the opposite side of the drain across the frontage of his property. He argued that the assessed value of one developed lot opposite his largely vacant lot is of a similar value and, therefore, should be levied a similar Benefit assessment as that levied against the single developed lot.

He expressed the opinion that the work would not increase his property value or provide any Benefit to it as defined in the Act. He stated that he has no intention to ever use the property for agricultural purposes or develop the land. He expressed the view that maintenance works on the drain would not materially impact his property in appearance, market value or more effective drainage. He does not believe that it is fair or reasonable that a Benefit assessment be levied against this property.

Neal Morris, P. Eng.

Mr. Neal Morris, P. Eng. confirmed that he authored the Report dated July 31, 2014. He noted that this work had been initiated in 2002 although he was not involved until 2010 when he assumed responsibility for the project and carried it to completion. He stated that he developed the watershed limits for the Black Creek Drain and various tributaries from historical plans, topographic plans, aerial photography and old reports. In his investigation, he noted that the lands had been significantly developed within the watershed and the governing by-laws had never been amended to reflect the development. Further, changes around the boundaries of some of the watersheds were identified as well as gaps and overlaps within the watersheds.

Mr. Morris testified that he divided the total length of the various drains and branches into manageable intervals. He assigned an assumed maintenance cost to each interval that represented the product of $20/m and the length of the interval. He applied a 40%/60% relative Benefit/Outlet split in the upper reaches of the watershed and a 30%/70% split in the lower reach. With the exception of Interval No. 1, (location of the appellants' properties) he then divided the Benefit cost within each interval amongst the lands eligible for a Benefit assessment based on the length of drain abutting each of the eligible properties.

Interval No. 1 was dealt with somewhat differently as the lands within this reach were composed of roads, a large number of small, urban lots and four large undeveloped properties. He testified that the large lots were considered to be of similar size to the developed area. Of the total Benefit cost to be levied against this interval, (approx. 30% of total interval cost) 1/3 was levied against the roads, 1/3 was divided equally against all small developed lots, and 1/3 was divided equally against the four large lots. He confirmed that the Outlet assessment was levied against all lands lying upstream of this interval based on an equivalent area basis. He confirmed that the value of the Benefit applied to small lots within the floodplain are double that of small lots beyond the floodplain.

Mr. Morris testified that, in his opinion, the properties assessed for Benefit in this Report continue to receive a Benefit in perpetuity and it does not disappear when maintenance is undertaken. He confirmed that he typically would adjust the Benefit/Outlet split in a manner that places a lower percentage of the costs in Benefit for maintenance works on a drain than would be the case for works of construction or improvement. However, he would not typically remove it entirely. He disagrees with Mr. Wood's narrow interpretation of Benefit as set out in the *Act* but, rather, relies on the more general clause in the definition " or any other advantages relating to the betterment of lands..."

Mr. Morris argued that similar if not equal Benefit assessments may be levied against properties similarly impacted by a drainage works irrespective of their state of development or assessed value. His position is that each landowner has the capability to develop their property within the full extent to the local by-laws and that must not influence the value of the Benefit assigned to that property by the engineer.

Mr. Morris also testified that during the preparation for this hearing, he uncovered clerical errors in the Schedule B - Schedule of Assessment for Theoretical Future Maintenance. Apparently, the Benefit assessments as shown in the schedule attached to the Report showed Benefit assessments against the lands in Interval No. 1 that were double the actual calculated value. Mr. Morris offered a revised Schedule B – Schedule of Assessment for Theoretical Future Maintenance dated December 17, 2015 that corrects those errors.

Mr. Morris conceded that, had the large lots in Interval No. 1 been agricultural properties, he would have not equalized the Benefit assessment against each lot but, rather, distributed the assessment against each lot individually based on the frontage of the property abutting the Drain. He confirmed that this was the approach he applied to all agricultural lands in the upper intervals of the Drain.

Mr. Morris confirmed that he had assessed Roll No 30-272-00 despite its small size and land locked location because it was listed as a valid property within the watershed based on MPAC property assessment records and he felt obliged to not purposefully ignore the property.

When questioned as to the process of subdividing the assessments now identified against the large parcels in the event that they are ever subdivided, Mr. Morris referred to the application of Section 65(1) which would require input from an Engineer or Section 65(2) which would be accomplished by mutual agreement.

Findings

No appeals were raised regarding the assessments related to the distribution of the capital cost to prepare the Report. No issues were raised regarding the distribution of Outlet Liability charges against any property in the watershed. The only matters to be resolved are the issues revolving around the distribution of Benefit assessment in Interval No. 1. Further, to be clear, Section 74 confirms that future maintenance costs are only levied 'at the expense of all upstream lands and roads'. Consequently, should no maintenance work ever be carried out on the Drain adjacent to or downstream of the appellants' properties, they will not be assessed.

1. *Should Benefit and Outlet assessments be considered when developing a schedule of assessment for future maintenance or should only Outlet be considered?*

Mr. Wood relied on the decision on the Little Creek Drain to support the argument against the consideration of a Benefit assessment in the development of a Schedule of Assessment for Maintenance under Section 74 of the *Act*. The physical and functional characteristics of the Little Creek Drain are quite different from the Black Creek Drain. The Little Creek Drain adjacent to the appellants' lands in that decision is contained within earth dykes. The tributary drains that discharge into Little Creek Drain do so by mechanical pump systems. The considerations given to the development of assessments on the Little Creek Drain and its tributaries would differ from those applied

to the Black Creek Drain as are the considerations for the development of a new schedule of assessment for maintenance.

Mr. Morris supported the application of a Benefit assessment (albeit reduced from that which might apply to new construction or improvement) in the calculation of the responsibility for future maintenance costs. He clearly gave specific consideration to this issue and used his best judgement to quantify the Benefit and Outlet Liability responsibilities that would apply to the properties. The Tribunal supports the inclusion of a Benefit assessment in the development of a schedule of assessment for future maintenance in this case.

The *Act* provides a means by which an engineer can apply his knowledge and understanding of the function of a drainage works to quantify the service it provides to the adjacent lands. The total value of that service can be expressed in terms of Benefit, Special Benefit, Outlet Liability, and Injuring Liability, all where applicable. The apportionment of those component assessments may be different as between the distribution of costs related to new construction or improvement and future maintenance, but it is not proper to arbitrarily eliminate one of the component assessments. In this case, the elimination of the Benefit assessment for future maintenance considerations would place a disproportionate burden of the cost on the upstream lands.

2. *Should lots be grouped and equally assessed or should each property be considered individually?*

Mr. Wood acknowledged the practical application of an equalized assessment against a large number of small urban lots within a developed area but objected to that approach being considered for the four, large, undeveloped properties. Mr. Morris acknowledged that the equalized Benefit applied to the four large lots in Interval No. 1 was an anomaly as the Benefit assessment on all other large agricultural lots in the upstream reaches was developed in relation to the length of frontage on the Drain.

The practice of distributing an equalized Benefit assessment against clusters of small urban lots eligible for this type of assessment is a common practice. A reference was made in the evidence to Section 25(1) as an alternative method of assessing small urban lots but the engineer did not apply that technique in this instance. The Tribunal finds no fault with this method of assessment against the small urban lots.

This equalized methodology is less applicable to large lots. Although not strictly prohibited in the legislation, it does not comply with the generally applied assessment techniques as suggested in the 'Todgham Method' and it is less likely to meet the fairness test. It is the Tribunal's view that the equalized Benefit method applied to the four lots is not appropriate in this instance. The assessment approach applied to all other large lots in the upstream reaches of the drain should be used and applied to the large lots in Interval No. 1 as well.

3. Should improved lots be assessed the same as unimproved lots?

Mr. Wood and Mr. Dayboll raised several arguments to suggest that their respective properties should not be assessed in the same manner as developed properties. Both claim to have no intention of developing their properties and, therefore, should not be charged for a property that has development potential. Both claim that the MPAC assessed value of their respective properties is low compared to much smaller developed lots and consideration should be given to those differences. The evidence confirms that while portions of the properties immediately adjacent to the drain may have restricted uses, the majority of these parcels can potentially be subdivided and developed.

The evidence of Mr. Morris is that the Benefit assessment against a property should not be adjusted because the owner of the property chooses not to use the drain to the full potential of the opportunity provided or choose not to develop the property. The Tribunal accepts this position. When developing the relative value of the Benefit assessment against lands in a watershed, the engineer cannot practically determine the intention of the individual owners of each piece of property over the lifetime of the by-law. It is accepted that each owner will subdivide or develop their property or make use of the drain in a manner that suits them and meets all requirements of the legislation. The engineer, using his best judgement, must consistently apply his assessment methodology to all properties giving consideration to their development potential and assumed maximum use of the drainage facility by the current or future owners.

4. Should the assessment to Dan Dayboll et al. (Roll No. 29-28-00) be revised?

Mr. Dayboll argued that his Benefit assessment should be eliminated or at least reduced to the value equivalent of one small, urban parcel. As discussed in points 1 and 2 above, the Tribunal does not support the notion that the Benefit assessment should be eliminated or reduced to the equivalent of one small urban lot. However, it does support the revision of the Benefit assessment against this property as well as the other three large lots found in Interval No. 1. The engineer must apply the same approach to the development of the Benefit assessment against this property as he had applied to all other large lots in the upper reaches of this drain.

5. Should the assessment to Margaret Plyley et al. (Roll No. 30-107-00) be revised?

Mr. Wood argued that the Benefit assessment against this property should be eliminated or at least reduced to the value equivalent of one small, urban parcel or, in the alternative, equal to the aggregate of 61 lots opposite the property on the south side of the Drain. As discussed in points 1 and 2 above, the Tribunal does not support the notion that the Benefit assessment should be eliminated or reduced to the equivalent of one small urban lot. However, it does support the revision of the Benefit assessment against this property as well as the other three large lots found in Interval No. 1. The 'mirror lot' approach cannot be consistently or equitably applied to the large lots in this interval. The engineer must apply the same approach to the development of

the Benefit assessment against this property as he had applied to all other large lots in the upper reaches of this Drain.

6. Should the assessment to D. Plyley (Roll No. 30-272-00) be revised?

The evidence confirms that this parcel is very small, practically inaccessible, functionally undevelopable, and the owner is in the process of having this parcel merged with Roll No. 30-107-00. The engineer confirmed that he assessed this property largely on his understanding that every property shown on the assessment roll of the Municipality that is affected by the drainage works must be assessed. The Tribunal accepts the arguments of Mr. Wood and agrees that the property should neither be assessed for the costs to prepare the Report (Schedule A) or attract an assessment for future maintenance (Schedule B). We also concur with the engineer as to the requirement to assess all known properties within the watershed as shown on the assessment roll of the Municipality. This property may certainly be identified in the schedules of assessment attached to the Report but also be shown to have a $0 assessment. Thus, the future merger of this property into Roll No. 30-107-00 will have no repercussions on the schedules of assessment and require no action on the part of the Municipality.

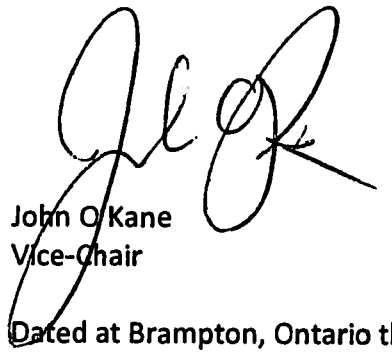
ORDER OF THE TRIBUNAL

The Tribunal orders as follows:

1. The revised Schedule A – Schedule of Assessment for Section 76 Report, dated December 17, 2015 shall form part of the Report and shall apply subject to further modifications as ordered herein.
2. The revised Schedule B – Schedule of Assessment for Theoretical Future Maintenance dated December 17, 2015 shall form part of the Report and shall apply subject to further modifications as ordered herein.
3. The appeal by Margaret Plyley et al. pertaining to Roll No. 30-107-00 under Section 54(1) of the Act is hereby granted in part. The assessment levied against this property in Schedule A (as revised) shall remain unchanged. The total value of the Benefit assessment as shown in Schedule B (as revised) to be levied against Roll Nos. 29-211-00, 29-228-00, 30-107-00 and 30-110-00 shall be summed and then be re-distributed against these specific properties in proportion to the length of the drain that abuts each property.
4. The appeal by D. Plyley relating to Roll No. 30-272-00 under Section 54(1) of the Act is granted in part. This roll number shall continue to be shown in Schedule A (as revised) but the assessment levied against it shall be shown as $0 and the remnant amount shall be applied to the nearest Road. This roll number shall continue to be shown in Schedule B (as revised) but the assessment levied against it shall be shown as $0 and the remnant amount shall be applied to the nearest Road.
5. The appeal by Dan Dayboll et al. pertaining to Roll No. 29-228-00 under Section 54(1) of the Act is hereby granted in part. The assessment levied against this property in Schedule A (as revised) shall remain unchanged. The total value of

the Benefit assessment as shown in Schedule B (as revised) to be levied against Roll Nos. 29-211-00, 29-228-00, 30-107-00 and 30-110-00 shall be summed and then be re-distributed against these specific properties in proportion to the length of the drain that abuts each property.

6. The non-administrative costs of the Municipality incurred with respect of these appeals shall form part of the cost of the drainage works, and such costs include the Engineer's fees and expenses for preparing the Report, as well as well as the Engineer's fees and expenses for attending and participating in the hearing.
7. There shall be no other Order as to costs and all parties are responsible for their own costs.



John O'Kane
Vice-Chair

Dated at Brampton, Ontario this 20th day of January, 2016.

TO:
Laura Bubanko, Clerk
The Town of Fort Erie
1 Municipal Drive
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AND TO:
Dan Dayboll
3665 Hayslip St.
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Stevensville, ON L0S 1S0

AND TO:
Margaret Plyley
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AND TO:
All persons assessed or compensated in the Engineer's Report.