

The Corporation of the City of Kawartha Lakes
Council Report

Report Number ENG2019-023

Date: Tuesday October 22, 2019
Time: 1:00 p.m.
Place: Council Chambers

Ward Community Identifier: Ward 4

Title: MacEachern / Brown Petition Drain

Description: Petition Drain under the Ontario Municipal Drain Act

Author and Title: Mike Farquhar, Supervisor, Technical Services

Recommendation(s):

That Report ENG2019-023, **MacEachern / Brown Petition Drain**, be received;

That Council proceeds with the petition submitted by D.S & D. Farms Inc., Robert MacEachern and Lynda Maceachern for drainage works by owners for Lot 17 Con 3, Lot 16 Con 3 and Lot 16 Con 2 in the Former Eldon twp., and instruct the City Clerk to proceed with the notices required under Section 5 of the Drainage Act; and

That Council appoints and retains, D.M. Wills and Associates Limited, in accordance with the Drainage Act, as the Engineer of Record for the petition and to proceed with the requirements of a petition drain.

Department Head: _____

Financial/Legal/HR/Other: _____

Chief Administrative Officer: _____

Background:

The subject area/land is bounded by Palestine Road to the South, and is separated by County Road 46 (refer to Appendix A). There are no existing Municipal Drains within the vicinity. The area of the land identified in the petition is approximately 200 acres in size.

The property is within the Lake Simcoe Region Conservation Authority jurisdiction as defined under the Ontario Conservation Act and has an identified watercourse on the property (see Appendix B). This existing watercourse has been identified as the Eli Budd Award Drain, awarded construction in 1904.

On September 3, 2019 the City of Kawartha Lakes Clerks department received a petition for Drainage works within the subject area (Appendix C).

The Drainage Superintendent was called to the site after a neighbor was concerned that a drainage ditch had been replaced with a covered pipe. A records request was completed and it was determined that the ditch was an existing Award drain. A meeting was held with landowners where legislation governing Award drains was discussed. The following was explained to land owners:

Section 3(18) of the Drainage Act states:

Drainage works constructed on requisition

3 (1)-(17) Repealed: 2010, c. 16, Sched. 1, s. 2 (1).

Existing ditches

(18) Every ditch constructed under *The Ditches and Watercourses Act*, being chapter 109 of the Revised Statutes of Ontario, 1960, shall be maintained in accordance with the award of the engineer providing for such maintenance until such ditch is brought under the provisions of this Act by petition under section 4. 2010, c. 16, Sched. 1, s. 2 (2).

Therefore, the drain must be maintained as per the latest engineer's report until it is petitioned for a municipal drain.

The first step to initiating maintenance is to send notice to the owner who is not maintaining their section of drain. This notice was served which initiated a site meeting between the land owner in contravention and owner serving notice. If the drain is still not maintained as per the engineer's report then there are three options for the landowner serving notice;

- Initiate a civil lawsuit based on non-compliance with an agreement.
- Initiate an appeal to the drainage referee under subsections 3(18) and paragraph 106(1)(c) of the Drainage Act.

- Petition under section 4 of the drainage act to have the award drain made into a municipal drain.

It is up to the land owner to initiate the appeal to the drainage referee and the procedure to follow for appeal is Ontario regulation 232/15 Rules of Practice and Procedure in Proceedings Before the Referee. Recommendation was made that all land owners seek their own legal advice for clarity and next steps.

Subsequent meetings were held with the applicants representative and City staff on site to review options for a mutual drain, municipal drain or alterations to the award drain. This situation was also discussed with the current Drainage Coordinator for OMAFRA. It was of the opinion that upon appeal, the Drainage Referee would change the Award drain to a Municipal drain and therefore the petitioning process initiated as per Section 4(1) of the Ontario Drainage Act. It was determined to be too costly and time consuming to pursue the appeal process and a petition was submitted to the Clerk's office on September 3rd, 2019.

At the September 17, 2019 Drainage Board meeting a deputation was brought before the Drainage Board based on the previously described history. The following are the minutes of the deputation from the September 17, 2019 meeting:

DB2019-03.3.1

Deputation from the Petitioners for Drainage Works Robert and Lynda MacEachern Scott Brown (for D. S. & B. Farms Inc.)

Robert and Lynda MacEachern spoke as the petitioners for drainage works. Mr. MacEachern shared they petitioned for a municipal drain to replace an old Award Drain (known as the Budd, and Hopkins Award Drains) that were awarded in 1904. They stated that a portion of the award drain had been filled-in on the Brown property, and replaced with a closed drain system that was too small to accept their water. After considering their options under the Drainage Act for dealing with an altered Award Drain, Mr. & Mrs. MacEachern signed the petition for drainage work with Mr. Brown. He responded to questions from the members of the Board.

DB2019-021 Moved By Councillor Ashmore Seconded By C. Clarke

That the deputation of Robert and Lynda MacEachern, regarding Petition for Drainage Works by Owners, be received.

After listening to the deputation and reviewing Staff's report on the petition drain the Drainage Board made the following recommendation.

DB2019-022

Moved By Councillor Ashmore **Seconded By** J. Oriotis

That the memorandum from the Drainage Superintendent - Engineering and Corporate Assets L. Feiter, dated September 17, 2019, regarding the petition for drainage works by owners of Concession 2, Part Lot 16, Geographic Township of Eldon (being Scott Brown of D.S.& B. Farms Inc.), and Concession 3, Part Lot 16, Geographic Township of Eldon (being Robert and Lynda MacEachern), be received; and

That Council proceed with the petition submitted by D. S. & B. Farms Inc. and Robert and Lynda MacEachern for drainage works for Concession 2, Part Lot 16, and Concession 3 Part Lot 16 Geographic Township of Eldon to be known as the “MacEachern-Brown Drain” and instruct the City Clerk to proceed with the notices required under Section 5 of the Drainage Act; and

That Staff concurrently continue to pursue with the petitioners options for a mutual drain agreement as per the City Policy; and

That pursuant to Section 8(1) of the Drainage Act, R.S.O. 1990, Chapter D. 17, staff recommend to Council a Drainage Engineer for the examination of the area requiring drainage and proceed with the requirements of the proposed MacEachern-Brown Drain.

Carried

Rationale:

The Drainage Board has made a recommendation to Council to proceed with the petition. Neither the Drainage Board nor Council has the authority to determine if the petition is valid; this responsibility is vested with the Engineer under the Drainage Act.

Once a decision has been made to accept the petition and proceed, notice of its intention to proceed must be sent, within 30 days, to each petitioner, the Clerk of any other municipality that may be affected, the local Conservation Authority and the Director of the Ministry of Agriculture, Food and Rural Affairs.

Section 8(1) of the Drainage Act stipulates that where Council has decided to proceed with the drainage works, Council shall by by-law or resolution appoint an Engineer to make an examination of the area and to prepare a report.

An alternative to a petition drain would be to consider mutual agreements between the City of Kawartha Lakes, the petitioners and any downstream property owners. Staff presented this alternative to the Drainage Board. The petitioners were not in support of a mutual agreement and requested that a petition drain process be followed.

In order for any mutual agreement to be viable, all parties involved need to be in agreement. As the petitioners were not receptive to this course of action and there was no representation from the downstream landowners, a mutual agreement was not likely to succeed. In light of this information, the Drainage Board recommended that a petition drain process commence. Staff is satisfied and agrees that accepting the petition is a suitable course of action to deal with this petition.

The Drainage Board left the selection of a Drainage engineering firm up to Council based on a recommendation by staff. Staff has recommended awarding the project to DM Wills Associates Limited, noting that this engineering firm has suitable experience and familiarity with the surrounding municipal drains and subject area. This recommendation is based on the results of a RFQ which was distributed to a standing list of Drainage Engineering firms. Staff supports this recommendation, and if accepted by Council, would proceed through the City's procurement process to implement.

Other Alternatives Considered:

If Council's decision is not to accept the petition, the Drainage Act states that the Council must, within 30 days of the filing of the petition, send notice to each petitioner of Council's decision not to accept the petition (section 5(2)). Each petitioner has the right to appeal to the Tribunal against Council's decision not to accept the petition (Section 5(2)). This action is not recommended.

Financial/Operation Impacts:

If the drainage works proceed, the engineer's report will include an estimate of the cost of the works, which includes the engineer's costs for the preparation of the report and the tendering and construction inspections. The report includes an assessment schedule, which indicates the total assessment of each property assessed on the drainage works, including assessments on roads. When the construction is completed and the final costs of the project are known, a by-law is passed to reflect the true costs, and the costs are billed out to the owners assessed in the report.

Notwithstanding the above, Council adopted Policy No. 118 FD 013 Municipal Drainage Projects on March 23, 2005 which outlines the process to follow for drainage works, as follows:

1. Prior to the commencement of each phase of the project, the Drainage Engineer shall prepare a detailed work program. The work program shall lay out the major items of work, the resources to be employed and the associated costs. The work program shall be reviewed by the Drainage Superintendent and subsequently, the Drainage Board for approval.

2. A schedule of payments shall be determined prior to the commencement of each phase of the work and approved by the Drainage Board. Once approval has been obtained, a purchase order shall be established for the value of the work. According to City policy, a change order is required to amend the initial tender. No payments shall be made until the change order receives the appropriate approvals. City staff shall not proceed with a change order without an amendment to the Engineer's original report which shall be undertaken pursuant to the provisions of the Drainage Act.
3. Once an Engineer's report has been received, the cost of the works shall be built into the City's capital budget. If the construction is to cover multiple taxation years, the capital budget will also be planned for multiple years.
4. The Drainage Superintendent shall satisfy himself that the invoice conforms to the schedule of payments and the work has been completed in accordance with the work program. When satisfied, the Drainage Superintendent shall recommend the invoice for payment. Final sign off shall be by the Director of Public Works or designate.
5. The Finance department shall prepare quarterly reports on all municipal drains for the Drainage Board meetings that document the financial status of all active capital drainage projects.
6. The final step of the procedure is to set the levying by-law before Council for approval, and subsequently, issue invoices to the ratepayers. The Finance Department shall confirm all expenses with the Engineer prior to setting the rate By-law.

Relationship of Recommendation(s) To The 2016-2019 Strategic Plan:

Section 3.1.7 of the Strategic Plan recognizes the protection of prime agricultural land by including policies in the Official Plan and working with the agricultural community to identify opportunities to support the sector.C05

Review of Accessibility Implications of Any Development or Policy:

N/A

Servicing Implications:

N/A

Consultations:

Drainage Board
Office of the City Clerk

Attachments:

Appendix A – Map of subject area/land



Appendix A.pdf

Appendix B – Map of Lake Simcoe Region Conservation Authority Jurisdiction



Appendix B.pdf

Appendix C – Petition for Drainage Works



Appendix C.pdf

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Department Head: Juan Rojas