

Drainage Act FAQ for Urban Municipalities

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Purpose of Document:

The STEP Water team has been assessing the Drainage Act for its suitability to serve as a vehicle capable of facilitating the implementation of optimized, cost-efficient stormwater infrastructure retrofits (LID). The need to retrofit existing urban areas has been well documented in previous publications and is not discussed here. This Drainage Act FAQ for urban municipalities is intended to serve as a simple and accessible reference guide for any professionals interested in understanding the benefits of the Drainage Act – a unique and powerful piece of problem-solving legislation – which has been used in Ontario to solve drainage issues since 1835. While the information provided in this document is no substitute for a strong knowledge of the Drainage Act legislation, it does provide answers to some of the most common, practical questions which arise when dealing with urban stormwater retrofits. The STEP Water team welcomes reader feedback and looks forward to answering any additional questions which you may have.

1. Q: What is a municipal drain?

A: "Municipal drain" also known as a "petition drain" is a term used to describe a drainage system constructed using the Drainage Act process. The development of municipal drains are triggered by a Section 4 petition and have legal existence as they get adopted by municipal council as by-law. These systems are professionally designed to suit the requirements of the individuals, corporations and other groups petitioning for drainage. Municipal drains allow for the collection of water and its transfer across the boundaries between properties, whether privately or publically owned, in order to be safely discharged through a legal outlet. The lower tier municipality is responsible for construction and drain management using the user pay framework in the Drainage Act.

2. Q: Who can petition for drainage under the Drainage Act?

A: Every landowner in Ontario, whether urban or rural, has the right to use the Drainage Act process to solve drainage issues (Section 4). Public and private landowners, or anyone with signing authority for a property requiring drainage, can submit a petition under the Drainage Act. This includes executors, administrators, trustees, CEO's, etc. Road authorities can also submit a petition. The Act defines a road authority as "a body having jurisdiction and control of a common and public highway or road, or any part thereof, including a street, bridge, or any structure incidental thereto and any part thereof" (Section 1).

3. Q: Who is the petition for or to?

A: Petitions are a starting point which allows public or private landowners to find relief from drainage-related issues, no matter how large or small. A petition is submitted to the clerk or administrator of any municipality within the Province of Ontario (lower tier in the case of two-tier municipalities). The clerk or administrator is then required to present that petition to their municipal council. If council decides to proceed after considering the petition, they appoint a drainage engineer to review the petition and to hold an on-site meeting to determine the petition's validity. The appointed Engineer determines the area requiring drainage and uses the following criteria from the Act to determine the validity of the petition:

- The majority in number of landowners in the area requiring drainage sign it.
- The owner or owners of at least 60 per cent of the land area requiring drainage sign it.
- A road authority signs it.

4. Q: Do road authorities have special status as petitioners?

A: As mentioned above, any petition initiated by a road authority is usually considered valid by the appointed Engineer. From a legal standpoint road authorities are just another signatory with no additional privileges or responsibilities regarding the processes outlined under the Act.

5. Q: What responsibility does a municipality have when presented with a petition under the Drainage Act Legislation?

A: Municipalities have a legal obligation to act when presented with a petition as described under the Drainage Act. Upon receiving a petition, municipalities have two choices: they can appoint a drainage engineer or decline to appoint one. Either decision requires municipalities to give the reasons for their decision in writing to the petitioners. Nearly all Drainage Act petitions result in the appointment of an engineer to make a report. If a municipal council declines to appoint an engineer, the petitioners can appeal to the Ontario Drainage Tribunal, which has the authority to order the municipality to appoint an engineer and to follow the process as outlined in the Drainage Act legislation.

The Tribunal does not decide on the validity of the petition or on the merit of the project. The Tribunal order is usually to ensure that the Drainage Act process is followed. Municipalities with drainage superintendents usually draw upon their expertise to assist both the petitioners and Council with the petition process.

6. Q: What is a mutual agreement drain?

A: A drain is considered to be a mutual agreement drain when two or more property owners reach an agreement for improved drainage on their land. In general, mutual agreement drains offer a low-cost simple resolution to small drainage issues involving a few landowners and possibly a municipal roadway.

A written agreement is recommended that outlines the lands affected by the mutual agreement drain, the specifications for the drainage works and a payment agreement regarding their construction and maintenance. Mutual agreement drains may also be registered on title. In this case, the agreement is binding

on the property and therefore on future landowners. Unregistered drains are not binding on future owners. Mutual agreement drain can be constructed with or without an easement.

The mutual agreement process is identified under the Drainage Act but does not have the same status as a drain constructed under the petition process in the Act. The municipality does not have control over private mutual agreement drains.

7. Q: Why not use mutual agreement drains for resolving drainage issues?

A: A mutual agreement drain offers a low-cost resolution to small drainage issues involving few landowners and possibly a municipal roadway. However, the Ontario Land Registry now requires that site plans be altered to include mutual agreement drains if the drain is to be registered on the property title. This requires securing an Ontario Land Surveyor, which dramatically increases costs and made petitioning for a petition drain the more affordable option.

Aside from cost, there are also several functional challenges associated with mutual agreement drains. Mutual agreements can be relatively straightforward when dealing with one or two neighbouring properties and where the legal outlet is located on private lands. However, reaching drainage agreements between three or more properties is challenging. Mutual agreements for drainage do not require process for ensuring maintenance occurs when needed. There is no requirement for provisions allowing entrance on to private lands for maintenance purposes. Moreover, aggregating independently via mutual agreement may contravene municipal by-laws, as it facilitates water movement across property boundaries.

8. Q: Why would landowners want to sign a petition over aggregating themselves independently of the Drainage Act?

A: The two most common approaches to solving drainage issues are for landowners to agree to implement a joint-drainage feature, known as a “mutual agreement drain” or to petition for drainage works, leading to a municipal drain (petition drain). The key to a mutual agreement drain is that the landowners understand that all parties must mutually agree to a common resolution and accept a percentage of the costs for construction, maintenance and future improvements. Disadvantages of these drains are that there is no process to impose maintenance, landowners are responsible for coordinating maintenance themselves, it’s difficult to reach an agreement with more the two landowners, mutual agreement drains registered on title and could devalue properties, and possible contravention of municipal by-laws.

Moreover, most landowners are not stormwater experts, do not know what the process for securing a mutual agreement drain entails, and do not have the time required for planning, coordinating and implementing legally-recognized drainage solutions. Submitting a petition for drainage under the Drainage Act initiates a streamlined process for facilitating the, design, construction, management, and payment of drainage works. Part of the Act’s purpose is to make getting drainage relatively easy for landowners with little knowledge of and time for stormwater engineering or legal agreements.

The Drainage Act is also a financially appealing tool for aggregation, as it helps property owners realize economies of scale with respect to project costs.

9. Q: Can landowners aggregate under the Condominium Act for cost effective stormwater management?

A: Communal private property stormwater management is possible under the Condominium Act. It allows condo owners to aggregate resources by sharing in the costs for construction and for the maintenance of the drainage works. Although the Condominium Act may allow for cost sharing among owners, drainage works are to be within a single condo property. The Condominium Act does not appear to be structured to readily accommodate the pooling of stormwater resources across multiple property boundaries, nor does it appear to be well-suited to the implementation of trans-boundary drainage features. The Condominium Act only allows for cooperation amongst multiple owners of the same property (e.g. a condo board), and not multiple-property aggregation. By using the Drainage Act as an implementation framework, multiple properties may be aggregated to allow for a drainage system design that is also optimized for performance and provides additional cost savings. The Drainage Act also helps overcome property set back requirements imposed on condo corporations.

10. Q: What is the role of the drainage superintendent in the petitioning process?

A: Municipalities with drainage superintendents usually draw upon their expertise to assist both the petitioners and Council with the petition process. This helps to ensure that landowners and municipal council properly follow the Drainage Act process.

Landowners with drainage issues will often meet with a drainage superintendent to discuss options for resolving a drainage problem prior to signing a petition. When meeting with potential petitioners, the drainage superintendent should make them aware of the liability clause on the petition form noting that petitioners will have to pay for cost to-date if they withdraw from a petition in order to stop the Drainage Act process. The drainage superintendent can also go over the Drainage Act process and the length of time it may take to resolve the drainage issue.

11. Q: How do drainage works constructed using the Drainage Act benefit municipalities generally?

A: The Drainage Act provides a reliable, established process for resolving nearly any drainage issue. The engineer's drainage report – which is the document enacted by council as a by-law – is created through a communal, democratic process. It provides a cost effective asset management plan where the project costs – including future costs for keeping the drain protected and maintained in perpetuity – are fully accounted for and shared in a transparent and equitable fashion by everyone who benefits from the drain and by everyone who contributes runoff to it. The Drainage Act can save municipalities money by helping them share the costs of stormwater management with the private sector.

In addition, the municipality has the legal authority to inspect the drainage features without needing property easements, etc.

12. Q: How do drainage works constructed using the Drainage Act save municipalities money?

- Municipalities employing drainage superintendents to oversee the inspection, operation and maintenance of drainage works constructed under the Act are eligible to have 50 per cent of their salaries paid by the Ministry of Agriculture, Food and Rural Affairs (OMAFRA), prorated according to their time allocated to such work (Section 87(3)). Other costs for enabling the drainage superintendent to perform their function – e.g. vehicles and other necessary equipment – are also eligible for the 50 per cent subsidy.
- A reduction of possible liability lawsuits for flood damages stemming from illegal stormwater collection and discharge.
- Public-private sharing of costs for completing drainage projects, resulting in direct savings.
- Public-private sharing of costs for maintaining drainage projects in perpetuity.
- Utility companies are required to pay the increased cost of construction arising from the presence of the utilities themselves (Section 26).
- Since municipal infrastructure can be located on private property by using the Drainage Act, full land costs for conventional stormwater management technologies such as ponds may be foregone further creating a cost savings.

13. Q: What other benefits does the Drainage Act process provide to municipalities?

- Municipalities are guaranteed the right of access for the purpose of inspection and maintenance of drainage works (Section 95(3)).
- For maintenance costs, the municipality can decide not to bill landowners for five years or until the total costs reaches \$5,000, whichever comes first (Section 75(3)).
- Community property owners – including municipalities – can legally manage the trans-property movement of drainage water in a holistic, integrated, legal and aggregated manner.
- Municipalities can use inspection and maintenance knowledge to inform the adaptive management of drainage works and have the ability to modify the works in order to improve their performance (Section 78(1)).
- Municipalities are legally absolved from any problems caused by snow and ice (Section 79(3)).
- Anyone who obstructs or impedes the function of the drainage works in any way is required to repair or remove the obstruction. If a property owner fails to do so, the municipality can remedy the situation at the property owner's expense ((Section 80(1) & 80(2)).

14. Q: Who is responsible for the cost of the appointed drainage engineer?

A: If the petition is invalid after the meeting to consider the preliminary report, the original petitioners are responsible for the costs to-date in equal shares. The petition is invalid after the meeting to consider the engineer's report then the costs to-date are shared by the original petitioners proportional to their assessment in the report.

If the project proceeds to completion the engineering costs form part of the total cost of the drainage works and are assessed to all lands and roads in the watershed of the drainage works as determined by the engineer and outlined in the assessment schedule in the report.

15. Q: What legal obligations do municipalities have under the Drainage Act?

A: When a petition under the Drainage Act is submitted a municipality has a legal obligation to ensure that the Drainage Act process for a petition drain is followed, i.e. the municipality provides a venue for the Drainage Act process to take place, and that the report is adopted by bylaw (Section 45(2)). Once a report on a petition has been adopted by bylaw the municipality has a legal obligation to ensure that the drain is constructed in accordance with the engineer's report (Section 58(5) and Section 64). After the drain is constructed the municipality has a legal obligation to maintain the drain (Section 74 and 79) in accordance with the maintenance provisions in the report. In order to ensure proper future drain maintenance, the municipality should appoint a Drainage Superintendent (Section 93).

16. Q: What would an urban municipality need in terms of resources to operationalize the Drainage Act?

A: Municipal staff would need an understanding of the Drainage Act process. OMAFRA provides courses for municipal staff to obtain this knowledge. Municipality should have a Drainage Superintendent with knowledge of the Drainage Act process and an understanding of how to carry out drain maintenance. OMAFRA provides a course for Drainage Superintendent training.

17. Q: Is there a cost-effective way for municipalities to screen the viability of projects under the Drainage Act?

A: Under the Drainage Act, municipalities have the right to request a preliminary report, which contains a conceptual design with enough detail to facilitate a cost estimate (Section 10(1)). This can be used as the basis to decide if a project is worth pursuing. A grant is available from OMAFRA under Section 85(c) on the cost of preparing a preliminary report if the project is terminated after the meeting to consider the preliminary report and provided the Preliminary Report meets the criteria in Section 10(1).

18. Q: How are project costs and maintenance costs are assessed to landowners under the Drainage Act?

A: Assessment schedules for the total project cost are developed by the drainage engineer and are included in the final drainage report. Assessments are made to the affected lands and roads using the criteria outlined in Sections 21 to 28 of the Act. The engineer will also include in the report an assessment schedule for assessing our future maintenance cost.

19. Q: Will the municipality be required to assist financially with the cost of constructing a Drainage Act project?

A: The municipality will be assessed for any municipal lands and roads that are within the watershed of a drainage works as determined by the drainage engineer. The municipality will have to bear some of the administrative cost for the Drainage Act process as outlined in Section 73 of the Act.

20. Q: What rights are afforded to the municipality if they are assessed a share of the project costs by the engineer in the Drainage Report?

A: In this situation the municipality is considered to be another landowner and has the same rights to participate in the appeals process identified in the Drainage Act.

21. Q: Are there opportunities for municipalities to keep assessments simple in cases where there are many small properties (e.g. subdivisions)?

A: All properties in a drainage area have to be identified and assessed in the assessment schedule prepared by the drainage engineer (Sections 35 to 37).

22. Q: Can landowner requests for aesthetic enhancements be accommodated when they do not provide a direct improvement to the functionality or performance of the drainage works?

A: Yes, but all increased costs are assessed directly to the requesting landowner as a special benefit (Section 1 and Section 24)

23. Q: Do drainage features constructed using the Drainage Act process need to be registered on title?

A: No, there is no requirement within the Drainage Act that the bylaw for a drainage works needs to be registered on title for the properties on which the drain is constructed. Section 68 of the Act states that when allowances under Section 32 (insufficient outlet) and Section 33 (loss of access) are granted to a property the drain bylaw is to be registered on the title of the property receiving these allowances.

24. Q: How would a drainage superintendent coordinate construction and maintenance on private property?

A: The Drainage Engineer's report provides specifications for the construction of the drainage works and defines the working corridor or easement for the construction of the drainage works on private and public lands. Construction of the drainage works is usually coordinated by the engineer that prepared the report and not by the drainage superintendent.

The Drainage Engineer's report will provide detail for future maintenance including a working corridor or easement for maintenance of the drainage works on private and public lands. Case law before the Drainage Referee has upheld that even if a maintenance easement is not specified in an engineer's report the Drainage Act provides an inherent easement and right of entry along a drainage works on private property for the municipality to undertake future maintenance work.

25. Q: Who does the drainage superintendent work for?

A: The Drainage Superintendent is appointed by Municipal council under Section 93 of the Act. The Drainage Superintendent is thus a municipal employee.

26. Q: Who does the drainage superintendent report and answer to?

A: As per Section 93(3) the Drainage Superintendent reports to the municipal council.

27. Q: Who covers the wages and expenses of the drainage superintendent?

A: Section 93(4) states that the cost of providing drainage superintendent services shall be paid from the general funds of the municipality. Sections 85(b) and 87(3) note that a municipality may receive a grant from OMAFRA equal to 50% of the cost of providing drainage superintendent services provided that the qualifications of the appointed.

28. Q: What is the difference between a drainage superintendent and urban drainage superintendent?

A: There should be no substantial difference between a drainage superintendent appointed in a rural municipality and a drainage superintendent appointed in an urban municipality. Drainage Superintendents are governed by the provisions of the Drainage Act and the duties of the Drainage Superintendent outlined in Section 93(3) of the Act. Minor functional differences are that Drainage Superintendents in urban areas may be more involved with engineered green infrastructure projects and there would be a lessened necessity to apply for agricultural land grants (Section 85(a)).

29. Q: Who supports the drainage superintendent?

A: The drainage superintendent may have municipal support staff as required to carry out the duties of the drainage superintendent. The cost of the support staff would also be paid from the general funds of the municipality. The cost of the support staff is not eligible for the 50% OMAFRA grant for providing drainage superintendent services.

30. Q: What legislation should drainage superintendents be familiar with?

A: Drainage Superintendent must be very familiar with the requirements of the Drainage Act. The Drainage Superintendent must also be familiar with other legislation that may regulate watercourses such as the Conservation Authority Act and the federal Fisheries Act.

31. Q: Are easements a viable option to ensure municipal power to enter land and to complete maintenance?

A: Establishing individual easements on a property-by-property basis is not cost effective, since a survey provided by an Ontario Land Surveyor and registration of the easement on title would be required on a property-by-property basis. Since easements are registered on title they tend to devalue property worth. By using the Drainage Act, municipalities have power to enter land for the inspection and maintenance of the drainage works on private property without the need for registering the drain on title.

With easements it can be difficult to negotiate who is responsible for maintaining the drainage works, when maintenance should be completed as well as who or how much each landowner should pay, let alone a method for collecting the dollars. The Engineer's Report under the Drainage Act provides a transparent maintenance plan and cost recovery for maintenance.

32. Q: How are easements for constructing and maintaining drainage works handled under the Planning Act versus the Drainage Act?

A: The Planning Act includes content on rectifying drainage issues. It identifies swales and other conveyance methods as options to transport water to designated spots, such as backyard catch basins. Easements approved through the Planning Act can secure the right to enter onto private property to inspect and to maintain such structures. Establishing easements requires a survey provided by an Ontario Land Surveyor and registration of the easement on title of the property the pipe crosses to get to the catch basin. This usually devalues that particular property compared to other properties, since it restricts the use of the area. Also, the Planning Act does not require that definition of maintenance criteria be developed and or that these features be protected.

Reaching a drainage resolution under the Drainage Act provides municipalities with the ability to enter land for construction, inspection and maintenance of the drains. The engineer's Drain Report and its maintenance program ensure that constructed features are protected in perpetuity.

33. Q: What happens if a property changes owner after maintenance is carried out, but prior to being charged to the benefitting property?

A: The costs of maintenance are assessed to the property, not the property owner. A property would have benefited from the drain in the past and will continue to benefit from the maintenance of the drainage works in the future, regardless of a change in ownership. The invoice is directed to the owners of the property at the time of billing out the final costs, according to the criteria outlined above. A prospective property buyer's lawyer should enquire with the municipality as to the status of liens or other costs which may be assessed against the property on behalf of their client.

34. Q: How would the Drainage Act work with a Storm-Sewer Standards Bylaw?

A: The Drainage Act is meant to work with other legislation, so long as its application does not recreate or exacerbate issues which that legislation is intended to remedy. For example, stormwater leaving a municipal drain and entering the storm-sewer must comply with the requirements outlined in any Provincial legislation or the standards for the storm-sewer.

35. Q: What do property owners do if they don't want to be part of a municipal drain anymore?

A: A drain can be abandoned, in whole or in part, as per the process outlined in Section 84 of the Act. This process is initiated by a written request to the municipality from 75% of the landowners assessed for benefit on the portion of the drain to be abandoned. All landowners assessed on the drain proposed to be abandoned must then be notified by the municipality of the intent to abandon a drain. If one or more assessed landowners object to the abandonment of the drain the municipality must appoint an engineer to prepare a report on the drain abandonment. This report is to be processed under the Drainage Act in the same manner as a report for the construction of a drain. This report will then determine if the requested drain can be abandoned. If no one objects to the initial request for abandonment, then the municipal council

can pass a bylaw to abandon the drain as requested and the municipality will then no longer have any obligation to the abandoned drainage works.

36. Q: How does the Drainage Act deal with redevelopment?

A: If changes or improvements are required for a new development within a drainage area the developer can submit a request to the municipality under Section 78 of the Act for a new report on the drain to provide for the changes or improvements required. If the changes or improvements required do not meet the criteria outlined in Section 78 then the developer would have to submit a petition under Section 4 for the improved drainage required for the area to be developed.

37. Q: How can municipalities assess costs to lands that have been subdivided after drainage works have been installed?

A: Section 65 of the Act provides for a process to amend assessments when land is subdivided after a drain report has been adopted by bylaw. First option is that the owners of the subdivided land can mutually agree to the division of the assessment to the original parcel and submit a written agreement for such to the municipality. Municipal council may then approve this agreement by resolution. Second option is for the Clerk to instruct an Engineer to prepare a report to apportion the original property assessment to the subdivided parcels of land.

38. Q: Where has the Drainage Act been used within urban boundaries?

A: The City of London has a drainage superintendent on staff to manage previously established municipal drains in rural areas that were annexed by the City. Chatham-Kent used the Drainage Act to serve a large urban development consisting of several thousand homes to prepare a unique system to deal with existing and new municipal drains. In addition, Norfolk County has used the Drainage Act in many urban areas to deal with storm water systems, constructed wetlands and related features. Case study examples can be shared by CVC staff.