ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE COURT OF THE DRAINAGE REFEREE

CITATION:	**Jones v. Derby (Town) 1986 ONDR 3**
DATE OF DECISION:	**1986-12-08**
FILE NUMBER:	**1986-03**
STATUTE:	***Drainage Act***
HEARING:	**1986-01-06**

BETWEEN:

RICHARD ALAN JONES

Appellant

and

TOWNSHIP OF DERBY

Respondent

R.A. Jones vs. Township of Derby

Cook Drainage Works
Referee Turville
December 1986
Key Words: joint owners, on-site meeting, change in petition, drainage area

This is an appeal by Richard Alan Jones of a petition for a drainage scheme in the Township of Derby.

In preparing his report, the engineer became aware that those owners who signed the petition for this scheme did so without the written consent of their joint owners. Since there was concern that this would mean that there was no majority of land owners as required by the Drainage Act, a second petition was signed to include these joint owners. No on-site meeting was held for this new petition. The area of land requiring drainage was also increased in the second petition from 100 acres to 113.07 acres. The Township was not informed of this change, so the Clerk was not able to send notice of it. The engineer also excluded lands to the east of Concession Road 6-7 on the basis that there were two separate drainage areas on either side of the road.

The appellants contended that the petitions and the on-site meetings were invalid and that the engineer failed to properly determine the area requiring drainage.

Referee Turville ruled that the engineer did not follow proper procedures because he did not call a second on-site meeting when the number of petitioners and the areas requiring drainage had changed. The Referee stated that this did not give the original petitioners an opportunity to withdraw. He held that this situation and the fact that the Township was not advised that the petition was deficient were enough grounds for the report to be set aside.

The Referee also determined that there was no difference between land on either side of the Concession Road and that there was no justification for two separate drainage area. The Referee stated that an area requiring drainage had to be an irregular saucer shape with reasonably well defined banks around it and that this area can not change simply because a landowner requires drainage. He held that the engineer did not form the proper independent judgement required by the Act when making his assessment and was simply responding to the wishes of the landowners.

The report was set aside and costs assessed to the Township.

DECISION

MIDDLEBRO' & STEVENS
Solicitors for the Appellant

McKERROLL & McKERROLL
Solicitors for the Respondent

This application was heard on January 6, 7, 8, and 9th, 1986 at the Court House in the City of Owen Sound. The appeal was authorized pursuant under Sec. 47(1) of The Drainage act, 1980 R.S.O. c. 126. The recital in the proposed By-Law 13-84 of the Respondent Township stated it had been authorized under the Drainage Act, S.O. 1975 c.79. It received its second reading and was provisionally adopted on July 12, 1984. There were two Petitions filed for this drainage scheme, August 25, 1983 and September 22, 1983. The date of the filing of the Petition dictates the applicable legislation. (Divisional Court, Short 2(A) Municipal Drain and Township of Mariposa, 1980). The only amendments to the 1975 and 1980 drainage legislation were the alterations from "acreage" to "hectarage" in Sec. 4(1) (d) and the added words to Sec. 8(1) (a) intended for the

engineer's report "including a description of the area requiring drainage."

The grounds of appeal filed are:

> 1. For a declaration that the petitions dated the 25th day of August and the 17th day of September, 1983, are invalid and setting the same aside because they do not comply with the requirements of the Drainage Act, R.S.O. 1980 Ch. 126;
>
> 2. For a declaration that the notice of an "on site" meeting dated September 1, 1983, and the purported "on site" meeting September 13, 1983, are invalid and setting the same aside because of failure to comply with the Drainage Act, R.S.O. 1980 Ch. 126 and regulations thereto;
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> 3. For a declaration that the report of the engineer, if any, made pursuant to the petition dated August 25, 1983, the notice dated September 13, 1983, is invalid and setting the same aside;
>
> 4. For an Order extending or abridging any time periods required under the Drainage Act, R.S.O. 1980 Ch. 126, and regulations under the circumstances.
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> 5. Costs on a solicitor and his own client basis and;
>
> 6. For such further and other relief as this Honourable Court deems just.

The Ontario Drainage Tribunal by its creation in the Drainage Act S.O., 1975 c. 126 had been given some jurisdiction to hear certain appeals from the engineer's report previously within the jurisdiction of the Referee. This appeal before me is authorized under the Drainage Act 1980. R.S.O. c. 126 Sec. 47(1).

> Sec. 47(1);
> Any owner of land or public utility affected by a drainage works, if dissatisfied with the report of the engineer on the grounds that it does not comply with the requirements of this Act, or that the engineer has reported that the drainage works cannot be constructed under section 4, may appeal to the referee and in every case a written notice of appeal shall be served upon the council of the initiating municipality within forty days after the mailing of the notices under section 41.

The engineering firm of Gamsby and Mannerow Limited of Owen Sound, was appointed by the Township of Derby to prepare the report and in compliance with Sec. 8(2), Mr. Wm. Mannerow was appointed the engineer in charge of this project.

The Appellant contends that no on-site meeting had been called following the acceptance of the second Petition in accordance with Sec. 9. Apparently, Mr. Mannerow was of the view that

those owners who signed the first Petition did so without the written consent of their joint owner, causing concern that there had been no majority in compliance with the prerequisite of Sec. 4. It must be emphasized that the present legislation casts the responsibility upon the engineer of advising his employer the grounds of the deficiency, should he decide the Petition fails (see Sec. 9(4)). This appears not to have been done, however a second Petition was accordingly filed at the engineer's request, however no on-site meeting was held as required by Sec. 9(1). Mr. Mannerow was of the opinion that the only difference in the two Petitions were more signers in the second. I cannot agree. The second petition as well, described the lands requiring drainage on 46 hectares or 113.7 acres as opposed to the 100 acres in the first petition. I view the failure to hold this on-site meeting following council's acceptance by resolution of the second petition on September 22, 1983, as more than a mere technicality. The added names to the second Petition increases the possibility that at the second on-site meeting more information and discussion could be exchanged. This opportunity, now lost, might have caused the new signers, as well as the original Petitioners that signed the first petition to withdraw or add their names in accordance with Sec. 42. Similarly, Mr. Barfoot night have reconsidered his position and not withdrew his name. As well, failure to direct the Clerk to send out this notice as required by Sec. 9(a) is a withdrawal of one's right to be informed of the extent and of the approximate cost of the drainage scheme from the engineer himself. (McDougal vs. Twsp. of Harwich 1945 O.R. 291). The fact that the other joint owner may be a spouse makes no difference, even if the same lands identified in both Petitions were identical, is irrelevant. The report was based on the second petition only, otherwise Mr. Mannerow would have proceeded on the first one. There is some confusion from page 1 of his report exactly what petition he decided complied with Sec. 4. I see no provision in the Drainage Act that permits the engineer to circumvent this mandatory provision of Sec. 9 and certainly he shall advise his employer accordingly. I find these two omissions to comply with the Act sufficient grounds for the report to be set aside.

On the assumption I am wrong, I shall proceed with the issue of the area requiring drainage which was the main thrust of the Appellant's argument.

This scheme was designated the Cook Drainage Works as described in the petition as follows:

> East pt. Lot 6, Concession 7, Township of Derby, South pt Lot 7, Concession 7, Township of Derby, Pt. of the North pt. Lot 7, Concession 7, Township of Derby, South pt. of Lot 8, Concession 7, Township of Derby

The proposed drainage works are approximately 1 km. in length and an open drain is

contemplated. The Appellant's main argument at this Hearing was the engineer's failure to properly determine the area requiring drainage. The Appellant was of the view that the township engineer merely followed the wishes of the Petitioners and paid little heed to the lands in the same drainage basin. The Appellant's solicitor relied heavily upon the reasoning in Re Duane and Finch 1908 12 O.W.R. 144.

As I stated in the decision of Westendorp et al vs. Twp. of Elizabethtown June 2, 1986, The Drainage Act does not set out any standards for determination of the area requiring drainage though certain principles have been lain down in previous decisions. This is left to the engineer's discretion and independent judgment for he is the expert employed by council. I have no doubt that the area requiring drainage designated in a petition could be similar to that found by the engineer after his own determination, but it would indeed be very rare. Sec. 4(a)(b) is to be applied to the lands found by the engineer as requiring drainage and not to the lands described in the Petition. I have been aware for some time of Referee Henderson's definition of the area requiring drainage and cited it in the Westendorp decision. lt was put forth by the Appellant's solicitor in this matter and is again worthy of mention.

> "It is not necessary that there should be a majority of the petition of all those whom the Engineer finds to be eventually interested in the drainage work. What you need is in the first place a reasonably well defined drainage area, that is a section of land requiring drainage, and it is this territory which should be described in the area. It is of course not proper to pick out just enough lots to enable a majority, but there should be what I generally speak of as an irregularly shape saucer with reasonably well defined banks around it. This might be all on one lot, although that is of course a rare case, but the point is that once you have that low lying..."
>
> November 29, 1929

Early on in drainage legislation, the courts found that the determination of what lands constitute the area requiring drainage, was left to the Petitioners to describe it in their petition. Subsequently, the courts placed this added responsibility upon the local council (Re Duane vs Finch 1908 12 O.W.R. 144) that they should inform themselves in a general nature of the lands described in the Petition and that it should be fairly described. As well, and no means must portion of land requiring drainage be picked out so as to permit what Referee Henderson said in that decision at page 147:

> "I wish to guard myself against laying down the proposition that 3 lots or parts of lots may not constitute an area. There may be a case in which it would be proper for the council to act upon a petition which described such a small area only, but it would needs be an extraordinary case. What I wish to point out very plainly is that it is not proper to pick out any portion or portions of what is in fact a distinct basin

requiring drainage. Subject to the discretion of the township council, the majority are to rule,..."

It is no longer the responsibility of council under the present legislation to acquire local knowledge and to apply their discretion that the area in the petition is fairly described. It now falls to the engineer. The engineer must however obtain his local knowledge from a discussion at the on-site meeting, maps of various assortment and an obvious necessity of traversing the petitioned lands. The lands requiring drainage cannot as a rule be determined at the on-site meeting, as was the occasion here, but further work following that meeting in most cases is required. see:

1. Lawrence McKenn, and the Corporation of the Township of East Williams and the Corporation of the Township of Adelaide, May 31, 1966, page 9, 10.

2. Ingersoll Golf and Country Club Limited and The Corporation of the Township October 12, 1977, page 9.

It was agreed from the outset that the validity of the Petition itself was not to be decided at this Hearing. As a result par. 1 of the Appellant's grounds of Appeal was waived. However, on further consideration it seems to me that a successful party having knowledge that a Petition might fail and delays in bringing his application may well jeopardize his costs.

The lands described in both Petitions as requiring drainage were similar according to the evidence of Mr. Mannerow though I expressed earlier I was not in agreement. The area petitioned as requiring drainage is located on the west side of the north south Concession Road 6-7 and north of the County Road #5, in the Respondent Township. The owners who signed the second Petition are:

1. Shirley McLean, C.R. McLean
2. Robert J. Cook, Helen M. Cook
3. Guy K. Barfoot

In all, there were five properties assessed in the revised report for benefit. The Appellant Jones of course was assessed benefit. One property owner, Barfoot, (part of lot 7 Conc. 7) withdrew his name at the meeting to consider the report and thereby non-compliance with sec. 4(1)(a). Mr. Mannerow, determined however that more than the 60% requirement of the Sec. 4(1)(b) had been met. The north south Concession Road 6-7 was assessed for benefit but was not included in the area requiring drainage as assessed by Mr. Mannerow. Traditionally, and Mr. Mannerow accepted this, that lands assessed for benefit fall within the area requiring drainage. There was no calculation of the number of hectares in the area requiring drainage in the report which surely is a necessity in establishing that it complies with 4(1)(b).

As stated earlier, the Appellant urged upon me that the township engineer in preparing his report was influenced in his determination of the area requiring drainage by the Petitioners and as a result had overlooked portions of lands east of Concession Road 6-7 that were within the same drainage basin.

The Reeve, and one member of council testified that two of the property owners immediately east of Concession Road 6-7, DeVokes and McConnell's lands would receive benefit had they been included in the drainage works. These gentlemen were familiar with the area and the farming community.

The Appellant, Mr. Jones resides on part of the north 1/2 of lot 7, con.7. He is an accountant and has lived on his 16 acre parcel year round for the past 12 years. He produced some 28 (Ex. #25) coloured photographs taken on November 22, 1983, a time of the year when the water level is at its lowest. I accept Mr. Jones' evidence and have concluded from it that the lands were relatively flat on both sides of the north south Concession Road 6-7 though it rises slightly to the south of his property. He testified that a natural watercourse flowed from the north east, westerly year round from the McConnell's property approximately 1200 metres north of the road intersection under the north south road through a double culvert of substantial size at the property line between Cook and Jones' property to the west. In addition he testified there was a natural spring 1/2 km. east of the road intersection on McConnell's property which flows westerly in a roadside ditch. I accept the evidence that water flowing from McConnell's property contributes to the wet lands west of Concession Road 6-7 on parcels owned by Cook and McLean, as well as through three culverts surrounding the road intersection obviously placed there for that purpose.

The Appellant's drainage expert, Mr. A. McBride an engineer with considerable background in municipal drainage schemes. He attended at the site on October 2, 1985. Taking the identical watershed or drainage area from the engineering firm's Plan and Profile, he was of the opinion that other lands ought to have been included in the area requiring drainage had he designed this scheme. In all, there were nine separate parcels to be assessed benefit in his view.

1. C. & S. McLean,
2. R. & H. Cook,
3. R. & A. Jones,
4. G. Barfoot,
5. Twsp. Sideroad 6-7
6. Ontario Hydro
7. DeVokes Estates
8. D. McConnell
9. Twp. Concession Road 6-7

In total he found there to be 47.3 hectares.

He testified that there were low wet areas on the east half of lot 6 con. 6 to the northeast, lands owned by Mr. McConnell surrounding the natural water course. He personally inspected these lands on both sides of the north south road within the watershed, and particularly the lands adjacent to the natural water course. He confirms much of Mr. Jones' evidence. Mr. Mannerow did not inspect the lands on the ground particularly those to the east prior to determining the area requiring drainage at the on-site meeting, other than to look at them from the road.

Mr. McBride reviewed aerial maps stereoscopically. He concluded from studying soil maps that lands lying immediately west of the north south road were chelsea silty clay loam which he defined in agricultural terms to mean wetness that required drainage. Like Mr. Jones, Mr. McBride testified that the water flows from east to west through a series of culverts surrounding the road intersection, McLean's property to the north onto Cook's lands, from DeVoke's property north to McConnell's lands and again from McConnell's to Cook's at low water level periods through an east west culvert immediately north of the road intersection and at times northerly at high water periods in a roadside swale to the natural water course. Mr. Mannerow felt this east-west culvert was an overflow culvert only, though the Respondent failed to lead any evidence from its road authority that water was intended to flow in a northerly direction. It is significant to note that Mr. McBride did not see this area to the east as proposed by Mr. Mannerow as having sufficient outlet as defined by the Act, otherwise lands to the immediate east would not have been as wet as they are. Mr. McBride corroborated Mr. Jones' evidence as well that water passes westerly through a double culvert of substantial size to the north of the road intersection onto Cook's and Jones' property from the natural watercourse to the east. His suggestion that subsurface water from the east side of the road was also a contributing factor to the wetness on Cook, McLean and Jones' property was not refuted. From his study of the area he was of the opinion that all of the lands described as requiring drainage as he found them to be on both sides of the north south Concession Road 6-7 was one drainage basin. It appears he had no difficulty unlike Mr. Mannerow, in arriving at the number of hectares in his description of the area requiring drainage by the use of a planimeter. I might add that to assist the court Mr. McBride stated the drainage area, watershed, and drainage basin are to be used synonymously.

Mr. Wm. Mannerow, an engineer for some 20 years, whose firm does municipal drainage schemes within a general engineering practice testified that there were two areas requiring drainage separated only by Concession Road 6-7. He accepted as the area requiring drainage the lands described in both petitions though I found these two areas described were dissimilar.

Mr. Mannerow proposed that the second area requiring drainage on the east side of the north south Concession Road 6-7 (and somewhat smaller than that determined by Mr. McBride)

would outlet at McConnell's property line between Jones' and Cook's lands through the double culvert presently in place into the Main Drain with branch or lateral drains on the south of McConnell's and DeVoke`s lands. Mr. Mannerow re-attended at the site on May 10, 1984 to obtain information on rock formation for the revised report. He had studied aerial maps of the watershed but I was unable to find any evidence to satisfy me that he confirmed this aerial mapping information in the field with respect to the lands east of the north south road that it was a separate area requiring drainage, certainly nothing was done of any consequence for the on-site meeting. He acknowledged that the failure of confirmation from the aerial information could lead to error. Like Mr. McBride he was of the opinion that the lands on both sides of the Concession Road 6-7 were similar in elevation, topography and vegetation except for some cropping of it on McConnell's property.

Mr. Mannerow acknowledged that in using his discretion in determining which wetlands require drainage was left for the most part to the Petitioners themselves. He decided at the on-site meeting that the lands described in the Petition requiring drainage was an adequate definition of his obligation under Sec. 8(1)(a) (save as to Lot 8). This suggests that if the Petitioners could accurately describe the area requiring drainage that would otherwise be the engineer's responsibility, then this statutory duty would be redundant, hardly what the legislature had in mind.

> 1. Lawrence McKeen, and the Corporation of The Township of East Williams and The Corporation of The Township of Adelaide May 31, 1966,
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> "Those who petition for drainage are not experts and their views may be totally inconsistent with the realities revealed by a survey and calculations made by a trained engineer."

Mr. Mannerow walked the entire watershed only after the on-site meeting, but not the lands within them and most importantly he observed the lands east of the Concession Road 6-7 from the road only. He was aware that portions of the water from the wet lands on DeVoke's and McConnell's flowed westerly through the double culvert under the north south road and contributed to its wetness into what he describes as the first area requiring drainage west of the north south road. When he re-attended at the site on May 10, 1984, he observed water moving in roadside swale east of Concession Road 6-7 that took some of the natural watercourse north. Mr. McBride (Exhibit #35) had taken a photograph on October 21, 1985, indicating the road authority had done some ditching and it appears they intended it to continue its natural path westerly. The road authority did not testify to the contrary. I do not view the east-west culverts below the north-south road are intended to divert the water artificially to the west, but to assist its flow in that direction as

it was prior to the north-south road being constructed. I was however puzzled as to why no Petitioner gave evidence in support of their petition. Mr. McBride was as well of the opinion that the intent of the petition was to include wetlands to the east of the north-south road. This is mere speculation as the Petitioners failed to give evidence as to what they had in mind. I am of the view that it is the intention of the present Drainage Act, that lands not described in the petition as requiring drainage that are subsequently found to require drainage by the engineer in his report to have similar physical features so as to form one area requiring drainage with those lands described in the petition as requiring drainage, are as well, to be included when the requirements of Sec. 4(a) or (b) are being considered, otherwise the lands described in the report by the engineer in accordance with Sec, 8-1(a) would not be fairly described. Failure to do so would not afford the intended protection for those who did not sign the petition. On the question of who shall determine the area requiring drainage: As was said in part by the Divisional Court, Craig, J. on the appeal in Westendorp v. Township of Elizabethtown September, 1986,

> "I do not find any basis upon which to doubt the correction of the decision of the Drainage Referee. The main ground of the appeal is that the area described in the By-law did not correspond with the lands as set out in the Petition. The Drainage Referee held that the determination as to what owners and lands fell within the definition of the area requiring drainage. In so finding, it is my opinion that he did not err. In the circumstances it is my view that the appeal is without merit. Further, is therefore dismissed with costs."

In determining the area requiring drainage and in his apparent endeavour to accommodate the petitioners, Mr.Mannerow was prepared to increase the area to the west if Barfoot as well as DeVokes and McConnell to the east had requested drainage in the petition. This decision is made without first studying the physical conditions of the land to determine if in fact they would fall within the area requiring drainage as determined by him in his capacity as the engineer and not to readily accept the area as described in a Petition. This approach does not coincide with Referee Henderson's statement. You cannot adjust the irregular "shaped saucer with reasonably well defined banks around it" just because a landowner indicates his desire for drainage, without first ascertaining where those well defined banks are located on the ground. In his zeal to accept the Petitioner's version of the area requiring drainage Mr. Mannerow has not formed the proper independent judgment when making his assessment.

see: "King Trust Properties Limited et al vs
Twp of Blandford-Blenheim, July 12, 1985.

I have considered all of the evidence carefully and I have no hesitancy in finding as a fact

that the area requiring drainage as found by Mr. McBride on both sides of the north south road is one contiguous drainage area or basin and does as well form the same area requiring drainage having similar physical features and conditions and was therefore fairly described, see: Re Duane and Finch 1908 12. O.W.R. 144. I find Mr. Mannerow's own statement in this regard assists me in drawing these conclusions. In response to the question.

Mr. Stevens Q.

> "Apart from the fact that there is that McConnell and DeVokes and Hydro did not sign the petition and given your feeling, your opinion that this is a second drainage area, as far as the physical characteristics of the lands are concerned, is there any reason to differentiate between McConnell, DeVokes and Hydro on the east side of the north south road as opposed to McLean and Cook on the west side?"

Mr. Mannerow A. "No"

Mr. Mannerow tendered Exhibit #44 showing what purports to be the two areas requiring drainage on either side of Concession Road 6-7. It was obvious to me that he intended it to be the two areas requiring drainage as his evidence as to why the lands to the east were excluded. I see little relationship between the amount of land in area #1 in this exhibit, and that area he accepted in either the first or second petition (46 hectares) as requiring drainage at the on-site meeting. Area #1 appears somewhat smaller though similar in shape as that determined by Mr. McBride, (Exhibit #28) the latter found there to be 16 hectares for the same four parcels (Cook, McLean, Barfoot and Jones). There was no explanation for this sudden reduction of area of almost 2/3 in that Exhibit from that described in either petition, except for the inkling that he now approached the determination of the area requiring drainage differently for this Hearing.

I must reject Mr. Mannerow's approach of two area requiring drainage within the same drainage basin. I can accept the proposition that there could be two areas requiring drainage within another and flow together, not one into the other as is the situation before me, but two branches each requiring drainage meeting at the leg of a fork that takes the shape of a "Y", with its outlet at the base.

I lean to Mr. McBride's conclusions as reflecting the accurate approach to and definition of the area requiring drainage. In essence there is simply no difference between the lands on either side of the north south road within the area requiring drainage. The Appellant's solicitor suggested there may be similarity in Mr. Mannerow's approach to the area requiring drainage as was found in Re Duane and Township of Finch 1908 12 O.W.R., 144 and that was to exclude persons or lands

(now under the present legislation) in that area requiring drainage so as to create a majority. Whether that was Mr. Mannerow's intention because they were not described in the Petition, is only a guess. I am however restricted to the evidence, and clearly it is my view that once Mr. Mannerow observed water moving in a westerly direction at different locations under Concession Road 6-7, he was duty-bound to address the question that prior to his determination of the area requiring drainage there was a likelihood of a larger area requiring drainage, and not one that was separated by a man-make road under which water was intended to pass. This omission creates a significant risk in the face of engineering evidence to the contrary that the area was not fairly described in his report.

There is no doubt that this court relies heavily upon the engineer in charge of the project. As was said by Garrow, J.A. in Re: Township of Anderson and Townships of Malden and Colchester South (1912) 8 D.L.R. 812 at 814 concerning the engineer's duty:

> "He has necessarily to make a close and careful examination and study of the whole premises, and in his deliberate conclusions ought not in my opinion, to be disregarded. Except under clear evidence of error, or unless a question of law is involved."

In the light of the evidence of the Appellant, its engineer Mr.McBride, and Mr. Mannerow's failure to investigate adequately the lands east of the north south road, I am compelled to set this report aside. There is an obvious "benefit" within the meaning of Sec. 1 of the Act to the lands east of the north south road requiring drainage which lands ought to have been assessed benefit in the report and been included in the area requiring drainage. Both engineers testified that lands on both sides of the north south road require drainage. Mr. Mannerow had assessed lands to the east of the north south road for outlet, but I saw on evidence as to how he arrived at that assessment based upon the volume and rate of flow of the water he considered was artificially caused to flow through the double culvert that he felt was an adequate outlet.

For the reasons given the report shall be set aside and accordingly the Appellant is entitled to his cost taxed an a District Court Scale.

Dated at Newmarket this 8th
day of December, 1986.

William D. Turville
Drainage Referee