

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE COURT OF THE DRAINAGE REFEREE

CITATION: Westendorp v. Elizabethtown (Town)
1986 ONDR 1
DATE OF DECISION: 1986-06-02
FILE NUMBER: 1986-01
STATUTE: *Drainage Act*
HEARING: 1985-12-02

BETWEEN:

HAROLD WESTENDORP, WILFRED ORR,
GLEN ROSSWORM and EDWARD WILLIAMS

APPLICANTS

- and -

THE CORPORATION OF THE TOWNSHIP
OF ELIZABETHTOWN, A.J. GRAHAM
ENGINEERING CONSULTANTS LIMITED

and B.L. BOYD

RESPONDENTS

J U D G M E N T

APPEARANCES:

Gerald Amell, Esq. For the Applicants

Michael W. Carty For the Respondents
Messrs. Cunningham, Swan
Carty, Little & Bonham

I appointed December 2nd and 3rd, 1985 to hear this Application at the Court House, Brockville, Ontario. There was some confusion at the outset as to which section of the Drainage Act R.S.O. 1980, c. 126, this Notice of Appeal, dated April 9, 1984 was intended. The provisional by-law received second reading on October 11, 1983, its final reading on January 9, 1984 and only be by virtue of the time its filing on April 9, 1984, it therefore must have been the Appellants' intention to appeal under Section 58 (2) of the Drainage Act, R.S.O. 1980 c. 126, to quash By-law 83-29 of the Respondent Township.

A preliminary Application was made by the Appellants' solicitor, Mr. Amell. He advised the Court his clients were abandoning their claims in paragraphs 9, 10 and 11 of the Statement of Claim, leaving the following issues to be disposed of:

5. The Plaintiffs state and the fact is that the aforesaid drainage by-law 83-29 was not passed in accordance with the provisions of the Drainage Act.
6. The owners who petitioned the Township of Elizabethtown did not represent a majority in numbers nor 60 percent of the hectares (hectarage) in the area described in the petition.
7. The lands as set out in the petition as requiring drainage are significantly different from the lands as set in the Drainage By-law 83-29.
8. The clerk of the Township of Elizabethtown did not give written notice of its decision to all required parties in accordance with the Drainage Act.

The petition dated September 8, 1980 filed with The Respondent Township states:

“PETITION FOR DRAINAGE WORKS”

We, being owners, as shown by the last revised assessment roll of land in the Township of Elizabethtown requiring drainage, hereby petition that the area more particularly described as follows: Commencing in Lot 11, Concession 5 proceeding Easterly in the Southerly portion in Lots 11, 10, 9, 8, Concession 5 to the Township Road crossing in Lot 8, Concession 5 may be drained by means of a drainage works.

The following names signed as original petitioners, or were added at the meeting in accordance with Sections 42 & 43:

Lyle Greer, Lot 11, Conc. 5 Twp. Elizabethtown
 Eric Smith, Pt. Lot 9, Conc. 5, Twp. Elizabethtown
 Lucien Roberge, Pt. Lot 10, Conc. 5, Twp. Elizabethtown

Kerry Greer, Pt. Lot 10, Conc. 5, Twp. Elizabethtown
Donald Greer, Pt. Lot 10, 11, Conc. 5, Twp. Elizabethtown
Allen H. Earle, Pt. Lots 10 & 11, Conc. 5, Twp. Elizabethtown

Mr. Allen H. Earle a local farmer, testified since the petition had been filed with the Respondent Township on September 8, 1980, he and his brother-in-law Donald Greer had purchased the lands previously owned by Eric Smith as original petitioner. Consequently, their names were added at the October 4, 1984 meeting to consider the revised engineer's report in accordance with Sec. 42 & 43 of the Drainage Act. Their added names do not increase the total number of petitioners as Messrs. Greer and Earle, for all intense and purposes are deemed to be one owner in accordance with Sec. 4(5) and Eric Smith's name shall be disregarded. In all, there were four petitioners.

The Respondent Township on September 17, 1980, by resolution appointed the firm of A.J. Graham Engineering Consultants Ltd. the engineering firm to prepare the report. As required by Section 8(2), B.L. Boyd was designated by that firm as the engineer in charge of this project. He had prepared approximately 40-60 municipal drainage reports under the earlier 1970 Drainage Act and subsequently under the authority of the 1975 and 1980 drainage legislation. His involvement surrounding the question of the validity of a petition was limited.

Much of the evidence and argument focused on the issue of improper forms, notices not sent out, re-scheduling of on-site meetings, etc.. After reading the evidence, had I found there to be omissions that caused any injustice or any persons' rights had been adversely affected, I would have had no hesitancy in setting aside this By-law. Failure to notify each petitioner in accordance with Sec. 5(1)(b) of the Drainage Act is not fatal to the enacting By-law.

I also find as a fact that the Petition filed with the Respondent Township on Sept. 8, 1980, was a Petition within the meaning of Section 4 of the Act. There was no evidence that any interested party believed it was anything other than just that, and the submissions by the Appellants to the contrary are groundless.

Mr. Amell did state in his summation that no party to these proceedings had been misled. In addition, I heard no evidence that anyone not a party to these proceedings who failed to receive any notice in accordance with the Act, could have affected the outcome of this Hearing. In that regard Sec. 42 & 43 in particular, had been complied with. On this point regarding notice, see: McDougal vs. Township of Harwich 1945 O.R. 291.

My reasons and statement of the law on technical matters are unequivocally clear and my views expressed in Eves et al vs Township of Amherst Island dated August 2, 1983 were confirmed by the Divisional Court on July 12, 1984. Consequently, I find as a fact that the submissions of the Appellants are frivolous with respect to paragraph 8 of the Appellants' Statement of Claim.

The final report of the engineer Mr. Boyd, stated it was “prepared under the authority of Section 4 of the Drainage Act 1975.” The form of By-law 83-29, finally passed, stated it was authorized under the Drainage Act R.S.O. 1980, c. 126. It appears to me that the only amendment between the 1975 and 1980 drainage legislation were the words changed from ‘acreage’ to ‘hectarage’ in Sections 4 (1)(b) and the added phrase to Sec. 8(1)(a), which stated in part:

8 (1)(a) “...including a description of the area requiring drainage;”

Turning to paragraph 6 of the Appellants’ Statement of Claim. Two grounds for quashing a drainage By-law, would be an invalid Petition should there not be a sufficient number qualified owners as petitioners or the failure to obtain the 60% requirement of hectares. In the event a majority does not sign the Petition, or are not added at a later date in accordance with Sec. 42 & 43, a by-law based upon such a Petition could not be within the jurisdiction of the Act, and the drainage works therefore cannot be protected. There have been numerous decisions over the decades on the question of insufficiency of the Petition as a ground for quashing a by-law from as early as... - White vs Township of East Sandwich, 1882 O.R., 530 and Township of Chatham vs Township of Dover, 1886, S.C.R., 321 and more recently McKeen vs The Corporation of the Township of East Williams and the Corporation of the Township of Adelaide, dated May 31, 1966.

The area requiring drainage as determined by Mr. Boyd’s engineering report “are parts of Lots 10 and 11, Concession 5 in the Township of Elizabethtown.” This municipal scheme had been designated the Greer Municipal Drain consisting of the Main Drain and the Fairfield Branch. The following is a brief synopsis of the location of the Main Drain and the Fairfield Branch as described in the engineer’s report.

LOCATION OF THE DRAINS

Main Drain

The Main Drain commences in Lot 11 at a point approximately 50 metres east of Lot 12 and 350 metres south of the half lot line. The Main Drain flows in a southeasterly direction across Lot 11 thence easterly across Lot 10 and the west part of Lot 9 thence through the Canadian Pacific Railway and continues easterly in the west part of Lot 9 for approximately 250 metres to its outlet within its own course. The Main Drain is approximately 1,225 metres in length.

Fairfield Branch

The Fairfield Branch commences at the western edge of Lot 11 at a point approximately 600 metres north of the Fairfield Road. The Drain flows in an easterly direction across Lot 11 then turns north following the western edge of Lot 10 to its outlet in the Main Drain.

The Fairfield Branch is approximately 475 metres in length.

The evidence of one of the Appellants, Mr. Westendorp and that of the engineer Mr. Boyd, differed significantly on the question of what area constitutes the area requiring drainage. The present legislation suggests there is an area as described in the petition and further suggests there may be a second area requiring drainage as determined by the engineer, the latter to form part of his report. These two areas may be similar, but at the same time may be different, as is implied by the language of Sec. 10 (2)(a) after the engineer has made his findings.

Sec. 10: (2) Upon the filing of the preliminary report, the council of the initiating municipality shall cause the clerk to send a copy of the preliminary report and a notice of the date of the council meeting at which the preliminary report will be considered, to,

(a) every owner of land within the area requiring drainage as determined by the engineer or described in the petition, as the case may be;

The 1975 Drainage Act and the minor amendments to the 1980 Drainage Act, were a major departure from the 1970 Drainage Act. The significant sections pertinent to this Application to be dealt with by me are:

4 (1)(a) the majority in number of the owners, as shown by the last revised assessment roll of lands in the area, including the owners of any roads in the area;

(b) the owner or owners, as shown by the last revised assessment roll, of lands in the area representing at least 60 per cent of the hectareage in the area;

“4.-(2) A petition under subsection 1 shall be in the Form prescribed by the regulations and, where it is filed by an owner or owners under clause a or b of subsection 1, shall be signed by such owner or owners.

8.(1) Where the council of the initiating municipality has decided to proceed with the

drainage works described in a petition, the council shall, by by-law or resolution, appoint an engineer to make an examination of the area requiring drainage as described in the petition and to prepare a report which shall include,

(a) plan, profiles and specifications of the drainage works and including a description of the area requiring drainage.

9. (1) The engineer shall, before making his examination and report, cause the clerk of the local municipality to send at least seven days written notice in the Form prescribed by the regulations to each owner of lands within the area requiring drainage as described in the petition and to each public utility that may be affected by the petition setting out the time and place of an on-site meeting with the engineer to examine the area.

9. (2) At the on-site meeting, the engineer shall,

(a) determine the area requiring drainage;

(b) determine whether the petition complies with section 4 for the area requiring drainage; and

(c) where he is of opinion that the petition fails to so comply, establish the requirements for a petition to comply with section 4.

The best definition of the area requiring drainage that I was able to research appeared in a letter dated November 29, 1929, to the Clerk of the Township of West Williams from Drainage Referee George F. Henderson:

‘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 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 shaped 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 section of land requiring drainage, it is a majority of the owners in that section that you need for a petition, no matter how many

others the Engineer may bring in...”

The question of what majority of owners and lands that encompass this area requiring drainage has long been the subject of varying judicial opinion. It must be borne in mind that the report of the engineer was properly considered in accordance with the Drainage Act and was adopted by provisional By-law 83-29 on October 11, 1983. The issue before me is not as to whether the engineer erred in his description of the area requiring drainage in an engineering way at the time he prepared his report in compliance with Sec. 8(1)(a). This question could only be dealt with at an appeal under Sec. 47(1) of the Drainage Act, long since past. The report stands on its own merit once the provisional By-law is passed. As I said earlier, the question before this court is, what majority as determined by whom, so as to satisfy the condition precedent prescribed by Sec. 4(1)(a) or (b)? To assist me with the interpretation of the present intention of the legislation, I found it necessary to review some past decisions on this subject. Prior to 1906, Drainage Referee Hodgins in Township of Plympton vs Township of Sarnia 2 C.S. 223, March 1897, found the number of requisite owners to render a petition effective to be:

- (1) Owners whose lands are to be benefitted.
- (2) Owners whose lands are assessed for injury and liability.
- (3) Owners whose lands are assessed for outlet liability, and lie within the drainage area are to be counted.

It appears to me from that decision, that the term drainage area is limited to the area described in the petition, as by clause (a) to subsection 4 of the same section it is enacted that the owners liable to assessment for ‘injury liability’ or for “outlet liability”, as the case may be, shall not count for or against the petition, unless within the area therein described (the underlined word is mine). Subsequently, the amendment to Section 3(1) of the Act of 1906, the sufficiency of a petition is to be ascertained solely by reference to the area described in it. This section stated; “the 1906 amendment formerly Section 18 of the Municipal Drainage Act is amended by inserting the word “described” in the fourth line of the said section of the words in such petition.” See also - re McKeena and Twp. of Osgoode, (1906) 13 O.L.R., 471, (C of A.). Also, in Re Duane and Finch, (1908) 12 O.W.R. 144, it was found that it was no longer necessary that the Petition should be signed by a majority of the owners whose lands are found to be benefitted by the engineer who makes the report. It is as well, still necessary that the petition should describe a real drainage area, which should bear some reasonable proportion to the size and extent of the drainage scheme.

The McDougal et al vs The Township of Harwich 1945, O.R. 291 a decision of Mr. Justice Gillanders of the Court of Appeal, where he clearly laid out the requirements for a sufficiently signed petition and reviewed the changing provisions of earlier legislation and decisions based upon them. It

was clear from the Duane and McDougal decisions that the local had the very heavy responsibility of having to pass judgment both upon the sufficiency of the area described in the petition, as well as to see to it that the area is therein fairly described.

The same legislation was in place at the time both the Duane and McDougal decisions were written. R.S.O. 1937 c. 278 Sec. 2(1):

“Upon the petition of the majority in number of the resident and non-resident persons, exclusive of farmers’ sons not actual owners, as shown by the last revised assessment roll to be the owners of the lands to be benefitted in any area as described in such petition within any township, village, town or city, to the municipal council thereof, for the drainage of the area as described in the petition by means of..”

Referee Clunis in dealing with this same question in the McKeen vs The Corporation of the Township of East Williams and the Corporation of the Township of Adelaide, as to what persons and lands constitute the statutory requirement, was of the view that the 1962-63 Drainage Act varied materially from the previous legislation when the Duane and McDougal decisions were written, to which I concur. His approach to Sec. 3 of the 1962-63 Drainage Act was quite simply put at page 12 of his decision.

“These arguments would over look the plain readings of Subsection 1 of Section 3. The land described in the Petition, read with the assessment roll, is the only method of arriving at the conclusion concerning the adequacy of the number of signers.”

This statement upon Sec. 3(1) 1962-63, S.O. c. 136, states in part:

3.(1) Subject to subsection 4, upon the petition in Form 1 of the majority in number of owners, as shown by the last revised assessment roll to be the owners of lands and roads in the area requiring drainage as described in the petition within any local municipality...

Referee Clunis’s view is supported for the most part by the evidence of one of the Appellants, Mr. Westendorp. Exhibit 4, was an aerial photo of the drainage basin and its surrounding lands. This witness had outlined on the exhibit the drainage area as he found it to be as described in the Petition. Mr. Westendorp was the beneficiary of a trust held by J. Corbet of lands forming part of Lot 10, Conc. 5. Mr. Boyd felt this area described in the Petition as outlined on Exhibit number 4 by Mr. Westendorp was reasonable. Mr. Westendorp had listed the owners in this area, allowed acceptable adjustments for severed parcels and the owners of lands whose lot lines fell within and without that drainage area as

he saw it, and concluded correctly, on his evidence, that there was not only a deficiency of the required number of signers, but the 60% requirement of hectarage as well had not been met as prescribed by Section 4(1)(a) or (b). This area requiring drainage as described on Exhibit 4 had as a result increased the number of signers and hectarage immediately north of the Fairfield Road whose holdings were very small and non-agricultural. Mr. Westendorp had excluded the lands owned by K. Greer (Lot 8, Conc. 5), an original petitioner, as he believed it received no benefit as it was drained by The Slack Municipal Drain to the east. This evidence was unsupported. In any event, the exclusion of any one of the petitioners or their lands from the area described in the petition as Mr. Westendorp had done, would be contrary to the McKean principal enunciated by Referee Clunis of the area requiring drainage as described in the petition and as well would contradict this witness's own definition of that area.

Mr. Boyd, on the other hand testified after completing his perusal of the area petitioned, his study of the aerial photos, inspection of the topography and the maps, presented two distinct areas requiring drainage. First, as described in the Petition which included 1.3 ha. of K. Greer's property an original petitioner. He calculated a total of 102 ha. in the area requiring drainage as described in the Petition. The other area requiring drainage as determined by him in compliance with Sec. 9 (2)(a) was outlined as well on Exhibit 7 was as a result of his field observation and survey work, was 62.1 ha.. Approximately 5 weeks following the on-site meeting, Mr. Boyd concluded that the Petition had indeed complied with Sec. 4 as he was required to do by the Act (see sec. 9(2)(b)).

All in all, the owners of lands within this 62.1 ha. are:

Lyle Greer S.Pt. Lot 11, Conc. 5 - 34 ha.

E. Smith W.Pt. Lot 10, Conc. 5 - 15.8 ha.

(now Earle & Greer)

J. Corbett (in trust) E.Pt. Lot 10, Conc. 5 - 12.3 ha.

Based on this evidence there would be a majority of signers (66%), of owners whose lands were described in the petition that were found to be in the area requiring drainage as established by the engineer in compliance with Sec. 9(2)(a)(b) and Sec. 4(1)(a). Though the number of ha. (62.1) in the area requiring drainage as established by Sec. 9(2)(a) is less than the requirement of Sec. 4(1)(b), the validity of a Petition however need only meet the criteria of Sec. 4(1)(a) or (b). Though the preposition "or" does not appear between Sections 4(1)(a) "or" 4(1)(b), the intention of the legislation becomes obvious with the reading of Sec. 4(2);

"A petition under subsection 1 shall be in the Form prescribed by the regulations and, where it is filed by an owner or owners under clause a or b of subsection 1, shall be signed by such owner or owners."

The major changes in the Drainage Act, R.S.O. 1970, c. 136, and the present statute I believe are the result of earlier court decisions that required the discretion of the initiating council and its continuing frustration and inability to define the area requiring drainage as described in the Petition. As well, it should be fairly described and the local council was often in a position of being unable to define this area without the assistance of an engineer. The definition of the area requiring drainage in the Petition was often only a guess on the part of the petitioners and more importantly by the local council who had to decide if a majority had signed. On this subject I refer to statements of two former Referees:

Referee Clunis The Drainage Act,
1962-63 S.O., c.39 May 31, 1966.

LAWRENCE MCKEEN,
AND
THE CORPORATION OF THE TOWNSHIP OF
EAST WILLIAMS AND THE CORPORATION OF
THE TOWNSHIP OF ADELAIDE

“Prior to 1906, there had been conflicting decisions as to what was required to constitute a sufficiently signed petition. Some earlier cases had held that the majority contemplated by the earlier section was a majority of those who were ultimately assessed for benefit under the engineer’s report. So long as the authority of these cases remained unimpaired, it was problematical whether there was any obligation on a council, before referring a petition to an engineer, to even consider whether it appeared to be sufficiently signed. The reason, of course, was obvious. No computation of how many persons were assessed in the area could be made with certainty until the engineer settled the number of his report.” (From page 9, 10)

Referee J.P. McMahon, October 12, 1977 The Drainage Act, R.S.O.
1970, c. 136 as amended.

INGERSOLL GOLF AND COUNTRY CLUB LIMITED

- AND -

THE CORPORATION OF THE TOWNSHIP

“In defining an area to be drained in a petition, absolute certainty is in most instances impossible. An adequate definition of a drainage area in most instances is not possible until the report of the engineer is prepared since it is dependent upon the topography and the variation of ground levels. In essence, the initial area set forth on the petition may increase or decrease, dependent upon the professional determination of the engineer.” (From page 9)

Prior to the passing of the Drainage Act R.S.O. 1980 c. 126, as amended, which saw major

revisions to the present legislation, the Minister of Agriculture and Food commissioned a Steering Committee to make recommendations for this new legislation. The following paragraphs are excerpts from Sec. VIII, "The Petition Procedure", which I believe are the reasons the engineer possessing the skills and judgment, was in the present Act given the statutory duty to accurately describe the area requiring drainage in his report. Apparently the legislature no longer wished this determination to be left to laymen.

"At one time, the legislation spoke of "lands to be benefited in the area described", but this was changed because it became apparent that the council, on receipt of the petition, could not determine which lands were to be benefited until they had engaged an engineer and gave him this responsibility. In many cases, the municipal clerk merely computed the number of petitioners as a percentage of the total owner on the tax roll within the area described and assumed that the area was the one to be benefited. When the Act was changed to "in the area requiring drainage", it was not of any greater help because the council was still unable to decide whether or not an area required drainage unless they had personal knowledge of the area or the expert advise of an engineer. The Committee has been informed of cases where managed areas have been devised and a majority petition raised within the managed area.

There have not been many cases in the law regarding this problem. In those that could be traced, however, the referee or the court held that the engineer was beyond his authority when he reported to the council on an area greater than that described in the petition. There is one case on record where an engineer's report was rejected because it described an area which the engineer felt was a logical drainage area or basin but which was not similar to that described in the petition.

In rejecting the above engineer's report, the drainage referee said, in part:

"...a petition must described a real drainage area and it follows that there was an obligation on a council before acting on a petition to satisfy itself that a real drainage area was described in the petition... In my view a council must come to a conclusion as to whether or not the petition described a real drainage area..."

The problem with this judgment is that it leaves the council to decide the real drainage area, which is something it cannot do without expert advise. The recommendations in this section will solve this problem.

The present Act requires that the engineer shall make the determination of the area requiring drainage and that it complies with Sec. 4. He is not required to communicate his findings to anyone should it comply but only that “he shall proceed to prepare his report or a preliminary report, as the case may be.” in accordance with (see Sec. 9(3)). It is irrelevant and at times impractical that he should make this determination at the on-site meeting. He is however, required in the interest of saving costs to make this determination early as to whether it complies with Sec. 4. His position is quasi-judicial. He need not give evidence as to how he established the area requiring drainage, but only to satisfy this Court of his definition of the area requiring drainage and those owners and their lands that fall within that area.

The mandatory language of Sec. 9(2) leaves no doubt in my mind that the present legislation was intended to divest local councils of the heavy burden of having to decide the area requiring drainage without the assistance of a professional, something local councils were always loath to do. As well, it restricts an over zealous engineer from creating a scheme far larger than envisaged in the petition. The scheme proposed in the petition was geographically similar to that propounded by the report and was fairly described.

There is nothing in the present legislation, though it was the recommendation of the Minister’s Steering Committee, that requires the engineer, as had been the case in some previous legislation that those who are assessed for benefit must be within the area requiring drainage. The fact that G. Rossworm owner of S.E. Pt. 12, Conc. 5, was assessed for benefit in the Fairfield Branch is irrelevant. His lands were excluded in the engineer’s definition of the area requiring drainage in his report, which might otherwise have affected the majority in number of owners contemplated by Sec. 4(1)(a). It was open to the Appellants to have raised this issue in an appeal under Sec. 47, which they failed to do. In the final analysis the engineer and he alone shall decide what owners and their lands fall within the definition of the area requiring drainage. Only those owners and lands in that area as determined by Mr. Boyd that were originally described in the petition, or were added or struck out in accordance with Sec. 42 or 43 shall count for or against. (Subject of course to Sec.23(4))

The Respondent Township was within its jurisdiction to undertake By-law 83-29 and accordingly the Appellants’ Notice of Appeal is dismissed. In accordance with Sections 108 and 109, the Appellants shall pay to the Respondents their taxed costs on a Supreme Court Scale.

DATED at Newmarket, Ontario this 2nd day of June 1986

William D. Turville
Drainage Referee