

Agriculture, Food and Rural Affairs
Appeal Tribunal
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Tribunal d'appel de l'agriculture, de
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FILE NO.: 006Biederman23
DATE: 2024/03/04

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

AND IN THE MATTER OF the appeals submitted by Kenneth and Sandra Kendell of Port Colborne, Ontario, under Sections 48(1) and 54(1) of the *Drainage Act*, with respect to the Biederman Municipal Drain in the City of Port Colborne;

AND IN THE MATTER OF an electronic hearing held pursuant to Rule 18 of the Tribunal's Rules of Procedure;

BETWEEN:)	
)	
Kenneth and Sandra Kendell)	
)	Appellants
)	Self-Represented
)	
)	
– and –)	
)	
City of Port Colborne)	
)	Respondent
)	Self-Represented
)	
– and –)	
)	
Township of Wainfleet)	
)	Party on Request
)	Self-Represented

Held: January 31, 2024 via Zoom.

Before: Robert Fuller, Vice-Chair; Andrew McBride, Vice Chair; and Dave Fawcett, Member.

Parties Present:

Sandra Kendell, Appellant
Kenneth Kendell, Appellant
Saima Tufail, Interim Acting City Clerk, City of Port Colborne
Alana Vander Veen, Drainage Superintendent, City of Port Colborne
Brandon Widner P. Eng., Engineer, Spriet Associates
Mark Jemison, Drainage Superintendent, Township of Wainfleet
Noor Sahyon – Acting Drainage Superintendent, City of Welland

DECISION OF THE TRIBUNAL

PRELIMINARY MATTERS

- [1] Prior to the beginning of this hearing, the Tribunal issued an order making all landowners assessed or compensated in the Report parties to the appeal. The Municipality filed an Affidavit of Service as proof that all parties had been served with the Notice of the Hearing. This affidavit became Exhibit 1 at the appeal.
- [2] At the commencement of the hearing Mr. Mark Jemison, Drainage Superintendent of the Township of Wainfleet, on behalf of the Township of Wainfleet, requested to be named as a party to the proceeding. After consideration of the submissions of Mr. Jameson, the Township of Wainfleet was added as a party to the proceeding pursuant to Rule 8 of the Tribunal's Rules of Procedure.
- [3] At the commencement of the hearing Ms. Noor Sahyon, Acting Drainage Superintendent of the City of Welland, on behalf of the City of Welland, requested to be named as a participant to the proceeding. After consideration of the submissions of Ms. Sahyon, the City of Welland, was added as a participant to the proceedings pursuant to Rule 8 of the Tribunal's Rules of Procedure.

BACKGROUND

- [4] A drainage report for the Biderman Drain was initiated by the City of Port Colborne, under Sections 4 and 78 of the *Drainage Act* R.S.O. 1990, c. D.17, as amended (the "Act"), after receiving a Petition from the Road Authority for a new Branch Drain and after receiving a recommendation from the Drainage Superintendent for a Drain Improvement Project and the updating of assessment schedules. Spriet Associates was retained by the Respondent City to perform an examination with regards to improving the Biderman Drain resulting in an Engineer's Report prepared on January 12, 2023 (the "Engineer's Report"). Section 78 states that where it is expedient to change or modify the drainage works Council may, on the report of an Engineer appointed by it, undertake and complete the drainage works as set forth in such report.
- [5] The Biderman Drain was originally constructed in 1913 and was last improved under an Engineer's Report dated March 1, 1979. The Skelton Drain, a tributary to the Biderman Drain, was last reconstructed pursuant to an Engineer's Report dated October 29, 2019.
- [6] The Biderman Drain currently outlets into the Welland Canal. Its upstream end is 500 metres upstream of Biderman Road. It is 6960 metres in total length and services approximately 1,880 hectares. The Drain requires maintenance and restoration to the original design grade. Some culverts on the drain require

replacement together with the possible installation of a new farm culvert. An existing private ditch could be improved to provide a proper outlet.

- [7] The Engineer's Report proposes the clean out of the Main Drain and existing road and rail crossings, the installation of new road and access culverts, the removal of an existing culvert under Barrick Road, and the construction of a new drain to be known as the Sugar Branch, using an existing ditch located adjacent to the Welland Canal. The Engineer's Report also proposes the installation of beaver cones, the cleanout and improvement of Branch "B" and that multiple surface runs and outlet pipes be protected with quarry stone riprap.
- [8] The Engineer's Report was adopted by the City of Port Colborne Drainage Committee.
- [9] The sitting of the Court of Revision took place on April 17, 2023, at which time appeals to the Court by the Appellants were heard. Ms. Kendell advised that the other properties in the watershed were assessed too low and the costs of the drain were very high. The Appellants were advised that assessments consist of benefit and outlet and that properties were provided allowances for damages to the property for work being done. She was further advised that a new Main Drain is not being created but that the Respondent City is obliged to do maintenance on the existing Drain. The Court of Revision confirmed the Engineer's assessments and dismissed the Appellants' appeals.
- [10] The Appellants own five smaller non-agricultural properties in the drainage area (approximately 2.7 hectares each), one that fronts on Barrick Road and contains their residence, and four that are vacant and front on an unopened road allowance. The Drain passes through two of these vacant properties. The gross assessment on all five properties is \$4,408 and the net assessment is \$2,918. They submitted appeals to the Tribunal under section 54(1) of the Act for all five properties. After a grant of extension of time by the Tribunal, the Appellants also submitted appeals for all five properties under 48(1) of the Act, specifically with respect to the allowances provided being inadequate.

ISSUES

- [11] The issues to be determined by the Tribunal are as follows:
 - a) Should the allowances provided to the Appellants' properties for the drainage works, as set out in the Engineer's Report, be altered?
 - b) Should the assessments of the Appellants' properties be reduced?

EVIDENCE

- [12] Mr. Widner gave an overview of the project and summarized the work that is proposed to be done on the existing Drain and Branches, including proposed culverts as set forth in the Background above.

Appellants' Section 48 Appeals

The Evidence of Tyler Rodrigue

- [13] Mr. Rodrigue spoke regarding the land on which he has his principal residence and his surrounding property, which is immediately upstream of the four Kendell properties. He advised that the Drain is clean in this area and does not cause any overflow or flooding. He advised that the working space is accessible and the proposed work should not affect him as a landowner. He did not feel the owners in his area should be responsible for part of the cost of the cleanout and it should be sufficiently covered by present property taxes. He did not appeal this matter due to other commitments and time constraints. The gross assessment on his property is \$5,179 but the net assessment is \$3,189.

The Evidence of Jan Putman

- [14] Mr. Putman acknowledged his benefit from the Biederman Drain and advised that he was a proud community member and steward of the land. He was concerned that his high property taxes do not cover drainage improvements. He also did not notice overflow or flooding during recent weather events. The assessment on his property is \$162.

The Evidence of Karrie Haynes

- [15] Ms. Haynes stated that the Biederman Drain is not an issue to the residents of Barrick Road and the payments should not fall on them. She feels the property taxes already paid are sufficient to pay for the works proposed by the City. The assessment on her property is \$104.

The Evidence of Donna Putman

- [16] Ms. Putman spoke of the stability of homeowners and the affordability crisis. She is looking for approaches to limit and mitigate costs to homeowners. As aforementioned, the assessment on the Putman property is \$162.

The Evidence of Sandra Kendell

- [17] Ms. Kendell advised that her property deed did not mention the Biederman Drain. She was advised by the City that the Drain did not need to be contained in the deed. Ms. Kendell stated that the Biederman Drain work should be paid from property taxes already paid or other City sources. Ms. Kendell presented a document from the City showing the utilization of property taxes and advised the City should be using other funds to pay for the maintenance of the Drain. In charging her for the Biederman Drain and for her property taxes, Ms. Kendell felt that the City was double charging.

Mr. Brandon Widner, P.Eng. – Section 48 Appeal

- [18] Mr. Widner presented the Tribunal with the 1977 Drainage Report together with the 1979 update showing a benefit to two of the Appellants' properties. He testified that all of the Section 48 appeals were with respect to allowances for the Appellants' properties. He explained that the allowances regarding the two Appellants' properties where work is proposed to be done are for right of way and damages to land, at the same values as everyone else on the Drain. He explained that the other three Appellants' properties had a zero allowance as no work was being done on those properties. He acknowledged that there had been maintenance on the Drain at some time, but he was unaware of the details.

The Evidence of Sandra Kendell – Section 54 Appeal

- [19] Ms. Kendell provided very similar evidence on this appeal as the Section 48 appeal and raised no other novel issues.

Mr. Brandon Widner, P.Eng. – Section 54 Appeal

- [20] On unanimous consent, Mr. Widner was recalled and provided a breakdown of the property assessments for each of the properties which utilized the modified Todgham method and typical percentages for the area. Mr. Widner dealt with the southern three properties first which were outlet assessments only as the Biederman Drain is not located on them. The Engineer's Report contained only outlet acreage charges with a reduction for woodlot for each of these three properties. The other two properties also had outlet assessments but also benefit assessments. Mr. Widner explaining the cost breakdown apportioned by land. The allowances for the lands had been explained earlier in Mr. Widner's previous testimony, consistent with other properties.
- [21] Mr. Widner explained that the disparity between different property total assessments was due to the size of the properties. In an explanation of other property assessments, Mr. Widner advised that the assessment rates were the same, but the other properties did not have direct access to the drain for a legal drainage outlet.
- [22] Mr. Widner explained the various costs of the new work being done together with recouping of costs.

ANALYSIS AND FINDINGS

- [23] Subsection 48(1) of the Act states:

48(1) Any owner of land or any public utility affected by a drainage works, if dissatisfied with the report of the engineer on the grounds that,

(a) the benefits to be derived from the drainage works are not commensurate with the estimated cost thereof;

(b) the drainage works should be modified on grounds to be stated;

(c) the compensation or allowances provided by the engineer are inadequate or excessive;

(d) the engineer has reported that the drainage works is not required, or is impractical, or cannot be constructed,

may appeal to the Tribunal, and in every case a written notice of appeal shall be served within 40 days after the sending of the notices under section 40 or subsection 46 (2), as the case may be.

[24] The Appellants have not provided any evidence that the compensation or allowances provided by the engineer are inadequate or excessive.

[25] Subsection 52(1) of the Act states:

52 (1) An owner of land assessed for the drainage works may appeal to the court of revision on any of the following grounds:

1. Any land or road has been assessed an amount that is too high or too low.
2. Any land or road that should have been assessed has not been assessed.
3. Due consideration has not been given to the use being made of the land.

[26] Subsection 54(1) states:

54(1) Any party to an appeal before the court of revision may appeal to the Tribunal by giving notice addressed to the clerk of the Tribunal, given to the clerk of the initiating municipality, from the decision of the court of revision or from its omission, neglect or refusal to hear or decide an appeal within twenty-one days of the pronouncement of the decision of the court of revision or of any matter evidencing such omission, neglect or refusal. [R.S.O. 1990, c. D.17, s. 54 \(1\)](#).

[27] The Appellants have not provided sufficient evidence that the decision of the Court of Revision was incorrect in that they have not shown any land or road has been assessed an amount that is too high or too low or that any land or road that should have been assessed has not been assessed. They also have not shown that due consideration has not been given to the use being made of the land.

[28] Although the Tribunal has sympathy for the difficulties and costs of home and property ownership, the powers of the Tribunal are limited to the parameters of the Act which do not allow an order to vary the assessments of the Appellants on the grounds provided.

Section 48 Appeal

[29] The Tribunal accepts as fact that the Biederman Drain needs reconstruction and improvement as set forth in the Engineer's Report.

Section 54 Appeal

[30] Based on the evidence and analysis of Mr. Widner, the Tribunal finds the assessments set forth in the Engineer's report to be fair and reasonable, as per the Act. The Appellants did not provide the type of evidence that would support a variation of their assessment or of the decision of the Court of Revision.

ORDER

[31] The Tribunal orders that:

- 1) The Engineer's Report of Spriet Associates dated January 12, 2023, be adopted in full and the Biederman Drain drainage work proceed in accordance with such Report.
- 2) The Appeals of Kenneth and Sandra Kendell under Section 48 of the Drainage Act are dismissed.
- 3) The Appeals of Kenneth and Sandra Kendell under Section 54 of the Drainage Act are dismissed.
- 4) The non-administrative costs of the Township incurred with respect of these appeals shall form part of the costs of the drainage works.
- 5) There shall be no other order as to costs and the parties are responsible for their own costs.



Robert Fuller, Vice-Chair

Released: March 4, 2024

TO:

Kenneth and Sandra Kendell
673 Barrick Road
Port Colborne, ON L3K 4C1
Email: sandrakendell34@gmail.com

AND TO:

City of Port Colborne
c/o Saima Tufail
Interim Deputy City Clerk
66 Charlotte Street
Port Colborne, ON L3K 3C8
Tel: 905-835-2900 x115
Email Saima.Tufail@portcolborne.ca

AND TO:

Brandon Widner
Spriet Associates Architects and Consulting Engineers
155 York St. - London, ON - N6A 1A8
Email: brandon@spriet.ca

AND TO:

Township of Wainfleet
c/o Mark Jemison
Drainage Superintendent
Email: MJemison@wainfleet.ca

This document is also available in French. Please contact the Tribunal at 519-826-3433 or by email at AFRAAT@ontario.ca to request a copy in French.

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