



MUTUAL AGREEMENT DRAINS

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EARLY AGREEMENT DRAINS

The Ditches and Watercourses Act was passed in 1874 although its provisions included legislation from pioneer days. It was intended to be made use of in, and provide the necessary authority for, the construction and maintenance of comparatively short and inexpensive drains, which were to carry the surplus water to a sufficient outlet so that no injury to neighbouring lands would result from their construction and use.

The owner of the land requiring drainage was authorized to set the Act in motion by serving notice on neighbouring landowners whose lands would be entered or benefited by the construction of the drain. The notice set out a time and place to discuss the proposal.

If, at the "friendly meeting" an agreement was arrived at regarding the shared responsibility for the construction, maintenance and terms of assessment, the Act made it of binding effect and provided a remedy for enforcing the terms of the agreement against any parties who may subsequently default in performing their obligations under it.

The drain was then constructed by the parties interested, each completing his agreed upon portion of the work, without any interference by, or assistance from the municipality, except when the municipality as a landowner was a party to the agreement.

The agreement was reduced to writing and signed by all parties. A copy was then filed with the township clerk of each municipality in which the drain was situated. Township offices contain boxes of these dusty old agreements, generally unindexed. Consequently, an old agreement for a drain would likely be very difficult to locate today, except for an owner's copy. Such agreements are probably still valid.

Award Drains

When no agreement could be reached at the "friendly meeting" the owner wishing the improved drainage filed a requisition with the township clerk for the engineer, specially appointed under The Ditches and Watercourses Act, to appoint a time and place for a site meeting and examination of the area.

The engineer was appointed by by-law and held office until a new engineer was appointed. While he was appointed by Council he did not act as their representative, nor make any report to Council. If he found the ditch was required, he then made an "award", in labour and

materials, which was filed with the township clerk. The award set forth the portion of ditch to be constructed and maintained by affected persons. The engineer supervised the work.

When the work was not completed by the appointed time, or was in default, the engineer could tender the work and collect the cost through the collector's roll as taxes.

Maintenance of Agreement and Award Drains

Maintenance was to be by the respective owners in such proportion as provided in the original or subsequent agreement or award. If an owner who was to maintain a certain portion of the drain failed to do so, he was notified in writing by another owner to put it in repair within 30 days. If he failed to do so, the affected owner then notified the engineer to make an inspection of that portion of the ditch. The engineer could then tender the work and place the cost against the defaulting property. This was the only means of enforcing the award as the Act (R.S.O. 1960, c.109, s.38) stated that a suit could not lie.

Award drains had greater status and formality than an agreement. These awards of the engineer were also filed with the township clerk but are usually indexed and may be located, sometimes with difficulty. The difficulty in locating the award is in not knowing the proper name of it.

Many of the old agreement and award drains have been incorporated in municipal drains under The Drainage Act, 1975, or its predecessors.

The Ditches and Watercourses Act was repealed June 1, 1963. The construction sections were incorporated as Sections 2 and 4 of The Drainage Act, 1962-63, and are Sections 2 and 3 of The Drainage Act, 1975. The legislation review committee was of the opinion that award drains should all come under The Drainage Act as soon as possible and maintenance provisions for old awards were omitted from The Drainage Act after 1963.

It is apparent that: (1) no new award drains can be constructed; (2) existing award drains are still legal and can be maintained by the owners in accordance with the original award or agreement; and (3) when an owner does not comply with the written notice that the drain is out of repair, there are no statutory provisions to enforce compliance.

An affected owner may (1) attempt to have the old award or agreement changed to come under The Drainage

Act so that a grant may be allowed, and the owner may receive an allowance for ditch already constructed; or (2) file a suite for damages for non-compliance with an agreement under civil law. A third possibility is an appeal to the Referee under sections 3(18) and 106(1)(c) of The Drainage Act.

Creating New Agreement Drains

The Drainage Act now incorporates the requisition of award section of the Ditches and Watercourses Act as Section 3 and the agreement section of the old Act as Section 2.

Section 2 reads:

2. — (1) When two or more owners of land desire to construct or improve a drainage works on any of their lands and are willing to pay the cost thereof, they may enter into a written agreement for the construction, improvement, financing and maintenance of such drainage works, which shall include the following:

Mutual agreement re drainage works

1. A reference to *The Drainage Act*, 1975, c. 79 1975.
2. Descriptions of the lands of the parties to the agreement sufficient for the purposes of registration in the proper land registry office.
3. The estimated cost of the drainage works.
4. A description of the drainage works, including its nature and approximate location.
5. The proportion of the cost of the construction, improvement and maintenance of the drainage works that is to be borne by each of the owners of the lands.
6. The date the agreement was entered into.
7. An affidavit of a subscribing witness to the execution of the agreement by the parties sufficient for the purposes of registration in the proper land registry office.

(2) A copy of the agreement and the plans and schedules if any, of the proposed drainage works may be filed with the clerk of the local municipality in which the land or any part thereof is situate, and the agreement or an executed copy thereof may be registered in the proper land registry office. **Filing of agreement**

(3) An agreement made under this section shall, upon registration in the proper land registry office of the agreement or an executed copy thereof, be binding upon the heirs, executors, administrators, successors and assigns of each party to the agreement. **Registered agreement binding on successors**

(4) The subsequent provisions of this Act do not apply to any drainage works constructed under this section. 1975, c. 79, s. 2. **Exception**

Oral agreements do not have legal status and cannot be enforced. A standard "Agreement by Owners — Mutual Agreement Drains" form is available from the township office.

Mutual agreement drains have a number of advantages:

- There is no limit regarding the cost or extent of the work as in Section 3, requisition drains.
 - Agreement drains are usually cheaper to construct.
 - Repairs and maintenance do not depend on a public body.
 - Drains are constructed quickly, there are few delays.
- There are also a number of disadvantages:
- Impractical when major roads, railways, or utilities are involved.
 - No prescribed way to decide on the actual cost.
 - Not properly engineered, owners must assume liability.
 - Legal fees and filing fee for agreement.

No grants are payable under The Drainage Act for construction or maintenance of agreement drains.

A sample of a general agreement form is below showing the information that an agreement should contain. Any section can be modified to meet a particular situation.

The agreement must be written on one side only of 8½ x 14 paper using black ink and preferably signed in black ink. A Form 4 Document General must be completed and taken to the Registry Office with the agreement in order to have the document registered.

Blank Form 4 forms can be purchased at legal stationary stores. Any questions regarding completing a Form 4 Document General should be asked at the Registry Office.

EXAMPLE AGREEMENT

Date of
Agreement

AGREEMENT made in duplicate this _____ day of _____, 19____

BETWEEN: _____ of Lot _____, Con. _____ of the Township of _____.

hereinafter called the Party of the First Part
and

_____ Lot _____, Con. _____ of the Township

of _____ hereinafter called the Party of the Second Part.

Reference to
Drainage
Act,
RSO, 1980

This agreement is made under the authority of section 2 of The Drainage Act, RSO, 1980

WHEREAS the Party of the Second Part desires to obtain an outlet for a tile drainage system on Lot _____, Con. _____

and

WHEREAS it is necessary to construct the outlet on the property of the Party of the First Part on Lot _____, Con. _____, the Party of the First Part and the Party of the Second Part do hereby agree that the work shall be constructed, repaired and maintained according to the following conditions.

Legal
Description
of Lands

1. The properties affected by this drainage agreement are described as follows: Part _____ of registered plan # _____, Instrument Number _____, Pt. Lot _____, Concession _____ North East, Township of _____, County of _____ being the property of the Party of the First Part and Part of registered plan # _____, Instrument Number _____, Pt. Lot _____, Concession _____ North West, Township of _____, County of _____ being the property of the Party of the Second Part.

Description
of Drainage
Works

2. The drainage system leaves the Party of the Second Part's property approximately 100 feet South of the North East corner of the property and crosses the property of the Party of the First Part in a straight line at approximately 90 degrees to the property line and empties into the ditch, 400' east of the west boundary line of the property of the Party of the First Part.

3. The drain on the property of the Party of the First Part shall be constructed of 10" clay tile approximately 3' below the ground surface. The outlet shall be of corrugated metal pipe with a rodent grate. The pipe is to be 10' long.

Construction

4. The Party of the Second Part, his employees and workmen may enter on and may construct the drain on the property of the Party of the First Part within six months of the date of agreement.

5. The Party of the First Part shall not be liable for any damages to the drain caused by the Party of the First Part provided that the Party of the First Part exercises reasonable care.

Maintenance

6. The Party of the First Part shall not be responsible for maintaining the ditch at the outlet at a depth that will ensure free flow of water away from the drain. The Party of the First Part shall not obstruct the flow from the drain by filling in the ditch or by placing obstructions.

7. On reasonable notice in writing to the Party of the First Part, the Party of the Second Part may have reasonable access to the property of the Party of the First Part to repair or maintain the drain. The Party of the first Part shall allow access for repairs, maintenance or inspection of the drain within 1 week of the Party of the Second Part giving notice.

Costs

8. The entire cost of the construction, repair and maintenance of the drain shall be borne and paid by the Party of the Second Part.

9. This agreement herein contained when executed by the Parties hereto, shall be registered in the proper Registry Office and any costs shall be borne by the Party of the Second Part. The provisions herein contained shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, executors, successors and assigns.

In Witness Whereof the Parties hereto have hereunto set their hands this _____ day of _____, 19____.

Witness

Party of the
First Part

Witness

Party of the
Second Part