

ONTARIO
SUPERIOR COURT OF JUSTICE

Court File No. 04-B7552

c/w Closed Session October 4/0
Date _____
Item 1

IN THE MATTER OF AN APPEAL BEFORE THE DRAINAGE
REFEREE

BETWEEN:

**Boris Horodynsky, Paul Horodynsky, Horodynsky Farms Inc., Joseph Cestarić,
Sandra Cestarić, Inre Mora, Heidi Mora, and Innisfil Gardens Inc.**

Applicants

- and -

Town of Innisfil and the Nottawasaga Valley Conservation Authority

Respondents

Counsel for the Applicants:

Mr. John Archibald
Theall & Associates
Barristers and Solicitors
4 King Street West, Suite 1410
Toronto, Ontario
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Solicitor for Applicants

Counsel for the Respondents:

Ms. Mary E. Vallee
Graham, Wilson & Green
Barristers and Solicitors
190 Cundles Road East, Suite 107
Barrie, Ontario
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**Solicitor for Respondent - Town of
Innisfil**

DECISION

This matter first came before the Drainage Referee on the 24th day of July 2006 at 10:00 a.m. in the Superior Courthouse, Barrie, Ontario. The purpose of the hearing was to have the Drainage Referee review a Preliminary Drainage Report prepared pursuant to a previous Order of the Drainage Referee dated March 31st, 2005. That court Order had listed certain action items for consideration namely:

- a) Incorporation and repair/improvement, as required at the channel joining the drain namely the South Innisfil Creek Drain and branches including the Innisfil Creek.
- b) The repair and improvement of the drain to provide the required capacity.
- c) The addition of one or more storm water management facilities to the drain.
- d) The incorporation and improvement as required of the original outlet of the Hnydezake Drain, the incorporation, the improvement, replacement or removal of all crossings in the drain, and the necessity of additional crossings.
- e) The preparation of complete assessment schedules for a construction and maintenance of all components of the drain.
- f) The requirements of the Nottawasaga Conservation Authority and the Department of the Fisheries and Oceans.

Pursuant to the Order, the Municipality being the Town of Innisfil appointed the engineering firm

of Dillon Consulting Limited to prepare the Preliminary Drainage Report which report was signed by Tim R. Oliver P. Eng. who appeared and presented the report before the Drainage Referee on the 24th day of July 2006.

At the commencement of the Hearing Mr. Oliver advised the Drainage Referee that on the 3rd day of August 2005 a site meeting had been held at the Community Centre in Stroud, Ontario which meeting was well attended. A full account of the proceedings were attached to the Preliminary Report as Schedule "A."

BACKGROUND

A more complete history of the drain was presented in a previous Decision of the Drainage Referee, but here a brief review should prove helpful. Work was first done on the drain by M. Gaviller O.L.S. in February 1903 which report has since disappeared. The last major report was prepared by D.H. Weir P.Eng. dated November 9th, 1956 which recommended clean outs, straightening and improvement of the South Innisfil Creek Drain from the 5th Line Road Bridge downstream to the 5th Side Road Bridge. In that same report three branches were constructed, namely (a) the 10th Side Road Branch Drain, (b) the 3rd Line Branch Drain and (c) the 3rd Line Branch Drain's Spur. The outlet for the drain was found in a natural water course being the Innisfil Creek.

The water shed is frequently described as "bowl shape" surrounding an open drain of approximately 9322 meters in length serving 7397 hectares in area. The three branches were also surveyed in the preparation of the Preliminary Report.

Because the area is subject to repeated flooding, the Nottawasaga Valley Conservation Authority

has funded several studies over the years. The first was a hydrological modeling analysis prepared by Dillon Consulting in 1977. Subsequent studies were conducted in 1981 and 1983 by Ainley and Associates Limited and Triton Engineering Services Limited, both having recommended storm water detention facilities.

ISSUES

The issues to be considered by the Drainage Referee were:

- a) Whether the Preliminary Report should be followed by a full and complete drainage report.
- b) If a full drainage report was ordered which of three options provided in the Preliminary Drainage Report should be proceeded with.

PRELIMINARY DRAINAGE REPORT RECOMMENDATIONS & OPTIONS

a) OPTION NO. 1

Option number one recommended improvements to the South Innisfil Creek Drain (main drain) the Hnydezak outlet relief drain, 3rd Line Branch Drain and Spur and the 10th Side Road Branch Drain. This work would provide a minimum one and two-year storm capacity. The drainage engineer also recommended the improvement of the branch drains (which served approximately 35% of the entire water shed area.) The major feature of option number one was a drain overflow area near the outlet between County Road 89 and the 5th Side Road. The overflow area would have a capacity for temporary storage of 60,000 cubic metres of water, thus limiting

downstream flows during the one and two year storms. The Drainage Engineer recommended the full establishment of this drainage overflow area (including sediment trap features) prior to other upstream improvements, to allow for dissipation of the drain flow energy and to provide for colloidal sediment disposition. The total cost of the work for option number one including the improvement of the branches was estimated to be \$2,192,000.00. A cost benefit analysis of option number 1 was included in the Preliminary Report and provided for "benefit" over existing conditions of \$1,250.00 per hectare as calculated over a 10-year period.

b) OPTION NO. 2

Option number 2 included all of the improvements of option number 1 plus the addition of a drain overflow detention facility proposed off line to the drain and located immediately upstream of the benefit area of muck soil south of the 4th Line. The proposed overflow area would consist of approximately 14 hectares including areas north and south of the 4th Line and east of the 10th Side Road joined by a culvert. The total storage capacity would be approximately 180,000 cubic metres with control outlets. This overflow area would capture approximately 90% of the five year storm flows and approximately 25% of the two years storm flows disclosed by an analysis using a visual otthymo (VOT). The land south of the 2nd Line would receive no appreciable benefit from option number 2 and would therefore not be included in the cost for option number 2. The total cost for the project combining option number 1 and option number 2 would amount to \$3,072,000.00. In the cost benefit analysis, benefits of option number 2 for the three-year storm protection area over option number 1 amounted to \$2,500.00 per hectare calculated over 10 years.

c) OPTION NO. 3

Option number 3 included all of the improvements of option number 1 plus the addition of a drain overflow area located upstream of the benefit-area in the vicinity of the 5th Line as an alternative to the 4th Line drain overflow area of option number 2. The overflow area would consist of approximately 26 hectares and would have 120,000 cubic metres protection in the lower flood stage and a total potential storage of as much as 400,000 cubic metres in the higher flood stage, (e.g., for larger than one in five year return storm period storms.) For the land's south of the 3rd Line which use the main drain there would be no appreciable benefit from this number 3 option. This 5th Line overflow would capture approximately 78% of the five year storm flows and approximately 31% of the two year storm flows. The total cost of option number 3 which would include all of the cost of option number 1 would amount to \$2,672,000.00. Mr. Oliver advised that option number 3 had a higher benefit cost ratio for the benefitted lands (approximately 383 hectares) than option number 2 benefitted lands (756 hectares). This was attributed to the lower costs involved in the construction of the option number 3 drain overflow area compared to the option number 2 area.

Mr. Oliver recommended option number 2 on the basis that it protected more of the highly valuable muck area lands than did option number 3. However, it should be noted that in a summation the Drainage Engineer acknowledged that the cost of removing and disposing of the excavated material was somewhat uncertain. He advised that it could run the cost of option number 2 up by a possible \$300,000.00 to \$400,000.00 extra.

Mr. Oliver also advised the Drainage Referee that he had made significant efforts to accommodate environmental concerns. These included rock flow control dams, stone erosion protection, grass buffer strips, bio-engineered erosion control and hydraulic seeding. He further advised that the reservoir areas and meandering sections would enhance the cold water stream features. Further, the proposed excavation would remove existing shallow areas with the

lowering of culverts which would improve fish passage. Drain overflow areas would be used to revitalize parts of the drain's ecology as well.

Mr. Young the clerk/ administrator for the Municipality advised the Drainage Referee that he had mailed out a notice to all owners providing particulars of the hearing in accordance with the Order previously made and in addition, ads had been placed in the local newspapers and information provided on the web site of the town.

Mr. Boris Horodynsky appeared on behalf of the applicants and urged that option three be adopted. Mr. Horodynsky who was a large landowner of the highly valued muck lands stated that option three provided a much larger natural reservoir which could accommodate the larger storms from which the area had suffered in recent years. He also noted that option number 3 represented considerably less cost by using the natural capacity of the designated reservoir area. Mr. Horodynsky also urged that the Drainage Referee examine an area west of the drain along the 5th Line which consisted of an old sawmill pond. He advised that it featured an existing dam which had been breached and that one-third to one-half of the flow from that area eventually entered into the Innisfil Drain. He was of the opinion that this old dam be restored at a modest cost and would act as a further reservoir to arrest storm flows.

KEN SMART P. ENG.

Mr. Archibald counsel for the applicants called as his expert witness Mr. Smart who advised that in his opinion the work recommended in option number 1 was worthwhile and would be cost effective. He further recommended that option number 3 be utilized noting that it provided more protection in the event of a large storm. He advised that because of the large cost of the project that further analysis and modeling of the flows would be justified, addressing each alternative

option. Mr. Smart added that in his opinion the additional low flow pipe under the highway should be increased from 600 millimeters to 800 millimeters. He advised that the excavation requirements of option number 2 presented a significant cost risk.

OTHER REPRESENTATION

The Drainage Referee reviewed several documents filed at the proceedings by Counsel for the Municipality. One was a letter written by four parties namely, Robert and Melanie Franner, Edward and Elizabeth Lozinski and Craig and Gail Brankston. The letter urged that no work be done, adding that the letter writers had suffered no problems from flooding and that the parties benefitting were limited in number. They suggested that the problems may have arisen from the removal of forested area. An email was received from Ron and Sherri-Lynn Batsch who indicated that they were in opposition to the project noting that improvements did not benefit everyone in the water shed, but rather only a few farmers. A third note from Tania Delahunt advised that they were pleased with the work that had been previously done on the Hnydezak Drain and did not believe that any further work was justified.

SUBMISSION OF COUNSEL

COUNSEL FOR THE APPLICANTS

Mr. Archibald requested that the Drainage Referee recommend option number 3 for several reasons being:

- a) It was less expensive;

- b) It provided more protection for larger storms; and
- c) It involved less risk with respect to construction costs.

Counsel for the applicants noted that his clients collectively represented 65% of the valued (muck area). Mr. Archibald further requested that time limits be placed on the provision of a full report and that the Drainage Referee provide the mechanisms for further directions including the provision that the Drainage Referee address assessment. He concluded by urging that the Drainage Referee award costs in favour of his clients such costs to be included in the cost of the drain.

COUNSEL FOR MUNICIPALITY

Ms. Vallee counsel for the Municipality urged that option number 2 be considered by the Drainage Referee because it benefitted more owners. However, she indicated that the Municipality was not taking a strong position on the matters before the Drainage Referee. Ms. Vallee concluded by stating that in her opinion she saw the mill pond area should not be addressed at this time as part of the current project and in her opinion it would require a new petition.

JUDGMENT

The Drainage Referee having read the report (a thorough and complete report) and having listened to the witnesses and arguments of counsel, determined that an Order should be made requiring the Municipality to direct Dillon Consulting Limited to complete a full report. The options to be pursued in the complete report are option number 1 and option number 3. The Drainage Referee is of the opinion that the project is cost beneficial and that engineering work

proposed is sound. The water shed is a very large water shed with many assessed owners, many of whom have the advantage of being upstream owners and therefore do not perceive the need for drainage of their own properties. However, their properties do contribute to flows to the downstream lands and on occasion in severe storm conditions the flows have caused damage and havoc to the lands of downstream owners. In the circumstances of this water shed the downstream lands are of a uniquely productive nature providing specialty crops particularly of carrots and onions which are extremely valuable and sensitive to the recurring floods. The "raison d'etre" of the *Drainage Act* has always been to support downstream land owners who suffer losses as a result of floods from upstream lands. This water shed illustrates the principal graphically and has a history of organized drainage transcending a century. Farm lands of marginal quality occasionally cannot support the cost of drainage schemes, but farm lands that are intensively cultivated and of high value justify the cost. Such is the case here where the evidence provided indicated that the current onion crops can yield gross revenues reaching up to \$12,000.00 per hectare. In addition, it would appear that this is an environmentally sound project which will provide much improved fish habitat proving once again that properly engineered drainage projects are not detrimental, but are rather complementary to other good environmental practices.

The Drainage Referee is of the opinion that option number 3 is the one that ought to be pursued in the circumstances. Not only was it promoted by the applicants and their expert witness, Mr. Smart, but there were two additional arguments that are in its favour. Mr. Oliver quite candidly advised that the cost of excavation with respect to option number 2 could exceed projections as much as \$300,000.00 or \$400,000.00 because of the uncertain cost of the excavation and disposal of material. This introduced an element of risk that was not acceptable. Secondly, option


number 3 provided a greater measure of protection in the event of a severe storm. The history of this water shed is marked by the series of severe storms which have utterly wiped out the specialty crops in the muck areas. It appears that option number 3 will give the greatest protection in the event that these severe storms do recur.

Finally, throughout both hearings the measure of support for the project was very significant while the opposition was very limited despite the large number of assessed owners affected. That consideration weighted heavily in favour of the project.

ORDER

1. It is therefore ordered that the Municipality retain the engineering firm of Dillon Consulting Limited to prepare a complete drainage report adopting option number 1 and option number 3 of the Preliminary Report, a full assessment schedule and an allowance schedule is to be incorporated therein.
2. That the Municipality conduct a meeting of the Council to consider the report and provide appeals by assessed owners only with respect to assessment and allowances.
3. With respect to the issue of legal cost the Drainage Referee is prepared to address the issue only after receiving written submissions from legal counsel.

DATED: August 31st, 2006



Delbert A. O'Brien, Q.C. Juris D
Ontario Drainage Referee