



FILE NO.: 014Komoka21
DATE: 2022/06/02

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

AND IN THE MATTER OF an appeal to the Agriculture, Food and Rural Affairs Appeal Tribunal by **Campbell Hillview Farm Corp., Carol A. Jane Campbell, and Lenora Fournie** under section 54 of the *Drainage Act* with respect to the Komoka Drainage Works – Union Ave. Branch, in the Municipality of Middlesex Centre.

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

BETWEEN:)	
)	
Campbell Hillview Farm Corp, Carol A. Jane Campbell, and Lenora Fournie)	
Appellants)	Represented by John Goudy
– and –)	
)	
The Municipality of Middlesex Centre)	
Respondent)	Represented by Paula Lombardi

Heard: April 19th, 2022 and April 21st, 2022

Before:

Christine Greydanus, Vice-Chair; Robert Fuller, Vice-Chair; and Don McNalty, Vice-Chair

Appearances:

Brad Bunke, Engineer who wrote the report
John Goudy, Counsel for the Appellants
Paula Lombardi, Counsel for the Respondent
Carol A. Jane Campbell, Appellant
Brian Ritchie, Witness for the Appellants
Mark Muscutt, Witness for the Appellants
Daniel Anderson, Drainage Superintendent for the Municipality of Middlesex Centre

TRIBUNAL DECISION

- [1] The Agriculture, Food and Rural Affairs Appeal Tribunal (“the Tribunal”) held this hearing by Zoom video conferencing on April 19, 2022 and April 21, 2022. The Engineer’s Report (“the Report”) was prepared by Brad Bunke of GM BluePlan Engineering Limited and is dated July 28, 2021. The Report was prepared pursuant to section 78 of the *Drainage Act* (“the Act”) to investigate improvements to the Komoka Drainage Works, Union Avenue Branch (“KDW-UAB”).

Preliminary Matter

- [2] Prior to the hearing, the Tribunal issued an Order making all landowners assessed in the Engineer’s Report parties to this hearing. The Municipality of Middlesex Centre (“the Municipality”) filed an Affidavit of Service, dated February 16, 2022, with the Tribunal as proof that all parties had been served with the Notice of Electronic Hearing.

Background

- [3] The Komoka Drainage Works was originally adopted under the Act through a report prepared by A.M. Spriet, P. Eng. dated March 29, 1974 (“the Spriet Report”). The Spriet Report provided for Drain No. 1, Drain No. 2, and Drain No. 3 of the Komoka Drainage Works to serve the developed areas (at the time of the Spriet report) in the Village of Komoka. Under the Spriet report, Drain No. 3 consisted of approximately 2,201 meters (m) of 250 millimeter (mm) to 1200mm diameter concrete pipe and 762m of open drain with an outlet into the Crow Creek Drain (Waters Arnold Municipal Drain). Drain No. 3 replaced a portion of the downstream extension of the Frank Drain.
- [4] The KDW-UAB was constructed through a report, prepared by M.P. DeVos, P. Eng., dated October 10, 2006 (“the 2006 Report”) and revised by a Tribunal ruling, the *Komoka Drainage Works Union Avenue Branch (Re), 2007 ONAFRAAT 6 (CanLII)* (“*Komoka (Re) 2007*”). The 2006 Report provided for the construction of approximately 170m of 450mm to 750mm diameter concrete and Polyvinyl chloride (“PVC”) pipe, approximately 165m of swale adjacent to the pipe and approximately 110m of open drain, including corrugated steel pipe (“CSP”) road culverts across Union Avenue and Komoka Road. The KDW-UAB provided an outlet for the Komoka Station Park Development Stormwater management system in part of Lot 5 Concession 3, as well as an outlet for upstream lands in parts of Lots 4 to 6, Concession 3 to 4 to flow through the Development. The KDW-UAB outlets to the Komoka Drainage Works, Drain No. 3, with overflow using the Frank Drain as an outlet.

Issues

- [5] Should the KDW-UAB drainage works, as proposed by the Drainage Report, be funded entirely by the Municipality's Stormwater Management levy, thereby affording the Appellants 100% relief from their Outlet Liability assessment?
- [6] Or, in the alternative, should the Appellants receive a reduction of their Outlet Liability assessment levy, due to an inappropriate judgement by the Engineer for the equivalent factor applied to their property considering the wetlands and trees that and conversely the equivalent factor applied to the municipal road and, thereby, resulting in a corresponding reduction in their assessment?

Evidence

Brad Bunke, P. Eng., GM BluePlan Engineering Limited for the Respondent, Municipality of Middlesex Centre

- [7] Mr. Bunke was qualified as an expert witness and testified on behalf of the Municipality and presented the Drainage Report.
- [8] The Report was written as a result of GM BluePlan being appointed under section 78 of the Act by a resolution of the Municipal Council in May 2019 to review the KDW-UAB, with reference to the improvement of an existing drainage system.
- [9] As part of the review, Mr. Bunke considered the Spriet Report prepared in 1974 and the 2006 Report, as authored by M.P DeVos and as revised by the Tribunal on March 6, 2007. The Tribunal in Komoka (Re) 2007 had, in Mr. Bunke's understanding, made revisions to the 2006 Report that were minor in nature and included items, such as, noting in the report the elevations of Komoka Road and Union Road but that there were no design flaws in the drain design which stayed largely the same. The assessments were not under appeal. Mr. Bunke's review of the 2006 Report provided him with a primary background and history of the drain and an understanding of the KDW-UAB.
- [10] Mr. Bunke held an on-site meeting with the affected landowners on July 4, 2019. At this meeting, he got a sense of the history of the drainage works, divergence in the concerns and interests of the landowners, and that there was not an obvious solution that addressed all the concerns of the landowners. As a result, Mr. Bunke prepared a Technical Memo presenting five possible solutions.
- [11] Mr. Bunke testified that GM BluePlan presented the Technical Memo to the landowners at a Design Review Meeting on October 20, 2020. The meeting was lightly attended, probably due in part to the COVID-19 restrictions at the time, so he put together a landowner information package including the design review and hand delivered them on

October 30, 2020 to the seven landowners backing onto the drain with frontage on Union Avenue. Mr. Bunke provided them with a comment period until December 1, 2020 with the goal to solicit the preferred option of those presented. Two of the seven landowners provided comments. The general consensus was for the Drain Maintenance option which included some clean out of the ditch, and the reconfiguration of some upstream piping and an improved catch basin, including improved position/elevation and a greater hydraulic opening.

- [12] Mr. Bunke presented to the Middlesex Centre Municipal Council his recommendation of proceeding with the Drain Maintenance option. Council directed Mr. Bunke to prepare a report with the scope of work being the Drain Maintenance. The Engineer's Report, dated July 2021, was presented to Municipal Council on August 11, 2021. The total estimated cost was \$131,000.
- [13] Mr. Bunke stated that the schedule of assessment was determined as based on the modified Todgham method. The drain is broken up into logical sections and the contributing land owners based on land usage, size and overall run off potential are calculated within that drainage system and the cost worked out per section and tallied for the whole drain.
- [14] The assessment for the Appellants property was determined by considering the nature of the work being proposed. Some of the work involves replacement of the upstream catch basin with a larger structure and a connecting pipe system, while some of the work involves the physical maintenance of the swale or the backyard ditch. Mr. Bunke determined which was improvement work to the drain and which was maintenance work, restoring the drain to design conditions.
- [15] Mr. Bunke stated that the consideration was that an upstream landowner, such as the Appellants, only need capacity in the drain to take their runoff and the improvement, the piping and the catch basin should be the responsibility of anybody fronting on the drain and not the upstream landowners, such as the Appellants.
- [16] The Maintenance portion (Section 23 Outlet Assessment) was assessed at \$1,560 and it was determined that any lands throughout the upstream drainage area would be contributing water to the drain along with sediment debris and build up in the drain and would be assessed for maintenance. The 2006 Report, as written in 2006 and revised by *Komoka (re) 2007*, had recommended that 90% be assessed as Benefit to the adjacent properties and that 10% be assessed as Outlet to the upstream properties. Mr. Bunke considered this to be a fair assessment and that there was no need to overturn or change the distribution of assessment. Therefore, for the Appellants in this case, the Campbell Hillview Farm for 41.34 hectares adjusted area was assessed \$495, Carol A. Jane Campbell for 0.27 hectares adjusted area was assessed \$5, and Lenora Fournie for 0.26 hectares adjusted area was assessed \$5.

- [17] During cross examination, Mr. Bunke detailed the maintenance work to be completed noting that the proposed work does not serve to increase the overall capacity of the drainage system. The maintenance work being proposed to be completed at this time is warranted regardless of the work related to the catch basin. If the only work that needed to be done had been the maintenance, it could have been done by the drainage superintendent under the 2006 Report without the need for a new engineer's report.
- [18] The Engineer explained how, in his opinion, he made a fair assessment of the absorption of water based on the land use. He testified that he does not do an exact calculation but a judgement weighing the topography and land use to come to a determination of a fair equivalent factor to be used in calculating the assessment. The agriculture factor of 1.0 was used on all the Campbell farm property. The Engineer stated that he used the 1.0 agricultural factor on the Schlegel Property as well, even though it has a number of poultry barns in the assessed area, because it does not make sense to map out all the trees, hard surfaces and slopes considering his billing rate. Furthermore, he stated that any adjustment in equivalent factor would result in a negligible change in assessment
- [19] During redirect, Mr. Bunke reviewed the calculations for the Campbell farm articulating that the land was considered generally, taking into consideration the treed areas, ponds, and outbuildings, with the result that he determined it appropriate to use the 1.0 factor for agriculture lands on all of the property. Mr. Bunke stated, having taken into consideration the testimony of Ms. Campbell and the breakdown that she provided of treed areas, ponds, and wetlands, and accepting her acreage calculation and assessment of the various areas on the Campbell farm lands, his recalculation resulted in a similar assessment amount, if not slightly higher.
- [20] Mr. Bunke stated, on questioning by the Tribunal, that his understanding of the 2006 Report, and how future maintenance would be distributed to the owners affected by the drain, was that there is a clause in the 2006 Report that specifies that for future maintenance 90% would be assessed to lands where the work was being done on their property and the remain 10% assessed as outlet to the upstream lands. Additionally, there was an incidental clause to deal with how to distribute benefit for maintenance between Komoka Road and Union Avenue.
- [21] Mr. Bunke testified on questioning that the cost of any future maintenance or repair would be distributed to the landowners as per the provisions in the 2006 Report.

Carol A. Jane Campbell, Appellant

- [22] Ms. Campbell testified that the farm was bought in 1924 by her grandfather. She also has a property, approximately 0.5 acres, in her personal name at 22950 Komoka Road, a house where her sister Rosalyn lives and that her sister, Lenora Fournie, owns land next to the farm house that is vacant and is pasture land. The total land in this appeal is 110 acres, including the small personal properties.
- [23] Ms. Campbell testified that the farm is very hilly. They have a cow-calf operation. The north east corner of the property is 280-meter-high and it slopes down to the south to the Canadian Pacific Railway (“CPR”) tracks where it is around 240 meters high. The land to the east, on the neighbouring property, is a wood lot. The CPR culverts to the south drain the land. The culvert to the east being larger than the one to the west and is around 3 feet in diameter. The farmland near Melrose Drive is clay with sandy soil to the south. There is a 10-acre field at the south east corner of the farm that is cropped on a rotation of corn, soy beans and wheat. There are 11 acres of trees to the west and 32 acres that is usually in hay. Some areas of the hay were replanted to deal with noxious weeds. The south part of the farm has three wet lands. There is a fourth wet land on about 5 acres next to Komoka Road that gravel has been excavated from in the past. There is a bank barn, an implement shed, a pig pen and the farm house on about 5 acres of land off of Komoka Road.
- [24] By 2008, on the north east corner of the farm, 11 acres had been planted with approximately 6,000 white and Norway spruce, red oak, burr oak, tamarack, maple, and cedar trees. There is 0.5 acre of white pine planted at the north of the farm. There has been infilling and pruning in the tree plantation since 2008. In part, the trees were planted where they are as the area is too wet to cultivate. Ms. Campbell described four areas approximately 10 to 11 acres that, in her opinion, are wetlands and are unsuitable for cultivation. The wet areas have cattails, snapping turtles, tamarack trees, sand cranes and ponding.
- [25] Ms. Campbell disagrees with the equivalent factor of 1.0 agriculture being applied to the whole of her farm property, and argues there should be recognition of the treed areas and the wet lands and that their outlet assessment should be based on a lower factor.
- [26] Ms. Campbell stated that she had done research, contacting the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) and researching online to understand what equivalent factors were attributed to various features. She testified that gravel roads were a factor of 3 or 4, paved roads were 4 or 5, woodlots 0.5, residential lots were 2 and agricultural lands were 1. Ms. Campbell stated that she is a lay person with a lay understanding of how these factors are applied. She confirmed that she did not consult with or retain an engineer with respect to the equivalent factors.

- [27] Ms. Campbell believes that the drainage maintenance should be the sole financial responsibility of the residential area and should be paid through the Stormwater Levy. Ms. Campbell believes that the Municipal Drain within the Settlement area should be dealt with through the Municipality's Stormwater Management Plan.
- [28] In cross examination, Ms. Campbell acknowledged that on a map attached to the Middlesex Centre Settlement Area Stormwater Master Plan, which indicated significant woodland and significant Provincial wetlands, with base features produced under licence with the Ministry of Natural Resources and Forestry dated 2019, her farm did not have either wetlands or woodlands indicated.

Brian Ritchie, Witness for the Appellants

- [29] Mr. Ritchie is the former owner of 22862 Komoka Road, a property that is assessed on the KDW-UAB in the Engineer's Report 2021. Mr. Ritchie sold the property in 2013. Mr. Ritchie's former property is located such that water from the two CPR culverts outlet onto it. In 2006, Mr. Ritchie appealed the 2006 KDW-UAB Drainage Report resulting in the Tribunal's decision in Komoka (Re), 2007.
- [30] Mr. Ritchie provided historical information of the water coming from the CPR culverts, the flooding and the remedial actions he took prior to the KDW-UAB installation. He experienced on average twice a year flooding in his yard. The water coming through the two CPR culvert would contain debris including branches, leaves and pieces of railway ties, which would collect at the catch basin.
- [31] Mr. Ritchie provided historical context to his concerns with the KDW-UAB design, the concerns he had about the proposed housing development on Union Avenue, and the potential for flooding of the homes. Mr. Ritchie testified that when the catch basin was installed it appeared to be too high to be able to take the low flows as was intended and the water would then go down the swale rather than in the subterranean pipeline. Mr. Ritchie opined that this would then result in the sediment being deposited in the swale, rather than being flushed down the concrete pipe. Mr. Ritchie stated that in heavier rainfalls you would still have water going through the swale but that it would gush through swale depositing less than it would on low flows.
- [32] Mr. Ritchie testified that during his time on council he never remembered a drain requiring cleaning out within 15 years of being constructed and that, although he is not surprised that there is sediment build up in the swale, he is surprised that it happened so quickly. He is of the opinion that the bulk of the sediment should have gone through the subterranean pipe.
- [33] Mr. Ritchie testified that, in his opinion, the drain was not constructed in accordance with the design. Mr. Ritchie testified that he did not to appeal a second time to the Tribunal

under section 65 of the *Act*, as he did not know that he could. Mr. Ritchie testified that he trusted that the municipal staff would monitor the construction of the drain and ensure that construction would be done properly.

- [34] Mr. Ritchie questioned whether the assessments were being made as a financially equitable decision, or should be ascribed to maintenance, because it is premature but convenient? Mr. Ritchie believed that the assessment is prematurely required, because it is convenient to make alterations to some other portion of the drain. He felt the sediment build-up is a bit early and if the catch basin had been deeper, and in the lighter flows had drained into the subterranean pipeline immediately it would have been flushed out by the heavier rains, so that there wouldn't be much silt buildup along the swale bottom. Further, Mr. Ritchie questioned if this drainage work is premature as a result of a design flaw, or whether it was a legitimate request based on the erosion factors of the upstream properties.

Mark Muscutt, Witness for the Appellants

- [35] Mr. Muscutt resides at 105 Union Ave. and is assessed on the Drain. He purchased his land in 2008 from the developer. It was bare land with piles of dirt at the front of the lot and water at the back. At the time of purchase, he saw design drawings of the swale and was made aware by his lawyer of how it was supposed to work.
- [36] Mr. Muscutt started the construction of his house with the developer as his builder, but part way through the build Mr. Muscutt stated the developer was making mistakes, so he fired him.
- [37] Mr. Muscutt recalled seeing the design of the drain on the documents at the time of the purchasing of the property, and that he understood at that time that the swale would fill up once in a hundred years, and that it would only fill up 12 inches at most and then the water would be gone within three to four hours. Mr. Muscutt advised that his lawyer, from Thomson Mahoney Delorey, told him that worst case scenario, twice a year there would be water in the swale. Mr. Muscutt recalls discussing this with his wife and they decided that water twice a year would not be that big of a deal.
- [38] Mr. Muscutt stated that the water can build up to as much as two to three feet, and remain there all day in the swale. He asserted that the swale was not constructed according to plan and that the catch basin was not positioned according to the drawings. He stated that Styrofoam covering pipes in the ground on top of the berm are not at the depth as shown on the drawings and that there were many things that were not constructed according to the drawings. Mr. Muscutt noted the fence at the back of his property is falling over and asserted it was constructed poorly.

- [39] Mr. Muscutt testified that he was the person who made the request to the Municipality for the section 78 work that is being proposed now. In 2009, he had flooding in his basement that destroyed the contents of his basement. The swale was not complete at the time of the flooding. Once the swale was complete Mr. Muscutt stated that it was not done correctly. There was water in the swale so Mr. Muscutt complained to the Municipality but at that time the Municipality told him they had not assumed the development and that the Engineer had done the work correctly. Mr. Muscutt's lawyer advised him that any legal process would cost him around \$25,000 so he declined to proceed. In 2010 or 2011 the Municipality held a site meeting and with the land owners and the Mayor. An option was provided to put the whole of the drain underground but that all the landowners would need to agree and each landowner would pay \$10,000. All the landowners did not agree to this solution. Mr. Muscutt stated that the problems with too much water continued and he put in the section 78 request to the Municipality with the support of six other property owners assessed on the drain.
- [40] Mr. Muscutt believes that the noise abatement wall is part of the drain. Mr. Muscutt did not appeal his assessment. His property is in the Settlement area and he pays into the Municipality's Stormwater levy.

Daniel Anderson, Drainage Superintendent for the Municipality of Middlesex Centre

- [41] Daniel Anderson is the Drainage Superintendent for the Municipality of Middlesex Centre and attended Conestoga College, taking the Civil Engineering Technology Program. Mr. Anderson is familiar with the 2021 Report and the previous 2006 Report. Prior to this hearing he reviewed both of these reports.
- [42] GM BluePlan had been appointed under a section 78 request for drainage improvement. The request for improvement was submitted by Mr. Muscutt and seven landowners on Union Avenue. In speaking with Mr. Muscutt prior to him submitting his request, his major concerns were the volume and frequency of water that passes through the swale portion of the municipal drain. Mr. Anderson testified that Mr. Muscutt thought the system should be taking water in the tile system and that he would only see water in the swale portion once every 100 years.
- [43] Mr. Anderson testified that he was not employed by the Municipality at the time of the 2006 Report but that he has become aware of some of the concerns raised about the 2006 Report, including the development of the houses and whether they should be there. It had been noted that there were very wet conditions.
- [44] Mr. Anderson noted that he is aware that Mr. Ritchie appealed to the Tribunal in 2006 about the design of the drain and concerns with flooding of houses and the damage to trees within the area of the municipal drain. The result of the Tribunal was that the appeal was dismissed, however, the Tribunal noted that changes to the Report with regard to

the elevation of the Komoka Road and to that the C.P.R. culverts should not be enlarged as the restriction on the amount of water impacted the sizing on the municipal drain.

- [45] The CPR tracks and culverts are within both the watershed and drainage area but are not subject to the *Act*. Mr. Anderson testified that he has made the request to CPR, on at least two occasions, to clean out the culverts. He advised that Ms. Campbell had contacted the Municipality with concerns that there was debris in front of the culvert and it was backing up water onto her lands. Mr. Anderson stated that he advised Ms. Campbell that the culverts aren't part of the drain and that he doesn't have the ability to do maintenance on them but that he could contact the railway.
- [46] Mr. Anderson testified that the appeals to the Tribunal are only to the Assessment. Mr. Anderson noted that contrary to the assertions by the Appellants, the KDW-UAB is still under the *Act* and has not been abandoned as is recommended in the Middlesex Centre Area Stormwater Master Plan.
- [47] Mr. Anderson stated that Council for Middlesex Centre adopted the GM BluePlan Report for the KDW-UAB at the August 11, 2021 authorizing the Drainage works to proceed. They scheduled a Court of Revision for September 8, 2021.
- [48] The total cost of the drainage works is \$131,000. There was no provision made for Allowances in the Assessment schedule as there was allowance in the 2006 Report for the use of the land and the 2021 Report has as part of the works a provision for restoration so there are no allowances for damages. Under the revised assessment schedule, dated September 8, 2021, the assessment to Campbell Hillview Farm Corp. is \$495, to Jane Campbell is \$5 and to Lenora Fournie is \$5, with the three assessments being entirely for Outlet Liability.
- [49] The first Court of Revision was held virtually on September 8, 2021. Three appeals had been received and the Engineer noted two changes to be made to the assessment schedule. The Engineer's changes were the correction of a clerical error in one of the Concessions and the lowering of the area of one of the properties. The three appeals, from Jane Campbell, Lenora Fournie and Campbell Hillview Farm Corp., submitted by Ms. Campbell, were heard and the Court of Revision dismissed them.
- [50] The correction to the area of the one property resulted in an adjustment of \$55 which, after the Court of Revision, Mr. Anderson decided should be added to Melrose Drive rather than being distributed to all the land owners. It was determined that there should be a second Court of Revision to allow for any new appeals to the revised Assessment schedule. The revised assessment schedule, along with the notice of second the Court of Revision, was distributed to all landowners assessed on the drain. The second Court of Revision was held virtually October 27, 2021.

- [51] The three appeals, from Jane Campbell, Lenora Fournie and Campbell Hillview Farm Corp., were once again submitted to the second Court of Revision, however, there were no new appeals. The assessments had not changed on the three properties and the appeals had been dealt with at the first Court of Revision, therefore, they were not reheard. The Revised Assessment Schedule was adopted at the second Court of Revision.
- [52] The Stormwater levy is municipal policy that exists outside the *Act*. Under the Stormwater levy all landowners within the Settlement communities pay into the levy and it is included on their water and waste water bill. The amount per month is approximately \$16. The levy is used for the maintenance of the municipal Stormwater system and for the payment of any municipal drain assessments landowners who pay into the Stormwater levy may have.
- [53] Mr. Anderson testified that in 2007, when the 2006 Report was upheld by the Tribunal, that “as built drawings” were not required. The *Act* was changed in 2021 to include the requirement for “as built or record drawings” for the construction of drainage works. Mr. Anderson noted that it is quite common that, when either he or some of his contractors go out to maintain drainage works, there is some deviation to the Drainage Report, as to depth, location, and other aspects of the drain.
- [54] Mr. Anderson testified that, with respect to the KDW-UAB, the sediment that has accumulated in the drain comes from the upstream lands north of Union Avenue and enters into the Settlement area. As flow velocity diminish, the sediment is deposited, builds up and it periodically has to be removed. Mr. Anderson opined that with the changes to the KDW-UAB drain, the sediment present in the water from upstream lands will not change and will likely be deposited further down the drain.
- [55] Mr. Anderson stated that the intent of the proposed drainage work is to direct inclement flows of water underground rather than through the swale, not for the alteration of the location of the deposits of sediment. He advised that when a report is open for the improvement of a drain it is also open for the maintenance of the drain. In the present case under consideration, he advised that if the only work to be done was the maintenance, then there would be no requirement for an Engineer’s report.
- [56] Mr. Anderson testified that the abandonment of a municipal drain must be done in accordance with provisions set out in the *Act*. It is the recommendation of the Municipality in its Settlement Area Stormwater Master Plan that all municipal drains located in Settlement areas, that are subject to the Stormwater levy, once they are brought up to municipal standards, be abandoned. Mr. Anderson further agreed that from his understanding, even though they may ultimately be abandoned, any improvements to municipal drains must be undertaken in accordance with the *Act*. The Appellants lands are not located within the Settlement area.

Analysis and Findings

- [57] This appeal is pursuant to section 54(1) of the *Act* and was brought by Campbell Hillview Farm Corp, Carol A. Jane Campbell, and Lenora Fournie, property owners assessed under the KDW-UAB 2021 Report. There are no appeals of the design before the Tribunal in this matter.
- [58] The Tribunal finds that the KDW-UAB is subject to the *Act* with no part of it having been abandoned, as contemplated, in the Middlesex Centre Settlement Area Stormwater Master Plan.
- [59] The Tribunal finds that the Appellants' properties are not in the Settlement area, that the Appellants do not pay into the Municipality's Stormwater levy, and that the Appellants are responsible for the assessments in the Report.
- [60] The Tribunal finds that the Engineer's calculations of the Outlet Liability assessment, using a Factor of 1.0 for agricultural lands on the combined properties of the Appellants' property, is fair and reasonable. The Tribunal finds that the Engineer gave due consideration to the developing treed areas and wetlands, while balancing the barns, buildings, slopes, tilled and pasturelands, in his calculation of the Outlet Liability assessment for this agricultural land. The Tribunal notes that the same Factor of 1.0 was applied to all the other agricultural lands assessed for Outlet Liability. The Tribunal notes, the Schlegel Poultry Inc. property, with multiple large barns, may have warranted the utilization of different Factor when considering runoff, however, the application of the 1.0 Factor for Agricultural lands is consistent with all of the other agricultural lands within the drainage area. The Tribunal finds that the road Factor used in the Engineer's calculations was reasonable.
- [61] The Tribunal finds that based on the evidence presented, it is fair and reasonable to attribute a portion of the maintenance costs for the swale to the upstream landowners as Outlet Liability assessment.
- [62] The Tribunal notes that much of the Appellants' arguments were directed at the design flaws and / or construction flaws from the 2006 Report having resulted in the premature need for repair and maintenance, and therefore they argue there should be no liability to the upstream landowners for the cost at this time in relation to the drain maintenance. The Tribunal is not persuaded by this argument.
- [63] The Tribunal notes that it may be considered a shorter than normal time frame from construction to clean-out of the sediment in the KDW-UAB swale, however, the Tribunal finds that the source of the sediment that causes the build-up in the swale is the sediment in the runoff from the upstream landowners.

- [64] The Tribunal finds that the Engineer assessed 88% of the total cost of the proposed drainage works as Special Benefit pursuant to section 24 of the *Act*. This portion of the assessment is not disputed or under appeal.
- [65] The Tribunal finds that the Engineer divided the balance of the cost of the drainage works, being Benefit under section 22 and Outlet under section 23(1) of the *Act*, on a 90% Benefit, 10% Outlet split. The Tribunal finds the division of the assessments is based on the modified Todgham method.
- [66] The Tribunal finds that the Engineer's application of the modified Todgham method in the preparation of the schedule of assessment to be the current acceptable practice, and further, to have been utilized fairly and reasonably.
- [67] The Tribunal finds that although the assessed values being appealed are relatively small, there was no malicious intent by the Appellants and that they had the right to appeal.
- [68] The Tribunal finds that the assessments in this report to be fair and reasonable and in compliance with the *Act* and do not require any alteration.

Orders of the Tribunal

- [69] That there shall be no changes to the Appellants' assessments and the appeal shall be dismissed.
- [70] The non-administrative costs of the Municipality incurred with respect to this appeal shall form part of the cost of the drainage works.
- [71] There shall be no Order as to costs and all parties are responsible for their own costs.



Christine Greydanus, Vice-Chair

Released: June 2, 2022

TO:

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AND TO:

All landowners assessed or compensated in the Engineer's Report.