

Council-In-Committee Meeting – December 14, 2021

Subject: Dingle Creek Drain – Budget Amendment
Report Number: EIS 21-14
Division: Environmental and Infrastructure Services
Department: Engineering
Purpose: For Decision

Executive Summary:

Council must establish a budget for the Dingle Creek Municipal Drain in order for staff to proceed with procurement of the construction of the drainage works.

Discussion:

The Dingle Creek Municipal Drain was adopted under Norfolk County By-law 2015-55 receiving the third and final reading on June 26, 2018. This project has been through an extensive array of regulated *Drainage Act* appeals as well as additional legal appeal processes. (Refer to Attachment No. 1 Dingle Creek Drain General Plan and Attachment No. 2 Dingle Creek Drain Appeal Summary).

Since the report was adopted the engineering firm has completed various tender forms and extensive communications with staff. Staff are in receipt of the final documentation necessary from the engineer to complete a Tender for construction of the drainage works.

The Engineer has also been working with various environmental agencies to expand the restrictive timing windows for when work can be completed on this system. Since much of the work is located within a ravine and in the watercourse, a timing window has been established where work can be completed between June 3 and September 30 due to working in and around aquatic and terrestrial species.

Drainage services staff have met extensively with procurement staff to determine the best approach to procuring the varying scope of work within this project. This has led to the decision to complete a prequalification of contractors followed by a tendering process.

When staff report PW 14-32 was presented to Council in 2014 and 2015 the financial recommendations for the budget were as follows.

“Financing for the project will need to be determined when the award of the contract for the Dingle Creek Drain project is presented to Council for approval at a future date.”

In accordance with County Procurement Policies staff cannot procure goods or services without a budget established by Council.

Since the engineers report was completed in 2014 and based on expenses since that time. Staff consider the engineers estimate to be low and recommend that Council establish a budget that reflects the additional engineering and legal services costs accumulated to date and anticipated increases in construction and engineering costs. The engineer has provided an estimated increase in costs showing actual appeals cost as well as anticipated 133% increase in construction cost. (Refer to Attachment No. 3 – Dingle Creek Drain Engineers Estimated Increase)

In accordance with the *Drainage Act*, where the bid price for construction of the drainage works exceeds 133% of the engineers estimate, an additional Public Meeting must be held at Council to consider the contract price.

In accordance with the engineers report, expenses to date and projected increase in construction, inspection and administration staff recommend the budget for Dingle Creek Municipal Drain be established as \$4,427,000.

Based on the assessment schedule within the report and the staff revised estimate, the estimated assessment to lands and utilities would increase to \$2,366,000 and the estimated assessment to Norfolk County lands and roads would be \$2,061,000.

All affected lands and roads have previously been notified of decisions from the various appeal bodies.

Financial Services Comments:

Overall costs for the Dingle Creek drain have increased substantially from the initial budget estimate in 2012. The portion of the drain costs which has been assessed to Norfolk County is now \$2,061,000 which will need to be financed through the issuance of debentures. The most recent estimate also includes \$2,366,000 which will be billed to affected land owners. To date, costs amounting just over \$1,392,000 have been incurred on this drain project. A progression of the costs as reported to Council at various stages is shown in the table below:

	2012 Capital Budget (\$)	2014 Council Report (\$)	2021 Council Report (\$)
Land Owners	820,000	1,784,710	2,366,000
Provincial Grants	30,000		
Norfolk County	850,000	1,554,090	2,061,000
Total Project Cost	\$1,700,000	\$3,338,800	\$4,427,000

It is also important to note that all costs related to the construction of this drain, like all others, are borne by Norfolk County for the duration of the project construction until the completion certificate is received and billing takes place. It is Norfolk County's practice to charge interest to the drains in order to recover costs associated with the initial financing of construction expenditure as provided for in the Act.

The impact for this issuance was included in the debt payment projections presented within the 2022 Capital Plan, as high level estimates were available at that time, and no other funding sources have been identified. Therefore, there will be no change to the estimated Annual Repayment Level over the 10 year plan as a result of the approval of this report.

In addition, Financial Management and Planning staff are working closely with Drainage Services staff and Grant Match to identify and apply for grants to reduce the reliance on debentures for this project.

Interdepartmental Implications:

Legal Implications: Council is obligated under the *Drainage Act* to proceed with construction in a timely manner. Where Council does not proceed with reasonable dispatch with construction of the work, a petitioner may appeal to the Tribunal wherein the Tribunal may direct the council to take such action as the council is authorized to take under the Act.

Norfolk County procurement policies require a contract award with the above stated contract value to be awarded through. A further report to Council to award the contract to the successful bidder will be required at that time.

Through the *Drainage Act* where the contract bid is greater than 133% of the engineers construction estimate an additional Public Meeting at Council is required to consider the contract price.

Council may repeal a drainage by-law up until construction has commenced, however in doing so the municipality becomes responsible for 100% of the cost to date. Also, the engineers report has identified major drainage issues within the system as a result of years of development and property alterations prior to and during the *Drainage Act* process. These issues will remain unresolved without a sufficient outlet and the County may be subject to legal claims.

Purchasing Services Comments:

Purchasing staff have reviewed the report. Drainage Engineering staff have indicated that if approved by Council, the procurement of future construction works will be in accordance with CS-02 Purchasing Policy and CS-03 Purchasing Procedures.

Consultation(s):**Strategic Plan Linkage:**

This report aligns with the 2019-2022 Council Strategic Priority "Build and Maintain Reliable, Quality Infrastructure".

Explanation:

Dingle Creek Municipal Drain will service as the primary storm water drainage outlet for all agricultural, residential, and commercial and lands and roads in the northeast portion of the former Town of Simcoe.

Conclusion:

Staff recommend Council amend the Capital Budget to be \$4,427,000 for the Dingle Creek Municipal Drain project to allow staff to continue with procurement of construction of the drainage works.

Recommendation(s):

THAT Staff Report 21-14 Dingle Creek – Budget Amendment, be received as information;

AND FURTHER THAT the Capital Plan be amended to increase capital costs for the Dingle Creek Drain Project to \$4,427,000, with funding to be provided by external recoveries (\$2,366,000) and debentures (\$2,061,000);

AND FURTHER THAT staff be authorized to proceed with procurement of the construction of the drainage works in accordance with the drainage report and By-law 2015-55.

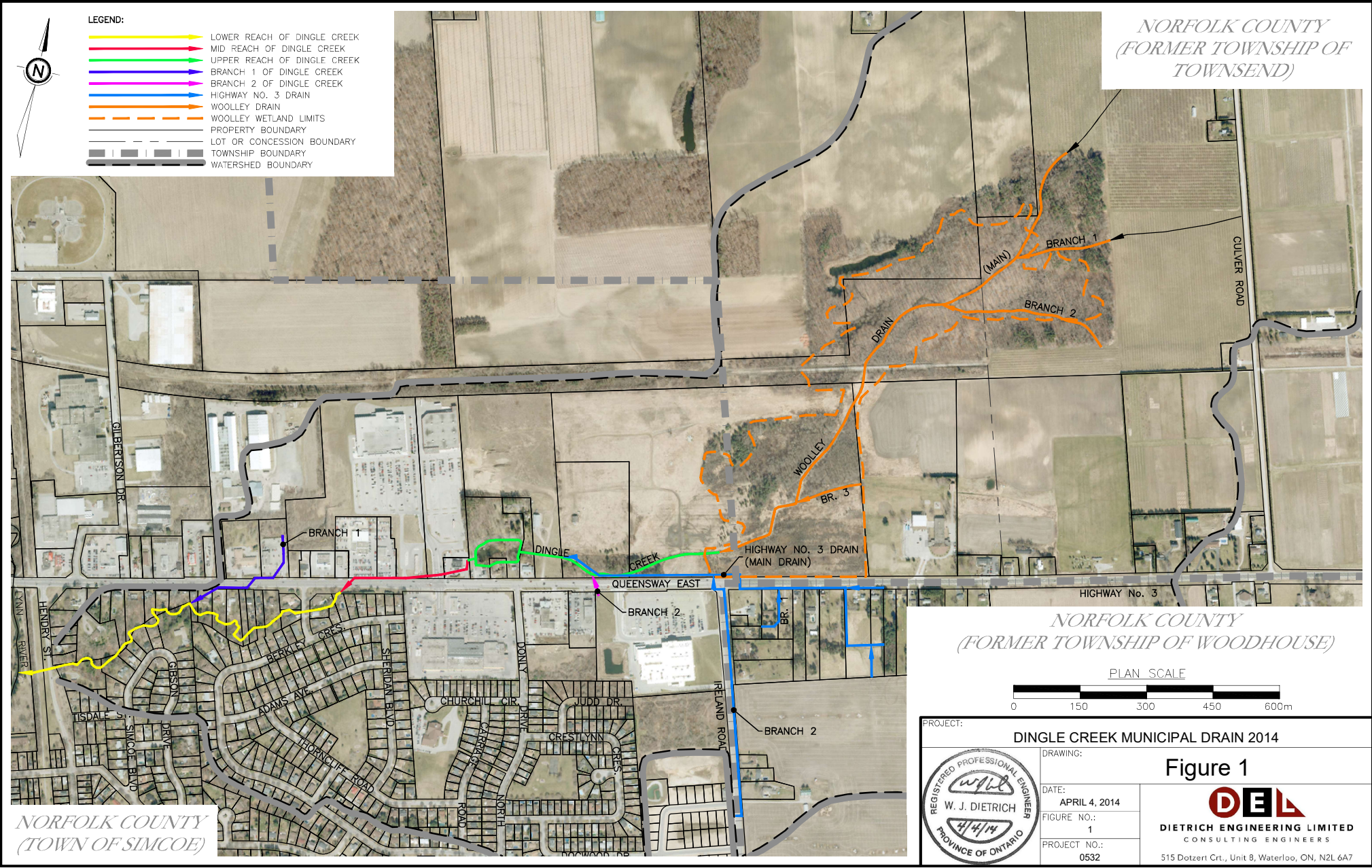
Attachment(s):

1. Attachment No. 1 – Dingle Creek Drain General Plan
2. Attachment No. 2 – Dingle Creek Drain Appeals Summary
3. Attachment No. 3 – Dingle Creek Engineers Estimated Increase

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Dingle Creek Drain - Summary of Appeals

Council Consideration

May 27, 2014 – Special Meeting of Council - Council deferred decision

May 12, 2015 – Special Meeting of Council - Council adopted Provisional By-law 2015-55

Court of Revision

June 11, 2015, Court of Revision addressed 12 Appeals.

June 25, 2015, 1 appeal required a further hearing

- 9 Written, 3 Late, 2 Verbal
- 7 Appeals Denied, 5 Assessment Changes ordered

Agriculture, Food and Rural Affairs Appeal Tribunal

Tribunal hearing was held in abeyance until Referee hearing concluded

- 4 Appeals
 - 3 Appeals regarding Decision of Court of Revision (Drainage Act, s.54(1))
 - 1 Appeal regarding the Engineers design (Drainage Act, s.48(1))

Superior Court of Justice in the Court of the Drainage Referee (Court File 83/15)

June 22, 2015 Notice of Application to Court of the Drainage Referee Received

December 14, 2016 – Order – Final Decision issued

December 22, 2016 – Order and Reasons for Decision issued

January 23, 2017 - Supplementary Reasons for Decision Pertaining to Costs issued

February 10, 2017 - Further Supplementary Reasons for Decision Pertaining to Costs issued

Superior Court of Justice (Division Court) (Court Files DC15-685, DC15-690, DC17-791, DC17-803)

DC15-685 – Notice of Application to Divisional Court for Judicial Review

- December 10, 2016 - Notice of Application Filed.
- January 19, 2017 Order Dismissing Application for Judicial Review issued

DC15-690 – Notice of Appeal to Divisional Court Section 121 of the Drainage Act

December 14, 2015 – Notice of Appeal to Divisional Court under Section 121 of the Drainage Act.

February 6, 2017 - Hearing

February 8, 2017 Oral Reasons for Judgement issued

DC17-791 – Notice of Appeal, Section 121 of the Drainage Act

January 19, 2017 Notice of Appeal filed

February 2, 2017 Notice of Appeal revised and re-issued

June 6, 2017 Oral Reasons for Judgement issued - Appeal dismissed

DC17-803 – Notice of Appeal to Divisional Court

April 27, 2017 Order Dismissing Appeal (or Cross-Appeal) issued - Appeal dismissed

Agriculture, Food and Rural Affairs Appeal Tribunal

Four Tribunal appeals filed. One Appeal of Engineers report (s. 48) and Three Appeals of Decision of Court of Revision (s. 54)

November 27, 2017 - Tribunal Hearing

January 23, 2017 Order and Supplementary Reasons for Decision Pertaining to Costs

February 10, 2017 - Further Supplementary Reasons for Decision Relating to Costs

May 31, 2018 – Decision of the Tribunal issued

June 1, 2018 - Amended Decision of Tribunal issued

July 9, 2018 Request for Review of Tribunal Decision

July 27, 2018 Request for Review Decision - Request denied

Ontario Superior Courts of Justice – Notice of Constitutional Question (Court File 17/62876)

Sept 18, 2017 - Notice of Constitutional Question

February 27, 2018 - Reasons for Judgement issued – Application Dismissed

Ontario Superior Courts of Justice, Ontario Court of Appeal - Appeal of Judgement of Ontario Superior Courts of Justice (Court File 17/62876)

July 2018 E-mail received - Appeal not Perfected

July 9, 2018 Ontario Consented to abandon appeal without costs.

Estimate Comparison

	Report Estimate	Actual and Projected	Comment
Allowances	\$ 288,780.00	\$ 288,780.00	Fixed Cost
Construction	\$ 1,869,330.00	\$ 2,486,208.90	133% of Estimate
Engineering	\$ 845,400.00	\$ 1,210,077.20	less Contract Administration to Date
Contract Administration	\$ 204,200.00	\$ 271,586.00	133% of Estimate
Contingencies (Est = 4%)	\$ 131,090.00	\$ 170,266.08	4% of total
Total	\$ 3,338,800.00	\$ 4,426,918.18	\$ 4,427,000.00

Assessment Calculation

	Estimated Assessment	Percent	Projected Assessment	Rounded
Land, Road and Utility Assessments	\$ 1,784,710.00	53%	\$ 2,366,348.73	\$ 2,366,000.00
Norfolk County Assessment	\$ 1,554,090.00	47%	\$ 2,060,569.45	\$ 2,061,000.00
Total	\$ 3,338,800.00	100%	\$ 4,426,918.18	\$ 4,427,000.00