

## Mutual Agreement Drains

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### INTRODUCTION

This factsheet provides information on the advantages and disadvantages, steps and content required to develop a mutual agreement drain. It also discusses some common situations where using a mutual agreement drain may be more advantageous than using a municipal drain.

Effective drainage is important to the competitiveness of the rural and agricultural community. A mutual agreement drain can be a cost-effective way to ensure that water from a private drainage system reaches a safe and legal outlet, known as a “sufficient outlet.” A carefully written agreement can protect everyone’s investment, property and access to proper drainage in the future.

Private drainage systems include subsurface agricultural drainage systems, agricultural ditches, piped drains or roadside ditches. They are typically located on a single property and owned and maintained by the property owner. These private systems must be discharged into a sufficient outlet, which may include a municipal drain or a natural watercourse.

To reach a sufficient outlet, a private drainage system may have to cross at least one other property. Property owners in Ontario have two options to get access to a sufficient outlet located on another property:

- petition the local municipality for a municipal drain under the [Drainage Act, 1990](#)
- construct a mutual agreement drain

### WHAT ARE MUTUAL AGREEMENT DRAINS?

Mutual agreement drains are private drainage systems that are authorized, constructed, improved, financed (owned) and maintained through an agreement between two or more property owners ([Section 2](#) of the *Drainage Act, 1990*). They are based on a written agreement that may or may not be registered on property title. Mutual agreement drains are different from municipal drains, which are constructed, owned and maintained by the local municipality.

### Advantages and Disadvantages of Mutual Agreement Drains

Mutual agreement drains are often compared to municipal drains. Mutual agreement drains usually have the following advantages over municipal drains:

- They are usually cheaper to construct.
- The involvement and expense of a professional engineer is not required.
- Construction, future repair and maintenance are performed at a time suitable to all property owners. This activity does not depend on the local municipality to implement.
- Construction, future repair and maintenance are performed quickly.

The disadvantages of having a mutual agreement drain rather than a municipal drain include:

- They may be impractical when major roads, railways or utilities are involved.

- There is no recommended way to determine the costs and how they are to be divided between the property owners. This can lead to disagreement on cost-sharing.
- If a professional engineer or licensed contractor is not involved, the drain may not be properly designed. Parties to the agreement may assume liability for any design flaws.
- The parties to the agreement are responsible for obtaining any necessary permits and approvals. For municipal drains, this work is the responsibility of the municipality.
- There are costs for legal fees and a filing fee for the agreement.
- If one of the parties to the agreement fails to comply with its terms, legal action by the other parties is required to enforce the agreement.
- No grants are payable under the *Drainage Act, 1990*, for construction, future repair or maintenance of mutual agreement drains.

### **CREATING A MUTUAL AGREEMENT DRAIN**

The first and most important step in developing a mutual agreement drain is to see if the neighbours are interested in working together to negotiate an agreement.

If all property owners agree in principle, the next steps are to determine:

- the form of the mutual agreement (e.g., written only or written and registered)
- the location of the drain
- the form of the drain (e.g., ditch or pipe)
- which of the parties to the agreement will use the drain for their property's drainage needs
- the required capacity of the drain
- the size and material for a piped drain
- the cross-section and elevations for a ditch drain
- construction timing and other details
- how the cost of construction, future repair and maintenance of the drain will be shared between the parties
- if any approvals are required to construct the drain and who will obtain and pay for these approvals

Draft the agreement and, ideally, register it on the title of each property in the land registry office.

### **Contents of a Mutual Agreement**

Mutual agreement drains must include the seven (7) attributes required by [Section 2](#) of the *Drainage Act, 1990*. These include:

- a reference to the *Drainage Act, 1990*
- legal descriptions of the lands on which the drainage system is constructed
- the estimated cost of the drainage system
- a description of the drainage system, including its design and approximate location
- the proportion of the cost to be paid by each owner of the land for the construction, improvement and future repair and maintenance of the drainage system
- the date the agreement was executed
- an affidavit of a witness to the execution of the agreement

The agreement can also contain other mutually agreed-upon clauses, such as:

- property access requirements for the purpose of drain construction and future drain inspection, repair and maintenance requirements
- identification of who will get and pay for any required permits for future drain repair and maintenance activities
- notification requirements for entry onto the property(s) for inspection, repair or maintenance requests
- time restrictions for entering onto the land and how any crop damage will be compensated during construction, future drain repair and maintenance activities
- registration requirements and payment of the registration costs
- indemnity clauses

### **Forms**

A standard form, [Agreement by Owners — Mutual Agreement Drains](#), is available from the [Ontario Central Forms Repository](#) as Form Number: 003-0180E.

Complete the form by including contact information, a description of the drain, estimated cost for construction, the proportion of the cost of construction, future repair and maintenance of the drain to be paid by each property, and any additional terms of the agreement.

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Property owners must sign the form binding each of the listed properties to the agreement.

The agreement must include legible plans showing:

- parcel/property boundaries
- location of the drain, including points of commencement, course and termination
- depth
- bottom and top width
- size of pipe used
- any bridge, culverts or catch basin, etc.

### **Registering the Agreement**

The agreement or an executed copy is registered at the land registry office. A registered agreement is binding on all properties, regardless of future ownership. An unregistered agreement is binding only on the current property owners and is no longer valid if a property changes hands through sale, death, etc.

Registering the agreement may be the hardest part of the process, since the neighbours may agree to the drain but not want it registered on their property. However, registering the agreement will protect everyone's investment, property and access to proper drainage in the future. There are some additional costs and administration needed to register the agreement on title.

For recordkeeping purposes, file a copy of the agreement, plans and schedules of the proposed mutual agreement drain with the clerk of the local municipality.

### **Professional Services**

The *Drainage Act, 1990*, does not require that property owners use a professional engineer for a mutual agreement drain. However, it may be a good idea to hire an engineer to size, design and prepare drawings and specifications for the drain. The engineer will also be able to help estimate the costs, develop and process the agreement, hire a contractor and supervise construction.

Drainage contractors licensed under the [Agricultural Tile Drainage Installation Act, 1990](#), are trained to survey, design and install piped agricultural drainage systems. They may also be able to assist

in the development and implementation of a mutual agreement drain. It may also be advisable to hire a lawyer to review and register the specific agreement.

### **Approvals**

All construction, repair and maintenance projects must comply with existing federal and provincial legislation where applicable (e.g., [Drainage Act, 1990](#), [Conservation Authorities Act, 1990](#), [Lakes and Rivers Improvement Act, 1990](#), [Fisheries Act, 1985](#), [Endangered Species Act, 2007](#), etc., and their associated regulations).

Contact the local municipality for mutual agreement drains discharging to a municipal drain — never complete any work on a municipal drain. Contact the [local conservation authority](#) or [Ministry of Natural Resources and Forestry office](#) for mutual agreement drains discharging to a natural watercourse.

Obtain all the necessary approvals prior to starting any work.

### **DRAIN REPAIR AND MAINTENANCE**

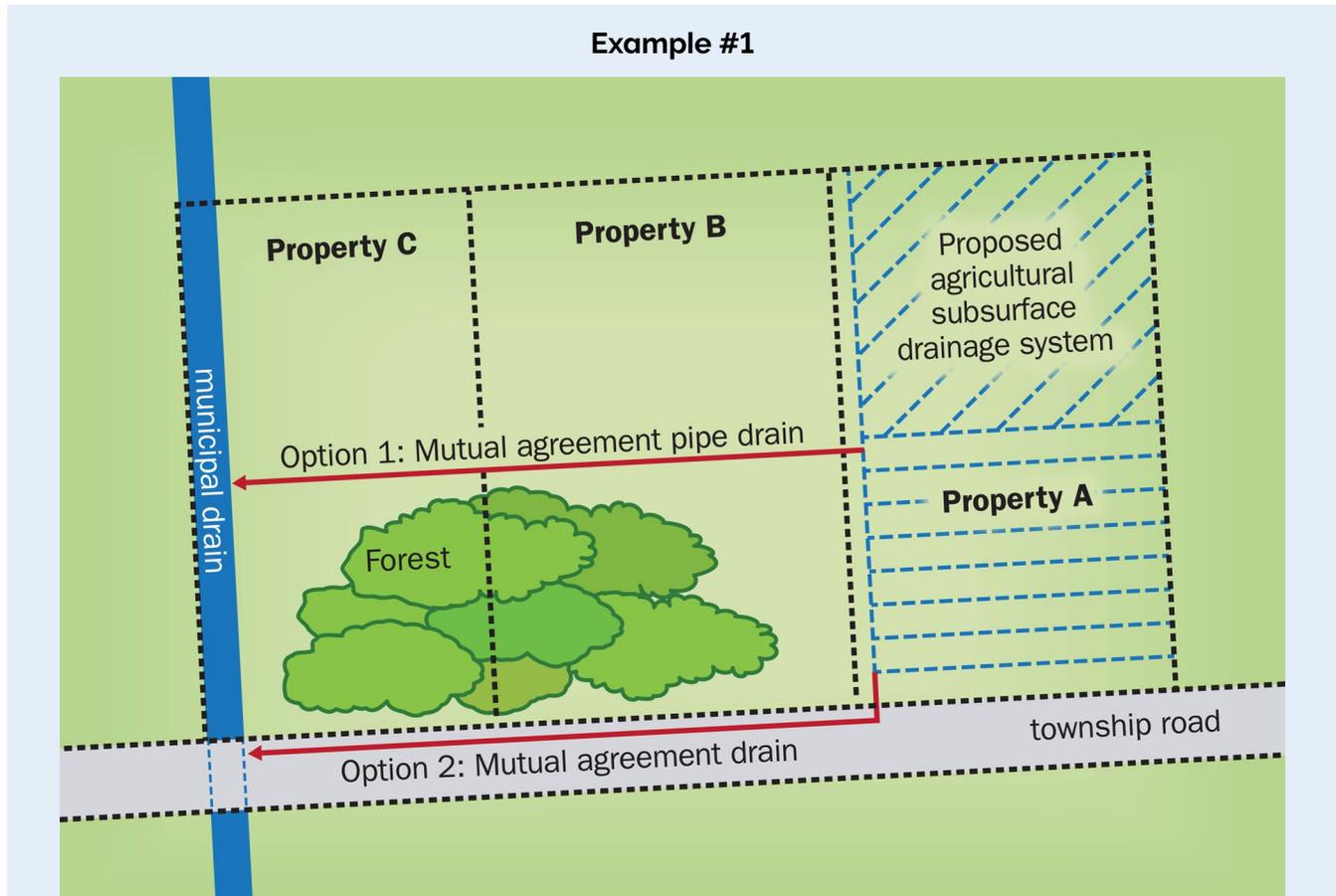
Inspection, repair and maintenance of a mutual agreement drain must be performed in accordance with the terms in the agreement. Usually, the party that is responsible for maintenance would provide notice to the other property owners that they wish to complete inspection, repair or maintenance work and have to access the various properties. Alternatively, a property owner may inform the property owner responsible for repair and maintenance of a situation that should be corrected.

If the repair and maintenance responsibilities are not met or access to a property is denied, there are two options to consider:

- initiate a civil lawsuit for non-compliance of the agreement and obtain a judicial order
- initiate a petition under the *Drainage Act, 1990*, to have the mutual agreement drain made into a municipal drain

## COMMON EXAMPLES OF MUTUAL AGREEMENT DRAINS

There are many different situations where the advantages of a mutual agreement drain outweigh the disadvantages when compared to a municipal drain. The following situations are presented with suggestions on how to structure the agreement.



**Figure 1.** Property details for Example #1.

### Background

An upper property owner (Property A) wishes to install a subsurface agricultural drainage system on their farm property but does not have a sufficient outlet on the property. The municipal drain, which would act as a sufficient outlet, can be reached by either crossing the neighbour's properties (Properties B and C) or by using the ditch along the township road as shown in Figure 1.

The owner of Property A could approach the neighbouring property owners (Option #1) and/or the municipality (Option #2) about a mutual agreement drain or could initiate a petition for a new branch of the existing municipal drain under the *Drainage Act, 1990* (Option #3).

For a mutual agreement drain, approach the owners of both Properties B and C and the municipality to determine if they are agreeable to a drain located on their properties. It is important to determine if a ditch or piped drain is desired based on their land use and their future drainage needs. These factors will affect the size of the drain, construction costs and structure of the agreement.

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### **Option 1: Mutual agreement with the owners of Properties B and C**

#### **Scenario A — Drainage for Property A only**

The owners of Properties B and C are agreeable but they don't want a ditch across their property nor do they wish to use the mutual agreement drain for their drainage needs. The agreement should include the following principles:

- Size the pipe to handle water from Property A only.
- Property A pays the entire costs for the construction of the drain.
- Property A is responsible for inspection, repair, future maintenance and associated costs.
- The agreement should prohibit the use of the drain by Properties B and C.
- Properties B and C grant access to their properties for inspection, construction, repair and future maintenance of the drain.
- Property A shall ensure Properties B and C are restored to their original condition after construction, future repair and maintenance.

#### **Scenario B — Drainage for Property A and other properties**

The owners of Properties B and C are agreeable and one or both wish to use the mutual agreement drain for their drainage needs. The agreement should include the following principles:

- Size the drain in sections to handle water from all properties using the drain.
- All properties using the drain agree on how to share the costs for the construction of the drain.
- All properties using the drain agree on the distribution of future repair, maintenance and associated costs.
- Agreement should prohibit the use of the drain by any properties not contributing to the cost of the drain.
- Properties B and C grant access to their properties for inspection, construction, future repair and maintenance of the drain.
- All properties using the drain agree on how to ensure Properties B and C are restored to original condition after construction, future repair and maintenance.

Water collected on any property must not be diverted to land that would not naturally receive it. Therefore, all property owners would need to verify with the local drainage superintendent that the portion of the property being drained has been assessed into the existing municipal drain. Permission from the municipality to connect the mutual agreement drain to the municipal drain is also required.

### **Option 2: Mutual agreement with the municipality**

The municipality is agreeable to allowing the existing roadside ditch to become a mutual agreement drain and act as an outlet for the private subsurface drainage system. The agreement should include the following principles:

- Confirm or increase the capacity of the existing roadside ditch to accommodate the drainage needs of Property A and the township road.
- The municipality oversees the construction to increase the capacity of the ditch, if necessary.
- Property A pays any necessary costs of construction to increase the capacity of the ditch.
- The municipality and Property A agree on the distribution of future repair, maintenance and associated costs.

### **Option 3: Municipal drain**

It is not possible to get an agreement for the mutual agreement drain from either the municipality or both Properties B and C. The owner of Property A could initiate a petition for a municipal drain under Section 4 of the *Drainage Act, 1990*.

## Example #2

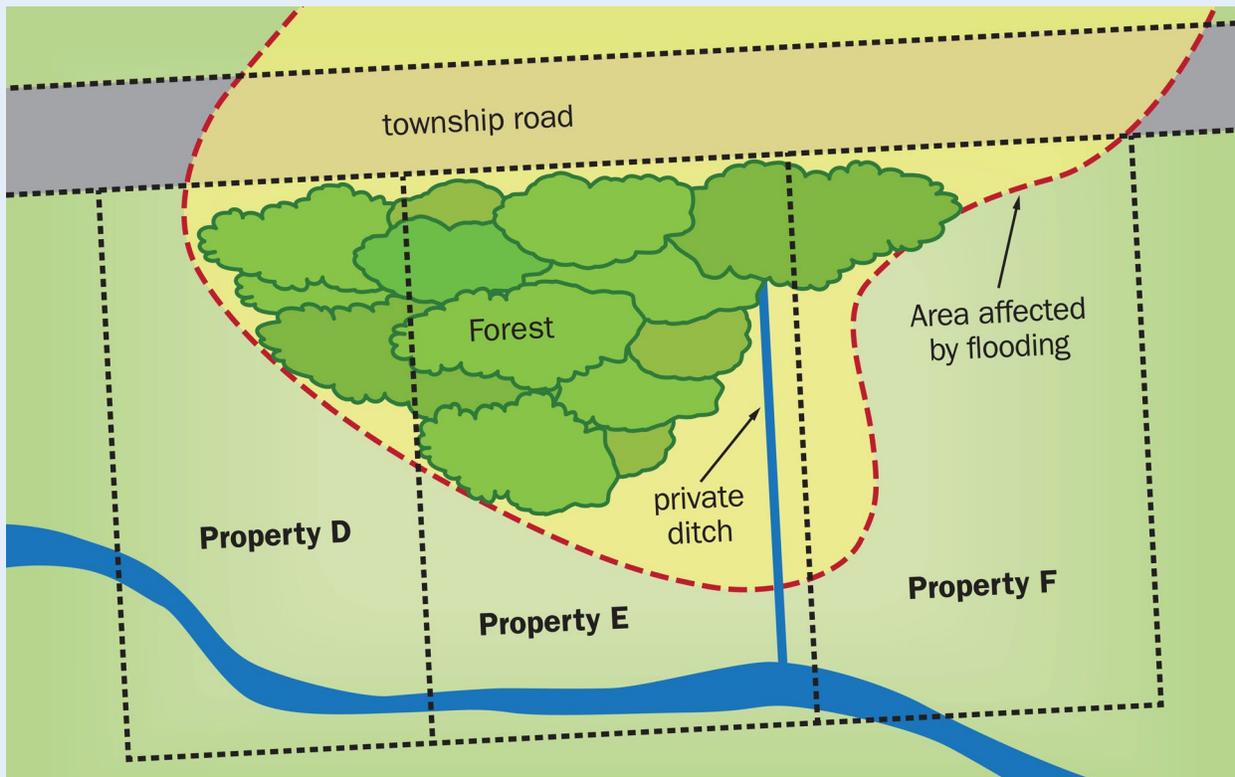


Figure 2. Property details for Example #2.

### Background

A private ditch is located on Property E to drain a forested section of the property. Beavers frequently build a dam near the natural watercourse and block the ditch. During the spring and intense rainfall events, the beaver dams cause flooding to parts of Properties D, E, F and the Township Road as shown in Figure 2. The owner of Property E does not farm the property and does not manage or remove any beaver dams on their property.

To reduce the impact on the road, the municipality could approach the owner of Property E about turning the private ditch into a mutual agreement drain (Option 1) or could sign a petition requiring a new municipal drain under the *Drainage Act, 1990* (Option 2). Both of these options would allow the municipality to manage the drain and the associated beaver activity to reduce the flooding that affects the township road. The municipality would have to follow the environmental requirements of [Fisheries and Oceans Canada](#), the [Ministry of Natural Resources and Forestry](#), and the local conservation authority when completing this activity.

### Option 1: Mutual agreement drain with the owner of Property E

The owner of Property E is agreeable to a mutual agreement drain for the management of the beaver activity. The agreement should define the size and location of the drainage system and include the following principles:

- The municipality is responsible for providing notice to the owners of Property E when beaver management activity is required.
- Property E grants access to the property for beaver management activities, including beaver dam removal.
- The municipality shall ensure that Property E is restored to its original condition if equipment is used to access Property E to manage beaver activity.

### Option 2: Municipal drain

It is not possible to get an agreement for the mutual agreement drain. The municipality can sign a petition for a municipal drain under [Section 4](#) of the *Drainage Act, 1990*.

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## **SUMMARY**

A mutual agreement drain can be a cost-effective way to ensure that water from a private drainage system reaches a sufficient outlet. A carefully written agreement can protect everyone's investment, property and access to proper drainage in the future.

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