



Cunningham Swan

LAWYERS

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PRIVILEGED AND CONFIDENTIAL

February 6, 2023

DELIVERED BY EMAIL TO: cao@tayvalleytwp.ca

Tay Valley Township
217 Harper Road
Perth, Ontario
K7H 3C6

Attention: Amanda Mabo, CAO/Clerk

Dear Ms. Mabo:

**RE: Private Unassumed Roads Policy
Our File No. 29235-3**

This letter was prepared at the request of Council to be provided to the public as part of a larger public communication on this issue. I have modified the letter to remove certain advice to Council while retaining most of the content of the original letter dated January 11, 2023. Provision of this letter in no way waives solicitor client privilege over any aspect of this matter or any advice -oral or written – given before or after public disclosure of this letter.

The original letter (as redacted) read as follows”

Council, at its meeting on September 27, 2022, adopted the following resolution:

RESOLUTION #C-2022-09-04

“THAT, the Private Unassumed Roads Working Group Executive Summary and Report presented to the Committee of the Whole on September 13, 2022, be received for information;

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***THAT**, staff be directed to provide a follow-up report that addresses the recommendations and various points and concerns arising from the Private Unassumed Roads Working Group Executive Summary and Report;*

***AND THAT**, in the meantime, staff proceed with obtaining a legal opinion with regards to the indemnification clause and insurance requirements contained in the Road Access Agreement with regards to:*

- *the reasons the clauses need to be included or not included, and if they need to be included, is there alternative wording that can be used; and*
- *the need for a Road Access Agreement or not.”*

By email dated November 17, 2022, you asked that we consider the Working Group report and progress to date and provide answers to Council’s questions. As part of our review, we also determined that there are concerns with the potential liability (both personal and Township) created by these private, unassumed roads.

BACKGROUND

It is important to set out our understanding of the nature of the roads at issue and the concerns that arise.

The type of road that is primarily under consideration is a road owned by the Township within older registered plans of subdivision. As a road described in a plan of subdivision, the Township is the owner of the road and the road is deemed to be a public highway as defined in the *Municipal Act* upon registration of the plan of subdivision. Notwithstanding the fact that the roads are defined as public roads, the Township has in most cases never maintained the roads and often the roads were never built to a standard that would be acceptable to the Township – to assume for use or maintenance.

We are advised that in some cases Township plow trucks cannot maintain certain roads as they are not built to a standard that would allow the vehicles to operate safely.

Notwithstanding that these roads are named “private unassumed roads” they are, in fact, public highways and the public have the legal right to use these roads.

The Township has referred to these roads as “private” because any maintenance is performed privately by the owners of lots served by the road.

The Township’s Zoning By-law requires that any lot to be developed with any structure or any lot to be used for a purpose permitted under zoning have frontage on an “improved street” (that is a road assumed and maintained by the Township year-round). Section 3.14 contains exceptions to this general rule, one of which provides that this requirement does not apply to:

A lot on a plan of subdivision registered before December 10, 2022, that has frontage on a street that is not an improved street, where the owner has entered into a Road Access Agreement to the satisfaction of the Township.

The zoning restriction does not prohibit any person from accessing or attending their property, but they cannot improve the land with a structure unless they fit within an exception. The Township’s standard Road Access Agreement (“RAA”) includes provisions for the private owner to indemnify the Township for damages/injuries occurring on the road and requires insurance to give effect to the indemnity, among other requirements. Certain residents have objected to entering into the RAA based on liability and insurance concerns.

The Private Unassumed Roads Working Group report dated August 31, 2022 was received by Council at its meeting of September 13, 2022.

There are other private and public unassumed but used roads that should also be included in any policy decision by Council, but for purposes of this opinion we focus only on those roads that are included in historic plans of subdivision.

ISSUES

Liability

The issues are best understood by first considering the liability associated with unassumed roads as this concern drives many, if not all, of the other issues.

Subdivision Agreement Obligations

Section 5.03 of the Working Group’s August report set out the Group’s conclusion that:

... the predecessor Townships breached their duty of care to act reasonably and prudently to protect the interests of the Township’s residents and taxpayers.

Weighing the direct evidence against the circumstantial evidence leads the WG to the inevitable conclusion that, on balance of probabilities, a “prima facie” case of negligence by the predecessor Townships has been established¹ and that such negligence was the proximate cause of the problems relating to PURs [Private Unassumed Roads] that the Township and its taxpayers and residents currently face.

We are not aware of any legal opinion from a lawyer that was sought or received by the Working Group to support this statement.

¹ *Fontaine v. British Columbia (Official Administrator)*, [1998 CanLII 814 \(SCC\)](#), [1998] 1 S.C.R. 424

With respect, this conclusion is outside the mandate or expertise of the Working Group. Its conclusion that a duty of care exists simply from the statement found in section 2 of the *Municipal Act* is not supported by case law. In order to make a finding of negligence each subdivision agreement and the facts surrounding the development of the subdivision must be considered. In addition to the fact-specific assessment needed to understand if any duty of care existed, a finding of negligence requires not simply a breach of the duty of care (assuming such duty existed) but a relationship of proximity and causality (a connection between the duty and the breach and proof that the breach is the reason for the injury).

It appears that the Working Group misunderstood the assessment of negligence and instead used negligence in a lay sense to express their personal view that the predecessor Townships made an error and should have ensured that the roads in question were built to a proper standard and assumed for maintenance. Failing to ensure roads were built to a certain standard or assumed for maintenance is not necessarily negligence. If the Townships made a policy decision to not require the roads to be built to a municipal standard and to require private maintenance to reduce the cost to the municipality, that policy decision may be immune from liability.

It is beyond the scope of this opinion to consider whether a valid policy defence exists, and to do so would require an assessment of each subdivision agreement and the surrounding facts and history. Suffice it to say that the assessment of negligence is far too complicated to accept the Working Group's bald statement that they feel the previous Townships acted inappropriately as actual negligence.

The Working Group then went on in sections 5.05 and 5.06 to provide an opinion that "doubted" that the Township had the legal authority to set private road standards. Again, this is an incorrect statement.

Municipalities have the legal authority to establish standards for any road within the municipality. For a lower tier municipality such as Tay Valley Township, Section 11(3) of the *Municipal Act* grants to municipalities the jurisdiction to pass by-laws respecting "highways". Section 8(3) confirms that a by-law may regulate or prohibit; require persons to do certain things; and provide for a system of licenses. Sub-section 8(4) further provides that a by-law may be general or specific and may differentiate in any way a municipality considers appropriate.

With respect, the Working Group was wrong in law to conclude that there was any doubt about the legal authority of the Township to pass by-laws or policies respecting road standards. A municipality does not need to find a specific section of the *Municipal Act* that gives precise authority to set road standards as suggested by the Working Group. The *Municipal Act* was amended in 2001 to change the powers of municipalities from a prescribed list of powers to a broad and purposive grant of legislative authority. Section 8 sets out this direction clearly,

“The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality’s ability to respond to municipal issues.”

The Working Group appears to have relied on these two flawed premises to support its conclusion that it is unfair for the Township to reduce the burden or liability on all taxpayers at the expense of those residents living on the roads in question.

Legal liability

The Township does have actual liability associated with these roads. Section 44 of the *Municipal Act* provides:

- 44 (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.
- (2) A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default.
- (3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,
- (a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;
 - (b) it took reasonable steps to prevent the default from arising; or
 - (c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met.
- (4) The Minister of Transportation may make regulations establishing minimum standards of repair for highways and bridges or any class of them.
- (5) The minimum standards may be general or specific in their application.

What this means in practical terms is that the unassumed roads are subject to section 44 and the Township must maintain them in a state of repair that is reasonable in the circumstances. The fact that the Township does not maintain the roads at all is not a “circumstance” that allows the Township to argue that its conduct is reasonable. The Township in fact knows that people are travelling over these roads – and it knows this because it issues building permits to allow construction and it receives property taxes for the dwellings that exist.

Given that the Township has exposure to liability for these roads, what needs to occur is a practical assessment of risk versus liability.

Options

Assuming that Council accepts that there is some legal risk or exposure to liability posed by the unassumed roads, there are various options available to address those risks.

Status quo

Council can always choose to maintain the status quo.

This will require an assessment of whether to continue with RAA. The specific issues of indemnities and insurance are discussed below. As a matter of risk management, the RAA concept is a sound one. We act for many municipalities with unassumed roads and where the public seek to make improvements to and/or maintain privately a municipally owned road allowance we always recommend a road access agreement. This agreement helps to establish what “reasonable in the circumstances” means in the context of section 44 of the *Municipal Act*. The agreement also apportions risk and liability so that the users of the road understand that they are accepting the risk of accidents when they choose to live on an unmaintained road. It is not a perfect solution, but with appropriate insurance to cover the indemnity given by the users of the road it is an effective tool to protect the municipality.

Road By-law

The Township should consider passing a by-law to classify the subdivision roads as unmaintained and as unassumed. This by-law can be done in combination with other options discussed in this section. The benefit of a by-law is that the by-law establishes what is “reasonable in the circumstances” in the context of section 44 of the *Municipal Act*. If the Township classifies roads as not maintained or seasonally maintained and signs them as such those facts establish the circumstances and allow the Township to argue that reduced (or no) maintenance is what users of the road expect. The goal of such a by-law is to create a factual basis to argue that the road is functioning as an unopened road allowance – which justifies limited or no maintenance.

If the by-law is selected as an option we recommend that the Township engage in some basic level of inspections and road upgrades to develop a minimum level of service. We also recommend having an agreement for maintenance in place. This agreement need not be a RAA (but that would be our preference) but could be an agreement with the owners that they will be responsible for maintenance. The difficulty with this type of agreement is that it is highly unlikely that all owners will enter the agreement, which reduces its effectiveness.

Road Association

An effective way to manage liability and avoid individual RAA's is to have the owners who use each unassumed road create an incorporated road association that would be responsible for maintenance. Such a corporation would be able to obtain insurance and avoid the concern of some owners that they are insuring a road for the use of others. The Township would continue to own the road and be subject to liability in the case of an accident, but the RAA with the road association would address indemnities and maintenance and insurance to minimize the financial risk to the Township.

The Township could offer to pay to incorporate the associations as an incentive for residents to establish the association. The costs of maintenance would continue to be borne by the residents so there would be no additional cost to the residents other than the shared cost of insurance.

Close the Road

The Township cannot simply close the road, as owners depend on the roads for access to their property. However, the Township could stop up and close the road and sell the road to a condominium or road association. This is a very effective option as it removes the road from the Township's inventory and it is therefore no longer responsible or liable for maintenance. The practical difficulty is that the owners must cooperate to create a condominium or road association and accept the transfer of ownership and liability.

One method to overcome resistance to this option would be for the Township to pay for the costs to incorporate the condominium or road association. Some contribution towards road upgrades might also induce the owners to participate.

Another variation of this option is to stop up and close the road and convey an easement to each lot owner. This avoids the need for a condominium or road association. Each owner would have a legal right of access across the now former road. The zoning by-law would need to be amended to ensure that these lots can be developed without frontage on a municipal road.

The land subject to the access easement would still be owned by the Township however, and there would be some liability because of this ownership. Most of that liability could be addressed in the terms of the easement that could make the owners who benefit from the easement responsible for maintenance and insurance. Individual owners would need to consent to receive the easement, but those who refuse would have limited recourse in the face of the offer by the Township to provide an easement. While the nature of their access would change, the fact that the Township was not maintaining the unassumed road previously gives the reluctant owners little practical recourse before the courts.

If a road is closed the Township would need to amend its zoning to ensure that the residences on the now closed road continue to have a legal right to obtain building permits and that vacant lots can be developed.

Upgrade and assume for maintenance

The final option is one recommended by the Working Group. The Township always has the option of upgrading and maintaining the roads. Since the Township already is liable for accidents, this allows the Township to manage that liability in the same manner that it does for its other maintained roads.

Given the fact that these roads may not be constructed to an acceptable municipal standard, the Township will need to expend significant funds (according to the Working Group report) to exercise this option. Before exercising this option Council needs to be certain that the roads can actually be built to an acceptable standard – assuming a substandard road simply invites liability in the event of an accident.

The Township might consider a Local Improvement Charge to fund all or part of the costs of the road upgrades.

A local improvement charge is permitted under the *Municipal Act* and apportions the costs of the improvement across all benefitting properties. The rules to implement such a charge are complex, but for purposes of this opinion the salient element is that if the Township passes a by-law to impose a charge a majority of owners who own at least 50% of the assessed value of all lots affected may object to the charge. Absent an application to the Ontario Land Tribunal for approval, such objections will eliminate the Township's authority to impose a charge for 2 years.

ROAD ACCESS AGREEMENTS

The method chosen by the Township starting in 2009 to address liability was to require a RAA in certain circumstances. There are two principal requirements of the RAA that are objectionable to certain residents and on which we have been asked specifically to provide an opinion: insurance requirements and an indemnity in favour of the Township.

Insurance

Is it mandatory

It is not a statutory requirement to require insurance for users of the road or those entering into the RAA. No other resident of the Township is required to obtain insurance over the municipal roads they rely on. Further, the Township has insurance for all of its properties, including these unmaintained roads, so there is an argument that requiring people using the unmaintained roads to insure the road is not equitable.

Is it recommended

We recommend requiring insurance for persons entering into the RAA. If there is an accident the indemnity (discussed below) will be meaningless unless there is insurance to fund the indemnity.

The Township can best limit its liability if insurance is required.

Indemnity*Is it mandatory*

An indemnity is not mandatory. There is no statutory or other legal requirement that obligates the Township to include an indemnity provision in the agreements.

Is it recommended

However, simply because it is not mandatory does not mean that the indemnity is not a good idea or a valid means to manage liability. We do recommend indemnities in this type of agreement.

At a minimum, we recommend language that ensures that the users of the roads acknowledge that the road is not built to a municipal standard (if this is the case) and that they further acknowledge that the Township does not maintain the road and that therefore any liability is the responsibility of the owners who do maintain the road. The owners can waive any claims that they may have against the Township as users of the road in this type of agreement. If they also indemnify the Township for third parties who may have an accident this better protects the Township.

RECOMMENDATION

The unassumed subdivision road is a unique circumstance that creates liability and development tensions in the Township. The current model appears to be unacceptable to some members of the community and Township Council is considering an alternative that balances the broader interest of all taxpayers to manage liability while being fair to the residents of these subdivisions.

The ultimate solution will be dependent on Council's tolerance for risk. All of these recommendations need to be assessed by Council in terms of risk, cost and ongoing operational implications.

The least risky solution is to stop up, close and convey the roads to an incorporated road association or condominium corporation. The corporation then becomes wholly liable for the

road and the Township has no liability. This is less costly even if the Township pays for the costs to incorporate. The limitation with this option is that it takes cooperation of the owners on the road, and a few owners who refuse to participate can prevent the success of this option. This solution would also require a re-zoning to ensure that the lots served by the new private road can obtain building permits and will be considered legal lots.

The next option in order of preference is to enter into a RAA with an incorporated road association. The Township would still retain some liability as the owner of the road, but this liability would be mitigated by the RAA and the insurance held by the road association.

The Township may also elect to bring the roads up to a municipal standard, assume the roads for maintenance and thereafter municipally maintain them. The costs for upgrading the roads in our opinion is a cost that ought not to be borne by the general tax base as they derive no benefit from that work. A Local Improvement Charge is a viable option to bring these roads into the municipal network.

If the Township continues to own the roads and is not able to improve and maintain the roads, the next best option is to continue with the RAA. In order to minimize Township liability, the RAA must at a minimum contain a waiver of liability clause and should ideally include indemnity and insurance language. Continuing with an agreement without this language creates more risk to the Township.

The least preferred alternative is to continue to allow private maintenance without any agreement. In this scenario, we recommend that the Township pass a road by-law to identify these roads as privately maintained and to sign them as “use at your own risk” etc. to alert the public to the potential for reduced maintenance standards. We also recommend some basic level of municipal inspection and maintenance to correct serious defects in the condition of the road and further reduce liability – this can be included in the by-law.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP

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