

Subject: Timberlea Sewer Backups – Financial Support for Impacted Homeowners**APPROVALS:**

Kevin Scoble, Deputy Chief Administrative Officer
Marcel Ulliac, Chief Administrative Officer

Administrative Recommendation:

THAT the Municipality not provide financial assistance for residents affected by the July 12, 2015 sewer backup flooding in the Timberlea area.

Summary:

At the September 22, 2015 regular Council meeting, the following motion was passed:

“THAT a decision on providing financial support in addition to or in lieu of compensation through the Municipality’s insurer, for residents affected by the July 12, 2015 sewer backup flooding in the Timberlea area, be deferred until (a) a detailed engineering investigation and proximate cause analysis with respect to the July 12, 2015 storm event is complete and delivered to Council; and (b) the Municipality’s insurer has made a determination as to whether it will pay claims relating to that event.”¹

The July 12, 2015 extraordinary incident affected a significant number of residential properties [65 claims have been received to date] and was directly linked to a severe storm event that day [1 in 50 year storm of 2 hours duration]. Hence, this incident was subjected to a thorough engineering investigation and analysis, verified by an independent third party, so that it could be fully understood.

Administration also committed at that time to making public the resulting technical report, so that affected residents could draw their own conclusions from the findings of fact. The Timberlea Sewer Backups Internal Investigation and Analysis Report is Attachment 1 to this Council Report. It was also shared with the Municipality’s insurer who has engaged their own independent engineering firm to provide a further peer and independent review of the report and the findings/conclusions contained within.

Administration’s conclusion with regard to the July 12, 2015 storm event is that the engineering investigation and analysis has not uncovered or identified any negligence of the Municipality, or of its contractor, that is causally linked to the damages suffered by residents. The Municipality’s insurer has not yet formally advised the Municipality of its own conclusions with respect to

¹ Shortly after that September 22, 2015 Council meeting it was determined that losses resulting from another “sewer backup” incident that occurred on August 30, 2015 in Timberlea – not associated with a storm event -- were caused by acts or omissions of the Municipality’s contractor. As a result, claims from residents affected by that August 30, 2015 incident have been accepted, and are expected to result in payments of compensation by the Municipality’s insurer. The insurer is also expected to pursue the contractor for reimbursement of payments it has made or will make on those claims. Accordingly, the balance of this Council Report will deal only with the July 12, 2015 event.

liability, but it is highly likely that the insurer will agree with the conclusions documented in the “The Timberlea Sewer Backups Internal Investigation and Analysis Report”. Administration therefore cannot recommend the payment of any financial compensation to affected residents in Timberlea who suffered loss and damages as a result of the storm event of July 12, 2015.

Discussion and Rationale for Recommendation:

The basic principle applied by the Municipality and its insurer in handling claims relating to alleged negligence or other wrongdoing by the Municipality or those for whom it is responsible in law -- e.g., employees or contractors -- is that compensation should be paid only where it is clear that the Municipality is legally liable. In this case, only in 2010 did the Municipality first have significant tangible evidence [i.e., an unusually high number of insurance claims from residents following a storm event that year] on which to hypothesize that the sewer system in the “Timberlea B’s” might not be adequate to prevent sewer backups from severe storm events. The evidence set out in the attached technical report shows that the Municipality did test this hypothesis and responded to what it discovered, in a prudent and reasonable manner and within a reasonable timeframe, by:

- (a) undertaking a technical investigation of the situation that confirmed the existence of a problem with sewer system performance under severe storm conditions in the Timberlea area, and defining the extent and probable causes of the problem (technical studies initiated in 2010 and built upon until 2014);
- (b) exploring, evaluating, and preparing cost estimates for remediation options (initial options identified in 2011, partially designed in 2012 and later refined based on new technical data);
- (c) preparing and adopting a capital budget for design and construction of a “bypass line” to handle flows that the existing system in the ground in the Timberlea “B’s” area is unable to handle without backups (budget first allocated in 2012);
- (d) completing the design and putting the project out to competitive tender (design finalized in 2014 and put out to tender in 2015); and
- (e) awarding contracts for both construction and site inspection services, covering the various aspects of the necessary work to implement the chosen technical solution, and mobilizing contractors and engineering consultants to site (2015).

All of the above had been done and construction on the project known as the “Confederation Way Sewer Bypass” was in progress when the storm event of July 12, 2015 occurred. The technical review assessed this storm event and whether there was anything about the construction practices that could have contributed to the losses suffered by area residents. The conclusion was that the main cause of flooding was the severity of the storm -- assessed at a 1 in 50 year event -- which overwhelmed the capacity of the sanitary system and the capacity of pumps used for construction water management on site. The review determined that the construction water management practices at the time of the storm likely accelerated the onset of basement flooding in the vicinity of the construction site open trench, and that the total duration of surcharge conditions (overwhelming of the physical line capacity) for some homes may have been prolonged by up to one hour. However, the review also included a model analysis of the sanitary system’s performance under the July 12, 2015 rain event for the purpose of estimating probable surcharge conditions had there been no construction project. The results of this analysis showed surcharging conditions for all properties in Timberlea where actual backups occurred. The main conclusion of this technical review is that

the storm event of July 12, 2015 was so severe that it would have caused widespread sewer backups regardless of any construction impacts.

Administration also wishes to call to Council’s attention that in November 1990, Associated Engineering [an independent third party engineering consulting firm] produced a study of the West Thickwood Heights sewer system and lift station, which had been undertaken to investigate the cause of a number of sewer backup incidents in Dickensfield. That study included some specific recommendations for the sewer system in that area, and also included a recommendation that the Municipality “*undertake an in depth study of the existing sanitary sewer system in East Thickwood Heights as well as in Timberlea to ensure proper functioning of these facilities at ultimate development.*” [The entire study is too lengthy to be an attachment to this Report, but will be made available to any Councillor or resident upon request.] There is no evidence in our files that such a study was ever done with respect to the Timberlea “B’s”. In the view of Administration, given the lack of any particularly noticeable pattern of sewer backup claims received out of Timberlea prior to 2010, this is not a sufficient basis upon which to find the Municipality liable for losses or damages sustained 25 years later in a part of the Municipality not studied in 1990.

In its September 22, 2015 Council Report and presentation, Administration expressed its awareness of, and empathy and regret for, the damages suffered and the inconvenience experienced by many of our residents as a result of sewer backups into their homes on July 12, 2015. That sympathy has not diminished. However, now that the full engineering investigation and analysis [validated by an independent third party] is complete and has not uncovered evidence of any negligence by the Municipality or its contractor that caused the sewer backups or aggravated the damages, Administration cannot recommend providing financial compensation.

Nevertheless, in view of the cost incurred by and the inconvenience caused to many Timberlea residents of repairing damages to their homes, Administration recognizes that it may be prudent for the municipality to consider a different course of action based on compassion for those residents negatively affected rather than applying the strict principles of fault/compensation. Therefore, if Council prefers, on this basis, to extend some financial aid to affected homeowners, in order to provide relief and assistance without assuming legal liability which has not been substantiated, an alternative has been identified as set out in the following section.

Alternative:

If Council opts to provide financial compensation to assist homeowners in the Timberlea area that were impacted by the sewer backups on July 12, 2015, then a program could be developed based upon a Contingency Fund drawn from Emerging Issues Reserve. The key features of this program would be as follows:

1. The program would provide for a payment to reimburse affected property owners to a maximum amount of \$40,000.
2. The deadline date for receipt of claims under the program would be March 31, 2016.
3. Access to the program would be conditional upon homeowners’ execution of key documents:
 - (a) a standard insurance industry proof of claim form;

- (b) a waiver of future claims [meaning that the homeowner would have to agree that the Municipality’s payment is not an admission of liability, and also agree not to sue the Municipality, in exchange for receiving payment out of the fund];
 - (c) homeowners’ consent for their own insurers to provide all available information and documentation relating to claims made by homeowners and amounts paid out.
4. Funding would not be a duplication of amounts already paid by homeowners’ insurers, but rather would function as a “top-up” of those amounts where necessary to cover the whole amount of the loss subject to the \$40,000 maximum.

Further details of the program consistent with the above, and standard form documentation, would be finalized by the Municipality’s Insurance and Legal Departments subject to the approval of the Chief Administrative Officer so that the program can be rolled out not later than January 1, 2016.

[The Deputy Chief Administrative Officer, who owns and lives in an affected property, would not be eligible for payment under this program due to his involvement in both the internal investigation report and the development of policy options for Council’s consideration.]

Budget/Financial Implications:

- Administration’s recommended course of action has no budget or financial implications.
- The Alternative has been analyzed for cost implications on the assumption that potentially as many as 100 claims may eventually be forthcoming [there are 65 received to date, ranging in value from \$15,000 to \$50,000.] Under this alternative, bearing in mind that 25% to 50% of homeowners will have insurance coverage for at least a part of their loss, it is projected that the average claim may be about \$30,000, which equates to a total payout cost of \$3 million. Additional estimated handling costs for field visits, documentation & administration would be approximately 10% of the average claim cost. **The estimated total contingency fund drawn from the Emerging Issue Reserve would be \$3.30 million.**

Strategic Plan Linkages:

- Pillar 1 – Building Responsible Government
- Pillar 2 – Building Balanced Regional Services
- Pillar 6 – Building a Sustainable Region

Attachment:

1. Timberlea Sewer Backups – Internal Investigation and Analysis Report