

Municipal and Developer Success Rates at the Ontario Municipal Board:

A London, Ontario Case Study

MPA Research Report

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## **Executive Summary**

The Ontario Municipal Board is a quasi-judicial tribunal with the authority to render a decision regarding land-use planning disputes. While many academics and practitioners are aware of the power the OMB holds, there is little literature available that explores the effects this has on cities and developers. Using London, Ontario as a case study, this paper attempts to determine if municipalities or developers are generally more successful before the OMB when they are in direct opposition.

This research seeks to highlight the underlying reasons why OMB makes its decisions, what it bases its decisions on, and any ramifications this may have for municipalities and developers. Through an extensive literature review, comparisons to other empirical studies of this nature, and a carefully selected research design, this paper will provide evidence regarding the behaviour of the OMB.

The OMB is a complex organization with a great amount of power. This paper finds that the OMB relies on two dominant factors to make its decision – quality of planning designs and expert testimony. It is imperative for municipalities to understand this fact and utilize its city planning team's advice regarding development.

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## **Introduction**

The Ontario Municipal Board (OMB or the Board) is a quasi-judicial tribunal that is responsible for hearing land-use planning disputes across the province of Ontario (Krushelnicki, 2007).

Specifically, the OMB has statutory power to rule on land-use planning issues from the Ontario Municipal Board Act, the Planning Act, the Statutory Powers and Procedures Act, the Ontario Heritage Act, and a few others (OMB Legislation and Regulations online, 2013). While there are many provincial bodies across Canada that deal with land-use planning disputes, the OMB is undeniably the most powerful of its kind and, more than likely, in all of North America (Moore 2013). Scholars and practitioners such as Alder (1971), Clark, (1985), Chipman (2002), Krushelnicki (2007) and Moore (2008) believe that due to the OMB's power, local actors who are responsible for development must always take the Boards behaviour into consideration when making development decisions. These actors include city councils, city planners, developers, neighborhood associations and more.

The vast majority of cases before the OMB involve a municipality and developer(s) in direct opposition to one another. Municipalities have visions of how development should take place within their boundaries. They are explicitly stated within its official plans, zoning bylaws, and other documentation pertaining to land-use developments. Often a developer's proposed blueprints and projects are not in alignment with a municipality's laws and regulation pertaining to land-use planning. When the two parties cannot agree upon a compromise, the developer will file an appeal to the OMB to render a decision pertaining to the dispute.

The most important point to underscore in this description of the OMB is that "the board has the final say on planning and development in Ontario's municipalities" (Moore 2008). Barring a misapplication of law, the OMB's decision is final. This research project is interested in

understanding how the OMB makes its decisions. This paper aims to determine if the municipality or the developer is more successful before the OMB in London, Ontario when in direct opposition to one another. To gather this information, OMB cases will be reviewed between the years 2000 and 2015. These data will also be compared with Aaron Moore's (2013) study of Toronto regarding OMB decisions. Further details on this information will be discussed in the appropriate sections of this paper.

The paper will be structured as follows:

1. **Literature Review** – A comprehensive literature review will be offered to understand what the current literature is presenting regarding the OMB's behaviour and the influences that determine its decisions.
2. **Research Questions and Hypotheses** – Two research questions are stated to give direction to this study. Each question will be accompanied by a hypothesis and support for this prediction.
3. **Methodology** – A detailed account of the research design for this study will be presented. This section will describe in detail the method of collecting the OMB cases to be reviewed, how the outcomes will be categorically organized and how comparisons will be drawn with Moore's Toronto study. It will also explain what statistical test was chosen to determine if the data is statistically significant.
4. **Case Examples** – Two OMB decisions will be presented to provide context and support for the empirical data that will be presented in this paper. One case will highlight the municipality winning. The second case will highlight the developer winning.

5. **Results and Interpretation of Data** – All data that were collected and organized will be presented. Interpretation of the data will also be included. This section will be organized by research questions.
6. **Conclusion** – Final thoughts on the data presented and the importance of municipalities' understanding the OMB process and trends in the decision it makes going forward.

The OMB plays a pivotal role in shaping the development in a municipality. While it can be argued that the OMB has too much power to dictate development, the merits of the OMB's power is beyond the scope of this research. Ultimately this research is concerned with determining patterns regarding OMB decisions in London and how understanding these patterns may help London, and other municipalities, be more successful before the Board in the future.



## Literature Review

Literature regarding the OMB and its role in land-use planning is relatively scarce. There are very few empirical based studies to determine if the OMB tends to favor municipalities or developers when they are in direct opposition to each other. Aaron Moore's Toronto study on the topic is the most in-depth research, and to this author's knowledge, the one only of its kind. While many commentators such as Alder (1971), Clark (1985), Bowman (2001), Chipman (2002), and Krushelnicki (2007) give anecdotal evidence concerning how and why the OMB arrives at its decisions, their studies are descriptive, not explanatory. Despite this, these circumstantial reasons are still worth exploring as they may become evident in the case study of London which was conducted.

Authors such as Kumar (2002 & 2005), Hamilton (2007) and Fernandes (2009) believe that developers are at a distinct advantage before the OMB due to the influence and resources they wield. This idea is supported empirically by Moore's Toronto study (2013) where he found that developers were favored over the municipality at a 3 to 1 ratio when the two parties were in direct opposition before the Board. Two distinct reasons emerge from the literature explaining why developers are more successful before the Board: one, they have more resources and stronger influence to persuade the OMB, and two, their planning designs and expert witnesses highlight the economic benefits of development. Based on these considerations, the following literature review will be organized into two sections to offer possible explanations for why the OMB may favor developers:

- Resources and Influences
- Urban Planning and Expertise

A detailed account of describing the OMB's behaviour in rendering a decision will be highlighted. Understanding the OMB's behaviour and how that influences its decisions is imperative to the London study which will be presented later in the paper. The review of this literature will help provide information to consider when studying the data collected on the OMB decisions that were reviewed. No literature is currently available discussing the London context. As such, the following literature is primarily concerned with Toronto. Despite this, it is likely that expertise and good planning will still be the benchmarks for success in London. Whether or not these two factors will benefit the developers or municipality in London will be hypothesized in the next section entitled 'Research Questions & Hypothesis'. For now, this literature review will explain how the OMB is making its decisions and what influences its behaviour in making them.

### *Resources & Influences*

One potential reason why the OMB may render a decision in favor of developers is that they have more resources at their disposal. In Karen Fernandes' M.A. thesis (2009), she describes how the ruling elite model works in relation to development in the City of Toronto. While Fernandes admits that developers often have limits on the amount of resources they can use, on average, these developers do have more resources than their counterparts in municipal government (2009). While Toronto more than likely has the resources to match developers, it may not always have public backing to support spending tax payers dollars on a particular case.

Power and resources often play a pivotal role regarding whom the parties select as their legal representation for matters heard before the Board. While the Statutory Powers and Procedures Act governs the right to allow any party to be represented by a lawyer, this does not necessarily

mean that the same level of representation will be guaranteed for each party. As Bruce Krushelnicki states, the lack of balance and equity among representation for each side can often results in cases being decided “not on their merit, but rather on the relative sophistication of the representation and therefore on the resources available to the party retaining counsels and experts” (2007, 95-96). Sandeep Kumar (2005) echoes this notion when he sites constant worry among Ontario municipalities in regards to the amount of financial resources and time it takes when being heard before the Board. In Toronto for example, the City is often apprehensive about the development of high-rise condominiums; however, usually the Board just makes a concession to decrease the size instead of scratching the development altogether. Inevitably this does not deter the developer as they can recoup their financial investments in other properties where there are no points of contention (Barber, 2002).

Often there are many competing interests regarding development in municipalities. Developers and municipalities are regularly far apart on the visions they have for the city. Stephen Hamilton (2007) argues that developers are much better at pushing their interests forward in land-use planning issues. To highlight this point, one can look at the Urban Development Institute (UDI) and the important role it plays in persuading the OMB. The UDI is an interest group for developers. Its policy statement has been unchanged since its creation in 1957 and mentions policy points such as the importance of development to the national economy, the support of private enterprise, and that the highest level of community standard be maintained. It is interested in preserving the rights of developers and the free market to create economically stable communities. According to Hamilton (2007, 66), the UDI has always supported a strong OMB and believes that it is imperative to stifle those groups who object to “intensified development”.

Expanding on the idea of influence and its effect on OMB decisions, it has been argued that the Board favors developers at times due to concrete numbers that show how a planned development will benefit a city. As one councillor in Etobicoke says, municipalities' vision is often thrown aside "if you can demonstrate that, numerically, something works" (Kate Allen 2012, para, 20). This sentiment shared by the Etobicoke councillor is supported by Bruce Krushelnicki (2007) - current city planner for Burlington and former OMB member. He suggests that the development industry is vital to the success of a municipality and their varied approaches to promote economic development is often better in providing this service than the public sector. Thus, it can be concluded, that developers' tendency to focus on the numbers in projecting the success of a development will outweigh municipal doubt.

Moore (2013) concluded that developers won before the OMB when in direct opposition to the City of Toronto at a 3 to 1 ratio. The number provided alone does not necessarily imply an unwarranted favoritism. That is, to put it simply, without the reasoning for the OMB's decisions, it is conceivable that the developers had a better case. What does become evident in the Toronto is its inability to properly use the resources at its disposal. Furthermore, they are unable to generate the same influence as developers. While hypothesising changes to remedy this reality is beyond the scope of this study, it is clear that municipalities in general must use their resources and influences to become more successful before the Board. While the Municipality of London may differ in its success rate before the Board, it is probable that these factors will still be relevant to its success.

### *Urban Planning & Expertise*

According to the School of Urban Planning at McGill University (2016), urban planning can be defined as " a technical and political process concerned with the welfare of people, control of the

use of land, design of the urban environment including transportation and communication networks, and protection and enhancement of the natural environment.” In essence, it allows for policies and guidelines that will help shape how the city’s land will be used. Despite the requirement for municipalities to have urban design plans – which often are shaped by official plans, zoning by-laws, and other planning documentation - many have skeleton plans which provide very little guidance to where development can and cannot occur (Kumar 2002).

According to Kumar (2002), approximately 70 per cent of municipalities have urban design plans. Furthermore, Kumar (2002) determined that most municipalities’ urban design plans are concerned with preservation over development. This 70 per cent can be misleading however as Kumar’s study determined that many of these urban design plans lack substantive information that is supported by policy guidelines. It can be concluded that while most municipalities have urban plan designs in some form, often they can lack substance which can be detrimental when they are before the Board.

Toronto’s urban design plan is set in the context of the *Toronto Urban Design Handbook*. This handbook sets out guidelines and rules to consider and follow for any proposed development. As mentioned in the preceding paragraph, these planning documents can be detrimental to the City should guidelines not be clear. As Stephen Hamilton (2007) suggests, urban designers are often called in as expert witnesses and use “flowery” language to engage the Board into thinking that the proposed development meets the criteria set forth in the *Toronto Urban Design Handbook*.

Toronto is perhaps the most sought after area to develop due to its population size and economic diversity. Thus, unlike other mid-sized cities such as London where any development is often considered good for the city, Toronto City Council can decide more selectively on which development plans to accept and which ones to forego. Despite this, according to an article in

the *National Post* in August of 2014, the downtown core is growing at 4 times the rate of the rest of the City (Keesmaat, 2014, para 4). While Toronto Council may be able to be selective, this selectiveness does not seem to slow urban development within the City.

The lack of well-structured urban design planning by municipalities, and specifically Toronto, tend to allow developers to interpret these plans and guidelines in their favor. Perhaps the best way to summarize why the OMB tends to favor developers in Toronto is that they prefer their well-structured design plans over the municipality's vague guidelines. As lawyer Timothy Bermingham states, "the adversarial function of the OMB is of assistance in reaching the best decision. Usually, being positioned between opposing views, the OMB is able to discern the strengths and weaknesses of each case" (2001, 7). Thus, it is possible to believe that the lack of clarity in city's urban planning designs have in fact helped the developer push their agenda before the OMB.

Evidence will be provided in this paper suggesting that London promotes development and intensification. It is likely vague urban design planning should not influence the OMB's decision in London at a high rate. Despite this, it will become evident that in a few cases that the London may lose to a developer for this very reason. The data collected will be sure to examine this argument in further detail in the results and interpretation section of this paper.

In examining expert testimony, the OMB relies on this method of evidence heavily in determining which party has a stronger case – a point highlighted by Moore in his case study. In fact, according to Michael Bowman, a lawyer with expertise regarding the OMB, the Board not only relies on expert witnesses to "help determine the merits of the applications and the appeals that come before it", but the Board will also explicitly state on occasion that they would like to hear expert testimony before rendering a decision (2001, 4). While listening to expert testimony

is undoubtedly part of the procedural process in an OMB hearing, Bowman (2001), Krushelnicki (2002), and Moore (2013) all believe it is the deciding factor in who wins and who loses.

While the OMB's desire to hear expert testimony makes logical sense in determining which party's experts has a better understanding of land use planning laws, it also provides a distinct disadvantage for a municipality. Returning to Fernandes, she states that most expert witnesses are provided by the developer and, furthermore, as the OMB currently functions, "it is simply a body that sees itself as having to uphold the dominant planning principles of the time (2009, 85). Developers provide expert witnesses who are pro development to ensure they will promote economic growth, and often, provide residential space for a growing population. While expert witnesses must remain independent and objective when presenting their testimony to the Board they nonetheless, have been hired and selected by a party (the developers in most cases) who is looking to promote their application (Bowman 2001). Of course municipalities also present their own planning expert as well; however, the Board almost always wants to hear from the city planners. Thus, a municipality does not have the same freedom to choose who its planning expert will be before the Board.

Moore's 2013 Toronto study concluded that OMB relied upon planning experts' recommendations in 70 per cent of all the cases compiled during the years researched. This number does not drop significantly even in cases where developers and the City reached a settlement. Moore concluded that 60 per cent of the time the OMB still relied on planning experts' recommendations excluding withdrawn cases. With this in mind, Moore alludes to the interesting point that expert testimony is still relied upon heavily even in incidents where reasoning for a decision is not necessary – such is the case with settlements (2013, 68).

Furthermore, Moore examines why Toronto may be failing in terms of providing expert testimony. His research concluded that, when the City opposed developers, it fared much better when they had the support of their city planners – winning decisions 44 per cent of the time. When they opposed developers without support from city planners, they were only successful in receiving a favorable judgement 32 per cent of the time (Moore 2013). Thus, it can be concluded that Toronto is failing to use the advice of its best planning expert, the City Planner, on numerous occasions. With expert testimony being imperative to success before the Board, Toronto, and other municipalities, need to understand the importance of taking their city planners' advice. Much of the time success is contingent on their recommendations.

Moore draws some important conclusions from his study that contextualizes why developers are being favored in the City of Toronto in matters heard before the OMB. As shown in the previous paragraph, the City does not fare well when they oppose their own city planners. This could continue to be a major concern moving forward. As Moore states, “Without the aid of experts, any appellant or opponent to a development will likely fail in front of the board” (2013, 79). Thus, as has been shown by Moore, it is advantageous for the City to use the city planners as its experts and listen to their recommendations. Secondly, Moore concludes that City Council, while “conscientious and considerate of potential benefits and pitfalls of choosing to support or oppose development”, have a tendency to choose their battles poorly (Moore 2013, 80). New ways of determining which battles are worth fighting need to be implemented to avoid poor results at the OMB.

### *Conclusions to Consider*

In conclusion, the literature reviewed suggests that there are two dominant factors that determine success before the OMB – sound planning designs and expert testimony. In the case of Toronto,



anecdotal evidence suggests that developers are better able to economically support its development plans while the City struggles to have organized and detailed planning documents to guide development. As will be shown in the next section, London promotes economic diversity and intensification. Thus, it unlikely that this issue should be as prevalent in the London context. Authors such as Bowman (2001), Krushelnicki (2002) and Moore (2013) suggest that expert testimony is necessary to success before the Board. Expert testimony is likely be a dominant factor in the rendering of decisions by the OMB regardless of the municipality and should be expected in the London case study. The next section will provide the research questions and subsequent hypothesises for London in relation to the topics discussed in this literature review.

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## **Research Questions & Hypotheses**

The following research is a case study regarding planning appeals in London, Ontario heard before the OMB between the years of 2000 and 2015. Specifically, all cases that were reviewed were ones in which the municipality of London and developers were in direct opposition to one another. All other cases were omitted. The goal of the research is to determine whether the OMB has tendency to favor one party over the other when rendering a decision and how these decisions are being made. Based on this information, this paper poses two research questions:

- 1. Do OMB decisions favor the municipality or developers when they are in direct opposition to one another?**
  
- 2. How important is expert testimony to OMB decision-making?**

### *Preliminary Support for Hypothesis*

Regarding the first research question, this author hypothesizes that in London, the municipality is more likely to be favored when in direct opposition to developers before the OMB. While the literature review highlighted developers' success in Toronto, the circumstances are much different in London. The logic behind this statement revolves around the London's Official Plan and zoning-by laws which promotes economic diversity and intensification. Provincial Policy Statements influence development decisions as well since these documents require municipalities to intensify and diverse economically where possible. Thus, for developers to win an appeal before the OMB, a drastic error in judgement by the municipality would have to be shown. With pro-development already instituted within the municipality's planning laws and regulations, it is

likely that additional concessions sought after by the developers would not be granted by the OMB.

Specifically for London, within its Official Plan and zoning-by laws, one can see rhetoric that clearly supports development more than it discourages it. In reviewing the City's Official Plan (OP), Chapter 2 discusses Council's strategic priority to support infrastructure renewal and expansion "to meet the needs of a growing community" (London's Official Plan, Chapter 2, p. 2). Furthermore, the City's OP states the support from Council to promote economic growth and diversification through office development, industrial development, commercial development and much more. Intensification through residential urban development was also stated as being expected and encouraged within the City's boundaries (Chapter 2, p. 6-12).

Chapter 11 of the OP deals with urban design principles. In this chapter, the City clearly lays out expectations of how development will commence and what guidelines developers must follow.

An important point to highlight is the City's request that all development must take into consideration natural features and try to "complement and protect" these areas (p. 1).

Furthermore, the chapter requests redevelopment of structures that have undergone a land-use change to do so in another appropriate space as redevelopment is "encouraged" (p. 2). That is, where existing structures are forced to vacate due to land-use changes, the City strongly supports reconstruction of the establishment in a better suited zoned area.

It also important to look at the London Economic Development Corporation (LEDC) which is the City's primary economic development body. According to Lyons (2015), its policy goals include business retention and expansion, workforce and downtown development, and business attraction. While the LEDC is interested in many aspects of improving London, development through new businesses is a big part of its mandate (LEDC.ca, About). According to Cobban

(2002), the LEDC is a “financially dependent corporation oriented toward attracting and retaining industrial development throughout the city” (2003, 239). While Council ultimately decides what development is greenlighted for construction, the LEDC does have a major influence in pushing an intensified and economic diverse agenda. The LEDC is certainly another piece of evidence that suggests London is pro-development

While the OP has been discussed briefly, there is far more language within the document that indicates that the City is pro-development in at least some capacity. To review the whole OP and the 51 zoning by-laws that the London has created is beyond the scope of this research.

However, it is important to note the pro-development rhetoric within these documents give some logical support to the hypothesis that has been stated. The LEDC and its role in the community is also another indicator that development is generally viewed as positive in London.

To the second research question, this author hypothesizes that in London, planning experts’ recommendations will be the most relevant factor the OMB takes into consideration when rendering a decision. This point is highlighted by Alder (1971), Clark, (1985), Chipman (2002), Krushnelnicki (2007), and Moore (2013). Barring any unusual circumstances in the City of London, the OMB should still favor expert testimony when rendering its decision.

## Methodology

The following section provides the framework used to answer the two research questions presented in this paper. The hope is that through the research design presented, other research can be conducted in the future to determine if municipal or developer favoritism exists before the OMB in other cities. While reviewing all cases between the years 2000 and 2015 would have been the most ideal situation to conduct my research, unfortunately London did not have a list of records of all cases heard between the municipality and developers during those years. Based on this limitation, the resource Lexis Nexus Quick Law (LNQL) – a case law database for all legal jurisdictions across Canada – was used to collect data to answer my research questions. Below are the research guidelines used to obtain these data.

To ensure that the results were as complete as possible, a single search function was used to attain the cases needed to for the study. Keeping the search parameters simple was the best way to achieve this result. As such, the following parameters were used to collect the cases needed to conduct the study:

**Tables 1 - Lexis Nexus Quick Law Search Parameters**

<i>Search Parameters (step-by-step order of completion)</i>
1. Select OMB case database
2. Search “London”
3. Select search function “last fifteen years”
4. Organize from “oldest first”

Under these search parameters, a total of 390 cases were generated. This paper is concerned with understanding how the municipality and developers fare before the Board when dealing with urban planning and development issues of a significant nature. Thus, minor variances were removed from the study to ensure that the results were not misrepresented in any fashion. To ensure these minor variances were not included, cases were isolated into three relevant legal issues for the study – official plan amendments, zoning by-law amendments and interim-control by-laws. This step was completed manually by reviewing the 390 cases generated and saving those results that dealt with the three issues presented in the previous sentence. This task was achieved by referring to the *Planning Act* and determining the section number that corresponds with these three issues. The *Planning Act* deals with official plan amendments under section 22, zoning by-law amendments under section 34, and interim control by-laws under section 38 (Planning Act, R.S.O. 1990, c. P.13). With this step completed, the total number of cases relevant to the study was narrowed down to 169 cases.

To organize the data, and ultimately answer the first research question, four categories were created – (1) municipality won, (2) developer won, (3) Board initiated compromise and (4) settlements. Category one, municipality won, identifies all cases in which the OMB rendered a decision undeniably in favor of the municipality. Category two, developer won, identifies all cases in which the OMB rendered a decision undeniably in favor of the developer. Category three, Board initiated compromise, identifies all cases in which the OMB rendered a decision that favored both the municipality and developer(s) to some degree which saw both parties receive partially what they were seeking in their proposals. Lastly, category four, settlements, identifies all cases in which the municipality and developer(s) reached a settlement that was supported by the OMB prior to it rendering a decision in favor of either party.

This study also aims to determine if individual property owners (IPOs) or corporate developers (CDs) are more likely to be successful before the OMB. This task was undertaken to better understand if one of these party's success rates has an effect on how often the municipality wins. With IPOs and CDs having different understandings of the law and different levels of available resources at their disposal, this information could be important to fully understanding the London case study. In reviewing the cases collected through LNQL, the data was organized by creating four categories: (1), individual property owners successful against municipality, (2), individual property owners unsuccessful against municipality, (3), corporate developers successful against municipality, and (4), corporate developers unsuccessful against municipality. Organizing the data from the two categories –municipality won and developer(s) won – these subcategories will ultimately create useful data to determine if there is any significant differences in success rates between individual property owners and corporate developers.

To organize the data, and ultimately answer the second research question, all cases were reviewed a second time to determine if planning experts' recommendations were used by the OMB in rendering a decision. Where decisions rendered by the OMB undeniably hinged upon planning experts' recommendations from either the municipality or developer(s), these cases were assigned a "yes" to help answer the second research question. Where the OMB relied upon any other method of evidence or matter of law to render its decision, these cases were assigned a "no" to help answer the second research question.

Lastly, where applicable, this London case study was compared to Aaron's Moore's Toronto case study. It is important to note some differences in methodology and to account for these differences when making comparisons. While the two studies are very similar in the information they collect, not all components of the research design are identical. Firstly, while the London

case study that is presented in this paper looks strictly at the municipality and developers in direct opposition to each other before the OMB, Moore's Toronto study also takes into consideration neighborhood associations when presenting his data. While neighborhood association cases are relatively small in number in Moore's Toronto study, they were nonetheless omitted where practical when comparing numbers between the two cities. Secondly, the London cases study will span 15 years of OMB cases while the Toronto case study spans only six years. Due to this, the relationship drawn between the two cities should be viewed with caution. .

Thirdly, while the London case study will provide interpretation for all of the data that is presented, Moore does not offer interpretation for every category he presents in his study. Thus, comparisons will only be made between the categorical information that is available in both studies.



## Case Studies

The following section will review two cases – one case in which the municipality won and one case in which the developer won before the OMB. In both cases, the municipality and developer were in direct opposition to one another. Each of these cases was carefully selected based on the data and discussion that is to follow in the remaining sections of this paper. The merits for the selection of these two cases is based on providing an example of the most common reasons behind either parties being successful before the OMB when they win. While each case is unique to itself, these two highlighted cases provide context regarding how OMB hearings are conducted and what are the most common factors leading to success. The cases that will be presented should not be used as strict evidence to support the data on their own. Instead, they give the reader some perspective to what is being discussed and considered during an OMB hearing. All information presented in these cases was taken directly from the decision orders created by the OMB and will be referenced by the appropriate paragraph number.

### *[2013] O.M.B.D. No. 421 – Shana’s Holdings Inc. vs. London (City) – Municipality Won*

On June 28, 2012, Shana’s Holding Inc. filed for an application for a Zoning By-law amendment to a R3-3 to allow for a single detached unit to be converted into a fourplex dwelling. The current property is zoned as R1-9 which does not allow any additional units in the residence. On October 9, 2012 City Council rejected the application citing that the proposed amendment did not align with the City’s Official Plan (paragraphs 1-4).

While the residence in question is close to the University of Western Ontario, it still is within the low density residential neighborhood that does not allow for construction of multi-residential

units in one dwelling. Despite this classification, it has become apparent from evidence that this unit at 260 Sarnia Road may fall within the NCNS OPA and NCNS ZBA of the Official Plan which deals with planning philosophy that helps with student accommodations. The unit in question is directly east of a University resident hall which is home to more than 1,000 bedrooms (paragraphs 5-10).

Planning expert recommendations were provided by two individuals. For the applicant, Harry Froussios, a planner with Zelinka Priamo Ltd. believed that the zoning by-law amendment should be allowed. Through the evidence presented, Mr. Froussios believed that the proposed amendment was aligned with the Provincial Policy Statement (PPS) 2005, was aligned with the City OP, was consistent with much of the rhetoric in the NCNS, and should not be considered spot zoning (paragraph 11)

City Planner, Craig Smith, provided expert evidence on behalf of the City. According to Mr. Smith, 260 Sarnia Road did not conform with the City OP, did not meet the criteria set out NCNS for an exemption, and did in fact meet the criteria of spot zoning (paragraph 12).

Mary Hryb spoke on behalf of the Sherwood Forest Ratepayers' Association (SFRA). Ms. Hryb spoke to the concern of SFRA believing that privacy would be an issue if the zoning by-law amendment were to be allowed. It was also mentioned the SFRA was concerned that the hearing could be "precedent setting" and that should this request be allowed, many other residencies would follow suit changing the nature of the neighborhood (paragraphs 13-14).

Based on the evidence provided, the Board member stated that for the zoning by-law amendment to take place, it must conform to the City OP. In reviewing the OP, the Board member cited section 3.2.3. which stated that the intensification projects must "ensure the character and

compatibility with the surrounding neighborhood are maintained” (paragraph 17). Furthermore, section 3.2.3.2 states that any zoning by-law provisions must ensure that the property in question “recognize the scale of adjacent land uses and reflect the character of the area” (paragraph 18). Lastly, the Board member cited section 3.2.3.4 of the OP which states that all applications must be “sensitive to, compatible with, and a good fit within, the existing surrounding neighborhood” (paragraph 19). In reviewing the NCNS, the Board member felt that the proposed amendment was ad hoc and unlikely to be precedent setting. (paragraphs 23-24).

Based on the reasons mentioned above, the Board member felt allowing the zoning by-law amendment would be in contradiction of the OP and the character of the neighborhood. In accordance with the *Planning Act* for having regard for Council’s decision, the Board member dismissed the applicant’s appeal. The Zoning by-law amendment was not approved (paragraphs 25-27).

*[2013] O.M.B.D. No. 372 – London (City) Zoning By-law Z-1 (Re) – Developer Won*

In April of 2013, Kapland Inc.’s appeal requesting a zoning by-law amendment to convert an existing duplex into a triplex was heard before the OMB. The property in question is located at 754 Maitland Street and is surrounded by single dwelling residences. The property relies on the use of a Municipal laneway to access many properties in the back where the original duplex had been permitted to be built. The proposed amendment by Kapland Inc. did not suggest any external changes to the building. The additional floor space would be created by converting the lower level of the duplex into additional dwellings (paragraphs 1 to 4). Under the City’s Official Plan, the Low Density Residential designation of Maitland would still allow for a triplex to be

zoned (paragraph 5). Despite this, in paragraphs seven to nine, the Board member clearly indicates that the current zoning by-law for the area only allowed a maximum of two dwelling units in a single residence. Thus, the matter before the Board is whether or not a zoning by-law amendment should be allowed to permit three dwelling units (triplex) in a single residence.

During the hearing, the Board member heard from two planning experts – one from the developer, Kapland Inc., and one from the City planner. Kapland Inc.'s planning expert, Richard Zelinka, provided a breadth of information and knowledge in support of the zoning by-law amendment. Mr. Zelinka's most prominent evidence were pictures of two triplexes and one five plex that already existed in a block radius of 754 Maitland Street (paragraph 12 and 13). Mr. Zelinka also familiarized the Board with the Provincial Policy Statement (PPS) regarding intensification. In reviewing the PPS, Mr. Zelinka was satisfied that Kapland Inc.'s proposal conformed to the PPS' intensifications guidelines and thus the zoning by-law amendment proposed by the developer should be allowed (paragraphs 17 and 18). In turning his attention to the City's Official Plan, Mr. Zelinka quotes the document as promoting "efficient use of land and encouraging compact urban form" (paragraph 19 and 20). He also showed that the Official Plan supported the notion of amending zoning by-laws to allow for conversion of single-use dwellings to accommodate intensification (paragraph 21). In conclusion, Mr. Zelinka believed, based on other dwelling units in the area exceeding the City mandated two dwelling units per residence, and with the rhetoric of the Official Plan and the PPS supporting intensification, that the proposed zoning by-law amendment by Kapland Inc. should be allowed.

The City staff expert planner, Mike Corby, presented evidence that opposed the findings of Mr. Zelinka. To start, Mr. Corby presented an exhibit which outlined what he believed to be the neighborhood boundaries. They differed from those presented by Mr. Zelinka. In Mr. Corby's

exhibit, he showed that almost all the houses in the area were single dwelling residences (paragraphs 28 to 30). Mr. Corby also believed that the area has been intensified enough already and that Mr. Zelinka's claim regarding the PPS may be valid but that the PPS as a whole is inconsistent in what it does and does not allow (paragraph 33) Lastly, Mr. Corby was concerned about the "increased traffic, noise, and garbage" that would result from the zoning by-law amendment and subsequent addition to the current duplex (paragraph 35).

In paragraphs forty to fifty-two, the Board gives justification for its decision. In regards to the Official Plan, the Board agreed with Mr. Zelinka regarding the rhetoric that supports intensification where applicable. In regards to the surrounding neighborhood, the Board agreed with Mr. Zelinka that the neighborhood surrounding 754 Maitland Street was of a "mixed" nature and not primarily single dwelling units as proposed by City Planner Mr. Corby. In relation to the PPS, the Board agreed with Mr. Zelinka that intensification of units should be allowed where it makes sense in doing so. The Board member made clear that he took Council's decision into deliberation and that they were not required by law to take previous case decisions into consideration. Based on these finding, the Board found in favor of Kapland Inc.'s appeal, and ordered the zoning by-law amendment to take place to allow 754 Maitland Street to convert the current duplex into a triplex.

### *Conclusions to Consider*

While only two cases were summarized within this section, they were chosen purposefully as they represented the OMB procedures and ultimate reasoning for its decision for a vast majority of the cases reviewed in this research. As can be seen through these summaries, in both cases, planning experts' recommendations were the main source of evidence that the Board members relied upon to make its decision.

Furthermore, both of the cases reviewed above clearly show how often the OMB relies upon the City of London's Official Plans and zoning by-laws to help render its decision. In almost all of the cases reviewed, it is one of the planning experts for either party who will reference these planning documents to support his position. In many, but not all, cases, the OMB relies on these planning documents to help make its decision. With the establishment of the City of London promoting development within its planning documents, these cases further support the notion that developers may have a difficult time being successful before the OMB.

The next section will present, analyze and interpret the data that was collected.

## **Results and Interpretation of Data**

### *Introduction*

The following section will present the results from the paper's two research questions that were stated earlier. Results and Interpretation of these results will be organized by research question. Comparisons to Moore's Toronto study will be made where applicable.

### *Statistical Significance of Data*

Both internal validity and external validity are important to ensure that the study conducted is sound in its reasoning and sample size. The data presented in this paper is nominal. Based on this, a binominal test has been selected for this research to determine the statistical significance of the data presented. This binominal test will help determine if the results presented are random in nature or if the results are trended in a direction that suggests that they could not have occurred just by chance. The binominal test will allow for confident interpretation of the results presented should a high p value be present. Due to a directional hypothesis being stated for each research question, a one-tailed P value has been selected. An alpha level of .05 was selected based on common selection among academics when testing a hypothesis.

### Research Question # 1 Results

Factoring in the case criteria needed for this study – zoning by-law amendments, official plan amendments, and interim-control by-laws – the relevant cases were narrowed down to 169 out of the 390 that were surveyed for the relevant years. A further 81 cases were dismissed on the grounds that the hearing did not result in a decision by the OMB. These dismissed cases ranged in their subject matter from pre-hearings, cost motions, adjournments, correction of errors, and

more. These dismissed cases provided no information as to whether or not the municipality or the developer are favored before the OMB based on their subject matter. For the purposes of this study, they have been discarded. Out of the 169 cases that pertain to the three criteria mentioned earlier in this paragraph, 88 were relevant to help answer the research questions presented in this paper.

Out of the 88 cases reviewed in this study, the Municipality won 37.5 per cent of the time, the Developers won 21.5 per cent of the time, a Board Initiated Compromise occurred 17 per cent of the time, and, Settlements were reached between the two parties and accepted by the Board with either slight or no modifications 24 per cent of the time. The results are provided in the chart below.

**Table 2 - Ontario Municipal Board results for London between 2000 and 2015**

<b>Outcome</b>	<b>Cases Won</b>	<b>Percentage of Cases Won</b>
Municipality Won	33	37.5%
Developers Won	19	21.5%
Board Initiated Compromise	15	17%
Settlements	21	24%

The initial research questions asked whether or not the municipality of London or developers were more successful when in direct opposition of one another before the OMB. The hypothesis that followed stated that the municipality of London would be more successful before the OMB. The reasoning behind this hypothesis related to the fact that London's Official Plans and zoning by-laws promoted development, and thus for the developer to be successful before the OMB,



they would have to show egregious error within these documents. The binominal test presented the following information:

- Number of cases won by municipality– 33 cases
- Total cases in which the OMB rendered a decision where the Municipality or developer won outright – 52

Based on these numbers, a one tailed p value of .0352 was calculated. With such a strong p value represented, it can be confidently stated that the hypothesis is supported and that the null hypothesis can be disregarded.

The literature review clearly indicated that well-thought out design plans and expert testimony are imperative to succeed before the Board. To further illustrate this finding, the next subsection tries to determine if individual property owners or corporate developers have different success rates. If they do, an examination as to why differences are present will be undertaken. By including this data, further understanding of why the municipality is more successful than the developers in London may become clearer.

#### *Individual Property Owners vs. Corporate Developers*

The goal of this subsection is to determine if there is any significant differences in success rates between the individual property owners (IPO) and corporate developers (CD) when they are in direct opposition to the municipality before the OMB. This data is presented to give better context as to why the municipality has a better success rates than developers before the OMB. To determine this information, a review of the cases won by the municipality and developers was

conducted taking these two different development groups into consideration. The following results were collected during this process:

**Table 3 - Success rates of different development groups against the Municipality**

<b>Developer Group</b>	<b>Won</b>	<b>Loss</b>
<i>Individual Property Owners</i>	5	17
<i>Corporate Developers</i>	14	16

Based on the data presented in the table above, individual property owners (IPO) were successful 23 per cent of the time when in direct opposition to the municipality before the OMB. Corporate developers (CD) were successful 47 per cent of the time when in direct opposition to the municipality before the OMB. While the municipality was more successful against either developer group, the data supports the notion that CDs are more likely to be successful before the OMB than IPOs. With a fairly drastic gap – CDs winning approximately 24 per cent more often than IPOs – further exploration into the reason behind these numbers is warranted.

When IPOs won, 80 per cent of the time planning experts' recommendations were the main reason cited by the OMB when rendering a decision in favor of their proposition. When CDs won, 64 per cent of the time planning experts' recommendations were the main reason cited by the OMB when rendering a decision. Inversely, when IPOs lost to the municipality, 76 per cent of the time planning experts' recommendations were the main reason given by the OMB for its decision. When CDs lost to the municipality, 56 per cent of the time planning experts' recommendations were the main reason given by the OMB for its decision.

Based on these statistics, one can reasonably conclude that IPOs are far more reliant on the planning experts' recommendations to be successful before the OMB when in direct opposition to the municipality than CDs. While CDs still rely on planning experts' recommendations majority of the time to be successful before the OMB, they also rely on other evidence (poor planning rhetoric, matters of law, etc.) to help them be successful. But it should be cautioned that it is likely that CDs are more familiar with OMB proceedings which gives them a distinct advantage of being more successful before the Board in comparisons to IPOs. Further exploration into this specific topic would be extremely beneficial for cities, developers, and the academic community to understand. For the purposes of this research, it is enough to state that in the London example, corporate developers are more likely to be successful before the OMB when in direct opposition to the municipality in comparison to individual property owners.

#### *Results Comparison between Toronto Study and London Study*

Moore's study of Toronto presents a stark contrast to the results found in London. As mentioned, when the municipality of Toronto and developers confronted one another directly before the OMB, developers were successful in winning at a 3 to 1 rate (Moore, 2013). Moore offers two overriding reasons explaining why developers were more successful: one, the Municipality's refusal to take City planners' advice and two, developers finding inconsistencies within Toronto's Official Plans and zoning by-laws. In London, the case studies reviewed previously in this paper offered two overriding factors for success before the Board: one, understanding and applying the official plans and zoning by-laws properly, and two, understanding the importance of planning experts' recommendations. In the London Case study, it is apparent that the municipality was better at utilizing these two tools to its advantage. While each case offers its own merits to take into consideration, the cases [2013] O.M.B.D. No. 421 –

*Shana's Holdings Inc. vs. London (City)* and *London (City) Zoning By-law Z-1 (Re)* were typical of most of the cases reviewed as to why the OMB accepted or denied the appeal application.

According to Moore's (2013) data, out of the 296 cases reviewed, 122 cases were settled in Toronto (omitting the one neighborhood association settlement). Thus, Toronto's settlement rate was 41 per cent. With settlement occurring in Toronto 17 per cent more often than in London, this sizable increase is worth discussing to draw a possible, although not definitive, conclusion on why the two cities differed greatly.

In Moore's study, he speculates that with developers succeeding roughly two-thirds of the time, settlements occurred at an extremely high rate due the vested interest of the City to ensure some of their concessions were met. As Moore directly states in reference to the topic of settlement, "the threat of a hearing could be enough to convince city council to settle, especially if City Planning is supportive to the application." (2013, 70). To the second point of Moore's sentence, city planners provide pivotal influence in the OMB's decision making. This seems to hold true in London as well.

In returning to the London example regarding settlements, this author argues that the inverse of Moore's statement has the potential to give insight into the numbers. With the Municipality of London being successful 37.5% of the time when in direct confrontation with developers before the OMB, it seems advantageous to proceed with a hearing and forego settling based on this success. Like Moore, this statement cannot be proved unequivocally and instead is a commentary based on the deduction of the statistics provided.

In comparing the variable 'Board Initiated Compromise' between the Toronto and London, the difference is not so drastic. As shown in Table 2, out of 88 cases in the London study, OMB rendered a decision that favored both the developer and the municipality in some significant manner 17 per cent of time. In comparison, in Moore's Toronto study, the OMB rendered a decision that favored both the developer and the City 14.7 per cent of time (2013). With a relatively small difference in percentage points between the two cities, it is hard to determine what, if any, difference may be represented by the findings. In the London example, it is possible that both the city planner and the developer's hired planning experts may have both had good planning recommendations which enticed the OMB to support both parties in some fashion. In other words, a forced compromise by the OMB suggests good planning was presented by both the developer and the municipality. This plausibility can be supported by Chipman (2002), Bowman, (2001), and Krushelnicki (2007), all of whom speak to the importance of both expert testimony and sound planning recommendations being the cornerstone of increasing one's chances of winning in front of the OMB.

### Research Question # 2 Results

In reviewing the 88 cases used for the City of London, planning experts' recommendations were cited by the OMB 74 percent of the time in its decisions. This criteria for decisions that relied upon planning expert's recommendations is that the decision rendered was hinged upon these recommendations. Thus, while other cases may have relied upon planning experts' recommendations in some fashion, other more apparent reasons were commented on by the Board member when he/she rendered the decision. These decisions are not included in this numbers presented below.

When the percentage of planning experts' recommendations used in OMB decisions is broken down into the four outcomes – municipality won, developers won, Board initiated compromise and settlement – the data is worth discussing. Below is a chart that illustrates the percentage of planning experts' recommendations used in OMB decisions by category for London:

**Table 4 -Planning Experts' recommendations used in London between 2000 and 2015**

<b>Outcome</b>	<b>Cases Won</b>	<b>Total number of Cases in which Planning Experts' Recommendations were used</b>	<b>Percentage of Total Cases in which through Planning Experts' Recommendations were used</b>
Municipality Won	33	22	67%
Developers Won	19	12	63%
Board Initiated Compromise	15	12	80%
Settlement	21	18	86%
<b>Total</b>	<b>88</b>	<b>64</b>	<b>73%</b>

As the chart shows, when the 'Municipality Won', planning experts' recommendations were 6 per cent below the total percentage of all cases in which the OMB relied on planning experts' recommendations to determine its decisions (73 per cent). When looking when 'Developers Won', planning experts' recommendations is 10 per cent below the total percentage of all cases in which the OMB relied on planning experts' recommendations to determine its decision. With 'Board Initiated compromises', planning experts' recommendations was used roughly 7 per cent more often than the total percentage of all cases in which the OMB relied on planning experts' recommendations to determine its decision. Lastly, with 'Settlements', planning experts'

recommendations was relied upon almost 13 per cent more often than the total percentage of all cases in which the OMB relied upon planning experts' recommendations.

Before discussing these results and offering potential interpretations to the findings, results of the binominal test must first be reported to ensure these numbers are not of a random nature. Below is a chart showing the statistical significance of each category:

**Table 5 - Statistical Significance for Planning Experts' Recommendations**

<b>Outcomes</b>	<b>Total Cases in which Planning Experts' Recommendations were used</b>	<b>P Value using Binominal Test</b>
Municipality Won	22/33	.0401
Developer Won	12/19	.1796
Board Forced Compromise	12/15	.0176
Settlements	18/21	.0007
Total of all Categories	64/88	.0001

In reviewing the chart above, it can be concluded that all outcomes have a high p value with the exception of category "Developer Won". Planning experts' recommendations were still used at a high rate (63%) for this category; however, a relationship between developers winning and planning expert recommendations cannot be established with a high level of confidence. It should also be highlighted the p value for the total of all categories was calculated and supported a statistically significant relationship between outcomes and the use of planning experts' recommendations. It is important to further explore the outcome data and determine reasons for

why this occurs. The subsequent paragraphs will breakdown each outcome and offer further details and information to consider.

### *Municipality Won*

At first glance the total percentage of cases that relied on planning expert's recommendations when the municipality won before the OMB is relatively low. However, taking a closer look at all those cases provides useful information to the reasons why. Of the 33 cases in which the municipality won, only 11 of these cases did not use planning experts' recommendations when the OMB rendered its decision. Specifically looking at these 11 cases reveals that planning experts' recommendations were not relied upon because these cases simply never made it to this portion of the hearing. In these cases, the City's Official Plan and zoning by-laws were explicit in explaining why this particular development would not be allowed, or, the developer simply did not provide any evidence to support their case. Thus planning experts' recommendations in these cases were not omitted or disregarded, but instead were simply not needed to render a decision. As highlighted by [2013] O.M.B.D. No. 421 – *Shana's Holdings Inc. vs. London (City)*), the municipality is wise to rely on planning expert recommendations to achieve positive results before the Board.

### *Developers Won*

In reviewing the data on planning experts' recommendations used when developers won, 7 cases did not rely upon their recommendations out of a total of 19. As mentioned earlier, London has sound planning which works in its favor before the OMB; however there are a few cases where this fails to be true. Out of the 7 cases in which the OMB did not rely upon planning experts'



recommendations to help reach its decision, 5 of those cases cited that the City was not clear in its official planning documents to show that said development should not be allowed. To the second point, there was only one incident in which the OMB cited the City's lack of understanding of the Planning Act which led the OMB to find in favor of the developer. One case could not be categorized easily. As highlighted by *London (City) Zoning By-law Z-1 (Re)*, when developers win, planning experts' recommendations is still likely to play an important role in their success. Based on the p value however, this cannot be stated with a high level of confidence.

#### *Board Initiated Compromise*

In reviewing decisions in which the Board initiated compromise, in 12 cases the OMB relied upon planning experts' recommendations to help make a decision on the case. It should be expected that this variable should have a higher rate than the overall average due to contentious nature of these cases. In cases where the OMB decided in favor of both the parties, it seems probable that both sides presented good evidence that suggested the Board should force a compromise. In order for a proper compromise to be implemented, the OMB would have to rely heavily on both parties' planning experts to ensure that all relevant information is taken into consideration. This ensures that the OMB can give a decision that is beneficial to both parties. While there were three cases where the board did not rely upon planning experts' recommendations when rendering a decision, there is no clear indication of any trends as to why it did not.

### *Settlements*

In reviewing cases that resulted in settlements, an overwhelming majority (18 out of 21 cases) resulted in the OMB referring to the planning experts' recommendations when rendering its decision. As Moore (2013) stated regarding Toronto, this is of particular interest since settlements would not require the OMB to speak to the matter of the case at all unless they made adjustments to the settlement agreed upon by both the municipality and the developer. With this in mind, such a prodigious number of cases referencing planning experts' recommendations in settlements in London suggests that there should be some logical reason that supports doing so. While it cannot be stated with objective certainty, in reviewing the cases, it seems that using planning experts' recommendations in the matter of settlements is one of a procedural nature. All 18 cases in which planning experts' recommendations were used followed the same formula of stating the two parties, describing the issue that resulted in the dispute, described what the planning experts' recommendations from both sides argued, and ultimately the terms they settled on. This procedural direction at the very least gives a possible reason as to why the OMB constantly refers to planning expert's recommendations when cases are settled.

### *Results Comparison between Toronto Study and London Study*

While London and Toronto have very comparable numbers in terms of how often planning experts' recommendations is used when the OMB renders its decision, it is hard to determine if there is any significant relationship due to the minor variances in the research design for the two studies. In Moore's 2013 study, he determined that 70 per cent of the time planning experts' testimony was used to help the OMB make its decision. Of particular interest to this point, Moore states "even in instances where the City and appellant(s) reached a settlement, the OMB

still referred to expert testimony and opinion 61 per cent of the time, despite not needing to justify its position at all” (2013, 68).

While a relationship may be able to be established between to the two municipalities, caution should still be taken in definitively stating that Toronto’s and London’s data unequivocally have a very strong relationship. The London example presented offers potential insight as to why planning experts’ recommendations was used for the different outcomes, Moore does not go into such detail. Furthermore, the addition of Moore researching neighborhood associations as well adds another variable which this study does not take into consideration. This must also be factored into the equation when comparing the use of planning experts’ recommendations before the OMB. Nonetheless, it can be stated with a high level of certainty that in both the London and Toronto case study, planning experts’ recommendations are relied upon heavily by the OMB when rendering its decision. Thus Bowman (2001), Chipman (2002), and Krusheinicki (2007) assertion that expert evidence is pivotal to success before the OMB is supported by both these studies.

## Conclusion

This paper was concerned with determining how the OMB operates and makes its decision in London, Ontario. Specifically, the research conducted was interest in answering two questions:

- 1. Do OMB decisions favor the municipality or developers when they are in direct opposition to one another?**
- 2. How important is expert testimony to OMB decision-making?**

The hypothesis for the first research question stated that the municipality would be more successful before the OMB when in direct opposition to developers. This hypothesis was formulated based on London's Official Plan and zoning by-laws which were shown to support economic diversification and intensifications through development.

The hypothesis for the second research question stated that planning experts' recommendations would be the most effective piece of evidence relied upon by the OMB when rendering its decisions. This hypothesis was formulated based on secondary resources from Chipman (2002), Krushnelnicki (2007) and Moore (2013) which supported the notion that expert testimony was the overriding reason leading to success before the OMB.

The data presented supported both hypothesis for the research questions that were stated. In London, the municipality won 37.5 per cent of the time when in direct opposition to developers before the OMB. Developers were only successful 21.5 per cent of the time following the same guidelines. These numbers were then analyzed through a binominal test to ensure that the results were not of a random nature. Based on a selected p value of .05 at the base measure, a one tail

binomial test was conducted which resulted in a p value of .0325. This showed an approximate confidence level that there was a 97 per cent chance that the statistics presented regarding the municipality winning were not of a random nature. Planning experts' recommendations were relied upon 74 per cent of the time in London. Using the binominal test, a p value of .0001 was calculated. This strongly supports the notion that planning experts' recommendations is pivotal to be successful before the Board.

This research also asked whether or not individual property owner or corporate developers fared better against the municipality before the OMB. The findings seem to suggest that corporate developers won about 24 per cent more often than individual property owners; however, as has been shown, both lost more often than not against the municipality. While reasoning for corporate developers' success is a topic for another paper, there does seem to be evidence that they have more resources at their disposal in comparison to individual property owners. This may allow for better planning experts to be hired which is generally a recipe for higher success before the OMB.

Aaron's Moore's Toronto case study was used throughout this research to help with the methodology presented in this paper. Furthermore, it was also used as a point of comparison for the London case to determine if any relationships could be seen between the two cities. Due to differences in outcomes measured and time periods reviewed, the relationships and comparison points stated should be viewed with caution and cannot be taken as definitive.

The ultimate goal of the research presented in this paper was to add much needed empirical data regarding OMB decisions to the relatively scarce volume of literature on the topic. It was also interested in understanding OMB behaviour. Regarding its behaviour, two conclusions can be drawn – one, the Board requires proper and organized land-use plans, and two, planning experts'

recommendations are relied upon the help it make its decision. Thus the Board's behaviour can be described as procedural and consistent in what factors it considers when rendering a decision.

While the literature review offered some procedural and theoretical positions to the OMB and whom it may favor, Moore's study is currently the only other study that is of an empirical nature. The OMB is perhaps the most powerful land-use planning tribunal in all of North America – a point highlighted by Moore (2013). Considering this fact, it is imperative that academics, lawyers, practitioners and many other actors start to understand the variables relating to decisions and common OMB trends across different Ontario cities.

With many similarities and differences between Moore's Toronto study and the London case study presented in this paper, it is this authors hope that research of a similar nature is conducted in other cities across Ontario. The information collected from these studies have the potential to give much useful information to municipalities to understand how to be successful before the OMB, and where improvement could be made when they are unsuccessful. With the OMB wielding the power granted to them by provincial legislation, it is essential for cities such as London and others to understand the process, the trends, and decisions of the OMB to better their position in the future.

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City of London, Zoning By-law, Section 11, *Residential R7 Zone*

City of London, Zoning By-law, Section 12, *Residential R8 Zone*

City of London, Zoning By-law, Section 13, *Residential R9 Zone*

City of London, Zoning By-law, Section 14, *Residential R10 Zone*

City of London, Zoning By-law, Section 15, *Residential R11 Zone*

City of London, Zoning By-law, Section 16, *Office Residential (OR) Zone*

City of London, Zoning By-law, Section 17, *Office Conversion (OR) Zone*

City of London, Zoning By-law, Section 23, *Neighborhood Shopping Area (NSA) Zone*

City of London, Zoning By-law, Section 31, *Regional Facility (RF) Zone*



### Provincial Legislation

*Ontario Heritage Act, R.S.O. 1990, c. O.18*

*Ontario Municipal Board Act, R.S.O. 1990, c. O.28*

*Ontario, Provincial Policy Statement, 2005*

*Ontario, Provincial Policy Statement, 2014*

*Planning Act, R.S.O. 1990, c. P.13*

*Statutory Powers Procedure Act, R.S.O. 1990, c. S.22*

### Ontario Municipal Board Cases

*[2013] O.M.B.D. No. 372 – London (City) Zoning By-law Z-1 (Re) – Developer Won*

*[2013] O.M.B.D. No. 421 – Shana's Holdings Inc. vs. London (City)*

\*\*\* All cases used in this research can be found on Lexis Nexis Quick Law using the search parameters stated in the 'Methodology' section\*\*\*