Natural Hazards at the Ontario Municipal Board

An analysis of Ontario Municipal Board decisions between 2001 and 2005 on planning applications with a significant natural hazard component.

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My interest in natural hazards and OMB decisions developed from my work as a planner at the Rideau Valley Conservation Authority. The framework for this report was in a large part conceived after reading David Berney’s report to the Ontario Nature Federation, demonstrating that the analysis of OMB decisions could be a very practical and informative endeavor.

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Executive Summary

In Ontario, land planning decisions are delegated primarily to local decision makers. In cases where a decision is disputed, parties may appeal the outcome to the Ontario Municipal Board (OMB). The Board is provincially legislated to hear land planning cases in a quasi-judicial format and has the power to make binding decisions. These decisions are often contentious, as they are perceived as over-ruling local elected decision makers, as supporting a pro-development stance or as confirming the belief that appointed members of the board may make decisions that are outside their areas of expertise. Local land planning decisions that approve or refuse development in areas affected by natural hazard constraints are one type of appeal that the OMB may hear. This report examines the written decisions of OMB members on appeals made under the 1997 Provincial Policy Statement between 2000 and 2005 which have a significant natural hazard component. Specifically, the decisions are subjected to a content analysis to understand the general character of the appeals, what the outcome is and what rationale is provided for the final decision. The rationale, or reasons, provided in the written decisions make specific references to the evidence that guided the OMB member final decision.

In Ontario, the Ministry of Natural Resources (MNR) and watershed based Conservation Authorities (CA’s) are responsible for natural hazard management. This includes their participating in the planning process, reviewing applications and advising municipalities on appropriate responses. A characterization of the applications and local decisions that are most likely to be appealed, as well as the nature of the cases being presented to the OMB, may assist these agencies in identifying and resolving issues before initial local decisions are made. This can assist in improved investment of their time and limited resources.

The findings of this report indicate that private development proponents are most likely to appeal a decision that denies their desired development on their personal property. The most frequent appeals are for unfavourable decisions on minor variance applications and zoning by-law amendments, which provide the opportunity for relief from hazard-based zoning constraints. Of the various natural hazards in Ontario, floodplain constraints are most likely to be challenged, followed by slope stability issues. The analysis indicates
that, once before the Board, witnesses are most likely to be planners and technical professionals who provide policy interpretation, acceptable implementation standards, and information on risk and mitigation.

In presenting a case before the OMB, knowledge of the types of evidence cited as significant or important by presiding board members in their written decisions may assist CA's and MNR in preparing stronger credible cases. This report found that members place significant weight on provincial planning legislation and approved local planning documents such as official plans and zoning by-laws. Even more notable was the consideration and persuasive nature of evidence provided by expert witnesses, primarily professional planners and engineers. Finally, of the 32 cases analyzed for this report, it was found that the majority of decisions by the OMB respected the constraints imposed by the natural hazards. This suggests that natural hazards are considered a serious issue by the board members and that they have regard for the provincial interests and the advice of the agencies responsible for natural hazard management in Ontario.
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1.0 Land Planning and Natural Hazards

1.1 Introduction

Few would challenge the notion that land planning is an important part of achieving sustainable and successful development. There may be contention about how planning is done and the correctness of certain decisions but not about the necessity of planning itself. Planning includes the use of policies and tools designed to promote the development of communities with sustainable social, economic and environmental frameworks, provide solutions to problems and improve upon existing circumstances. These policies reduce risks to human safety, control economic costs and lessen environmental impacts. A common implementation tool is the use of land designations which specify where different types of development and land uses may occur. This evolved out of the recognition that certain land uses were not complementary, such as slaughterhouses adjacent to residential buildings. This type of spatial constraint-based planning can be used to prevent or encourage different types of development in prescribed locations.

Land affected by natural hazards such as floodplains, unstable slopes, organic soils and dynamic beaches is generally not considered suitable for most development. These natural hazards are defined by the Province of Ontario in the 2005 Provincial Policy Statement, Appendix A. Good land planning directs development away from hazardous areas which are identified through designations as subject to constraints. Unfortunately, land subject to hazards is often desirable for development due to the proximity to waterfront or because marginal lands are the only remaining development opportunities. In Ontario, decisions to allow or refuse applications for development on constraint lands are made by a provincially delegated municipal-tier elected local authorities. When these decisions are unfavourable to the proponent or another interested party, they may be appealed to the Ontario Municipal Board (OMB). It is not unusual that decisions made by the Board are subject to criticism due to the adversarial nature of the applications brought

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2 Ibid.
before them. Preparing for appeals is time-expensive and resource-intensive for all involved parties. In particular, Ontario’s agencies responsible for natural hazard management, the Ministry of Natural Resources (MNR) and the Conservation Authorities (CA’s), are often required to participate in these cases.

This report examines three aspects of the OMB hearing (process) that may assist involved parties in protecting the natural hazard constraint policies of the province through the investment of resources in the most constructive manner. The information collected attempts to determine, according to the written decisions of the OMB members:

- what is the nature of appeals before them;
- what evidence is important to their decision-making and
- do the decisions respect natural hazard constraints?

This is done firstly by analyzing OMB written decisions from 2000 to 2005 to identify the character of the applications and appeals that challenge or support constraints imposed by the presence of natural hazards. Secondly, the overall consideration accorded in decisions to the natural hazard constraint is evaluated by comparing the number that ignore the hazard, mitigate it or avoid it. Finally, the influential evidence cited by presiding members in arriving at their decisions is collated to rank importance. Overall, the results of this decision review and analysis provide some insight into recent OMB appeals and decisions that have a significant natural hazard component.

In addition, a 2005 report commissioned by the MNR clearly indicates that Ontario is losing ground in the reduction of adverse flooding impacts.\(^4\) Research suggests that, due to projected climate change, growing urban populations and greater development investments, the costs of floodplain events are going to continue to grow. The MNR report identifies an information gap on the success of provincial policy in reducing natural hazard risks. One aspect of this risk reduction is preventing additional development from being exposed to natural hazards. The information in this report may

provide one baseline for comparative purposes in the future evaluation of the success of the updated 2005 Provincial Policy Statement.

1.2 Planning in Ontario

In Canada, provincial governments have authority under Section 92 of the Canadian Constitution Act over municipal issues, which by extension includes land planning. The provincial framework, which guides decision-making on development, is often a coalition of agencies, policies and regulations that are implemented at the local level. The Province of Ontario operates its land planning processes through a ‘one window’ approach, funneled through the Ministry of Municipal Affairs and Housing (MMAH). Participation by relevant agencies, special interest groups, technical committees and other provincial ministries work with MMAH to develop appropriate land use policies. Ultimately, the MMAH is responsible for creating legislation and directives that provide policy guidance on matters of provincial interest and for developing procedural instructions to the delegated local decision makers. The resulting planning system is generally accepted in an urban context as an integral part of achieving community objectives in the interest of the common good. This is implemented through the delegation of decision-making, primarily to elected local authorities operating at the municipal tier, with appeal opportunities at the provincial level in front of the Ontario Municipal Board.

1.2.1 Ontario Planning Policy

The Ontario Planning Act and the Provincial Policy Statement are the key documents that guide land planning and decisions at the local level. They provide the legal authority, procedures and overall policies that decision-makers must use to support or refuse development proposals.

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5 Hodge, supra note 1, at 1.
6 Ontario Ministry of Municipal Affairs and Housing, Municipal Plan Review and One Window Provincial Planning Service (Toronto: Queen’s Printer for Ontario, 1999).
7 Ibid.
The Ontario Planning Act governs land planning and development, and is comprised of mainly procedural statements that control the mechanisms of application, review and, to a minor degree, approval criteria for development proposals. Some guidance on approval criteria is offered in sections 51(24) on subdivisions and 53(12) on severance approval.\textsuperscript{11,12} The review of minor variance applications is also provided with a statutory framework for reference in section 45(1).\textsuperscript{13,14} These directions to decision makers provide limited policy guidance to deal with the array of issues which arise in relation to land planning and development decisions.

The Planning Act also assigns the jurisdiction to hear appeals over certain land planning decisions to the Ontario Municipal Board. Land planning appeals are reviewed under both the Planning Act and the Municipal Act which sets out the broad areas of authority in which municipalities can act and how they may do so.\textsuperscript{15,16}

Finally, the Planning Act instructs delegated authorities to make decisions in conjunction with the Provincial Policy Statement (first published in 1997, revised in 2005) and to conform to provincial plans that are in effect.\textsuperscript{17} The Provincial Policy Statement (PPS) includes sections on efficient and cost-effective development and land use patterns, resources, and public health and safety, and must be read in its entirety in order to understand the relationship between and among the various sections and considerations. The original 1997 PPS required that land planning decisions made by delegated authorities ‘have regard to’ the stated policies, a significantly reduced degree of deference than given to the provinces interests after the 2005 revision which requires

\begin{footnotes}
11 \textit{Ontario Planning Act, R.S.O.} 1990, c. P.13, s. 53(12) requires that in determining whether a provisional consent is to be given, regard shall be had to the matters under subsection 51(24).
12 Consideration of either type of application requires that regard shall be had for a list of issues, including infrastructure and services, social matters including the welfare of the present and future inhabitants of the municipality, matters of provincial interest, the suitability of the land, conservation, and efficiency, etc. \textit{Ontario Planning Act, R.S.O.} 1990, c. P.13., s. 51(24 and 12).
13 \textit{Ontario Planning Act, R.S.O.} 1990, c. P.13, s. 45 (1); 2006, c. 23, s. 18 (1).
14 This section indicates that authorization may be given provided the proposal is “desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained”. \textit{Ontario Planning Act, R.S.O.} 1990, c. P.13., s. 45 (1).
17 Provincial Plans include the Greenbelt Plan, the Niagara Escarpment Plan, the Oak Ridges Moraine Conservation Plan and the \textit{Ontario Places to Grow Act, 2005, S.O.} 2005, c. 13.
\end{footnotes}
decisions to ‘be consistent with’ the policies.\(^\text{18, 19}\) During the period that this report is focused (years 2000-2005), the 1997 version was in effect. The PPS plays a central role in land planning in Ontario, as all official plans (see below), implementation of policies and decisions made by all authorities, including the Ontario Municipal Board, must satisfy its directives. It is important to note that the 1997 version of the PPS allowed for greater flexibility in the implementation of its policies for decision-makers because of the weaker ‘have regard to’ direction. This has meant that in cases where there are conflicts or matters that cannot be satisfied concurrently, more flexibility was available to arrive at decision.

1.2.2 Official Plans

Municipal Official Plans are created by local government to provide long-range general guidance for the future physical development of the area. These plans must be aligned with the provincial interests and be supported by local council and vetted by the Minister of Municipal Affairs and Housing before approval.\(^\text{20}\) Policies in Official Plans are implemented through appropriate land development or constraint designations and related zoning which usually include the identification of the hazardous lands. Zoning by-laws may spell out specific parameters for the physical development and practical use of the property.\(^\text{21}\)

1.3 Natural Hazards in Ontario

Natural hazards are an important consideration when planning for development activities. Phenomena such as earthquakes, floods, tropical storms, tsunamis, avalanches and landslides become ‘disasters’ when they coincide with the presence of humans on the landscape.\(^\text{22}\) The effects of these events range from the economic including destruction of the built environment and disruption or destruction of livelihood, to the loss of human life and community structures, and also resulting in negative impacts on the environment.

\(^{18}\) Ministry of Municipal Affairs and Housing, supra note 9, at 3.
\(^{19}\) The research in this report is conducted under the 1997 PPS, applications dated January 2000-May 6, 2005.
Humans have inhabited areas subject to natural hazard events since early settlement. The convergence of transportation and water resource needs has made land adjacent to water a favored location for human centres. This proximity to water increases the risk of being within a hazard area, as floods, slopes, tectonic plates and tropical storms as well as sensitive soils, often occur along the land-water interface.\textsuperscript{23,24} The planning of some historic settlements has been affected by the perception of such risks, such as in the choice of location for colonial enclaves established in Greece and Rome which show sensitivity to the extent of floodwaters.\textsuperscript{25}

The Great Fire of London in 1666 was a threshold for the end of completely unrestrained development in large urban areas, as rapid city growth and neglect of the urban environment exacerbated damage and loss.\textsuperscript{26} Following the event, urban planning, at least in the form of regulations on structural standards, minimum street widths, access to water for firefighting and separating undesirable land uses was conceived.\textsuperscript{27} The perception of disasters resulting from the influence of spiritual forces (the omnipotent God) succumbed to the domain of human manageability,\textsuperscript{28} and the idea that “ordinary people are worth protecting from peril” gained general acceptance.\textsuperscript{29} Extending planning to manage natural hazards has since grown out of advances in technological and scientific understanding\textsuperscript{30} and a demand for civic safety.\textsuperscript{31}

In North America, most post-1970 literature supports the use of land planning as the principal tool for the mitigation of hazards.\textsuperscript{32} This consensus follows a century of structural approaches, including levees and floodwalls, reservoirs, engineered land filling

\textsuperscript{26} Ibid.
\textsuperscript{29} Burby, supra note 25, p.30.
\textsuperscript{30} Camuffo and Enzi, supra note 28.
\textsuperscript{31} Burby, supra note 29.
and retaining walls that have been built to allow development in otherwise hazardous lands. These physical interventions have proven to result in high costs for construction and maintenance, negative environmental impacts and expose people and property to greater risk due to failure or under-design.33 Alternatively, land planning (and related regulations) can prevent the initial exposure to risk by addressing natural hazards in urban areas through an appropriate convergence of the spatial and human dimension, primarily through risk avoidance. Overall, planning programs can reduce losses at the most practical level, by their ability to direct development to appropriate locations and by implementing effective requirements for building, site design and redevelopment.34

Taking natural hazards into consideration during land planning exercises accounts for economic, environmental and public safety impacts, all of which have short and long term consequences. From an economic perspective, capital investment in areas identified as subject to hazards may provide short term gains in terms of an expanded tax base for the municipality and profit for private developers, however, over time the costs of disaster assistance, insurance claims, municipal response activity and community rebuilding are substantially higher.35 Environmental consequences from hazards in areas altered by human activity include increased damage to, and slower recovery of, natural systems, including water quality and quantity, species loss and erosion of the land base. The protection of public health and safety relates to those occupying the risk area at the time of an event, but also extends to the emergency service workers who respond to events, and may impact those outside the affected area due to loss of power or water supplies. Poor planning and legislation can exacerbate the vulnerabilities of human development to disaster; good planning can reduce and mitigate it.36

All regions of Ontario have been impacted by natural hazards such as flood events and erosion or slope failure, although to different degrees.37 Settlement of the province

35 Godschalk, supra note 32, at 6.
36 Pelling, supra note 23, at 6.
occurred primarily along the numerous watercourses and lakes, historically for military reasons and access to the water for irrigation, transportation and energy. A significant amount of development has continued to occur along these shorelines in the past century, increasing the risk of water-related hazards such as dynamic beaches, flooding and unstable slopes. Some major disaster events stand out in Ontario’s brief history. In the 1930’s and 40’s, the results of ongoing land, water and forestry practices including massive deforestation and the draining of wetlands exacerbated a drought cycle that resulted in poor air quality, overland topsoil loss, unreliable water quantities, increased flooding and erosion.\(^{38}\) Major social and economic hardships were experienced as a result.\(^{39}\) In 1954, Hurricane Hazel crossed South and Eastern Ontario, killing 81 people and causing social upheaval and hundreds of millions of dollars in damages. The repairs included the entire rebuilding of communities and infrastructure. Other significant flood events include the Grand River Flood in 1974 which hit the communities of Cambridge, Kitchener and Brantford. Between 1985 and 1986, properties along the Great Lakes were subject to record high lake levels which, when combined with a number of storms, resulted in substantial damages on private and public lands, including loss of structures and severe erosion of the land base.\(^{40}\)

A combination of the climate and topography of Ontario results in fluctuating seasonal water flows, particularly during the spring freshet of March and April. Aggravated by ice and debris jams, fast thaws or additional precipitation, many rivers flood during the spring.\(^{41}\) Urbanization has hastened stormwater run-off and encroached on the natural floodplain of rivers and the shores of lakes.\(^{42}\) Historical geological processes, including glaciation and old sea beds, have left behind organic soils and Leda clays which are unstable in certain conditions.\(^{43}\)


\(^{39}\) Ontario Ministry of Natural Resources, supra note 37, at 7.

\(^{40}\) Ibid.


\(^{43}\) Ontario Ministry of Natural Resources, supra note 37, at 7.
In recent years, the incidence of flooding in Ontario has increased, averaging 3.8 flood events per year between 1996 and 2003, with at least one flood emergency declared every year.\textsuperscript{44} Incidents of insurance claims or lawsuits for hazard-related property damages, such as foundation failure due to organic soils or slope movement, have appeared regularly in local papers. Climate change and the projected increase in severe weather events are most likely to have a negative effect in areas already subject to natural hazards, while creating new areas at risk.\textsuperscript{45}

1.3.1 The Ministry of Natural Resources and the Conservation Authorities

The Ministry of Natural Resources (MNR) and the Conservation Authorities (CAs) play a central role in implementing the province’s natural hazard policies. The MNR is the provincial body responsible for policy development and emergency management on matters relating to most natural hazards, including flooding, slope stability, organic soils and forest fires. Additionally, they provide liaison services between the province and the 36 CA’s which have a statutory mandate for conservation and watershed management.

The Government of Ontario passed the Conservation Authorities Act in 1946, in response to the public’s concern “that all the renewable natural resources of the province were in an unhealthy state”.\textsuperscript{46} CA’s are professional agencies that develop and deliver programs to manage resources on a watershed basis, including matters relating to natural hazards such as of flooding and erosion control. Part of these programs are regulatory controls on hazards lands which, under the Conservation Authorities Act:

\[
\ldots \text{allow an authority to make regulations applicable in the area under its jurisdiction} \ldots \text{prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development.}^{47}
\]

In most areas, this is implemented by identification of areas which include those adjacent or close to the shoreline of the Great Lakes-St. Lawrence River System or to inland lakes that may be affected by flooding, erosion or dynamic beach hazards; river or stream valleys; hazardous lands; wetlands; or other areas where, in the opinion of the Minister,

\textsuperscript{44} Wianecki and Gazendam, supra note 41.
\textsuperscript{45} Ontario Ministry of Natural Resources, supra note 37, at 7.
\textsuperscript{46} Conservation Ontario, supra note 38, at 8.
\textsuperscript{47} \textit{Ontario Conservation Authorities Act, R.S.O.} 1990, c. C.27, s. 28.1 (c).
development should be prohibited or regulated or should require the permission of the authority.\textsuperscript{48} These areas, identified on a schedule, are subject to the Conservation Authority regulations, which require that a permit be issued prior to any development.\textsuperscript{49} In practice, this means that a municipal authority cannot issue a building permit unless a CA permit is already in place.

The MNR supports the work of CA’s and the education of municipalities and the public through the production of guideline manuals and technical documents. Planners and other professionals, such as engineers and hydrologists, particularly those whose work involves natural hazards, are required to be familiar with these guidelines.

**1.3.2 Implementation of Natural Hazard Policy**

At the municipal level, hazard management is primarily done through planning tools such as hazard mapping, land designation and zoning controls\textsuperscript{50} which are implemented by the delegated decision-making of elected local authorities under the Planning Act. Proposals to develop or change the use of land in an area identified as hazardous are considered by local council with input from municipal planning staff, the CA or MNR, and citizens. Official plans, CA policies and land planning decisions are required to have ‘regard to’ the provincial interests outlined in the PPS. The natural hazards section of the 1997 PPS is divided into three main areas which must be cross-referenced with the definition section in order to appreciate the distinctions between hazardous lands and hazardous sites and specific areas such as a floodways or dynamic beaches. Essentially, the PPS identifies lands subject to natural hazards on which development and site alteration will not be permitted.\textsuperscript{51} It also identifies another category of hazardous lands from which

\textsuperscript{48} *Ontario Conservation Authorities Act, R.S.O. 1990, c. C.27, s. 28.1 (e).*

\textsuperscript{49} Under the Conservation Authorities Act, “development” means”

\begin{itemize}
  \item [(a)] the construction, reconstruction, erection or placing of a building or structure of any kind,
  \item [(b)] any change to a building or structure that would have the effect of altering the use or potential use of the building or structure, increasing the size of the building or structure or increasing the number of dwelling units in the building or structure,
  \item [(c)] site grading, or
  \item [(d)] the temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere; (“aménagement”), *Ontario Conservation Authorities Act, R.S.O. 1990, c. C.27, s. 28 (25).*
\end{itemize}


\textsuperscript{51} Ontario Ministry of Municipal Affairs and Housing, *Provincial Policy Statement, 1997*, supra note 9, at 3, s. 3.1.2.
development should be directed away\textsuperscript{52} and indicates that some development may be allowed provided a set of criteria are addressed.\textsuperscript{53} Definitions and a copy of the Section 3.1 Natural Hazards of the 1997 PPS are provided in Appendix A.

Regulations under the Planning Act require that CA staff conduct environmental reviews on applications made under the Planning Act within their watershed. This includes the municipality’s own applications to make amendments or revisions to its Official Plan or zoning by-laws. In 1983, a Memorandum of Understanding between the CA’s, MNR and MMAH delegated the CA’s the responsibility to review policy documents and development proposals processed under the Planning Act to ensure appropriate regard for Section 3.1 (Natural Hazards) of the PPS.\textsuperscript{54} As part of the province’s ‘One Window Planning System’, the CA’s provide advice to municipal planners and the elected local authority to ensure conformity with provincial interests and compliance with the CA’s own regulations. In areas where there is no CA, the local MNR office fulfills this function.

The review process results in the CA commenting on, supporting or objecting to applications once they have determined the proposal’s merits within their mandate. It should be noted that CA’s do not always agree with the internal assessment by local planners or the decision reached by the elected local authority. Although it is recognized that urbanization has increased the threat of natural hazards due to intensified development, population growth, escalating property values, aging infrastructure and an increasing frequency of extreme weather events, development proposals and their advocates have tested the commitment of authorities and decision makers to implement the controls required to mitigate risk.\textsuperscript{55,56} Despite recent events such as hurricane Katrina, the perception of consequences associated with natural hazards is often inadequate.\textsuperscript{57} This

\textsuperscript{52} Ibid, s. 3.1.1.
\textsuperscript{53} Ibid, s. 3.1.3.
\textsuperscript{57} Godschalk et al, supra note 32, at 6.
may be due to a continued belief in the potency of engineering, combined with a belief that these types of events are so rare that the risk is insignificant, and the acceptance of disaster assistance as a social entitlement. This has sometimes resulted in the marginalization of the importance of planning for events that happen with less frequency than the day-to-day demands of economic and development pressures.

When local authorities refuse to approve applications made under the Planning Act, proponents may appeal the decision to the Ontario Municipal Board (OMB). Similarly, appeals against application approvals may also be made by third parties, the municipality and by the local CA (or MNR) if it is their opinion that the result is not in keeping with provincial interests or regulations under the Conservation Authorities Act. However, CA’s have a specific mandate and, like many other appellants, have limited funding for this work; therefore, it has been my experience working with the Conservation Authorities that appeals to the OMB are carefully considered prior to investing staff time and funds. Furthermore, CA or MNR staff usually supports appeals or defense before the OMB that are launched by other parties, including the municipality, if there is a common interest in their outcome.\footnote{Conservation Ontario, Ministry of Natural Resources and Ministry of Municipal Affairs and Housing, \textit{Memorandum of Understanding on Procedures to Address Conservation Authority Delegated Responsibility}, (Signed Feb.12, 2001); Conservation Ontario, supra note 58, at 12.} Appeals are also regularly launched by private and corporate development proponents if their applications are refused or if they are not in agreement with conditions of an approval.
1.4 Role of the Ontario Municipal Board

The Ontario Municipal Board (OMB) was originally conceived in 1904 as the Ontario Board of Railway Commissioners, created to reduce the burden on the Ontario Legislature of passing numerous individual bills to approve expanding municipal street rails. The intention was to establish a specialized agency with knowledgeable, non-partisan appointed member delegates acting on behalf of the province under a general enabling legislation. This board was modeled on the Interstate Commerce Commission, which regulated railways and interstate carriers in the United States. In 1906, the agency evolved into the Ontario Railway and Municipal Board, acquiring powers related to municipal utilities and financial management. Finally, in 1932, it was renamed the Ontario Municipal Board. Formally an administrative agency, the board performs as an independent adjudicative tribunal established under the Ontario Municipal Board Act, subject to the rules of natural justice and the requirements of the Statutory Powers Procedures Act. The jurisdiction and powers of the Board have grown since 1932, and it is currently referenced in over 70 public statues, with responsibilities including hearing applications and appeals on financial issues related to development charges, land expropriation, municipal finance and other legislated financial areas. Currently, however, applications before the board have been predominantly centered on land planning reviews and appeals, establishing the role of the OMB into one primarily identified as a land planning tribunal.

The membership of the board is composed of individuals acting as adjudicators who possess specialized knowledge relevant to the legislation. The Chair, Vice-Chairs and sitting members come from a variety of professions and include: lawyers, planners, engineers, architects, accountants, farmers, environmentalists, teachers, business owners,

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60 Ibid.
61 Ibid.
62 Chipman, supra note 59, at 12.
65 Chipman, supra note 59, at 12.
and administrators. Board members are appointed by the Lieutenant Governor in Council and conduct hearings in assigned areas of the province.\textsuperscript{66,67} Although the total number of members is at the discretion of the Lieutenant Governor, during 2005, there were twenty members, six vice-chairs and one chair.\textsuperscript{68} They are supported by legal council, administrators, planning managers and a Chief Executive Officer. Their expenses and salary are appropriated by the legislature of Ontario.\textsuperscript{69}

### 1.4.1 Relevant Legislation

The Ontario Municipal Board operates under the Ontario Municipal Board Act, 1990, most recently amended in 2006.\textsuperscript{70} The Act establishes the Board's authority and general jurisdiction, and provides authority for the Board's Rules of Procedure. The Act sets out who is eligible to make an appeal and the procedures that must be followed to do so. The main purpose of the OMB’s land use planning work is to hear appeals and applications on a range of municipal and land-related matters including Official Plans, zoning by-laws, subdivision plans, consents and minor variances.\textsuperscript{71}

The Planning Act designates the function of appeal court to the OMB. The Act sets out the response the board may make to an appeal, stating that the Board may:

- (a) dismiss the appeal; or
- (b) allow the appeal in whole or in part and repeal the by-law in whole or in part or amend the by-law in such manner as the Board may determine or direct the council of the municipality to repeal the by-law in whole or in part or to amend the by-law in accordance with the Board’s order.\textsuperscript{72}

Specifically, the OMB may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if, 

- (a) it is of the opinion that,
  - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal,
(ii) the appeal is not made in good faith or is frivolous or vexatious,
(iii) the appeal is made only for the purpose of delay, or
(iv) the appellant has persistently and without reasonable grounds
    commenced before the Board proceedings that constitute an abuse
    of process;
(b) the appellant has not provided written reasons for the appeal;
(c) the appellant has not paid the fee prescribed under the *Ontario Municipal
    Board Act*; or
(d) the appellant has not responded to a request by the Municipal Board for
    further information within the time specified by the Board. 73

1.4.2 Decision Making

Decision making at the OMB is:

...based on the merit of the application as presented at the hearing by
the parties. Members must weigh the evidence from all parties and arrive
at a decision that is based on good planning principles. Members of the
Board are mindful of the decision-making authority of elected councils
and will overturn those decisions only if the evidence is sufficiently
compelling. Due to the nature of the process, it is understandable that
the various parties, as well as the public, may view decisions in different
lights. 74

It is clear that the board members must consider a variety of factors in arriving at a
decision on appeals. These include previous actions of elected local authorities, as well as
the guidance within the Planning Act, the Provincial Policy Statement and ministerial
guideline documents. However, decisions on land planning issues are seldom clear-cut, as
they impact and are affected by different and often competing interests. The OMB strives
for a consistent, rather than ad hoc basis for decision-making, reflected in the attempts to
outline the rationale for their judgments in their written decisions. Given the controversial
nature and often negative perception of OMB judgments, agreement on the actual basis
for decision-making remains contentious among those involved in the planning process. 75

John Chipman suggests in his book on the culture of the OMB, ‘A Law Unto Itself’, that
decision-making policy at the OMB has been an evolutionary process heavily influenced
by the Board’s historical legislative guidance and role in adversarial disputes. 76 The

75 Chipman, supra note 59, at 12.
76 Ibid.
original conception of the OMB was a judicially-oriented tribunal which developed a procedure for hearings modeled on that of the courts. This legal framework, abetted by the high proportion of members who were, and still are lawyers, has distorted what is formally recognized as an administrative body into one that often appears to have a legally-based preoccupation concerning the protection of private rights and interests. Furthermore, the procedural framework of the applicable legislation today has not always been as devoid of direction or based on such broadly articulated provincial interests as it is today. In earlier legislation, the Ontario Rail and Municipal Board was instructed by the Municipal Amendment Act, 1921, that support could be given to repeal or amend a restrictive by-law if they were satisfied “of the desirability of the proposed repeal or amendment in the interests of the owners of the land in the district affected and of the community as a whole”. This language expresses what Chipman identifies as a central theme in the OMB’s policy development: that significant attention be given to the evaluation of public and private interests and the use of adverse impacts tests. Certainly, specific reference to public and private interests, as well as statements regarding the positive and/or negative impacts of proposals, can be found in many written decisions.

The OMB website lists the evidence which it accepts as follows:

- environmental, social and economic issues
- provincial legislation and policy statements
- municipal planning documents (e.g. official plans and zoning by-laws)
- the rights of individuals, and
- the best interests of the whole community.

In this context, it could be construed that provincial legislation and policy statements are of the same status as other evidence, and therefore, that the provincial authority in planning matters is to be accorded the same level of consideration as any other interests. A second implication could also be that ‘provincial interests’ are not always representative of the ‘public interest’, suggesting that the perception of ‘public interest’

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77 *Ontario Municipal Amendment Act, S.O. 1921, c.71.*
could be more closely identified with for example, what are actually the private interests of a group of citizens or other non-governmental stakeholders.

The literature on the OMB does not provide a definitive answer as to what the Board’s decision-making policies specifically are. Individuals and groups involved in the land planning process appear to have different perceptions of the biases inherent within the Board’s hearing process and decision-making. For example, development proponents may perceive the Board to be more pro-development than some elected local authorities. There are a large number of developer-driven appeals, particularly those arising from non-decision, suggesting that proponents see the OMB decision, despite the finality, as a favourable alternative to waiting for a decision from elected local authorities. Alternatively, interest groups such as Ontario Nature have gone so far as to commission studies on OMB decisions relating to natural heritage issues, in an effort to improve their success in front of the Board, as they perceive their interests to be unfavourably handled. Furthermore, Chipman’s study of cases between 1995 and 2000 clearly showed that social housing decisions were determined primarily on the basis of ‘adverse impacts’ on adjacent property owners, thus subordinating the province’s housing policy statement.

Conversely, information on the success or failure of OMB decisions preventing development in hazard lands is simply not available. Similarly, an understanding of the significance of different types of evidence considered by the Board on natural hazard matters is not published or expressed by Conservation Authority or MNR staff as known to the author of this report. A 2004 report commissioned by the MNR entitled the “Evaluation of Water Resource Management Strategies and Flood Damages” states that an issue warranting future study is the impact that the PPS has had on directing development away from flood-susceptible areas. Weight attributed to the provincial interests expressed in the PPS by the OMB in their decision-making is of considerable

79 Non-decision, refers to the refusal of a municipal approval authority to grant an application within the provincially legislated time frame.
81 Chipman, supra note 59, at 12, pp. 132-136.
82 K. Wianecki and E. Gazendam, supra note 4, at 2, p.22.
importance to the implementation of hazard management in Ontario. Regulations and policies in place by CA’s and MNR are aligned with this the PPS, as are constraint policies in Official Plans and zoning, all of which compose the Province’s mechanisms for handling natural hazards.

In addition to the directions contained in the PPS, MNR publishes guideline documents to assist the public and planning authorities with the interpretation of policies and to provide detailed, technical information and standards. For example, the guide “Understanding Natural Hazards” 83 discusses natural hazards in an Ontario context, expands on the perspective and policies of the province, provides acceptable standards and detailed technical approaches for evaluating and addressing hazards, relates hazard issues to ecosystem-based planning and management, and provides acceptable implementation options. Although these guideline documents are not regulatory, they provide a consistent and unequivocal interpretation of how to deal with matters relating to provincial interests, and are difficult to discredit or refute. Conflicting technical evidence may be evaluated on the basis of adherence to the procedures and standards identified in these manuals.

1.4.3 Natural Hazards at the OMB

The Province of Ontario depends significantly on land planning policies and tools to achieve long term sustainable urban and rural land use. Development activity should support economic, environmental and social objectives, and not increase risks or costs to the community. Avoiding exposure to natural hazards is part of sustainable development. The province directs local elected authorities to manage natural hazards by making decisions in accordance with legislated procedures and policies. As the final appeal body for land planning decisions, the OMB has the power to override or support the decisions of local authorities, or in some cases resolve the matter to the satisfaction of all parties. In each case, the OMB must have regard for the province’s policy direction while applying it in a local context. Local government staff and agencies, such as the Conservation Authorities, are usually responsible for conveying the local context and the policy environment to the OMB member. This may include direction provided in approved Official Plans and zoning by-laws, the expert opinions of qualified land planners,

83 Ontario Ministry of Natural Resources, supra note 37, at 7.
engineers and other professionals, and the relevance of established guidelines and applicable regulations such as the Conservation Authorities Act or the Ontario Building Code.\textsuperscript{84} Similarly, development proponents must show how their proposal is consistent with, or in support of, the PPS as well as the local situation or, conversely, why they should be granted an exception.\textsuperscript{85} Decisions made by the presiding OMB member usually consider this information and may also include aspects of private property rights, precedent, administrative error, opinion evidence (as opposed to expert evidence), the public interest and the potential for adverse impacts.\textsuperscript{86}

Appeals before the OMB are almost always adversarial in nature; thus, there is often disagreement over the outcome. The OMB is criticized for being pro-development, for being out of touch with current planning practices, for having appointed members overriding the decisions of democratically elected officials and for being inconsistent in their deliberations and decisions, making the outcome of appeals unpredictable.\textsuperscript{87} This report examines decisions with a significant natural hazard component to consider, with the expectation that some consistency and trends may be identified.

\textsuperscript{84} Ontario Municipal Board, supra note 78, at 16.
\textsuperscript{85} Ibid.
\textsuperscript{86} Ontario Municipal Board, supra note 78, at 16.
2.0 Research Method

2.1 Purpose

The purpose of this report is to identify predominant trends in Ontario Municipal Board appeals and related decisions between 2000 and 2005 relating to natural hazard constraints on development. The method chosen was based on a similar investigation undertaken for the Ontario Nature-Federation of Ontario Naturalists by David Berney and Sternsman International in October 2003. Their report reviewed decisions that had a significant natural heritage component in order to identify patterns and possible opportunities to improve future decisions. A categorization technique was used to identify relevant cases, and a simple content analysis was conducted on the written decisions issued by board members presiding over each case. An important distinction between David Berney’s approach and that taken in this report is that the natural heritage decisions were organized into two categories, ‘natural heritage’ appeals; and ‘development’ appeals. It was quickly apparent in the preliminary research for this report that there are very few ‘natural hazard’ appeals, the vast majority are ‘development’ appeals. A more useful approach for this report was to organize the appeals according to the outcome; that is, whether the natural hazard constraint was respected, mitigated by the imposition of conditions (typically structural design amendments or alterations to the proposal) or ignored.

Certain information can be consistently derived from OMB written decisions. This includes details of the original planning application, evidence presented and the reasons of the presiding member for their final decision. This report collects information from written decisions in order to provide insight into the character of applications which result in OMB appeals and the factors which may influence their final outcome. This information may be useful to commenting agencies such as the Conservation Authorities of Ontario and the policy work of the Ministry of Natural Resources. These agencies are responsible for participating in the land planning process as policy developers and in the evaluation of applications made under the Planning Act. MNR and the CA’s and have the

authority (delegated in the case of CA’s) to ensure that natural hazards are respected and that new development is not at risk. For this reason, OMB appeals in this area often involve the participation and expertise of these agencies.

2.2  Approach

To conduct the content analysis, appeals and their written decisions were identified in the OMB on-line database.89 The relevant information in the written decisions was collected on a spreadsheet and then categorized and coded to facilitate quantitative analysis. A table of the categories and coding is in Appendix II. The following provides a detailed explanation of the process used in performing this analysis.

2.2.1  Relevant Case Identification

To obtain a list of decisions for this study, parameters were chosen that yielded enough cases for meaningful data collection and a consistent legislative environment. It must be noted that applications under the Planning Act are reviewed under the legislation and council-approved policies in place at the time a complete application is made to the municipality. A significant threshold for policy change was the 1997 Provincial Policy Statement which was revised in May 2005. Therefore, for the purpose of this report, qualifying applications had to be submitted prior to May 2005 and fall under the 1997 PPS. The following process for identifying decisions was used:

i)  The Ontario Municipal Board has over 6000 written decisions available on-line starting in 2001.90 Decisions between 1989 and 2001 can be found using Quicklaw91 searches and copies of the written decisions must be requested. It was determined after a trial searching period that decisions from 2001 to present on applications made prior to May 2005 would yield sufficient data for the purpose of a meaningful analysis, although it excludes decisions made under the 1997 PPS between 1997 and 2001.

ii)  To isolate decisions that would include natural hazard considerations, searches of the OMB database were conducted using keywords. The OMB case keyword search checks the text within each decision for matching words. To understand what keywords would

90  Ibid.
yield the most relevant cases, different hazard-related words and combinations were tested. It was determined that the word ‘hazard’ was a key word to use in every search. However, hazard without an additional physical description returned many non-relevant cases. Combining the word hazard with a physical descriptor of the type of hazard consistently found relevant cases. These keywords were “hazard” + “flood”; “hazard” + “erosion”; “hazard” + “slope”, and “hazard” + “dynamic beach”. Other physical descriptors including storm, Timmins, Hazel, 1:100, great lakes, one hundred year, geotechnical, danger, damage, hazardous, were tested in addition to this list, however all relevant returned decisions were duplicates of ones already found.

iii) The searches returned lists of decisions that had the keywords in their texts. The lists were manually sorted to remove duplicate decisions and a master amalgamated list of 136 decisions was established (see Appendix C).

### 2.2.2 Decision Selection Criteria

Each of the 136 decisions was listed in a Microsoft Access database table and a preliminary read was conducted to ensure that each decision met the following screening criteria:

i) The decision had to be the final judgment rendered rather than one of many preliminary decisions. Although they are called ‘decisions’, OMB members produce written decisions that are not verdicts but are records of a preliminary decision on a matter. Additionally, a ‘decision’ may simply be a record confirming that a case has been withdrawn, settled or decided through mediated resolution.

ii) The information in the written decision was checked to ensure that that the appealed application was submitted under the 1997 PPS. In some cases the date of the application was given, other times the 1997 PPS or parts of it were mentioned. A few required telephone calls to be made to the respective municipal planning department to ask for the applicable dates.

iii) Decisions that met the above two criteria were read thoroughly to determine whether the case contained a significant discussion and dimension of the natural hazard in question. This criterion was important to ensure that decisions rendered on applications were based on the hazard component as the significant factor. It
was found in some cases that, although hazard issues were raised, they were determined not to be relevant, and the appeal and decision were based on other more significant determinants. The decision to rule out a ‘hazard’ as insignificant was based on whether the agencies responsibility for natural hazards (Conservation Authority or MNR) considered the hazard as a constraint. This position was clear in all the decisions as evidence, either testimony or written, was always referred to by the members in their decision.

This screening resulted in 32 decisions for analysis. A summary of each case was written for future referral (see Appendix D). Additional information on each case was collected to provide context for the decisions (see Appendix E – Appeal Characteristics). This included:

- the type of application that was the subject of the appeal;
- what the initial decision was;
- who the appellant and the defendant were and who represented them;
- whether the appeal was of the decision or of conditions on the decision; and
- what the natural hazard constraint was.

### 2.2.3 Evidence and Consideration of the Natural Hazard Constraint

The written decisions were used to determine the factors the presiding member(s) took into account when deciding the appeal. The general format of the written decision usually began by listing the parties, describing the proposal and making reference to who provided evidence and what the evidence was. The second part normally discussed the presiding members’ rationale for their final decision. The members will make reference to evidence they found to be persuasive or of importance in developing their decision. This is the information that was noted and recorded in the analysis conducted for this report. For example, if the decisions cited the proposal’s conformity or lack thereof with the PPS, this would be recorded as a factor of consideration. Likewise, if reference was made to the evidence or the credibility of an expert witness, this would be recorded. However, simply stating that an application falls under the PPS earlier in the written decision, or listing the parties who provided evidence, would not be recorded. Finally, if
factors were included in conditions (e.g. Approval required under the Conservation Authorities Act) as part of the OMB approval, they were interpreted as a decision factor.

A list of the considerations that members could have used in arriving at a decision was initially developed prior to data collection as a guide for record keeping. This preliminary list of factors was eventually revised to reflect additional factors that were clearly playing a role in decision-making as they were encountered when reading the decisions. All the decisions were put through a second round of analysis to ensure that no factors were missed. The considerations were determined to be as follows:

- Ontario Planning Act
- Regional or municipal Official Plan
- Applicable Zoning By-law
- Expert Evidence (provided by witnesses accepted as experts in their fields by the Board)
- Opinion Evidence (fact and layman’s opinion evidence provided by witnesses)
- Conservation Authority Regulations
- Adverse Impact (Understood to be a consideration of the negative effects the proposal or refusing the proposal would have on the greater community)
- Private Property Rights (Understood as the right of a property owner to have certain privileges under common law)
- Precedent
- Public Interest
- Administrative Error
- Technical Guidelines
- Ontario Building Code

The spreadsheet categories and counts of factors considered in the decisions are available in Appendix E – Decision Outcome and Evidence.

2.2.4. Challenges in Data Collection and Research Limitations

Developing a consistent and thorough record of the relevant cases and data was important for a meaningful analysis. Identifying the decisions and resolving the information in
them required devising some measures through trial and error testing and the development of rules to apply for consistency.

When searching for relevant cases on the OMB e-decision website, the search function is not well-explained. To determine the best search terms to use for the best results, many iterations of searches were initially performed and the results recorded. The compiled lists of decisions were briefly read to determine which the search terms were returning the desired types of records. During this process, a list of 28 records accumulated that were identified as clearly relevant cases. It was found that searching for a very broad term such as hazard or flood or organic or soil, etc. on its own returned far too many records, many unrelated to the exact topic of this report. Conversely, searching for very specific terms did not return records that had been identified as relevant. Finally, multiple searches were done until a combination(s) of terms that returned all the initially identified relevant records plus new records were confirmed. The final four search combinations returned all 28 records initially identified as relevant and had duplications among them. This was accepted as the most thorough list of relevant decisions for the subject time period, however there may also be additional relevant decisions not identified by this report because they did not contain the keywords used in the search. There may also be qualifying, relevant cases that are as yet undecided and thus not available.

For each case at the OMB, often multiple decisions are published (up to 19 in one instance). To identify the appropriate decision for analysis, all the decisions were read to determine which was the final decision on the hazard component. Other decisions including matters such as costs, identification of issues, adjournments and revisions to applications were struck from the list. Furthermore, decisions that were arrived at through an alternate resolution process, such as facilitation, mediation or pre-hearing agreements were not included in the analysis.

One component of the analysis required participants to be identified. At times it was difficult to determine who the counsel and participants were for each party and what their qualifications were. To resolve this, names were searched on the Internet. In the case of representatives, if they were not identified as a lawyer, they were identified as ‘other’.
To qualify for this research, an application had to be decided under the 1997 PPS. It was unusual for this to be explicitly stated in the decision. Alternative measures for making this determination included checking the date of the initial planning application number as they often make reference to the year that the application was submitted. All applications are considered based on the policies in place at the time the applications was submitted and considered to be complete. Applications submitted from 1998 to 2004 qualified. If the application date was not provided, the application was searched for on municipal websites. References to the application were often found in council minutes. If the application was dated 2005 or the year was not identified, the decision was read to check for statements that were identical to those out of the 1997 or 2005 PPS. If the case was still undetermined, contact was made with the appropriate municipal planning department. No cases were left undetermined.

The most challenging exercise in the identification of relevant cases was evaluating whether the ‘natural hazard’ was a significant component of the case? In some decisions, there were multiple issues being considered. In order to have a consistent and meaningful analysis, a conservative approach was taken. To be included in the analysis, the natural hazard had to be addressed in the final decision reasons, either as a constraint on the development or as an issue that the member felt was could be overcome or ignored. If the natural hazard was not addressed in the reasons, then it was assumed that it was not a significant component of the case.

In order to decide whether the hazard was satisfactorily addressed in each decision, three categories were employed. The hazard constraint was deemed to be completely ignored, respected or mitigated. The reason for having a ‘mitigated’ category was that in some cases, the resolution allowed development to proceed with conditions or changes that indicated the hazard had been mitigated. In order to determine whether or not this had been done satisfactorily, the position of the MNR or the CA (as the authorities on natural hazards in Ontario) was accepted. If the MNR or the CA indicated their satisfaction with the Mitigative resolution, the decision was considered neutral with respect to natural hazards in the analysis.
A final limitation on the work conducted for this report is that not all relevant decisions made under the 1997 PPS were included in the analysis. Decisions made after 1997 and prior to 2001 were not available on the OMB on-line website and thus were not in the pool of records to be searched. This could be addressed through searching Quicklaw, however they were not sought for this report due to their age, the difficulty involved in retrieving copies and the acceptable number of records found on the on-line website.
3.0 Findings

The use of a quantitative analysis allowed two types of information to be gathered for examination. The first group of data ‘described the case’ and provided an overview of the character of the appeals. The second group of data looked specifically at the ‘type and frequency of evidence’ that was considered in the decision-making process by the OMB members. The analysis was founded on categories defining specific attributes and counts of the occurrences within each category. That is, each time a case had a particular attribute, it was counted as an occurrence within that category.
3.1 Characteristics of appeals made to the Ontario Municipal Board for applications with a significant natural hazard component

3.1.1 Who is the primary appellant on these decisions and why is the appeal made?

The majority of appeals (18/32, or 56 percent), were made by private development proponents (see Table 1). Fifteen of those appeals (47 percent) were based on a desire for some type of development on their personal property that was denied to them at a municipal level due to natural hazard constraints. Appeals by a third party, most often identified as neighbours, were all in response to an approval given at a municipal level that they perceived to put their own property at risk. These accounted for 8 of the 32 appeals (25 percent). Commercial developers appealed four (12.5 percent) municipal level decisions (or lack thereof) not in their favour. The one appeal by a municipality was against a Committee of Adjustment decision that did not appear to have regard to the hazard constraint. Neither Conservation Authorities nor the Ministry of Municipal Affairs (who would have made an appeal on behalf of MNR) appealed any local level decisions.

Table 1.
Number of Appeals made by Different Types of Appellants

<table>
<thead>
<tr>
<th>Appellant</th>
<th>Total number of appeals</th>
<th>Appeal of an approval</th>
<th>Appeal the conditions of an approval</th>
<th>Appeal of a denial</th>
<th>Appeal of no decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Development Proponent</td>
<td>18</td>
<td>-</td>
<td>3</td>
<td>15</td>
<td>-</td>
</tr>
<tr>
<td>Third Party</td>
<td>8</td>
<td>8</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Commercial Development Proponent</td>
<td>5</td>
<td>-</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Municipality</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Conservation Authority/ MNR</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>
3.1.2 What types of applications made under the Planning Act are most often appealed?

Decisions on minor variances are most commonly appealed, accounting for 44 percent (14/32) of the cases analyzed in this report (see Figure 1). Zoning by-law amendments, including those combined with Official Plan amendments are the second most frequent appeals at 28 percent (9/32). The predominance of minor variance and zoning amendments may be due to the fact that many hazards are identified through zoning designations, and these types of applications are required to negotiate or seek relief from these constraints. Consents and subdivision applications account for 16 and 6 percent of appeals respectively (5/32 and 2/32), while official plan amendments account for 15 percent (5/32) when including those combined with zoning amendments. It is possible that fewer land division applications are appealed because fewer are applied for, or that the policies against lot creation within hazard areas are perceived as more difficult to overcome. Furthermore, there may be some relationship between the proportional types of applications that are submitted at the municipal level, and the relative proportional representation of those applications subject to appeals. For example, there are likely many more minor variances applications than subdivision applications made at the municipal level, therefore there are proportionally more minor variance applications appealed to the OMB.

![Figure 1. Percentage of Types of Applications](image-url)
3.1.3 Are lawyers usually employed as representatives, and if so, is there a discrepancy between which positions or party is more likely to utilize them?

The appellants and the defendants were almost equally likely to be represented by legal council, with lawyers appearing on their behalf 63 and 66 percent of the time respectively (20/32 and 21/32), (see Figure 2). Alternatively, appellants and defendants were 39 and 34 percent (12/32 and 11/32) as likely to be represented by an alternative agent. This suggests it was unlikely that neither the appellants nor the defendants had an advantage over the other based on representation by agents with legal qualifications.

Very similar numbers were reflected in those supporting a pro-development position versus those asserting the natural hazard constraints. Sixty-six percent (21/32) of the pro-development position and 63 percent (20/32) of the hazard constraint position were represented by legal council. This is an important variable, as the performance of the representative often makes a substantial contribution to the success or failure of a case at a hearing. The representative prepares the case, manages the presentation, conducts cross-examination, elicits opinions and evidence from witnesses and must do so in conformity with the approved practices and procedures. Lawyers, by their training and experience may be more successful than a professional planner or layperson in conveying their case to the presiding member. If there had been large discrepancies between what types of representatives were appearing for the parties or positions, then the validity of the hearing outcomes or the types of evidence cited as important by the presiding members could be influenced by the type of representative conducting the case.
3.1.4 What is the most common natural hazard constraint that is appealed?

Floodplain constraints were the subject of more than half (17/32) of the natural hazard-based appeals (see Figure 3). This is likely because Ontario’s settlement areas are frequently characterized by river and lake systems, and are thus subject to floods. Furthermore, floodplain mapping continues to improve and expand, as additional data are collected and modeling is improved. This results in more land being recognized as subject to constraints that need to be considered during the planning process. Also significant is the increasing value and scarcity of available waterfront land, which intensifies the pressure to develop it. Eight cases (25 percent) related to unstable slopes were the second most appealed hazard constraint, likely for the same reasons as floodplains since they are often associated with embankments along waterbodies. Dynamic beach hazards are generally limited to the Great Lakes and only accounted for three cases (9.4 percent). One single case based attributed to organic soils. It is likely that since organic soils are often associated with wetlands, most cases that had an organic soil component were considered primarily under natural heritage values rather than for hazard characteristics.

3.1.5 What types of witnesses give evidence at an OMB hearing and how commonly were they participants in the study cases?

Accounting for 62 of the 140 appearances cited (almost 50 percent), professional planners (a combination of private consultants, municipal and provincial agency planners) are the most likely to give evidence at an OMB hearing (see Figure 4).

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92 Private planners may be employed by development proponents, municipalities or other agencies.
Professional planners are often accorded expert status, and are able to offer interpretation of land planning policy and implementation. Important when considering hazard constraints would be the regard had for Section 3.1 (Natural Hazards) of the Provincial Policy Statement as well as any opportunities to mitigate risk. Providing technical support for the accuracy of hazard boundaries and the ability to mitigate risk are the engineers. Combining those with water expertise and geo-technical and civil professionals, engineers and related technicians make up another 25 percent (35/140) of the witnesses. Development proponents and third party participants, most often private property owners, make up less than 20 percent of witnesses (27/140), and are usually only qualified to give layperson’s evidence, generally limited to factual matters. Very few decisions make reference to the specific evidence provided by this group, as they tend to present opinions which are not supported by fact or qualifications. The remainder of witnesses are either specialists in a relevant field or generalists who may provide contextual or background information in a case.

Figure 4. Frequencies of Types of Witnesses Providing Evidence for Each Case
### 3.1.6 What Conservation Authority region experiences the most appeals?

The St. Claire Region CA had the most (five) appeals during the five year period, followed by two non-CA regions which are covered by MNR. Kettle Creek CA, Ausable Bayfield CA, Toronto Region CA, Long Point Region CA and the Upper Thames River CA each had two appeals and the remaining regions had one or no occurrences over the subject time period.

### 3.2 Evidence and Consideration of the Natural Hazard Constraint

#### 3.2.1 Out of the 32 OMB decisions, how did the member address the natural hazard component?

The majority of OMB decisions respected the constraints imposed by natural hazards (see Figure 5). Out of the 32 decisions, 18 (56 percent) resulted in the refusal of a development proposal or part thereof, in order to avoid the hazard. Ten of the decisions (31 percent) took advantage of opportunities to mitigate the hazard, allowing for some degree of development to proceed. This usually involved the imposition of conditions that required additional engineering or amendment to the original proposal. A very small group of decisions (4/32 or 12.5 percent) ignored the hazard constraint, either because the member did not perceive it as a risk, or because he/she felt it could be mitigated, despite the opinion of the CA or MNR.

![Figure 5. Outcome of Hazard Component at Hearings](image_url)
3.2.2 What type of evidence is most often cited in decisions?

There were 14 factors cited by OMB members as being persuasive to the outcome of their decisions. These included direction provided in provincial and local planning documents such as the Planning Act, the Provincial Policy Statement, local Official Plans, Zoning By-laws and technical guidelines. Presiding members cited interpretations and arguments presented by experts and occasionally layperson’s opinions. Regulatory requirements and constraints under the Conservation Authorities Act and the Ontario Building Code were cited as factors as well. Less prescriptive considerations were also cited, such as administrative error, the setting of precedent or private property rights, as well as the broad concern of adverse impacts and public interest.

The most common determining factor cited by presiding members in their written decisions is the evidence provided by expert witnesses. Out of the 32 cases analyzed, the evidence of expert witnesses was cited 25 times. Following in importance was a combination of provincial and local planning documents such as the Planning Act (cited 16 times) and the Provincial Policy Statement (18 times), in combination with local Official Plans (22 times) and Zoning By-laws (16 times). About one third of the decisions included factors such as public interest, adverse impacts, Conservation Authority Regulations, and technical guidelines documents in their reasoning.

There were no substantive differences noted between the decisions that respected or mitigated the hazard constraint and the decisions that ignored the hazard. In fact, the decisions that ignored the hazard constraint cited provincial and local planning documents and expert evidence more frequently (two out of the four cases) than the other factors. This suggests that the presiding members who decided to ignore the hazard based their deliberations on the same factors as those who decided to respect or mitigate the constraint.

93 Erroneous information provided to applicants by municipal staff or the incorrect issuance of a permit was considered an administrative error if either resulted in a requirement for a planning application.
Table 2.
*Number of Times Evidence is Cited as Significant in Decisions*

\[
\begin{array}{ccccccccccccccc}
\text{Factor} & \text{Planning Act} & \text{PPS} & \text{Op} & \text{ZB} & \text{Guideline Documents} & \text{Expert Evidence} & \text{Opinion Evidence} & \text{CA Regulations} & \text{Ontario Building Code} & \text{Administrative Error} & \text{Precedent} & \text{Private Property Rights} & \text{Adverse Impact} & \text{Public Interest} \\
\hline
\text{Overall} & 16 & 18 & 22 & 16 & 12 & 25 & 2 & 11 & 2 & 4 & 4 & 6 & 10 & 11 \\
\text{Hazard Constraint Respected/ Neutralized} & 15 & 16 & 20 & 14 & 11 & 23 & 2 & 11 & 2 & 3 & 3 & 5 & 9 & 11 \\
\text{Hazard Ignored} & 1 & 2 & 2 & 2 & 1 & 2 & 0 & 0 & 1 & 1 & 1 & 1 & 0 \\
\end{array}
\]

3.2.3 Are there certain characteristics of OMB decisions that ignore the hazards?

Due to the small sample of decisions that ignored the hazard constraint, it was not possible to make a determination with any level of significance of the differences between decisions that respected or ignored the hazard constraint. However, a few observations about the four cases that ignored the hazard constraint were made. First, three of the four cases\(^{94}\) were appeals by development proponents against refusals by the municipality. The MNR or CA participated in the same three of the four cases. The fourth case was an anomaly, as no party appeared to defend the decision (see Appendix D, Case # 30 ~PL050238). Second, out of the four cases, only one technical witness provided evidence for the hazard constraint side. The pro-development side of the cases had more (four) technical witnesses. Third, the Provincial Policy Statement and the local Official Plan were cited as influential factors in only two of the four cases. Finally, in all four cases the natural hazard constraint was the floodplain.

In three of the four cases, (the fourth being the anomaly previously mentioned) the OMB member decided that the flood hazard could be addressed through engineered floodproofing and/or restrictions on use (see Appendix D, Cases # 15 ~PL050238; #33~PL011001; #64~PL020894). This appears to suggest that the additional technical witnesses provided by the development proponents were a successful strategy to

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\(^{94}\) Decisions that ignored the hazard constraint: PL020418, PL050238, PL011001 and PL020894, see appendix E.
overcome the constraint. Furthermore, in each of the three cases, the opinion of the Conservation Authority or MNR staff was ignored, and in the case involving the creation of two lots in the floodplain (#64-PL020894), neither the PPS nor the local Official Plan were cited as a decision factor. Overall, although there are some points to consider in these cases, no clear conclusions can be drawn.

3.3 Conclusion

The analysis of the 32 decisions revealed characteristics that can be used to identify the general the nature of the appeals. This information is helpful to understand who brings forth appeals and why, providing insight into the trends and issues that require the attention of those working in the field of land planning and natural hazard management. Recording the types of evidence and the frequency with which it was cited indicates that there is a propensity towards certain forms and categories of evidence, useful for hearing preparation and the evaluation of a cases merit. Finally, although there were not enough decisions that ignored hazards to provide sufficient data to compare with decision that did respect or mitigate hazards; the overall outcome of the decisions provides insight into the consideration of natural hazards by the OMB during the 2000 to 2005 period.
4.0 Analysis and Conclusion

The investment of resources required to participate in appeals before the OMB, combined with the contentious nature of its outcomes, suggests that involved parties need a better understanding of how decisions are made. In the case of development proposals affected by natural hazard constraints, commenting agencies such as the Ministry of Natural Resources (MNR) and the Conservation Authorities (CA’s), who are responsible for natural hazard management, may benefit from information on the general character of decisions arising from these appeals. The written decisions analyzed in this report provided information on the character of the appeals, the most influential evidence and the general outcome of decisions on appeals that challenged or supported constraints imposed by natural hazards. Decision trends regarding planning applications may also be interpreted as an indicator of the effectiveness of provincial planning legislation, policy and implementation in dealing with natural hazards and mitigating risk.

4.1 What is the nature of appeals before the OMB?

Clearly, preventing appeals and hearings before the OMB by initial intervention is the least expensive and most efficient way to participate in the planning process. The findings indicate that private development proponents are most likely to appeal a decision that denies their desired development on their personal property. These appeals are often for refused minor variance applications and zoning by-law amendments, or conditions imposed on approvals that the proponent does not agree with. Floodplain and slope constraints are most likely to be challenged. Most appeals are not successful in overcoming the hazard constraints; at best, mitigating conditions or alterations that allow for some development may be achieved. This suggests that better information needs to be conveyed to private development proponents before the planning application is initially submitted and the entire process set in play. The practice of pre-consultation and clear communication of the provincial and local policies, including the provision of relevant documents should be adhered to. In this regard, it is interesting to note that only four decisions were appealed by corporate development proponents and all of these were of non-decisions or conditions. Three of the four decisions required that development respect the constraints of the natural hazard. The small number of corporate development

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proponent appeals and their low success rate may indicate that familiarity with the OMB and their treatment of natural hazard issues is considered a higher risk appeal to undertake. The investment of resources required to mount an appeal that has a low chance of success simply may not make sense in a business case. Conversely, private property owners likely have a more personal stake in their application and may not be as familiar with the process and the unfavourable outcomes.

4.2 What evidence is important to the OMB’s decision making?

The findings of the report suggest that resources should be invested in some key areas when preparing for a hearing. Notably, the evidence and opinions provided by witnesses with professional expertise in relevant planning and technical fields appears very influential, cited in 25 of the 32 decisions. This professional expertise is an important component to ensuring that policies and guidelines are properly interpreted and implemented. Combining this function with the results indicating that provincial and local approved planning documents, cited in more than half of the decisions, are guiding much of the decision making by OMB members, reinforces the value of having experienced and competent professionals providing evidence. The importance accorded to provincial planning legislation and approved local planning documents also suggests that the current strategy for conveying provincial interest through a hierarchal approach is effective and that the information in this material is collectively and successfully directing development away from natural hazards. Despite the lack of approval criteria provided by the Ontario Planning Act, it is clearly providing some direction for decision-making at the OMB, as is the Provincial Policy Statement. In fact, the success of the 1997 PPS, despite its weak directive that development decisions must simply ‘have regard for’ its policies, indicates the significant amount of deference that it is given. Official Plans and Zoning By-laws also appear to play an important role in the evaluation of development applications at the OMB despite their regional nature. The frequency with which they are cited in the written decisions may be interpreted to indicate that the OMB is deferring more to local level planning polity, at least as far as natural hazards go, than is generally perceived. These strong influences on the decisions of the OMB in these cases may be useful guides for the investment of resources when preparing for hearings.
4.3 Do the OMB decisions respect natural hazards constraints?

Overall, the most substantive findings of this report indicate that natural hazards are considered a serious constraint on development, and that OMB members have regard for provincial interests and advice of the agencies responsible for natural hazard management in Ontario. Of the 32 cases analyzed for this report, 28 of the decisions respected or mitigated the hazard constraint. This is important because it offers assurance that participation in OMB hearings to represent provincial interests with respect to natural hazards is not a futile or meaningless endeavor. OMB decisions on these matters appear to reflect successful implementation of hazard management through land planning. The findings of this report may reassure those involved in natural hazard management and land planning in Ontario. The investment of resources to undertake participation is worthwhile and substantially contributes to a key component of hazard mitigation in Ontario.

4.4 Future Research

Additional investigations could reinforce the optimism of this report and gauge improvement or decline in the implementation of natural hazard constraints at the provincial level. Further research could include a similar analysis conducted on a larger sample of relevant cases. Including records back to May 1994 when the first comprehensive set of provincial policy statements came into effect might show an interesting historical progression of decisions relating to natural hazards and provide insight into the development of floodplain management through planning over time. An extended time frame was not useful for this study as the May 2005 revisions to the 1997 Provincial Policy Statement have recently changed the policy environment. However, in the future, a more detailed analysis using statistical tools might be possible if more cases were identified. Another interesting subject for research would be to identify the hazard mitigation techniques and conditions, in both adversarial and settled appeals that were used to address natural hazard constraints. The dissemination of this information could help resolve conflicts in advance of appeals reaching the OMB. Finally, a qualitative analysis, based on interviews with retired board members, which evaluated the evidence
that was persuasive to the outcome of decisions might provide a more nuanced version of the results of this report, in addition to reinforcing the accuracy of these findings.

The 2004 report commissioned by the MNR entitled “Evaluation of Water Resource Management Strategies and Flood Damages” identified that the impact of the PPS on directing development away from the flood-susceptible areas was an issue that warranted future study.95 The present report has responded to these challenges and determined that considerable weight was apparently attributed to the provincial interests expressed in the PPS by the OMB in their decision-making. A second study, mirroring the data collection and analysis done in this report, for five years of appeals under the new 2005 PPS (2005-2010) would indicate whether changes to the new PPS further improved the outcome of OMB decision-making with respect to natural hazard constraints. Significantly, the 2005 PPS now includes the directive that development decisions must ‘be consistent with’ the policies within the statement, whereas the 1997 version employed the weaker directive that decisions must ‘have regard to’ the policies. A second study of this nature would also show whether communication with development proponents had improved to reduce the number of appeals of this nature before the Board.

### 4.5 Conclusion

In conclusion, this report suggests that the results of the analysis were not in keeping with the general, often negative perception of OMB decisions by those involved in land planning and natural hazard management. The results provide an encouraging and positive confirmation of the effectiveness of their work, and of the OMB’s responsible and comprehensive consideration of natural hazard issues. This is important as land planning is a key component in reducing future risks associated with development in areas subject to natural hazards. Combined with other aspects of natural hazard management, the continued implementation of risk reduction strategies through constraint-based land designations should, in the long term, support sustainable rural and urban development.

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*Ontario Municipal Amendment Act, S.O. 1921, c.71.*

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


Appendix A

3.1 Natural Hazards

3.1.1 Development will generally be directed to areas outside of:

   a. hazardous lands adjacent to the shorelines of the Great Lakes - St. Lawrence River System and large inland lakes which are impacted by flooding, erosion, and/or dynamic beach hazards;
   b. hazardous lands adjacent to river and stream systems which are impacted by flooding and/or erosion hazards; and
   c. hazardous sites.

3.1.2 Development and site alteration will not be permitted within:

   a. defined portions of the dynamic beach;
   b. defined portions of the one hundred year flood level along connecting channels (the St. Mary's, St. Clair, Detroit, Niagara and St. Lawrence Rivers); and
   c. a floodway (except in those exceptional situations where a Special Policy Area has been approved).

3.1.3 Except as provided in policy 3.1.2, development and site alteration may be permitted in hazardous lands and hazardous sites, provided that all of the following can be achieved:

   a. the hazards can be safely addressed, and the development and site alteration is carried out in accordance with established standards and procedures;
   b. new hazards are not created and existing hazards are not aggravated;
   c. no adverse environmental impacts will result;
   d. vehicles and people have a way of safely entering and exiting the area during times of flooding, erosion and other emergencies; and
   e. the development does not include institutional uses or essential emergency services or the disposal, manufacture, treatment or storage of hazardous substances.

Definitions

Defined portions of the one hundred year flood level along connecting channels: means those areas which are critical to the conveyance of the flows associated with the one hundred year flood level along the St. Mary's, St. Clair, Detroit, Niagara and St. Lawrence Rivers, where development or site
alteration will create flooding hazards, cause updrift and/or downdrift impacts and/or cause adverse environmental impacts.

**Dynamic beach hazard:**
means areas of inherently unstable accumulations of shoreline sediments along the Great Lakes - St. Lawrence River System and large inland lakes, as identified by provincial standards, as amended from time to time. The dynamic beach hazard limit consists of the flooding hazard limit plus a dynamic beach allowance.

**Erosion hazard:**
means the loss of land, due to human or natural processes, that poses a threat to life and property. The erosion hazard limit is determined using considerations that include the 100 year erosion rate (the average annual rate of recession extended over an one hundred year time span), an allowance for slope stability, and an erosion/erosion access allowance.

**Flood fringe:**
for river, stream and small inland lake systems, means the outer portion of the flood plain between the floodway and the flooding hazard limit. Depths and velocities of flooding are generally less severe in the flood fringe than those experienced in the floodway.

**Flood plain:**
for river stream, and small inland lake systems, means the area, usually low lands adjoining a watercourse, which has been or may be subject to flooding hazards.

**Flooding hazard:**
means the inundation, under the conditions specified below, of areas adjacent to a shoreline or a river or stream system and not ordinarily covered by water:

a. Along the shorelines of the Great Lakes - St. Lawrence River System and large inland lakes, the flooding hazard limit is based on the one hundred year flood level plus an allowance for wave uprush and other water-related hazards;

b. Along river, stream and small inland lake systems, the flooding hazard limit is the greater of:
   1. the flood resulting from the rainfall actually experienced during a major storm such as the Hurricane Hazel storm (1954) or the Timmins storm (1961), transposed over a specific watershed and combined with the local conditions, where evidence suggests that the storm event could have potentially occurred over watersheds in the general area;
   2. the one hundred year flood; and
3. a flood which is greater than 1. or 2. which was actually experienced in a particular watershed or portion thereof as a result of ice jams and which has been approved as the standard for that specific area by the Minister of Natural Resources;

except where the use of the one hundred year flood or the actually experienced event has been approved by the Minister of Natural Resources as the standard for a specific watershed (where the past history of flooding supports the lowering of the standard).

**Floodway:**
for river, stream and small inland lake systems, means the portion of the flood plain where development and site alteration would cause a danger to public health and safety or property damage.
Where the one zone concept is applied, the floodway is the entire contiguous flood plain.
Where the two zone concept is applied, the floodway is the contiguous inner portion of the flood plain, representing that area required for the safe passage of flood flow and/or that area where flood depths and/or velocities are considered to be such that they pose a potential threat to life and/or property damage. Where the two zone concept applies, the outer portion of the flood plain is called the flood fringe.

**Hazardous lands:**
means property or lands that could be unsafe for development due to naturally occurring processes. Along the shorelines of the Great Lakes - St. Lawrence River System, this means the land, including that covered by water, between the international boundary, where applicable, and the furthest landward limit of the flooding, erosion or dynamic beach hazard limits. Along the shorelines of large inland lakes, this means the land, including that covered by water, between a defined offshore distance or depth and the furthest landward limit of the flooding, erosion or dynamic beach hazard limits. Along river and stream systems, this means the land, including that covered by water, to the furthest landward limit of the flooding or erosion hazard limits.

**Hazardous sites:**
means property or lands that could be unsafe for development and site alteration due to naturally occurring hazards. These may include unstable soils (sensitive marine clays [leda], organic soils) or unstable bedrock (karst topography).

**One hundred year flood:**
for river, stream and small inland lake systems, means that flood, based on an analysis of precipitation, snow melt, or a combination thereof, having a return period of 100 years on average, or having a 1% chance of occurring or being exceeded in any given year.
One hundred year flood level: means

a. for the shorelines of the Great Lakes, the peak instantaneous stillwater level, resulting from combinations of mean monthly lake levels and wind setups, which has a 1% chance of being equalled or exceeded in any given year;

b. in the connecting channels (St. Mary's, St. Clair, Detroit, Niagara and St. Lawrence Rivers), the peak instantaneous stillwater level which has a 1% chance of being equalled or exceeded in any given year; and

c. for large inland lakes, lake levels and wind setups that have a 1% chance of being equalled or exceeded in any given year, except that, where sufficient water level records do not exist, the one hundred year flood level is based on the highest known water level and wind setups.

Protection works standards:
means the combination of non-structural or structural works and allowances for slope stability and flooding/erosion to reduce the damage caused by flooding hazards, erosion hazards and other water-related hazards, and to allow access for their maintenance and repair.

Wave uprush:
means the rush of water up onto a shoreline or structure following the breaking of a wave; the limit of wave uprush is the point of furthest landward rush of water onto the shoreline.
Appendix B
# Categories and Coding Key

## Case Information

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<th>Entry</th>
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<tr>
<td>Decision</td>
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<td>SL</td>
<td>Slope stability</td>
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<td><strong>Representative / Agent</strong></td>
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### Impact of Final Decision in Relation to Natural Hazard

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Appendix E
CASE SUMMARIES

1. **PL010485**
   Development proponent appeal to severance condition imposed requiring owner to receive permit from Conservation Authority for construction on new lot. No Conservation Authority representation or mapping details, only letter written by Conservation Authority informing council that property was in flood prone area. Applicant disputes location of floodplain on subject property. New re-worded condition on severance requiring permit if area is determined to be subject to regulations.

4. **PL050108**
   Development proponent requests rezoning from "environmental hazard" to environmental "hazard exception" to allow for construction of single family dwelling which is flood-proofed in accordance with the requirements of Conservation Authority and frontage on an open and maintained road is not required. Does not conform with Official Plan or PPS or zoning in place. Expert planning advice of municipal planner opinion persuasive and Conservation Authority engineer written technical submissions preferred to statements of development proponent.

5. **PL041143**
   Rezone to allow residential development on undersized lot subject to severe shoreline erosion. Mitigative erosion control methods proposed by appellant, but would have negative ecological impacts.

6. **PL030344**
   Development proponent proposes the creation of substandard lot (setbacks and size) entirely within floodplain. Decision is based on land planning policies, however, extensive evidence is provided by Conservation Authority regarding the flood susceptibility of the land in support of the referenced land planning policies.

11. **PL050382**
    Zoning by-law amendment to allow re-development of subject lands which allows commercial uses and accessory residential apartment. Extensive technical and environmental studies reviewed by Conservation Authority and support development. Appellant is adjacent landowner, presented no evidence to refute finding of technical studies (flooding, wave uprush) or of issues he claimed including: ice build up, view, and filling of land with debris. OMB awarded costs of $800 against the appellant for acting in an unreasonable manner as an appellant by providing very little evidence and by calling no witnesses and by providing no exhibits. $14,769.17 were requested by applicant who applied for zoning by-law amendment to cover charges for technical reports and work by municipality.

15. **PL020418**
    One lot with two residences divided by private right-of-way, development proponent appeal relating to conditions 1) to rezone as seasonal and 2) have engineer report demonstrating land is available on each property above flood risk. Severance was allowed with reworded condition that future re-construction will require adherence to minimum lowest openings standards, but both lots are entirely within floodplain. *Administrator from township previously worked for MNR and was able to provide some technical and policy floodplain interpretation; as well letters from MNR and Ontario Land Surveyor were submitted which provided some information on lands. However, both lands, according to Ontario Land Surveyor were within floodplain.*
20. **PL000927**
Municipality appeals minor variance allowed by Committee of Adjustment to further reduce setback for additional deck on legally non-complying house. After an adjournment, the defendant acquired an engineer’s report. All parties agree to conditions requiring engineering report and design to address slope stability hazard.

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21. **PL010867**
Peninsula lands subject to regular and frequent flooding. Official Plan amendment appealed by development proponent for non-decision by MMAH. Designation of lands as floodway, flood-fringe or residential is issue, as well as whether they can be filled to remove them from the floodplain. OMB decides lands must remain in floodplain and not be developed mainly due to upstream impacts if fill placed to elevate lands. Decisive quote from OMB member in written decision: “Frankly, there is simply no compelling reason to develop these (lands) ...The protection of public safety must be paramount in these circumstances.” (Robert D. M. Owen, OMB Vice Chair)

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24. **PL030150**
New deck to be constructed in hazard zone on lower bank of slope. Only structure to be on property at bottom of a slope, it is land locked from the owner’s parcel higher up, and they have easement to access over neighbour’s lands. New Zoning By-law coming into effect in municipality that would allow structure anyway. Administrative error as applicants filed for minor variance, but under 45 (2) rather than as 45 (1) at advice of township. Township planner raised this issue at Committee of Adjustment hearing but was not changed. OMB agree with planner that 45(1) is more appropriate to hear application. Conservation Authority does not object but requested conditions of construction that OMB included in approval.

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29. **PL050676**
Multiple property owners seeking to regularize existing or build new boathouses along dynamic shoreline through changes to recently approved Official Plan amendment. Some are illegally built. Board notes that Official Plan amendment should not be changed to regularize existing structures that it now prohibits consistently under all applicable policies. Legal non-conforming uses have their own rights. Stress placed on destabilization of slopes and public safety. Note: A settlement was reached between the municipality and several owners, in order to expedite the hearing, however the board felt the settlement also offended all the same reasons for passing the Official Plan amendment and dismissed it as well. The municipal planner whose opinion was much of the OMB’s consideration had weak support for the settlement. The main issue appears to appropriateness of policies to direct development away from hazards areas. A indicative quote by the presiding member in the decision: “(The) suggestion that the use of the term “generally” in policy 3.1 somehow opens the door to permit the consideration of the ...proposal provided the structure is properly engineered was directly contradicted... ... the PPS does not include policies that permit the application of engineering studies or other possible mitigation measures to overcome a shoreline hazard.” (J.A. Smout, OMB member).

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30. **PL050238**
Minor variance to allow retroactive approval of tiny addition with small, reduced setback in floodplain. Technical expert testified to lack of impact. No representation of defendant. Main issue is lack of floodplain impact.

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31. **PL020198**
Official Plan amendment enacted by town to restrict group homes, primarily from being in floodplain area. Board finds that although group home is not an institution, risk is too great and does comply with intent of restrictions in policies. Main issue appears to be safety of tenants.

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33. **PL011001**
Building permit issued and re-construction of full height basement completed without triggering review in hazard area. Previously was short crawl space. Essentially an administrative error. Board applied conditions to restrict habitation of additional space created by new basement.

34. PL030054
Appeal by neighbours against consent given by Committee of Adjustment for creation of new lot. Conservation Authority letter of advice states land is almost entirely in flood and fill plain. Report from municipal planner (municipality not present at hearing) says that lot meets all relevant policies, however, planner for appellant disagrees on many points. OMB finds that proposed lot fails to address: Oak Ridges Moraine Conservation Plan and PPS, that the application is premature as it is not supported by required technical studies and conflicts with the very specific policies of the Official Plan.

45. PL011187
Oversize accessory building (Cabana) on dynamic beach built without permits. Minor variance for lot coverage required, also within Conservation Authority regulatory jurisdiction. OMB prefers evidence of township planner that the variance is not minor as it does not meet the intent of the by-law. Conservation Authority evidence not required to make decision as it fails on Minor Variance test.

47. PL030699
Minor Variance requested to bring cottage (which was reconstructed after fire with no building permit as a larger year round residence) into conformity. Result is an increase in living space in undisputed hazard area without floodproofing review. No Conservation Authority or MNR evidence, so degree of flooding or required regulatory approvals unknown. Board decision requires review of floodproofing as part of building permit.

48. PL020107
Developer requires Official Plan amendment and zoning by-law amendment to allow for residential development of vacant land. Two-zone concept (flood fringe) identified and supported by local Conservation Authority. Development approved subject to permits approved by Conservation Authority.

56. PL010750
Rezoning application to allow change from tourist cottage into tourist boutique. Determination by CA that reduction in number of cottages for human habitation in hazard area is favorable as accepted by OMB.

59. PL030854
Developer appeals conditions on plan of subdivision regarding rear lot erosion setback from top of ravine lands. Development proponent’s engineer submits multiple setbacks depending on which factor of safety applied, according to MNR guidelines respecting type of use. OMB takes conservative safety factor (active use) and subtracts rear yard setback of three metres, changing distance supported by municipality and Conservation Authority from 61 to 58 metres from edge of stream.

64. PL020894
Subdivision proposals with two lots in floodplain. Board decides that floodproofing of the houses as proposed by engineers will alleviate flood issue.
65. **PL041222**
Property owner appeals decision of Committee of Adjustment to dismiss application for minor variance to bring fence built on dynamic beach into legal status. Part of fence is shown to have a section that existed prior to by-law, but extension down to water’s edge did not. Fence is found to not be good planning and not in public interest. Issues relating to public safety and protection of dynamic beach movement. Evidence provided by Conservation Authority planners is favoured. Appeal is partially allowed to allow part of fence to remain (due to legal non-conforming status prior to by-law) but remainder must be removed.

66. **PL000859**
Existing lot of record requires Minor Variance to allow residential development that cannot meet required 30 metre setback from top of bank. Appeal is by neighbours citing aggressive erosion on site prevents development of lot. Board finds that site-specific design criteria and further technical investigation will support lot development. CA does not object and provides evidence regarding their own guidelines for approval under summons.

73. **PL001043**
Appeal by restaurant owner for Official Plan amendment and zoning by-law amendment to allow expansion of restaurant parking lot into wetland (a floodplain area). Board finds that filling parking lot will not comply with CA policies whereas leaving at grade causes access/egress concerns.

74. **PL020484**
Appeal by adjacent landowner of approved severance to create flag lot adjacent to bluffs/slope. OMB finds lack of certainty regarding the future stability and possible impacts of additional development on the integrity of the slope, in addition to other planning matters. Ironically, a re-hearing in the matter due to finding of “lack of understanding of the matter” also allows appeal on planning matters only and does not deal with slope issue.

75. **PL041224**
This case involves a subdivision appeal and a zoning by-law amendment appeal. The appeals were divided in two issues and the first one dealt with a zoning by-law amendment and was based on floodplain mapping. This partial case is considered in this analysis. A secondary plan and draft approved subdivisions rely on the rezoning of lands to show the location of the floodplain. Conditions made reference to certain regulations and studies to determine the floodplain boundary. The boundary was improperly mapped previously due to incorrect topographic information. New surveys show floodplain must be changed; therefore zoning will change and so will draft plans that are draft approved. OMB agrees that mapping and boundaries must be revised to reflect correct floodplain delineation.

84. **PL020337**
Committee of Adjustment dismisses application for minor variance to allow construction of home on vacant lot seriously constrained by size, road setback and hazards (bluff erosion adjacent to Lake Huron). Conservation Authority and municipality are in midst of study in area to determine if erosion control can/should be undertaken due to severity of bluff erosion. Board finds that evidence regarding relation to erosion hazard is weak and inconclusive but that minor variances sought are not minor. Appeal is therefore dismissed.
85. **PL010823**

Application for minor variance to allow construction of home on vacant lot seriously constrained by size, road setback and hazards (bluff erosion adjacent to Lake Huron). Committee of Adjustment to allows minor variance with condition that structure design be enhanced to allow for mobility if erosion threatened and to put a notice on title to warn future owners. Development proponent appealed conditions. Conservation Authority and municipality against any approval. Board overturns Committee of Adjustment decision and dismisses entire application due to degree of hazard and risk as well as non of four tests met and proposed reduced setback from road will create undue adverse impact on neighbours.

91. **PL030944**

Development proponent constructs deck and 3m x 3m two storey 'lighthouse' shed on unstable slope leading from residence down to beach. Retroactive approval for minor variance to allow shed to remain is denied by Committee of Adjustment. Deck is allowed to stay with condition that it meet OBC. Municipality and Conservation Authority agree with Committee of Adjustment to decision and can agree to deck but not shed. Board upholds decision of Committee of Adjustment.

92. **PL020254**

Development proponent receives partial approval for minor variance (extension of legal non-conforming use) to allow one of two decks to be built on residence. One deck is small while the other is very large and roofed. Board finds that construction of both decks on lands subject to high water, wave and erosion can be approved with conditions that separate structural component of deck from main house, as CA planner suggests is acceptable.

93. **PL050235**

Development proponent application for minor variance relief to allow attached garage construction requiring reduced setbacks on land that is situated with CA’s stable slope allowance. Township planner asserts that development is maxed-out on this constrained property. Board finds application does not meet the four tests and is not appropriate for development of these lands.

94. **PL030077**

Development proponent appeals decision of Committee of Adjustment to deny minor variance which would allow for significant expansion of legal non-conforming residence in dynamic beach area. Decision does not make clear who provided evidence or testimony. However, persuasive to the decision of the board was coastal engineer’s characterization and impacts of the dynamic beach risk as well and associated technical guideline documents. Evidence of photographs of damage of previous storm and regarding rescuer’s attempts to assist people who refused to evacuate were also entered by PP. Board dismisses appeal with emphasis on increased risk and non-conformity with provincial and local policies in place to reduce risk.

119. **PL010536**

Development proponent appeals the dismissal of their zoning by-law application to reduce the 150 metre setback from road due to adjacent quarry operation. OMB determines that organic soils are greater constraint than those of quarry operation. Reduction in setback from road allowed to prevent development of single family dwelling on organic soils/hazards lands.