TO:	**CHAIR AND MEMBERS, PLANNING AND ENVIRONMENT COMMITTEE MEETING ON JANUARY 16, 2012**
FROM:	**JAMES P. BARBER CITY SOLICITOR**
SUBJECT	**LONDON PROPERTY MANAGEMENT ASSOCIATION APPLICATION TO THE ONTARIO SUPERIOR COURT OF JUSTICE - COURT FILE NO. 2263/2010**

RECOMMENDATION

That, on the recommendation of the City Solicitor, this report concerning the Endorsement of the Ontario Superior Court of Justice issued December 16, 2011 in connection with the costs related to the application in respect of By-law No. C.P.-19, the Residential Rental Units Licensing By-law, **BE RECEIVED**.

PREVIOUS REPORTS PERTINENT TO THIS MATTER

Report of the City Solicitor to the Board of Control at its meeting held on June 27, 2007
Report of the City Solicitor to the Planning Committee at its meeting held on August 24, 2009
Report of the City Solicitor to the City Council at its meeting held on September 21, 2009
Confidential Report of the City Solicitor to the Board of Control at its meeting held on September 27, 2010
Report of the City Solicitor to the Built and Natural Environment Committee at its meeting held on October 17, 2011
Confidential Report of the City Solicitor to the Building and Natural Environment Committee at its meeting held on November 14, 2011

BACKGROUND

On Friday, September 24, 2010 London Property Management Association ("LPMA") served an Application Record, seeking certain declarations and an order quashing By-law C.P.-19, the Residential Rental Units Licensing By-law, in whole or in the alternative, in part (the "Application").

On September 30, 2011, the Court released its Reasons for Judgment upholding the By-law (the "Reasons"). On October 28, 2011, LPMA served a Notice of Appeal to the Court of Appeal for Ontario.

On December 16, 2011, the Court released an Endorsement on Costs, a copy of which is attached at Appendix "A", in which no costs were awarded. As set out in paragraph 14 of the Endorsement, the Court found that:

(a) LPMA could be considered a public interest litigant in this application;
(b) LPMA was a not-for-profit organization with no direct pecuniary or other material interest in the outcome;
(c) the issue was important beyond the immediate interest of LPMA;
(d) the public interest aspect affected landlords, home owners and renters;
(e) the issues were unsettled and were a matter of public importance;
(f) the issues had not been previously litigated; and

(g) neither party conducted the litigation in a frivolous or vexatious manner.

On December 21, 2011, LPMA served the City with a Notice of Abandonment of its appeal to the Court of Appeal for Ontario.

PREPARED BY:	RECOMMENDED BY:
JANICE L. PAGE SOLICITOR	JAMES P. BARBER CITY SOLICITOR

Encl.

APPENDIX "A"

CITATION: London Property Management Association v. City of London, 2011 ONSC 6946
COURT FILE NO.: 2263/2010
DATE: 2011-12-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LONDON PROPERTY MANAGEMENT ASSOCIATION (Applicant) – and - THE CORPORATION OF THE CITY OF LONDON (Respondent) – and - INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO (Intervener)

BEFORE: JUSTICE L.C. LEITCH

COUNSEL: J. Hoffer, for the Applicant

J. Page, for the Respondent

D. Goodis, for the Intervener

HEARD: Written submissions filed October 27 and 28, 2011

ENDORSEMENT ON COSTS

[1] The Respondent, as the successful party on the application, seeks its costs in the amount of $28,406.34 including disbursements. The parties conducted cross-examinations over one and one half days and the hearing of the application required two days. A useful compendium, factum and book of authorities were prepared.

[2] The Respondent relies on the provisions of s. 447.7 of the *Municipal Act*, 2001, S.O. 2001, c. 25 in claiming costs even though it was represented by in house legal counsel on this application.

[3] The Respondent cites a number of cases in which costs were awarded to a municipality in connection with an unsuccessful attack on a municipal bylaw (*1318706 Ontario Ltd. et al v. Rudan*, (2005), 75 O.R. 3d 405 (C.A.); *Adult Entertainment Association of Canada v. Ottawa (City)*, [2005] O.J. No. 4608 (S.C.) aff'd 2007 ONCA 389, [2007] O.J. No. 2021; *Toronto Livery Association v. the City of Toronto (City)*, 2009 ONCA 2725, [2009] O.J. No. 2725).

[4] The Respondent's position is that, as the successful party, it is entitled to costs absent "very good reasons" to depart from that general principle (see para. 50-52 of *1318706 Ontario Ltd.*).

[5] On the other hand, the Applicant submits that it is a public interest litigant and, as such, this is an appropriate case for the court to award no costs. Alternatively, if costs are to be awarded, then, the Applicant submits, the appropriate quantum is in the amount of $7,500.00 inclusive of GST and disbursements.

[6] Here, as in *1318706 Ontario Ltd.*, there is no suggestion of any misconduct, procedural miscarriage or oppressive and vexatious conduct on the part of the Respondent, which would justify

a departure from the principle that a successful party is entitled to its costs. The Court of Appeal in that case, allowed the cross-appeal against the order denying the municipality costs and substituted an order that it was entitled to its costs. The court noted that the motion judge had exercised his discretion on a wrong principle in penalizing the municipality for actions, which he found to be unimpeachable in law, on a basis that is unsustainable in law (see para. 52).

[7] *1318706 Ontario Ltd.* was applied in *Adult Entertainment Association of Canada*, where the submission that "a bylaw challenge is a type of public interest litigation in which the court may depart from the general practice of awarding costs to the successful party" was not accepted (see para.2).

[8] Having reviewed both *1318706 Ontario Ltd.* and *Adult Entertainment Association*, it seems to me that those applicants were not public interest litigants. I note also that public interest litigation was not discussed by the Court of Appeal in the *Toronto Livery Association* case.

[9] In *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 (S.C.), Perell J. undertook an in depth analysis of public interest litigants. As he observed at para.91:

> A public interest litigant, at a minimum, must, in a dispute under the adversary system, take a side the resolution of which is important to the public.

[10] Further, after considering *Odhavji v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, Perell J. concluded at para.94 that two aspects of a public interest litigant are that: (a) he or she is a partisan in a matter of public importance; and (b) he or she has little to gain financially from participating in the litigation. In determining whether a litigant is a public interest litigant, however, one of the contentious points is the extent to which a litigant must be altruistic.

[11] Justice Perell concluded that Incredible Electronics did not qualify as a public interest litigant. As he stated at para. 102, "it had much to gain by succeeding in the litigation, and it does not fit the profile of a genuine public interest litigant. The fact that the action involved an issue of public interest does not alter that Incredible Electronics was litigating in the main for its own substantial commercial purposes."

[12] In *Brunton v. Fort Erie (Town)*, 2011 ONSC 235, [2011] O.J. No. 63, it was noted that the following are factors to be considered in determining whether a litigant is a public interest litigant as outlined in *Bridgepoint Health v. Toronto (City)*, [2007] O.J. No. 2527 (Div. Ct.) as follows:

1. The proceeding involves issues the importance of which extends beyond the immediate interest of the parties involved;
2. The litigant has no personal proprietary or pecuniary interest in the outcome of the proceeding, or if her or she has an interest clearly does not justify the proceeding economically;
3. The issues have not been previously determined by a court in a proceeding against the same defendant;
4. The litigant has not engaged in vexatious, frivolous or abusive conduct; and
5. The public interest litigant is "a partisan in a matter of public importance"

[13] The Applicant submits that it is a public interest litigant because it raised issues of legal importance to the public; it took a partisan stance in the litigation; although some members of the Applicant had a pecuniary interest in the proceeding, their interest was modest; the Applicant itself had only an indirect pecuniary interest in the proceeding; the Applicant raised issues on behalf of tenants and students; no similar challenge to the licensing of rental housing has been made elsewhere in Ontario; and, the Applicant acted reasonably in bringing the application.

[14] I find the submission of the Applicant persuasive. I find that the Applicant can be considered a public interest litigant in this application. The Applicant is a not-for-profit organization with no direct pecuniary or other material interest in the outcome. The application involved an issue that is important beyond the immediate interests of the Applicant. The application had a public interest aspect in that it affects landlords, home owners and renters. The challenge of a bylaw of this nature raising unsettled issues is a matter of public importance. I find it significant that in *Adult Entertainment Association of Canada*, Hackland J. observed that many of the arguments brought forward by that applicant had already been rejected by the Ontario Court of Appeal and it had pursued lengthy cross-examinations. The issues on this application had not been previously litigated and neither party conducted the litigation in a frivolous or vexatious manner.

[15] I note also that, as stated in *Brunton,* a municipality as a government actor is often expected to forego costs as a successful litigant.

[16] Accordingly, for these reasons I am satisfied that there ought not to be an award of costs in favour of the Respondent.

Justice L.C. Leitch

Date: December 16, 2011