TORONTO

STAFF REPORT
ACTION REQUIRED

Council Adoption of Proposed Section 37 Implementation Guidelines

Date:	March 12, 2007
To:	Planning and Growth Management Committee
From:	Chief Planner and Executive Director, City Planning
Wards:	All
Reference Number:	pg070021

SUMMARY

This report is forwarding for adoption the Proposed Guidelines for Implementation of Section 5.1.1 of the Official Plan: Height and/or Density Incentives under Section 37 of the *Planning Act*. The consideration of Proposed Guidelines was deferred twice by Planning and Transportation Committee in 2006 to facilitate settlement discussions between the City and the appellants to the Section 37 (S.37) Official Plan policies. The S.37 policies were approved by the Ontario Municipal Board (OMB) in the Fall of 2006.

The revisions reflect changes to the version of the Proposed Guidelines contained in a report dated June 15, 2006, and address comments received from the Federation of North Toronto Residents' Associations (FONTRA) and the Greater Toronto Home Builders' Association (GTHBA), both organizations being appellants to the S.37 policies. The other ratepayer appellant organizations declined to participate in this round of consultations. The revisions also reflect staff changes in light of the approved Official Plan S.37 policies, specific situations, and minor editorial improvements. Staff is recommending adoption of the Guidelines now to assist staff, Council, the development industry and the public in the implementation of the Official Plan policies. Any necessary future changes to the Guidelines can easily be incorporated through further reports from the Chief Planner.

RECOMMENDATIONS

City Planning Division

1. The revised S.37 Implementation Guidelines attached as Appendix A to this report be adopted for use by City Council, City staff, the development industry and the general public in the implementation of Official Plan policies pertaining to S.37 of the *Planning Act.*

2. The appropriate City Officials be authorized and directed to take the necessary action to give effect thereto.

Financial Impact

This report will have no financial impact.

DECISION HISTORY

At its meeting of January 31, February 1 and 2, 2006, Council adopted without amendment Clause 3 of Report 1 of the Planning and Transportation Committee, with respect to Authorization for City Planning Staff to Consult with the Development Industry, Community Organizations, Interest Groups and the Public on Proposed Section 37 Implementation Guidelines. The Planning and Transportation Committee had adopted the recommendations contained in the staff reports referenced in the internet links below, thus providing the necessary authorization for a public consultation program on Proposed S.37 Implementation Guidelines, and also directed staff to seek a settlement with the developer and ratepayer appellants with respect to their appeals to the Ontario Municipal Board in connection with policies of the Official Plan regarding Section 37 of the *Planning Act*.

The internet links to the December 19, 2005 and December 22, 2005 reports referenced in the above recommendations (1) and (2) are as follows:

http://www.toronto.ca/legdocs/2006/agendas/committees/plt/plt060109/it004.pdf (report Dec. 19/05)
http://www.toronto.ca/legdocs/2006/agendas/committees/plt/plt060109/it004a.pdf (report Dec. 22/05)

Staff carried out a consultation program (see details in Background, below) and recommended revised Section 37 Implementation Guidelines for adoption by Planning and Transportation Committee and Council in a report dated June 15, 2006. The internet link to that report is as follows:

http://www.toronto.ca/legdocs/2006/agendas/committees/plt/plt060704/it006.pdf (report June 15/06)

At its meeting of July 4, 2006, (Report 5, Clause 15(a)), the Planning and Transportation Committee took the following actions, which were received for information by City Council at the meeting of July 25, 26 and 27, 2006:

(1) deferred consideration of the recommendations in the Recommendations Section of the report until its meeting of September 5, 2006 to permit negotiations on the settlement of the Section 37 Appeals;
(2) requested the City Solicitor to report at that time on the settlements attained; and
(3) received several communications.

Staff forwarded a further report dated August 15, 2006 to Planning and Transportation Committee, regarding additional comments received at the July 4, 2006 Committee meeting. That additional report can be found at the following internet link:

http://www.toronto.ca/legdocs/2006/agendas/committees/plt/plt060905/it010.pdf (report Aug. 15/06)

At its meeting of September 5, 2006, (Report 6, Clause 26(b)), Planning and Transportation Committee took the following actions, which City Council received for information at its meeting of September, 25, 26 and 27, 2006:

(1) deferred consideration of the following reports and communications until its special meeting to be held on September 25, 2006 at 12:30 p.m.:
    (a) (August 15, 2006) from the Chief Planner and Executive Director, City Planning, entitled, "Supplementary Report: Proposed Section 37 Implementation Guidelines";
    (b) (June 15, 2006) from the Chief Planner and Executive Director, City Planning, entitled, "Results of Consultation on Proposed Implementation Guidelines, for Section 37 of the *Planning Act*";
    (c) (August 27, 2006) from George S. Belza, Partner, ANALOGICA;
    (d) (August 28, 2006) from William H. Roberts, Barrister and Solicitor;
    (e) (August 31, 2006) from George Belza;
    (f) (August 31, 2006) from Paula J. Tenuta, MCIP, RPP, Director, Municipal Governmental Relations, Greater Toronto Home Builders' Association;
    (g) (September 1, 2006) from the Toronto Preservation Board; and
    (h) (September 1, 2006) from the Toronto Preservation Board.

(2) in the interim, requested staff to meet with the affected parties to achieve a resolution of the issues involved.

The special meeting mentioned in recommendation (1), above, was later cancelled. City Council adopted, at its meeting of September 25, 26 and 27, 2006 (Report 6, Clause 25 of the Planning and Transportation Committee), proposed modifications to the S.37 Official Plan policies as a settlement of the appeals of those policies. In adopting the clause,

Council added the following motion which references the Proposed S.37 Implementation Guidelines:

"That the Chief Planner and Executive Director, City Planning, be requested to report to the Planning and Growth Management Committee on the proposed implementation guidelines for the new Official Plan policies respecting Section 37 of the Planning Act and the potential for including Heritage Conservation Districts as a community benefit under Section 37."

This report is as requested by Council in the above motion. A report on Heritage Conservation District studies was forwarded under separate cover to the February 15, 2007 meeting of Planning and Growth Management Committee.

ISSUE BACKGROUND

In the context of settlement discussions in 2005 with the ratepayer associations which had appealed the S.37 policies of the Official Plan, staff committed to bringing draft Section 37 Guidelines forward prior to the Section 37 Official Plan policies being heard by the Ontario Municipal Board (OMB). After receiving authorization at the January 31, 2006 and February 1 and 2, 2007 Council meeting to conduct a public consultation program, staff sought comments on Proposed S.37 Implementation Guidelines from 477 residents', community, tenant and business groups on the City Clerk's general mailing list, the School Boards and interest groups in the fields of housing, heritage and daycare, and the ratepayer and development industry appellants to the S.37 policies. A report on the results, with revised Proposed Guidelines attached, was prepared for the July 4, 2006 Planning and Transportation Committee meeting.

To facilitate ongoing settlement discussions, Planning and Transportation Committee deferred the Proposed Guidelines at the July 4, 2006 and September 5, 2006 meetings, and a special meeting scheduled for September 25, 2006 was cancelled. The OMB approved the settlement of the S.37 policies in a verbal decision on October 17, 2006, and in written Order No. 3190 dated Nov. 10, 2006. In previously endorsing the proposed S.37 policy settlement at its September 25, 26 and 27, 2006 meeting, Council also requested a report to the Planning and Growth Management Committee on the Proposed Guidelines. This report fulfills that request and represents the next step in the process of adopting S.37 Implementation Guidelines.

COMMENTS

In preparing this report, staff sought further comments from the Greater Toronto Home Builders' Association (GTHBA) and the two ratepayer groups which had appealed the S.37 policies. One of the ratepayer organizations declined to participate in the consultations. Some changes to the Proposed Guidelines set out in this report are as a result of those consultations. Others are staff changes, resulting primarily from the approved Official Plan S.37 policies and editorial improvements.

The recommended S.37 Implementation Guidelines are attached to this report as Appendix A. The approved S.37 Official Plan policies (section 5.1.1) are attached as Appendix B. The analysis of written comments received from FONTRA and GTHBA is attached as Appendix C.

Two New Sections Added

City Planning staff has added two new sections 3.1 and 3.13. Section 3.1 addresses the implications of Official Plan policy 5.1.1.3, which states that where the zoning by-law has not been updated to implement the Plan, then the City will consider whether height and/or density increases are warranted without recourse to S.37. Where such situations exist, the City will thus need to consider whether S.37 should apply to some, all or none of the proposed increases, and this section provides some guidance in that respect.

Section 3.13 addresses the situations where S.37 community benefits are cash contributions towards leased City facilities. In these situations, the City must ensure that use of public funds will result in a lengthy enjoyment of the benefits by the public, and this section assists in achieving this objective.

Summary of Recommended Revisions to Proposed Guidelines

The following represents a list of the significant changes put forward in this report, by section number of the Proposed Guidelines (the new section numbers in Appendix A). These are changes to the version attached to the June 15, 2006 report referenced above in the Decision History section of this report. Minor editorial changes are not listed below.

2. Implementation Principles of Section 37

   a) in 2.2, add wording to indicate that the zoning by-law must now also include the increase in height and/or density, as required by policy 5.1.1.1;
   b) in 2.3, revise wording in the last paragraph to indicate that general or vague categories of community benefits do not comply with policy 5.1.1.6, which requires specific capital facilities as benefits;
   c) reword 2.4 to reflect the appropriate planning relationship between benefits and the development as set out in policies 5.1.1.1 and 5.1.1.7, and the new non-policy sidebar;
   d) in 2.5, second paragraph, add words to refer to the need for a reasonable planning relationship between benefits and anticipated development over the defined area;
   e) in 2.6, add wording to better reflect policy 5.1.1.7 regarding how community benefits are selected;
   f) in 2.7, revise the wording to clarify that matters necessary to mitigate adverse impact are not usually eligible community benefits, and that matters required to support a development may only be secured in the S.37 agreement upon mutual consent of the City and owner;
   g) in 2.8, add wording to again clarify that securing matters as a legal convenience in a S.37 agreement requires mutual consent of the City and the owner;

h) in 2.9, add wording to clarify that community benefits addressing service needs or deficiencies in the existing community must bear a reasonable planning relationship to the contributing development;
i) reword 2.10 to emphasize that S.37 is an essential tool for implementing certain Housing and Heritage Resource policies.

3. General Considerations

a) add a new 3.1 to address policy 5.1.1.3 regarding use of S.37 in situations where the zoning by-law has not been updated to reflect the new Official Plan;
b) in 3.4, revise to clarify why a distinction in the agreements and by-laws between eligible community benefits and other secured matters is important;
c) in 3.6, expand sub-clause (a) to clarify that the overall project size and height/density increase thresholds must be exceeded, and add a new sub-clause (c) to clarify that use of S.37 in accordance with policy 5.1.1.5 is also one of the alternatives for using S.37;
d) in 3.7, revise the wording to state that making changes to existing S.37 agreements is often not a simple exercise, rather than generally discouraging such changes;
e) add a new 3.13 to address conditions under which community facilities leased by the City may be improved by way of S.37 community benefits;

5. Guidelines for Other Specific Community Benefits

a) add a new introductory paragraph to emphasize that Heritage Resources, usually off-site, can also be addressed through optional community benefits;
b) in 5.6, add a paragraph regarding streetscape improvements within a defined area, as recommended in the August 15, 2006 report referenced in the Decision History section of this report, above.

Conclusions

Staff has carried out an extensive consultation exercise in preparing the Proposed S.37 Implementation Guidelines to assist in the implementation of Official Plan policies. The S.37 policies are now approved. Further revisions are recommended to the version of the Guidelines forwarded in a June 15, 2006 report to Planning and Transportation Committee. These further changes are to address comments received in the most recent consultations with the ratepayer and development industry appellants to the S.37 Official Plan policies, and to address the approved S.37 policies and specific situations that may arise.

The Guidelines will be of great assistance to staff in implementing Official Plan policies, as well as to Council members, the development industry and the general public. Any necessary changes in future can easily be incorporated through Council direction or adoption of reports from the Chief Planner. Adoption of the Guidelines set out in Appendix A is recommended.

CONTACT

Barbara Leonhardt,
Director of Policy and Research,
City Planning Division,
Tel: 416-392-8148, Fax: 416-392-3821
E-mail: bleonha@toronto.ca

SIGNATURE

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Ted Tyndorf
Chief Planner and Executive Director
City Planning Division

ATTACHMENTS

Appendix A: Guidelines for the Implementation of Section 5.1.1 of the Official Plan
Appendix B: Official Plan Section 5.1.1 - Height and/or Density Incentives
Appendix C: Analysis of Written Comments Received

APPENDIX A

Guidelines for the Implementation of Section 5.1.1 of the Official Plan for the City of Toronto: Height and/or Density Incentives under Section 37 of the *Planning Act*

(March 9, 2007)

Contents

5.4 Non-Profit Child Care Facilities
5.5 Public Art
5.6 Streetscape Improvements

1. Introduction

These Guidelines are intended to assist in the implementation of the policies of the Official Plan contained in Section 5.1.1: Height and/or Density Incentives. Facilities, services or matters (community benefits) obtained through height and/or density incentives are secured pursuant to Section 37 of the *Planning Act*. These Guidelines must be read in conjunction with the policies of the Official Plan. If any conflicts arise between Official Plan provisions and these Guidelines, the Official Plan provisions will prevail.

Section 37 authorizes a municipality with appropriate Official Plan provisions to pass zoning by-laws involving increases in the height or density otherwise permitted by the Zoning By-law, in return for the provision by the owner of community benefits. The community benefits must be set out in the zoning by-law. The community benefits may be secured in an agreement which may be registered on title.

The term "community benefits" reflects the City's priority on providing public benefits within the local community in which the contributing development project is located,. The increase in height and/or density is an incentive to the developer to provide community benefits at no cost to the City.

These Guidelines are organized to outline important implementation principles (section 2), general considerations for using Section 37 (section 3), guidelines for using Section 37 to implement specific Official Plan policies (section 4), and guidelines for securing other specific community benefits (section 5). Not all types of eligible community benefits require specific guidelines, and any community benefits which comply with Official Plan policies in section 5.1.1 are eligible community benefits notwithstanding that they may not have a corresponding sub-section in section 5 of these Guidelines.

These Guidelines can be revised through Council adoption of a report from the Chief Planner or through Council direction. In the future, as new policies may be added to the Official Plan or as existing policies are amended, either through Council-adopted or OMB-approved Official Plan amendments, these Guidelines may also require appropriate revisions through adoption by Council. The impact of the recently enacted and proclaimed provincial *Stronger City of Toronto for a Stronger Ontario Act, 2006* (Bill 53) will also need to be assessed, particularly when Regulations pertaining to conditional zoning are released by the Province.

2. Implementation Principles of Section 37

The principles below are to be followed when using Section 37 of the Planning Act:

2.1 **The proposed development must represent good planning**. An owner/developer should not expect inappropriately high density or height

increases in return for community benefits and the City should not approve bad development simply to get community benefits.

2.2 **Community benefits and the increase in height and/or density must be set out in the zoning by-law.** Section 37 must be implemented through a zoning by-law. This is usually a site-specific zoning by-law amendment permitting a height and/or density increase for a specific development.

2.3 **Section 37 community benefits should be specific capital facilities, or cash contributions to achieve specific capital facilities.** This principle contains two important sub-principles: a) community benefits should be capital facilities; and b) those capital facilities should be specific capital facilities, not general or indeterminate facilities.

Community benefits should be durable. Cash-in-lieu of capital facilities is only acceptable where the cash is secured for specific local capital facilities. Operating, programming, and maintenance funds are not durable and are not appropriate community benefits (the only permitted exceptions are start-up funds where a child care facility is secured, in accordance with Official Plan policy 5.1.1.6(b), and rent levels and tenant relocation and assistance plans as required through the application of policies 5.1.1.6(h) and (i) and section 3.2.1).

On occasion, at the owner's discretion, cash contributions may be made to special accounts already established by City Council and intended to be used for capital facilities in the broader community (e.g. Capital Revolving Fund for Affordable Housing, Public Art Trust Fund). Studies, whether planning, visioning, Heritage Conservation District, or other studies, are not capital facilities and are thus not eligible S.37 community benefits.

Section 37 is not a vehicle to generate general revenue within a local community for non-specific or indeterminate purposes**.** The term "cash-in-lieu" as used with respect to community benefits means cash contributions toward specific capital facilities, in lieu of the developer being required to actually construct or provide those specific facilities. The securing of cash contributions for "local community facilities", "community purposes within the Ward", for general categories of community benefits (e.g. parks improvements in the Ward), or similar general or vague purposes, is not in compliance with Official Plan Policy 5.1.1.6.

2.4 **There should be a reasonable planning relationship between the secured community benefits and the increase in height and/or density in the contributing development.** At a minimum, this planning relationship includes an appropriate geographic relationship and the addressing of planning issues associated with the development. The priority location for community benefits should be on-site or in the local area. Community benefits may be appropriate amenities and services in the local community that go beyond consideration of matters necessary to support that particular development, and which may be

important in maintaining the quality of life in the City while accommodating intensification.

2.5 **No citywide formula, or quantum, exists in the Official Plan or these Guidelines for determining the level of Section 37 benefits.** An example of such a formula would be that the cost of community benefits should be at least 30% of the increased land value resulting from the density increase. An approach that institutionalized a rigid, value-based formula, or quantum, across the entire City, would likely be challenged in court, and might not survive the challenge on the basis that it constitutes an illegal tax. As a result, most Section 37 agreements are negotiated on a case-by-case basis, and the amount or value of the community benefits in relation to the value of the density or height increase varies from project to project or from one area of the City to another.

In certain secondary plans (notably the North York Centre and Sheppard East Corridor), specific provisions relating the benefits provided to the resulting density increases exist (e.g. a certain density increase in return for a day-care facility or for community centre space of a certain size). The new Official Plan (5.1.1.8) allows for a formula-based approach within defined geographical areas, with the formula determined through local area studies, and in which the formula employed is based upon a reasonable planning relationship between the justified benefits and the anticipated development over the defined area, but the Plan deliberately does not propose any citywide formula. A formula within a defined geographical area is not an illegal tax because it is based on the estimated costs of the community benefits to be secured within the area.

2.6 **Typical community benefits are listed in the Official Plan, (policy 5.1.1.6), but this list is not exhaustive**. The specific community benefits secured in a development are the result of public consultation, discussion among City Planning staff, the owner/developer, the local Councillor and other City or City agency staff as necessary, and consideration of intensification issues in the area, the nature of the development application, and the strategic objectives and policies of the Official Plan. Other benefits not specifically listed in the Official Plan may also be secured, provided these have been identified through a Council approved assessment (such as a Community Improvement Plan or a community services and facilities study) and the City and the owner have agreed to such community benefits.

2.7 **Matters required to support a development may also be secured in a Section 37 agreement as a legal convenience**. Matters either necessary for good planning or routinely required in the absence of using Section 37 are generally not considered to be eligible Section 37 community benefits, and should be provided by the developer notwithstanding any use of Section 37. This would include most matters necessary to mitigate adverse impact of the proposed development. However, such matters may be secured in a Section 37 agreement as a legal convenience where the City and the owner agree. Where such matters are secured

in other agreements or conditions pursuant to other sections of the Planning Act, the City of Toronto Act, or other legislation, they may not need to be secured in the Section 37 agreement.

2.8 **Good architecture and good design are expected of all developments, as a matter of course, and are not eligible Section 37 benefits.** The path to good design is not through increased density or height. However, as described in 2.7, above, a Section 37 agreement can be used to secure materials, finishes, or special built form features as a legal convenience where the City and the owner agree. If the City were to accept good architecture and/or good design as eligible Section 37 benefits, it would be signalling that lower standards are appropriate in developments where Section 37 is not used, which is definitely not the case.

2.9 **Section 37 cash contributions should not be secured towards that portion of the cost of specific capital facilities that is anticipated being funded through development charges (DC's).** Provided all Official Plan policies are satisfied, Section 37 community benefits in the form of cash contributions may be secured toward services and facilities (or appropriate portions thereof) that:

- address service needs or deficiencies in the existing community where a reasonable planning relationship exists between the contributing development and the community benefits. (Development charges fund only the portion of certain capital services required for new growth, and not capital services for existing development);
- cannot be, or are not, funded by the DC By-law;
- represent the municipal share of providing services for new growth that are only partly funded through DC's; or
- represent that portion of service levels for new growth above the maximum levels funded by DC's.

2.10 **Section 37 is an essential tool for implementing certain Official Plan Housing and Heritage Resources policies.** The provision of affordable housing as a first priority community benefit on large development sites, the preservation of existing rental housing on intensification sites, the replacement of existing rental housing to be demolished, and the conservation of heritage resources on development sites, are fundamental Official Plan policy requirements. Section 37 is the primary tool to implement these policies. In the context of rezonings to increase height and/or density, these policies cannot be viewed as being optional or the basic requirements as being open to negotiation, unlike the negotiation of other Section 37 community benefits where the type and quantity are not governed as tightly by Official Plan policy.

2.11 **The Ward Councillor should always be consulted by City Planning staff in the negotiation of S.37 community benefits:** The Ward Councillor has a role, if he or she wishes, in determining what benefits should be the subject of

negotiation between the City and the developer/owner, and should always be consulted in the negotiation process.

2.12 **City Planning staff should always be involved in discussing or negotiating Section 37 community benefits with developers/owners:** City Planning staff should never be excluded from the discussions or negotiations between Council members or other City staff and the developer/owner regarding S.37 community benefits. City Planning staff has a particular responsibility to ensure that the Official Plan policies are being complied with, and must recommend an appropriate package of S.37 community benefits when the staff report recommending approval of the proposed development is forwarded for Community Council consideration.

3. General Considerations

3.1 Applicable Zoning Not Updated or Reviewed

Policy 5.1.1.3 addresses the use of Section 37 where the applicable zoning has not been updated to implement the Plan (a review of the existing zoning for the local area could determine that changes are not required, in which case the zoning is considered up to date). The policy states that where the zoning does not implement the Plan, the City will consider whether an increase in height and/or density is warranted without recourse to Section 37. The rationale behind this policy is that if an area containing the proposed development would likely be zoned for higher densities under the new Official Plan than was the case under the previous Official Plan, then it may not be fair to measure the density increase for the site in question from the existing zoning density limits, for the purposes of Section 37 discussions.

Rather, the measurement of the density increase on the specific site, for Section 37 purposes, may be taken from the estimated, higher density limits for the area or zoning district rather than the current, existing limits. This policy allows the City flexibility to consider what the general zoning density limits might reasonably be for the area in question under the new Official Plan, and thus consider whether Section 37 should be applied to all, some, or none of the proposed density increase.

One cannot use a site-specific assessment of the appropriate height and/or density under the new Official Plan to determine an appropriate Section 37 base height or density level. The general zoning by-law establishes height and density limits, among other matters, for areas or zoning districts rather than for specific sites. Where the zoning has not yet been updated, or reviewed, to reflect the new Official Plan, the assessment of the appropriate zoning for the area or district containing the specific site could be considered in order to address policy 5.1.1.3. This exercise is also not merely a determination based on purely technical considerations, because the ultimate determination of appropriate heights and densities for the new zoning by-law will involve the participation of the public in the process. Furthermore, given Official Plan provisions 5.1.1.5(d) and (e), and also the fact

that there is no Section 37 formula or quantum in the Official Plan, any such consideration by the City of a higher base height and/or density level for Section 37 purposes may or may not affect the type or level of Section 37 community benefits to be secured.

3.2 Timing of Agreement Execution

The Section 37 agreement will generally be executed prior to the introduction of the Bill in Council that implements the rezoning for the increased density and/or height. It should be noted that payment or provision of community benefits often does not occur upon execution of the agreement. The timing of payment or provision of benefits is typically stated in the agreement provisions.

3.3 Timing of Cash Payments

The payment of community benefits secured as cash will most often be required, as a condition of the Section 37 agreement, prior to the issuing of an above-grade building permit. Where the particular circumstances warrant, for example where restoration of a heritage building is to be carried out prior to the construction of the new portion of the development, or a community facility is needed sooner rather than later for good planning reasons, the payment(s) may be secured at an earlier appropriate trigger. In a phased development, the phasing of payments may occur. If payment timing is related to the issuance of a building permit, such timing provisions should be included in the zoning by-law as well as in the agreement.

3.4 Differentiating Community Benefits from Other Development Requirements

Eligible Section 37 community benefits should be distinguished in staff reports and by-laws from matters secured as a legal convenience, to avoid confusion over what is being explicitly exchanged for increased height and/or density.

The Official Plan (policy 5.1.1.6) provides that Section 37 community benefits are facilities, services or matters over and above those that would otherwise be required as part of the development process in the absence of using Section 37. In most cases, matters required for good planning are not considered to be eligible community benefits because they would be required even if S.37 was not being used. The conservation of heritage resources, the provision of affordable housing as a first priority community benefit on large development sites, the preservation of existing rental housing, and the replacement of rental housing to be demolished represent unique situations, however, in that they are considered as both essential for good planning and as eligible Section 37 community benefits. They are such important planning objectives that the Official Plan provides for height/density incentives to achieve them even though such achievement is required for good planning and to comply with other specific Official Plan policies.

Community benefits are generally not expected to mitigate adverse planning impact of developments. In fact, in most cases, with the exceptions noted above, anything that is necessary to mitigate adverse impact is considered necessary for good planning and thus should not be deemed an eligible Section 37 community benefit. Matters routinely required to support development in the absence of using Section 37 are not considered to be eligible community benefits but may nevertheless be secured as a legal convenience in the Section 37 agreement, where the City and the owner agree.

3.5 Conversion of Existing (Built) Floor Area

Official Plan policy 5.1.1.3 addresses situations where a change of use is proposed. A rezoning application to convert existing (built) floor area to another use, whether or not an Official Plan Amendment is required, is considered to be a density increase for the purpose of using Section 37. However, in such circumstances Section 37 is used only in accordance with Official Plan policy 5.1.1.5.

If the permitted density is being increased beyond the conversion of existing floor area, such as in the case where additional floors are added to an existing building, the use of Section 37 is not limited to the application of policy 5.1.1.5. Community benefits may be secured with respect to the added floor area, provided the overall project size and the added density (or height) exceed the thresholds in the Official Plan (policy 5.1.1.4).

3.6 Change of Use of Permitted Unbuilt Density (including demolition of built density)

Again, Official Plan policy 5.1.1.3 addresses situations where a change of use is proposed. A change of permitted use with respect to existing but unbuilt permitted density is considered to be an increase in permitted density, for the purpose of using Section 37 to secure community benefits, where:

(a) the permission for the new use and/or density requires an amendment to the Official Plan and the overall project size and height/density increase thresholds in policy 5.1.1.4 are exceeded; or
(b) permitted floor area not yet constructed is subject to an existing but not yet fulfilled Section 37 agreement and is being converted to another use by way of a Zoning By-law amendment; or
(c) Section 37 is used in accordance with policy 5.1.1.5.

This section also applies to the situation where existing floor area is demolished, with the permitted density being converted to a new use through an Official Plan amendment.

3.7 Change in Previously Secured Community Benefits

A change to an existing agreement to reallocate funds or change the community benefits is often not a simple exercise, but where necessary, the change process must be open, public, and subject to the appropriate legal processes, and be authorized by Council. Council cannot unilaterally amend an agreement. All parties to the original agreement, or their successors in title, must approve the change and sign an amending agreement. Where potentially controversial or complex, Council authority should be obtained to begin the process and to approach the current owners. Because specific Section 37 community benefits are often set out in the site-specific Official Plan and Zoning By-law provisions, amendments to those provisions may also be required. A minor variance process may be an option, but Council authority is still required to amend the agreement.

3.8 No Section 37 Exemptions for Development Charges or Section 42 Park Levies

Section 37 agreements shall not provide for exemptions from, or reductions in, development charges under the Development Charge By-law or parks contribution requirements under Section 42 of the *Planning Act*.

3.9 Credits under the *Development Charges Act* (DCA)

In most cases, no consideration should be given in S.37 agreements to credits under the *Development Charges Act*. The DCA provides that a credit is not mandatory and may be given only where the City explicitly agrees in writing to give the developer a credit for work performed (not cash contributions) that relates to a service funded through the Development Charge (DC) By-law.

There may be unique and unusual circumstances where Section 37 is being used to secure the actual construction of capital facilities required for good planning for a community, where such specific facilities would otherwise have been partially funded through development charges. For example, the redevelopment of a former industrial area to a residential neighbourhood could require a community centre considered necessary for good community planning. The Section 37 agreement could require a developer to construct all or part of that community centre and could in return provide for a development charge credit. However, such a situation would be rare, and would likely require a complicated agreement.

The consideration of any development charge credits through a Section 37 agreement should only be undertaken in highly specific and unusual circumstances as described above, and only in consultation with staff in both Legal Services and Special Projects Division responsible for implementing development charges.

3.10 Non-Profit Housing Developments

In considering the use of the Section 37 policies contained in s. 5.1.1 of the Official Plan in relation to non-profit developments involving housing, the following definition shall apply, and is as contained in Development Charge By-law 547-2004:

"NON-PROFIT HOUSING — Housing which is or is intended to be offered primarily to persons or families of low income on a leasehold or co-operative basis and which is owned or operated by:

A. A non-profit corporation being a corporation, no part of the income of which is payable to or otherwise available for the personal benefit of a member or shareholder thereof; or

B. A non-profit housing co-operative having the same meaning as in the *Cooperative Corporations Act*."

The intent of Official Plan policy 5.1.1.4 is to generally exempt non-profit developments from providing community benefits above and beyond those that may be required to satisfy specific policy requirements as per policy 5.1.1.5. The exceptions to the general exemption for non-profit developments pertain primarily to conservation of heritage resources and/or existing rental housing, replacement of existing rental housing to be demolished, or to securing matters required to support development (i.e. securing matters as a legal convenience that are required for good planning or are routinely required in the absence of using S.37).

It is emphasized that the general exemption from community benefits applies to non-profit developments, and not necessarily to non-profit developers. In order for this exemption to apply, it is necessary, but not sufficient, that the proponent be a non-profit developer. However, a non-profit developer could propose a development that has a for-profit component, (e.g. life leases that could be resold at a profit, or rental housing that is not affordable, or condominium registered units), in which case the City would use S.37 in accordance with the Official Plan policies with respect to that component to secure community benefits.

Where S.37 is used with respect to a non-profit housing development in accordance with Official Plan policy 5.1.1.5, City Planning staff will ensure coordination with the requirements of other City Divisions and will consider any applicable legislation in avoiding unnecessary duplication through the S.37 agreement of requirements already adequately secured, as determined by City Planning staff in consultation as necessary with Legal Services. However, it must be recognized that senior government housing funding programs, related requirements, and applicable legislation can change relatively frequently, and the long-term fulfillment of the Official Plan Housing policies may necessitate some duplication of requirements at the time of development approval through the S.37 agreement(s).

3.11 Indexing of Cash Contributions Secured

Where cash contributions are secured in S.37 agreements, the amount of such funds should generally be indexed to the Statistics Canada Construction Price Index for Toronto that would pertain to the type of community benefit secured (new housing or non-residential). Indexing may not be appropriate in every situation involving cash contributions. Relevant recommendations should be included in final planning reports and such provisions should be included in the agreements.

3.12 Community Benefits Summary in Financial Impact Section of Final Reports

The Financial Impact section of final planning reports on planning applications involving S.37 should contain a summary of the community benefits secured, the estimated cost or value of each community benefit where possible, and the timing of their provision, especially the payment timing for cash contributions secured. Staff of Divisions other than City Planning will be required to assist in estimating the cost or value of community benefits for which they would normally be responsible or have specific knowledge. There are some community benefits, such as preservation of heritage resources or existing rental housing, for which a value is usually not possible to estimate.

3.13 Contributions Toward Leased City Facilities

The securing of improvements to capital facilities, including cash contributions toward such facilities, that are leased by the City, is a legitimate Section 37 community benefit, provided there is a lengthy securing of the facilities in the lease arrangements for the benefit of the general public. For example, cash contributions could be secured toward improvements to a community centre that is leased by the City. The secured community benefits should comply with the principles contained in the Official Plan Section 37 policies and in these Guidelines and should be capital facilities which remain in the public domain for a lengthy period.

There should be an existing lease, or an existing lease that is renewable at the City's option, to secure the facilities for at least 15 years, and preferably 25 years, from the time the community benefit is provided to the City. If a shorter term than 15 years remains on an existing lease, or if no lease has yet been signed, then the community benefit should either not be considered or should be made conditional upon the appropriate lease being secured by the City. In such a conditional situation, the Section 37 agreement could secure an alternative community benefit that would take precedence in the event that the appropriate lease provisions are not realized.

4. Guidelines for Securing Specific Official Plan Policy Requirements

This section contains guidelines pertaining to the securing of Section 37 community benefits that are often required to be provided by Official Plan policies. In the context of development applications involving a rezoning for increased density and/or height, even where the project size and density increase thresholds of policy 5.1.1.4 are not exceeded, the securing of certain heritage and rental/affordable housing matters using Section 37 are high-priority planning objectives required for good planning.

Policies of the Official Plan other than the Section 37 policies are also applicable and are referenced as necessary. Such policies will help determine the applicable terms and conditions to be included in the Section 37 agreement. In situations where Section 37 is not applicable or is not used, most of these high priority planning objectives may still be pursued by the City using other means.

The use of a Section 37 agreement to secure the achievement of these explicit Official Plan policy requirements should not be construed to mean that the basic policy requirements are open to negotiation or can be weighed against other, "optional" community benefits.

There will be situations where one or more of the community benefits addressed in this section are not required by Official Plan policies but are nevertheless chosen by the owner and the City to be part of the Section 37 package of community benefits. For example, new affordable rental housing can be either a S.37 community benefit required by the Housing policies (section 3.2.1) of the Official Plan, or an optional community benefit if provided as part of a negotiated S.37 agreement even though not required by the Official Plan. Thus, this important community benefit is addressed in both sections 4 and 5 of these Guidelines. Conservation of off-site heritage resources is almost always considered to be an optional community benefit, but is included in this section as part of Heritage Conservation guidelines.

The definitions of rental housing, affordable rental housing, affordable ownership housing, mid-range rents and social housing are as contained in Section 3.2.1 of the Official Plan.

4.1 Heritage Conservation

Relevant Official Plan Policies: Section 3.1.5 (Heritage Resources)

The use of Section 37 of the *Planning Act* can assist the City in conserving its valuable heritage resources, often in conjunction with the *Ontario Heritage Act* (*OHA*). Section 37 may be used to protect, restore or commemorate on-site heritage resources or off-site heritage resources in the local area. The preservation or restoration of on-site resources as a community benefit is in most cases considered to be a policy requirement of the

Official Plan, whereas the addressing of matters pertaining to off-site heritage resources is in most cases considered to be an optional or negotiable community benefit.

The Heritage Resources policies of the Official Plan (policy 3.1.5.8) provide that additional gross floor area can be permitted as an incentive to conserve an on-site heritage building, in specified land use designations, subject to a number of conditions including a maximum density increase. Whether used in accordance with that policy, or as an independent initiative with respect to a heritage resource, Section 37 can be used to secure a range of heritage objectives, including but not limited to the following:

- The preservation, restoration and/or adaptive reuse of heritage buildings;
- The designation of the heritage resource and/or the execution of Heritage Easement Agreements under the *Ontario Heritage Act*;
- Funds toward the conservation, preservation, restoration, and/or commemoration of off-site heritage/archaeological resources, preferably in the local area, including, upon the consent of the owner, contributions to the City's heritage grant fund; and
- Public access to heritage buildings.

It should be noted that studies, including Heritage Conservation District studies, are not capital facilities and are not eligible S.37 community benefits.

4.2 Preservation of Existing Rental Housing (Rental Site Intensification)

Relevant Official Plan Policies: Section 3.2.1 (Housing), policy 5; Section 4.1 (Neighbourhoods), policy 8; Section 4.2 (Apartment Neighbourhoods), policy 3.

The preservation of existing rental housing is a high-priority planning objective where:

- Rental housing exists on the development site; and
- Some or all of the existing rents are at or below the mid-range at the date of application.

A Section 37 agreement may be used as the tool to secure both the rental tenure and improvements to ensure the on-going viability of the existing rental property. The tenants should be consulted by the owner as part of deciding with City staff what type of improvements are to be secured and undertaken.

Other key provisions are as follows, with additional details to be included in the Section 37 agreement:

- Secure the rental tenure for at least 20 years, with no application permitted during that period for demolition or conversion to ownership tenure;

- Secure capital improvements to the existing rental building and related facilities beyond those which may be required in any event for repairs and maintenance or for non-durable landscaping, with no pass-through of related costs to the tenants in their rents; and

- Secure the submission and implementation of a Construction Mitigation and Tenant Communication Strategy to the City's satisfaction.

Other community benefits may also be appropriate where the density increase is significant enough to warrant such consideration. Proposals to intensify sites containing existing rental housing provide excellent opportunities to encourage the owner to secure any new building as mid-range rental housing (see section 5.2 of these Guidelines).

4.3 Replacement of Existing Private Rental Housing

Relevant Official Plan Policies: Section 3.2.1(Housing), policy 6

In cases where planning approvals are sought which would result in the loss of six or more rental housing units, Section 37 will be used to secure the following:

Replacement Units: All of the lost rental units must be replaced with primary (purpose-built) rental units (see Official Plan definition in 3.2.1).

Partial Replacement/Cash-in-lieu: Where full replacement on site is not possible, some units may be replaced by situating them on another site in the vicinity and/or through a cash-in-lieu contribution to the City. The amount of the cash-in-lieu will generally be based on the subsidy cost to build the same rental unit types with similar rents.

Duration of Rental Period: The rental tenure of the replacement units is secured for at least 20 years, with no application permitted during that period for demolition or conversion to ownership tenure.

Initial Rents of Replacement Units: Returning tenants will have maximum rents set no higher than the rent previously paid, increased by an allowance for capital improvements and annual rent guideline increases. New tenants will have rents set no higher than the affordable rent maximum where the new unit is replacing an affordable rental unit, and the mid-range rent maximum where the new unit is replacing a mid-range rental unit (see definitions in Official Plan Section 3.2.1.) Maximum rents shall include the cost of heat, hydro and water.

Rent Increases: Rent increases for any tenancies beginning at first occupancy or within 10 years of the first occupancy will not exceed the provincial rent increase guideline or applicable above-guideline increases, until the tenancy ends or the rental tenure period secured in the agreement with the City expires, whichever occurs first. Provisions shall

be included for phasing in rent increases for such tenants remaining at the expiry of the rental tenure period.

Units Rented After Vacancy: Any replacement rental unit vacated and re-rented within 10 years of the date of initial occupancy of the unit will have a maximum initial rent upon re-rental equal to the greater of: (1) the last rent charged for the vacated unit; and (2) the then current affordable or mid-range rent level, as applicable. Any replacement rental unit vacated and re-rented subsequent to the 10th anniversary of the initial occupancy of that unit would no longer have any restrictions on rents through the Section 37 agreement.

Tenant Relocation and Assistance Plan: Communication with tenants throughout the application and development process forms an important part of the Plan, and tenants should be consulted in the preparation of the Plan. During the application review period, and assuming the demolition is approved, until the day that tenants are vacating for the demolition, the landlord is expected to maintain the occupancy of the rental buildings. Tenants should not be asked to leave prior to City Council approval of the development proposal and the Tenant Relocation and Assistance Plan, and the landlord should ensure the maintenance of the building and the reasonable enjoyment of the premises. Tenants forced to vacate their units as a result of the application, even if prior to submission of the application, are eligible for Tenant Relocation and Assistance benefits, in addition to that required by provincial legislation, consisting of:

a) Rights to return to replacement rental units, on the basis of seniority of tenure;

b) Financial assistance for relocation costs;

c) Provision of interim accommodation or financial assistance to offset the higher cost of interim or permanent accommodation, or possible phasing of the redevelopment to minimize the need for tenants to secure off-site accommodation;

d) Longer notice period before vacant possession so that tenants have more time to find alternate accommodation, and

e) Additional assistance as appropriate for special needs tenants, including elderly or very long-term tenants.

Construction: Where rental units are occupied during demolition or construction activity, the submission and implementation of a Construction Mitigation and Tenant Communication Strategy to the City's satisfaction is required, with submission prior to the issuing of the relevant demolition or building permit.

Other community benefits: Additional community benefits are not precluded, especially where the replacement rental housing comprises a relatively small proportion of the overall density increase.

4.4 Replacement of Social Housing to be Demolished

Relevant Official Plan Policies: Section 3.2.1 (Housing), policy 7

The principles and conditions which apply to replacement social housing, as defined in Section 3.2.1 of the Official Plan, are very similar to those set out with respect to replacement rental housing, above. Some points of difference include:

a) Where redevelopment would result in removal of a building with even 1 social housing unit, the appropriate policies and conditions apply;

b) The replacement social housing, which is always secured as rental housing, is to be maintained as social housing for at least 25 years.

c) Displaced tenants should be guaranteed accommodation in a social housing unit, whether returning to a replacement social housing unit, or permanently relocating to other social housing units, and if returning, will also be provided with a temporary relocation unit. As long as eligibility continues, tenants with Rent-Geared-to-Income (RGI) subsidies will continue to receive RGI.

d) The tenant relocation and assistance plan achieves a higher standard of comprehensively addressing any financial hardship reasonably attributed by the City as being caused by the development project.

4.5 New Affordable Rental Housing

Relevant Official Plan Policies: Section 3.2.1 (Housing), policies 3, 4, and 9(b); Section 3.3 (Building New Neighbourhoods), policies 1(e) and 3(d).

The provision of new affordable rental housing, as defined in Section 3.2.1 of the Official Plan, may be secured either as a first priority community benefit in accordance with policy 3.2.1.9(b) (large-sites), in accordance with the policies of section 3.3 (new neighbourhoods), or as an optional community benefit agreed to by the owner and the City. All of the following conditions must be satisfied:

a) The proposed rental units must be primary (purpose-built) rental units;

b) The minimum number of affordable rental units to be provided as a community benefit is 7;

c) The rental units are to be secured as rental housing for a minimum of 20 years, with no application permitted within this period for demolition or conversion to ownership tenure;

d) The initial rents of the designated units are to be no higher than the maximum affordable rent, which includes the cost of heat, hydro and water.

e) Rent increases for any tenancies beginning within 10 years of the initial occupancy of the rental units will not exceed the provincial rent increase guideline or applicable above-guideline increases, until the tenancy ends or the 10th anniversary of the tenancy, whichever occurs first. Provisions shall be included for phasing in rent increases for such tenants remaining after the 10th anniversary of their tenancy.

f) Rental units vacated and re-rented within 10 years of the date of initial occupancy of the unit will have a maximum rent upon re-rental equal to the greater of: (1) the last rent charged for the vacated unit; and (2) the then current affordable rent level.

g) Rental units vacated and re-rented subsequent to the 10th anniversary of the initial occupancy of that unit would no longer have any restrictions on rents through the Section 37 agreement.

h) If secured as a policy requirement, the affordable units must be designated in the Section 37 agreement and must be provided prior to or in conjunction with the construction of the other housing; and

i) The affordable rental units secured in the agreement are eligible for other government funding, as long as the funding does not duplicate but extends the secured affordability benefits through lower rents, additional units or longer periods of affordability.

4.6 New Affordable Ownership Housing

Relevant Official Plan Policies: Section 3.2.1 (Housing), policies 4, and 9(b); Section 3.3 (Building New Neighbourhoods), policies 1(e) and 3(d).

New affordable ownership housing, as an alternative to affordable rental housing, may be secured when fulfilling policy requirements of the Plan on large sites or new neighbourhoods. It is not a community benefit that can be optionally chosen under the Height and Density Incentive policies alone. The following must be addressed in the Section 37 agreement:

a) The minimum number of units is 7;

b) The specific units must be designated in the Section 37 agreement;

c) The affordable units must be provided prior to or commensurate with the progress of the construction of the other housing;

d) The maximum sale prices will be set by the City and calculated based on the definition of affordable ownership housing in the Official Plan; and

e) Provisions will be made to the satisfaction of the City to ensure that all purchases are by owner-occupiers, and that speculation is discouraged.

5. Guidelines for Other Specific Community Benefits

This section of the Guidelines deals with the securing of specific types of community benefits that are negotiable community benefits, i.e. not matters explicitly required by Official Plan policies. This does not mean that the owner may choose not to provide Section 37 community benefits where the Official Plan policies authorize the use of Section 37, but rather that the specific type(s) of community benefits may be selected through agreement between the City and the owner from among the many choices available. Not every type of community benefit listed in the Official Plan policies has corresponding Guidelines in this section. The list of eligible community benefits is not limited by the contents of these Guidelines. The relevant Official Plan policy references are provided where appropriate.

New affordable rental housing is also an optional community benefit, in addition to being required in certain circumstances by Official Plan policies. Thus, it appears in both sections 4 and 5 of these Guidelines as a community benefit. The requirements are the same in both situations in order for new affordable rental housing to be considered as an eligible benefit, so those requirements can be found in section 4.5 and are referenced, but not repeated, in section 5.1, below.

The conservation, preservation, restoration, or commemoration of off-site heritage/archaeological resources, referenced in section 4.1 of these Guidelines, can also be an optional community benefit, but the relevant Guidelines are not repeated in this section.

5.1 New Affordable Rental Housing

Relevant Official Plan Policies: Section 3.2.1 (Housing), policy 3 and Section 5.1.1, Height and/or Density Incentives, policy 6.

New affordable rental housing can be a negotiated, optional community benefit where not required to be provided in accordance with the New Neighbourhood policies or as a first priority community benefit by the Housing policies of the Official Plan. Where the City and the owner agree that new affordable rental housing will be secured, it will be considered as an eligible community benefit if all of the requirements set out in section 4.5 of these Guidelines are satisfied.

At the owner's discretion, a cash contribution can also be made as a community benefit to the Capital Revolving Fund for Affordable Housing.

5.2 New Mid-Range Rental Housing

Relevant Official Plan Policies: Section 3.2.1 (Housing), policy 3 and Section 5.1.1, Height and/or Density Incentives, policy 6.

The definitions of rental housing and mid-range rents are as contained in Section 3.2.1 of the Official Plan. New primary (purpose-built) rental housing is an eligible Section 37 community benefit provided that the rent levels do not exceed mid-range rents as defined in Section 3.2.1 of the Official Plan.

Proposals to intensify sites containing existing rental housing provide excellent opportunities to encourage the owner to secure the new building as rental housing. Other community benefits may also be appropriate where the density increase is significant enough to warrant consideration or especially in locations where the proposed mid-range rents are in fact market rents.

In order for the proposed new rental housing to be an eligible community benefit, all of the following conditions must be satisfied:

a) The proposed rental units must be primary (purpose-built) rental units;

b) The minimum number of mid-range rental units to be provided as a community benefit is 7;

c) The rental units are to be secured as rental housing for a minimum of 20 years, with no application permitted within this period for demolition or conversion to ownership tenure;

d) The initial rents are to be no higher than the maximum mid-range rent, which includes the cost of heat, hydro and water;

e) Rent increases for any tenancies beginning within 5 years of the initial occupancy of the rental units will not exceed the provincial rent increase guideline or applicable above-guideline increases, until the tenancy ends or the 10^{th} anniversary of the tenancy, whichever occurs first. Provisions shall be included for phasing in rent increases for such tenants remaining after the 10^{th} anniversary of their tenancy;

f) Rental units vacated and re-rented within 5 years of the date of initial occupancy of the unit will have a maximum rent upon re-rental equal to the greater of: (1) the last rent charged for the vacated unit; and (2) the then current mid-range rent level; and

g) Rental units vacated and re-rented subsequent to the 5th anniversary of the initial occupancy of that unit would no longer have any restrictions on rents through the Section 37 agreement.

5.3 Community Services and Facilities Space

Relevant Official Plan Policies: Section 3.2.2 (Community Services and Facilities); Section 3.3 (Building New Neighbourhoods)

For the purpose of these guidelines, community services and facilities include non-profit libraries, publicly funded schools, recreation facilities, community centres, community health centres, family resource centres, public meeting spaces and multi-use facilities, or any other facility operated or directly funded by a government agency or non-profit institution for the purpose of providing human services. Child care facilities are addressed separately in section 5.4, below.

Where community services and facilities space is secured as a community benefit, the following conditions shall generally apply and be secured in the Section 37 agreement. It is intended that there be flexibility in these conditions to allow for consideration of the specific circumstances:

a) The space is to be provided for a term of 99 years on a turn-key basis, with nominal rent (i.e. $2 per annum) and with property taxes, occupancy and maintenance costs funded by the developer. The developer is responsible for constructing, furnishing, finishing and equipping the space and for payment of all applicable development charges, park levies and any other up-front development costs.

b) Generally, the City will conduct a selection process to identify a non-profit service provider to operate in the space. Where deemed appropriate by the City, and the developer agrees, the developer shall issue a request for proposals for the space, and the Chief Planner must approve the developer's choice of operator/service provider; and

c) The size, location, materials and design are to the satisfaction of the City and meet all licensing and Ontario Building Code requirements.

S.37 cash contributions are generally not appropriate for the purposes of directly funding capital construction of publicly funded school buildings given the Province's jurisdiction and role in financing such construction through the funding formula. Cash contributions toward capital construction of school buildings, public or private, are not eligible S.37 community benefits.

However, important community services and facilities not provided by the school boards may be housed within, or associated with, school buildings, or located on school properties, where the general community has reasonably open access and/or the service provider has reasonably long term security of tenure. Such services and facilities could include child care, or various human services. There may be capital costs unique to such community services and facilities space, towards which S.37 cash contributions may be appropriate.

S.37 cash contributions may also be appropriate towards the municipal capital costs of providing community services and facilities on school properties or within school buildings where joint funding/use agreements are in place, and thus could also include pools and other indoor recreational facilities and service program space where the municipality has a funding and long-term public access agreement with the school board.

Such S.37 cash contributions can not only assist in providing important community services and facilities, but in doing so also indirectly help mitigate pressures to close schools or even sell school properties. Cash contributions toward the capital needs of community services and facilities space on publicly funded school properties, provided appropriate public access and long-term tenure are adequately secured, can thus be a particularly effective community-building strategy and should be encouraged.

5.4 Non-Profit Child Care Facilities

Relevant Official Plan Policies: Section 3.2.2 (Community Services and Facilities)

Recognizing that the total cost of a non-profit child care facility may not be financially feasible for smaller developments, more than one development can contribute funds toward the provision of such a facility. The community benefit can thus involve an on-site facility or a cash contribution toward a specific day care facility in the local area. As discussed in the previous section, S.37 cash contributions toward the capital needs of non-profit child care facilities located on publicly funded school properties, provided long term tenure is secured, may be a particularly effective community-building strategy.

5.4.1 General Terms

a) The developer shall construct, finish, furnish and equip a child care facility sufficient to accommodate 52 to 86 children aged 0 to 6 years. The exact size of the child care will be to the satisfaction of the City and the owner;
b) The interior space shall provide for 110 square feet per child, and the exterior space shall provide 60 square feet of usable playground space per child;
c) Child Care space must meet criteria within the Day Nurseries Act; Planning & Design Guidelines for Child Care Centres from the Ministry of Child Services and Youth Services; the CAN/CSA-Z614-03 Children's Play Spaces and Equipment or equivalent; the Toronto Accessibility Guidelines; all provincial codes and municipal planning, zoning and by-law criteria and if the proposed operator will be servicing subsidized spaces the Operating Criteria for Child Care Providing Care in the City of

Toronto must be followed; and
The developer must either select an existing non-profit child care operator with a proven track record in providing licensed child care, or establish a new non-profit corporation with the majority of members being the parents of children enrolled in the program, to the satisfaction of the City.

5.4.2 Facility Design

The S.37 agreement shall provide that at the time of site plan application, approved plans must show:

a) exterior fenced play space adjacent to interior space, suitably weather protected, equipped and landscaped to facilitate year-round use with a minimum 8' x 8' of vandal-proof storage adjacent to each playground;
b) a location at grade is preferred, or partially on the second floor level if there is an opportunity for an adjacent play area on a podium. Infant and toddler playroom space must be located at grade;
c) direct access to grade level and an elevator (if partially located on the second floor). The elevator must be large enough to handle a full length stretcher;
d) acceptable safe access to the Child Care Centre for children, parents, custodians and staff, including pedestrian and vehicular drop-off and pick-up location of children;
e) parking provision of a minimum 3 spaces to be located within a short walk to the centre;
f) fully functional kitchen based on the needs of the chosen operator;
g) acceptable wind, sun/shade, noise, air quality and soil quality conditions;
h) acceptable security provisions that allow the child care to operate autonomously within a multi-use facility;
i) provision and space for the ability to recycle all food, diaper, fluorescent tubing in order to achieve 100% waste diversion by 2010 and the developer to provide funding to reach this goal;
j) compliance with all physical criteria necessary to obtain a license required to operate a child care facility; and
k) Prior to issuance of a building permit, working drawings and specifications must be submitted to the Chief Planner, and the Province's Ministry of Child Services & Youth Services – Compliance Review Services for their review and approval.

5.4.3 Equipment and Start-up Costs

a) The developer must equip the facility in accordance with provincial and municipal standards. Replacement of appliances and large pieces of equipment shall be the responsibility of the developer and shall be the subject of an equipment lease, including a detailed equipment list to be appended to the lease for the facility; and
b) The developer must provide funds required for the defrayment of operational deficits incurred during the first year of operation. The amount will be dependent on the licensed capacity of the program, but shall be in the range of $100,000 to $130,000, adjusted for cost of living increases over time.

5.4.4 Lease

a) The operator and the developer shall enter into a lease for 3-25 year terms, and one 24 year term. The lease shall ensure that the facility is free of all rent, the cost of all utilities and municipal services supplied to the facility, caretaking costs, repair and maintenance costs, property damage, liability insurance, realty taxes, development charges, park levies and any other up front development costs, and local improvement charges; and
b) In the event that the facility is no longer required for licensed daycare purposes, the lease shall acknowledge the City's right to establish another non-profit community service use in the premises.

5.5 Public Art

Relevant Official Plan Policies: Section 3.1.4 (Public Art)

Participation in the City's public art program would constitute an eligible community benefit, for the entire cost of the program as secured in the agreement. These guidelines are not intended to set out in any detail the operations of the City's public art program; that is done in other guidelines and publications, including the "Percent for Public Art Program Guidelines".

a) Public art as an eligible Section 37 community benefit may take the form of an on-site public art installation, or a cash contribution to either a specific off-site installation or a City fund for public art purposes, or a combination thereof. A public art program secured under Section 37 also involves the participation of the City. The public art program must follow the City's established process for approval.

b) For on-site installations, various public art opportunities in the publicly accessible areas of the development should be identified early in the project planning and design stages. Public art can be most effective, both economically and artistically, if planned simultaneously with the design of the project built form and/or open space. Because the City is a participant in the on-site public art program, the developer should consult early in the project planning and design stages with Urban Design staff involved in the public art program. The developer owns the resulting public art unless it has been commissioned for publicly owned lands and the ownership of the artwork is accepted by the City or other public body.

c) An on-site public art installation is primarily suited to large projects including phased development projects. The suggested level of participation is a value of one percent of the gross construction costs of the project, but a higher percentage

may have a greater beneficial impact on the development. The minimum value of an on-site public art installation, in order to best achieve the objectives of the City's public art program in a cost-effective manner, should be $150,000. For projects in which the public art contribution is less than $150,000, other public art options, as outlined in the sections below, could be considered.

d) Cash Contribution to Specific Off-site Public Art Installation: A cash contribution may be made to the City toward a specific off-site public art installation in the vicinity of the development. That public art project, whether privately or publicly owned, must be supported by the City. Areas identified in the Official Plan as a high priority for new development are anticipated to have high potential for public art. Because the Section 37 cash contribution is a community benefit and represents public funds, the City must be accountable for the flow of the funds to the public art project. A cash contribution toward a specific off-site public art installation may constitute only part of the cost of the installation, where it is anticipated that other private and/or public contributions will fund the balance of the cost.

e) Cash Contribution to a City Public Art Fund: At the owner's discretion, a cash contribution may be made to the Public Art Trust Fund or to other City accounts intended to fund public art projects.

5.6 Streetscape Improvements

Relevant Official Plan Policies: Section 3.1.1 (The Public Realm)

Streetscape improvements (e.g. sidewalk improvements/widenings, tree planting, lighting, bicycle locking rings, pedestrian and planting islands, decorative paving) in the public rights-of-way are generally considered as eligible Section 37 community benefits when they are located in the street right-of-way near but not abutting the development site. Streetscape improvements in the abutting public right(s)-of-way between the property line(s) of the development site and the nearside curb(s) bounding the paved road surface(s) are usually required to be provided by the owner as a standard condition of site plan approval, and thus should not be provided in return for increased density and/or height in a rezoning application.

Exceptions to this general rule could be considered for a level of streetscape improvements in the abutting boulevard(s) above and beyond what would normally be required as a condition of site plan approval. Those streetscape improvements that are normally required as a condition of site plan approval can still be secured in a Section 37 agreement, as a convenient legal mechanism, but are not eligible to be exchanged for increased density and/or height.

Cash contributions toward streetscape improvements within a defined area, where a plan for such improvements has been endorsed by City Council, from developments approved

within or near the defined area, are eligible Section 37 benefits. Such defined areas could include Secondary Plan areas or portions thereof, Business Improvement Areas, Community Improvement areas, or special project areas. In such circumstances, the cash contributions could be secured toward achievement of the overall streetscape improvement plan or to specific components of that plan.

The design, standards and specifications of any streetscape improvements must be acceptable to the City.

APPENDIX B

OMB-Approved Policies of the Official Plan
Section 5.1.1: Height and/or Density Incentives,
plus
Modifications to Non-Policy Text

1. Zoning by-laws, pursuant to Section 37 of the *Planning Act*, may be enacted to permit more height and/or density for a use than is otherwise permitted by the zoning by-law for that use in return for the provision of community benefits in the form of capital facilities to be set out in the zoning by-law together with the related increase in height and/or density, subject to the following:

   a) the capital facilities must bear a reasonable planning relationship to the increase in the height and/or density of a proposed development including, at a minimum, having an appropriate geographic relationship to the development and addressing planning issues associated with the development;

   b) the development must constitute good planning, be consistent with the objectives and policies of this Plan, and comply with the built form policies and all applicable neighbourhood protection polices; and

   c) the use of Section 37 must be contingent upon adequate infrastructure to support the development.

Proposed (Non-Policy) Sidebar to be located opposite Policy 1:

This Official Plan recognizes that planning issues related to a proposed development go beyond consideration of matters necessary to support that particular development. They include consideration of appropriate amenities and services in the local community within which the development is to be located. In other words, the planning issues may go beyond appropriate built form, use, compatibility, direct impact, site planning, adequate servicing and the proper functioning of the development to include the adequacy of, for example, the green space system, community services and facilities, the bikeway network, arts and cultural facilities, the public transit system and other aspects of the public realm. These amenities and services are important in maintaining the quality of life in the City while accommodating intensification and thus may have a reasonable planning relationship to the new development.

2. Subject to the provisions of Policy 3, an owner may elect either to develop at such increased height and/or density as may be permitted by the Official Plan in return for providing specified capital facilities in accordance with Policy 1 or else to develop in accordance with the height and density permitted by the zoning by-law in the absence

of any such increase(s). Where the owner elects to provide the capital facilities, they will be secured in one or more agreements that are registered on title to the lands.

3. Except as contemplated in Policy 5, if the applicable zoning has not been updated to implement this Plan or where a change of use is proposed, then the City will consider whether additional height and/or density beyond that permitted by the zoning by-law for the use is warranted without recourse to Section 37 of the *Planning Act.* However, in all cases, where a Secondary Plan or area specific policy contains an explicitly stated base value from which increased height and/or density may be permitted in return for certain capital facilities, then that base value will be used instead of the density permitted by the zoning by-law.

4. Except as contemplated in Policy 5, Section 37 may be used for development, excepting non-profit developments, with more than 10,000 square metres of gross floor area where the zoning by-law amendment increases the permitted density by at least 1,500 square metres and/or significantly increases the permitted height. Where the zoning by-law measures residential density in units per hectare (UPH), the units are to be converted to gross floor area at the rate of 100 square metres per unit in order to determine whether these thresholds are exceeded.

5. Despite Policies 3 and 4, Section 37 may be used, irrespective of the size of the project or the increase in height and/or density:

    a) to conserve heritage resources or rental housing in accordance with the provisions of this Official Plan;

    b) to replace rental housing in accordance with the provisions of this Official Plan;

    c) where Secondary Plan or area specific policies in this Plan contain Section 37 provisions that prevail;

    d) as a mechanism to secure capital facilities required to support development; or

    e) as may otherwise be agreed upon, subject to the policies contained in this Section.

6. Section 37 community benefits are capital facilities and/or cash contributions toward specific capital facilities, above and beyond those that would otherwise be provided under the provisions of the *Planning Act* or the *Development Charges Act* or other statute, including:

    a) the conservation of heritage resources that are designated and/or listed on the *City of Toronto Inventory of Heritage Properties*;

b) fully furnished and equipped non-profit child care facilities, including start-up funding;
c) public art;
d) other non-profit arts, cultural, community or institutional facilities;
e) park land, and/or park improvements;
f) public access to ravines and valleys;
g) streetscape improvements on the public boulevard not abutting the site;
h) rental housing to replace demolished rental housing, or preservation of existing rental housing;
i) purpose built rental housing with mid-range or affordable rents, land for affordable housing, or, at the discretion of the owner, cash-in-lieu of affordable rental units or land;
j) local improvements to transit facilities including rapid and surface transit and pedestrian connections to transit facilities;
k) land for other municipal purposes;
l) substantial contributions to the urban forest on public lands; and
m) other local improvements identified through Community Improvement Plans, Secondary Plans, *Avenue* Studies, environmental strategies, sustainable energy strategies, such as deep lake water cooling, the capital budget, community service and facility strategies, or other implementation plans or studies.

7. Section 37 community benefits will be selected on the basis of local community needs, intensification issues in the area, the nature of the development application, and the strategic objectives and policies of this Plan. Priority will be given to the provision of on-site or local community benefits.

8. Where a Secondary Plan or area specific policy identifies additional capital facilities that bear a reasonable planning relationship to greater height and/or density over an area defined in the Secondary Plan or area specific policy, any Section 37 increase in height and/or density anywhere in that defined area, and the community benefits (specified capital facilities or cash contributions toward the specified capital facilities) in return therefor, will be tied to the identified capital facilities in the manner prescribed by that Secondary Plan or area specific policy. In such circumstances, where appropriate, the prescription will be quantitatively formulated.

9. All zoning by-law provisions enacted pursuant to Section 37 and agreements in effect at the time that this policy comes into force are authorized by this Plan and deemed to comply with this Plan.

Proposed Revision to Introductory (Non-Policy) Text of Section 5.1.1:

The third introductory (unshaded) paragraph of Section 5.1.1. Height and/or Density Incentives, is deleted.

APPENDIX C

Analysis of Written Comments Received

1. Letter (Dec. 1, 2006) from two Co-Chairs of the Federation of North Toronto Residents' Association (FONTRA)

We are writing to express our support for George Belza's request for an extension of the discussions on the proposed implementation guidelines. We strongly support the continuance of the method of principled discussion that proved so successful in regard to the Official Plan.

On behalf of the residents' associations of FONTRA, we also wish to provide you with our initial comments on the proposed implementation guidelines for the new Official Plan policies respecting Section 37 of the Planning Act. Should the extension referred to above not be granted, FONTRA supports the following implementation principles as outlined in the proposed Section 37 Guidelines:

a) the development must represent good planning (2.1);
b) the community benefits must be set out in the site-specific zoning by-law (2.2);
c) the community benefits should be specific capital facilities or cash contributions to them (2.3);
d) there must be a reasonable planning relationship between the community benefits and the development (2.4); good architecture or urban design are expected of all developments and do not qualify as community benefits (2.8);
e) the community benefits must relate to existing deficiencies that will not be funded by development charges (2.9);
f) the Ward Councillor and Planning Staff should always be involved in the negotiation process (2.11 and 2.12).

From our point of view, however, the following implementation principles appear to be more controversial:

g) no city-wide formula for determining Section 37 contributions exist (2.5), but, at the very least, a cap on the maximum height and density increases should be established;
h) the list of eligible benefits in the Official Plan is not exhaustive (2.6), but it should be;
i) matters not eligible as community benefits but otherwise required for good planning can be secured in a Section 37 Agreement for convenience (2.7), but such an approach lacks the necessary transparency;
j) the use of Section 37 to secure certain OP-requirements does not render these requirements negotiable (2.10), but it certainly does give such an appearance.

After further consideration, we may forward to you additional comments about the proposed Section 37 Guidelines.

Thank you for your attention to this important matter.

Staff Response:

Item (g):
As discussed in the December 19, 2005 and June 15, 2006 reports (see internet links in Decision History section of this report), and as can be seen in the Official Plan policies in Appendix B of this report, neither the Official Plan policies nor the S.37 Guidelines contain a quantum, or formula, for determining the level or value of benefits. The Official Plan also does not in general contain density limits, so density "caps" on increases are not appropriate, because the appropriate increases depend upon the specific context of the application, including the current limits.

This concern appears to be based on a fear that use of S.37 will result in inappropriately large height and/or density increases, and staff have, in the above-mentioned staff reports, discussed the fact that developers will make applications for height and density increases even if S.37 is not used, and the City must conduct a planning analysis of such applications and determine that they represent good planning on their merits before considering approval. The same planning analysis must be conducted when S.37 is being used to secure community benefits. The proposed development must in all cases represent good planning.

In staff's view, S.37 is a tool by which community benefits may be obtained when increased height and/or density are proposed. S.37 is not a tool by which height and/or density may be increased through the provision of community benefits, except in limited, defined and controlled circumstances such as are set out in the North York Centre Secondary Plan. Even in this example cited, the proposed development must still represent good planning before approval is considered.

Item (h):
Staff can see no benefit to limiting the scope of community benefits, beyond setting out broad policy parameters and specifically listing the more common types of benefits. If an innovative type of benefit conforms to Official Plan policies and is mutually agreed upon by the City and the owner, is endorsed by Council after a public participation process, but is not explicitly listed in policy 5.1.1.6, then there would appear to be no good reason to prohibit such a benefit.

Item (i):
Staff does not agree that securing matters that are not eligible community benefits, i.e. matters required to support the development, causes any increased lack of transparency. No increased height and/or density is exchanged for such matters, and these matters would be required even if S.37 was not being used. Their inclusion in the agreement is recommended in the Final Reports, which are subject to public scrutiny. The S.37

agreement is enforceable under the Planning Act, and inclusion of matters in the agreement adds a level of security that may not otherwise be available to the City. As the City's new powers under the Planning Act and City of Toronto Act reforms are unveiled, there may be other mechanisms to secure some such matters (possibly conditional zoning and/or site plan approval conditions), which may reduce the number of these matters included in S.37 agreements.

Item (j):
The S.37 agreement has, until very recently, been one of the only tools at the City's disposal for implementing certain Housing and Heritage Resource policies of the Official Plan. If better tools were available, they would be used instead. The new powers of conditional zoning may provide some assistance, depending upon what the as yet unreleased Provincial Regulations permit the City to do. However, staff anticipates that S.37 will continue to be an important implementing tool with respect to the Official Plan.

In any event, this principle 2.10 in the Proposed S.37 Guidelines has been reworded as a result of the comments received from both FONTRA and GTHBA, to emphasize that S.37 is an essential tool for Official Plan implementation.

Staff Recommendations:

That section 2.10 be revised as per the wording contained in Appendix A to this report.

2. Memorandum received Jan. 19/07 from McCarthy Tetrault, solicitors representing Greater Toronto Home Builders' Association (Note: section numbers have been edited to reflect the appropriate section numbers in the Appendix A version of the Proposed Guidelines)

The following are intended to be preliminary comments to "kick-off" further discussions aimed towards finding a consensus position. They are referenced to the identified paragraph in the draft Guidelines.

2.4 Delete third sentence commencing "a planning relationship exists…": who "benefits" is not an indication of a planning relationship.

2.5 Second paragraph after the first sentence should be re-written to clarify that any formula employed in an area relates the justified benefits to development over the defined area in a reasonable (planning) way.

2.7 This paragraph should be re-written to acknowledge that any matter not specifically justified through the application of Plan policy may only be secured with the consent of the owner. The City should not arbitrarily decide that any matter is "necessary for good planning or routinely required in the absence of using Section 37".

2.8 This paragraph should be deleted. On one hand it is a truism, on the other it removes any motivation to do something truly exceptional which could be a public benefit.

2.9 The first bullet should be deleted. Any section 37 contribution must be premised on the development in issue and matters which bear a reasonable planning relationship thereto. This bullet obfuscates that relationship.

2.10 This paragraph should be deleted. The policies of the Plan that have been the subject of all the negotiations appropriately and fully articulate this subject matter.

3.1, 3.2 (now 3.2, 3.3) Any requirement for timing prior to the by-law being passed has no basis in law. Council has not authorized the invocation of section 37 until the by-law is passed, so there is no legal basis to suggest that the agreement should be executed prior to such, or that any obligation could come due.

3.3 (now 3.4) see comments re: section 2.7, 2.9, 2.10 above.

3.6 (now 3.7) There is insufficient reason to discourage a change provided that the suggested process is followed.

3.7, 3.8 (now 3.8, 3.9) These paragraphs should be deleted. The approved OP policy indicates that the benefits are to be net: these provisions serve only to limit the tools that may be brought to the table to implement an appropriate planning outcome.

Sections 4 and 5 of the proposed Guidelines, even on this preliminary basis, require personal discussion. From our perspective the general principles enunciated above continue to hold for these more specific sections, but to come to a reasonable accommodation in a co-operative way face-to-face meetings are essential right at the outset. (Staff note: A verbal communication was subsequently received from a GTHBA spokesperson indicating that Sections 4 and 5 had been reviewed and no additional comments were necessary.)

Staff Response:

Section 2.4
Staff agrees with revisions to better reflect the approved policies (Appendix B to this report), including the nature of the planning relationship between the community benefits and the increase in height and/or density, and in particular policies 5.1.1.1 and 5.1.1.7 and the non-policy sidebar.

Section 2.5
Staff agrees, in light of approved policy 5.1.1.8, that the wording could better reflect the wording of the policy.

Section 2.7
Staff agrees that the wording could better recognize that the owner and the City must mutually agree to secure matters as a legal convenience, and similarly in 2.8.

Section 2.8
Staff cannot agree that this section be deleted, because good architecture and good design represent subjective matters that could not be objectively considered as community benefits in a consistent manner from one S.37 project to the next. Most applicants will argue that their project represents good design and architecture, and if considered an eligible community benefit, City Planning staff and Council would then be in an impossible position of having to evaluate how much of the overall S.37 benefit "room" this benefit should occupy for each project. As stated in section 2.8 of the Guidelines, accepting good design and architecture as S.37 community benefits would signal that lower standards are appropriate when S.37 is not used.

Section 2.9
While staff disagrees that the first bullet should be deleted, the wording could be improved to indicate that all Official Plan policies must be satisfied and that a reasonable planning relationship must exist between the contributing development and the community benefits.

Section 2.10
Rather than deletion of the section, staff agrees that a rewording would be appropriate to recognize that S.37 is an essential tool for implementing certain Official Plan Housing and Heritage Resource policies, and to clarify why such community benefits should be distinguished from others not governed so tightly by Official Plan policy.

Sections 3.1, 3.2 (now 3.2, 3.3)
Staff is of the view that requiring execution of agreements, and occasional payment of cash contributions, prior to introduction of the Bills in Council is a necessary course of action that does not deal with applicants in an unreasonable manner. This process has been employed successfully for years by the current City and former municipalities, with very few complaints from the development industry. If an agreement was executed by the applicant, and Council refused the application, then the City would not sign the agreement, and the By-law authorizing the community benefits would not be passed. Similarly, any cheques submitted as S.37 cash contributions would be returned.

Section 3.3 (now 3.4)
Staff agrees that the section should be revised to better address how eligible community benefits and other matters secured to support development should be determined and distinguished.

Section 3.6 (now 3.7)
Staff agrees that the words "should generally be discouraged" be replaced with "is often not a simple exercise", for a softer approach.

Sections 3.7, 3.8 (now 3.8, 3.9)
Staff does not agree that these sections be deleted. Guidelines are not by-laws. With respect to 3.8, if there is ever a situation in which the reasons are overwhelming for considering in the S.37 agreement a reduction or elimination of development charges or parks levies, then staff could report to Council seeking appropriate authority for a change in direction. The appropriate Divisions responsible for development charges and parks levies should of course be consulted in the preparation of such reports. In the overwhelming majority of cases, no exemptions or reductions for development charges or parks levies should be considered, and this section appropriately makes that clear.

Section 3.9 does already provide for exceptional circumstances to be considered where the S.37 agreement could provide for development charge credits.

Staff Recommendations:

That sections 2.4, 2.5, 2.7, 2.8, 2.9, 2.10, 3.4 and 3.7 be revised as per the wording contained in Appendix A to this report.