



## STAFF REPORT ACTION REQUIRED

### Response to Auditor-General's Report: Section 37 and Section 45 Funds Not Received in 1998-2007 Approvals

<b>Date:</b>	February 24, 2012
<b>To:</b>	Planning and Growth Management Committee
<b>From:</b>	Chief Planner and Executive Director, City Planning
<b>Wards:</b>	All
<b>Reference Number:</b>	pg12004

#### SUMMARY

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This report responds to the Auditor-General's recommendation in his March, 2011 report to the Audit Committee with respect to funds secured under Sections 37 and 45 of the Planning Act, that the Chief Planner assess the status of community benefits secured since amalgamation (January 1, 1998) to provide an appropriate level of assurance that cash that should have been received, has been received and to report any uncollectible benefits.

City Planning staff analysis has shown that of \$120.8 million secured as cash benefits in 248 Sections 37 and 45 approvals from 1998 through 2007, only \$770,000, or 0.6%, from 6 developments is due where no record of payment has been found to date. These 6 developments are listed in Attachment 1 to this report. Through subsequent analysis and investigation by City Planning staff, the overwhelming majority of the \$24.9 million identified as outstanding from 1998-2007 approvals has been categorized as not yet due, as not required to be paid at all, or as received as described on page 4.

#### RECOMMENDATIONS

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**The City Planning Division recommends that:**

1. City Planning staff, in cooperation with Legal and Finance staff, continue to investigate and pursue outstanding Section 37 and Section 45 funds which are due but for which no records of payments have been found, with priority given to funds secured since amalgamation (January 1, 1998). And further, that the Chief Planner report on the final results of this work by January 2013.

## **Financial Impact**

There are no immediate financial impacts as a result of approval of the recommendation in this report.

The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact information.

## **DECISION HISTORY**

The Auditor-General forwarded a report dated March 31, 2011 (Item AU2.4) to the May 12, 2011 Audit Committee meeting, on his audit of community benefits secured under Sections 37 and 45 of the Planning Act. The Audit Committee and subsequently, City Council on June 14, 2011, adopted the report's recommendations without amendment.

The adopted recommendations included the following:

- "1. The Chief Planner assess the status of community benefits secured since amalgamation (January 1, 1998) under Sections 37 and 45 of the Planning Act to provide an appropriate level of assurance that all cash and significant non-cash benefits that should have been received, have been received and report any uncollectible benefits to Council."

The Management Response from the Chief Planner and the Deputy City Manager/Chief Financial Officer, attached as Appendix 2 to the Auditor-General's report, contained the following action item in response to the above recommendation:

"Chief Planner will forward reports to Planning and Growth Management Committee on: cash benefits secured since amalgamation (2011 Q4); and significant non-cash benefits secured since amalgamation. This latter report will take significant resources to complete (2012 Q4)."

The following are the relevant links:

Agenda Item AU2.4: <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.AU2.4>  
Auditor-General's forwarding staff report dated March 31, 2011:

<http://www.toronto.ca/legdocs/mmis/2011/au/bgrd/backgroundfile-37764.pdf>

Appendix 1 to March 31, 2011 report- City Planning Division - Community Benefits Secured Under Section 37 or 45 of the Planning Act:

<http://www.toronto.ca/legdocs/mmis/2011/au/bgrd/backgroundfile-37765.pdf>

Appendix 2 to March 31, 2011 report - Management's Response to the Auditor General's Review of City Planning Division, Community Benefits Secured Under Section 37 or 45 of the Planning Act: <http://www.toronto.ca/legdocs/mmis/2011/au/bgrd/backgroundfile-37766.pdf>

## **ISSUE BACKGROUND**

In Section A.1 of the Auditor-General's report (Appendix 1 referenced above), entitled "Ensure Benefits Previously Secured Are Received", the Auditor-General makes the following statements:

"The management information system indicates the City and its former municipalities have secured \$161 million in cash benefits prior to 2008. While a significant amount of these benefits have been received, the database indicates \$28 million remains outstanding. Since these amounts arose prior to the implementation of improved business processes in 2008, a review to confirm the status of the outstanding cash benefit amounts is warranted."

In considering the above statement in conjunction with the Auditor-General's recommendation quoted in the Decision History section above, this report focuses on the S.37/S.45 amounts outstanding with respect to the developments approved since amalgamation (January 1, 1998) and prior to 2008, when the new tracking system was implemented.

## COMMENTS

### Context: Summary of All Section 37 and Section 45 Approvals (Before 2008)

Table 1 below provides a summary of all relevant Section 37 and Section 45 approvals prior to 2008 and the related cash contributions.

**Table 1: Summary of Section 37/45 Approvals Prior to 2008 and Related Cash Contributions (as of February 16, 2012)**

<b>Approvals Prior to 2008 and Related Cash Contributions</b>	<b>S.37/S.45 Approvals Securing Community Benefits 1998-2007</b>	<b>S.37/S.45 Approvals Securing Community Benefits Before Amalgamation (Jan. 1/98)</b>	<b>Total</b>
<b>No. of S.37 Approvals</b>	<b>252</b>	<b>81</b>	<b>333</b>
<b>No. of S.45 Approvals</b>	<b>82</b>	<b>0</b>	<b>82</b>
<b>No. of Approvals Securing Cash Contributions</b>	<b>248</b>	<b>61</b>	<b>309</b>
<b>Amount of Cash Contributions Secured<sup>[1]</sup></b>	<b>\$120,776,550</b>	<b>\$43,189,595</b>	<b>\$ 163,966,145</b>
<b>Amount of Cash Contributions Received<sup>[2]</sup></b>	<b>\$107,649,793</b>	<b>\$32,611,524</b>	<b>\$ 140,261,317</b>

[1] The term "secured" as used in this report means secured in an agreement or Committee of Adjustment decision, and does not necessarily mean that the City has received the funds. Amount can vary slightly over time due to owner selection of cash/non-cash options, e.g. public art is usually listed as an in-kind

benefit, but owners sometimes opt to make cash contributions in lieu of installations. Also, new information regarding benefits secured does come to light from time to time.

- [2] Includes indexing and, for former Scarborough, interest accrued prior to amalgamation on balances transferred to the new City of Toronto. Again, new information can also come to light to change the total.

### **Methodology: Categorizing Contributions Secured But Not Received**

The Section 37/45 Database, which the Auditor-General partly relied on to support some of his findings, is maintained jointly by the City Planning and Accounting Services Divisions. City Planning staff has analyzed each amount secured from January 1, 1998 through December 31, 2007 that was identified as outstanding at the time of the Auditor-General's review, and has carried out appropriate checks and investigations to determine in which of the following four categories the cash amount should be included:

1. **Payments not due.** This means that the payment has not yet been triggered, which in most cases would mean that the respective building permit has not been issued;
2. **Records updated: Payment not required.** This was usually due to a careful reading of the detailed provisions of the respective agreement or Committee of Adjustment (C of A) decision. Initial descriptions were usually based on the Section 37 provisions of the relevant zoning by-law or the conditions of the Committee of Adjustment minor variance decision (Section 45) and the agreement provisions can contain refinements. In some cases there were cash and non-cash alternatives where the latter were selected by the owners.
3. **Payments received.** In some instances, the payment was received after the September 24, 2010 production date of the Auditor-General's database report, and in other cases further investigation has revealed that the payment had been previously received by the City.
4. **Payments due: No record of payment.** In this category, the development has usually been constructed or is under construction, and no record of payment has been found. Staff emphasize that outstanding cash amounts included in this category could possibly have been received previously, but records have not yet been located. The developers/owners should be given an opportunity to provide proof of payment before being characterized as having not having fulfilled their Section 37/45 obligations.

### **Analysis of Outstanding Section 37/45 Balances (1998-2007 Approvals)**

The categorization of the individual amounts outstanding, in accordance with the methodology described above, has produced the results shown in Table 2 below. The total amount outstanding at the time of the Auditor-General's review, has been calculated by simply summing all of the outstanding payment amounts in approvals from 1998-2007, with the result being \$24.9 million.

**Table 2: Status of outstanding balances of Section 37/45 cash benefits secured in approvals 1998-2007 at time of Auditor-General's Review (September 24, 2010)**

<b>Status of Outstanding Balances</b>	<b>S.37/S.45 Approvals from 1998 to 2007</b>	<b>Number of Development Approvals</b>
<b>Payments Not Due</b>	\$15,550,384	33
<b>Records Updated: Payments Not Required</b>	\$1,771,752	14
<b>Payments Received<sup>[2]</sup></b>	\$6,779,923	31
<b>Payments Due: No Record of Payment<sup>[3]</sup></b>	\$770,000	6
<b>Total</b>	<b>\$24,872,059<sup>[4]</sup></b>	<b>76<sup>[1]</sup></b>

- [1] Total number of approvals is less than sum of individual category approvals in column above because some approvals with more than one cash benefit appear in more than one category.
- [2] No indexing or interest included. Payments received since September 24, 2010 or documentation uncovered of previous payments. The amount reflects only those payments documented since September 24, 2010 which pertain to outstanding cash amounts identified as of that date by the Auditor-General, and does not include all payments received with respect to post-amalgamation approvals (see Table 1).
- [3] Inclusion in this category does not necessarily mean that the City has definitely not received payment. Some payment documentation may not yet have been uncovered.
- [4] This total is obtained by summing all of the individual post-amalgamation cash amounts secured and outstanding as identified in the database printout used by the Auditor-General.

The City Planning staff analysis focuses on developments approved from January 1, 1998 to December 31, 2007. Table 2 shows that the total amount outstanding, where payments should have been made, and where no records of payments have been found, is \$770,000 involving 6 approvals. This is out of a total amount secured since amalgamation, as shown in Table 1, of \$120.8M involving 248 approvals in which cash contributions were secured. Attachment 1 to this report provides a list of these 6 development approvals for which records of payment for at least one cash amount secured have not yet been found.

**Discussion of Specific Auditor-General's Comment**

As indicated earlier in the "Issue Background" section of this report, a rough estimate by the Auditor-General, derived through data obtained from the City's Section 37/45 tracking database in September, 2010, revealed that \$28 million "remains outstanding" with respect to the pre-2008 approvals. This dollar figure included amounts from both post- and pre-amalgamation approvals. Questions were asked of City Planning staff by Audit Committee members about this \$28 million outstanding amount when the Auditor-General's report was under consideration.

Thus, this amount identified by the Auditor-General was considered to be worthy of a brief discussion in this report.

A similar rough estimate can be obtained from Table 1 by subtracting the total amount received (\$140.3M) from the total amount secured (\$164.0), resulting in a difference of \$23.7M. This differs from the Auditor-General's \$28M result because additional payments have been recorded and other new information has come to light since September, 2010 that have collectively changed both the total amount secured and the total amount received.

City Planning staff has found that this methodology under-estimates the total balance outstanding by a significant amount. The true balance outstanding, as of the September 24, 2010 database report on which the \$28M figure was based, was actually \$41.6 million. The true total balance outstanding is found by simply summing all of the individual amounts secured that are not recorded as received. The erroneous \$28M amount outstanding resulted from the fact that the total amount received by the City includes indexing amounts as well as a limited amount of interest accrued (see Note #2 pertaining to Table 1), and is thus an "inflated" amount. If this "inflated" total amount received is subtracted from the total amount secured, the result is less than the actual amount outstanding.

Of this \$41.6 million outstanding total, \$24.9 million, as shown in the "Total" row of Table 2, pertains to post-amalgamation approvals and is the subject of the further analysis contained in this report.

### **Next Steps**

If further internal review of the outstanding amounts due fails to turn up any documentation of payments received, the current or former owners will be asked to provide, where possible, documentation that the payments were made. Depending upon the results, Legal staff could then be consulted regarding any possible further action on the part of the City.

Where condominiums are involved and have been registered, the condominium unit owners, through the condominium corporations, are in most cases legally obligated to fulfill the requirements of the Section 37 agreement if the obligations remain outstanding. The original developers/property owners who signed the agreements are no longer the primary parties to those agreements. Staff anticipates that enforcement of a registered Section 37 agreement by the City against a condominium corporation to obtain outstanding cash balances could be difficult and undesirable, since the individual unit owners would not be at fault for the delinquencies. Most S.37/S.45 approvals pertain to residential condominiums, and thus there may come a point in time where the City, with legal advice, determines that some outstanding amounts owing are uncollectible. This determination could be based partly upon cost-benefit analyses, in that any potential gains for the City are outweighed by political, compassionate and financial cost considerations of proceeding with legal actions. The internal review and due diligence are continuing.

## Conclusions

The Auditor-General recommended that City Planning staff assess the status of Section 37/45 community benefits secured since amalgamation. The Auditor-General's analysis focused on pre-2008 approvals because the City's tracking system was greatly improved in early 2008. City Planning staff's subsequent analysis has revealed that of the total \$120.8 million in Sections 37 and 45 funds secured in the period from amalgamation to 2007, only \$770,000, or 0.6%, is due and for which no payment records for the six approvals have yet been found. These outstanding funds have not yet been deemed "uncollectible".

Planning staff will continue to review and pursue the outstanding funds identified, both pre- and post-amalgamation, with emphasis on the funds secured since amalgamation. This report recommends such a course of action.

## CONTACT

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## SIGNATURE

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Gary Wright  
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City Planning

## ATTACHMENTS

Attachment 1: Section 37/45 Approvals 1998-2007 with Payments Due and No Record of Payments Received

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Attachment 1

Section 37/45 Approvals 1998-2007  
with Payments Due and No Record of Payments Received

(Report produced from S.37/S.45 Tracking Database)





City Planning

**S37/45 Benefit Details (Cash Summary)**

**Section 37 Benefits**

Ward 9	Location & Comments	Approval Date	By-law	Total Secured
	30,901,100 Billy Bleshop Way and 695 Wilson Avenue (aka Wilson Ave.(S. side) between Dufferin St. & Allen Rd., Blk H) LC for \$200K dated Sept'03 in possession of LC Administrator (#LCP2005127V00010, \$150K for streetscape improvements & \$50K for traffic infiltration study, Costco Canada Inc.), \$50K released and \$150K drawn down. OZ	30/Aug/2000	623-2000 (OMB)	\$307,493.61
	<b>Community Benefit</b>			
	Community arts facilities associated with Downsview Collegiate community arts program	\$25,000.00		\$150,000.00
	Wilson Ave Streetscape Improvements (LC received as part of \$200K LC)	\$150,000.00		\$26,377.69
	1% of govt for Public Art - \$60K Home Depot, \$36K Best Buy, \$4K Krispy Kreme, \$7.5K LCBO, \$6,702.60 Bldg D (HS CB Bank), \$14,259.21 Bldg G (Linens 'n Things) Remaining balance to be pooled for Wilson Ave project (Urban Design 100504)	\$132,493.61	\$107,500.00	\$176,377.69
	<b>Location Totals:</b>	\$307,493.61	\$107,500.00	\$176,377.69
	<b>Ward 9 Totals:</b>	\$307,493.61	\$107,500.00	\$176,377.69
	<b>Ward 10</b>			
	775 Steeles Ave. W. OPA By-law 195-2005(OMB). Uncertain whether agreement executed in 2004 or 2005. OMB Order Nos. 244 & 554. O.Z	28/Sep/2004	196-2005(OMB)	\$75,000.00
	<b>Community Benefit</b>			
	Improvements to parks/community facilities in Ward 10, prior to B.P.	\$75,000.00		
	<b>Location Totals:</b>	\$75,000.00		
	<b>Ward 10 Totals:</b>	\$75,000.00		
	<b>Ward 19</b>			
	65,758.5, 190 East Liberty St., 69, 80, 90 Lynn Williams St. OPA Nos. 165 & 349. Amended Zoning By-law 566-2000 as amended by 664-2003. Also see record for 14 Strachan (also part of the Garrison Common Lands which were formerly the Ingilis Lands). OZ	16/Jun/2005	600-2005	\$721,279.70
	<b>Community Benefit</b>			
	1% of Geis Construction Costs Public Art Program \$100,000 (indeed) prior to issuance of first building permit for any one or more of: King Street West railway underpass located east of Atlantic Avenue, the proposed King Street over-pass; and, or the connection to the proposed GO Station, Ingilis Lands	\$621,279.70	\$621,685.50	\$0.00
	<b>Location Totals:</b>	\$721,279.70	\$621,685.50	\$0.00
	<b>Ward 19 Totals:</b>	\$721,279.70	\$621,685.50	\$0.00
	<b>GRAND TOTALS Section 37 Benefits:</b>	\$1,103,773.61	\$734,185.00	\$176,377.69

**Section 45 Benefits**

Ward 27	Location & Comments	Approval Date	CoA File No	Total Secured
600 Jarvis Street OZ		04/Jun/2004	A0191/04TEY	\$120,000.00
<b>Community Benefit</b>				
\$120,000.00 to the 519 Church Street Community Centre Capital Improvement program;				
Location Totals:				
Ward 27 Totals:				\$120,000.00
<b>Ward 28</b>	<b>Location &amp; Comments</b>	<b>Approval Date</b>	<b>CoA File No</b>	<b>Total Secured</b>
106-111 Richmond St. E. OZ		21/Mar/2000	A099/00TD	\$340,000.00
<b>Community Benefit</b>				
public parkette adjacent to the off-site benefits (Dundas Square)				
Location Totals:				
Ward 28 Totals:				\$340,000.00
<b>33 Bay St.</b>				
OZ		01/May/2006	A 02110/06TEY	\$250,000.00
<b>Community Benefit</b>				
Streetscape improvements in the area bounded by the railway on the north, Bay Street on the west, 100 metres east of Yonge Street on the east and Queens Quay on the south.				
Location Totals:				
Ward 28 Totals:				\$250,000.00
<b>GRAND TOTALS Section 45 Benefits:</b>				<b>\$0.00</b>
<b>GRAND TOTALS ALL SECTIONS BENEFITS:</b>				<b>\$0.00</b>

Secured	Received	Interest	Spent	Balance
\$120,000.00				
\$120,000.00				
\$120,000.00				
\$200,000.00				
\$140,000.00	\$140,000.00		\$140,000.00	\$0.00
\$340,000.00	\$140,000.00		\$140,000.00	\$0.00
\$250,000.00				
\$250,000.00				
\$590,000.00	\$140,000.00		\$140,000.00	\$0.00
\$710,000.00	\$140,000.00		\$140,000.00	\$0.00
\$1,813,773.51	\$1,048,182.61	\$1,381.07	\$874,185.80	\$176,377.88