

# Section 37 Review

## Final Report

**City of Toronto**

Prepared by **Gladki Planning Associates**

**January 2014**

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Improvements to the Section 37 Implementation Process -  
*Interim Study Findings*







# Introduction

Section 37 of the *Planning Act* authorizes municipalities to grant increases in height and density of development, in exchange for the provision of “facilities, services or matters”. The City of Toronto has used Section 37 provisions for community benefit contributions more extensively than any other municipality in Ontario, since its introduction by the Province. The City’s experience is widely relied upon by other municipalities as they implement their own frameworks for using the provisions of Section 37.

A number of issues have emerged over the years regarding the use of Section 37 for community benefit contributions, particularly regarding clarity, consistency and transparency. Some of these issues have been around since the concept of allowing additional height and density in exchange for community benefits was first introduced; others have emerged as experience with the use of this Section of the *Planning Act* has evolved. The need for clarity and transparency going forward is essential to gain the trust and support of the public, politicians and the development industry.

Section 5.1.1 of the City’s Official Plan, provides a planning framework for the use of Section 37. City Council also adopted detailed “Implementation Guidelines for Section 37 of the Planning Act” and a “Protocol for Negotiating Section 37 Community Benefits” in the Fall of 2007.

City Council recently considered an amendment to Section 5.1.1.6 of the Official Plan, as part of its five year review to add opportunities for “affordable ownership housing” and “affordable rental units” as community benefits under Section 37. In addition, the City has policies that are somewhat more prescriptive in the North York Centre and Sheppard East Subway Corridor Secondary Plans, based on a schedule of benefits that represents a formula. Embedded

in as-of-right zoning bylaws on “Avenues” such as Dundas Street West (Royal York Road to the Humber River) in Etobicoke, Lawrence Avenue East (Victoria Park to Birchmount), Kingston Road (Cliffside), Kingston Road (Victoria Park to Birchmount), and Old Kingston Road and Kingston Road in Scarborough are base density/height levels and increased density/height levels achievable through the provision of Section 37 benefits. A number of other Secondary Plans also include area-specific Official Plan policies that contain “more prescriptive” Section 37 provisions.

Since amalgamation the City has secured \$309 million in Section 37 cash benefits and received \$212 million in payments and accrued interest, as well as significant additional un-quantified in-kind benefits that may exceed the value of the cash contributions. Section 37 of the *Planning Act* represents an important planning tool that the City has used effectively to help achieve “good planning” in areas where development is located, by integrating new development within a neighbourhood context through community benefit contributions and improving the adjacent community through the development approval process.

It is important to remember in the context of this review that although Section 37 contributions are significant, they represent what is primarily a planning tool to address community benefits mostly in proximity to the development. The funds that are provided through Section 37 agreements represent a small fraction of total revenue that is generated through developments that require approval for rezoning. For example, each development approval increases the City’s assessment base and generates significant additional tax revenues for the City year after year. In addition, all developments generate development

charge revenues which are funneled into general revenues and available to address needs across the City. Each development also contributes to parks levies, a portion of which are allocated to address City wide needs.

As an example, the City approved a rezoning for a development at 33-45 Lombard Street in 2003 known as the Spire, which generated \$3,253,500 in Section 37 benefits for the revitalization of the Parish House and Diocesan Centre at St. James Cathedral in addition to a publically accessible open space on the south side of Lombard Street (not valued). In addition, through a restriction proposed in the site-specific zoning by-law for this development, no further development would be permitted that increases the floor area on the St. James Cathedral site. Applying 2013 development charge and tax rates, the development would generate \$3,768,000 towards development charges, \$1,131,000 towards the land transfer tax, \$591,740 towards the park levy as well as \$685,000 in annual tax revenue for the City (all figures represent 2013 values).

Gladki Planning Associates have been engaged by the City to provide recommendations to improve the clarity and transparency of the Section 37 process for obtaining community benefit contributions at the City. The process for conducting this assignment has included background research, individual interviews with councillors and staff and a series of workshops.

Attached to this report is an interim document prepared for this study; "Improvements to the Section 37 Implementation Process", dated October 2013, prepared by Gladki Planning Associates, which:

- Provides an assessment of the current process as it relates to the overall objec-

tive for the use of Section 37 as stated in the Official Plan;

- Presents the results of a review of academic research and best practices from elsewhere;
- Provides an overview of Ontario Municipal Board decisions regarding the use of Section 37; and
- Summarizes the results of consultations with City Planning and Legal staff, councillors, staff from other departments, and the development community to identify points of consensus and issues to be resolved.

Following the completion of the interim document a number of workshops were held to solicit comments on the main findings and issues identified. These include:

- A workshop with senior planning and legal staff at the City;
- A workshop with staff from operating divisions at the City;
- A workshop with City councillors;
- A workshop with BILD Toronto; and
- A workshop with senior management from across the City.

This report integrates feedback generated at these workshops with the earlier findings included in the interim document to formulate conclusions and recommendations for future action to improve the negotiation and implementation of Section 37 agreements for community benefit contributions.

# 2

## Rationale for Section 37

The most important conclusion of this study is that Section 37 represents a useful and valuable tool for achieving community benefits related to development approvals. It represents an integral component of “good planning”, which is identified in the City’s “Implementation Guidelines for Section 37 of the Planning Act”, as a key consideration in assessing development approvals in the City.

Many participants in this study stated that, in their view, consideration of community benefit contributions in the context of Section 37 of the *Planning Act* provides an important vehicle for relating development to its neighbourhood context. Their view is that good planning refers not just to the nature and fit of the building under consideration, but also how it can improve the surrounding neighbourhood.

Thus Section 37 of the *Planning Act* is to be seen as fully integrated with Section 34 of the *Planning Act* (the provisions related to zoning), and not as a distinct consideration, particularly in areas where a large amount of intensification is taking

place. In these areas rapid change requires that facilities be upgraded and capacity expanded to maintain acceptable levels of community services for existing and new populations. Section 37 community benefit contributions provide a means to help address these needs in proximity to development.

Overall, the City’s policy framework for the use of Section 37 is seen as solid by participants in interviews and workshops, but there are concerns that the policy is not consistently applied and that variations in its implementation may have undermined the credibility of the concept. A particular concern relates to how the value of the Section 37 contribution is determined.

The issues that have been identified do not relate so much to the policy framework as reflected in the Official Plan, but rather with the need to clarify aspects of the Implementation Guidelines. So while the City’s overall approach represents a valid framework, this report suggests a number of recommended actions that are intended to strengthen the Guidelines and clarify their intent.





# 3

## Reasonable Planning Relationship

The City's Guidelines emphasize the importance of establishing a reasonable, clear and defensible relationship between the development under consideration and the proposed community benefits. This position is reinforced through decisions at the Ontario Municipal Board, which has ruled on a number of cases involving Section 37 issues in Toronto that there must be a connection, or nexus, between the contributing development and the community benefits.

A reasonable planning relationship with regards to Section 37 community benefit contributions has been generally interpreted as having an appropriate geographic relationship to the development. While this is already stated very clearly in the Guidelines, some additional clarity may be helpful to further define how the geographic relationship is to be applied in different circumstances, since the context for development is different in densely developed communities compared to more sparsely populated neighbourhoods. The following recommendation is therefore proposed to be added to the Guideline as a clarification regarding the issue of an appropriate geographic relationship:



### Recommendation

That the City include the following in its Section 37 Implementation Guidelines:

“An appropriate geographic relationship exists if one or more of the following criteria are applicable:

- a) The contributing development is located within the catchment area of the facilities being constructed or improved as a community benefit;
- b) The contributing development is located within the community or neighbourhood that benefits from the provision of the community benefits;
- c) The occupants of the contributing development will have the opportunity to use the facilities being constructed or improved;
- d) The contributing development will benefit from the provision of the community benefits, possibly through increased value, or enhanced marketing or business opportunities; and
- e) In the specific case of affordable housing as a community benefit, the appropriate geographic relationship is considered to be citywide, i.e. the location of affordable housing as a community benefit can be anywhere in the City, or as otherwise specified.”



# 4

## Standardized Valuations and Contributions

There was an overwhelming sentiment by participants consulted in this review that a standardized approach towards calculating the value of the contribution towards community benefits would be preferable to the current case-by case negotiation process. The City's Guideline states that a City wide formula does not exist for calculating the value of Section 37 benefits. On the other hand, the City has attempted to establish a systematic approach towards calculating the value of a community benefit contribution that is somewhat consistent. However, the implementation is carried out by a number of participants in different parts of the City, with varying negotiation skills and abilities resulting in inconsistent outcomes from case to case. Negotiations also consume a considerable amount of time and effort, with participants often not clear what is expected of them. The Ontario Municipal Board, in a number of rulings, has also noted the need for setting out specific and predictable requirements for Section 37 contributions.

A standardized, more codified approach would provide greater certainty for all participants. It would allow purchasers of land for development to factor in the additional cost of rezoning to increase height and density as a component of their land negotiation process. The evidence suggests that costs related to development related charges will be absorbed for the most part in land transactions, in a strong market. This issue was discussed in the June 17, 2013 Development Charges Background Study prepared for the City by Hemson Consulting, which also references a 2004 City commissioned study by David M. Nowlan to assess the economic effects of the 2004 City of Toronto Development Charges and a 2008 Development Charges study.

A similar observation can be made regarding Section 37 related community benefit contri-

butions. For example, the North York Centre Secondary Plan specifies how much additional density can be achieved as part of Section 37 agreements and the City usually secures 100% of the increase in land value. Developers who are familiar with the City's approach routinely factor in the additional cost of the Section 37 community benefit contribution into their land transactions. The development in this area at higher densities is profitable even with capture of the full increase in land value by the City, due to lower costs for additional development generated by economies of scale.

In order to establish a more standardized approach to calculating the value of Section 37 contributions, this report recommends that the City explore alternative approaches to valuation, including the potential of a per square metre charge to be applied to the increase in buildable area of development, differentiated for different parts of the City, reflecting differences in land values and updated annually. If this approach were adopted the percentage of the increase in land value for a development that would revert to the City would be applied to the appraised value per square metre of buildable land area. Annual land appraisals calculated under the supervision of the City's Real Estate Division would provide a base for establishing the increase in land value.

In other words, in this approach the per square metre calculation would reflect the following: appraised land value per square metre of buildable floor area multiplied by the percentage that would revert to the City. This figure would be applied to the increase in permitted density of the development, represented in metres.

The amount of percentage to be captured by the City as a result of the increase in height and density has varied over the years. Initially, when Section 37 was first introduced, City staff had

explored the prospect of capturing 50% of the increase in land value in most areas of the City. After amalgamation City staff had investigated the potential of capturing approximately 30% of the increase. This figure was included in the Section 37 Implementation Framework adopted in the year 2000, which were superseded by the adoption of the Official Plan Section 37 policies in 2002.

Recent experience suggests that the City has been able to secure between 10 and 20% of the increase in land value for most developments, with the exception of the North York Centre area where the City has been able to capture 100% of the increase. In Vancouver, City policy is to capture 70% of the increase generated through rezoning for “Community Amenity Contributions”, which are similar to Section 37 community benefit contributions. Other Ontario municipalities have identified ranges between 20% and 40%.

This variation in percentage capture represents a broad range between 10 and 100%, with little guidance on what is appropriate in the City today. However, based on the generally higher percentages that are either being achieved or are proposed in other locations, it would seem reasonable for the City to establish a percentage increase overall that is slightly higher than it has been able to achieve recently in most parts of the City. A target that is higher than the City is currently achieving, outside of the North York Centre and Sheppard East Subway Secondary Pan Areas, would seem to make sense based on other examples and the City’s recent experience. The actual percentage would need to be determined based on further study, reviewed periodically and adjusted, depending on market response.

## Recommendation

That the City hire an outside appraiser to provide land values for each square metre of increased density for different geographic areas across the City and that these values be updated annually.

That the City explore alternative approaches for calculating Section 37 community benefit contributions for developments in different areas, including a per square metre charge be applied to the increase in buildable area generated through a rezoning, based on appraised land values and a percentage target for capturing the increase in land value to be determined based on further study.



# 5

## Base Density

The base density for the purposes of calculating the increase in height and density with regards to Section 37 community benefit contributions is generally considered to be based on the zoning bylaw, unless there are specific provisions relating to Section 37 increases in the Official Plan, such as the North York Centre and the Sheppard East Subway Corridor Secondary Plans. In a number of instances the City has conducted specific studies that have resulted in “two-tiered” zoning bylaws that provide for a base density and an increased density, provided a Section 37 agreement is entered into to secure specific benefits as outlined in the bylaws (see Background Report).

Section 5.1.1.3 of the City’s Official Plan also states that in circumstances where the zoning bylaw has not been updated, or only a change in use is contemplated, the City will decide whether a Section 37 agreement is warranted when an increase in density is applied for. This statement provides for some room in interpretation, but it is unlikely that it will be possible in all parts of the City to pre-determine an optimal base density that is different from densities that reflect what currently exists in the area.

Zoning bylaws are designed, for the most part, to protect areas from change and thus conservatively reflect the existing context. Even where new development has happened it may not be considered acceptable to extend similar development rights to a wider area without initiating a review process to ensure that impacts regarding light, view, privacy, pedestrian comfort, shadows, transportation capacity, amongst others, are assessed. Thus, it would seem reasonable to keep the density provided for in the zoning bylaw as the base density for the purposes of calculating Section 37 community benefit contributions for much of the City, with criteria to evaluate wheth-

er additional density will be able to adequately address City standards identified through Official Plan policies.

It may be worthwhile, however, to consider introducing Official Plan density limits and a policy framework for increasing densities in areas where growth and redevelopment is anticipated. Such a policy framework could establish increased density levels provided a Section 37 agreement is entered into, similar to the policies in the North York Centre Secondary Plan. The policies could be included in Secondary Plans or as site and area specific policies, in areas where growth is promoted in the context of relatively homogeneous redevelopment.

### Recommendation

That when the City Planning Division introduces or updates Secondary Plan policies and/or site specific and area Official Plan policies for areas of the City as appropriate, they consider incorporating base densities and a specific schedule of community benefits related to increasing density through a quantitative formula.

# 6

## Assessment of Community Needs

With a few exceptions in a number of wards, there has not been a systematic assessment carried out across the City on an area by area basis of community benefits that might be included in future Section 37 discussions relating to specific development approvals. Discussions regarding Section 37 benefits often occur near the end of the approval process relating to specific applications. This has raised some concerns that decisions may be rushed and have limited opportunities for community input.

The issue could be addressed by conducting an assessment of potential community benefits based on input from the community on a neighbourhood by neighbourhood basis ahead of time. In this way when an application comes forward in a particular area, the councillor can refer to the assessment to help identify the benefits that might be secured through the particular application. The benefits of this approach are recognized in the City's Protocol for Negotiating Section 37 Community Benefits, Appendix A: Determination of Appropriate Types of Community Benefits.

Applicants requesting increases in height and density are currently informed early in the process that their application, if approved, will likely be subject to a Section 37 community benefit contribution. This is generally identified as an issue for further discussion in the Preliminary Report on an application. Community input on what benefits are appropriate is often channeled through the ward councillor. The councillor's recommendations are usually based on his or her knowledge of the community needs in the area, inputs from City staff and requests from constituents. However, participants in this study identified that decisions are often last minute and may appear to lack sufficient public scrutiny.

Some planning staff and councillors also are reluctant to raise the prospect of Section 37 community benefit contributions at the initial community consultation meeting on an application, since this may send the wrong message that there is already an assumption regarding approval, prior to carrying out a full assessment of the merits of the application. The preparation of community based assessments for various neighbourhoods, not tied specifically to any particular application, would provide the ward councillor and planning staff with a list of benefits ahead of an application being filed that could be incorporated as part of a specific Section 37 agreement. Such a process also would provide transparency for the residents in an area responding to an application, as well as the applicant, who would know ahead of time what might be expected.

This type of assessment would benefit greatly from the knowledge each councillor has of their ward and thus should preferably be carried out through each ward councillor's office with support and input from planning staff and City operating divisions. After the assessment has been prepared, it would make sense to conduct an update once during every new term of Council. A community assessment process may also provide an opportunity to update policies for areas which have a specific benefits identified in Secondary Plans, such as the North York Centre Secondary Plan and the Sheppard East Subway Corridor Secondary Plan.

### Recommendation

That ward councillors work in collaboration with the community, and City Divisions, to prepare an assessment of potential Section 37 community benefit contributions for various neighbourhoods within each ward, to be updated once during each term of Council.





## Flexibility Regarding Expenditures on Specific Benefits

According to City's "Implementation Guidelines for Section 37 of the Planning Act", funds for specific community benefits are committed at the time of bylaw approval, but are not actually paid until a building permit is issued. There is often a significant lag from the time when a set of community benefits has been identified in a site specific bylaw to when a building permit is issued and funds are available to be spent. As a result, there have been a number of instances where councillors have found that by the time the funds are available, the specific community benefits which have been identified and embedded in site specific zoning bylaws are no longer appropriate for a number of reasons and that, more relevant, alternative priorities have emerged. The concern is that, in order for these funds to be redirected to other expenditures, an amendment to the site specific bylaw is required; a time consuming and cumbersome process for what is essentially a technical adjustment.

City staff have created a standard clause to be included with the recommendations regarding Section 37 community benefit contributions in site specific bylaws, to allow funds to be redirected after a period of time, without the need for an amendment to the site specific zoning bylaw. The clause refers to both a time frame and a process for determining how the funds are to be redirected.

### Recommendation

That staff continue to include a standard recommendation in reports regarding Section 37 community benefit contributions to allow funds intended for specific community benefits to be redirected if they remain unspent for a three year period after receipt without requiring an amendment to the site specific bylaw, provided that the benefits towards which the funds are redirected represent a reasonable planning relationship to the original application and a report on the matter is submitted to Council by the Chief Planner and Executive Director City Planning.

# 8

## Transparency

Recommendations regarding Section 37 community benefit contributions are contained in public reports which are presented to Community Council as part of the public statutory meeting required in the *Planning Act* in connection with development approvals involving rezoning and/or official plan amendments. They are available to the public prior to the meetings and interested members of the public, if they wish, can make deputations on the recommendations to Community Council. This approach, in the view of many, provides for a significant degree of openness and transparency regarding Section 37 matters.

Some concerns have also been raised reflecting the opposite view; that the degree of openness and transparency is not sufficient. Partially the concern seems to be related to the lack of opportunity by some members of the public to provide input, in the past, into the nature of the community benefit contributions that were being secured, prior to discussions with the applicant. The proposed process for identifying items for consideration as potential community benefit contributions for various neighbourhoods in the City as outlined in section 6 of this report would address this concern. This process would provide communities with opportunities for input and knowledge ahead of time on the potential community benefits that might be considered in connection with a specific development application.

Another concern regarding the issue of transparency is the lack of understanding on the part of communities regarding the overall purpose, objectives and achievements regarding Section 37 community benefit contributions. There appears to be a high degree of misinformation and misconception connected to Section 37 matters in Toronto. Better public information regarding Section 37 matters can easily be provided by preparing an attractive brochure on Section 37

to be made available to the public on the City's web site and in print form. One example of this type of public information is the City of Vancouver's Community Amenity Contribution pamphlet available on-line.

Another opportunity to inform the public about Section 37 achievements is to prepare an annual report to Council on the nature and amount of community amenity contributions secured compared to previous years. The report could include a breakdown of contributions by type of amenity (i.e. streetscape improvements, parks improvements, community service facilities, affordable housing, cultural facilities). It could also include a list of additional items that have been secured through Section 37 agreements, but for which a specific value has not been determined, such as heritage conservation and rental housing protection. In Vancouver this type of summary is provided to Council annually and is relied upon to assess the value of the program from year to year.

### Recommendation

That the Chief Planner and Executive Director City Planning be requested to prepare public education information explaining the City's process for securing Section 37 community benefit contributions to the public as well as an annual report summarizing the previous year's achievements regarding Section 37 community benefit contributions.

# 9

## Heritage Conservation and Rental Housing Protection

There seems to be some confusion over how heritage conservation and rental housing protection are addressed in Section 37 agreements, since in both cases the agreements are used as legal mechanisms to secure compliance with other sections of the Official Plan as well as in some cases to achieve higher levels of conservation and protection in return for increases in height and density.

In the case of heritage conservation, Section 3.1.5.8 of the City's current Official Plan already contains policies regarding the provision of additional density in return for the conservation of a heritage building; the additional density is not to exceed the floor area of the designated heritage building or structure. In the case of a development approval that incorporates a density increase that is greater than the floor space of a designated heritage resource, the portion of the floor space representing a designated heritage resource would be considered as meeting the intent of Section 3.1.5.8 of the Official Plan, while any additional increases in height and density, if considered appropriate from a planning perspective, would be assessed in the context

of securing higher levels of heritage protection or additional community benefits. The Section 37 agreement would include the commitment to protect the designated heritage building as well as securing any additional benefits that may be identified.

A similar policy is included in Council's recently approved OPA 199 with respect to the public realm and heritage policies (see Section 3.1.5.19 (b)). The amendment has received Ministerial approval, but the Minister's decision has been appealed.

With respect to rental housing protection, Section 3.2.1.6 of the Official Plan outlines a clear set of requirements regarding the obligation to replace any rental housing resulting in a loss of six or more units affected by development. This is clearly stated and adopted as City policy. The requirement and the details regarding the replacement of the rental housing, rent schedules and tenant relocation are secured in a Section 37 agreement.





# 10

## Follow Up on Community Benefits

Because of the time lag between the approval of a development by Council, when funds for specific community benefits have been secured, and the issuance of a building permit, which can last five years or more, there have been a number of instances of inadequate follow up with respect to the implementation. In some cases lack of coordination with other City capital projects hinders implementation. In other cases staff changes or the election of new councillors may result in a loss of corporate memory regarding the original intent.

Currently, councilors and affected City staff are notified once Section 37 payments are received. In addition, a ward summary of available funds secured through Section 37 agreements is distributed quarterly to staff and councillors. Follow up regarding unspent funds, however, can still fall through the cracks. The average funds secured per year through Section 37 agreements is greater than 35 million dollars. Given the size of the budget and the challenges with implementation, it would seem appropriate for the City to provide additional staff resources to ensure that Section 37 funds are spent as intended, in a timely way, after receipt by the City.

### Recommendation

That Council provide additional dedicated staff resources to address, on an ongoing basis, the timely implementation of improvements and expenditures identified in Section 37 agreements as community benefit contributions.





# 11

## Conclusion

This review concludes that Section 37 represents a useful and valuable tool for achieving community benefits related to development approvals for the City of Toronto, but that some adjustments would improve the process of negotiating and implementing agreements. Specific findings include:

- More than 300 million dollars of funds for community benefit contributions have been generated as part of Section 37 agreements since 1998 as well as significant additional in-kind contributions that likely exceed the cash contributions in total value.
- The objective of Section 37 is to improve the communities within which development and intensification takes place, and to address, at least in part, needs generated by adding population in any particular area.
- Considerations regarding the contribution of community benefits constitute an important aspect of “good planning” and should be integrated with assessment of the physical form of development.
- A “reasonable planning relationship” must be established between the additional height and density and the community benefit, usually interpreted as reflecting geographic proximity.
- The City’s policies and Guidelines regarding the use of Section 37 for community benefit contributions are by and large solid, but are not always adhered to in implementation.

The main recommendations for improving the City’s implementation process regarding Section 37 of the *Planning Act* include:

- Exploring options for establishing a set of standard charges for additional height and density, based on different geographies in the City that reflect differences in appraised land values.
- Clarification of the concept of a “reasonable planning relationship” as it applies to different types of community benefits.
- Undertaking an assessment to establish a set of potential community benefit contributions on a neighbourhood by neighbourhood basis across the City, based on consultations with communities and already existing departmental service plans.
- Continue to add a standard recommendation to reports recommending Section 37 community benefit contributions to allow funds to be transferred, if they remain unused for a period of time after they have been received, based on a report to Council.
- Improving public information on Section 37 by providing a brochure on-line to explain the City’s process for securing Section 37 community benefit contributions as well as an annual report that summarizes the previous year’s achievements regarding Section 37 community benefit contributions.
- Dedicating additional staff resources to follow-up with project implementation.



## Appendix

# **Improvements to the Section 37 Implementation Process** *Interim Study Findings*





# Improvements to the Section 37 Implementation Process Interim Study Findings



City of Toronto  
October 2013

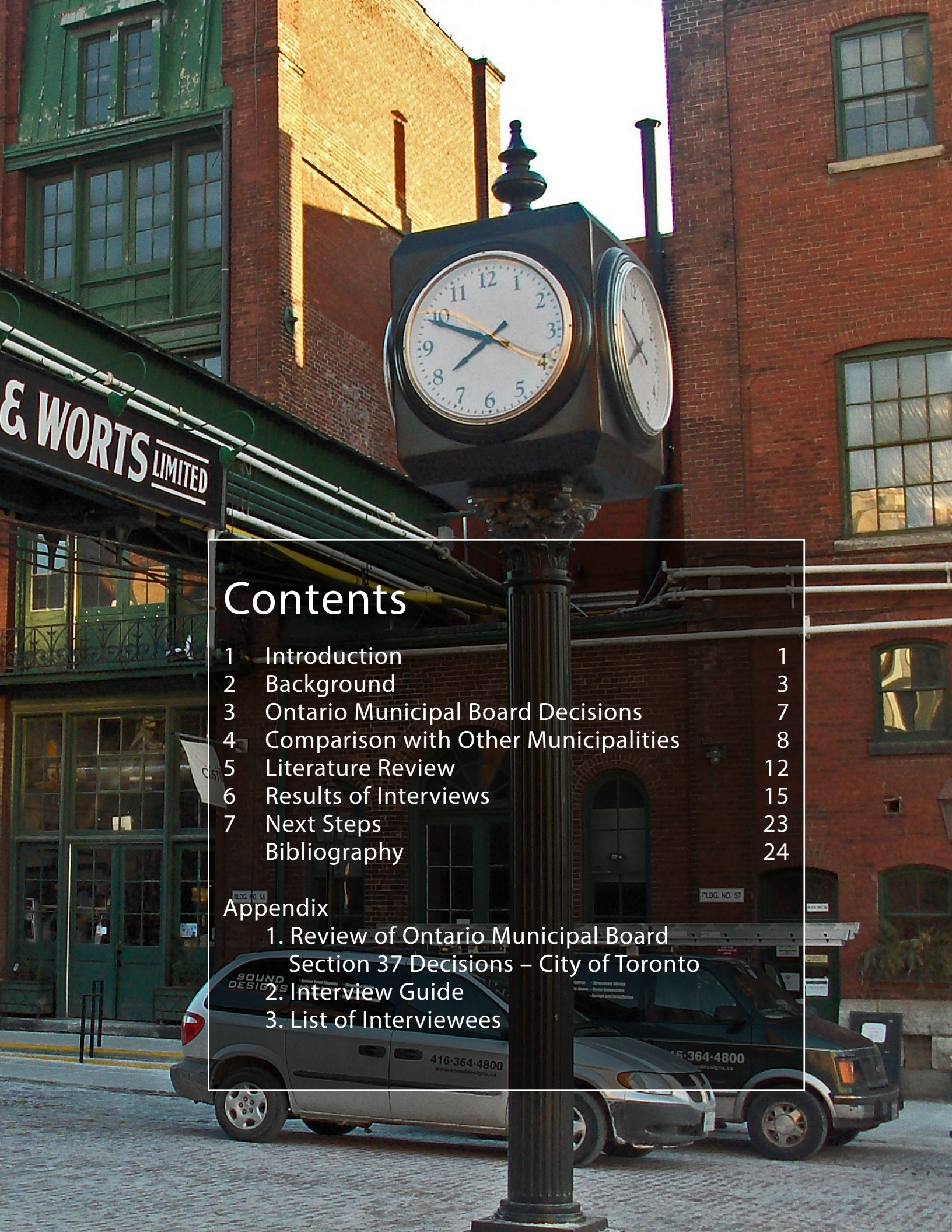
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GOODERHAM







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Section 37 Decisions – City of Toronto
2. Interview Guide
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# 1 Introduction

Section 37 of the *Planning Act* authorizes municipalities to grant increases in height and density of development, in exchange for the provision of “facilities, services or matters”. The City of Toronto was the first municipality in Ontario to use these powers under the predecessor to Section 37 when it was still section 36 of the *Planning Act*. Since then, the City of Toronto has used these provisions more extensively than any other municipality in Ontario and the City’s experience is widely relied upon by other municipalities as they implement their own frameworks for using the provisions of Section 37. In recent years, more and more municipalities across Ontario have been implementing policies and guidelines regarding the use of Section 37.

Section 5.1.1 of the Official Plan provides a planning framework for the use of Section 37. City Council has also adopted detailed “Implementation Guidelines for Section 37 of the

Planning Act” and a “Protocol for Negotiating Section 37 Community Benefits” in December, 2007. City Council recently considered an amendment to section 5.1.1.6 of the Official Plan, as part of its five year review to add opportunities for “affordable ownership housing” and “affordable rental units” located in condominium buildings as community benefits under Section 37. In addition, the City has policies that are somewhat more prescriptive in its North York City Centre and Sheppard Avenue Subway Corridor East Subway Secondary Plans, and embedded in as-of-right zoning by-laws on “Avenues” such as Dundas Street West in Etobicoke.

Gladki Planning Associates have been engaged by the City to provide recommendations to improve the clarity and transparency of the Section 37 process at the City. While Section 37 related benefits have generated more than \$300 million in cash to the City since 1998, as



*Cloud Gardens was an early example of the use of section 36, the predecessor to Section 37.*



well as additional un-quantified in-kind benefits, a number of issues have emerged over the years which require clarification. Some of these issues have been around since the concept of allowing additional height and density in exchange for community benefits was first introduced; others have emerged as the experience with the use of this section of the *Planning Act* has matured. The need for clarity and transparency going forward is essential to gain the trust and support of the public, politicians and the development industry.

The purpose of this report is to:

- Provide an assessment of the current process as it relates to the overall objective for the use of Section 37 as stated in the Official Plan;
- Present the results of a review of academic research and best practices from elsewhere;
- Provide an overview of Ontario Municipal Board decisions regarding the use of Section 37; and
- Summarize the results of consultations with City Planning and Legal staff, councillors, staff from other departments, and the development community to identify points of consensus and issues to be resolved.

Following review and further discussion of this report by staff, a report will be prepared outlining recommended changes to the City's Section 37 Official Plan policy, if appropriate, and/or the Section 37 Implementation Guidelines and Negotiating Protocol.

## 2 Background

### 2.1 Planning Act

Section 37 of the *Planning Act* authorizes municipalities to pass bylaws to increase height and density in return for provision of facilities, services or matters as set out in the zoning bylaw, provided that there is an official plan in effect that contains provisions relating to the authorization of the increases in height and density. The section also authorizes the municipality to require the owner to enter into agreements dealing with the facilities, services or matters and to register such agreements on title.

### 2.2 City's Official Plan

Section 5.1.1 of the City's Official Plan provides policy guidance for the use of Section 37.

Section 5.1.1.1 states that the bylaws may be enacted to permit increases in height and/or density in return for the provision of community benefits in the form of capital facilities subject to there being a reasonable planning relationship (at a minimum an appropriate geographic relationship), meeting the test of good planning and adequacy of infrastructure to support the development.

Section 5.1.1.2 states that an owner has the option of developing land at higher densities and providing the capital facilities subject to an agreement that is registered on title, or developing at density levels provided for in the zoning bylaw.

Section 5.1.1.3 states that in circumstances where the zoning bylaw has not been updated, or only a change in use is contemplated, the City will decide whether a Section 37 agreement is warranted when an increase in density is applied for.

Section 1.1.1.4 establishes a threshold of 10,000 square metres of total gross floor area and an additional density of 1,500 square metres for developments which could be subject to Section 37 policies.

Section 5.1.1.5 states that Section 37 may be used to conserve heritage resources, replace rental housing, achieve secondary plan Section 37 policies, or as a mechanism to secure capital facilities.

Section 5.1.1.6 lists the types of capital facilities that will be considered as Section 37 community benefits and states that these are to be above and beyond what could otherwise be achieved elsewhere under the *Planning Act*, the *Development Charges Act* or other legislation.

Section 5.1.1.7 describes how community benefits will be selected stating a preference for on-site or local provision.

Section 5.1.1.8 states that in circumstances where capital facilities have been identified in a Secondary Plan or area specific policy, the Section 37 benefits will be tied to the identified capital facilities as prescribed in the secondary plan or area study, provided they bear a reasonable planning relationship to the increased height and density.

Section 5.1.1.9 states that all in-force zoning bylaws pursuant to Section 37 are deemed to comply with the Plan.

## 2.3 North York Centre Secondary Plan

Section 3.2 (b) (ii) states that a development proposal cannot exceed the densities otherwise specified in the Plan by more than 33% through density incentives and transfers. Figure 3.3.1 provides a very specific menu of incentives and exemptions in return for the provision of community facilities. The provision of a public recreational centre and social facilities such as day care centres, counseling centres, crisis care centres and school facilities in particular are identified as eligible for bonus densities and secured through a Section 37 agreement.

## 2.4 Sheppard East Subway Corridor Secondary Plan

Section 4.2.4.1 of the Plan references the provision of pedestrian access across Leslie Street to a subway station in return for density incentives to be secured through a Section 37 agreement. Section 4.3.3 identifies a menu of density incentives and exemptions in return for the provision of a number of facilities including a public community centre, a fire station, a new social facility such as child, elder or co-generation daycare, drop in counseling or crisis centre and pedestrian access across Leslie Street to be secured by a Section 37 agreement.



*North York Centre*



## 2.5 Lawrence Avenue Study (Victoria Park to Birchmount Road)

The zoning bylaw resulting from this study (bylaw 1119-2008) requires developers of buildings over 6 storeys to enter into a Section 37 agreement authorizing the increase in height and density in return for the provision of a specific range of community benefits as outlined in the bylaw.

## 2.6 Cliffside Avenue Study (Kingston Road between Danforth and Chine Drive)

Bylaw 1224-2009, which implements the study for this avenue study for the area, includes a number of clauses that allow for increases in height over 6 storeys, up to a maximum of 8 or 11 depending on location along this segment of Kingston Road, in return for the provision of a specific range of community benefits outlined in the bylaw to be secured through a Section 37 agreement.

## 2.7 Kingston Road Revitalization Study (Victoria Park to Birchmount)

Bylaw 222-2010, the implementing zoning bylaw for the revitalization study allows for an increase in height from 6 to 8 storeys in return for the provision of a specific range of community benefits outlined in the bylaw to be secured through a Section 37 agreement.

## 2.8 Old Kingston Road and Kingston Road (between Lawson Road and Morrish Road)

Bylaw 1647-2012, the implementing zoning bylaw resulting from this study requires all developments with more than 13.5 metres in height to enter into a Section 37 agreement to secure a specific range of community benefits outlined in the bylaw in return for the increase in height and density.

## 2.9 Dundas Street West (between Royal York Road and the Humber River)

Section 3 B (3) of Bylaw 717-2006 which implements the avenue study for this area references the use of Section 37 agreement, authorizing an increase in height and density to the lesser of a floor space index of 3.0 or a height of 18.5 metres and 6 storeys in exchange for benefits which are outlined in section N of the bylaw. These include parkland and streetscape improvements abutting and beyond the development site including: trees, planters, benches, pedestrian level street lighting, walkways, landscaped medians and public art.

## 2.10 City of Toronto Implementation Guidelines for Section 37 of the Planning Act and Protocol for Negotiating Section 37 Benefits

The guidelines outline the implementation principles of Section 37 including:

- meeting the test of good planning;
- setting out the benefits in the zoning bylaw;
- the need for benefits to be capital facilities or cash contributions;
- the need for a reasonable planning relationship;
- the absence of a city wide formula;
- typical benefits are listed in the Official Plan;
- other matters can be secured as part of a Section 37 agreement;
- good architecture and good design is expected and not eligible for Section 37;
- capital facilities to be over costs that are funded through development charges;
- Official Plan policies for heritage preservation and affordable housing to be implemented through Section 37;
- Ward councillor to be consulted; and



- Planning staff to always be involved in negotiations.

The guidelines also address a number of other considerations such as:

- the need to, in some instances, take into account that densities in the zoning bylaw may be out of date;
- the timing of the agreement;
- timing of payments;
- details regarding particular development circumstances;
- no exemption for parks levies;
- exemptions for non profit developments;
- indexing of cash contributions; and
- providing financial impact sections in planning reports.

There are also sections dealing with securing specific Official Plan policy requirements including heritage conservation, preservation and replacement of rental housing, replacement of social housing, creation of new affordable rental and ownership housing. The document includes a set of guidelines for securing other community benefits such as other types of housing, space for community services and facilities, non-profit child care facilities, public art, streetscape improvements and school playground improvements. The final section of the guideline outlines a protocol for negotiating community benefits including the role of planning staff, other departmental staff, councillors and the local community.

The guidelines and protocol are quite extensive and detailed, and have been relied upon by other municipalities to help them formulate their approaches to the use of Section 37.



*Artscape Witchwood Barns received \$1 million in Section 37 contributions*

### 3 Ontario Municipal Board Decisions

A review of OMB decisions regarding Section 37 issues reveals the following:

- Very few development approvals involving Section 37 end up being adjudicated at the OMB. Even with approvals involving Section 37 that do end up at the Board, the vast majority are settled before the hearing.
- For the few cases that end up in a hearing, there is no clear pattern of decisions regarding Section 37. In general, the Board panels seem to prefer not to have to deal with Section 37 issues since these are intended to represent agreements between the City and the developer.
- Most decisions regarding Section 37 matters reference the need to establish a nexus between the increase in height and density and the community benefit, although there is no clear consensus on what the nexus is. Some decisions specifically reference on-site or improvements in close proximity to the development. In one early decision on Section 37 the Board ruled that the facilities, services or matters must be a benefit to the public in the area and not necessarily related to the particular development, although in subsequent decisions the Board seems to have distanced itself from this interpretation in favour of establishing a direct link between the benefit and the development.
- The Board has ruled, in a number of cases, that Section 37 cannot be viewed as a financing tool, but that it is a planning tool, hence the need to establish a reasonable planning relationship.
- In a number of decisions the Board has ruled that the use of Section 37 must be fair, clear and transparent based on

specific provisions contained in the Official Plan.

- In a few instances where developments in the North York Centre have ended up at the Board, the Board appears to have taken some comfort in the degree of precision that exists in the North York Centre Secondary Plan regarding the use of Section 37.

A summary of decisions as they relate to Section 37 is provided in Appendix 1. A case by case summary along with commentary has also been prepared by Patrick Devine in a number of articles which are cited in the bibliography.<sup>1</sup>

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<sup>1</sup> Devine, Patrick J, "Section 37—An update on 'Let's Make a deal Planning'", The Law Society of Upper Canada, 5<sup>th</sup> Annual Six-Minute Municipal Lawyer, March 5, 2008

Devine, Patrick and Shoebridge, Kelli, "Section 37—A Further Update and a Question: 'Is is (sic) a Tax'", The Law Society of Upper Canada, The Six Minute Municipal Lawyer 2012

Devine, Patrick J, "Updates of Recent Municipal Board Decisions Re: Section 37" (undated).

## 4 Comparison with Other Municipalities

### 4.1 Other Ontario Municipalities

While Toronto has the most extensive experience with the implementation of Section 37 agreements, a number of other Ontario municipalities now also have Official Plan policies and some experience with securing benefits pursuant to Section 37. Ottawa, Mississauga, Markham, Burlington, London and Cambridge, amongst others, have policies and some limited experience negotiating agreements. Most municipalities have relied on the experience in Toronto, including the policy and guidelines, as a template for preparing an approach that is tailored to their own unique circumstances and needs.

One departure from Toronto's approach that some municipalities have adopted is to state in their guidelines how the expected value of the benefit will be calculated. Ottawa has included a per square metre charge in its guidelines; one charge for its inner city area and another for the rest of the city. Mississauga has included a percentage range of the increase land value resulting from the increase in density. The City of Vaughan is exploring a similar approach. The chart on page 10 summarizes the similarities and differences in approach for a number of municipalities in Ontario.

### 4.2 City of Vancouver

Vancouver is often held up as an example of how community amenities can be secured through the development approval process. The mechanism that is used in Vancouver is called a "Community Amenity Charge" and applies to all rezonings. It is important to keep in mind that the legislative framework for planning in Vancouver is significantly different from Toronto's. The most significant difference is that Vancouver does not need to demonstrate that its charge is not a tax. In addition, there is no equivalent to the Ontario Municipal Board

in Vancouver to which planning decisions can be appealed. Finally, Vancouver's councillors are elected City-wide and are not involved in ward-based community amenity issues the same way that Toronto councillors are.

"Standard rezonings" in Vancouver are charged a fixed target rate Community Amenity Charge (CAC) of \$39.29 per square metre which is applied across the City to the net increase in floor area allowed by the new zoning. There is also a "negotiated charge" for "non standard rezonings" which include projects on site areas of over 0.81 hectares in size, all changes from industrial to residential uses and Downtown rezonings.<sup>2</sup> According to planning staff, the process for determining the negotiated charge is to request the developer to provide the City with a pro forma analysis that demonstrates what the residual land value for the property is. After assessing the pro forma to satisfy its own criteria, the City applies a 70% assessment on the uplift in residual land value as the Community Amenity Charge.<sup>3</sup>

Community benefits are to be determined through an assessment of City services and the adequacy of existing amenities in the area, opportunities to meet needs, City plans and policies, the cost of providing the amenities, community input through the rezoning process or community plans and the development economics of the donor project. In additions, CACs should be:

- located in the community where the

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2 City of Vancouver, Community Amenity Contributions Through Rezonings June 2013 (Adopted by Council June 20, 1999 and last amended June 17, 2013), page 3.

3 E mail correspondence with Brian Jackson, General Manager, Planning and Development, City of Vancouver and e-mail correspondence and conversation with Chris Cibbon, City of Vancouver Planner, City Wide and Regional Planning, City of Vancouver.



- rezoning takes place;
- growth-related or addressing past deficiencies;
- operationally viable; and
- within City servicing standards.<sup>4</sup>

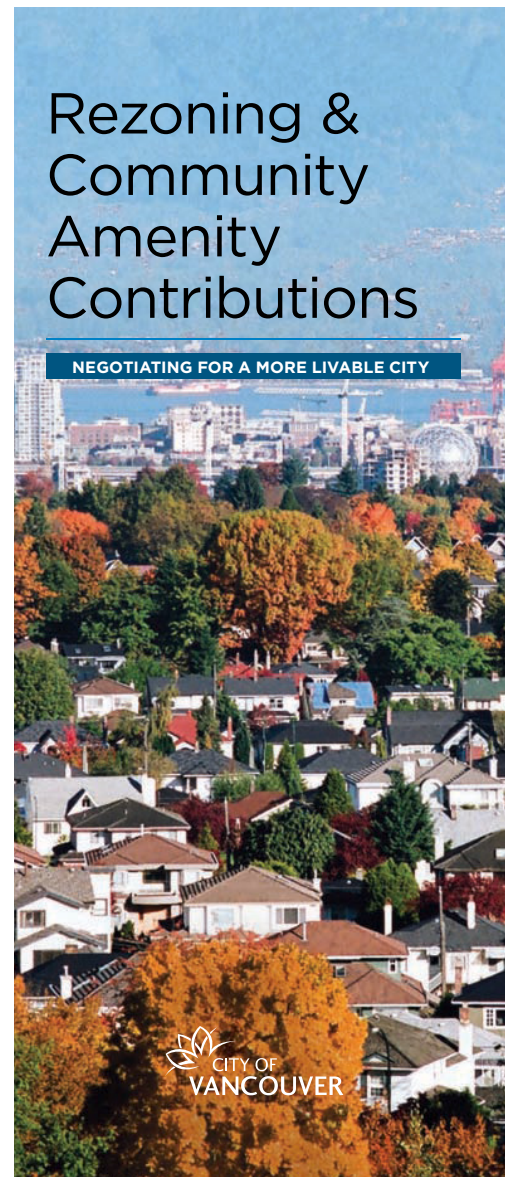
The City has prepared an attractive brochure explaining community amenity charges, which is easily accessible on its web site. Staff also report annually to Council on “Public Benefits from Approvals of Additional Density”. The report includes charts which summarize the additional square footage approved, the total value of benefits secured, a breakdown of benefits by major categories of amenities (affordable housing, heritage, community facilities and parks, open space and public art) as well as a chart in an appendix outlining all of the projects for which benefits have been secured (including address, density increase, public benefits and value of benefits).<sup>5</sup>

The latest report shows the value of benefits for 2010 as \$27 million, for 2011 as \$110 million and for 2013 as \$68 million.

It is difficult to make a direct comparison between Vancouver and Toronto regarding the process of obtaining community benefits through rezonings and the value of the benefits secured because of the many differences between the two jurisdictions. To do a thorough comparison one would have to factor in all the costs associated with development such as development charges (development cost levies in Vancouver), parks levies, the land transfer tax, permit fees as well as Section 37 (or community amenity charges).

<sup>4</sup> City of Vancouver, op. cit., page 3.

<sup>5</sup> City of Vancouver, 2012 Annual Report on Public Benefits from Approvals of Additional Density, General Manager of Planning and Development, Report to Standing Committee on City Finance and Services, May 16, 2013.



On the surface it appears that Vancouver is able to obtain more benefits for community amenities than Toronto through rezonings, but even for this calculation there are important nuances that make this observation inconclusive. One important difference is that Toronto, for the most part, has not included in-kind benefits in its summary of valuations. For example, heritage conservation has not been included, nor is rental housing replacement at affordable rents. Both of these represent substantial achievements secured through Section 37 agreements. Other in-kind benefits are also not included



<b>Municipality</b>	<b>Development Threshold</b>	<b>Percentage of Value Increase</b>	<b>Protocol</b>	<b>Geography</b>
City of Toronto	Greater than 10,000 sq m; Density increase exceeds 1500 sq m	Not specified/under review	City Planning staff to coordinate; Ward Councillor to be consulted prior to any discussions or negotiations	Priority given to on-site or in the local area
City of Ottawa	Greater than 7000 sq m; Density increase is 25% of more than otherwise permitted	To be based on “uplift value”--Inner Urban Area \$250/sq m Outer Urban Area \$130/sq m (to be drawn down based on relevance of zoning/OP; retention of heritage; implementation of public benefits within development)	Planning and Growth Management staff to coordinate; Ward Councillor to be consulted prior to any discussions or negotiations	Appropriate geographic relationship to address amenities and services in the local community
City of Mississauga	Greater than 5000 sq m; Density increase exceeds 1500 sq m	20-40% of the increase in land value	Planning and Building staff to lead discussions; Ward Councillor must be consulted prior to any negotiation	Highest priority—on site or immediate vicinity; next priority community benefits to address city –wide needs
City of Markham	Greater than 5000 sq m; Density increase exceeds 1500 sq m	Not specified	Planning staff are to be lead negotiators; Councillor(s) to be involved	Highest priority—on-site provision of community benefits; next level of priority –immediate vicinity of the site; City wide benefits to be considered where fund exists
City of Burlington	No threshold specified	Not specified	Staff committee chaired by Director of Development Services	High priority for on-site or near site community benefits; high priority for city-wide community benefits
City of Vaughan (Proposed)	Greater than 2000 sq m; Density increase exceeds 1000 sq m	25-35% increase in land value	Planning staff to manage negotiations; Ward Councillor to be consulted	Highest priority—immediate vicinity; next level—local area; City-wide needs to be considered where appropriate

*Note: A version of this chart was first prepared by Gladki Planning Associates for the City of Vaughan.*

in the summaries. Vancouver includes a value for all in-kind contributions in its summaries. In 2012, for example, \$23 million of all the contributions in Vancouver were attributed to heritage conservation (one project's heritage value was estimated at \$15 million).

The most thorough recent attempt at comparing the nature and value of the benefits secured in the two municipalities is provided in a paper prepared by Aaron A Moore of the Institute on Municipal Finance and Governance at the University of Toronto.<sup>6</sup> The major observations coming out of this comparison were as follows:

- Both cities have adopted a case-by-case approach to negotiating and securing benefits.
- Vancouver secures a significantly larger percentage of its contributions towards affordable housing, community services and heritage conservation, whereas in Toronto the highest percentages of funds secured are for “visually desirable amenities” such as parks improvements, streetscape improvements and community and recreation services. Mr. Moore’s conclusion on this is that since affordable housing and community services can be viewed as fulfilling more of a city-wide need, Toronto’s focus is more heavily based on securing locally beneficial amenities. This he attributes to the ward based electoral system in Toronto, in contrast to the city wide system in Vancouver.
- In Vancouver the process is driven more by city staff, whereas in Toronto, local councillors play an active role in determining the value and benefit.

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6 Moore, Aaron A., Trading Density for Benefits: Toronto and Vancouver Compared, IMFG Papers on Municipal Finance and Governance, University of Toronto, No 13, 2013.

- Vancouver has secured more cash contributions per ‘development based agreement’, while Toronto secures more in-kind benefits than Vancouver. In Vancouver, less than 20 % of contributions secured were in-kind, whereas in Toronto more than 50 % of contributions were in-kind.
- In both cities there was little measurable redistribution of benefits to areas with lower median incomes.
- In both cities the majority of benefits secured remained in the immediate vicinity of the development.<sup>7</sup>

### 4.3 Affordable Housing Incentives in US Municipalities

A number of US jurisdictions have introduced a bonus density regime in return for the provision of affordable housing.<sup>8</sup> This initially began as an attempt to require developers to provide a percentage of affordable units in conventional housing developments. As a result of a number of successful court challenges, municipalities moved towards an incentive based system for the provision of affordable housing. One example of how such a system is structured is in New York City where new developments or enlargements that include more than 50 percent of the existing floor area, can receive a floor area bonus constituting 33% more floor area, provided that 20 % of the total floor area is allocated for affordable housing. Other cities have variations on the same theme.<sup>9</sup>

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7 Ibid, pp 20-35.

8 See Gladki, John and Pomeroy, Steve, “Implementing Inclusionary Policy to Facilitate Affordable Housing Development in Ontario, Ontario Non Profit Housing Association, 2007.

9 New York City web site: [http://www.nyc.gov/dcp/html/zone/zh\\_inclu\\_housing.shtml](http://www.nyc.gov/dcp/html/zone/zh_inclu_housing.shtml) Zoning Tools: Inclusionary Zoning, accessed on 7/25/2013.

## 5 Literature Review

In addition to the studies already cited by Patrick Devine and Aaron A. Moore, there are a small number of other research studies that are relevant for this review. These are summarized below:

- Aaron A. Moore, “Trading Density for Benefits: Section 37 Agreements in Toronto”, Institute on Municipal Finance and Governance, No 2, 2013. In this study Mr. Moore reviews the value type and location of Section 37 benefits between 2007 and 2011. He concludes that “there is little certainty about what Section 37 benefits should be used for” and that “in practice the major rationale appears to be to compensate neighbouring residents for the ‘negative impacts’ of the added density”. He attributes the inconsistent nature of the use of Section 37 to the case by case negotiations “with no established City practice for identifying what benefits to secure and a great deal of discretion resting with ward councillors”. He further questions “whether to abolish reform, or replace Section 37 with alternative tools such as inclusionary zoning policies or fixed charges.”<sup>10</sup>

It is unclear how Mr. Moore’s analysis accounts for in-kind benefits. He acknowledges that in-kind benefits are potentially more valuable than cash contributions, but it appears that he is not able to incorporate the value of in-kind benefits into his analysis. Instead, he appears to use cash contributions as his major source of information regarding

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10 Moore, Aaron A., Trading Density for Benefits: Section 37 Agreements in Toronto, Institute on Municipal Finance and Governance, No 2, 2013, Executive Summary.

value, while adding together the frequency of instances for in-kind contributions and cash contributions for various benefits and treating each of these as equal. Since value appears not to be incorporated into this part of the analysis, the figures he uses to base some of his conclusions could be distorted.

- Isaac Tang, Critics Weigh in on Section 37 Agreements, The Lawyers Weekly, Vol. 32, No. 9, June 29, 2012. In this article Mr. Tang reviews criticisms that have been levied against the use of Section 37 due to concerns around transparency and effectiveness. He briefly assesses the case against Section 37 citing the lack of consistency in addition to the lack of transparency. He reviews attempts by municipalities, particularly Toronto, to address these concerns by providing implementation guidelines and protocols for negotiating Section 37 agreements. He concludes that: “Section 37 agreements have the potential to significantly transform neighbourhoods where market demands intensification and concerned parties have equal opportunities to negotiate. Instead of proposing alternatives to s. 37 agreements, municipalities should strengthen their implementation guidelines and official plan policies for s. 37 benefits to encourage greater accountability for developers, planning staff and city councillors to consult with local community groups.”<sup>11</sup>

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11 Tang, Isaac, Critics Weigh in on Section 37 Agreements, The Lawyers Weekly, Vol. 32, No. 9, June 29, 2012.,pg. 2.

- Hossein Danesh Heidari, “Optimal Methods for Collecting Community Benefits from Developers when Higher Density is Granted: A Case Study in the City of Toronto”, Master’s Thesis, School of Urban and Regional Planning, Queen’s University, April 2013. Mr. Heidari seeks to show that “Toronto’s current method of negotiating with developers on a case by case basis, and without consideration of real estate economics is not generating the optimal revenue that could be generated from community benefits”.<sup>12</sup>

The main part of Mr. Heidari’s thesis concerns a pro forma analysis of three real estate projects in the Yonge Eglinton area. His goal is to “identify the community benefits collection method that provides the most benefits to the municipality in the most efficient manner without rendering the projects unfeasible”.<sup>13</sup> His findings show that in the three case studies, developers returned only 4-9% of the land lift as community benefits, compared to 75% for some municipalities in British Columbia, based on the residual method of appraisal. He postulates that the original owners of the sites have captured most of the land lift through the sale of land. He concludes that the City would be better off by applying a per square metre charge for zoning bylaw amendments in order to achieve community benefits.

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12 Heidari, Hossein Danesh, Optimal Methods for Collecting Community Benefits from Developers when Higher Density is Granted: A Case Study in the City of Toronto, Master’s Thesis, School of Urban and Regional Planning, Queen’s University, April 2013, pg. i.

13 Ibid, pg 1.

It is difficult to verify Mr. Heidari’s assumptions used to make his calculations, but his conclusion regarding the merits of applying a rate for every square metre of additional density may be worth considering further.

- R.E Millward and Associates Ltd., “Securing Cultural Benefits: Approaches to the use of Section 37 Benefits for Arts and Culture facilities”, Report for the City of Toronto Cultural Services, March 2013. “The report highlights a variety of projects in which development activity has resulted in infrastructure that support the arts and culture in Toronto. It also reviews different approaches in other jurisdictions.”<sup>14</sup> Lessons deal with opportunities for identifying area based priorities for cultural facilities in secondary plans, supporting the replacement of displaced facilities, creating a critical mass of cultural facilities in appropriate locations and situating cultural facilities at locations convenient to transit.
- Leah Sandals, “Condos: Boon or Blight for the Toronto Arts Scene”, Canadian Art, August 6, 2013. The article reviews the experience of the arts community in Toronto with securing space in condo development for arts facilities, as replacement for displaced facilities, affordable artist studios and housing and the creation of new spaces. While the article does not focus particularly on Section 37 as an approach to securing these facilities, it does examine successful projects that have created spaces for

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14 R.E Millward and Associates Ltd., “Securing Cultural Benefits: Approaches to the use of Section 37 Benefits for Arts and Culture facilities”, Report for the City of Toronto Cultural Services, March 2013, pg 1.



the arts though the development process, with a focus on the West Queen West area of Toronto.

- DB Research Group, “Section 37 Implementation Alternatives”, <http://www.Section37.ca/> accessed on July 11, 2013. The authors’ goal is to “help guide the appropriate formulation of Provincial policy on Section 37.” The short term focus is to develop “a ‘malleable’ precedent based formula for Toronto that takes into account current developmental context.”<sup>15</sup> The research methodology relies on the City of Toronto’s Planning Department’s Section 37 payment compilation dated March 9, 2013 to assemble a profile of contributions for each ward between 2000 and 2012 on a per square foot and per unit basis. Average payments were then calculated for each ward. It is unclear what assumptions were made in formulating this analysis or whether in-kind contributions were factored in. It is also unclear whether calculating average contributions across each ward is helpful since variations in land values within each ward would not be taken into account. Observations that the values of per unit contributions have increased over time are not surprising since land values have increased as well. A number of wide ranging questions for further discussion are provided, many of which are outside the scope of this study.

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<sup>15</sup> DB Research Group, “Section 37 Implementation Alternatives”, <http://www.Section37.ca/> accessed on July 11, 2013, pg. 1.

## 6 Results of Interviews

Intensive interviews were conducted with 11 councillors and eight senior staff from City Planning and Legal Divisions. The interview guide is reproduced in Appendix 2. The list of Interviewees is provided in Appendix 3.

In this section responses have been organized by theme, divided into two parts: “main findings” which represent the views of a large majority of respondents and “issues” which still need to be resolved.

### 6.1 Main Findings

#### **Community planning rationale—“good planning”**

All respondents agreed that Section 37 is a useful tool for addressing community needs and securing community benefits in the context of “good planning”.

Responses focused on to how to interpret the principle of “good planning”, which is stated as an underlying foundation for all Section 37 considerations. There was a clear consensus amongst respondents that Section 37 and Section 34 of the *Planning Act* need to be seen as an integrated whole, and that addressing community needs is an essential aspect of the development approval process and needs to be reviewed in tandem with built form considerations. Respondents felt that development proposals should not be considered only as stand-alone buildings, but as contributing positively to the neighbourhoods within which they occur. Thus, Section 37 considerations need to be seen as an essential element of good planning. In the words of a couple of respondents, Section 37 “makes good planning better”.

**Section 37 needs to establish a “reasonable planning relationship”, but is also part of a larger universe of City capital expenditures**  
Respondents felt that the need to establish a “reasonable planning relationship” between the

increase in height and density and community benefits, particularly geographic proximity, positions the use of Section 37 in a unique way compared to other tools that deal with growth related needs. Most respondents felt that Section 37 provides the only tool available to the City to address the implications of intensification/development within the geographic neighbourhood within which it occurs. Financing tools such as development charges represent a revenue source that is channeled into general revenues to pay for City-wide growth related expenses. Parks levies likewise are partially funneled to local communities where development occurs, but also to larger areas and City wide projects. Because it is a planning tool and thus subject to the need to establish a “reasonable planning relationship”, Section 37 links improvements to the geographic area near the development.

Respondents reinforced the statement in the City’s guidelines that Section 37 benefits should complement, not duplicate, other tools for achieving community amenities, including development charges and parks levies.

Almost all respondents, with one exception, did not feel that it would be appropriate to use Section 37 to address City wide needs. Respondents acknowledged that there were significant needs in areas of the City which did not experience a lot of development activity, but that these needs were not growth related and thus could not be linked to development. Respondents felt that drawing on other sources than Section 37, to address needs in these areas, would be more appropriate.

#### **The need for consistency**

Almost all respondents agreed that the approach to valuation of Section 37 benefits should be standardized/codified as much as possible. The current process of valuation

relies on case-by-case negotiations involving individual councillors and planners, with varying degrees of skill and interest in the negotiation process. Thus, despite what appears to be the City's standardized approach to valuation involving appraisals by Real Estate staff, there exists a considerable degree of uncertainty regarding the outcome of the valuation. This is because the appraisal provides an upper and a lower range for land values, leaving room to maneuver during negotiations, and the percentage of the uptake in land value that the City is able to acquire also fluctuates. In addition, the base density from which the increase in development rights is calculated is not always clear. Even the Official Plan acknowledges that there are areas of the City where the zoning bylaw has not been updated to reflect the most recent Official Plan.

On the other hand, most respondents felt that, other than valuation, a more standardized City approach regarding the nature and process for determining benefits would be useful, but that there needs to be an acknowledgement in any process that areas and communities are unique and that the development context varies across the City.

### **Community Involvement**

There was a strong sentiment amongst respondents that planning staff and ward councillors should work with community groups and with input from other departments to develop comprehensive assessments of community needs and potential benefits for various areas of the City which are subject to development pressures. The purpose would be to prepare a prioritized list of needs ahead of any development proposal which be consulted as part of the assessment of any proposed development

regarding Section 37 benefits. These community needs assessments would need to be updated on a regular basis.

There was also somewhat of a consensus that the potential to address community needs should be raised and discussed with the community early in the development application process, possibly even at the first community consultation meeting held to review the application. Some respondents raised concerns that in some communities, and with some development proposals, the community may view such a discussion as premature and as a reflection of planning staff's intention to recommend approval in return for a "deal" on community benefits.

### **Transparency**

A number of respondents stated that the reporting process as it now exists is already transparent: final reports recommending approval of development applications include the details of the benefits to be secured as part of a Section 37 agreement. These reports are circulated and available to the public. The public has an opportunity to address the members of Community Councils about these matters during statutory public meetings connected to the applications.

A large number of respondents felt that a version of the ward summaries that are routinely prepared regarding Section 37 funds secured should be made accessible to the public on the City's web site. Some respondents cautioned that the summaries do not tell the whole story regarding the status of Section 37 funds. The funds that are listed as "unspent", in particular, are misleading since funds that are secured at the time of development approval are not available to the City until a building permit is issued, often representing a lag of up to five

years or more. A further concern is that, in some cases, funds from a number of developments located in close proximity to each other are being pooled to fund a large capital project in the area and will remain “unspent” until sufficient funds have been collected. A final concern is that funds, which are to be directed at a particular capital facility, may have to be combined and coordinated with other City capital expenditures directed towards the provision of the facility in the area, which may result in a delay in timing.

In general, respondents felt that it was important to improve efforts to educate the public and councillors about Section 37, including possibly preparing an attractive brochure explaining Section 37 to be made available on the City’s web site, and organizing the report summarizing Section 37 contributions for any given year by benefit category, using charts and visual aids.

## 6.2 Issues

### **What is a “Reasonable Planning Relationship”?**

While there was an overall consensus amongst respondents about the need to locate most community benefits within close proximity to the development in order to establish a “reasonable planning relationship”, there was some confusion about how this should be interpreted for different types of facilities. Respondents pointed out that geographic proximity needs to be interpreted differently for:

- Streetscape Improvements;
- Parks improvements;
- Community facilities;
- Affordable housing; and
- Cultural facilities.

Streetscape improvements can be clearly targeted for the area close to the development. Parks improvements can also be targeted towards parks located near the development. Many community facilities that serve the area within which the development is situated however, may be located some distance away from the development. Affordable housing may be provided on-site or elsewhere in the City. Would locating affordable housing somewhere else in the City still constitute a “reasonable planning relationship”? What about cultural facilities, such as the TIFF Lightbox, which may be located on-site but serves the City as a whole?

### **Is a standardized North York Centre type approach possible across the City?**

A number of respondents stated that they would prefer to adopt a North York Centre style approach regarding the use of Section 37. The appeal of this approach was its homogeneity regarding the quantum of additional development that is allowed (33% greater than the Official Plan limits), the consistent refusal to consider amendments above this limit, the City’s ability to get 100% of the landlift resulting from the increase and the limited, and quite specific, list of benefits that are to be provided in return for the increase in density. Some respondents identified other areas of the City where such an approach would be possible including Avenues<sup>16</sup>, particularly along the Eglinton LRT Corridor, and the Scarborough and Etobicoke City Centres.

For the Downtown area and for the Yonge Eglinton and Yonge St Clair centres, however, most respondents did not believe it would be

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<sup>16</sup> A number of Avenues have incorporated similar approaches through zoning bylaw amendments, as described in Section 2 of this report, but few of these areas have experienced the type of development that has happened in the North York Centre.



possible to install such a system because of the unique contextual circumstances related to development sites and the need to mould densities to respond to these unique circumstances.

Some respondents felt that the City should be moving towards a development permit system, which would set a base density that planners are satisfied can meet planning considerations and allow for increases without the need to rezone the property, in return for meeting development standards and providing Section 37 benefits. However, respondents acknowledged that this approach will take a considerable amount of time and effort to implement City-wide.

### **How should the base density be defined?**

The issue of what should be considered a base density was raised by a number of respondents. Since densities were stripped out of the City's general Official Plan in 2007, but the zoning bylaw has not been updated since then, one possibility is to re-introduce densities into the Official Plan. There does not appear to be much appetite to do this, however, since it

would require a significant effort in time and energy without much of a corresponding pay-back. Another, more realistic, option would be to re-introduce Official Plan density limits in particular areas through secondary plans, and review of existing secondary plans. The results in a number of areas may even resemble the two tiered system that is already in place in the North York Centre. This may take some time, but could be introduced in an incremental way across the City for areas most susceptible to development.

Another option is to update density limits in the zoning bylaw across the City. This option is probably not realistic in the short or medium term, since it would represent even more of a herculean task than re-introducing density limits into the Official Plan. In addition, zoning bylaws tend to reflect the status quo in an area, and are most effective for protecting areas from uncertain physical change, in keeping with their origins. By this reasoning, densities in zoning bylaws will always remain low to prevent uncertain change from happening in any given neighbourhood.



**How should the valuation be standardized?**

As mentioned earlier, there was general consensus by respondents that a standardized or codified approach towards calculating the value of benefits would be preferable to the current case-by case negotiation process.

However, a number of barriers will make it challenging for the City to achieve this standardization. The City's current guidelines state that a City wide formula does not exist for calculating the value of Section 37 benefits. On the other hand, there is already an attempt by the City to establish a systematic approach towards calculating value that is somewhat consistent, but the implementation is carried out by a number of participants in different parts of the City with differing negotiation skills and abilities.

One option might be to state in the guidelines that the City will seek to achieve a certain percentage of increase in land value (say 30%). While this would not eliminate all uncertainty, it would narrow the range of uncertainty and establish a benchmark, known to all, to strive for in negotiations. This can be done quite easily and would not undermine the City's approach to date.

Another option might be to establish an upfront, known, charge per square metre of land value for additional building area, differentiated by sub areas of the city, representing the target percentage increase to be captured. This set of figures could be included in the guidelines and updated annually to reflect changes in land value. The advantage of this approach would be to eliminate all uncertainty and provide developers with a known upfront cost for a rezoning that they could factor into their price when purchasing land for development without passing on the increase to purchasers. The challenges for the City with such an

approach would be to establish and update the charge and to implement it in a way that is accepted by the development industry and does not leave the City susceptible to a legal challenge.

**What should the roles of the various parties be in identifying benefits?**

Respondents had a variety of different views regarding the appropriate roles for the various participants at the City regarding the identification of benefits. As stated earlier, most respondents stated that they would prefer to see community needs assessments carried out in neighbourhoods across the City to identify needs and possible benefits ahead of time. A number of respondents stated quite emphatically, however, that it was the councillor's responsibility to take the lead in determining what the particular benefits associated with a specific development should be, taking into account staff inputs from all departments. Some respondents felt quite strongly that planning staff were not equipped, or knowledgeable enough about the community to lead these types of discussions. Other respondents felt that a collaborative approach between councilors and staff is the most appropriate direction to strive for.

Respondents were split on the appropriate role of the community for defining particular benefits associated with development. There were some concerns raised about the need to protect against vested interests or fears of NIMBY-ism from having an undue influence over what kinds of benefits get support from the community. Affordable housing, services for youth such as skateboard parks and bicycle trails were all cited as examples which communities had fought against in past developments. So while all respondents embraced the idea of area studies to identify benefits, some were less inclined to support formal community involve-



ment in determining benefits associated with particular developments.

**Are some expenditures not appropriate as community benefits?**

The issue of which expenditures were appropriate for inclusion as Section 37 benefits was raised by a number of respondents. Most agreed that design work associated with capital improvements was a legitimate Section 37 expense. Costs associated with environmental assessments required to carry out capital improvements were also generally agreed to as legitimate expenditures. However, there was some difference of opinion regarding other studies that may be required. Although Heritage Conservation District Studies are now included as potential Section 37 expenditures, it was pointed out that these had initially been

opposed by planning staff as legitimate expenditures.

Although most respondents did not feel that other studies would be legitimate candidates as Section 37 expenditures, some respondents suggested that area studies to identify community needs may be appropriate. Others disagreed.

Some respondents raised concerns about including affordable housing as Section 37 benefits. Specifically, there was a concern in some instances that contributions were so low that they would make only a small dent in the provision of affordable housing, and that since the provision of affordable housing should be a senior government responsibility, the City was taking on a mandate that it could not afford.



*The proposed John Street Cultural Corridor has used Section 37 fees for environmental assessment and design work.*

Types of Section 37 contributions towards affordable housing could include:

- Replacement rental housing;
- Securing on site affordable housing;
- Securing off site affordable housing;
- Contributions to the maintenance of existing social housing; or
- Contributions towards rent supplements.

The use of Section 37 to secure replacement rental housing has worked very well in the past. Likewise, the provision of both on site and off site affordable housing, while not generating a huge number of units, nevertheless has made a positive impact by adding to the supply of much needed housing in the City. While there appears to be a direct planning relationship between the approvals of higher density development along with the resulting increase in land value, and the corresponding need to address affordable housing, there seems to be a more tenuous Section 37 link between Section 37 contributions towards the maintenance of existing social housing units and rent supplements. This issue becomes even more pronounced given the small amounts that could be generated towards this purpose and their limited impact, which could potentially be used more effectively for other purposes.

#### **How should Section 37 benefits be integrated with City capital expenditures?**

A number of comments were made during the consultations regarding the need for planning staff and councillors to consult with staff from the implementing departments at the City prior to finalizing the Section 37 benefits. Concerns raised included the inadequacy of some of the amounts secured to be useful, the need to integrate Section 37 expenditures into more general departmental capital budget plans and

the inadequacy of follow up. These are all important internal administrative matters that need to be looked at.

The concern regarding follow-up in particular was mentioned by more than one respondent, since a number of respondents felt that projects that had been secured in previous years may have fallen through the cracks, because of personnel changes or loss of institutional memory. A suggestion related to this concern was that the value of cash benefits generated annually on average (\$35 million) would justify having a staff person at the City dedicated to the task of following up on Section 37 implementation.

#### **Should identified benefits be very specific or more general?**

Interviewees were asked to what extent Section 37 benefits should be identified very specifically in zoning bylaws. Past practice has been to be very specific. Some respondents preferred to continue to be as specific as possible, to avoid any doubt as to the purpose of the benefits to be secured. However, a key issue regarding the practice of identifying benefits very specifically in the site specific zoning bylaw is that needs and priorities might change in the neighbourhood by the time the City actually receives the funds and, if this happens, the process for changing bylaws can be cumbersome, since it involves an amendment to the zoning bylaw. Another concern raised by some of the respondents is that some of the funds allocated for specific purposes in the past have been small and inadequate to cover the expenditures for which they were targeted. Finally, there have been instances where, because of the delay in receiving the funds, other sources have been found to provide the benefit and there is a need to reallocate the funds.



A solution to this seems to have already been introduced into a number of recent bylaws which now include a clause that allows the funds to be used for the same general purpose as the specifically identified expenditure, should the original expenditure no longer be applicable. There was a concern raised, however, regarding the need to ensure that the expenditure would both be for the same general purpose as originally intended and in the general vicinity of the development. In addition, it a number of respondents felt that there was a need to ensure some sort of public accountability and reporting on the proposed change.

back” the timing of the expenditure with a related capital works project in the area of the development.

### **When should funds be received by the City?**

A number of respondents raised a concern about the delay between when the City receives the funds dedicated to Section 37 expenditures compared to when these have been secured. Rather than receiving the funds at the time of issuance of the building permit, these respondents felt that it might be more appropriate to, either:

- require that the funds be transferred at the time of bylaw approval; or
- alternatively to place an expiry time on the development approval tied to an application for a building permit.

An alternative to this might be if a building permit has not been applied for by a certain time after the development approval has been granted, the Section 37 funds would have to be provided at that time to the City.

Some respondents pointed to examples where a variation of the early provision of funds already exists. In these instances, applicants were given a choice of providing a discounted amount earlier than the issuance of a building permit in order for the city to be able to “piggy

## 7 Next Steps

The themes and issues identified in this report are being discussed at four workshops with staff from implementing departments, planning and legal department staff, Build Toronto and Councillors. The feedback received as part of these discussions will provide input into the final report which will include an assessment of options and recommendations for moving forward.

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## Appendix 1: Review of Ontario Municipal Board Section 37 Decisions – City of Toronto

Year	OMB Case and Decision Number	Summary
2000	Toronto (City) v. Minto BYG. O.M.B.D. No. 1102	<p>The only issue before the Board was “whether Bonusing provisions should form part of the amendments... and if so, in what amount”</p> <p>City’s position: test of ‘good planning’ as established by the Official Plan required Minto to provide S. 37 benefits in exchange for increased height and density. Minto’s position: the application for S37 benefits should not result in further amenities, other than those which had been proposed or which are valid conditions for approval.</p> <p>The Board reviewed the history of S37, and found that it had always been the subject of negotiation, but was now being asked by Minto to decide whether public benefits should be required and if so, how much.</p> <p>The Board granted the appeal on the grounds that:</p> <ul style="list-style-type: none"> <li>• Whether contributions should be authorized must be judged on the beneficial effects of such contributions to the proposal.</li> <li>• It lies with the City to demonstrate the connection between the proposal and the benefits.</li> <li>• Absent from this demonstration, a developer is obligated to meet only the requirements of the Official Plan policies regarding S37 benefits.</li> <li>• S37 benefits must be guided by established policy; a proponent is entitled to some degree of certainty in ascertaining what public benefits it will be required to provide pursuant to S37.</li> </ul>

Year	OMB Case and Decision Number	Summary
2003	1430 Yonge Street v. Toronto (City). O.M.B.D. No. 926	<p>The City is seeking three items under Section 37.</p> <ul style="list-style-type: none"> <li>• An alternate vehicle entrance as part of the building's design (The developer is willing to provide this)</li> <li>• Cash payment for improvements to a nearby park</li> <li>• Cash payment for a dog fountain in another nearby public space</li> </ul> <p>Developer's position: the cash contributions are not warranted because the park will be little used by residents of the development and the dog fountain is in a space some distance away.</p> <p>The developer's lawyer agrees that S 37 can be used to secure the alternate vehicle entrance as of the one of the "positive features of the development proposal"(City's OP 16.21). However, he argues that they do not apply to the park or dog fountain.</p> <p>City's position: The City argues that a Section 37 benefit does not have to be related to or justified by the project, but needs to simply be a benefit to the public offered in exchange for the permission to development at a height and density above what the plan the by-law permit.</p> <p>The Board rules in favour of the City, but lowers the height of the proposal and reduces the s. 37 benefits to reflect to the lower scale of development.</p> <p>From the Board:</p> <p>"Normally Section 37 provisions are obtained by mutual consent and secured by an agreement – not imposed by the OMB. The developer might agree to pay for a dog fountain or park contribution in return for permission to exceed the Official Plan and zoning limits, each of which presumably have value in the marketplace and increase the return available for the development of the site. It is the legal extension of an informal and age-old practice of securing some public benefit in return for a permission that creates betterment or increased land value. Seen in this light, the benefit need not be related to the project or caused by it. That is, it is not necessary that the park be used by the residents of the project - it is not a park levy. What is relevant is that in return for additional development rights granted to the developer, the exercise of which may have social costs to the public in the area, the public receives some tangible benefit or amenity to offset the cost. If the area residents must put up with increased height, massing and congestion caused by the developer getting additional development rights, the public should receive some tangible benefit. That's the theory behind a Section 37 bonus."</p>

Year	OMB Case and Decision Number	Summary
2005	Irber Holdings Ltd. (and others) v. Toronto (City). O.M.B.D. No. 3.	<p>This proposal is to develop a new 13 storey condominium on lands that have two existing 13 storey 1960s era apartment buildings. The staff report recommended that a S37 contribution of \$85,000 be made for improvements to the existing buildings. The applicant's proposal was circulated for comment, including to the parks department. No comments were made.</p> <p>However, when the matter went before Community Council, the proposed improvements were replaced with a recommendation that the applicant provide \$300,000 for an outdoor swimming pool or splash pad at Earl Bales Park.</p> <p>The City took the position that the improvements to the buildings would have been made anyway.</p> <p>"In the Board's view, there must be a real and demonstrable connection between the Section 37 benefit being requested and the 'positive features of the development proposal', as stated in the Official Plan policy. In the subject case, such a connection was not established by the evidence of the City's witness, nor, obviously, by the City's original planning report, with respect to the \$300,000 splash pad contribution."</p> <p>Another issue was to formalize an existing pathway to an adjacent park. The City felt that the applicant should extend the formal pathway to the park, but the Applicant successfully argued that the formal pathway should be provided only on the subject property.</p>
2005	Duca Financial Credit Union Ltd. v. Toronto (City). O.M.B.D. No. 0255	<p>In this case, the dispute was how much S37 fees should be paid. The proposed increase density was 34,685 sf. There was no dispute that the value of the increased density equates to \$25.00/sf in 2001 and \$30.00/sf in 2005.</p> <p>The Applicant submits that \$260,137.50 represents a fair amount to pay towards to the social facility being 30 percent of the resulting additional density valued in 2001.</p> <p>The City argued that the North York OPA No. 477 policy 3.3 should apply, including the requirement that cash in lieu of the social facility equate to the actual cost of construction off site or, in the alternative, that an amount equal to 100 percent of the value of the increased density be provided.</p> <p>Construction cost would be \$215/sf (2001) or \$245 (2005). Building a facility off site would cost \$1,373,690 or a cash-in-lieu payment of \$1,040,550 being \$30 times 34,685 feet of additional density.</p> <p>The Board finds that the City addressed its position on the matter in a staff report in November 2001. The City fully supported the proposal, subject to a Section 37 agreement in accordance with OPA 447. The negotiations failed, and the applicant brought forth a site specific OPA in 2003. The Board finds it appropriate in the circumstances of this case to set land valuations at the dates of any S. 37 agreement. The Board dismisses the appeal by the applicant.</p>

Year	OMB Case and Decision Number	Summary
2005	Sterling Silver Development Corp. v. Toronto (City). O.M.B.D. No. 1313	<p>In this case, the Board conducted an extensive review of the Minto BYG, 1430 Yonge Street and Irber Holdings decisions. The Board concluded that it could not support the “imposition of other S.37 benefits on the owner, unless there is a nexus between the benefit demanded and the development proposed.”</p> <p>The Board noted that two layers of obligation are triggered by development: Development Charges and Parkland. The Board asked whether the City can demand a third layer of obligation in the form of S.37 without which a development can be refused. And, if so, can the City appeal to the Board?</p> <p>The Board addressed the question of any contradictions between the <i>Minto BYG</i> and the <i>1430 Yonge Street</i> decisions which in its view were resolved with the <i>Irber Holdings</i> decision. According to the Board “the <i>Planning Act</i> is a not a revenue statute” and “there must be a nexus between the development and the Section 37 benefits, demonstrating that the benefits pertain to the development (whether on-site or off), not to unrelated municipal projects (no matter how meritorious).</p> <p>The Board found that “it was incumbent on the City to demonstrate the connection between Section 37 benefits being requested and the positive features of the development proposal.” Moreover, Section 37 obligations could be imposed if there is “a real demonstrable connection”.</p>
2005	Elderbrook Developments Ltd. v. North York (City). O.M.B.D. No. 980	<p>The City requested \$500/unit (approximately \$500,000) as a contribution for securing of a floor for community space. The City had been actively pursuing additional community space since 1996. Further, the City planner was also seeking a public art contribution of 0.5 percent of the gross construction cost, or approximately \$400,000.</p> <p>The planner for the applicant noted that no shortfalls in community facilities were identified in the staff report. She also noted that there had been no direction for the provision of public art.</p> <p>On the issue of community space, the Board sided with the City, largely because the City had shown a continued effort to gain that space, and it would benefit the entire neighbourhood including the new residents generated by the development.</p> <p>As for the public art contribution, the Board sided with the applicant. The Board found that the development was not a major development for Metropolitan Toronto.</p>
2006	Sunny Hill Gardens Inc. v Toronto (City). O.M.B.D. No. 595	<p>In this case, the City requested \$398,000 worth of benefits as a condition of approval.</p> <p>The Board refused to support the City’s request stating that they had an ad hoc wish list prepared as a result of the rezoning, stating that Section 37 must come from “fair, clear, transparent, predictable specific requirements that are set out in the Official Plan.”</p>



Year	OMB Case and Decision Number	Summary
2007	1640830 Ontario Inc. v. Toronto (City). O.M.B.D. No. 914	The City requested \$400,000 in contributions. The Board held that the requested benefits were not set out in the in-force Official Plan or Part II Plan (the same as the one at the time of the <i>Minto BYG</i> decision). Therefore, the Board sided with the developer because they could not reasonably know what was to be expected in granting additional height and density.
2007	584952 Ontario Ltd. Toronto (City). O.M.B.D. No. 827	<p>The City sought benefits in the form of:</p> <ul style="list-style-type: none"> <li>• A six-month transit pass to each new purchaser.</li> <li>• Funding for a study to be commissioned by Transportation Services.</li> <li>• Construction of an above or below-grade connection to Downsview Subway station.</li> </ul> <p>The City provided no witnesses in support of these requested benefits, except to make a general reference to S. 37.</p> <p>The Board rejected the City's request noting that the City called no witnesses and provided no evidence and the Official Plan makes no mention of transit pass or the study. Lastly, the Board noted that no change in density was sought in this matter.</p>
2007	Daniel's HR Corp. v. Toronto (City). O.M.B.D. No. 176	<p>North York Community Council modified the benefits proposed in a staff report to recommend that Daniels, in addition to agreed upon benefits, provide future condominium purchasers of the proposed development with a one-year transit pass (reduced to six months at Council) and payment for traffic monitoring. However, the City also added that Daniels pay "benefits in an amount similar to benefits contributed by other developments in the area in an amount satisfactory to the City Solicitor and to be used for community centre purposes in the area".</p> <p>The Board held that the voluntary contribution of the transit pass and traffic monitoring is appropriate and consistent with the Official Plan.</p> <p>The Board distinguished this proposal from others in the City because Official Plan amendment was not required.</p> <p>The Board also held that voluntary contributions are "voluntary and nothing more."</p>
2007	1640830 Ontario Inc. (TAS Design Build) v. Toronto (City). O.M.B.D. No. 2532.	<p>Proposal for a 34 storey condominium with retail at grade.</p> <p>The City requested that if the Applicant was successful at the Board, that S37 benefits be secured for the following:</p> <ul style="list-style-type: none"> <li>- \$400,000 for park improvements</li> <li>- Public art contribution of 1% of gross construction cost</li> <li>- The use of exterior materials in the building to the satisfaction of the City</li> <li>- Use and measures to mitigate sound in residential part of building</li> </ul> <p>Board relies heavily on Minto appeal to the Board, 1252-1260 Bay Street and 61-63 Yorkville Avenue in determining its decision.</p> <p>Board finds that the City's request for S37 is inappropriate and should be denied.</p>

Year	OMB Case and Decision Number	Summary
2009	Damaris Development Inc. v. Toronto (City). O.M.B. Case No. PL060687	<p>In this case, the City sought \$175,000 for park playground improvements in two City parks in the vicinity. The City provided no evidence to support their request. The planner for the applicant argued that there was no planning basis for the payment, but did concede to a contribution \$10,000 for the improvements.</p> <p>The Board decided in favour of the applicant.</p>

Year	OMB Case and Decision Number	Summary
2010	Daniel's HR Corporation v. Toronto (City). O.M.B. Case Number PL090313	<p>This development proposes a 3.71 FSI, whereas the maximum density is set at 3.0. In May 2008, City Council opted not to support the application in its present form, stating a number of conditions, including the reduction of the FSI to 3.0, but if greater than 3.0 coverage is approved, that the owner be required to provide:</p> <ul style="list-style-type: none"> <li>• \$135,000 for parks improvements and/or construction of a community center in the immediate area.</li> <li>• No sale of the residual portion of the former cul-de-sac</li> </ul> <p>In October 2009, City Council replaced the condition for Section 37 with</p> <p>“In the event that the density of more than 3.0 times coverage is approved the owner be required, prior to the issuance of the final Order approving such rezoning, to achieve such additional density by way of the density transfer or density incentive, as provided for in the Density policies of the applicable Secondary Plan.”</p> <p>The Applicant maintains that the public benefit contribution is unnecessary and is not stipulated in any relevant policy documents pertaining to the proposal. The Board sided with the Applicant by deciding that the development falls below the 10,000 square metre Official Plan threshold, and none of the exemptions listed under Policy 5 applies in this situation.</p> <p>“Although the City’s Official Plan provides an exemption under Policy 5(c) that Section 37 maybe used irrespective of the size of the project where the Secondary Plan contains Section 37 policies that prevail, the Board agrees with the Applicants submission that is not enough that there is a Secondary Plan with Section 37 policies; there has to be a clear and unequivocal statement that any development, irrespective of size, is required to provide a public benefit contribution in exchange for approval of increased height or density.”</p>



Year	OMB Case and Decision Number	Summary
2011	English Lane Residential Development v. Toronto (City). O.M.B. Case No. PL110393	<p>This application requests that the permitted 192 units be increased to 350 without the applicant having to provide a Section 37 benefit. No changes are proposed to the approved zoning permissions regarding density and gross floor area; only a resizing of the units is proposed. Because of the increase in number of units, the applicant wishes to add to the number of parking spaces.</p> <p>The City requested that the Board order the Applicant to pay between \$72,000 and \$158,000, depending on the method of calculation, for a children's splash pad in a nearby park.</p> <p>Policy 4 of the Official Plan states: "Where the ZBL measures residential density in units per hectare, the units are to be converted to gross floor area at a rate of 100 metres per unit to determine whether the thresholds are exceeded".</p> <p>The Applicant submitted that the proposed ZBL amendment does not increase the density by 1,500 sq m; it does not increase the height; the 1999, in force ZBL retains the GFA permitted in that instrument; and it does not reference UPD, or the number of units.</p> <p>The planner for the applicant opined that there is no increase in height or density sought for the proposed apartment building, there is no planning basis to warrant the imposition of a S37 condition. He reminded that the Board that the subject ZBL does not measure units per hectare, rendering this policy inapplicable in the case at hand. Further, even if the measurement were valid for this case, which it is not, the UPH number is unhelpful as the applicant proposes no increase in density and the planning instrument does not use it. He emphasized that the requested increase in density is related to gross floor area and not the number of units. In terms of intensification, he opined that GFA is a better indicator of density. He added that there is no relevance in respect of the increase in units, which neither proves the need nor requires the payment of funds, there is no reason to provide a benefit.</p> <p>The Board heard evidence that an adjacent developer (Camrost) had applied to the City for an increase in units, but the City had not requested a S37 contribution.</p> <p>While residential intensification as seen in the PPS counts the number units in its definition, there is no direct corollary to payment of S37. City planning staff never put any request for a S37 benefit in its preliminary report, despite the fact the City's guidelines require this. No request was made in the final report either.</p> <p>The Board was unable to ascertain the City's reasoning in requesting that the applicant pay a S37 where the applicant has not requested relief from either height or density.</p>

Year	OMB Case and Decision Number	Summary
2013	1093 Queen Street West Residences Inc. v. Toronto (City). O.M.B. Case No. PL080993	<p>Proposal for a nine storey mixed-use building. The parties disagree with respect to S37.</p> <p>City's position: It is right to request a S37 contribution because the proposal is above 3,858 sq m over and above the as of right permission. The amount requested was \$260,000 (\$67.40 per sq m), consistent with other developments in this area of the City. The City provided a table of comparable developments.</p> <p>Applicant's lawyer argued that they were never provided with planning documents or reports on how the \$260,000 was arrived prior to the hearing.</p> <p>The applicant's planner argued that a S37 contribution was inappropriate because the area is designated a "Regeneration Area". Further, he notes that if the application had been revised to be under 10,000 sq m, then no S37 contribution would be payable, suggesting that only 635 sq m exceeds the 10,000 sq m. He also points out that if the retail component were taken out, the overall GFA would be less than the threshold.</p> <p>Board's decision: Not satisfied that the City set out specific, fair, transparent and predictable requirements in its OP as to when, where, or how much and or what purpose a contribution will be required under S37 by a developer. Furthermore, the subject lands are situated in a "Regeneration Area", where one would expect addition density to be permitted to spur on development.</p>

## Appendix 2: Interview Guide

1. Please describe your experience with Section 37.
2. Do you think Section 37 is a useful tool for obtaining community benefits?
3. What do you think is the rationale behind Section 37?
4. At which point in the development approval process do you think the issue of Section 37 contributions should be raised? Is it appropriate to discuss the types of benefits that might be secured before built form issues (including height, density) have been resolved?
5. Do you have any suggestions for how to identify Section 37 community benefits (e.g. community process; local vs City-wide)?
6. What do you think the role of planning staff and councillors should be regarding Section 37 negotiations?
7. Do you have any suggestions on how to better engage or inform the public about the negotiations or at least the benefit priorities?
8. When funds have been secured and received for less specific purposes, e.g. community services in the local area, can or should the public have a say in what those funds are spent on, and what is a good process for obtaining such public input?
9. Do you have any suggestions on how the value of benefits is determined?
10. Are you familiar with the City's "Implementation Guidelines and Protocol for Negotiating Section 37 Benefits?"
11. Do you have any suggestions for improving the Guidelines/Protocol?
12. Other issues/suggestions?

## Appendix 3: List of Interviewees

### **Councillors**

Councillor Michelle Berardinetti/Michael Giles, Ward 35

Councillor Glenn De Baeremaeker, Ward 38

Councillor Denzil Minnan-Wong, Ward 34

Councillor John Filion, Ward 23

Councillor Josh Matlow/Athanasios, Ward 22

Councillor Pat McConnell, Ward 28

Councillor Peter Milczyn, Ward 5

Councillor James Pasternak, Ward 10

Councillor David Shiner, Ward 24

Councillor Adam Vaughan, Ward 20

Councillor Kristin Wong-Tam, Ward 27

### **City Staff**

Allen Appleby, Planning Director North York District

Neil Cresswell, Planning Director Etobicoke York District

Ray David, Planning Director, Scarborough District

Jennifer Keesmaat, Chief Planner

Peter Langdon, Manager, Community Policy

Gregg Lintern, Planning Director, Toronto and East York District

Kerri Voumvakis, Director, Strategic Initiatives, Policy and Analysis

John Paton, Director City Legal





