



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Response to Auditor-General's Outstanding Recommendation Regarding Section 37 and Section 45 Funds Not Received in 2008-2017 Approvals

Date: August 12, 2019

To: Planning and Housing Committee

From: Chief Planner and Executive Director, City Planning and City Solicitor

Wards: All

REASON FOR CONFIDENTIAL INFORMATION

The Confidential attachment to this report contains advice or communications that are subject to solicitor-client privilege.

SUMMARY

This report responds to the Auditor-General's recommendation to the City Council with respect to funds secured under Sections 37 and 45 of the *Planning Act*, and that the Chief Planner assess the status of community benefits secured since amalgamation (January 1, 1998). The Chief Planner was asked to provide an appropriate level of assurance that cash that should have been received, has been received and to report on any uncollectible benefits. A report was adopted by the Planning and Growth Management Committee on March 22, 2012 which provided an analysis of Sections 37 and 45 approvals from 1998 through 2007. This report provides an analysis of approvals from 2008 through to 2017 and responds to the Committee's request that City Planning staff, in cooperation with Legal and Finance staff continue to investigate and pursue outstanding Section 37 and Section 45 funds which are due but for which no records of payments have been found.

An examination by City Planning staff reveals that a total of \$486.5 million has been secured from 554 Section 37 and 45 approvals from 2008 through to 2017. A line by line analysis of the outstanding funds reveals that approximately \$3.3 million was to be paid but never received. Through collection efforts \$2.6 million was recovered, leaving \$701,387 that related to 5 developments as potentially outstanding where no record of payment has been found to date. These 5 developments are listed in Attachment 1 to this report.

RECOMMENDATIONS

The Chief Planner and Executive Director, City Planning and the City Solicitor recommend that:

1. City Council adopt the confidential instructions to staff in Confidential Attachment 1 to the report dated August 12, 2019 from the City Solicitor and the Chief Planner and Executive Director, City Planning.
2. City Council direct that Confidential Attachment 1 to the report dated August 12, 2019 from the City Solicitor and the Chief Planner and Executive Director, City Planning remain confidential in its entirety as it contains advice that is subject to solicitor-client privilege.

FINANCIAL IMPACT

There are no financial implications resulting from this report.

The Chief Financial Officer & Treasurer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

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

The adopted recommendations included the following:

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

The following are the relevant links:

Agenda Item AU2.4:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.AU2.4>

Auditor-General's forwarding staff report dated March 31, 2011:

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

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

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

Appendix 2 to March 31, 2011 report - Management's Response to the Auditor General's Review of City Planning Division, Community Benefits Secured under Section 37 or 45 of the *Planning Act*:

<http://www.toronto.ca/legdocs/mmis/2011/au/bgrd/backgroundfile-37766.pdf>

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

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.PG12.11>

BACKGROUND

Update on Outstanding Section 37/45 Balances (1998-2007 Approvals)

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

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

In response to the Auditor-General recommendation above, the Chief Planner prepared a report dated February 24, 2012 (Item PG12.11) which indicated that the total potentially outstanding amount was \$24.9 million and not \$28 million. This difference is a result of the date an accounting report is generated by the Community Benefits management information system. The reports represent a specific moment in time, and accordingly the accounting report used by City Planning to conduct an audit in 2011 would have had additional information and revisions to what had been secured¹ and received when compared to the 2010 report which was utilized by the Auditor to conduct their review.

The \$24.87 million in fact represented the difference between that which had been secured and the total value in Section 37 and 45 funds received. However through a line by-line audit it was determined that the \$24.87 million was comprised of:

¹ The term "secured" as used in this report means secured in a Section 37 Agreement or Committee of Adjustment decision, and does not necessarily mean that the City has received the funds.

- Payments which were not yet due (\$15,550,384);
- Payments which were not required after an internal review (\$1,771,752);
- Payments received - The amount reflects only those payments documented since September 24, 2010 which pertain to outstanding cash amounts identified as of that date by the Auditor-General, and does not include all payments received with respect to post-amalgamation approvals (\$6,779,923); and
- Payments which were due, however there was no record of a payment (\$770,000).

When one subtracts the payments which were not required and the payments that had been received, the true outstanding balance of \$16.3 million which included 6 developments (3 Section 37, 3 Section 45) approved since amalgamation (January 1, 1998) to the end of the calendar year 2007 where Section 37/45 cash payments to the City totalling \$770,000 were due and no records of receipt had been found.

<https://www.toronto.ca/legdocs/mmis/2012/pg/bgrd/backgroundfile-45771.pdf>

It has since been determined that the 6 outstanding payments and/or supporting documentation verifying fulfillment of the payments have been received.

Notwithstanding that the outstanding payments identified in the 2012 Report have been collected, the Auditor-General's office requested an updated examination of outstanding balances for cash benefits secured prior to 2008. To undertake an update of the 2012 Report findings the same parameters with respect to funds secured and received from pre-amalgamation to the year-end of 2007 were inputted into the Division's management information system on December 12, 2018. The data revealed that the City and its former municipalities have secured \$171.6 million in cash benefits prior to 2008 and that \$175.4 million has been received.

The difference between what the Auditor reported as secured (\$161 million) and the new data (\$171.6 million) is predominately a result of developers selecting to provide cash in-lieu for what had originally been secured as a non-cash benefit; for example public art is usually listed as an in-kind benefit but owners may opt to make cash contributions in lieu of installations. Funds received exceed the value of the amount secured due to indexing added to the initial amount.

COMMENTS

In order to fully address the Auditor-General's recommendation that the Chief Planner assess the status of community benefits and report any uncollectible benefits to Council, this report has been prepared to provide an analysis of approvals from 2008 through to 2017. Collectively, both this report and the previous report dated February 24, 2012 (Item PG12.11) will have examined Section 37/45 amounts outstanding with respect to the developments approved since amalgamation (January 1, 1998) to the end of 2017.

Summary of All Section 37 and Section 45 Approvals (2008 to 2017)

The following information is based on an analysis of approved by-laws and Committee of Adjustment decisions between 2008 and 2017 where community benefits were secured, as of November 14, 2018.

An analysis was conducted of 554 approvals (407 secured under Section 37 and 147 secured under Section 45(9) of the *Planning Act*) and the following information was collected:

- **\$486,570,145 in cash benefits were secured.** This amount can vary over time depending when a report is generated from the Community Benefits management information system. This is due to the fact new information regarding benefits that are secured does come to light from time to time and may relate to an owner's election to provide a cash contribution in lieu of in-kind secured benefits. For example public art may be listed as an in-kind benefit but owners can elect to make cash contributions in lieu of art installations.
- **\$405,591,790 in cash benefits were received.** This value was identified in the report generated from the Community Benefits database. This value is comprised of the total secured amount (\$486.5M) minus the cash benefits that are yet to be received (\$129.1M) plus the indexing and in-kind conversions to cash (\$48.1M).
- **\$80,978,355 equals the difference identified in the Community Benefits database between what has been secured and what has been received.** This value has been verified by subtracting the value of the determined indexing/in-kind conversion benefits received from the line-by-line calculated outstanding balance.
- **\$48,119,550 in indexing and the conversion of in-kind to cash benefits were received.** Again a line-by-line review was conducted to calculate the indexing payments over and above the secured contribution and/or payments that were received where a \$0 value (in-kind) was identified as secured contribution.
- **\$129,097,905 in cash benefits were not received.** A more in-depth analysis of the status of the actual secured cash contributions and potential required payments is contained in Table 2.

The above information is summarized in Table 1 below.

Table 1 - Financial Summary of Section 37/45 Approvals from 2008 to 2017

	Section 37/45 Approvals Securing Community Benefits 2008-2017
Amount of Cash Contributions Secured	\$486,570,145
Amount of Cash Contributions Received	\$405,591,790
Difference between received cash benefits and secured contributions	\$80,978,355
Value of Indexing and In-kind conversions	\$48,119,550
Actual Outstanding Balance	\$129,097,905

Methodology: Categorizing Contributions Secured But Not Received

The Section 37/45 Community Benefits management information system, (i.e. the Section 37/45 Database), is maintained jointly by the City Planning and Accounting Services Divisions. To expand on the first period of analysis (1998-2007) City Planning staff has analyzed each entry secured from January 1, 2008 through to December 31, 2017 to identify if there were any outstanding payments which may be categorized as 'contributions secured but not received', and to otherwise provide assurance, as appropriate, that cash benefits required have been received.

City Planning conducted an analysis of 554 entries and has carried out appropriate checks and investigations to determine in which of the following four categories the cash amount should be included:

- 1. Payments not due:* This means that the payment has not yet been triggered, which in most cases would mean that the respective building permit has not been issued.
- 2. Records updated and payments not required:* This analysis identified those secured community benefits where payments would be considered as no longer required. This determination was based upon a careful reading of the detailed provisions of the respective agreement or Committee of Adjustment (C of A) decision combined with an in depth analysis into the status of the development proposals. These records fall into two categories: Firstly contributions which were initially identified as cash contributions but which were later determined to have been transformed into non-cash alternatives that were supplied as an in-kind contribution by the owners. Secondly, developments which have been abandoned by the owner and accordingly no cash contribution is expected unless the development is reinitiated.

3. *Payments received.* A thorough analysis of the 554 entries where no payment was received resulted in a determination that in the case of 14 developments the condition for requiring a payment had been triggered and records had not been located regarding receipt of the payment. In addition, payment had not been received from 2 developments identified as potentially delinquent from the previous report. In these 16 instances the developer/owner was contacted and was requested to produce proof of payment or in the alternative make the required payment. The values contained in this category represent the 11 payments collected through the efforts of City staff in assessing the outstanding payments and the cooperation of the developers.

4. *Payments due:* In this category, the development has usually been constructed or is under construction, and no record of payment has been found. The developers/owners have been given an opportunity to provide proof of payment.

Analysis of Outstanding Section 37/45 Balances (2008-2017 Approvals)

The categorization of the individual amounts outstanding, in accordance with the methodology described above, has produced the results shown in Table 2 below.
 Table 2: Status of outstanding balances of Section 37/45 cash benefits secured in approvals from 2008 to 2017

Status of Outstanding Balances	S. 37/45 Approvals from 2008 to 2017	Number of Development Approvals
Payments Not Due	\$114,696,813	97
Records Updated: Payments Not Required	\$11,064,715	14
Payments Received since Audit:	\$2,634,990	11
Payments Due: No record of Payment	\$701,387	5
Total	\$129,097,905	

The City Planning staff analysis focused on developments approved from January 1, 2008 to December 31, 2017. Table 2 shows that the total amount outstanding, where payments should have been made, and where no records of payments have been found, is \$701,387 involving 5 development approvals. Attachment 1 to this report provides a list of these 5 development approvals for which records of payment for at least one cash amount secured have not yet been found.

A review of the 16 instances where this review determined that some form of payment was due and not received identified the following:

- in 4 instances payment was due on condominium registration;
- in 2 instances no trigger for payment was identified in the by-law or Committee of Adjustment decision;
- in 7 instances payment was due upon issuance of a building permit; and
- in 3 instances the required indexing was not calculated and applied.

In 2008 the City reviewed its business processes in an effort to eliminate situations where outstanding benefits were not being collected or were not being collected as intended. In the 7 instances where community benefits should have been collected on a building permit, there were 3 instances that failure to collect occurred before the enactment of the City's improved business processes in 2008, and the remaining 4 instances occurred in a short time period between 2010 and 2011. Since 2011, there have been no further instances of non-payment for any reason.

Notwithstanding the above instances, to avoid the reoccurrence of non-payments in 2008 the City began implementing improved business processes and producing training material for staff. The implementation changes included direction (among others) that:

- payments being secured at condominium registration be avoided in favour of a clear building permit trigger that plan examination staff have clear oversight over;
- payments always be associated with a clear trigger and that the trigger be specified in the site-specific by-law;
- indexing provisions be articulated in zoning by-laws and related agreements; and
- the necessity to index a payment is clearly articulated to plan examination staff in IBMS.

Steps taken with respect to the outstanding amounts

An internal review of the outstanding amounts due has not disclosed any documentation of payments received. The original owner(s) identified in the underlying documents as the party(s) responsible for making the required payment were contacted by City Planning and given the opportunity to provide confirmation of payment if the City information was incorrect. In the 5 instances as set out in Attachment 1, no responses were received. Formal demand letters were also subsequently sent by City Legal to the original owners of the developments in an effort to facilitate payment without further enforcement action either against them or against the current owners (including condominium corporations) now in possession of the property and subject to the registered agreements that had initially secured the requirements. Those collection actions have not resulted in any further payments.

City Planning has consulted Legal Services regarding any possible further action on the part of the City. The attached Confidential Attachment 1 from the City Solicitor provides advice and seeks direction from City Council with respect to the outstanding balances.

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SIGNATURE

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ATTACHMENTS

Public Attachment 1 - Section 37/45 Approvals 2008-2017 with Payments Due and No Record of Payments Received

Confidential Attachment 1 - Confidential Instructions to Staff