Use of Section 37 in the City of Ottawa

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Contents

Section 37 of the *Planning Act*[1]

Section 37 allows municipalities to extract various benefits from developers in exchange for allowing projects that exceed as of right height or density restrictions. Although the *Planning Act* applies to all of Ontario, a municipality must implement Section 37 in its Official Plan ("OP") in order to use it to extract benefits. Section 37 provides as follows:

> **Increased density, etc., provision by-law**
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> **37.** (1) The council of a local municipality may, in a by-law passed under section 34, authorize increases in the height and density of development otherwise permitted by the by-law that will be permitted in return for the provision of such facilities, services or matters as are set out in the by-law.
>
> **Condition**
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> (2) A by-law shall not contain the provisions mentioned in subsection (1) unless there is an official plan in effect in the local municipality that contains provisions relating to the authorization of increases in height and density of development.
>
> **Agreements**
>
> (3) Where an owner of land elects to provide facilities, services or matters in return for an increase in the height or density of development, the municipality may require the owner to enter into one or more agreements with the municipality dealing with the facilities, services or matters.
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> **Registration of agreement**
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> (4) Any agreement entered into under subsection (3) may be registered against the land to which it applies and the municipality is entitled to enforce the provisions thereof against the owner and, subject to the provisions of the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land.

While Section 37 appears to be an available tool for improving community benefits within municipalities, only a handful have implemented it and even fewer use it on a regular basis. Toronto has been the most obvious and prolific user of Section 37 and Ottawa hopes to learn from both the successes and challenges that Toronto has experienced along the way. The purpose of this paper is to outline the history of why Ottawa is the way it is today, compare the approaches of Toronto and Ottawa with regards to Section 37, outline the challenges for both the municipality and the developers and set out some hopes Ottawa has for the future use of Section 37.

1. Ottawa History

The original 1964 comprehensive zoning for Ottawa allowed for a population within the greenbelt of around 800,000, but by the mid-1970s the Region decided to lower this to 630,000 in its OP. From the 1970s-1990s, in the name of "preserving communities" the former City passed by-laws providing for limited development and went through a long-term period of down

[1] R.S.O. 1990, c. P.13, as amended

zoning. By the mid-1990s the region estimated that there could only be a population of around 500,000 within the greenbelt.

Significant change came with the 1997 Region OP which carried the slogan "grow in, not out". The spirit of the OP was to promote intensification. This led to the OP providing for higher densities. Many Zoning By-laws however remained unchanged. In 2008, after amalgamation, City of Ottawa passed the first comprehensive zoning for the entire former region with Zoning By-law 2008-250, which essentially mirrored the zoning that was already in place.

Now finally the number of condominium units and high-rise towers built in Ottawa ranks in the top four among large Canadian cities. With this comes the potential to use Section 37. Section 37 will allow for even greater intensification in exchange for contributions to community benefits in order to alleviate the negative impacts.

Section 37 was added to the OP in 2003 and is still in its infancy in Ottawa. Although Ottawa has negotiated a handful of Section 37 agreements, so far only two have been registered on title. The first Section 37 agreement was for 801 Albert Street which required a $450,000 contribution toward the design and construction of a future pedestrian and cycling bridge over the existing O-Train corridor, to be provided prior to the issuance of a building permit. The agreement further provided for the transfer of some of the property to the City for a public right-of-way.

A second Section 37 agreement was entered into for 159, 163 and 167 Parkdale Avenue. The agreement provided a $275,000 contribution towards a community fund for the Mechanicsville neighbourhood where the development is to be located. The contribution was broken up with $125,000 being provided prior to the issuance of a building permit and $150,000 to be provided within 24 months of the issuance of a building permit.

2. How the amounts are set

A hot topic of debate over the past few years is whether Section 37 is a tax, and therefore an illegal tax, posed on developers by municipalities. Municipalities must be careful when implementing Section 37 policies in their respective OPs and when conducting negotiations to avoid Section 37 payments being disallowed as illegal taxes.

If a developer does not agree with the requested Section 37 benefits, relief may be sought at the Ontario Municipal Board. In order for Section 37 benefits to be accepted a municipality must meet the test laid out in *Toronto (City) v. Minto BYG.*[2] This twofold test states 1) the increase in height and/or density must be defensible on good planning grounds and 2) contributions requested by the City must be within the limits of its OP policies. Municipalities must also ensure that there is a sufficient degree of connection or nexus between the proposal and the Section 37 benefits.

[2] 2000 CarswellOnt 6710 (OMB)

Before any negotiations begin Planning Staff must determine if the project is eligible for Section 37 benefits. Both Toronto and Ottawa have determined the minimum building size and height or density increase that will trigger a request for Section 37 benefits.

Toronto and Ottawa have implemented Section 37 Guidelines for Staff to follow.[3] Both cities Section 37 Guidelines acknowledge the nexus needed for Section 37 contributions. Section 2.4 of Ottawa's Guidelines mirrors Toronto's section 2.4, which states that there should be a reasonable planning relationship between the secured community benefits and the increase in height and/or density in the contributing development**.** At a minimum this is to include a geographic relationship. Although both cities recognize the nexus, the two cities set the amounts requested and (conduct negotiations) differently.

2.1 Ottawa

Pursuant to section 2.5 of Ottawa's Guidelines, the project must be at least 7,000 square metres in size in order to qualify for Section 37 benefits. Further, Section 37 will only apply to development applications where the requested density represents a 25% or greater increase over what is permitted by as of right zoning.

A report to Planning Committee on February 1, 2012 stated that the method of assessing Section 37 community contributions will involve a case-by-case analysis to ensure that each proposal is reviewed in a fair and consistent manner. The report lays out the steps that the City will go through before entering into negotiations with developers.

First the City will calculate the value uplift. This will be done using two main geographic zones, for which the value uplift will be calculated annually by a qualified appraiser. The second step is to determine the percentage of the calculated uplift to be applied as a community benefit by multiplying the increase of the gross floor area between the base zoning and the proposed zoning by the value uplift rate to establish the full amount of the value uplift.

Using a set formula to calculate Section 37 contributions is arguably an illegal tax.[4] For this reason Ottawa makes it clear that it will take each case as it comes and apply other factors to potentially draw down the quantum of the benefit. The draw down factors include the relevance of existing zoning to the OP or to the Community Design Plan ("CDP") or Secondary Plan, the retention of built heritage and the implementation of public benefits in the development. The report further states that in instances where the zoning is acknowledged not to be current relative to the OP, a Secondary Plan, or CDP, the percentage of uplift for Section 37 community benefits will be reduced accordingly.

[3] Ottawa's Section 37 Guidelines are entitled "Implementation Guidelines for Section 37 of the Planning Act and Protocol for Negotiating Section 37 Community Benefits" ("Ottawa's Guidelines")
Toronto's Section 37 Guidelines are entitled "Implementation Guidelines for Section 37 of the *Planning Act"* ("Toronto's Guidelines")

[4] In *ADMNS Kelvingrove Investment Corp. v. Toronto (City)* [2010] O.M.B.D. No. 282 (OMB) the City's expert planner explained that it was their "internal practice" to base their initial "Ask" letter based on 20% of the estimated capital gain expected from the Official Policy Amendment or Zoning By-law Amendment. The Board expressly stated that nothing in their decision should be taken as endorsing that approach.

2.2 Toronto

Section 5.1.1 policy 4 of Toronto's OP provides that in order to qualify for Section 37 benefits projects must have more than 10,000 square metres of gross area and the Zoning By-law Amendment must be for an increase by at least 1,500 square metres and/or significantly increase the permitted height. If the Zoning By-law measures residential density in units per hectare ("UPH"), the units must then be converted to gross floor area, at a rate of 100 square metres per unit, in order to determine whether the threshold is exceeded. However, section 5.1.1 policy 5 of the OP provides for situations where Section 37 may be used, irrespective of the size of the project or the increase in height or density.

The Toronto Guidelines make it clear that the City does not intend to use a formula to calculate the level of Section 37 benefits; instead a case-by-case analysis is performed. However, the Guidelines further state that the new Toronto OP allows for a formula-based approach within specific geographic areas and asserts that this is not an illegal tax because it is based on costs of community benefits to be secured within the specific area (section 2.5).

3. Negotiations

While Toronto's Guidelines do not contain a process that governs initial price points, they do provide Protocol for Negotiating Section 37 Community Benefits[5] ("Toronto's Protocol").

Toronto's Protocol outlines how appropriate types of community benefits may be determined and states that identification of existing and potential needs should be completed in advance of the receipt of any planning application. This can be helpful to speed up negotiations as the needs of the area will be known before discussions start. The Board has rejected Section 37 benefits that were deemed to have been prepared on an ad hoc basis as a result of an application filed for rezoning.[6] Toronto's Protocol also outlines how Planning Staff and the Ward Councillor will work together and how the community is to be consulted.

Ottawa could learn from Toronto's Protocol and negotiation process. It will be important for Ottawa to establish a negotiation process while the use of Section 37 is still young so that the process is procedurally fair for all involved. Implementing negotiation guidelines will only add to the requirement that the use of Section 37 must be fair, clear, transparent and predictable.

4. How can the funds be utilized

While there must be a sufficient nexus between the benefit and the development, what that benefit will be varies depending on the needs of the surrounding area. Stakeholders can include not just the municipality and the developer but also any community associations in the area.

[5] As adopted by City Council at meeting of December 11-13, 2007
[6] *Sunny Hill Inc. v. Toronto (City)* [2006] O.M.B.D. No. 595 (OMB)

4.1 Ottawa

Ottawa's OP, in section 5.2.1.11, states that the community benefits that may be authorized include, but are not limited to the following:

a) Public cultural facilities;
b) Building design and public art;
c) Conservation of heritage resources;
d) Conservation/replacement of rental housing;
e) Provision of new affordable housing units; land for affordable housing, or, at the discretion of the owner, cash-in-lieu of affordable housing units or land;
f) Child care facilities;
g) Improvements to rapid-transit stations;
h) Other local improvements identified in community design plans, community improvement plans, capital budgets, or other implementation plans or studies;
i) Artist live-work studios;
j) Energy conservation and environmental performance measures;
k) Conservation of existing greenspace or the creation of new greenspace.

4.2 Toronto

Section 5.1.1 policy 6 provides that Section 37 community benefits include the following:

a) The conservation of heritage resources that are designated and/or listed on the *City of Toronto Inventory of Heritage Properties*;
b) Fully furnished and equipped non-profit child care facilities, including start-up funding;
c) Public art;
d) Other non-profit arts, cultural, community or institutional facilities;
e) Parkland, and/or park improvements;
f) Public access to ravines and valleys;
g) Streetscape improvements on the public boulevard not abutting the site;
h) Rental housing to replace demolished rental housing, or preservation of existing rental housing;
i) Purpose built rental housing with mid-range or affordable rents, land for affordable housing, or, at the discretion of the owner, cash-in-lieu of affordable rental units or land;
j) Local improvements to transit facilities including rapid and surface transit and pedestrian connections to transit facilities;
k) Land for other municipal purposes;
l) Substantial contributions to the urban forest on public lands; and
m) Other local improvements indentified through Community Improvement Plans, Secondary Plans, *Avenue* Studies, environmental strategies, sustainable energy strategies, such as deep lake water cooling, the capital budget, community service and facility strategies, or other implementation plans or studies.

Both lists are non-exhaustive and contain similar provisions defining what Section 37 benefits. Ottawa added two new potential benefits in 2010: j) the provision of energy conservation and k)

environmental performance measures and the conservation of existing greenspace or the creation of new greenspace.

Toronto's Protocol specifically requires Planning Staff to consult the Ward Councillor prior to entering into any Section 37 negotiations. The Ward Councillor may then in turn consult with the community. While this may complicate negotiations it includes people who have a feel for what benefits the community requires. It can also have the added benefit of getting the community on board with the development if they feel the Section 37 benefits will sufficiently offset any negative impacts. An involved community association may also serve as a "watch dog" to ensure the negotiated benefits are actually provided.

Outlined below are examples of Section 37 benefits that have been accepted and rejected by the Board in past cases. Both sides in Ottawa will look to these cases for guidance as to what the Board will consider reasonable contributions to community benefits and how closely connected they must be to be accepted.

4.3 Benefits Accepted

In *1430 Yonge Street Inc. v. Toronto (City)*[7] the Board famously approved an increase of height and density of a mixed use development in exchange for $230,000 for improvements to two parks in the area, including a large sum for a dog drinking fountain.

In *Sterling Silver Development Corp. v. Toronto (City)*[8], although the Board stated that Section 37 is neither a municipal capital gains tax, nor a tool for municipalities to sell upzoning to supplement their coffers, the Board found that there was a direct nexus between the provision of greenspace and the proposed development. This was due to the fact that the development would take away landscaped open space in a park-deficient neighbourhood. The developer was therefore ordered to pay a $40,000 contribution to the closest park.

In *1030 King General Partner Inc. v. Toronto (City)*[9], the Board allowed a 14 storey mixed-use building whereas the Zoning By-law only allowed approximately 7 storeys. The developer had offered a $1,000,000 as a Section 37 contribution and the City had requested $1,500,000. The Board, after considering the concerns about parks in the area allowed for the $1,000,000 contribution with an additional $150,000 contribution to park improvement in the area.

In *Elderbrook Developments Ltd. v. Toronto (City)*[10] a $500 per unit contribution (approximately $500,000) was accepted as reasonable to assist in securing approximately 410 square metres of community floor space under City control. The Board found that securing additional floor space for community service groups would benefit the entire neighbourhood, including the proposal.

4.4 Benefits Rejected

[7] [2003] 46 O.M.B.R. 63 (OMB)
[8] [2005] O.M.B.D. No 1313 (OMB)
[9] [2011] O.M.B.D. No. 532 (OMB)
[10] [2005] O.M.B.D. No. 980 (OMB)

In *Irber Holdings Ltd. v. Toronto (City)*[11] the Board rejected the Staff recommendation that the Applicants make City a $300,000 contribution toward the construction of an outdoor swimming pool or splash pad at a local park. The Board found that was no real and demonstrable connection between the Section 37 benefit being requested and the development proposal.

The Board held in *Davenport Three Develco Inc. v. Toronto (City)*[12] that the off-site benefits proposed by the City, namely improvements to neighbourhood parks and to an adjacent junction of two main roads, did not relate to the proposed development and were therefore disallowed. Conversely the on-site benefits of publicly accessible open space and design elements were allowed because there was a clear nexus to the development.

In *Re Daniels HR Corp.* the Applicant had applied for an OPA, site specific ZBLA and a Site Plan. City Staff were in support and the OPA and ZBA were approved in principle by the City. The City and the Applicant had negotiated a Section 37 agreement wherein the Applicant would contribute $225,000 toward a community centre 0.5 kilometres from the subject property. The OPA and By-law were then not passed and the requirement to make an additional $250,000 contribution was raised at a statutory public meeting, which was to be used for public art.

The Board found that there was no requirement in the OP or Secondary Plan to support the additional contribution, nor did the manner in which it was raised accord with Toronto's Guidelines.

5. Lessons Learned from Toronto's Experiences

From the Toronto case law it has become apparent that the requirements from the *Minto* decision are still applicable. Therefore Section 37 agreements will not make bad planning good, they must implement OP polices and the municipality must demonstrate a sufficient nexus between the proposed benefits and the development. Ottawa's Planning Staff will look to the case law to ensure any benefits requested will fit the requirements the Board has set out.

A further theme from the case law is the requirement that the use of Section 37 must be grounded in fair, clear, transparent, predictable and specific requirements that are set out in the OP that are not arbitrary in their application. The Board is adamant that the Applicant has a right to know how the figure is derived in sufficient detail.[13] Therefore Ottawa's Section 37 agreements should be clear about how much money is being allocated to specific benefits and how these benefits are connected to the development.

6. Challenges

6.1 Challenges for the City

[11] [2005] 49 O.M.B.R. 178 (OMB)
[12] [2006] O.M.B.D. No. 637(OMB)
[13] *Menkes Church Street Holdings Inc. v. Toronto (City)* [2012] O.M.B.D. No. 649 (OMB) at para 58

A major challenge for all municipalities is asking for Section 37 contributions without having them classified as illegal taxes. As noted above, Ottawa's technique to avoid the illegal tax argument is coming up with a value up lift number for initial negotiations and then taking into account various factors that could draw down this number. This is in order to make sure that all applications are considered on a case-by-case basis.

The City also has to contend with many competing interests: the developers, the City Councillors, community associations and the general public. It is extremely difficult to satisfy all these stakeholders when negotiating a fair Section 37 agreement. Ottawa will want to maximize benefits, while not provoking developers to file Ontario Municipal Board appeals.

Another challenge for both the City and developers is determining the timing of the contributions. Ottawa takes the position that the timing of the payment or provision of benefits will be flexible and that this forms a part of the negotiation process. However, since community benefits are meant to curb the negative impacts of the development, the community may insist they be provided around the time the development is completed.

City Planners have the responsibility of making sure the proposed development represents good land use planning before Section 37 contributions are even discussed. Planning Staff must ensure that the proposal would be supported but for the fact that it crosses the thresholds established in the Guidelines.

6.2 Challenges for Developers

One challenge developers in Ottawa face that is unique is the preservation of the "Capital Views" pursuant to the Capital Views Protection Policy of the National Capital Commission. This is secured in the OP and the Section 37 guidelines. No amount of Section 37 benefits will allow obstruction of these views and developers must work around this policy.

Ottawa is seeing some developers negotiating their own Section 37 benefits without the assistance of legal counsel. Although many developers may be experienced negotiators it is still important to have a handle on the case law that accompanies Section 37. Even if developers want to conduct their own negotiations it is probably prudent to consult legal counsel before entering into any final and binding agreement.

Developers want to make sure the money they provide in lieu of community benefits as set out in the Section 37 agreement. If the process is not open and transparent developers will equate the money to a tax. Tangible benefits in close proximity to the development will make developers feel like the money is being invested in the area rather than being held by the City. If the benefits are able to help sell the development then developers will more readily enter into negotiations for their next project.

7. Hopes for the Future

Section 37 will, we all hope, be used in Ottawa to facilitate Win - Win situations, with Section 37 benefits helping both the community and the developers. For Section 37 to work properly the

benefits requested must be reasonable and substantially connected to the development. If the benefit increases the value and desirability of the property while at the same time alleviating some of the negative impacts of the development, then all stakeholders can be satisfied.

An example of a successful Section 37 agreement in Toronto is the Living Shangri-la, located on University Avenue North and Adelaide. The agreement included a large contribution to public art, which benefitted both the City and the developer. The Living Shangri-la is a 66 floor 873,000 square foot development with both residences and luxury hotel rooms.

The public sculpture by Zhang Huang is entitled “Rising” (below). The work represented a significant addition to public art in Toronto. The developer further benefitted from the publicity of the public unveiling.

Figure 1: Rising by Zhang Huang

Figure 2: The Living Shangri-la 180 University Avenue