Amenities for Density: Section 37 of the Planning Act

a presentation by Ted Tyndorf, Chief Planner, City of Toronto
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What is intended by Section 37?

Is It an Incentive?

No - Unless within a defined area for community improvement with an approved community improvement plan that provides for incentives, incentives are not permitted under the Municipal Act.

Is it a tool to mitigate the effect of development in a neighbourhood?

No - By definition, support for new development must be based on the principles of good planning. Goodies do not make bad developments, good.

So what is this 'authority' that Section 37 gives to municipalities across the province?

Let's look at the words. The Council may by by-laws, authorize increases in height and density otherwise permitted in return for such facility services or matters set out in the By-law.

Authorize an increase in height and density <u>in return for ….</u>
So, the legislation contemplates an exchange in the context of good planning and under the conditions set out in the Official Plan.

The developer receives something of value and the legislature conceived that the Council should receive something of value in return.

Sounds simple and yet is so complicated.

The legislation gives no further guidance; there are no regulations; Councils are divided over the merits of using or not using such a tool and how it should be wielded.

Everyone wants rules, just not the rules that anyone has proposed.

Some call it “let’s make a deal planning”, then complain that the negotiators settled for too little, as though there would ever be enough.

It’s not that difficult to understand the angst that the use of Section 37 causes.

One would presume that an appeal body would, in the absence of specific regulatory direction, develop a consistent approach based on case law.

One would be incorrect in that assumption. Don’t take my word for it, read the decisions. It’s still an open question, is it mitigation or is it a benefit?

- The OMB has not, on the whole, been very supportive of the City of Toronto’s approach to using Section 37, and has through its collective decisions greatly restricted how the City uses the tool and has reduced the value of benefits that the City realizes.

- Vancouver realizes about 75%-95% of the “land lift”, meaning increased land value resulting from the density increase, in the downtown. Overall, the City of Toronto realizes much less in value of community benefits secured. In both situations, there is also a development charge or levy regime in place. Furthermore, I understand that Vancouver does not have specific legislation authorizing the density incentives.

- Section 37 has been controversial since its inception in 1983 – you either love it or you hate it.

- Toronto is one of the few municipalities in Ontario to use it.

- New citywide Official Plan policies regarding the use of Section 37 have recently been approved by the Ontario Municipal Board, resulting from a settlement of policy appeals by the development industry and certain ratepayer organizations.

- It was important for the City to establish limits to the use of Section 37 to maintain credibility and integrity of the planning process – the challenge is to keep the use of it "inside the box". Everyone wants rules, just not those rules.

- Section 37 has been a critical tool in conserving heritage resources and existing rental units.

◊ The development including the density/height increases must constitute good planning

- Since amalgamation, the City has used Section 37 in 195 development projects, securing cash contributions of at least
  $68 million plus significant non-cash benefits.

The Official Plan sets out the major principles relevant to the securing of community benefits:

◊ The development including the density/height increases must constitute good planning

◊ A reasonable planning relationship must exist between the increased density/height and the community benefits secured, including geographic proximity and addressing planning issues associated with the development

◊ if the zoning by-law has not been updated to implement the Official Plan, or a change of use is proposed, then the City will consider whether any increase in density should be given without invoking Section 37

◊ Generally Section 37 will be used in developments exceeding 10,000 m2 gross floor area, where the density increase is at least 1,500 m2

◊ S. 37 may be used for on-site heritage conservation, preservation of rental housing, or replacement rental housing, or as a convenient legal mechanism to support development, or as may be agreed upon

◊ Community benefits are specific capital facilities (or cash for same)

◊ Priority is given to on-site or local community benefits

◊ Community benefits are based on local community needs, intensification issues in the area, the nature of the development application, and strategic objectives and policies of the Official Plan

◊ A quantative formula may be appropriate within Secondary Plan or area specific policies

No citywide formula, or quantum, exists in the Official Plan or related guidelines for determining the level or value of benefits to be secured. Legal advice is that such a formula on a city-wide basis could be considered an illegal tax by the courts

Except within the Secondary Plans applicable to North York Centre and the Sheppard East Subway Corridor (for now), every Section 37 agreement is negotiated on a case by case basis. This is a resource intensive process and leads to the perception of let's make a deal.

Matters required to make a development functional or otherwise routinely required, are not considered by the City to be community benefits eligible for exchange for increased density and/or height

These principles have been the foundation for Implementation Guidelines presented to Council last term. They were referred back to staff.
Everyone wants rules, just not those rules.

One approach to resolving this conundrum is to address one of the fundamental criticisms. Each negotiation is triggered by a proposal to amend the applicable law which leads to the

perceptions of let's make a deal, piecemeal planning and worst of all, the selling of development rights.

So why are there so many applications to amend the Zoning By-law?
Quite simply, in many cases, the applicable zoning bears only passing resemblance to the vision established in the OP. How could these by-laws reflect Toronto of 2006, many were written more than 50 years ago!

So the task and much of the solution, it appears to me, is to establish zoning that meaningfully implements the OP vision. This creates certainty and stability in the neighbourhood and the investment community.

Land value is supposed to be driven by the bundle of development rights attached to the ownership of the asset. Those rights should be predicated on the highest and best use as set out in the Official Plan as prescribed in zoning.

Establishing that correlation between value and use reduces the potential for speculation and reduces the perception of deal making.

By establishing a meaningful base zoning that reflects good planning, one could then consider a reasonable system of incentives based on established municipal goals and desirable outcomes.

We are on the road to establishing that basis for reasoned and reasonable development rights.

But is there the determination on City Council to actually put the Official Plan vision into Zoning By-law precision?

Three years ago, the answer would have been no. Times have changed, new legislation, a new mandate for the Mayor and Council, new governance models.

Renewed Optimism.

I think that this Council is ready to say yes.