

DRAFT IMPLEMENTATION GUIDELINES
FOR SECTION 37 OF THE PLANNING ACT
AND PROTOCOL FOR NEGOTIATING
SECTION 37 COMMUNITY BENEFITS



Section 37

IMPLEMENTATION GUIDELINES FOR SECTION 37 OF THE PLANNING ACT AND PROTOCOL FOR NEGOTIATING SECTION 37 COMMUNITY BENEFITS

To assist with the implementation of section 5.2.1 (11) of the City of Ottawa Official Plan, Increase in Height and Density By-law.

CONTENTS

PAGE

<u>Section 37 Implementation Guidelines</u>	1
1. Introduction	1
2. Implementation Principles of Section 37	1
3. General Considerations	5
3.1 Timing of Agreement Execution	5
3.2 Timing of the Provision of the Benefit	5
3.3 Changes in Previously Secured Community Benefits	5
3.4 Non-Profit Housing Developments	6
3.5 Community Benefits Summary in Financial Implications Section of Final Report	6
<u>Protocol for Negotiating Section 37 Community Benefits</u>	7
Use of Section 37	7
Determination of Appropriate Types of Community Benefits	7
Consultation with Ward Councillor	9
Community Consultation	9
Other Issues	
Figure 1	10

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Section 37 Implementation Guidelines

1. Introduction

These Guidelines are intended to assist in the implementation of the policies of the Official Plan contained in Section 5.2.1 (11) *Increase in Height and Density By-law*. Community benefits obtained through height and/or density incentives are secured pursuant to Section 37 of the *Planning Act*. These Guidelines must be read in conjunction with the policies of the Official Plan. If any conflicts arise between Official Plan provisions and these Guidelines, the Official Plan provisions will prevail.

Section 37 authorizes a municipality with appropriate Official Plan provisions to pass Zoning By-laws involving increases in the height or density otherwise permitted, in return for the provision by the owner of community benefits. The community benefits must be set out in the Zoning By-law amendment and then secured in an agreement registered on title.

The term “community benefits” reflects the City’s priority on providing public benefits within the local community in which the contributing development project is located. The increase in height and/or density is an incentive to the developer to provide community benefits at no cost to the City.

2. Implementation Principles of Section 37

The principles below are to be followed when using Section 37 of the *Planning Act*:

- 2.1 The proposed development must represent good land use planning principles.** An owner/developer should not expect inappropriately high density or height increases in return for community benefits and the City should not approve poor development simply to get community benefits. Developments must respect good planning principles in terms of appropriate densities and building form and conform to the City’s design guidelines. Good architecture and good design are expected of all developments, as a matter of course, and are not eligible Section 37 benefits.
- 2.2 Community benefits and the increase in height and/or density must be set out in the Zoning By-law.** Section 37 must be implemented through a site-specific Zoning By-law Amendment. Such a By-law, in addition to containing all of the usual provisions that would govern development on the site, would include a section that requires the owner to enter into an agreement under Section 37 to secure the facilities, services and matters outlined in the By-law.
- 2.3 Section 37 community benefits should be specific capital facilities, or cash-in-lieu contributions to achieve specific capital facilities.** The facilities should be specific capital facilities, not general or indeterminate facilities. Amenities obtained should benefit the area where the development is located. Increased density can result in higher numbers of people who place higher demands on community

amenities, such as daycares and open space. The amenity is intended to maintain or improve existing community liveability and the quality of life in the area that takes the higher density.

The term “cash-in-lieu” as used with respect to community benefits means cash contributions toward specific capital facilities, in lieu of the developer being required to actually construct or provide those specific facilities. Generally, any cash contributions should be secured toward community benefits that are defined with sufficient specificity in the agreement to be able to demonstrate a reasonable planning relationship between the contributing development and the community benefits. Cash contributions may be considered as a share of a larger capital project in the vicinity of the development, in instances where the contribution would not cover the full cost (e.g. a pedestrian bridge). Operating, programming, and non-capital maintenance funds are not durable and are not appropriate community benefits.

- 2.4 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 planning relationship includes an appropriate geographic relationship and the addressing of planning issues associated with the development. Community benefits may be appropriate amenities and services in the local community that go beyond consideration of matters necessary to support that particular development, and which may be important in maintaining the quality of life in the community while accommodating intensification.
- 2.5 Section 37 will be pursued for larger projects throughout the city where significant increases in height or density are being requested.** Development projects city-wide will be candidates for negotiating Section 37 benefits if the proposed building is at least 7,000 square metres in size. This minimum threshold is intended to eliminate smaller low-and mid-rise projects so as not to deter such development. Section 37 will apply to development applications where the requested height and/or density represent a 25% or greater increase over what is permitted through as-of-right zoning. The intention is to utilize Section 37 as a tool to negotiate community benefits from projects that seek significant changes from existing zoning. The exceptions would be where specific policies in Community Design Plans and Secondary Plans direct the use of Section 37 for increases in the height and density of smaller developments or where the permitted density is redistributed in a manner that is consistent with the City’s design guidelines.
- 2.6 The rate for calculating the ‘value uplift’ shall be established annually by the municipality.** In order to ensure an orderly and consistent approach to the calculation of the ‘value uplift’ the following steps shall be taken:
- i. To provide a level of certainty to all stakeholders, the City shall establish annually a ‘value uplift’ rate based geographically on two zones - inner urban and outer urban - as shown in [Figure 1](#) (Page 10). The two zones represent the area of the city where Section 37 agreements are most likely to be negotiated.

- ii. The City's Realty Services Branch, in consultation with key stakeholders, shall be responsible for providing the yearly values for the two zones, on the basis of an agreed upon fair market value. The values shall be expressed in dollars per square metre.
- iii. Any properties outside these zones (the remainder of the city) will have individual appraisals undertaken.
- iv. Should the owner/developer challenge the total uplift based on the rate, they may at their own cost undertake their own appraisal on a mutually agreed upon Terms of Reference with the City.

2.7 The value of the uplift shall be determined by calculating the increase of the the Gross Floor Area (GFA) between the base zoning and the approved zoning. The 'uplift value' is defined as the increased land value calculated on the basis of the increased GFA as a result of an approved zoning change. The quantum of the uplift will first be calculated on the basis of the entire uplift and then drawn down by the following factors:

- i. Age of zoning (e.g. recently completed Community Design Plans)
- ii. Relevance of zoning to Official Plan policy
- iii. Retention or rehabilitation of built heritage
- iv. Implementation of public benefits in the proposed development (e.g. plaza, pathways, exceptional sustainability measures).

2.8 Typical community benefits are listed in the Official Plan, (policy 5.2.1.11), but this list is not exhaustive. The Ward Councillor, community groups and area residents shall participate in determining what benefits should be the subject of negotiation between the City and the owner/developer. Community groups are encouraged to compile a list of community priorities annually.

As well, consideration should be given to intensification issues in the area, the nature of the development application, and the strategic objectives and policies of the Official Plan. Other benefits not specifically listed in the Official Plan may also be secured. For example, community needs that have been identified through a Council-approved assessment such as in a Secondary Plan, or a Community Design Plan.

The consultation must remain within the timelines established under the Development Review Process. If a Ward Councillor chooses not to lead the community consultation, staff will assume this responsibility. Based on the consultation a recommendation on the proposed community benefits will be included in the staff zoning report to Planning Committee.

2.9 Visual integrity and symbolic primacy of the Parliament Buildings and other national symbols must not be compromised. Increases in height and/or density shall not be considered in situations where such increases may compromise the Capital Views Protection policy of the National Capital Commission; or the City's Official Plan's Annex 8A, Central Area Key Views and View Sequences of the

Parliament Buildings and Other National Symbols; or Annex 8B, Maximum Building Heights/Angular Planes; or any extension of these key views, view sequences and angular planes beyond the Central Area.

- 2.10 When reviewing an application for a minor variance involving an increase in height and/or density, planning staff must advise the Committee of Adjustment of the City's interest in negotiating a Section 37 community benefit.** During the course of reviewing a minor variance application for an increase in height and/or density, staff will consider whether or not there is an opportunity to negotiate a Section 37 benefit. Should staff determine such an opportunity exists, they will advise the Committee of Adjustment through the Department's comments that the minor variance should be processed by way of a Zoning By-law Amendment application and be dealt with at Planning Committee.

In considering the application, the Committee of Adjustment must decide to either grant the application as is, notwithstanding the staff comment on the use of Section 37, or refuse it and require the applicant to submit a Zoning By-law Amendment application. A Section 37 benefit can only be imposed through the enactment of a by-law, which negates the ability of the Committee of Adjustment from doing so themselves in their decisions.

- 2.11 Section 37 cash contributions toward capital facilities should be over and above the facility costs that will be funded through development charges or parks contributions requirements.** Section 37 community benefits in the form of cash contributions may be secured toward facilities (or portions thereof) that cannot be, or are not, funded by the Development Charges By-law. The cash contribution must also be separate from the parks contribution requirements under Section 42 of the *Planning Act*.

- 2.12 Section 37 may be used to protect, restore or commemorate or interpret cultural heritage resources.** Funds used for cultural heritage resources secured through a Section 37 agreement shall be used in accordance with the *Ontario Heritage Act*, Council-approved heritage policies of the Official Plan, Arts and Heritage Plan and Standards and Guidelines for the Conservation of Historic Places in Canada.

Where there is an identified cultural heritage resource on the subject site, funds secured through a Section 37 agreement for an on-site cultural heritage resource may be used to protect, restore, commemorate or interpret cultural heritage resources, or to adapt the cultural heritage resource for a new use.

Where there is no identified cultural heritage resource on the subject site but one or more exist in proximity to that site, funds secured through Section 37 may be contributed to a heritage grant fund to assist with the future conservation of those resources.

Where the subject site is located in a Heritage Conservation District, funds secured through a Section 37 agreement may be used to identify, interpret or commemorate the heritage character of the district through interpretive plaques, street signs, streetscaping, or other appropriate means.

3. General Considerations

3.1 Timing of Agreement Execution

The Section 37 Agreement will generally be executed prior to the introduction of the by-law that implements the Zoning By-law Amendment for the increased density and/or height. It should be noted that payment or provision of community benefits often does not occur upon execution of the agreement. The timing of payment or provision of benefits is typically stated in the Section 37 agreement provisions.

3.2 Timing of the Provision of the Benefit

1. If a cash payment is being secured as a condition of a Section 37 Agreement, then the use of that cash payment shall determine the timing. If the payment is needed as part of a community benefit that has a set schedule for completion, then this schedule may be used as a basis for negotiation. If the payment is to be attributed to a fund for a future project then the timing can be negotiated accordingly.
2. If the benefit is being provided by the proponent as part of the development (i.e. day care, pedestrian pathways), the timing will be determined on the basis of the project's construction schedule.
3. The timing of the benefit(s) shall be specified in the Section 37 Agreement and be agreeable to all parties.

3.3 Changes to Previously Secured Community Benefits

A change to an existing Section 37 Agreement to reallocate funds or change the community benefits is often not a simple exercise, but where necessary, the change process must be open, public, and subject to the appropriate legal processes, and be authorized by Council. Council cannot unilaterally amend an Agreement. All parties to the original agreement, or their successors in title, must approve the change and sign an amending agreement. Where a condominium has been registered, all unit owners are considered parties to the Agreement.

3.4 Non-Profit Housing Developments

In considering the use of the Section 37 policies in relation to non-profit developments involving housing, the following definition shall apply:

“NON-PROFIT HOUSING - Housing which is or is intended to be offered primarily to persons or families of low income on a leasehold or co-operative basis and which is owned or operated by:

- A. A non-profit corporation being a corporation, no part of the income of which is payable to or otherwise available for the personal benefit of a member or shareholder thereof; or
- B. A non-profit housing co-operative having the same meaning as in the *Cooperative Corporations Act*.”

Non-profit corporations involved in the development of non-profit housing are exempt from having to negotiate a community benefit when seeking increases in height and/or density. They are subject however to all other provisions of the *Planning Act* and the policies of the City’s Official Plan.

3.5 Community Benefits Summary in Reports to Planning Committee

Reports to Planning Committee involving Section 37 should contain a summary of the community benefits secured, the estimated cost or value of each community benefit where possible, and the timing of their provision, especially the payment timing for cash contributions secured. It should also indicate the accounts to which the cash contributions are to be deposited. Staff of other City Departments may be required to assist in estimating the cost or value of community benefits for which they would normally be responsible or have specific knowledge. When the community benefit involves a capital project, they will be required to assist in estimating the cost or value of ongoing operations and maintenance. There are some community benefits, such as preservation of heritage resources, for which a value may not be possible to estimate.

Protocol for Negotiating Section 37 Community Benefits

Use of Section 37

The decision by the City as to whether, and how, to use Section 37 must conform to the general Section 37 policies of the Official Plan (Section 5.1.1) and/or any more specific Section 37 policies within Secondary Plans, Neighbourhood Plans or Community Design Plans. The Section 37 Implementation Guidelines may provide additional assistance in applying such policies. Section 37 Agreements are appropriate only where the proposed development constitutes good planning in accordance with the objectives and policies of the Official Plan, including the built form policies and all applicable neighbourhood protection policies.

Determination of Appropriate Types of Community Benefits

A general determination of community benefit priorities in an area anticipating potential intensification need not await the receipt by the City of a planning application. It is desirable and encouraged that an analysis and identification of existing and potential needs and services be done in advance of the receipt of any planning application. The purpose of such analysis is to assist in setting the determination of appropriate type(s) of community benefits as set out elsewhere in this protocol.

Such advance determination could be very beneficial to the community, the developer(s) and the City, and is encouraged, with the involvement of the Ward Councillor, the local community, area residents, City staff, and the relevant service provider(s).

A summary list of potential Section 37 community benefits, and where possible the estimated values/costs of such benefits, should be produced at the end of the advance determination process.

The determination of appropriate type(s) of community benefits for a specific application will conform to the relevant Official Plan policies in the specific context of the application. In the context of compliance with the policies of the Official Plan and seeking agreement with the applicant on an appropriate package of community benefits, consultation with the local Councillor, local community associations and area residents is considered a high priority. Section 37 funds must not be used as a substitute for funding which would normally be provided as part of the City's operating budget or as part of the routine capital maintenance program (e.g. road repairs).

The following must be taken into account in order to ensure both the legitimacy and accuracy of determining a Section 37 benefit (in no particular order):

- i) Consultation with Ward Councillor;
- ii) Consultation with other City Departments;
- iii) Consultation and engagement with the local community;
- iv) Knowledge on the part of the Ward Councillor, community, Planning and Growth

- v) Management staff, and other City staff regarding local needs;
- v) Council-approved studies or assessments outlining community needs, including any advance assessment of community benefit priorities; and
- vi) Interests of the applicant.

Consultation with the Ward Councillor

- i) The Ward Councillor will be consulted by Planning and Growth Management staff prior to any discussions or negotiations regarding Section 37 benefits with the applicant;
- ii) Staff will provide the Ward Councillor with the following information as soon as it is available:
 - advice as to whether Section 37 benefits are appropriate and desirable;
 - appropriate types of benefits, based on any information previously assembled;
 - advice regarding the implications for community benefits of Official Plan policies and other relevant considerations in the context of the specific application; and
 - the amount of the total value uplift.
- iii) Further consultation between Planning and Growth Management staff and the Ward Councillor may occur as necessary and/or as agreed upon between them.

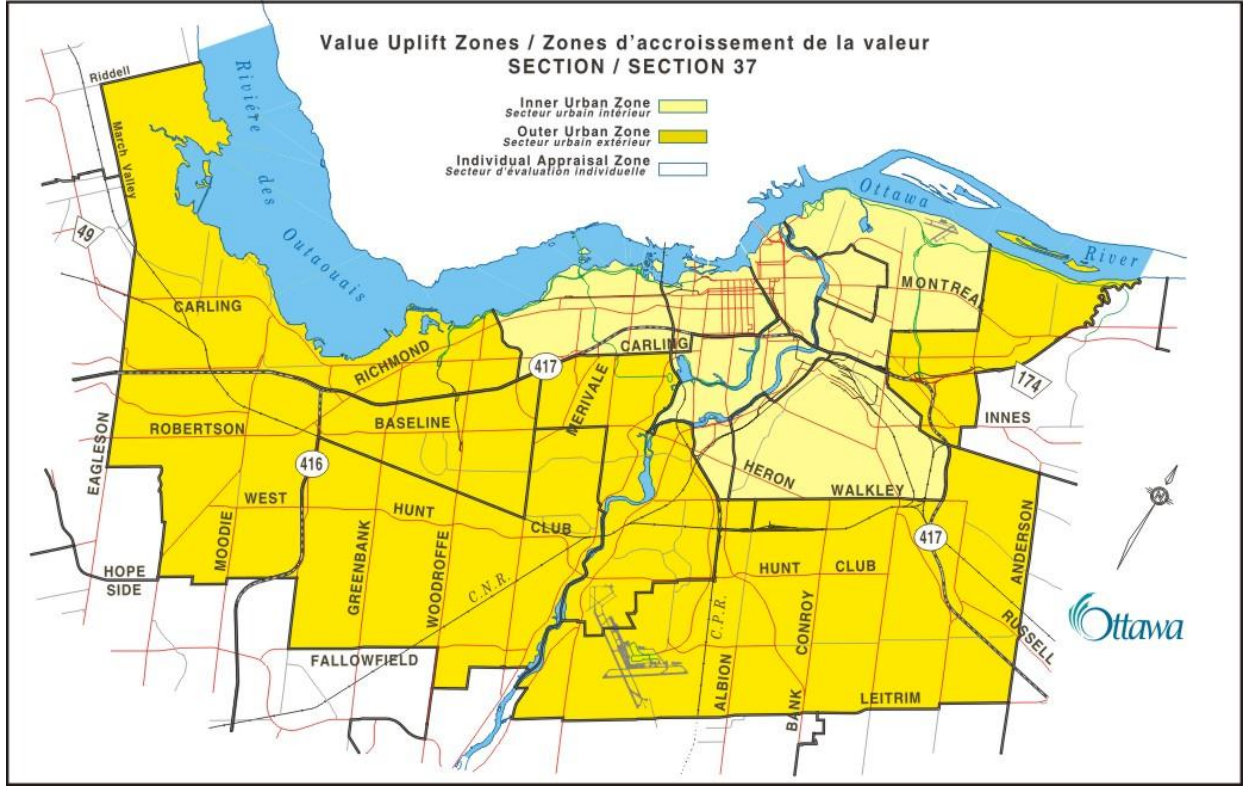
Community Consultation

- i) Consultation and engagement with the community by City staff and/or the Ward Councillor in advance of receipt of development applications, to help determine priorities for community benefits is encouraged.
- ii) Staff will circulate notice of the development application to local community associations and to residents in the vicinity of the project.
- iii) Community consultation meetings with local community associations and area residents to determine and prioritize appropriate benefits shall be coordinated through the Ward Councillor's office prior to any negotiations with the applicant.
- iv) The statutory public meeting at Planning Committee provides the opportunity to comment on the proposed development and the appropriate type and/or level of Section 37 community benefits.

Other Issues

- i) City Planning and Growth Management staff should coordinate Section 37 negotiations:
 - staff is responsible for compliance with Official Plan policy and for recommending an appropriate decision on the application, including an appropriate package of Section 37 community benefits where applicable;

- ii) Timing of Section 37 negotiations in relation to discussion of other planning issues:
- the possibility of pursuing Section 37 negotiations should be raised as early as possible in discussions on an application (pre-consultation stage), based generally on the Implementation Guidelines and Official Plan policies, without committing in principle or otherwise to any increase in height or density or both;
 - Section 37 discussions need not await resolution of all other issues, and the timing approach on each application may vary; and
 - the appropriate package of Section 37 benefits is a planning issue to be resolved, along with other planning issues associated with a development application.
- iii) A summary list of recommended Section 37 community benefits and, where possible, estimated values/costs of such benefits, should be included in the “Financial Impact” section of final planning reports.



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