

Auditor General's Office

City Planning Division – Community Benefits Secured Under Section 37 or 45 of The Planning Act

[Transmittal Report](#)

[Audit Report](#)

[Management's Response](#)

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**AUDITOR GENERAL'S
REPORT
ACTION REQUIRED**

**City Planning Division – Community Benefits Secured Under
Section 37 or 45 of The Planning Act**

Date:	March 31, 2011
To:	Audit Committee
From:	Auditor General
Wards:	All
Reference Number:	

SUMMARY

The Auditor General's 2010 Work Plan included a review of development funds including community benefits negotiated under Sections 37 and 45 of the Planning Act. The objective of this review was to assess administrative procedures for monitoring benefits secured under Sections 37 and 45 of the Planning Act.

This report contains seven recommendations along with a management response to each of the recommendations. The implementation of these recommendations will improve the administrative controls which ensure all community benefits secured under Sections 37 and 45 of the Planning Act are received.

RECOMMENDATIONS

The Auditor General recommends that:

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.
2. The Chief Planner develop and implement a monitoring process to ensure receipt of all non-cash community benefits secured under Sections 37 and 45 of the Planning Act.

3. The Chief Planner ensure all community benefits secured through Section 37 of the Planning Act are included in the re-zoning by-law.
4. The Chief Planner conduct an annual review of balances in the Sections 37 and 45 reserve funds to ensure divisions are advised of any funds secured and received.
5. The Deputy City Manager and Chief Financial Officer in consultation with the Chief Planner develop monitoring controls to enable effective administration of any letters of credit secured in relation to Sections 37 and 45 of the Planning Act.
6. The Deputy City Manager and Chief Financial Officer in consultation with the Chief Planner consider providing appropriate Planning Division staff with read only access to the letter of credit database.
7. The Chief Planner ensure that consideration is given to applying an appropriate inflationary index to the funds secured under Sections 37 and 45 of the Planning Act which are payable at a future date.

Financial Impact

The implementation of recommendations in this report will improve controls which ensure the receipt of both cash and non-cash benefits secured under Sections 37 and 45 of the Planning Act. The extent of any financial impacts as a result of implementing the recommendations in the report is not determinable at this time.

COMMENTS

This report provides the results of the Auditor General's review of community benefits negotiated in return for an approval to build under Section 37 or Section 45 of the Planning Act.

The Auditor General's report entitled "Community Benefits Secured Under Section 37 or 45 of The Planning Act" is attached as Appendix 1. Management's response to each of the recommendations contained in the report is attached in Appendix 2.

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SIGNATURE

Jeff Griffiths, Auditor General

09-CPD-01

ATTACHMENTS

- [Appendix 1:](#) City Planning Division – Community Benefits Secured Under Section 37 or 45 of the Planning Act
- [Appendix 2:](#) 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

APPENDIX 1

CITY PLANNING DIVISION

COMMUNITY BENEFITS SECURED UNDER SECTION 37 OR 45 OF THE PLANNING ACT

March 31, 2011



Auditor General's Office

Jeffrey Griffiths, C.A., C.F.E.
Auditor General
City of Toronto

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EXECUTIVE SUMMARY

Objective of this review

The objective of this review was to assess the administration of community benefits secured under Sections 37 and 45 of the Planning Act.

Community benefits secured under Sections 37 and 45 of the Planning Act

Frequently, land owners plan developments that exceed the height and density permitted by the City's Official Plan and the zoning by-law. Sections 37 and 45 of the Planning Act allow Council to enact zoning by-laws and to approve applications for minor variance requests in exchange for negotiated community benefits. There is a very broad interpretation on the type of community benefit and it can include parkland, daycare spaces and streetscape improvements, or cash to fund these items.

Audit Results

Our review of community benefits secured under Section 37 of the Planning Act determined that there was compliance with Council approved guidelines and protocol for negotiating community benefits. At the time of our review no similar protocol was in place for community benefits resulting from Section 45 of the Planning Act (Committee of Adjustment Decisions).

The main issue identified regarding the administration of community benefits secured under either Section 37 or 45 was the absence of centralized control to ensure the receipt of non-cash community benefits.

We also identified other areas where improvements to existing controls would help ensure the accurate and timely receipt of all community benefits. Our suggestions are to:

- Include secured benefits in the re-zoning by-law which approves the development.
- Develop and implement monitoring controls in order to properly administer letters of credit secured as a community benefit.
- Protect the value of benefits secured by applying an appropriate index to adjust cash amounts negotiated but not due until a future date.

Our report includes seven recommendations which have been reviewed with management. The implementation of these recommendations will improve the administrative controls which ensure all community benefits secured under Sections 37 and 45 of the Planning Act are received.

BACKGROUND

City's Official Plan and zoning by-law regulate development

The Planning Act requires the City to develop an Official Plan which sets out goals, objectives and policies to guide how land is developed. The City's Official Plan was prepared by staff in the City Planning Division with significant resident input and was subsequently approved by Council. The City has also enacted zoning by-laws which regulate various aspects of land use such as types of buildings, height and density.

Section 37 of the Planning Act allows the City to grant increased height and/or density in return for negotiated community benefits.

Community benefits negotiated as part of the planning process

Community benefits are negotiated between the owner or developer and the City on a case by case basis. The benefit can be a facility, service, cash contribution or any other matter that is negotiated. All such negotiations are subject to the policies in the City's Official Plan and the Section 37 implementation guidelines and protocols as approved by Council.

Committee of Adjustment may approve minor variance

Certain requests for exceptions to zoning by-laws are minor. Such exceptions are referred to as minor variances. Section 45 of the Planning Act allows the Committee of Adjustment to approve requests for a minor variance through approval decisions. A separate Committee of Adjustment has been established for each of the four City Districts. Committee members are citizens appointed by Council.

New business process has significantly improved administrative controls over cash benefits.

In order to monitor agreements under Sections 37 and 45, a new business process was implemented in 2008. The new process was to ensure that all community benefits secured were received in compliance with terms in the agreements. Controls, particularly over cash benefits have improved significantly with the implementation of this new process.

In March 2008, Council directed City staff to consolidate all the negotiated community benefit funds received under Sections 37 and 45 of the Planning Act into two separate reserve accounts. The activity in the respective reserve accounts for 2010, as at March 31, 2011, is summarized below:

	<u>Section 37</u>	<u>Section 45</u>
	\$	\$
Opening Balance	69,101,000	4,073,000
<u>Revenues</u>		
Financial Benefits	21,739,000	2,391,000
Interest	238,000	23,000
<u>Expenditures</u>		
Capital	<u>(8,804,000)</u>	<u>(132,000)</u>
Closing Balance	<u>\$82,274,000</u>	<u>\$6,355,000</u>

The City Planning Division is accountable for ensuring the cash benefits secured by the City are used for their intended purpose. The Finance Division is responsible for the accounting and investment of these funds.

AUDIT OBJECTIVES, SCOPE AND METHODOLOGY

***Auditor General's
2009 Audit Work
Plan***

The Auditor General's Audit Work Plan included a review of the management of development funds, including those negotiated under Sections 37 and 45 of the Planning Act.

Audit Objective

This audit reviewed the administrative procedures for negotiating, tracking and reporting on benefits secured under Sections 37 and 45 of the Planning Act.

The specific objectives were to:

- Assess the management controls established for negotiating and securing community benefits obtained in return for increases in permitted height and/or density.
- Assess compliance with the terms and conditions contained in agreements and Committee of Adjustment approval decisions securing a community benefit.

- Review the adequacy of controls in place to monitor and report on the status of any benefits secured by the City.
- Review relevant expenditures to ensure funds received for community benefits are used for the intended purpose.
- Provide assurance that information systems are effectively used to support the efficient administration of funds received.

Audit Scope

We reviewed a sample of 22 agreements securing community benefits under Section 37 and a sample of 6 agreements under Section 45 of Planning Act. The audit sample was based on the following criteria:

- benefits negotiated and agreement executed in 2009, or
- a payment was collected in 2009, or
- an expenditure using Section 37 or 45 funds was processed in 2009.

Audit Methodology

Audit methodology included:

- review of legislation, policies, procedures
- review of current divisional practices
- interviews with relevant City staff
- review of relevant documents, records and management reports
- evaluation of the adequacy of management control processes
- analysis of data, and
- any other procedures deemed appropriate.

Compliance with generally accepted government auditing standards

We conducted this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence that provides a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

AUDIT RESULTS

A. IMPROVE MONITORING CONTROLS TO ENSURE RECEIPT OF COMMUNITY BENEFITS

Business processes related to the receipt of funds secured as a community benefit were reviewed in 2008. Those process changes have resulted in improved controls over the cash benefits secured in agreements with developers since 2008. However, weaknesses still exist in ensuring the receipt of cash benefits secured prior to 2008. In addition, at the time of our review no central controls were in place to ensure the receipt of non-cash benefits. Improving monitoring controls to ensure the receipt of all benefits secured is the focus of this report.

A.1. Ensure Benefits Previously Secured Are Received

Cash Benefits

Information concerning community benefits secured, both cash and non-cash, is maintained in a centralized management information system in the City Planning Division. The system contains information on benefits secured from 1983, which is the date when Section 37 (then Section 36) of the Planning Act came into effect.

Status of cash benefits secured before 2008 should be verified

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.

Cash benefits are generally due prior to issuing a building permit

The City's primary leverage to ensure all community benefits are received comes from coordinating the receipt of these benefits to development milestones such as the issuance of a building permit. Consequently, it is important to review past agreements and approval decisions to ensure cash benefits have been received.

We understand that outstanding benefits related to condominium buildings present a specific problem once the developer has sold the individual units. Should such instances exist, it would be advisable to consult the City Solicitor to determine the collection of any outstanding amount from the developer. Where this is not possible, staff should advise Council that the secured benefit will not be received.

All cash benefits reviewed in audit were received

Our review of a sample of files with activity during 2009 confirmed that all cash benefits that should have been received were in fact received.

No Central Control to Ensure Receipt of Non-Cash Benefits

Risk that non-cash benefits may not be received

When the City Planning Division implemented a compliance function, management advised us that the Division did not implement tracking of non-cash benefits, due to resource limitations. Examples of non-cash benefits include landscaping improvements, daycare facilities, or pedestrian walkways. While various City divisions have a vested interest in ensuring the benefit is received, there is no centralized function or responsibility to track that all secured benefits are received. Mitigating this to some extent is the fact that these non-cash benefits are often highly visible physical enhancements known to, and expected by, members of the community and the local Councillor.

All community benefits received in sample selected, but non-compliance with certain terms and conditions in agreements

We reviewed nine agreements where development projects were completed to the point that the community benefits should have been received. Verification of the receipt of benefits required that we contact various divisions directly. With some difficulty, we were able to confirm that all community benefits were received. However, we did note three out of nine instances of non-compliance with certain terms and conditions defined in the agreements. For example, in one case the submission of a financial security for landscaping of \$80,000 was only received six months after the due date.

We were unable to verify that certain conditions of agreements were met

In another three cases, there was no evidence to confirm compliance with certain terms and conditions defined in the agreements. As an example, in one case the agreement required the developer to provide an architect's certificate that the construction complied with City specified noise reduction procedures. Staff could not produce the certificate or confirm that one was ever provided.

Adequate central controls for cash benefits in place since early 2008.

In summary while adequate controls were put in place in early 2008, the status of a significant amount of cash benefits secured before 2008 is unknown. In addition, monitoring procedures need to be put in place to ensure the receipt of non-cash benefits.

Recommendations:

- 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.**
- 2. The Chief Planner develop and implement a monitoring process to ensure receipt of all non-cash community benefits secured under Sections 37 and 45 of the Planning Act.**

A.2. Include Benefits in Re-zoning By-laws

Control over benefits secured is improved when the benefits are included in the re-zoning by-law

In accordance with Section 37 of the Planning Act, Council may approve a specific re-zoning by-law for a development project which increases the permitted height or density requirements in exchange for community benefits. Including the negotiated benefits in the respective re-zoning by-law is a Council approved policy and is the best way for the City to ensure the receipt of these benefits. If a benefit is not provided by the developer and was not included in the by-law then it becomes more difficult and costly to ensure it is received.

Community benefits secured were not included in the re-zoning by-law in three of 22 Section 37 agreements we reviewed. These three agreements are all relatively recent and the benefits are not yet due. Although the benefits not included in the agreements were not significant in nature, the City's position is best protected by including all benefits in the re-zoning by-law.

Recommendation:

- 3. The Chief Planner ensure all community benefits secured through Section 37 of the Planning Act are included in the re-zoning by-law.**

A.3. Ensuring a Regular Review of Cash Benefits Secured or Received

Cash benefits secured under Section 37 are usually used to fund specific capital projects. As cash benefits are received, they are recorded in respective reserve funds to be applied to a specific project. For benefits secured prior to 2008, there is a risk that the related capital project has been undertaken but that the funds have not been transferred from the reserve fund.

\$300,000 secured for a project completed in 2006 is still in the reserve fund

For example, in 2003, an agreement secured \$300,000 in Section 37 benefits towards the construction of Yonge-Dundas Square. Because of the timing of the development, the funds were not received until 2007. Yonge-Dundas Square was completed in 2006. Since Yonge-Dundas Square was already complete, the funds were not applied to the capital project and were still in the reserve fund at the time of our audit.

In the specific case of Yonge-Dundas Square, the capital project was funded from various sources, including debt. There is likely an opportunity to apply the Section 37 funds to repay a portion of the debt used to fund the project or applied to any related future capital expenditures.

Recommendation:

- 4. The Chief Planner conduct an annual review of balances in the Sections 37 and 45 reserve funds to ensure divisions are advised of any funds secured and received.**

A.4. Establish Monitoring Controls for Letters of Credit

Our review of 22 agreements that secured Section 37 benefits found that the requirement for the owner to provide a letter of credit to the City was a condition in 14 cases. None of the six Section 45 approval decisions we reviewed required a letter of credit.

Letters of credit serve to either provide funds directly or act as financial security

A letter of credit serves as financial security for work to be performed by an owner or developer. Letters of credit relating to Sections 37 and 45 of the Planning Act are collected by staff in the Toronto Building Division and are centrally maintained by staff in Corporate Finance. The City Planning Division also records the receipt of the Letter of Credit in their database to show that the developer has met this requirement of the agreement.

No way to identify letters of credit collected for Sections 37 and 45 of the Planning Act

Corporate Finance staff track letters of credit for all City divisions in a central database. There is no process in place to identify Sections 37 and 45 letters of credit in the database. In addition, although letters of credit serve a rather distinct purpose there was no way to identify which ones were to be drawn on as a project progressed and which ones were only retained as financial security.

Risk that funds may not be received

Despite the significant use of letters of credit there were no established procedures to guide staff on how they are to be monitored or effectively used and released when necessary. Of the 14 agreements requiring letters of credit, we noted two instances where they had not been received and two where the letter of credit was received but the database maintained by Corporate Finance was not appropriately updated to reflect the receipt.

In the absence of formal procedures to guide staff on how to regularly monitor letters of credit there is a risk that benefits secured under Sections 37 and 45 of the Planning Act may not be received.

Finally, since letters of credit play an important role in securing community benefits, it would be helpful for the City Planning division to have access to the database at the "read only" level as a minimum. Alternatively, monthly reports on relevant letters of credit could be provided to appropriate City Planning staff.

Recommendations:

- 5. The Deputy City Manager and Chief Financial Officer in consultation with the Chief Planner develop monitoring controls to enable effective administration of any letters of credit secured in relation to Sections 37 and 45 of the Planning Act.**
- 6. The Deputy City Manager and Chief Financial Officer in consultation with the Chief Planner consider providing appropriate Planning Division staff with read only access to the letter of credit database.**

A.5. Protect the Value of Benefits Secured

Ensuring value of community benefits secured is maintained over time

Although certain cash benefits are secured at the time that an agreement is reached the collection of the funds is often well into the future. The capital cost to build the community benefit for which the funds were intended likely will have increased due to inflation by the time the funds are collected.

In certain agreements the City included a condition to adjust the cash amount to be collected by an appropriate inflationary index. However, our review of the 10 agreements established in 2009 found that this was not done consistently as four of the agreements did not contain such a provision.

Recommendation:

- 7. The Chief Planner ensure that consideration is given to applying an appropriate inflationary index to the funds secured under Sections 37 and 45 of the Planning Act which are payable at a future date.**

CONCLUSION

The objective of this review was to assess the administrative procedures implemented by management in order to track and report on benefits secured under Sections 37 and 45 of the Planning Act.

Our review found that improvements to certain processes are required to ensure all community benefits secured are received, particularly in relation to the receipt of non-cash benefits.

This report includes seven recommendations which will improve administrative controls.

**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**

<u>Rec No</u>	<u>Recommendation</u>	Agree (X)	Disagree (X)	<u>Management Comments:</u> <i>(Comments are required only for recommendations where there is disagreement.)</i>	<u>Action Plan/ Time Frame</u>
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.	X			Chief Planner will forward reports to Planning and Growth Management Committee on: <ul style="list-style-type: none"> • cash benefits secured since amalgamation (2011 Q4); and • significant non-cash benefits secured since amalgamation. This latter report will take significant resources to complete (2012 Q4).
2.	The Chief Planner develop and implement a monitoring process to ensure receipt of all non-cash community benefits secured under Sections 37 and 45 of the Planning Act.	X			Chief Planner will report to Planning and Growth Management Committee on non-cash benefit monitoring process (2011 Q4).
3.	The Chief Planner ensure all community benefits secured through Section 37 of the Planning Act are included in the re-zoning by-law.	X			Chief Planner to issue memorandum to City Planning staff, copied to the City Solicitor, advising of the need to include all Section 37 community benefits in the relevant site-specific zoning by-laws (2011 Q2).

**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**

<u>Rec No</u>	<u>Recommendation</u>	Agree (X)	Disagree (X)	<u>Management Comments:</u> <i>(Comments are required only for recommendations where there is disagreement.)</i>	<u>Action Plan/ Time Frame</u>
4.	The Chief Planner conduct an annual review of balances in the Sections 37 and 45 reserve funds to ensure divisions are advised of any funds secured and received.	X			<ul style="list-style-type: none"> • City Planning staff continue to notify relevant Ward Councillors and City staff of each S.37/S.45 cash payment received, and the related purpose(s) (ongoing). • City Planning staff to continue to provide annual citywide Section 37/45 Cash Summary reports, showing funds received and available and the purposes thereof, to all affected Divisions and, on a Ward basis, to individual members of Council, by the end of Q2 of each year. • City Planning staff continue to provide S.37/S.45 Cash Summary reports to Councillors and City staff on an as-requested basis (ongoing).

**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**

<u>Rec No</u>	<u>Recommendation</u>	Agree (X)	Disagree (X)	<u>Management Comments:</u> <i>(Comments are required only for recommendations where there is disagreement.)</i>	<u>Action Plan/ Time Frame</u>
5.	The Deputy City Manager and Chief Financial Officer in consultation with the Chief Planner develop monitoring controls to enable effective administration of any letters of credit secured in relation to Sections 37 and 45 of the Planning Act.	X			<p>The Capital Markets section of Corporate Finance is working with the Information Technology and Planning Divisions to determine the cost and scope of work needed to develop the tools to identify and monitor Letters of Credit in the L/C system that are related to Section 37 & 45 agreements.</p> <p>If affordable, the ability to provide reports for Planning Division staff to help facilitate monitoring is anticipated to be operational by September 2011.</p>

**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**

<u>Rec No</u>	<u>Recommendation</u>	Agree (X)	Disagree (X)	<u>Management Comments:</u> <i>(Comments are required only for recommendations where there is disagreement.)</i>	<u>Action Plan/ Time Frame</u>
6.	The Deputy City Manager and Chief Financial Officer in consultation with the Chief Planner consider providing appropriate Planning Division staff with read only access to the letter of credit database.	X			The Capital Markets section of Corporate Finance is currently working with IT to establish the cost of enhancing the letters of credit system to allow for read-only access for staff of the Planning Division and other appropriate divisions. The affordability of the required system changes is anticipated to be determined by September 2011, following which staff will determine the most cost effective approach to providing data to the affected divisions.
7.	The Chief Planner ensure that consideration is given to applying an appropriate inflationary index to the funds secured under Sections 37 and 45 of the Planning Act which are payable at a future date.	X			Chief Planner to issue memorandum to City Planning staff, copied to the City Solicitor, advising of the need to recommend in final reports on S.37 rezoning applications and, in any planning advice provided to the Committee of Adjustment on minor variance applications, the appropriate inflationary indices for community benefits to be secured as cash contributions and payable at a future date. (2011 Q2)