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Trading Density
for Benefits:
Toronto and Vancouver
Compared

Aaron A. Moore

Fellow

Institute on Municipal Finance and Governance



UNIVERSITY OF
TORONTO

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Institute on Municipal Finance & Governance
Munk School of Global Affairs
University of Toronto
1 Devonshire Place
Toronto, Ontario, Canada M5S 3K7
e-mail contact: info.imfg@utoronto.ca
<http://munkschool.utoronto.ca/imfg/>

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Aaron Moore received his Ph.D. in political science from the University of Western Ontario, and recently completed a postdoctoral fellowship at the Institute on Municipal Finance and Governance. He is currently a fellow at IMFG and a research affiliate at the Cities Centre, University of Toronto.

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Trading Density for Benefits: Toronto and Vancouver Compared

Aaron A. Moore

Abstract

This paper describes and evaluates the process for negotiating and distributing density for benefit agreements (DBAs) in Toronto and Vancouver. Density for benefit agreements allow municipalities to secure cash contributions or amenities from developers in return for allowing developers to exceed currently prevailing height and density restrictions. The City of Toronto secures such contributions through Section 37 agreements, while Vancouver uses agreements known as Community Amenity Contributions. This paper examines how the two cities determine the values of these agreements; what type of benefits the cities secure from developers; how the cities determine which type of benefits to secure; and who benefits from the agreements. It also compares the use of such agreements in the two cities to the three most common rationales invoked to justify their use: sharing the wealth created by development, funding related infrastructure upgrades, and compensating those negatively affected by the development. The analysis shows that the process of negotiating DBAs is inherently lacking in transparency and that there are valid arguments either for abolishing DBAs altogether, or for replacing them with alternative tools such as inclusionary housing provisions.

Keywords: density for benefit agreements, density bonusing, community benefit agreements, uplift, externalities, urban development, Toronto, Vancouver
JEL codes: H23, H27

Trading Density for Benefits: Toronto and Vancouver Compared

Introduction

In 2005, the Toronto District School Board joined local ratepayers in opposition to a proposed hotel and condominium development. The proposal called for the construction of two towers in Toronto's Yorkville neighbourhood. Both towers would significantly exceed density and height restrictions for the proposed site. Although in its initial assessment, the School Board had found nothing wrong with the proposal, it later decided that the buildings would cast too long a shadow over a nearby schoolyard. In response to these concerns, the developers offered to pay \$2 million for the redesign and construction of the school's playground. The School Board accepted the offer, although the improvement would do nothing to mitigate shadows that would purportedly be cast on the schoolyard (Moore 2013). The \$2 million cash contribution was included as part of a final \$5 million Section 37 agreement between the City of Toronto and the developers.

Section 37 of the Ontario *Planning Act, 1990*, allows municipalities in Ontario to secure "facilities, services or matters" (benefits) from developers, in return for heights and densities that otherwise exceed existing zoning by-law restrictions. Though the School Board's intervention is unusual in this instance, Section 37 agreements are common in Toronto. The nature of these agreements has remained relatively obscure, however. Until recently, there has been little public debate concerning the nature of the negotiations for Section 37 agreements, what manner of benefits are being secured, and how the cash contributions are distributed.¹ Nevertheless, more municipalities in Ontario have begun using Section 37, following Toronto's practices.

Although the City of Vancouver allows for a more systematic approach in arriving at exchanges for density, which it calls Community Amenity Contribution (CAC) agreements, for the most part it has adopted an ad hoc, case-by-case approach similar to that used in Toronto. In 2010, Vancouver's City Council passed a motion demanding greater transparency and better accounting for CAC agreements (SCPE 2010).

Planning departments in both cities have worked to improve transparency and accountability with regards to tracking the value and use of contributions from developers. However, how the cities determine the value of individual agreements, which benefits to secure from developers, and where the benefits should be distributed remains obscure at best. Moreover, accounting for the types of benefits being secured and their cash value does little to address the appropriateness of Section 37 and CACs in the first place.

1. This lack of transparency has, however, led to a small but increasing chorus of opponents to the City's use of Section 37 and a report from the City of Toronto's Auditor General requiring more stringent accounting for cash contributions and greater oversight of all benefits being secured from developers (Toronto Auditor General 2011).

This paper describes the process for negotiating and distributing Section 37 benefits and CACs. I examine how the cities determine the value of these agreements; what type of benefits they secure from developers; how the cities determine the type of benefits to secure; and who benefits from density for benefit agreements. The purpose of the research is to establish the rationales that determine the use of density for benefit agreements in Toronto and Vancouver and the variables that influence decision-making. Finally, the paper will consider the appropriateness of such agreements as a way for local government to obtain public amenities.

The paper draws on substantial quantitative and qualitative research for the period between 2007 and 2011. The quantitative findings come from databases created for each city, using city council and sub-committee minutes and staff reports to council during the five-year span. Each database includes data on the value, distribution, and type of benefits secured from developers, among other variables. The qualitative research included the study of staff reports, provincial legislation, municipal by-laws, official plans, and other documents, as well as personal communications and interviews between the author and stakeholders in both cities, carried out in spring and summer 2012. For the remainder of this paper, I will cite the latter types of communications as “personal correspondence.”² I will also use the term *density for benefit agreement* (DBA) throughout this paper in reference to Toronto and Vancouver’s distinctive method of exchanging density for benefits to distinguish it from more common and systematic approaches used elsewhere.

The paper is divided into six sections. Section 2 provides an overview of density for benefit agreements and their relationship to similar tools elsewhere. The section also provides a brief background and description of Toronto and Vancouver. Finally, I describe the practice for negotiating Section 37 agreements in Toronto and Community Amenity Contributions in Vancouver.

Section 3 introduces the theoretical concepts and rationales behind the use of DBAs, drawing on academic literature and the practices and policies of other jurisdictions. It introduces the concept of “uplift” (that is, the increase in land values attributed to development) and how different approaches to the use of “uplift” can shape the use of DBAs.

Section 4 provides greater detail on the methods of research and analysis used in this study. Section 5 focuses on the quantitative findings of my research by examining which benefits are being secured from developers in return for increased density and who benefits from density for benefit agreements.

Lastly, Section 6 considers the rationales that influence the use of DBAs in Toronto and Vancouver and the variables that explain the differences between the two cities in their use of DBAs, and evaluates the way in which density for benefit agreements are used in each city.

2. For a list of some of individuals I consulted, please see the Appendix.

This paper finds that, while the two cities share similar elements in their approach to DBAs, institutional differences shape the final use of contributions secured through DBAs. In Toronto, DBAs are highly politicized, given the influence ward-based councillors have in negotiating the agreements and allocating the benefits. As a result, there appears to be no clear policy or planning objective associated with their use. In Vancouver, a more technocratic process insulates DBAs from politics, and results in a more effective deployment of developer contributions. In both cities, however, the process for negotiating DBAs and distributing their benefits is complex and lacks transparency, mainly because the nature of DBAs in each city, and the concept of uplift they rely on, ensures a complex process unintelligible to outsiders.

2. “Density Bonusing” and Density for Benefit Agreements

The practice of density bonusing is commonly used in cities across North America.³ A density bonus system usually focuses on one type of benefit and involves a systematic approach for determining the nature of developers’ contributions. In many U.S. jurisdictions, density bonusing evolved from the practice of inclusionary zoning, that is, requiring a certain percentage of affordable housing units in every new residential development.⁴ Density bonusing emerged in certain American jurisdictions in which the courts had struck down attempts by municipalities to impose inclusionary zoning provisions, finding that requiring a specific percentage of all new development to be affordable housing constituted a tax that was beyond municipal authority to impose. In response, cities and counties in states such as Virginia and Maryland began offering developers greater density limits on their property if they included affordable units in their developments. Typically, the municipality would grant developers increased density based on the number of affordable units built by the developer (Fox and Davis 1975; Gladki and Pomeroy 2007).

In such systems, the type of benefit secured by municipalities and its value are predetermined. For instance, municipal regulations may require developers to pay a set cash value for each additional square foot of floor space in excess of that allowed under existing zoning regulation. The municipality would apply the same set value to all density bonusing agreements. For affordable housing provision using density bonusing, municipal regulation would establish the number of

3. The term *incentive zoning* is often used in place of density bonusing, but the term implies a wider use not specific to density increases (Benson 1969).

4. Inclusionary zoning is used throughout the United States and the United Kingdom. The State of New Jersey, for instance, requires 20 percent of all new housing developments to be set aside for affordable housing (Fox and Davis 1975; Gladki and Pomeroy 2007). In the U.K., between 10,000 and 15,000 affordable housing units are built each year through the practice (Gladki and Pomeroy 2007).

affordable housing units required in a new development as a predetermined ratio of all market units above the number allowed under the existing by-law.

Not all density bonusing arrangements have emerged from attempts to adopt inclusionary zoning measures, however. Some jurisdictions use the practice to secure street-level retail, others to secure cultural facilities or daycares. As with affordable housing, the process for securing these amenities is systematic (Kayden 1991).

While the use of density bonusing to secure affordable housing has typically been upheld by courts in the United States, its use for other purposes has led to successful court challenges. U.S. courts have found that density bonusing requirements themselves constitute an illegal tax. In particular, the courts have overruled attempts by municipalities to use density bonusing to secure infrastructure from developers that bears no relation to the needs of the new development. These decisions have led to the notion that a “nexus” must exist between the benefits or amenities municipalities secure from developers and the development (Benson 1969; Delaney 1993).

I use the term *density for benefit agreements* or DBAs to describe Toronto’s use of Section 37 and Vancouver’s Community Amenity Contributions because they do not fit the standard definition of a density bonus system. That Toronto and Vancouver’s use of density bonusing diverges from the systematic approaches used in other jurisdictions is an important consideration that this paper will explore in detail. Not only do the two cities negotiate the amount of density and value of benefits secured on a case-by-case basis, they also secure a wide variety of benefits from developers. Some jurisdictions, like Seattle, employ forms of density bonusing for varied purposes, but continue to follow a systematic approach to their use (Seattle Planning Commission 2007). New York City appears to be the only other municipality to employ density bonusing in the ad hoc manner of Toronto and Vancouver (Benson 1969; Delaney 1993; Kayden 1991).

2.1. A Tale of Two Cities

Toronto and Vancouver share many attributes. Both are the central cities of their metropolitan regions. Their metropolitan populations are the first and third largest in Canada, respectively. Both have undergone significant and sustained construction booms, led by condominium development. As of the 2006 Census of Canada, more than half of all residents in both cities were foreign-born. Each city also has a roughly equal split between people who own and people who rent their dwellings (Statistics Canada 2007a; 2007b).

Beyond these similarities lie many substantive differences, however. The current City of Toronto was created in 1998 through the amalgamation of the former City of Toronto, five surrounding suburban municipalities, and the former upper-tier metropolitan government. As a result, the City of Toronto covers 630 square kilometres, and as of 2011, had a population of 2.6 million people (larger than the entirety of metropolitan Vancouver). In contrast, the City of Vancouver

covers 115 square kilometres and has a population of 603,502 (Statistics Canada 2012a; 2012b; 2012c).

Institutionally, the cities are also quite different. Vancouver has a council elected at large, and an active party system. Toronto lacks a party system and elects its councillors by ward. These features and its “weak-mayor” system have resulted in strong incumbent councillors and a tendency toward parochialism that is not present in Vancouver (Sancton 2011). The fact that Toronto comprises both urban and suburban areas and Vancouver is predominantly urban represents another contrast between the two cities. The institutional differences between the two cities play a substantial role in determining how each city uses DBAs.

2.2. Section 37 in Toronto

Section 37 was first introduced into the *Planning Act* in Ontario in 1983 (as section 36). In its current form, Section 37(1) of the Act reads as follows:

The council of a local municipality may, in a by-law passed under section 34, authorise 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. (*Planning Act*, 1990. s. 37(1))

Subsection 2 of Section 37 further states that municipalities may include such provisions in by-laws only if their official plans already contain a provision relating to such increases in height and density. The wording of the section is vague and provides little direction as to the purpose or use of the “facilities, services or matters.”

The Ontario Ministry of Municipal Affairs and Housing (MMAH) provides an overview of the intent and purpose of Section 37 in a single-page commentary. According to the MMAH, the potential benefits a municipality can secure from developers may include “facilities, services, or matters, such as public art or transit improvements, to be provided to the community without increasing the financial burden on municipalities and their taxpayers” (Ontario, MMAH 2009). Municipalities may also use Section 37 to “support intensification, growth management, transit supportiveness and other community building objectives” and “may provide desirable visual amenities to enhance the development site and the surrounding neighbourhood” (Ontario, MMAH 2009). Note that the first use does not suggest any particular location for the benefits, while the second suggests they should be located in the neighbourhood surrounding the development.

In a series of decisions, the Ontario Municipal Board (OMB)⁵ indicated a slightly different interpretation of Section 37. The Board has not defined the type

5. The Ontario Municipal Board is a powerful quasi-judicial body responsible for hearing disputes over planning decisions in Ontario municipalities (Moore 2013). As a result of its jurisdiction over planning disputes, the OMB has, on occasion, weighed in on the issue of Section 37 (Devine 2008, 2012).

of benefits that can be secured, but, echoing the decisions of American courts, has stated that a “nexus” must exist between the development and the benefits secured from the developer. The municipality must demonstrate “that the benefits pertain to the development (whether on-site or off), not to unrelated municipal projects (no matter how meritorious)” (cited in Devine 2012). The Board has also called for greater transparency and criticized the ad hoc “wish lists” that city councillors put forward whenever there is the potential for a Section 37 agreement (Devine 2008). Despite the Board’s emphasis on transparency, it did not provide any suggestions regarding the type of benefits the City could expect to receive from developers in return for increased density.

In response to the Board’s rulings, and concerns that the City’s approach to Section 37 agreements could be interpreted as an illegal tax, the City adopted a set of guidelines for the implementation of Section 37 agreements, and, in the new Official Plan, included a range of benefits that could be secured from developers (personal correspondence).⁶ Section 2.3 of the City’s implementation guidelines states “community benefits should be specific capital facilities, or cash contributions to achieve specific facilities” (Toronto City Planning, Policy and Research 2007, 5). The same section explicitly forbids the use of Section 37 for non-specific purposes and for generating general revenue, and forbids its use for “operating, programming, and non-capital maintenance funds” (Toronto City Planning, Policy and Research 2007, 5).

Section 2.5 states that the city may not use a citywide formula to determine the value of Section 37 contributions. This section was included in response to developers’ opposition to a standardized approach, and to the fear that the agreements could be considered an illegal tax (personal correspondence). Finally, Section 2.7 states that, while the City and developer may include matters relating to good planning in Section 37 agreements “as a legal convenience,” “matters...necessary for good planning...are generally not considered eligible Section 37 community benefits” (Toronto City Planning, Policy and Research 2007, 7). As with high-quality architecture and design, the development should already constitute good planning as a condition of approval (Toronto City Planning, Policy and Research 2007; personal correspondence).

This last provision, combined with the interpretations from the Ministry of Municipal Affairs and Housing and the Ontario Municipal Board, demonstrates the uncertainty surrounding Section 37. The Ministry’s statement that Section 37 benefits may support “intensification, growth management, and transit supportiveness” (Ontario, MMAH 2009) should apply, according to the City’s guidelines, only if the growth-related benefits are not required to ensure that the development meets standards of good planning, since such benefits are not considered eligible for Section 37 agreements. However, the Board requires a

6. Ontario courts have yet to hear a challenge to the use of Section 37. However, given the OMB’s past decisions and precedents set in the United State (Benson 1969; Delaney 1993), the City’s fear may be well founded.

“nexus” between the development and the benefits being secured. Therefore, any benefit relating to growth management, which presumably would entail good planning, must “pertain” to the development. Such a benefit would appear to contradict the City’s policies. The only way such a benefit could be secured and meet the requirements of both the City and Ontario Municipal Board is if it constituted “*better planning*,” which would be the likely interpretation of the City in such instances (personal correspondence). There is nothing inherently wrong with the notion that a development can be improved beyond a base level of good planning (whatever that entails), but the route to arriving at such an interpretation in this instance is laborious and confusing.

The process for negotiating Section 37 agreements is a bit more straightforward, thanks largely to Toronto City Planning’s introduction of implementation guidelines, but the process still lacks transparency. It begins when a developer approaches the planning department asking for density on a site over and above that permitted by the existing by-law. The proposal must also involve a minimum of 10,000 square metres of gross floor area (GFA), as the City’s Official Plan limits the use of Section 37 to proposed developments that size and larger (Toronto City Planning 2002). Since many of Toronto’s existing zoning by-laws and related height and density limits are out of date, city planners must first determine whether they can reasonably require any Section 37 benefits (Toronto City Planning 2002).

Once they determine that a Section 37 agreement is warranted, the planners ask the Appraisals Section of the City’s Real Estate Services to estimate “a range of land values of a unit (metres squared) of density” for the site (personal correspondence). The planning department uses these estimates to calculate the value of the additional density, or the “uplift.” Again, since many zoning by-laws are out of date, City Planning can adjust the base density to a higher level, which would reduce the value of the uplift. However, planning staff usually make such adjustments only in response to developers’ objections. In most instances, the existing base density is used, regardless of the age of the by-law (personal correspondence). Currently, city planners in Toronto seek to secure between 15 and 20 percent of the uplift when negotiating with developers.⁷

The planning department’s initial report on the proposal circulates to other departments and to councillors. Because the report is not circulated to all city departments,⁸ the departments that do receive the report have an opportunity to

7. Initially, following amalgamation, the planning department intended to secure a fixed 30 percent of the uplift for all Section 37 agreements, and to set aside one-third of the contributions from each agreement for affordable housing. This approach was not enshrined in the city’s official plan, however, so the Ontario Municipal Board prohibited its application (personal correspondence).

8. Planning reports circulate to departments with a direct relationship to planning (such as Transportation Services), and to other departments if other matters of policy arise (personal correspondence).

press for the inclusion of their projects in the Section 37 agreement, while departments not on the list remain unaware of the potential to fund improvements. For example, the Department of Parks and Recreation is on the circulation list and has successfully lobbied for park improvements in the past. In contrast, the Toronto Public Library does not receive the reports, and so does not have an opportunity to press for library improvements (personal correspondence). Nevertheless, city departments other than planning have only minimal influence on the final benefits to be secured.

While City Council as whole has the final say on all zoning by-law amendments, the councillor of the ward in which the proposed developed lies typically determines which benefits will be sought from developers in return for increased density. Once the planning department and the developer establish the value of the Section 37 agreement, the ward councillor will enter into discussions with the developer concerning the type of benefits to be secured. This point in the negotiating process is the most obscure. Councillors will approach developers with a list of benefits or amenities they would like to secure. While a councillor may consider input from city staff, he or she may ignore these suggestions. The type of benefits to be secured is entirely at the councillor's discretion, provided that the developer agrees (Jenset 2012; personal correspondence).

The list of the benefits that councillors may demand is very long.⁹ The Official Plan lists 13 categories of benefits and some of these categories are themselves very broad. For instance, one category is simply "land for other municipal purposes," and the final category includes:

other local improvements identified 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 (Toronto City Planning 2002, sec. 5, 3).

The role of city councillors in Toronto is the key difference between the use of Section 37 in Toronto and the use of CACs in Vancouver.

2.3. Community Amenity Contributions in Vancouver

Vancouver's approach to the use of Community Amenity Contribution agreements is often portrayed as more transparent or unambiguous than Toronto's approach to Section 37 (Jenset 2012; Punter 2004). This is true of the process for choosing *which* benefits or contributions will be sought. However, much of the process for negotiating CAC agreements is very similar to the process for Section 37 agreements in Toronto (personal correspondence).

Vancouver first introduced DBAs to provide for new parks, affordable housing, and other amenities in the redevelopment of derelict lands in False Creek and Coal

9. A complete list of categories is provided in Table 1.

Harbour. This fixed value-capture system required developers to pay a fixed rate for each additional square foot of density that exceeded the prescribed limit. As the City introduced DBAs to other parts of the city, this systematic approach proved too inflexible (Gray 2012; Punter 2004). New policies, adopted in 1999, anticipated that most CAC agreements would continue to be applied under the existing fixed value-capture rate system, but allowed the City to negotiate case-specific CACs to capture substantially greater increases in uplift when certain circumstances were met (Punter 2004).

Section 565.1 of the *Vancouver Charter* governs the use of CAC agreements.¹⁰ Section 565.1(1), paragraph (a) states that a zoning by-law can “establish different density regulations for a zone, one generally applicable for the zone and the other or others to apply if the applicable conditions under paragraph (b) are met.” Paragraph (b) states that a zoning by-law can “establish conditions in accordance with subsection 2 that will entitle an owner to a higher density under paragraph (a).” Among the conditions described in subsection 2 are: “conditions relating to the conservation or provision of amenities, including the number, kind and extent of amenities” and “conditions relating to the provision of affordable and special needs housing.”

Although these provisions are not quite as vague as those of Ontario’s Section 37, the meaning of “amenities” in Section 565.1 is not readily apparent either. Section 565.1 does explicitly mention the provision of affordable and special-needs housing, but does not include them in the section on amenities, which suggests that they are distinct. Subsection (1)(a) seems to prescribe a fixed or explicit system of density bonusing. However, most CAC agreements in Vancouver continue to be negotiated on a case-by-case basis.

The interpretation of Section 565.1 of the *Vancouver Charter* seems never to have been at issue in Vancouver. Section 565.1 seems to allow for a systematic approach to density bonusing, which would preclude charges that CACs constitute an illegal tax, as long as the amenities secured from the developer fall within the conditions stipulated in subsection 2. British Columbia also has no equivalent to the Ontario Municipal Board to influence the use of CACs. As a result, the City is relatively unfettered in its use of CACs and is able to tailor them in accordance with the city’s interests.

Section 2.1(a) of Vancouver’s guidelines for CACs states that for standard rezoning, a flat rate of \$32.29 per square metre will be applied for any additional floor space (i.e., increased density) provided in the new zoning. Such an approach would be in keeping with section 565.1, similar to a traditional density bonusing system. However, section 2.2(b) states that for non-standard zoning changes, the CAC would be “determined through a negotiated approach” (Vancouver Community Services 2011, 3). “Non-standard” zoning includes rezoning for sites

10. Other municipalities in British Columbia have the same authority to enter into CAC agreements through Section 904 of the *Local Government Act*.

larger than 0.81 hectares, rezoning from industrial to residential, and downtown rezonings. In addition, a number of specific areas within the city are excluded from the standard approach. Most of these areas either prohibit the use of CACs or favour a negotiated approach.

The process for negotiated CAC agreements begins after a developer applies for rezoning to allow for greater density. City planners for Vancouver require developers to provide pro formas for the proposed development at this juncture.¹¹ Though developers were reluctant to provide such documentation (Gray 2012), providing the City with their own estimate of the cost and value of development significantly aided city planners when determining the value of the uplift on the site (Jenset 2012). Along with the pro formas, the City undertakes its own assessment of the economics of the proposal. City planners next determine the value, if any,¹² of the resulting uplift from the density increase (Gray 2012) and approach the developers to determine what portion of the uplift should be returned to the city in form of CACs.

As in Toronto, there is no fixed rate applied in negotiated CAC agreements. According to some staff members, the City of Vancouver regularly secures about 70 percent of the value from the uplift (Gray 2012), or, at the very least, aims to secure 70 percent. Such a value could be an exaggeration (personal correspondence), but, on average, Vancouver does seem to achieve higher returns than the 20 percent purportedly achieved on average in Toronto.

Most of CAC agreements fall under “non-standard zoning,” and are, as a result, negotiated (personal correspondence). However, even where the “standard” approach is applied, the process for arriving at the value of CACs is only marginally more transparent. After all, both the City and the developer must agree on the value of the uplift, and a development proposal may not result in sufficient uplift to allow for CACs (Gray 2012). The developer and City must also agree where the boundary lies between “regular” economic rent (the economic rent, if any, the developer would accrue without the increase in density) and the uplift resulting from the increased density, requiring them to agree on the base density for the site. A greater base density would lower the resulting uplift, while lesser base density would result in a higher uplift. Thus, despite the semblance of a more standardized and transparent approach to the use of DBAs, in practice, many of the DBAs in Vancouver are determined on a case-by-case basis as they are in Toronto, while those based on a formula still require significant economic and real estate analysis, followed by negotiation.

11. According to Jenset, “[a] proforma analysis determines the increase or decrease in profit resulting from the bonus density agreement. It is a standard technique that developers use to estimate returns on factors such as construction and borrowing costs, and expected market value” (2012, 23).

12. In contrast with Toronto, Vancouver’s city planners frequently determine that requiring CACs would make the proposal untenable.

While the process for establishing the value of the benefits to be secured is similar in both cities, Vancouver's process for determining the type of benefit to be secured diverges significantly from the process in Toronto. Significantly, city councillors do not take part in CAC negotiations in Vancouver (Jenset 2012). Council establishes a list of priorities for the use of CACs (Vancouver Community Services and Financial Services 2012). This list reflects citywide policies adopted by City Council, and public benefit strategies for specific areas of the city. During the rezoning, city staff also seek and receive community input (personal correspondence). City Council has a say only when the agreement arrived at between city staff and developer is presented at a public hearing (Gray 2012). Council can change the agreements recommended by city staff at that point, but such changes are rare (personal correspondence).

Vancouver's guidelines for the use of CACs require that they be located on site or in areas surrounding the proposed development (Vancouver Community Services 2011), a requirement similar to the Ontario Municipal Board's "nexus." Vancouver also requires that the amenities be "growth-related, or meet past deficiencies or other community priorities" (Vancouver Community Services 2011, 3), seemingly allowing for a wide range of benefits. However, the list of potential benefits or amenities that can be secured through CACs is shorter and less ambiguous than that for Section 37 benefits in Toronto (Vancouver Community Services and Financial Services 2012), and the nature of specific CACs is often predetermined before negotiations with developers (Gray 2012). Even so, city staff may leave cash contributions secured from developers entirely unallocated (Vancouver Community Services and Financial Services 2012).

3. Theory and Rationales

DBAs are premised on the same fundamental theory behind density bonusing. Most similar tools or devices that secure benefits from developers in return for increases in density rely on the concept of *increased economic rent*,¹³ better known as *uplift* in planning.¹⁴ Zoning by-laws limit a developers' economic rent by limiting

13. In economic terms, *economic rent* is the portion of income a developer (or any other business for that matter) receives above the opportunity cost associated with the production of a good or service, including land or housing (Parkin and Bade 2000). *Opportunity cost* refers to the value of the highest alternative forgone in favour of another activity (Parkin and Bade 2000). For instance, if a landowner's best alternative to development is using his or her land as a parking lot, he or she will develop the land only if the opportunity to do so presents the possibility of greater profit (that is, development is the best alternative). Any additional profit the landowner receives in his or her new venture that exceeds the profit that would be generated by the parking lot is economic rent. This explains why some land appears to go under-used for long periods. A developer will not build, or a landowner will not sell, unless there is a prospect for making profit beyond that earned by the existing use of the land.

14. City staff in Vancouver uses the term *land lift* in place of uplift. However, uplift is the more common term.

the size and density of a development.¹⁵ As a result, developers often seek to have existing height and density restrictions altered to allow for greater density, thus increasing their profit. Municipalities, therefore, effectively have the authority to grant developers *increased* economic rent (Fischel 1987). The concept of *uplift* is vital for understanding most forms of density for benefit exchange. Since the municipality requires only a portion of the uplift, the developer is still better off than if he or she did not receive the increased density (Fischel 1987).

The concept of uplift is broadly accepted, but there is less certainty about the rationale municipalities should apply in determining how to use the portion of uplift secured through DBAs. While not necessarily mutually exclusive, there are at least three competing rationales for the use of DBAs and similar tools:

1. The need to fund infrastructure to serve dense development;
2. A desire to share the wealth created by dense development with the city at large;
3. The need to compensate those who will be negatively affected by dense development.

3.1 Infrastructure for Density¹⁶

According to the first rationale, DBAs should cover the costs of infrastructure necessary to support the increased density. The notion that DBAs should be used to ensure that developers provide the necessary infrastructure for development relates closely to the rationale behind the introduction of subdivision agreements. In fact, one long-time participant in Section 37 negotiations in Toronto argues that the original intent of section 36 (the predecessor of Section 37) of the Ontario *Planning Act* was for it to serve as a “vertical” equivalent to subdivision agreements (personal correspondence).¹⁷

15. If zoning restrictions are too strict, they can hinder development altogether, as the developer may not be able to make a profit based on what can be built (personal correspondence).

16. The term “good planning” is often used in relation to this approach to DBAs and density bonusing in general. The term is open to so many interpretations, however, that it is almost meaningless. In conjunction with density bonusing, it usually refers to the provision of necessary infrastructure to accommodate increased density.

17. The subdivision agreement was first introduced in the United States in the 1930s, and became standard throughout the country by the late 1950s. Before these agreements were instituted, “the subdivider needed only to prepare an accurate plat of property to be subdivided” (Smith 1987, 5). Subdivisions did not require the landowner or “subdivider” to build any infrastructure to serve the new plots of land or any future development on them. Without such requirements, an oversupply of subdivided lots accumulated. These “paper” subdivisions were often never improved, and “became ‘dead land’ ” (Smith 1987, 5). This situation led to lost taxes or tax delinquencies, which, in turn, exacerbated the financial problems of municipalities. In response, municipalities introduced the subdivision agreement to force subdividers to build necessary infrastructure to the standards of the municipality, and to relinquish responsibility for the new infrastructure to the municipality. Developers were eventually permitted to provide municipalities with cash contributions in lieu of building the needed services themselves (Smith 1987).

When density bonusing, or incentive zoning, first emerged in the United States, municipalities' authority to regulate height and density had long been established. As a result, the courts did not question municipalities when they began securing improvements to infrastructure from developers in return for allowing greater density (Benson 1969). One observer actually distinguished between two types of bonuses: "bonuses for things that make density possible for everyone in the area...such as transit access...and on the other hand bonuses for things that are really not related...to density" (quoted in Benson 1969, 898, note 16).

In theory, density and height restrictions in existing zoning by-laws are based on, among other things, the existing capacity of services, infrastructure, and utilities available to a given site. Since increasing the density of development on a site could strain these existing services or infrastructure, a density for benefit agreement, like a subdivision agreement, would require the developer to invest in increasing the capacity of such services (personal correspondence). Presumably, developers could also offer municipalities cash contributions in lieu of providing the new infrastructure themselves, a practice common in both Toronto and Vancouver.

However, municipalities already use development charges to fund the upfront capital costs associated with new development. These charges, also known as impact fees or development levies, allow municipalities to, in theory, "allocate to each development its proportionate share of the future cost of providing public services such as parks or highway improvements" (Smith 1987, 16). While impact fees proved controversial in parts of the United States (Delaney 1993; Smith 1987), they are enshrined in provincial legislation in both British Columbia and Ontario.

British Columbia allows municipalities the right to employ impact fees. The Province granted this tool, referred to as a *development cost charge*, to the City of Vancouver through Section 523D of the *Vancouver Charter* and to other municipalities through Section 933 of the *Local Government Act*. In Ontario, all municipalities in the province have access to development charges by way of the *Development Charges Act*.

3.2 *Sharing the Wealth*

According to the second rationale, since the municipality is granting developers a windfall profit, the municipality and its residents should share in this windfall. States such as Virginia and Maryland introduced density bonus systems to circumvent court decisions that prohibited inclusionary zoning. Municipalities in these states could not force developers to set aside a fixed percentage of their new units for affordable housing, because the courts considered this a form of illegal taking or tax. As a result, municipalities began "trading" density for the provision of affordable housing (Fox and Davis 1975; Gladki and Pomeroy 2007).

To prove that these new density bonus systems did not constitute an illegal taking, municipalities argued that they were simply "sharing" the windfall produced through the increase in density. This rationale contends that economic uplift is a direct result of a municipality's decision to allow the developer an

increase in density and that any additional profit the developer would accrue from the increased density should be shared between the developer and the municipality. The uplift, or the additional profit, does not belong solely to the developer. Thus, when a municipality requires a developer to set aside units for affordable housing, or asks for another type of in-kind benefit or cash contribution, it does not constitute an illegal taking. Rather, the municipality is asking only for its share of the uplift it created (Fischel 1987; Fox and Davis 1975; Gladki and Pomeroy 2007).

Following this reasoning, the benefit secured from the developer need not have any specific relationship to the actual development. Although in practice many benefits are provided by the developer on site, a “nexus” between the development and the benefit is unnecessary. Thus, if a municipality needs affordable housing stock elsewhere in the city, it can secure a cash contribution from the developer, and direct the funds where they are most needed. This rationale allows for a much greater variety and wider distribution of benefits than the other two.¹⁸

While such a premise clashes somewhat with concepts of traditional property rights, many jurisdictions in the United States have accepted the argument (Fox and Davis 1975). Other jurisdictions have not. The Ontario Municipal Board, for instance, has made it clear that the benefits secured from developers through Section 37 cannot be arbitrary. There must be a “nexus” between the development and the benefit.¹⁹

The problem with this rationale is that it assumes that the municipality, by amending its own zoning, creates the uplift. However, zoning by-laws may be out of date. Where density restrictions are out of date, but municipalities continue to use them as the basis to negotiate DBAs, as in Toronto, can the municipality truly claim that it is “creating” the uplift, and should therefore share in the benefits? The uplift is arbitrary, based on both the base density for a site, and the agreed-upon increase in density. Municipalities could also abuse their ability to set density restrictions in such a process.

3.3 Compensating for Negative Externalities

According to the final rationale, DBA contributions should be used to compensate local residents negatively affected by the increased density. These “negative externalities” can include shadows cast by the new development or increased congestion on local streets. Compensating for negative externalities is rarely explicitly used to justify DBAs. However, the potential or perceived negative effects

18. The City of Ottawa includes the sharing rationale in its own guidelines for Section 37, which state: “Section 37 of the Planning Act provides municipalities the authority to share in the increased value that may result from an increased height and/or density of a development project” and “Section 37 ... provides municipalities with the authority to share in the increased economic uplift that may result from increased height and/or density” (cited in Devine 2012).

19. The Ontario Municipal Board did accept the sharing rationale in one decision, but did not in numerous subsequent decisions (Devine 2008).

of a new development on the surrounding areas can upset neighbouring residents, and DBAs offer a means to compensate residents for the real or perceived effects of development by providing for new amenities in the neighbourhood. The benefits municipalities secure from developers in this instance would be for the betterment of the neighbourhood, such as the regeneration of an existing park or art installations, rather than specific efforts to mitigate the effect of increased density.

This is also the premise used to justify community benefits agreements (CBAs) in the United States.²⁰ The rationale is based on the notion that a new development will have a negative impact on, or create negative externalities for, the surrounding community and the stakeholders within it. As a result, developers should compensate those who will be negatively affected by providing various amenities or benefits (Baxamusa 2008; Gross 2008, 2012). For DBAs, the argument is slightly different, as it focuses solely on the negative externalities created by increases in height and density.

The example of the Toronto District School Board's opposition and subsequent acceptance of the proposed hotel reflects this rationale perfectly. The School Board opposed the development because it would cast a shadow on the play area of a nearby school. The shadow of the building was a negative externality. In response, the developer offered \$2 million in Section 37 cash contributions to pay for a new playground.

Though this rationale is by far the simplest of the three, it also has many associated problems. First, many opponents to this approach consider such contributions inducements from developers to secure local support, or at least reduce opposition to the development (personal correspondence; Gross 2008). This argument is also raised against the use of CBAs, particularly since such agreements are negotiated directly between the developer and an ill-defined group of "citizens" who are negatively impacted (Gross 2008; Wolf-Powers 2010). The possibility for abuse in such situations is high, arguably greater than under the "sharing" approach.

Second, if a development is so poorly planned that it causes negative externalities throughout the surrounding neighbourhood, it probably should not be built in the first place. In the case of the hotel and the schoolyard, it is not clear

20. Since the 1990s, the use of so-called "community benefits agreements" (CBAs) has risen steadily and spread throughout the United States from its roots in California. In many ways CBAs seem similar to DBAs, and the two do share some of the same attributes. For instance, parties to CBAs negotiate such agreements on a case-by-case basis. However, they are, on the whole, far less frequent in any given city. Also, though DBAs follow no rigid structure in both Vancouver and Toronto, there are some general principles that cities follow when negotiating with developers. In contrast, there is no regular protocol for establishing CBAs. More importantly, whereas DBAs are negotiated agreements between a municipality and developer, CBAs, although governed by state statute and often overseen by municipal government, are private agreements between the developer and coalitions of civic groups, such as labour groups or ratepayers' associations (Baxamusa 2008; Wolf-Powers 2012). CBAs also lack an important feature of DBAs, namely the focus on exchanging density for benefits. For CBAs, the question of density may be only one of many issues addressed by the agreement. The main purpose of CBAs is to head off opposition to development, notwithstanding the development's lack of adherence to density restrictions.

how a new playground did anything to mitigate the purported negative impact of the building on its surroundings.

Third, DBAs, by definition, involve intensification of use on a site. As demonstrated by government policies, such as Ontario's *Growth Plan for the Greater Golden Horseshoe*, greater intensification and density is considered a positive attribute for new development (Ontario Ministry of Infrastructure 2006). There are often as many positive externalities generated by well-planned dense developments in established neighbourhoods as there are negative ones. For instance, more intensive development is usually cheaper to service per capita and also allows for better transit, which helps to reduce the number of cars on the road and the pollution they generate. Developers who build high-density developments are not rewarded for the positive externalities their developments generate for the wider community, nor are developers who contribute to sprawl penalized for the wider negative externalities they generate. Why then should developers who contribute to intensification be penalized?

4. Method of Research and Analysis

The findings of this paper rely on both quantitative and qualitative research. The quantitative research and analysis address three primary objectives. The first is to determine the number and type of benefits being secured by the cities. The second is to establish the geographical distribution of benefits in each city. The third is to determine who in each city benefits most from Section 37 and CAC agreements. To achieve these objectives, I compiled databases for both cities documenting all Section 37 and CAC agreements each city entered into from 2007 through 2011. The databases draw on council minutes, city planning reports, and demographic and geographic data.

Table 1 lists the 14 variables included in the database for Toronto.²¹ Although the City of Toronto now has guidelines for the type of benefits the City should secure from developers, the parameters remain broad, and the variety of benefits actually secured is even broader. As a result, when determining the "type" of benefit being secured, I consolidated many of the categories in order to prevent this variable from becoming too unwieldy for analysis. Even so, I identified 18 categories of benefits secured from developers by the City. Table 1 also lists these 18 categories.²²

21. For Toronto, I relied predominantly on minutes from City Council meetings, minutes from the four Community Council meetings, minutes from the Planning and Growth Management Committee, and City Planning reports to Council. The median household income data is based on census tract data from Canada's 2006 Census. For establishing distances between developments and related Section 37 benefits, I used Google Maps. Finally, to verify my own data, and supplement missing data, I relied on the City's own database of Section 37 agreements, provided by Peter Langdon.

22. Even when accounting for semantics (city planners often use different terms for the same thing), roughly 50 different types of benefits were accrued. Many were one-offs, such as the Chinese Archway Reserve Fund. Section 37 agreements also often list multiple benefits of the same type. So it may list three parks and a park washroom as separate benefits. I did not make such distinctions when compiling the database.

Table 1: Variables included in the database and categories of benefits secured, City of Toronto

Variables included in the City of Toronto Database	Categories of benefits secured by the City of Toronto
<ol style="list-style-type: none"> 1. Location of the development 2. City ward in which the development is located 3. Location of the benefits secured (where available) 4. Year of the agreement 5. Cash contributions secured by the city for each Section 37 agreement 6. Median household income for the census tract in which the development is located 7. Median household income for the census tract in which the benefit is located 8. Type of benefits secured in each agreement 9. Distribution of cash contributions by benefit type 10. Number of in-kind benefits secured and number of cash contribution benefits secured by type 11. Walking distance from the development to the farthest benefit secured from the development 12. Total gross floor area (GFA) of the proposed development 13. GFA by use 14. Height of the proposed development 	<ol style="list-style-type: none"> 1. Parks (including related benefits such as playgrounds and other forms of open spaces) 2. Libraries 3. Community improvements (a generic term used on occasion by the City) 4. Roads and streetscapes 5. Community and recreation centres 6. Public housing improvements 7. Affordable housing 8. Design project and area studies 9. Community services (including seniors' centres and daycare) 10. Three-bedroom units 11. Environmental improvements 12. Heritage preservation and related benefits 13. "Underground" benefits (PATH system, or improvements to subway stations) 14. Rental replacement²³ 15. Transit passes for new condominium owners 16. Arts and cultural facilities 17. Public art 18. "Other"

The Vancouver database includes most of the same variables as Toronto, with some exceptions, as outlined in Table 2.²⁴

23. The City also has the power to require rental replacements without recourse to Section 37.

24. For the Vancouver database, I relied on minutes from public meetings held by City Council, and reports from city planning. Although Vancouver has not compiled a list of past CAC agreements, I was able to use reports on CAC agreements compiled by City-Wide and Regional Planning, to help verify and supplement data for 2010 and 2011. Unlike the Toronto data on Section 37, the City of Vancouver was able to account for the value of both in-kind and cash contributions. As with the Toronto database, I incorporated median household income data by census tract from the 2006 Census of Canada, and used Google Maps to establish distances between developments and CACs. The staff reports to Vancouver City Council were less consistently structured than those from city planning to Toronto City Council, making it difficult to compile the database, even though there were far fewer cases of CAC agreements during the five-year span in Vancouver than Section 37 agreements in Toronto. Nevertheless, every effort was made to avoid missing data, and I believe the database is still robust. Unfortunately, in Vancouver, decisions on the type of benefit to be funded by cash contributions from developers often take place well after the City enters into CAC agreements. Because the City's new accounting practices only cover 2010 through 2011, it was difficult to trace how the funds were eventually used. Even in 2010, many staff reports omitted the breakdown of CACs, though 2011 saw a significant improvement. Unfortunately, as a result of these accounting lapses, 25 percent of the cases have missing data relating to the type of benefit secured from the developer. This is not a failure in data gathering, but an indication of the former lack of transparency in the use of CACs.

Table 2: Variables included in the database and categories of benefits secured, City of Vancouver

Variables included in the City of Vancouver Database	Categories of benefits secured
<ol style="list-style-type: none"> 1. Location of the development 2. Location of the benefits secured, where known 3. Year of the agreement 4. Value of cash contributions secured for each CAC agreement 5. Value of in-kind contributions secured 6. Total value of contributions secured 7. Median household income for the census tract in which the development is located 8. Median household income for the census tract in which the benefit is located 9. Type of benefits secured in each agreement 10. Distribution of cash contributions by benefit type 11. Number of in-kind benefits secured and the number of cash contribution benefits secured by type 12. Walking distance from the development to the farthest benefit secured from the development 13. Total gross floor area (GFA) of the proposed development and GFA by use 14. Amount of floor space for each development (including initial and proposed) 15. Initial and proposed height and density of the proposed development 	<ol style="list-style-type: none"> 1. Parks 2. Roads and streetscapes 3. Community and recreation 4. Public housing 5. Affordable housing 6. Community services 7. Heritage preservation²⁵ 8. New rental units 9. Other

Unlike Toronto, Vancouver has a specific list of benefits for which CAC contributions may be used. As a result, the list of categories for Vancouver is much shorter than that for Toronto, and I was not required to make many decisions regarding the category in which certain benefits belonged.

In the qualitative research, I focused on assembling an account of the process for negotiating CAC and Sections 37 agreements and for determining how the two cities decided which benefits to secure from developers, what the value of the agreements should be, and how the benefits secured from developers should be

25. The City's accounting for CAC agreements involving heritage preservation is inconsistent. Both the total number of CAC agreements and the number of CACs for heritage preservation are undercounts. In many instances, staff reports did not refer to CAC agreements, but included heritage preservation agreements resulting in increased density (which would qualify as CACs). To further confuse issues, the 2010 and 2011 reports from City Planning combine both the cash contributions from CACs and the value of heritage density transfers. Heritage density transfer is a completely different tool from a CAC. The City does not receive funds from developers for such agreements. I distinguished between the two in compiling my database.

distributed. The qualitative data sources included documents and reports for both cities, including the guidelines each city has adopted for DBAs, auditors' reports, and individual density for benefit agreements. I also examined provincial legislation and commentaries in both provinces, and, for Toronto, I examined Ontario Municipal Board decisions relating to the use of Section 37.

Because many of the practices and norms associated with the use of CACs and Section 37 are unwritten, I also relied on personal correspondence, conversations, and interviews with individuals who are currently involved or have been involved in creating CAC and Section 37 agreements. The appendix lists the main individual sources of information.

5. Which Benefits and for Whom?

The following maps depict the distribution of developments with DBA agreements and the value of the agreement in each city from 2007 through 2011. Map 1 depicts all of Toronto, while Map 2 focuses on the three downtown wards.²⁶ Map 3 depicts all of Vancouver, including the downtown.

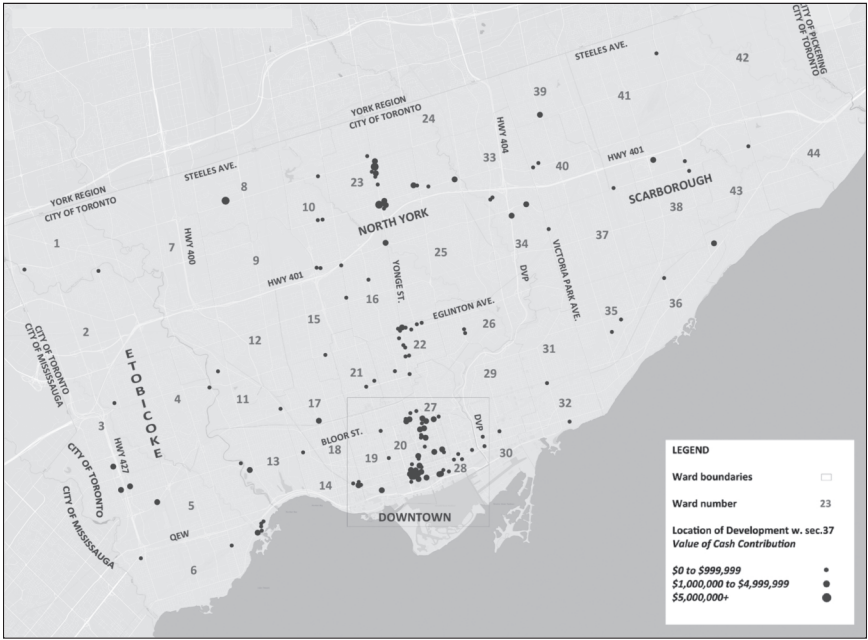
From the beginning of 2007 to the end of 2011, the City of Toronto entered into 157 Section 37 agreements and the City of Vancouver entered into 47 CAC agreements. The difference in the number of agreements cannot be accounted for simply by the significant variation in population size of each City, since the three wards in Toronto's downtown core (wards 20, 27, and 28) accounted for 53 Section 37 agreements on their own in an area with a population a quarter the size of Vancouver's. The difference in the numbers may reflect a greater and more sustained development boom in Toronto. Another factor, expressed in interviews, could be that Vancouver's planning staff often consider CACs inappropriate for developments, because existing density restrictions are too onerous, whereas Toronto seems to seek these agreements as a matter of course for any large development requiring significant density increases (personal correspondence).²⁷

An important observation is that the DBAs are heavily concentrated in the parts of the cities that have experienced the most rapid growth and property development. Figure 1 provides a breakdown of the number of Section 37 agreements in Toronto by select ward, demonstrating the uneven distribution. The five wards with the highest number of agreements (wards 20, 22, 23, 27, and 28) are along Toronto's Yonge-University-Spadina subway line, which runs north-south in the heart of the city. Wards 20 and 27 had by far the most high-rise development during the five-year span of this study. Both are downtown. Ward 23, in contrast, lies well north in one of the former suburbs of Toronto, though it, itself, has

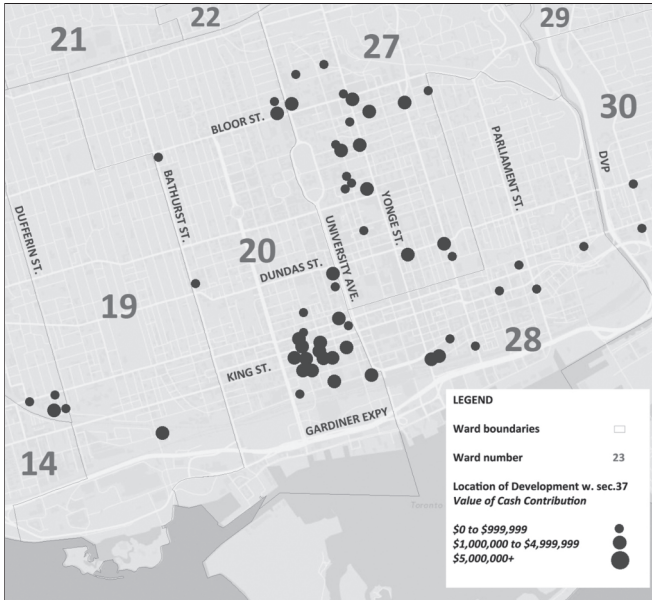
26. Because of Toronto's ward system, and the importance of individual councillors in determining the benefits to secure from developers, I have included data from select wards, along with the comparative citywide data for both Toronto and Vancouver.

27. Interestingly, however, Vancouver entered into more CAC agreements in 2011 (26) than all four previous years combined (21).

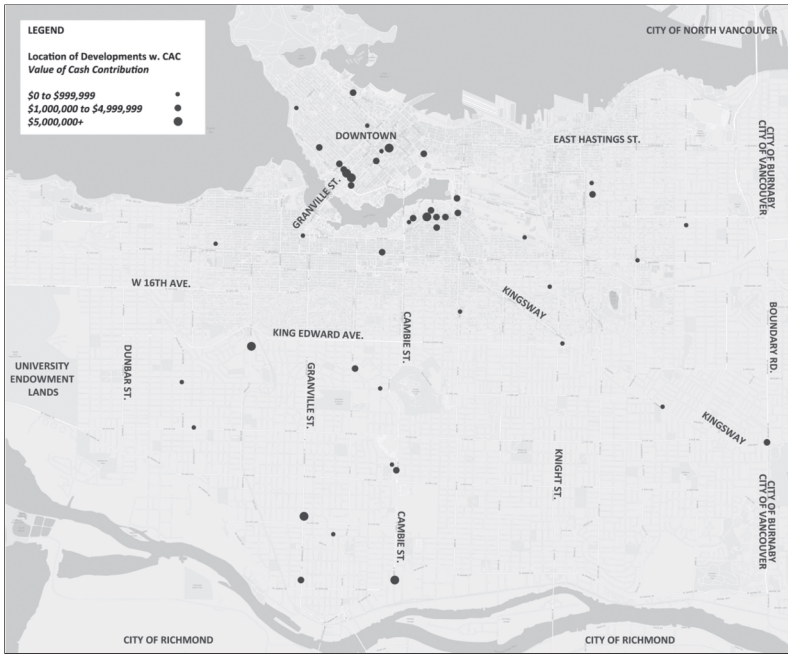
Map 1: Density for benefit agreements in Toronto



Map 2: Density for benefit agreements in Toronto (downtown wards)



Map 3: Density for benefit agreements in Vancouver



undergone a massive transformation, and is one of the most urbanized areas outside the traditional downtown.²⁸

As you would expect, the number of benefits is disproportionately high in the wards with the most DBAs. Figure 2 shows the number of benefits (by type) secured from all Section 37 agreements by ward. The pattern is similar to the previous figure. However, Ward 20 seems to have a disproportionate number of benefits secured. Ward 20 averaged 3.5 benefits per Section 37 agreement. In contrast, Ward 27 average fewer than two. These discrepancies by ward will become more apparent throughout this analysis.

Figures 3 and 4 depict the type of development with which Section 37 agreements and CACs are most associated. Each column represents the percentage of a certain land use category in developments with associated Section 37 agreements or CACs. In both cities, residential development is associated with an

28. Wards 18, 20, 22, 27, 28, and 30 are all in what was once the pre-amalgamation City of Toronto. Although each ward includes low-rise housing, they are highly urbanized. Ward 23 lies to the north and was the former heart of the City of North York, one of Toronto's former "inner suburbs." Although it is predominantly suburban in nature, it has one of the largest concentrations of office and condominium development outside the downtown. Wards 6, 8, 10, 16, 34, and 38, although they vary significantly in character, lie in former suburbs, and maintain a more suburban character, despite an influx of high-rise condominiums in certain areas.

Figure 1: Number of Section 37 Agreements by Ward , Toronto

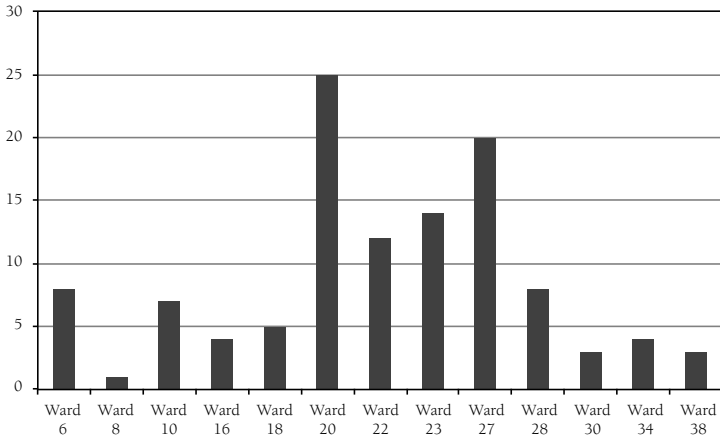
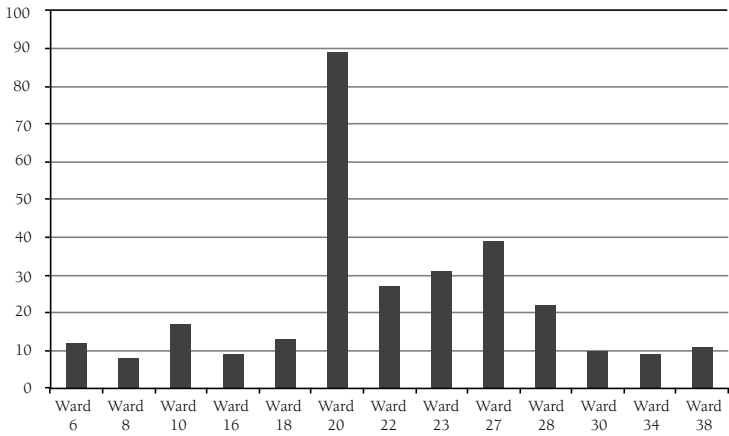


Figure 2: Number of Benefits Extracted by Ward, 2007-2011, Toronto



overwhelming majority of DBAs. In Toronto, almost 90 percent of the developments that resulted in Section 37 agreements contained residential uses. Industrial uses accounted for only 1 percent. Though the margin is greater in Toronto, almost 70 percent of developments in Vancouver contained residential uses. Toronto also has a greater proportion of developments that contained retail, office, and commercial uses.²⁹ The higher proportion of institutional or “other” land uses in Vancouver reflects the number of staff reports that do not identify the land use, rather than the volume of institutional buildings under construction in the city. Despite these differences between the two cities, the figures suggest both cities secured benefits predominantly from mixed-use residential development.

29. The “commercial” category in Vancouver often includes both retail and office.

Figure 3: Frequency of Usage in Developments with Section 37 Agreements (%), Toronto

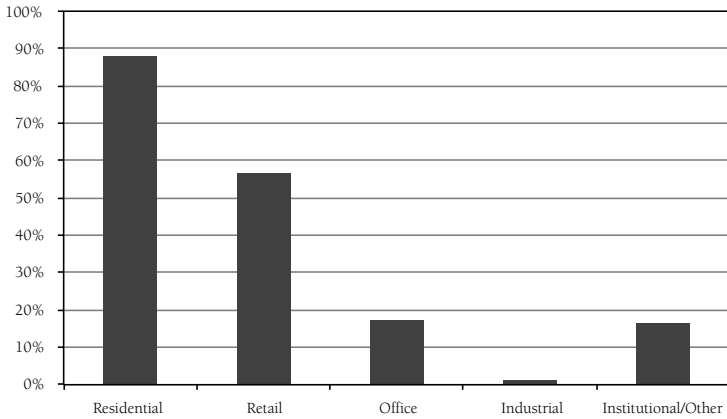
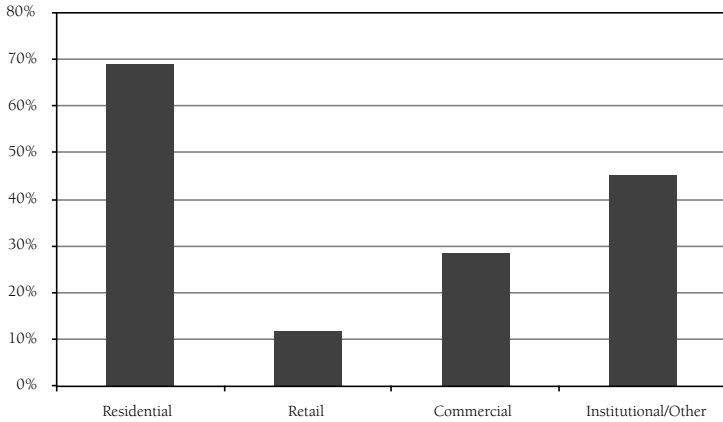


Figure 4: Frequency of Usage in Developments with CACs (%), Vancouver



Vancouver has secured far higher cash contributions per DBA than Toronto, while Toronto has sought more in-kind benefits. With only about one-third the number of the agreements as Toronto made with developers, Vancouver earned over \$146 million in cash contributions to Toronto's \$136 million. Since Vancouver seeks to secure 70 percent of the uplift from developers, while Toronto aims for 20 percent, this discrepancy may not be surprising. Contributing to Vancouver's overall performance were three CAC agreements worth over \$10 million each (one was worth \$30 million).

When one considers the value of in-kind contributions for each city, however, the picture changes. Figure 5 breaks down the percentage of in-kind contributions versus cash contributions for each city and, for Vancouver, the monetary value as a percentage of the total value of contributions. In Vancouver, less than 20 percent

Figure 5: In-Kind vs. Cash Contributions in Toronto and Vancouver (%), Value of In-Kind vs. Cash Contributions as % of Total in Vancouver

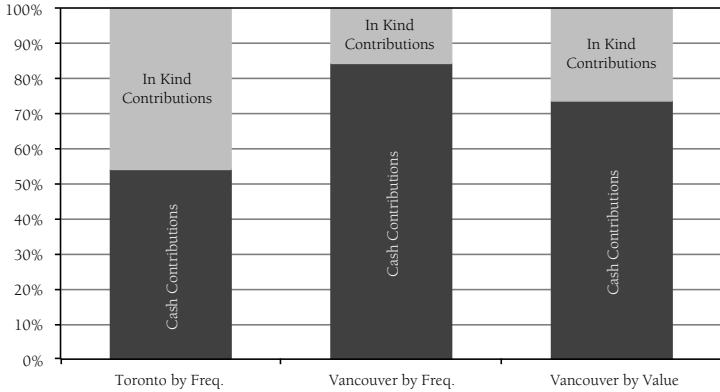
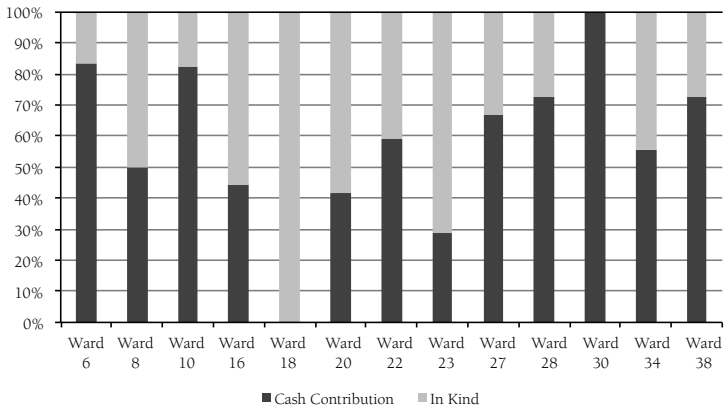


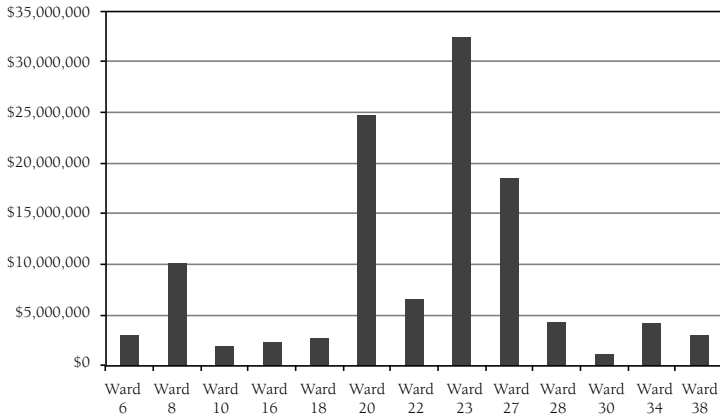
Figure 6: Proportion of Cash Contributions vs. In-Kind Benefits by Select Wards, Toronto



of the contributions secured from developers were in kind. Those in-kind contributions, however, were worth more per capita than the cash contributions, according to the City’s estimates. In Toronto, almost half of all contributions were in kind. Since Toronto has only recently begun calculating the value of in-kind benefits, there is no data that would allow for a comparison with their value in Vancouver over the five years. However, if Toronto’s in-kind contributions are worth more per capita than cash contributions—which at least one observer feels is the case (personal correspondence)—the City’s Section 37 receipts from 2007 through 2011 would be significantly ahead of Vancouver’s, despite the fact that city planners in Toronto focus on obtaining only 20 percent of the uplift.

In-kind contributions are clearly more popular in Toronto, and potentially more lucrative. However, the preference for in-kind contributions relative to cash varies significantly by ward, as Figure 6 indicates. The figure depicts a similar

Figure 7: Value of Total Cash Contributions Extracted by Ward, Toronto



breakdown of cash contributions versus in-kind contributions by ward. For the selected wards, there is no pattern of preference. The split between in-kind and cash varies from one extreme (Ward 18, all in-kind contributions) to the other (Ward 30, all cash contributions).

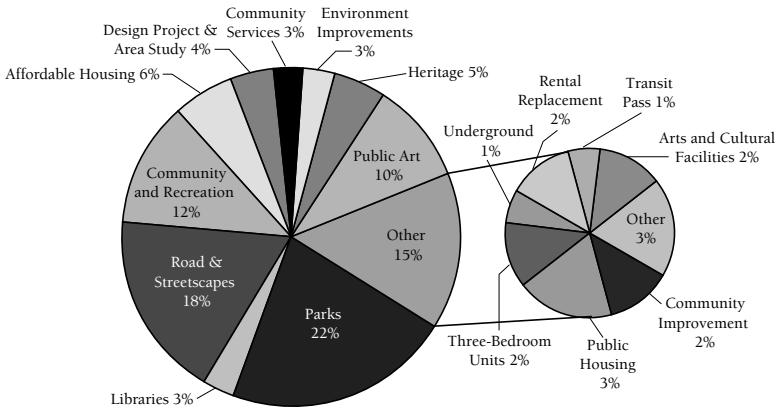
Finally, Figure 7 provides a breakdown of the value of total cash contributions secured by ward. There is a notable shift here in favour of Ward 23. Although Ward 23 accounts for only 9 percent of all Section 37 agreements, its generates one-quarter of the value of all cash contributions secured in the city. It could be that Ward 23 focuses on cash contributions in place of in-kind benefits, explaining its disproportionate share of financial compensation. However, that is clearly not the case, as the previous figure indicates. In Ward 23, cash contributions account for only 25 percent of all benefits secured. In contrast, Ward 20, which secured the most benefits from developers, has a higher proportion of cash contributions, but a significantly lower valuation.

5.1 Which Benefits?

Toronto secures a far greater variety of benefits from developers than Vancouver. Figure 8 shows the type of benefits as a percentage of all benefits secured in Toronto. In keeping with Toronto’s own guidelines for the use of Section 37, a majority of benefits secured relate to capital facilities. Community and recreation centres, roads and streetscapes, libraries, and parks account for 55 percent of all benefits secured. Other “capital facilities” include underground amenities (such as expansion of the PATH system, an underground complex linking downtown commercial buildings), arts and cultural facilities, and public and affordable housing. Community services account for only 3 percent of the benefits secured.

Of the “capital facilities” secured by the City, half (parks, roads and streetscapes, and public art) would fall under what the Ontario Ministry of Municipal Affairs and Housing defines as “desirable visual amenities” (Ontario,

Figure 8: Type and Frequency (%) of Benefits Accrued from Section 37, Toronto



MMAH 2009). Figure 9 reinforces both the preference for capital facilities and visually desirable amenities. It breaks down the value of cash contributions by type of benefit as a percentage of total cash contributions secured from developers. Community and recreation centres, roads and streetscapes, libraries, and parks account for 75 percent of the cash contributions.

Without knowing the value of in-kind contributions in Toronto, it is difficult to know how much the different types of benefits are worth in total, but the City has a clear preference for certain kinds of benefits. Along with community services, one of the city’s “least used” benefits is affordable housing. Affordable housing accounts for only 6 percent of all benefits secured and value of cash contributions. The lack of interest in either community services or affordable housing contrasts sharply with the situation in Vancouver.

The differences between Vancouver and Toronto are striking. Figure 10 shows the percentage of benefits being secured in Vancouver by type. There are far fewer types of benefits than in Toronto, and the preferences are reversed. Parks, roads and streetscapes, and community and recreation centres account for only 20 percent of all benefits secured. Community services and affordable housing each account for 25 percent of the benefits secured. While affordable housing is a “capital facility,” it is distinct from the “desirable visual amenities” preferred in Toronto.

The pattern is similar in Figure 11, which combines the value of both in-kind and cash contributions. Parks, roads and streetscapes, and community and recreation account for less than 10 percent of the value of all benefits secured, whereas affordable housing accounts for 30 percent of the value of contributions secured and community services account for a further 25 percent.

Given the variety of benefits secured in Toronto (and the limitations of greyscale printing), it is difficult to make out much in Figure 12, which breaks down the type of benefits being secured by ward. However, two things are clear:

Figure 9: Type, Frequency (%), and Value (\$) of Cash Contributions, Toronto

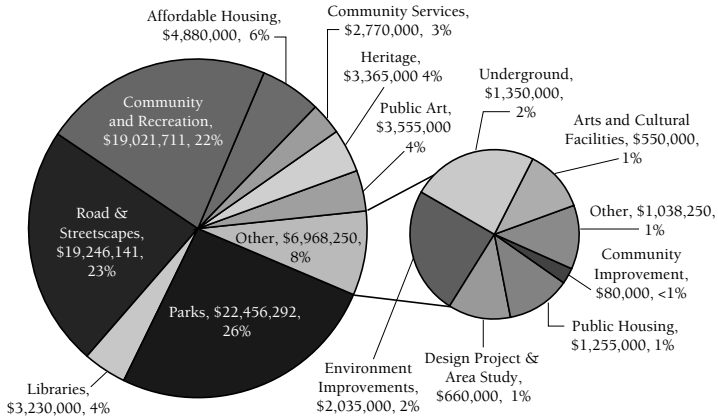


Figure 10: Type and Frequency (%) of Benefits Accrued from CACs, Vancouver

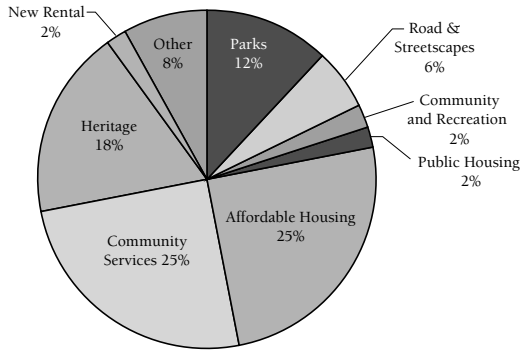


Figure 11: Type, Frequency (%), and Value (\$) of All Contributions, Vancouver

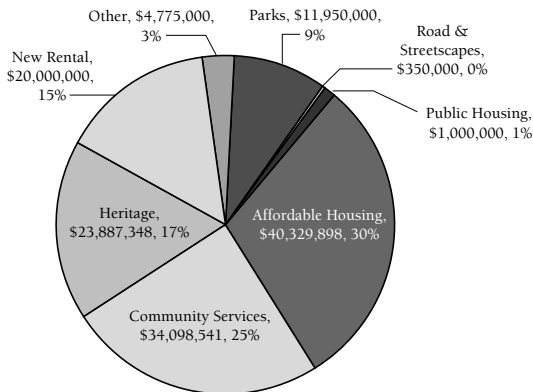
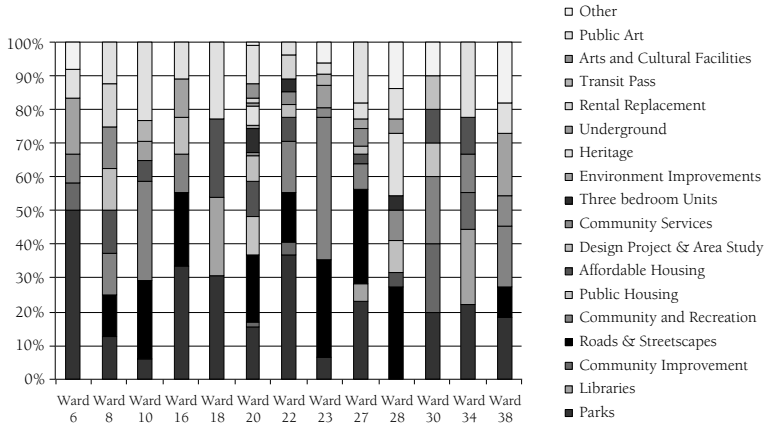


Figure 12: Frequency of Benefits Extracted as a Percentage of Total by Ward, Toronto



there is no citywide pattern for determining benefits to secure, and no one type of benefit accounts for more than 50 percent of the benefits secured in any ward. In fact, only Wards 6 and 23 prefer one type of benefit enough for it to account for nearly half of the benefits secured (parks in Ward 6, and community and recreation in Ward 23).

Ward 20 secured the greatest variety of benefits, which would account for the disproportionate number of benefits secured in that ward. In total, Ward 20 secured 15 different types of benefit. Nonetheless, roads and streetscapes, followed by parks, are still the two most common benefits secured there. Although it is a downtown ward, affordable housing accounts for only 9 percent, and improvements to public housing accounts for 10 percent. Ward 18, another downtown ward, is the only one in which affordable housing accounts for more than 10 percent of benefits secured, at 23 percent. However, most of the affordable housing in this instance is geared specifically to artisans. Again, each ward—and by proxy, each ward councillor—has its specific preferences for the use of Section 37 contributions. The only commonality between most of the wards, is a preference for benefits that would could be described as “desirable visual amenities.”

If there are trends in the types of benefits being secured, Toronto’s Section 37 agreements secure a much broader mix of benefits that tend to favour capital improvements and visual amenities, whereas Vancouver’s CACs tend to direct the benefits to affordable housing and community services.

5.2 Who Benefits?

Answering the question of who benefits from DBAs is not easy. It depends not only on the type of benefits being secured, but also the location of the benefits secured in each city. This subsection will look first at the income levels of the neighbourhoods receiving the benefits and whether benefits are redistributed

Figure 13: Distribution of Section 37 Agreements by Census Tract: Median Household Income (2006 Census), Toronto

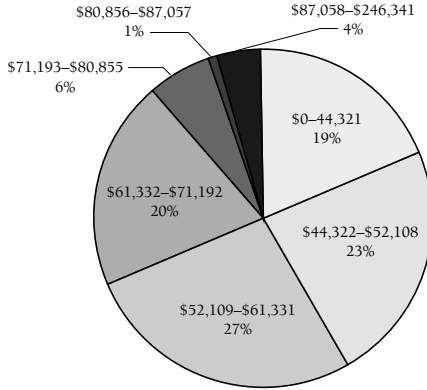
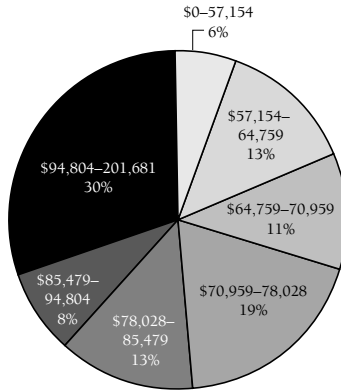


Figure 14: Distribution of CAC Agreements by Census Tract: Median Household Income (2006 Census), Vancouver



across the city. It will then examine the proximity of the benefits to the developments from which they were secured.

Figures 13 and 14 depict the percentage of Section 37 and CAC agreements, respectively, by the median household income of the census tract in which they are located. For instance, in Toronto, 19 percent of all developments with Section 37 agreements are located in census tracts with the lowest median household income in the city (\$0 to \$44,321). In Vancouver, only 6 percent are located in the census tracts with the lowest median income (\$0 to \$57,154). While this data is not a measure of who benefits in itself, it does provide a sense of where DBAs in each city are focused. As with the type of benefits secured in each city, the distribution of DBAs is very different.

In Toronto, 69 percent of all DBAs are located in census tracts with median household incomes in the lowest three brackets; only 11 percent are located in census tracts in the top three brackets. In Vancouver, this distribution is mostly reversed. Only 30 percent of developments with CAC agreements are located in census tracts within the bottom three median household income brackets, while a slim majority (51 percent) are located in census tracts within the top three brackets. These two figures suggest that development (at least that with DBAs associated with it) is being built in different areas in the two cities. In Toronto, the DBAs occur in areas with lower median household incomes. In Vancouver, they occur in areas with higher median household incomes.

Figures 15 and 16 focus on the distribution of benefits secured through DBAs. The pie charts indicate a relationship between benefits secured and the developments from which they are secured, as well as who is benefiting from the agreements. Because the number of benefits secured through any given DBA can vary, some discrepancies should exist between where the developments are distributed and where the benefits are distributed. However, a significant difference between the two would suggest that benefits are being directed to areas with different income levels from those in which the development is located. Such a redistribution could be either regressive or progressive in nature.

Figures 13 and 15 show a very similar distribution of developments and benefits by median household income. Thus, in Toronto, there appears to be little redistribution of Section 37 contributions from developers in the City. Figures 14 and 16 suggests the same for Vancouver. Given Vancouver's focus on affordable housing, this result should not be surprising. For instance, the intent of inclusionary zoning is to provide affordable units in new developments that would be otherwise unattainable for households or individuals with lower income. The intent of inclusionary zoning is not only to create affordable units in a city, but to create mixed-income neighbourhoods. Distributing affordable housing to lower-income areas would serve only to widen income disparities between areas.³⁰

I also examined housing tenure to determine who benefits from DBAs. As with median household income, most developments with Section 37 agreements in Toronto are located in census tracts with lower numbers of homeowners compared with renters (less than 50 percent). The benefits remain in these areas. This is also true in Vancouver. However, most developments and benefits are located in census tracts with higher levels of homeownership (50 percent or higher), in keeping with the higher median income of these areas.

Developments with DBAs are usually located in areas with similar housing tenure and median household income as the benefits secured from them. This fact does not mean that all benefits directly relate to their respective developments,

30. On the other hand, given the high average household incomes in the areas in which benefits are distributed in Vancouver, one may question how "affordable," these new units are, or how many affordable units are actually being created in these high-income areas.

Figure 15: Distribution of Section 37 Benefits by Census Tract: Median Household Income (2006 Census), Toronto

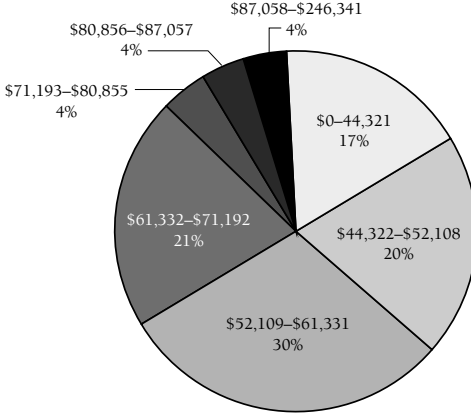
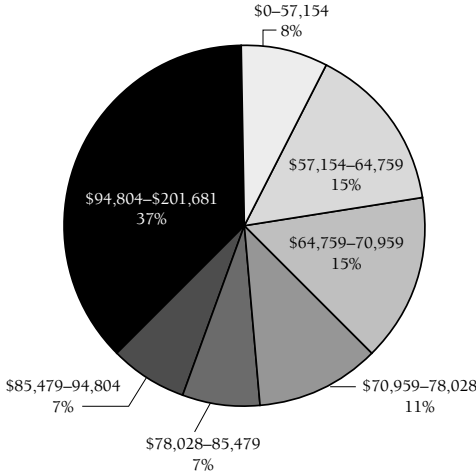


Figure 16: Distribution of CACs by Census Tract: Median Household Income (2006 Census), Vancouver



however. Figures 16 and 17 illustrate the physical relationship between developments and benefits to determine whether either city is adhering to a notion that a “nexus” should exist between the development and the benefits secured through DBAs. In each figure, the relationship between development and benefit is measured by walking time between the farthest benefit secured and the development itself. (In roughly 20 percent of the cases in both cities, I could not determine the distance.) Because I focused solely on the benefit farthest from the development, the percentage of benefits at greater distances is over-represented in the figures.

Figure 17: Proximity of Furthest Benefits Secured to Development by Walking Distance in Minutes, Toronto

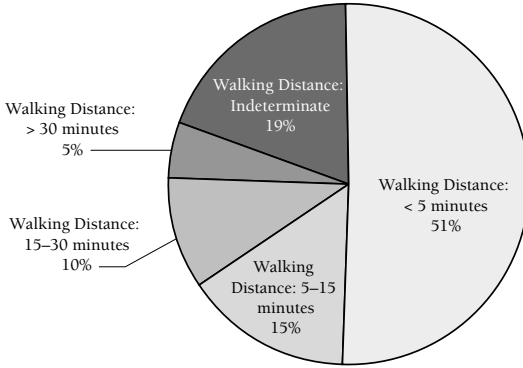
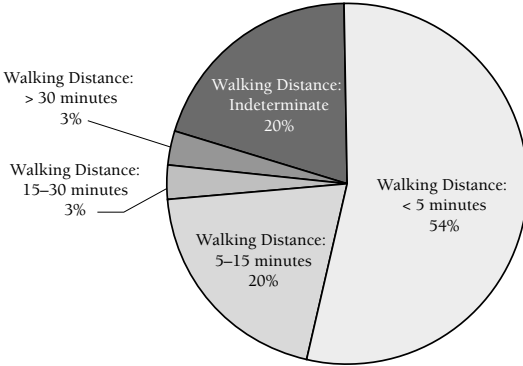


Figure 18: Proximity of Furthest Benefits Secured to Development by Walking Distance in Minutes, Vancouver



In both cities, the majority of benefits secured from a development remain in its immediate vicinity. In Toronto, 51 percent are no more than 5 minutes away, while in Vancouver, 54 percent are 5 minutes or less from the development. Since the guidelines for DBAs in both cities emphasize the proximity of benefits to developments, this outcome is not surprising. There are still a number of instances in which the benefits are located significant distances from their related developments, however. A small proportion is actually more than 30 minutes away from the development. Thus proximity is the norm, but both cities diverge from this practice on occasion.

Even where benefits are located well away from developments in Toronto, they almost always remain in the same ward. In fact, of the 157 Section 37 agreements the City entered into between 2007 and 2011, only one benefit crossed a ward

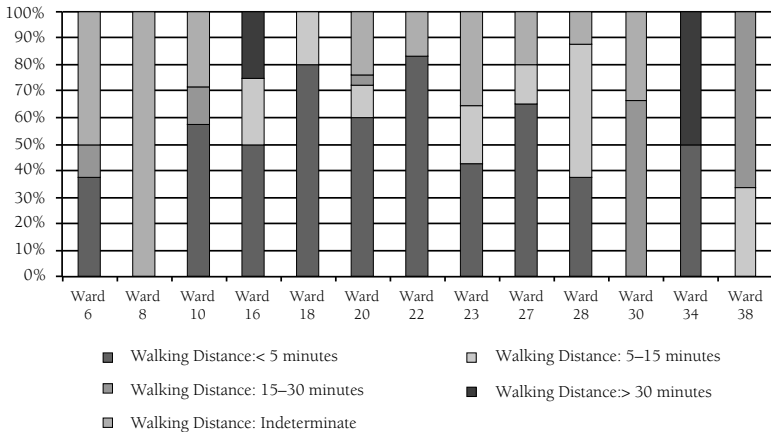
boundary, although in this instance, the development itself was close to the border of the wards, as was the benefit in question.

The proximity of benefits to developments varies by ward, as shown in Figure 19. In seven of the selected wards (wards 10, 16, 18, 20, 22, 27, and 34), at least half of all benefits are located within five minutes of the development. In most of the downtown wards and wards 20 and 23, a large majority of benefits are located within 15 minutes of the development. In suburban wards, the benefits were often located at greater distances from the development. For instance, in Ward 34, while half of the benefits are located within five minutes of the development, the other half are more than 30 minutes away. In Ward 8, it was impossible to determine where any of the benefits were located. Although these differences could indicate an urban/suburban divide, in Ward 30, a downtown ward, all of the farthest benefits were located at least 15 minutes away from the development.

In both Vancouver and Toronto, benefits are, for the most part, located close to the development. However, because the type of benefits being secured varies significantly between each city, arguably the beneficiaries vary too.

In Toronto, the focus on “desirable visual amenities” and their proximity to developments suggest that current and future neighbourhood residents near the development benefit most from DBAs. In most instances, these benefits will not be enjoyed by the wider city, as local libraries, parks, and community centres tend to be frequented by locals. Ward councillors also benefit, in a way, as they can win approval by distributing visually desirable amenities throughout their wards. In Vancouver, benefits are also usually close to the developments. However, while community services may be a benefit to some existing residents, they would not have the same appeal as a park to the wider neighbourhood. Furthermore, some residents in a neighbourhood may actually consider new affordable housing to be

Figure 19: Proximity of Benefits to Development for Select Wards by Walking Distance in Minutes, 2007–2011, Toronto



a burden, rather than a benefit. Aside from the people who occupy the affordable housing, the main beneficiary of DBAs in Vancouver is the city as a whole.

6. Analysis of Section 37 in Toronto and Community Amenity Agreements in Vancouver

Both the account of the process for negotiating DBAs in Toronto and Vancouver and the data in the previous section on the use of DBAs in each city suggest the cities share certain practices, but diverge in other respects. Both cities have, over time, adopted a case-by-case approach to negotiating DBAs. They also, for the most part, ensure that the benefits they secure from developers will be close to the developments that are the subject of the agreement. However, while Vancouver's process is largely driven by city staff, and to some extent insulated from politics, ward councillors in Toronto largely direct the use of DBA contributions in the city. Toronto's councillors tend to focus on securing visually desirable amenities for residents close to the developments. In contrast, Vancouver focuses on securing amenities such as affordable housing and community services. The following two subsections examine the rationales that influence the use of DBAs in Toronto and Vancouver and the variables that explain the differences between the two cities. The final subsection evaluates the use of DBAs in each city.

6.1 Section 37 and Toronto Revisited

All three rationales—infrastructure for density, sharing the wealth, and compensating for negative externalities—are present in both Toronto and Vancouver. However, their overall influence on the use of DBAs varies widely. In Toronto, the types of benefits and the location of most amenities close to the developments suggest that the negative externalities rationale drives much of the use of Section 37 agreements. Sharing the wealth, by redistributing benefits to lower-income neighbourhoods, plays less of a role, but is still important. Finally, it is rare that benefits are directed to pay for infrastructure to service additional density. It also appears that ward councillors have a great deal of discretion in negotiating and allocating benefits under Section 37.

Although the City seems to favour certain benefits, such as parks or roads and streetscapes, there is no established practice for determining which benefits to secure. Based on the findings in this paper, the allocation of benefits in many wards appears to suggest that individual councillors do not always follow a consistent logic from agreement to agreement in deciding which types of benefits to secure. As a result, benefits tend to be spread thinly across multiple small projects. Rarely are contributions from different developments directed to the same project.

Some benefits, such as road improvements or contributions directed to subway stations, are related directly to the rationale of providing infrastructure to support additional density. However, ward councillors are the final arbiters in Section 37 agreements, and infrastructure for density does not seem to drive their approach to DBAs. In addition, developers in negotiation with the City have a greater incentive to agree to provide benefits that will enhance the value of their development. While subway access and road improvements in the immediate vicinity of the development may serve to enhance this value, infrastructure that is

farther removed from the development, even if intended to accommodate additional density, may not.

Other benefits appear to be allocated in order to “share the wealth,” by redistributing benefits through investment in affordable housing and community services, for example. The ad hoc nature of DBAs in Toronto and the notion that the City must negotiate its share of uplift are the only means for the City to maintain and justify its use of Section 37, whether it explicitly uses the term “sharing” or not. Were the City to eschew such a rationale, its use of Section 37 could be understood as a form of spot levy or tax, legal or not. In the United States, many jurisdictions have adopted the rationale of sharing the wealth to circumvent charges that the practice of securing density for benefits constitutes a taking or tax. Nevertheless, many jurisdictions apply flat rates for density bonusing. In Ontario, the Ontario Municipal Board has suggested that the courts may interpret the application of a flat rate as an illegal tax. As a result, the City of Toronto, wary of court challenges, will not or cannot impose a flat rate.

Based on the evidence in this paper, the rationale that seems to be most frequently applied is compensating local residents for the negative externalities arising from the additional density. Discussions of Section 37 and the agreements themselves rarely use terms such as “compensation” to explain why the City is asking for certain benefits. However, the tendency of most councillors to secure visually desirable amenities and to intersperse them in the immediate area surrounding new developments suggests that seeking compensation for local residents “negatively affected” by development is the dominant rationale in the city.

6.2 Community Amenity Agreements and Vancouver Revisited

In Vancouver, the idea of sharing the wealth explains most of the use of community amenity agreements in the city. Most benefits are located in the near vicinity of the developments that give rise to the agreements. However, amenities like affordable housing and community services do not, generally speaking, fall under the rubric of compensation for negative externalities, nor do they constitute infrastructure necessary to accommodate density. Depending on the attitudes of neighbouring residents, certain services and affordable housing may be considered to be undesirable rather than a positive outcome of new development, although such perceptions are more prevalent among Toronto residents than those in Vancouver (Moore 2011; 2013).

Although Vancouver can apply, has applied, and may yet reapply uniform rates for CACs, sharing the wealth appears to underlie their use in the city, as it does in many American municipalities with density bonus systems. When securing CACs, the City of Vancouver chooses to use the contributions to fund benefits of citywide importance. The city may also pool funds from different developments to fund individual projects. Such an approach is antithetical to the notion that a specific “nexus” must exist between the development and the benefits or amenities being secured. Benefits such as affordable housing can only loosely be said to benefit area residents. Rather, distributing affordable housing throughout the city benefits not only low-income residents, but everyone in the city.

7. Final Observations

The findings described in the preceding sections suggest that the use of DBAs in each city is shaped by the nature of the enabling provincial legislation that governs the use of density for benefit agreements and the various municipal and provincial institutions that determine planning policy. In Ontario, Section 37 of the *Planning Act* offers limited guidance to municipalities. This vagueness results in a planning tool whose purpose and net effect on the city are ambiguous. In contrast, the enabling legislation in Vancouver (565.1 of the *Vancouver Charter*), though only marginally clearer than Section 37 in Ontario, makes explicit mention of affordable housing as a desirable result from the implementation of DBAs. Vancouver follows this provision closely. This fact, and the nature of urban planning in Vancouver, results in a more consistent approach to using DBAs.³¹

The ad hoc nature of DBA negotiations also raises questions. No matter how a municipality chooses to allocate the benefits—on the basis of sharing the uplift, retaining the uplift for infrastructure, or using it to compensate those negatively affected by a development—the value of the uplift generated by the additional density must be determined and the resulting benefits negotiated. While the process may be open to the public, the way in which the value of uplift is determined is invariably complicated. As a result, transparency will always be an issue, and accusations of the misuse or abuse of DBAs will inevitably emerge.³²

31. The high cost of housing in Vancouver, and the nature of development in the city, which is focused largely on former industrial and port lands, may have generated momentum to secure affordable housing in the city. The diverging nature of the Vancouver and Toronto neighbourhoods in which development is concentrated seems to support this fact. Development in Vancouver is occurring in areas with much higher median household incomes than it is in Toronto. However, the lower median incomes in downtown Toronto are misleading. They mask the increasing cost of housing in the city, and the displacement of households with moderate to low incomes from the downtown. If anything, given the concentration of services and access to transit in Toronto's downtown versus its inner suburbs (Horak and Moore forthcoming), there should be an even greater impetus to create affordable housing in the city's downtown, where most of the development and Section 37 agreements occur.

32. Though the potential for abuse always exists, both cities seem to have some form of check on such abuse. In Vancouver, city staff regularly determine that securing CACs is not justified. City staff will also acknowledge when existing density limits are too low to allow for development. In many cases in Vancouver, developers apply to increase the density allowed on a site, not to create a windfall profit, but to ensure they will make a profit to begin with. Thus city staff in Vancouver mitigate the potential for abuse. In Toronto, city planners rarely change the base density for determining uplift. As a result, the staff often determine the uplift of an increase in density based on zoning by-laws that have been in place for half a century. Some observers have therefore suggested that the City maintains low limits on density in order to secure greater Section 37 benefits from developers (Barber 2008). However, city planners in Toronto also ask for far less of the "uplift" generated from increased density (15 to 20 percent in Toronto versus 70 to 80 percent in Vancouver), so in many ways city planners are accounting for the dated nature of the City's by-laws in Toronto. More importantly, due to the tenuous nature of Section 37 agreements, developers could easily challenge any attempt by the City to extract an unreasonable contribution.

Debates over the lack of transparency and the use of contributions secured through DBAs may also mask greater problems with these agreements. Determining economic rent and the value of increases to economic rent (uplift) is complex and hard for the general public to understand. Yet any attempt to introduce a more systematic approach could result in charges that the city is levying a new charge or tax on developers.

In British Columbia, Sections 565.1 of the *Vancouver Charter* and 904 of British Columbia's *Local Government Act* seem to allow for some room in how density for benefit exchanges are accomplished, but moving from a negotiated to a systematic approach entails moving from the concept of uplift to a charge for additional density.³³ In Ontario, the Ontario Municipal Board has suggested in some of its decisions that such a move would not be legal for municipalities.

Given the inherent lack of transparency of any tool that relies on the concept of uplift, the abolition of DBAs or their replacement with alternative tools may be a better option for municipalities. The choice between abolition and replacement depends on the rationale used to justify DBAs. For instance, in Toronto, many of the benefits the City secures from developers are justifiable only if conceived as compensation to neighbouring residents negatively affected by the new development. However, such benefits and amenities rarely address these negative effects. If the negative effects are so egregious that they significantly upset the lifestyles of neighbouring residents, the development should not be allowed in the first place. If the negative effects are minor and the development otherwise constitutes good planning, however, it is unclear why developers should compensate local residents at all. Therefore, if their use is based solely on the rationale of compensation for negative externalities, DBAs should be abolished.

However, if the intent of DBAs is to achieve broader planning objectives, such as securing affordable housing, an alternative to DBAs would be more appropriate. For instance, if permitted by provincial legislation, municipalities could adopt inclusionary housing provisions, requiring all new residential developments to include a fixed percentage of units as affordable housing. This form of inclusionary housing is already practised in many parts of the United States. In fact, many of the jurisdictions that purportedly employ density bonusing to secure affordable housing are, in practice, requiring such fixed contributions. Alternatively, where having the developers provide affordable housing units themselves is impractical, municipalities could levy a charge similar to development charges, requiring developers to pay a fixed amount based on the square footage or number of units in the new development. Both approaches would be far more transparent than the use of DBAs, and could be applied to all new development.

Unfortunately, municipalities in Ontario, and to a lesser extent British Columbia, cannot adopt such alternatives to DBAs on their own. While Toronto and Vancouver each established their own rules and processes for negotiating

33. One of the corollaries of this findings is that American jurisdictions that claim to be “sharing the uplift,” but that employ rigid density bonusing systems are, in fact, taxing density.

DBAs, only the provincial governments can change the system or allow alternatives. Provincial governments set the rules for municipalities on all issues, including planning and revenue tools. If there is a problem with transparency or a flaw in the use of a tool that the provinces have legislated, the provinces must take responsibility for clarifying, amending, or abolishing that tool. If an alternative tool is appropriate, it is the provincial government's responsibility to create such a tool through legislation.

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Appendix: Select Correspondents

Amborski, David. Professor, School of Urban and Regional Planning at Ryerson University in Toronto.

Bailey, Jim. Senior Planner, City of Vancouver, City-wide and Regional Planning.

Clibbon, Chris. Planner, City of Vancouver, City-wide and Regional Planning.

Dachis, Benjamin. Senior Policy Analyst, C.D. Howe Institute.

Devine, Patrick. Partner and municipal planning lawyer at Fraser Milner Casgrain LLP.

Howard, Ronda. Former Assistant Director of Planning, City of Vancouver.

Langdon, Peter, Acting Manager of Community Policy for the Policy and Research division of Toronto City Planning.

McAfee, Ann. Former Co-Director of Planning, City of Vancouver.

Pecarski, Randy. Senior Planner, City of Vancouver, City-wide and Regional Planning.

Rae, Kyle. Former Toronto city councillor and current partner at PQR Solutions.

