

IMFG

No. 2 / 2013

perspectives

Trading Density for Benefits: Section 37 Agreements in Toronto

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The Institute conducts original research on issues facing cities in Canada and around the world; promotes high-level discussion among Canada's government, academic, corporate and community leaders through conferences and roundtables; and supports graduate and post-graduate students to build Canada's cadre of municipal finance and governance experts. It is the only institute in Canada that focuses solely on municipal finance issues in large cities and city-regions.

IMFG is funded by the Province of Ontario, the City of Toronto, Avana Capital, and TD Bank Group.

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Acknowledgements I would like to thank Enid Slack, André Côté, and Philippa Campsie for all of their support, work, and patience in this endeavour. I would especially like to thank Enid Slack for her support and guidance throughout my postdoc, and continued support beyond. I am also indebted to Paul Hess and David Amborski for their feedback on early drafts of my paper, and to Ben Dachis, Patrick Devine, Kyle Rae, and Peter Langdon for offering their insights into Section 37 and planning in the City. Lastly, I would like to thank the funders of the Institute of Municipal Finance and Governance.

The views expressed in this paper are those of the author and not IMFG or its funders.

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Series editor: André Côté

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ISBN 978-0-7727-0912-7

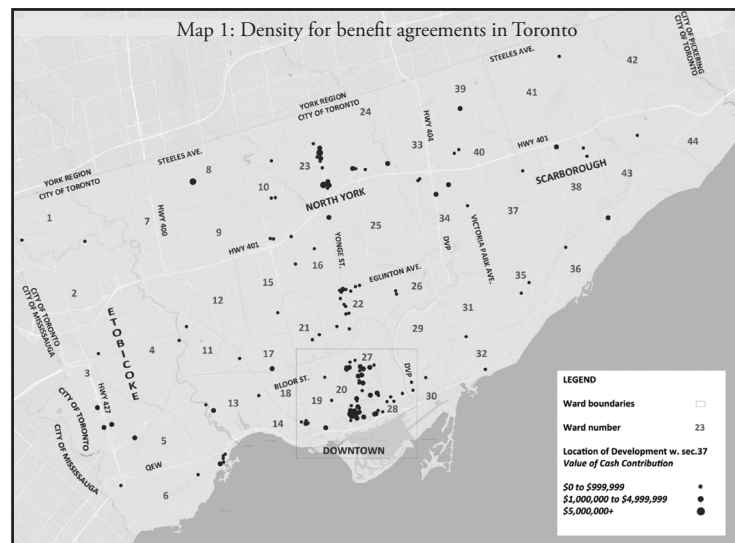
Executive Summary

In the Toronto policy and planning community, Section 37 (S37) of the *Planning Act*, which allows for a form of “density for benefit agreement,” is the source of much debate and disagreement. It has also become a focal point in the City of Toronto’s Official Plan review process during 2013. Between 2007 and 2011, it is estimated that the City of Toronto secured \$136 million in cash contributions from developers through S37 agreements. However, until recently, there has been little public debate about what S37 agreements are, what they are intended to do, how they are negotiated, and where the significant benefits the City secures are being spent.

Section 37 of the *Planning Act* allows municipalities to secure cash or in-kind contributions from developers in return for allowing them to exceed existing height and density restrictions. The City of Toronto has put in place a set of S37 guidelines and identified a list of benefits that can be secured from developers. In practice, while Toronto Planning staff play a central role in determining the value of contributions secured from developers, the ward-based councillors play a significant role in determining how the contributions should be allocated.

Based on data on the value, type, and location of S37 benefits over the period from 2007 to 2011, this paper identifies a number of trends. The benefits were heavily concentrated in the parts of the city that have experienced the housing boom, notably the downtown core. Developer contributions were largely split between cash and in-kind, and were allocated to a wide variety of public purposes within and across the City’s wards – mainly “desirable visual amenities” such as parks, roads and streetscapes, and public art. Finally, most benefits were close to the development, and they almost always remained within the ward.

These findings suggest a few important conclusions. First, there is little certainty about what S37 benefits should be used for. In practice, the major rationale appears to be to compensate neighbouring residents for the “negative impacts” of the added density. Second, the inconsistent use of S37 benefits likely relates to the fact that agreements are negotiated on a case-by-case basis, with no established City practice for identifying what benefits to secure, and a great deal of discretion resting with ward councillors. Third, the inconsistent use of S37 could also result from the lack of clarity in provincial legislation and planning policies. Given the significant questions this paper raises about the use of S37s in Toronto, there should be serious consideration of whether to abolish, reform, or replace S37 with alternative tools, such as inclusionary housing policies or fixed charges.





Trading Density for Benefits: Section 37 Agreements in Toronto

1. 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.¹ 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.

But what is a Section 37 agreement (S37), and why would it secure such a lucrative return for the City? In the Toronto policy and planning community, the term "Section 37" has become ubiquitous and controversial. It has also become a focal point in the City of Toronto's Official Plan review process during 2013. Between 2007 and 2011, it is estimated that the City of Toronto secured \$136 million in cash as well as in-kind benefits from developers through S37 agreements. However, until recently, there has been little public debate about what S37 agreements are, what they are intended to do, how they are negotiated, and where the significant benefits the City secures are being spent.

This Perspectives paper describes the theory behind "density for benefit agreements" (DBAs), the legal and policy framework for S37 in Toronto, the possible rationales for their use, and the value, type, and location of the S37 ben-

efits secured in Toronto over the past few years. The paper concludes with some observations about S37 and the appropriateness of these agreements as a way for local government to obtain or fund public amenities. The analysis draws on substantial quantitative and qualitative research conducted between 2007 and 2011. For more information about the methodology, please refer to the full-length *IMFG Paper* called “Trading Density for Benefits: Toronto and Vancouver Compared,” released in February 2013.

2. “Density Bonusing” and Density for Benefit Agreements

The practice of density bonusing is commonly used in cities across North America. A density bonus system usually focuses on one type of benefit and involves a systematic approach to determine the nature of developer contributions. In many U.S. jurisdictions, density bonusing evolved from the practice of inclusionary zoning, which requires that a certain percentage of the units in a new residential development be affordable.² 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.³

In such systems, the type of benefit secured by municipalities and its value are predetermined. For example, 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 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. Yet not all density bonusing arrangements emerged from attempts to adopt inclusionary zoning measures. Some jurisdictions use the practice to secure street-level retail, cultural facilities, or daycares, though a systematic process is also used for securing these amenities.⁴

It is notable that Toronto’s use of density bonusing, through S37 agreements, diverges from the systematic approaches used in other jurisdictions.

It is notable that Toronto’s use of density bonusing, through S37 agreements, diverges from the systematic approaches used in other jurisdictions. Not only are the amounts of density and the value of benefits secured on a case-by-case basis, but the agreements also secure a wide variety of benefits from developers. New York City and Vancouver appear to be the only other comparable municipalities to employ density bonusing in Toronto’s ad hoc manner.⁵

3. Section 37 in Toronto

With a population of 2.6 million people, Toronto is the largest municipality in Canada. In recent years, the City has undergone a dramatic and sustained condominium-driven construction boom, resulting in significant economic growth for the City. This sustained development has provided the opportunity to enter into many S37 agreements, though they have largely been localized in certain parts of the city – notably in the downtown core and surrounding areas.

The Legal and Policy Framework for S37

The legal and policy basis for S37 agreements rests with the provincial government. The provision was first introduced into the *Planning Act* in Ontario in 1983. 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))

The Act goes on to state that municipalities may create S37 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), which is responsible for overseeing municipalities in the province, provides an overview of the intent and purpose of S37 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.”⁶ Municipalities may also use S37 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.”⁷

The other important provincial player is the Ontario Municipal Board (OMB), the province’s quasi-judicial planning oversight body. In a series of decisions, it has interpreted S37 somewhat differently. The OMB has not specified what types of benefits can be secured by municipalities, but 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).”⁸ The OMB 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.⁹

In response to the OMB’s rulings, the City of Toronto has adopted a set of S37 guidelines and, in its Official Plan, identified a list of benefits that can be secured from developers. The guidelines state that “community benefits should be specific capital facilities, or cash contributions to achieve specific facilities,”¹⁰ and forbid the use of Section 37 for non-specific purposes, generating general revenues or “operating, programming, and non-capital maintenance funds.”¹¹

The City’s guidelines also state that a citywide formula cannot be used to determine the value of S37 contributions. This provision is in response to both developers’ opposition to a standardized approach, and the fear that a standardized formula for calculating the value of agreements could be considered an illegal tax.¹²

The differing interpretations of S37 create significant contradictions. The City’s policies do not consider S37 as a means to achieve “good planning” objectives, as the presumption is that the development should already constitute good planning as a condition of its initial approval. Yet, MMAH suggests that S37 benefits should support planning objectives such as “intensification, growth management, and transit supportiveness,” without indicating a proximity requirement for the benefits.¹³ The OMB, meanwhile, requires a “nexus” linking the benefits to the development, without specifying what types of benefits should be sought or whether they should support broader planning policies.

The Process for Negotiating S37 Agreements

The process for negotiating a S37 agreement begins when a developer approaches the City Planning Department to increase the allowable density on a site permitted by the existing zoning by-law. If the City Planner determines that a S37 agreement is warranted, he or she asks 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. The planning department uses these estimates to calculate the value of the additional density, or the “uplift.” Currently, city planners in Toronto seek to secure between 15 and 20 percent of the uplift when negotiating with developers. The planning department’s initial report on the proposal circulates to selected other departments and councillors.

Once the planning department and the developer establish the value of the S37 agreement, the councillor from the ward in which the proposed development is located will enter into discussions with the developer concerning the type of benefits to be secured. This point in the negotiating process is the least transparent. While City Council as a body has the final say on all zoning by-law amendments, ward councillors typically have a great deal of discretion in the negotiations.

They will approach developers with a list of benefits or amenities they would like to secure. The Official Plan lists 13 categories of benefits, some of which are very broad. Input from city staff can be considered or ignored.

While City Council as whole has the final say on all zoning by-law amendments, ward councillors typically have a great deal of discretion in the negotiations.

Ultimately, provided the developer agrees, the type of benefits secured is entirely at the councillor’s discretion.¹⁴ This level of councillor engagement in the process of negotiating density for benefit agreements distinguishes Toronto from other cities like Vancouver, where staff are largely insulated from political involvement.

4. What is the Rationale for the use of Density Bonusing?

The uncertainty regarding the conflicting objectives of MMAH, the OMB, and the City, and the ad hoc nature of the negotiation process, raises an important question: what is the rationale for using S37s as a planning tool? Density for benefit agreements are premised on the idea that municipalities should share in the increased economic rent – the “uplift” – created by the City when it allows developers to build greater height and density. The concept of uplift is broadly accepted, but there is less certainty about how and why municipalities should share in it. There are at least three competing rationales:

1. To fund the infrastructure needed to serve the higher density development;
2. To “share the wealth” by redistributing it to the city at large; or
3. To compensate those negatively affected by the higher density development.

Infrastructure for Density

The first rationale suggests that density for benefit agreements should cover the costs of infrastructure necessary to support the increased density. In theory, density and height restrictions in zoning by-laws are based on, among other things, the existing capacity of services, infrastructure, and utilities. Since increasing the density of development on a site could strain these existing services or infrastructure, the agreement would require the developer to invest in increasing the capacity of such services. 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.”¹⁵

Sharing the Wealth

The second rationale is premised on the notion that the municipality should share in the windfall profit it is granting developers. Following this reasoning, the benefit secured from the developer does not need to have any specific relationship to the actual development. The municipality can secure a cash contribution from the developer and redistribute the funds where they are most needed in the city. This rationale justifies a greater variety in the type of benefits secured, and their distribution beyond the ward where the development occurred. At the same time, the OMB has maintained that the benefits secured cannot be arbitrary and that there must be a “nexus” between the development and the benefit, although it has accepted the “sharing” rationale in one decision. Others argue that as restrictions in municipal zoning by-laws can be arbitrary or out of date the notion that municipalities are “creating” additional profit for developers is problematic, and that S37 creates the incentive for municipalities to abuse their power to set density restrictions to secure benefits.

Compensating for Negative Externalities

The final rationale suggests that the benefits 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, which can potentially have negative effects on the surrounding communities and upset neighbouring

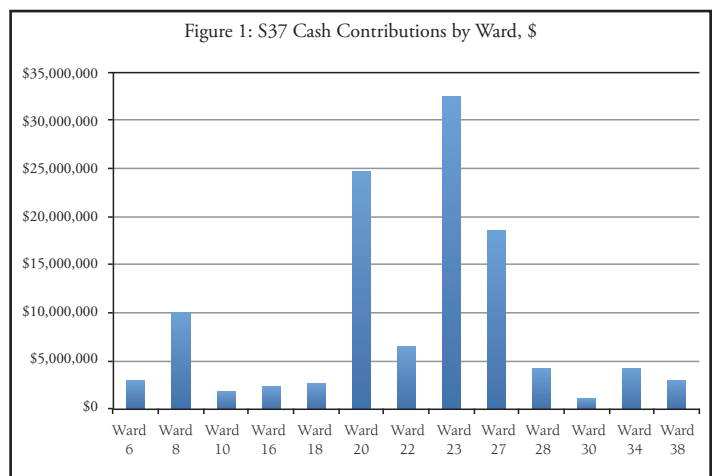
residents. The benefits municipalities secure from developers in this instance would be for the betterment of the neighbourhood, such as the regeneration of an existing park or art installations, rather than specific efforts to mitigate the effect of increased density. The example of the Toronto District School Board’s opposition and subsequent acceptance of the proposed hotel reflects this rationale.

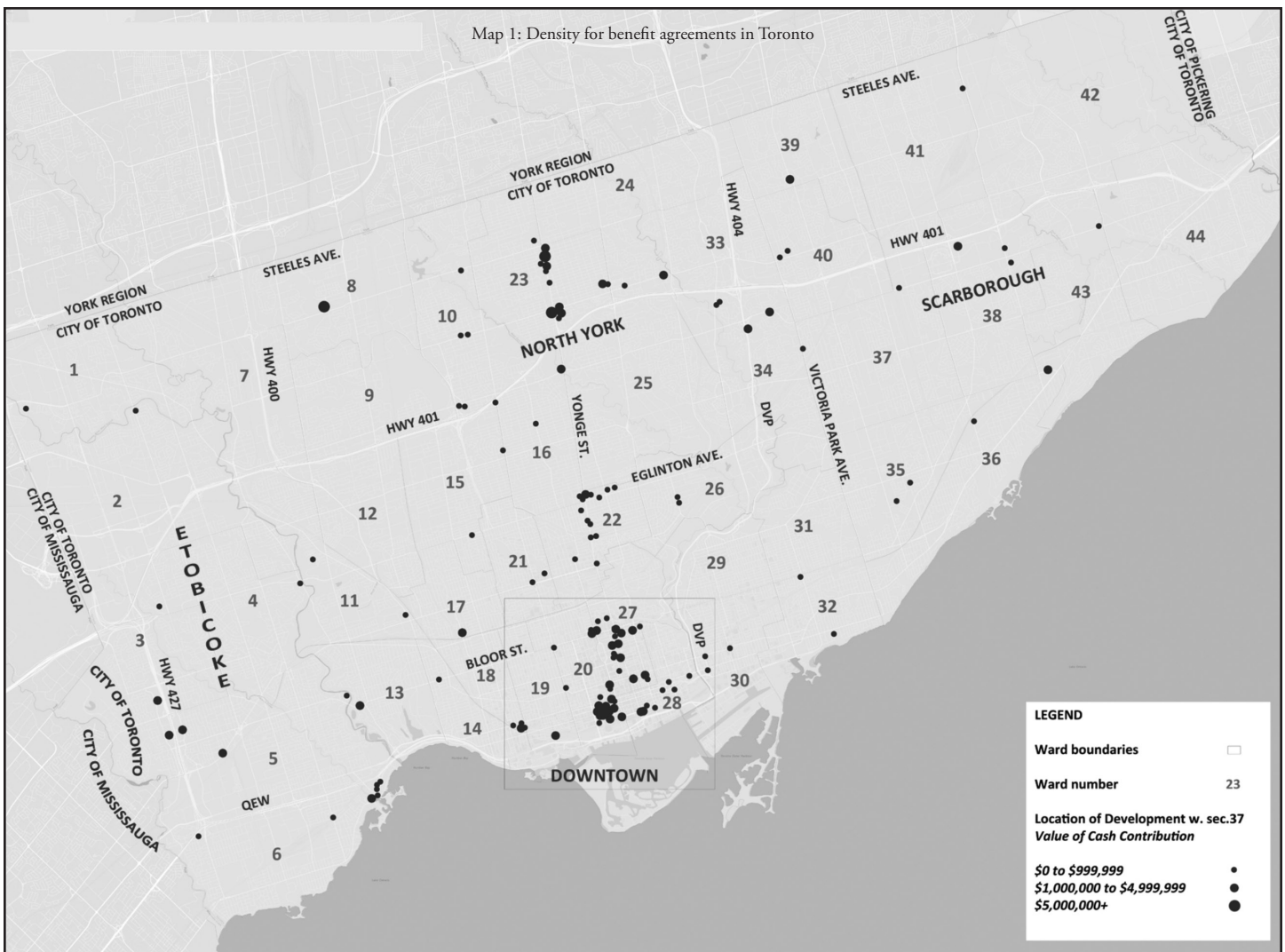
This rationale also raises important concerns. First, it seems to justify claims by opponents that S37s are used as “inducements” by developers to secure local support for a development. Second, if a development is so poorly planned that it causes significant negative externalities in the surrounding neighbourhood, then it probably should not be built in the first place. Third, S37 agreements, by definition, involve intensification of use on a site – a stated objective of local and provincial policies, such as Ontario’s *Growth Plan for the Greater Golden Horseshoe*. There are often as many positive externalities generated by well-planned, dense developments as there are negative ones, such as lower service costs per capita and better access to transit. Why then should developers who contribute to intensification be penalized?

5. Section 37 Agreements in Toronto: What Benefits, Where, and for Whom?

This section examines the use of S37 agreements in Toronto between 2007 and 2011, looking at a number of factors: the number of agreements and the distribution across city wards, the type and value of the benefits secured, and the proximity of the benefits to the developments (the “nexus”). Here are the key findings:¹⁶

- Between 2007 and 2011, the City of Toronto entered into 157 Section 37 agreements.
- The City has secured both cash and in-kind benefits from developers, varying significantly by ward. Cash contributions totalled \$136 million. Though it is impossible



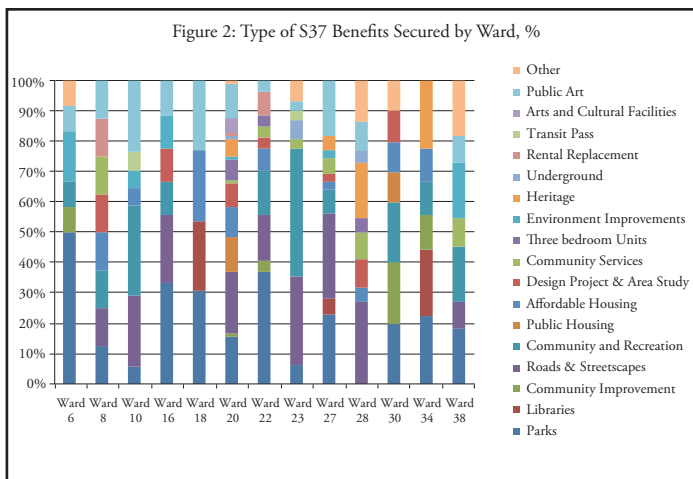


to provide an accurate estimate of the value of in-kind benefits, they could be as valuable or more valuable than the cash contributions secured by the city.

- S37 agreements were concentrated in the parts of the city that have experienced the most rapid growth and property development, with the three wards in Toronto’s downtown core (wards 20, 27, and 28) receiving 53 percent of the benefits and ward 23 in North York also securing a significant share (see Map 1 and Figure 1).
- Almost 90 percent of S37 agreements were for development that contained residential uses, while industrial uses accounted for only 1 percent.
- Toronto secures a large variety of benefits from developers, with a majority of benefits directed to capital facilities, including community and recreation centres and libraries, as well as “desirable visual amenities” such as

parks, roads and streetscapes, and public art. Affordable housing accounts for only 6 percent of all benefits secured.

- On a ward-by-ward basis, there is no citywide pattern to the benefits secured, and no one type of benefit accounts for more than 50 percent of the benefits in any ward. The only commonality is the general preference for “desirable visual amenities” (see Figure 2).
- The majority of amenities secured from developers benefit residents in the immediate vicinity, with 51 percent no more than five minutes away on foot. While a small proportion is more than 30 minutes away from the development, they almost always remain in the same ward. Of the 157 agreements, only one benefit crossed a ward boundary (see Figure 3).



The S37 negotiation process

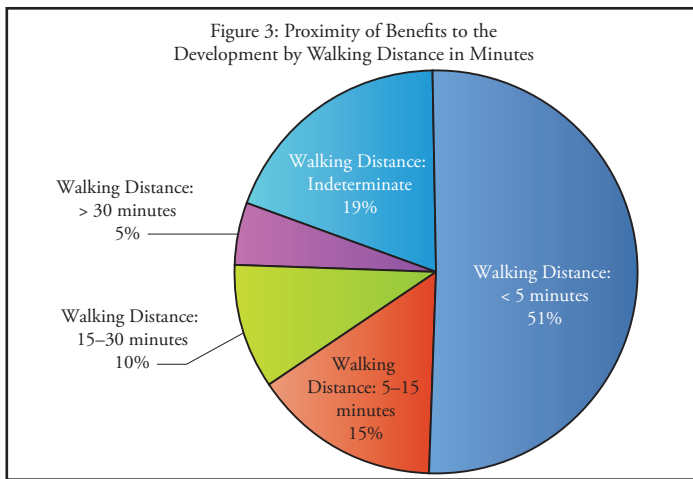
The data also demonstrate that there is little consistency in the distribution of S37 agreements across the City or in the types of benefits secured through S37 contributions. This is likely a reflection of the process used to negotiate agreements with developers, largely on a case-by-case basis, with no established City practice for determining which benefits to secure, and ward councillors given considerable discretion in negotiating and allocating the benefits. In addition to the variance *across wards*, the allocation of benefits *within many wards* suggests that individual councillors do not always follow a consistent logic from agreement to agreement. As a result, benefits tend to be spread thinly across multiple small projects, and contributions from different developments are rarely directed to the same public amenities. The ad hoc nature of negotiations also raises questions about transparency and the potential misuse or abuse of S37s.

The legislative and policy framework for S37

A primary factor in the inconsistent use of S37 is the lack of clarity in provincial legislation and planning policies. Section 37 of the Ontario *Planning Act* offers limited guidance to municipalities in terms of how they should use the tool. The lack of precision in provincial legislation or local policies might also reflect another concern about S37. Some OMB decisions have suggested that attempts to introduce a more systematic approach to assessing the uplift value or allocating the benefits might constitute an illegal charge or tax on developers.

Whither Section 37?

Given the significant questions this paper raises about the use of S37 in Toronto, there should be serious consideration of their abolition or replacement with alternative tools.



7. Final Observations

What conclusions can be drawn from the data? First, they show that there is little certainty about the rationale for using S37 agreements in Toronto. The predominant type of benefits

– capital improvements largely in the form of visual amenities – and their proximity to the developments suggest that the major rationale is compensating residents for the “negative externalities” created by the added density.

The use of benefits to “share the wealth” is less common but important nonetheless and includes benefits directed to community centres, recreation facilities, and public housing, or redistributed to lower-income neighbourhoods. The “infrastructure for density” rationale appears to be applied rarely, though some benefits, such as road improvements or contributions directed to subway stations, provide infrastructure to support additional density.

Section 37 of the Ontario *Planning Act* offers limited guidance to municipalities in terms of how they should use the tool.

How to proceed should depend on the rationale used to justify their use. If the primary use of S37 is to compensate neighbouring residents for the negative externalities of added density, there is a strong case for abolition for three reasons.

First, as with the TDSB case, the amenities secured through S37 agreements often fail to address the negative effects of the development. Second, if the negative effects are so egregious that they significantly upset the quality of life of neighbouring residents, the development should not be allowed in the first place. Third, if neighbourhood impacts are minor and the development otherwise constitutes good planning, why should developers compensate local residents at all?

By contrast, if the intent is to achieve broader planning objectives, reforming the City's S37 policies or identifying alternative tools would be more appropriate. For example, if affordable housing was a stated priority, as it is in British Columbia, municipalities could adopt inclusionary housing provisions requiring all new residential developments to include a fixed percentage of affordable units, or levy a charge requiring developers to pay a fixed amount into an affordable housing fund. Either approach would be more transparent than the present use of S37, and could be applied consistently to all new development. But while Toronto can change its own rules and guidelines for using S37, it is the Province that would have to take responsibility for fundamentally reforming the tool or creating an alternative.

Endnotes

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16. Extensive analysis can be found in the full-length *IMFG Paper No. 13* by Aaron Moore titled, *Trading Density for Benefits: Toronto and Vancouver Compared*, released in February 2013.

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