



# Section 37

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

---

To assist with the implementation of section 5.2.1 (11) of the City of Ottawa Official Plan, Increase in Height and Density By-law.  
(Official Plan Policies attached as Appendix A in this document)

CONTENTS

PAGE

<b><u>Section 37 Implementation Guidelines</u></b>	1
1. Introduction	1
2. Implementation Principles of Section 37	1
3. General Considerations	5
3.1 Timing of Agreement Execution	5
3.2 Timing of Cash Payments	5
3.3 Differentiating Community Benefits from Other Development Requirements	5
3.4 Changes in Previously Secured Community Benefits	5
3.5 Non-Profit Housing Developments	6
3.6 Community Benefits Summary in Financial Implications Section of Final Reports	
<b><u>Protocol for Negotiating Section 37 Community Benefits</u></b>	6
Use of Section 37	6
Determination of Appropriate Types of Community Benefits	7
Consultation with Ward Councillor	8
Community Consultation	8
Other Issues	8
<b>Appendix A: Issues To be Discussed At The Consultation Session</b>	10
<b>Appendix B: Approved Section 37 Policies of the Official Plan (Section 5.1.1, Height and/or Density Incentives)</b>	12

## **Section 37 Implementation Guidelines**

### **Introduction**

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

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

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

### **2. Implementation Principles of Section 37**

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

- 2.1 **The proposed development must represent good land use planning principles:** An owner/developer should not expect inappropriately high density or height increases in return for community benefits and the City should not approve a development simply to get community benefits. Developments must respect good planning principles in terms of appropriate densities and building form and conform to the City’s design guidelines.
- 2.2 **Community benefits and the increase in height and/or density must be set out in the Zoning By-law.** Section 37 must be implemented through a site-specific Zoning By-law amendment. Such a By-law, in addition to containing all of the usual provisions that would govern development on the site, would include a section that requires the owner to enter into an agreement under Section 37 to secure the facilities, services and matters outlined in the By-law.
- 2.3 **Section 37 community benefits should be specific capital facilities, or cash contributions to achieve specific capital facilities.** This principle contains two important sub-principles: a) community benefits should be capital facilities; and b) those capital facilities should be specific capital facilities, not general or indeterminate facilities.

Amenities obtained should benefit the area where the development is located. Increased density can result in higher numbers of people who place higher demands on community amenities, such as daycares and open space. The amenity is provided to maintain or improve existing community liveability and the quality of life in the area that takes the higher density.

Section 37 is not a vehicle to generate general revenue within a local community for non-specific or indeterminate purposes. The term “cash-in-lieu” as used with respect to community benefits means cash contributions toward specific capital facilities, in lieu of the developer being required to actually construct or provide those specific facilities. Generally, any cash contributions should be secured toward community benefits that are defined with sufficient specificity in the agreement to be able to demonstrate a reasonable planning relationship between the contributing development and the community benefits. Cash contributions may be considered as a share of a larger capital project in the vicinity of the development, in instances where the contribution would not cover the full cost (e.g. a pedestrian bridge). Operating, programming, and non-capital maintenance funds are not durable and are not appropriate community benefits.

On occasion, upon agreement between the owner and the City, cash contributions may be made to special accounts already established by City Council and intended to be used for capital facilities in the broader community (e.g. Social Housing Reserve Fund.)

2.4 **There should be a reasonable planning relationship between the secured community benefits and the increase in height and/or density in the contributing development.** At a minimum, this planning relationship includes an appropriate geographic relationship and the addressing of planning issues associated with the development. The priority location for community benefits should be on-site or in the local area. Community benefits may be appropriate amenities and services in the local community that go beyond consideration of matters necessary to support that particular development, and which may be important in maintaining the quality of life in the city while accommodating intensification. Furthermore, Section 37 may be used to secure benefits such as affordable housing or public art that are provided at a city-wide scale rather than necessarily in proximity to the development. This may be deemed to represent a “reasonable planning relationship” because of the basic need for these benefits and the difficulty of providing them in the immediate vicinity.

2.5 **No city-wide formula exists in the Official Plan or these Guidelines for determining the level of Section 37 benefits.** The use of a fixed, value-based formula across the entire city, would likely be challenged in court, and might not survive the challenge on the basis that it constitutes an illegal tax. As a result, most Section 37 agreements are negotiated on a case-by-case basis, and the amount or value of the community benefits in relation to the value of the height or density increase varies from

project to project or from one area of the city to another. The cost of the community benefits should represent a negotiated percentage of the increased land value resulting from the height or density increase.

- 2.6 **Typical community benefits are listed in the Official Plan, (policy 5.2.1.11), but this list is not exhaustive.** The specific community benefits secured in a development are the result of public consultation, discussion among City staff, the owner/developer, the local Councillor and other City agency staff as necessary. As well, consideration should be given to intensification issues in the area, the nature of the development application, and the strategic objectives and policies of the Official Plan. Other benefits not specifically listed in the Official Plan may also be secured. For example, community needs that have been identified through a Council approved assessment such as in a Secondary Plan or a Community Design Plan.
- 2.7 **Good architecture and good design are expected of all developments, as a matter of course, and are not eligible Section 37 benefits.** If the City were to accept good architecture and/or good design as eligible Section 37 benefits, it would be signalling that lower standards are appropriate in developments where Section 37 is not used, which is definitely not the case.
- 2.8 **Visual integrity and symbolic primacy of the Parliament Buildings and other national symbols must not be compromised.** Increases in height and/or density shall not be considered in situations where such increases may compromise the Capital Views Protection policy of the National Capital Commission; or the City's Official Plan's Annex 8A, Central Area Key Views and View Sequences of the Parliament Buildings and Other National Symbols; or Annex 8B, Maximum Building Heights/Angular Planes; or any extension of these key views, view sequences and angular planes beyond the Central Area.
- 2.9 **When reviewing an application for a minor variance involving an increase in height and/or density, planning staff must advise the Committee of Adjustment panel of the City's interest in negotiating a Section 37 community development.** During the course of reviewing a minor variance application for an increase in height and/or density, staff will consider whether or not there is an opportunity to negotiate a Section 37 benefit. Should staff determine such an opportunity exists, they will advise the Committee of Adjustment through the Planning Department's comments that the minor variance should be processed by way of a zoning application and be dealt with at Planning Committee.
- In considering the application, the Committee of Adjustment must decide to either grant the application as is notwithstanding the staff comment on the use of Section 37 or refuse it and require the applicant to submit a zoning application.
- 2.10 **Section 37 cash contributions toward capital facilities should be over and above the facility costs that will be funded through development charges or parks contributions requirements.** Section 37 community benefits in the form of cash contributions may be secured toward services and facilities (or portions thereof) that cannot be, or are not, funded by the Development Charges By-law.

The cash contribution must also be separate from the parks contribution requirements under Section 42 of the *Planning Act*.

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

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

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

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

Section 37 funds shall not be used as a means to justify or support the removal or demolition of cultural heritage resources or to carry out work that is not carried out in accordance with the City-adopted policies described above. Examples of unacceptable work would include the dismantling, relocation or replication of a cultural heritage resource.

- 2.12 **The Ward Councillor must always be consulted by City staff prior to any negotiation of Section 37 community benefits.** The Ward Councillor has a role, if he or she wishes, in determining what benefits should be the subject of negotiation between the City and the developer/owner, and should always be consulted prior to negotiations with the applicant.
- 2.13 **City staff must always be involved in discussing or negotiating Section 37 community benefits with developers/owners.** City staff has a particular responsibility to ensure that the Official Plan policies are being complied with, and must recommend an appropriate package of Section 37 community benefits when the staff report recommending approval of the proposed development is forwarded for Council consideration.

### **3. General Considerations**

#### **3.1 Timing of Agreement Execution**

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

#### **3.2 Timing of Cash Payments**

The payment of community benefits secured as cash will most often be required, as a condition of the Section 37 agreement, prior to the issuing of an above-grade building permit. Where the particular circumstances warrant, for example where restoration of a heritage building is to be carried out prior to the construction of the new portion of the development, or a community facility is needed sooner rather than later for good planning reasons, the payment(s) may be secured at an earlier appropriate trigger.

#### **3.3 Differentiating Community Benefits from Other Development Requirements**

Eligible Section 37 community benefits should be distinguished in staff reports and by-laws from matters secured as a legal convenience, to avoid confusion over what is being explicitly exchanged for increased height and/or density.

Official Plan policy 5.2.1.(11) provides that Section 37 community benefits are facilities, services or matters over and above those that would otherwise be required as part of the development process in the absence of using Section 37. In most cases, matters required for good planning are not considered to be eligible community benefits because they would be required even if Section 37 was not being used.

Community benefits are generally not expected to mitigate adverse planning impact of developments. In fact, in most cases, with the exceptions noted above, anything that is necessary to mitigate adverse impact is considered necessary for good planning and thus should not be deemed an eligible Section 37 community benefit.

#### **3.4 Changes to Previously Secured Community Benefits**

A change to an existing agreement to allocate funds or change the community benefits is often not a simple exercise, but where necessary, the change process must be open, public, and subject to the appropriate legal processes, and be authorized by Council. Council cannot unilaterally amend an agreement. All parties to the original agreement, or their successors in title, must approve the change and sign an amending agreement.

Where a condominium has been registered, all unit owners are considered parties to the agreement.

### **3.5 Non-Profit Housing Developments**

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

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

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

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

### **3.6 Community Benefits Summary in Financial Impact Section of Final Reports**

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

## **Protocol for Negotiating Section 37 Community Benefits**

### **Use of Section 37**

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

## **Determination of Appropriate Types of Community Benefits**

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

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

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

The determination of appropriate type(s) of community benefits for a specific application will conform to the relevant Official Plan policies in the specific context of the application, and the community benefits must bear a reasonable planning relationship to the increase in the height and/or density of a proposed development including, at a minimum, having an appropriate geographic relationship to the development and addressing planning issues associated with the development. The following additional matters, which are listed in no particular order, may play a role:

- i) Consultation with Ward Councillor;
- ii) Consultation with other City Departments;
- iii) Knowledge on the part of City Planning and Growth Management staff, Councillor or other City staff of local community needs;
- iv) Council approved studies or assessments outlining community needs, including any advance assessment of community benefit priorities;
- v) Consultation with the local community; and
- vi) Interests of the applicant.

In the context of compliance with the policies of the Official Plan and seeking agreement with the applicant on an appropriate package of community benefits, consultation with the local Councillor and the community would be a high priority. Section 37 funds should not be used as a substitute for funding which would normally be provided as part of the City's operating budget or as part of the routine capital maintenance program (e.g. road repairs).

### **Consultation with Ward Councillor**

- i) Ward Councillor will be consulted by Planning and Growth Management staff prior to any discussions or negotiations regarding Section 37 benefits with the applicant;
- ii) Staff will provide Ward Councillor with the following information as soon as it is available:
  - advice as to whether Section 37 benefits are appropriate and desirable;
  - appropriate types of benefits, based on any information previously assembled;
  - advice regarding the implications for community benefits of Official Plan policies and other relevant considerations in the context of the specific application; and
  - calculated range of land values of the density increase(s) (derived from estimates from the Real Estate Partnership and Development Office of a range of land values of a basic unit of density);
- iii) Further consultation between Planning and Growth Management staff and the Ward Councillor may occur as necessary and/or as agreed upon between them.

### **Community Consultation**

- i) Community consultation meeting(s) and the statutory public meeting provide the public with opportunities to comment on the proposed development and the appropriate type and/or level of Section 37 community benefits;
- ii) Any further community consultation on Section 37 issues would be coordinated by the Ward Councillor; and
- iii) Consultation with the community by City staff and/or the Ward Councillor in advance of receipt of development applications, to help determine priorities for community benefits, is encouraged.

### **Other Issues**

- i) City Planning and Growth Management staff should coordinate Section 37 negotiations:
  - staff is responsible for compliance with Official Plan policy and for recommending an appropriate decision on the application, including an appropriate package of Section 37 community benefits where applicable;
  - where the Ward Councillor independently pursues discussions with an applicant on Section 37 benefits, Planning and Growth Management staff handling the application must be consulted prior to such discussions.

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

## Appendix A

### Issues To Be Discussed At The Consultation Sessions

#### Where in the city should Section 37 Agreements be pursued?

##### Options

1. City-Wide - Section 37 agreements are pursued on a case by case basis on projects throughout the urban and rural areas.
2. Intensification / Design Priority Areas - Section 37 agreements are pursued on a case by case basis in areas established in the Official Plan that are to absorb intensification and higher density uses, such as:
  - a. Downtown Precincts as defined by the Downtown Ottawa Urban Design Strategy (DOUDS);
  - b. Traditional and Arterial Mainstreets as identified on [Schedule B](#) of the Official Plan;
  - c. Mixed Use Centres as identified on [Schedule B](#) of the Official Plan;
  - d. Other areas with special design needs such as the mainstreets within Villages designated on [Schedule 'A'](#) of the Official Plan, Village core areas identified in [Volume 2C](#) of the Official Plan, community core areas identified in community design plans or secondary plans approved by City Council.
3. Locations within the urban area - Section 37 agreements are pursued where medium to high profile development at medium to high profile densities is permitted in the Zoning By-law. Such locations are identified in secondary plans and in Community Design Plans.

#### What types of projects would Section 37 apply to?

##### Options

1. Minimum project size - Limit where Section 37 agreements will be pursued to projects larger than a specified size, e.g. 5000 sq.m.
2. Minimum density increase - Limit where Section 37 agreements will be pursued to projects that exceed a certain size (e.g. 1500 sq.m.) over what would otherwise be permitted and/or one floor above what is legally permitted.

3. Limit height and density increases to what is permitted in the Zoning By-law and in secondary plans and Community Design Plans - Any zoning in excess of the maximum development limit may be considered eligible for Section 37 benefits.
4. Minimum height of a project - Exempt developments under a certain height - e.g. buildings under four storeys.
5. A combination of the above.

### **Other Considerations**

Applicability to office buildings - Other municipalities have included office buildings for negotiating Section 37 benefits.

Applicability to registered non-profit groups - Other municipalities have exempted such groups from having to provide a Section 37 benefit.

## Appendix B

### *Approved Section 37 Policies of the Official Plan* **Section 5.2.1 (11) - Increase In Height And Density By-law**

Pursuant to Section 37 of the *Planning Act*, the City may authorize increases in the height and density of development above the levels otherwise permitted by the zoning by-law in return for the provision of community benefits. However, no increase in height will compromise any of the Capital Views Protection policy of the National Capital Commission. Public consultation will be included in the development and approval of such a by-law.

Limited increases will be permitted in return for the provision of such community benefits as are set out in the by-law and shall be secured through an agreement as authorized by Section 37 of the *Planning Act*. Such community benefits must be over and above those facilities and services that would otherwise be required as part of the City's standard development review process, standard budgeting process or that may be provided through the Development Charges By-law. The community benefits that may be authorized include, but are not limited to:

- a. Public cultural facilities;
- b. Building design and public art;
- c. Conservation of heritage resources;
- d. Conservation/replacement of rental housing;
- e. Provision of new affordable housing units; land for affordable housing, or, at the discretion of the owner, cash-in-lieu of affordable housing units or land; [Amendment 10, August 25, 2004]
- f. Child care facilities;
- g. Improvements to rapid-transit stations;
- h. Other local improvements identified in community design plans, community improvement plans, capital budgets, or other implementation plans or studies;
- i. Artist live-work studios;
- j. Energy conservation and environmental performance measures;
- k. Conservation of existing greenspace or the creation of new greenspace.