

# **SECTION 37 GUIDELINES 2017**

## **CITY OF OTTAWA**

**APPROVED BY CITY COUNCIL MAY 24, 2017**

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## **Section 1.0 Introduction**

Section 37 of the *Planning Act* allows a municipality, with appropriate Official Plan policies, to pass Zoning By-laws permitting increases in the height and/or density above what is in the existing zoning, in return for the provision of community benefits.

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 density increases are secured pursuant to Section 37 of the *Planning Act*.

The 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. Over time and as Official Plan policies are amended or changes to the *Planning Act* occur, these Guidelines may need to be updated, which can be done through City Council adoption of a report or through Council Direction.

The Guidelines outline key steps to help ensure that the implementation of Section 37 is consistent, regardless of the type of community benefit that is secured. Collaboration amongst participants will ensure a transparent and fair process.

## Section 2.0 Definitions

The following definitions are to be used for the purposes of these guidelines.

**As-of-right zoning** means the existing zoning on a property at the time a development application is deemed complete or the zoning on a property on March 28, 2012 as per Guideline 5.1.

**Cash contributions or cash payments** means money provided to the City that are used toward specific facilities or amenities in-lieu of the Owner constructing or providing those specific facilities or amenities.

**Gross Floor Area (GFA)** means the definition of Gross Floor Area from Zoning By-law 2008-250, as amended.

**Incremental changes in zoning** means any changes to the zoning on a property after March 28, 2012 through a privately-initiated Zoning By-law amendment or Minor Variance application, which resulted in an increase to the permitted density on a site.

**Non-designated Cultural Heritage Resource** means a cultural heritage resource that is not designated under the *Ontario Heritage Act* but that may be listed on the City's Heritage Register or identified by another level of government as having cultural heritage value.

**Non-Profit Housing** means 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*."

**Owner** means the registered owner of the property or a representative (applicant or developer) of the registered owner of the property.

**Secondary increase to GFA** means where an existing Section 37 by-law and agreement apply and there is a change to the proposed building resulting in either additional storeys within the permitted height or a new development application that results in an increase to the number of storeys or the GFA of the proposed building.

**Secondary decrease to GFA** means where an existing Section 37 by-law and agreement apply and there is a change to the proposed building resulting in either a reduction to the number of storeys within the permitted height or a new development application that results in a reduction to the number of storeys or GFA of the proposed building.

### **Section 3.0 What is Section 37 and what can it be used for**

Section 37 community benefits vary from project to project as outlined in this section. Community benefits however, must be over and above what would otherwise be required as part of the City's standard development application review process, parkland dedication requirements, budgeting process and Development Charges By-law. Further, the community benefits must be set out in a by-law and secured through a legal agreement between the Owner and the City that is registered on title.

Section 37 community benefits are not in-kind donations or contributions and the City will not provide recognition in the form of plaques or other means and will not provide naming rights for any benefit provided.

#### **3.1 Planning relationship**

There should be a reasonable planning relationship between the secured community benefit(s) and the proposed development. An increase to density can result in a higher number of people in a community, which can place higher demands on community facilities and amenities. The priority for community benefits is in the local area or where the benefit has an appropriate geographic relationship to the site, such as within the catchment area of a facility or amenity in the local community.

#### **3.2 Community benefits**

The Official Plan provides a list of Section 37 community benefits; however, this list is not exhaustive. There are other ways to determine community benefits including through a planning study or consultation specific to Section 37. In some cases, there may be an existing list of community benefits that was developed through a Community Design Plan (CDP) or Secondary Plan process. The Ward Councillor, Owner, community groups and area residents can participate in determining potential community benefits. Section 6 provides additional information.

#### **3.3 Qualifications for Section 37 contributions**

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

programming or non-capital maintenance costs are not appropriate Section 37 community benefits. On occasion, cash contributions may be made towards special accounts already established by Council, which are intended to be used for capital facilities in the broader community.

### **3.4 Land use planning**

The proposed development must represent good land use planning principles. An Owner should not expect inappropriate increases of height and density in return for community benefits. The City should not approve development applications simply to obtain community benefits. Decisions on development applications must respect good planning principles, conform to applicable Official Plan policies, Community Design Plan provisions and Design Guidelines. Good architecture and urban design are required for all development applications and are not considered eligible Section 37 benefits.

### **3.5 Section 37 and cultural heritage resources**

Section 37 benefits may be used to protect, restore, commemorate or interpret cultural heritage resources such as:

- a. Where there is an identified cultural heritage resource on the subject site, funds may be used to protect, restore, commemorate or interpret the cultural heritage resources.
- b. Where there is no identified cultural heritage resource on the subject site but one or more exist in proximity to the site, funds may be used to fund the conservation of the heritage resource under the direction of the Heritage Services Section or contribute to a heritage grant fund to assist with the future conservation of those resources.
- c. Where the subject site is located in a Heritage Conservation District, funds may be used to interpret the heritage attributes of the district such as interpretive plaques, street signs or streetscape improvements.

Funds for cultural heritage resources will be used in accordance with the *Ontario Heritage Act*, Council-approved heritage policies of the Official Plan, Arts and Heritage Plan and Standards and the Guidelines for the Conservation of Historic Places in Canada.

## **Section 4.0 When does Section 37 apply**

Not all development applications will be subject to Section 37. The City has developed a threshold to determine which development applications will be subject to Section 37.

### **4.1 Section 37 applies to development applications on a city-wide basis, which meets the following development threshold:**

- a. a proposed building of at least 7,000 m<sup>2</sup>; and
- b. where the requested density represents a minimum 25 per cent increase from the permitted as-of-right zoning.

This threshold avoids proposed building designs that increase the height by redistributing the as-of-right density in a way that is consistent with the City's Official Plan policies, and any applicable Secondary Plan, CDP and design guidelines.

### **4.2 Specific exceptions for the applicability of Section 37:**

Notwithstanding the above noted threshold, the following are specific exceptions to Section 37:

- a. Section 37 may be applied differently from these guidelines where there are specific policies in a Community Design Plan or Secondary Plan, which direct the use of Section 37 for different sizes of buildings, different increases in the height or density, or provides specific direction on any of the elements of Section 37.
- b. Section 37 does not apply where non-profit corporations or non-profit housing cooperatives are involved in the development of non-profit housing. If any part of the non-profit corporation's or non-profit housing cooperative's proposed development includes a for-profit component, that portion of the development may be subject to Section 37.

## **Section 5.0 How is Section 37 applied**

Determining the value of Section 37 is one of the most important parts of the Section 37 process. When determining the value of the Section 37 contribution, a standardized approach that is a rigid, value-based formula may constitute an illegal tax and so the determination must be done on a case-by-case basis. This section provides information on how to calculate the uplift value and which draw down factors to use to help determine the value of the Section 37 contribution.

### **5.1 Uplift value rate**

The City will establish the rate for calculating the uplift value, expressed as \$/m<sup>2</sup>, on an annual basis. To ensure an orderly and consistent approach to the calculation of the uplift value, the Realty Services branch will provide the Planning, Infrastructure and Economic Development department an annual uplift value rate based on two geographic zones, as shown in Figure 1. These two zones represent the areas of the city where development applications subject to Section 37 are most likely to occur.

This annual value is expressed in dollars per square metre and will be updated on the City's website on an annual basis by the Planning, Infrastructure and Economic Development department.

### **5.2 Individual appraisals**

For areas outside of the two geographic zones, an individual appraisal will be undertaken by the Realty Services branch and provided to the Planning, Infrastructure and Economic Development department. If the Owner disagrees with the uplift value based on the above, an agreed upon Terms of Reference will be established between the City and the Owner, and the City will hire a Land Evaluator to undertake an individual land appraisal at the Owner's expense.

### **5.3 As-of-right zoning and incremental changes in zoning**

Definitions for as-of-right zoning and incremental changes in zoning are included in these guidelines to ensure that incremental changes in zoning over time that increase the permitted density on a site do not eliminate a proposed development from the application of Section 37. March 28, 2012 was the date that Council passed the first version of the Section 37 Guidelines and this date is used for the purposes of determining incremental changes in zoning. If any incremental changes in zoning have occurred through a privately-initiated *Planning Act* application after March 28, 2012, the zoning prior to these incremental changes will apply for the purposes of calculating the

uplift value for a proposed building in Guideline 5.5.

#### **5.4 Calculation of Gross Floor Area (GFA)**

To ensure the most transparent and fair process possible when determining the uplift value between the as-of-right zoning and the proposed zoning, the City uses the definition of GFA found in the Zoning By-law. This definition reduces the GFA by subtracting hallways, elevators and other service areas of a building. If the definition of GFA is amended in the Zoning By-law, these guidelines will need to also be amended.

#### **5.5 Calculating the uplift value**

The uplift value is determined by multiplying the uplift value rate by the increase of the GFA between the as-of-right zoning and the proposed zoning, using the following applicable criteria:

- a. To calculate the as-of-right GFA, the same reduction that is used for the proposed building will be used to calculate the GFA for the as-of-right zoning. In addition, if the as-of-right zoning regulates the height of a building by metres only, the same floor to ceiling height of the proposed building will be used to calculate the number of storeys for the as-of-right zoning.

For example, if a proposed building's GFA is reduced by 17% based on the GFA exclusions in the Zoning By-law, the as-of-right zoning will use the same 17% reduction in the calculation of GFA. If the proposed building has an average 2.7 metre floor to ceiling height, the as-of-right zoning will use the same floor to ceiling height calculation to determine the number of storeys.

In the rare circumstance where the details of a proposed building are not provided by the applicant, the example listed above will be used to calculate as-of-right GFA.

- b. To determine the increase in GFA for the value uplift on a property that is designated under Part IV of the *Ontario Heritage Act* but does not have a Heritage Overlay, the calculation of the GFA will be based on the as-of-right zoning for the site including the building restrictions found in Heritage Overlay, Section 60(3)(a) to (c) in Zoning By-law 2008-250.
- c. The calculation of the uplift value will be completed after an application is deemed complete. If a decision on the development application is not made until the following calendar year, the uplift value rate that was used in the year when

the application was deemed complete will apply. If the application has been on hold for more than one year, when the application is reactivated, the uplift value rate for that year will apply.

## **5.6 Draw down factors**

The value of Section 37 is determined based on the uplift value as calculated above and then drawn down by the following factors, on a case-by-case basis:

- a. Conformity of the proposed zoning to the applicable policies of the Official Plan, Secondary Plan or CDP, which is not reflected in the as-of-right zoning.
- b. Restoration of a designated cultural heritage resource.
- c. Preservation or restoration of a non-designated cultural heritage resource.
- d. Publicly accessible lands with public easements granted to the City such as:
  - i. internal pathways that connect the site to an existing pedestrian or cycling network that are not already required by a CDP or Secondary Plan; and
  - ii. plaza spaces that are not already required by a CDP or Secondary Plan and that are adjacent to the public realm.
- e. The construction of a park not already listed in the Development Charges by-law.
- f. Implementation of public realm improvements above and beyond what is normally required through the development application review process.
- g. Implementation of publicly accessible benefits incorporated in the proposed development such as daycare space or public art.

Many of these draw down factors may be required to be secured through a Site Plan Control agreement or other mechanism.

## **5.7 Committee of Adjustment**

When reviewing an application for a Minor Variance, staff will advise the Committee of Adjustment of the applicability of Section 37. A Section 37 benefit can only be obtained through the enactment of a by-law, which is not typically done through a Minor Variance application. If a Section 37 opportunity exists, the Planning, Infrastructure and Economic Development department will provide an objection to the Committee of Adjustment and

advise that the application should not be a Minor Variance but rather a Zoning By-law amendment application.

## **Section 6.0 Who is involved in Section 37 and when**

There are a number of different participants in the Section 37 process. Collaboration amongst participants will ensure a transparent and fair process.

The Section 37 Coordinator is part of the Planning, Infrastructure and Economic Development department. The Coordinator's primary responsibilities are to track Section 37 agreements, provide assistance to the Corporate Services department in the financial tracking of agreements, provide status updates on Section 37 projects, assist with the coordination of Section 37 projects, ensure the uplift value rate is updated annually, and is the main point of contact for other City departments, Ward Councillors and Community Associations.

Development Review staff take the lead during the development application review process to facilitate the Section 37 negotiations with the Owner and consult with the Ward Councillor throughout the process. Development Review staff may also consult with other Departments on potential community benefits.

At different stages in the Section 37 process, the public may also be involved, such as at the beginning of the Term of Council or during a CDP process when a list of possible community benefits to be secured through Section 37 list is being developed for their community, and during the development application review process when potential community benefits are being confirmed. Community groups will also receive updates from the Section 37 Coordinator when funds are received and projects are completed.

Towards the end of the process other City departments will be involved to help implement the community benefit.

### **6.1 Section 37 consultation**

The Central wards are most likely to deal with development applications that will be subject to Section 37. To avoid undue delays in the development application review process, it is preferred that a Section 37 list of potential benefits for the Central wards is completed in advance of any development application. These lists can then be provided as a resource to the Development Review staff as well as applicants during the pre-application consultation stage so that there may be an opportunity to provide requested community benefits when a development application is made.

Councillors in these wards are encouraged to contact the Section 37 Coordinator to determine a process to identify potential Section 37 benefits for the Term of Council. If a Ward Councillor chooses not to lead the community consultation, the Coordinator can

assume this responsibility.

## **6.2 Involvement of other City Departments**

Staff in other departments may be required to assist in estimating the cost or value of community benefits. Staff in other departments may also be required to help implement the benefit and assist in estimating the cost or value of ongoing operations and maintenance.

## **6.3 Ward Boundaries**

Along with the circulation requirements of a development application, when such an application straddles a ward boundary, is adjacent to or in close proximity of a ward boundary, Development Review staff will inform any affected Ward Councillors of the applicability of Section 37 and ensure that both Ward Councillors are involved in the process.

## **Section 7.0 How is Section 37 applied and implemented**

The type of community benefit, timing of payment or contribution, oversight of any cash payments and financial requirements must be clearly set out in the by-law and legal agreement, which is registered on title. Reporting on the Section 37 funds by the City will be done in accordance with the requirements of the *Planning Act*.

### **7.1 Reports to Planning Committee**

Reports to Planning Committee involving Section 37 will contain a summary of the community benefits, the estimated cost or value of each community benefit and the timing of their provision, including the payment timing for cash payments and where possible, the anticipated timing of the use of the funds.

### **7.2 Community benefits set out in the Zoning By-law**

Section 37 is implemented through a site-specific Zoning By-law amendment. Such a by-law will 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.

### **7.3 Timing of execution of Section 37 agreement**

The Section 37 agreement will be executed prior to the passing of the by-law that implements the Zoning By-law amendment. Development Review staff will advise Legal Services that a Section 37 agreement is required and request that the agreement be drafted for signing prior to the passing of the by-law.

### **7.4 Timing of the Provision of the Benefit**

Regardless of the circumstances, the timing of the cash payment or provision of the community benefit will be clearly outlined in the Section 37 agreement and:

- a. Cash payments will be required no later than at the time of issuance of an above-grade building permit. If the cash payment is for part of a community benefit that has a set schedule for completion, then this schedule may be used as a basis for negotiation for the timing of payment earlier than an above-grade building permit.
- b. If the community benefit is being provided on-site as part of the development, such as day care space the timing may be determined on the basis of the development's construction schedule and clearly stated in the Section 37 agreement. Further details and securities for this type of community benefit will be secured through the Site Plan agreement.

- c. If the community benefit is off-site and constructed by the Owner, such as improvements on City-owned lands or rights-of-ways, the timing may be determined based on both the development's construction schedule and the City's timelines and clearly stated in the Section 37 agreement. Further details and securities for this type of community benefit will be secured through the Site Plan agreement.

## **7.5 Indexing of funds**

Where cash payments are secured through a Section 37 agreement, the funds will be indexed using the Statistics Canada Construction Price Index for Ottawa that applies to the type of community benefit being secured (residential or non-residential) and will be outlined in the Section 37 agreement. This indexing will be calculated from the time the agreement was executed to the time the cash payment is due.

## **7.6 Financial reporting and tracking requirements**

The use, tracking and reporting of all funds will be done by the Corporate Services department, with support by the Planning, Infrastructure and Economic Development department and any other department involved in the use of the funds. All financial reporting requirements of the *Planning Act* will be included in the the annual Treasurer's Report on Growth-Related Revenues.

## **7.7 Affordable Housing**

Any cash payments towards an affordable housing project will be clearly stated in the Section 37 agreement and the timing of the use of the funds will help to determine the timing of the cash payment. If there is no specific timing for the use of the funds, the latest a cash payment will be required is prior to the issuance of an above-grade building permit. The use of any cash payments towards affordable housing will be under the discretion of the General Manager of Community and Social Services in consultation with the Ward Councillor.

## **Section 8.0 How can an existing agreement be changed?**

From time to time, it may be appropriate to modify existing Section 37 agreements. In most circumstances, the community benefit or cash payment is required prior to the issuance of an above-grade building permit. Since some developments may not be built for years after a Section 37 by-law is passed and the legal agreement is executed, it may be necessary to modify the community benefit for a variety of reasons.

### **8.1 Changes to previously secured community benefits**

Any changes to an existing Section 37 agreement, such as to reallocate funds or modify the community benefit must be open with agreement from the Ward Councillor. Modifications to the community benefit may be redirected to a different community benefit without requiring an amendment to the site specific by-law, provided that:

- a. a clause to this effect is included in the original by-law and the Section 37 agreement;
- b. the funds are redirected to a purpose that represents a reasonable planning relationship to the original development application; and
- c. concurrence is received by the Ward Councillor.

The City and all parties to the agreement or their successors on title, must approve the change and execute an amending agreement.

### **8.2 Unspent or Unallocated Funds**

Any changes to an existing Section 37 agreement, such as to reallocate funds or modify the community benefit must be open with agreement from the Ward Councillor. If there are unspent or unallocated funds from a cash payment for a period of three-years after the receipt of the funds, the funds may be redirected to a different community benefit without requiring an amendment to the site specific by-law, provided that:

- a. a clause to this effect is included in the original by-law and the Section 37 agreement;
- b. the funds are redirected to a purpose that represents a reasonable planning relationship to the original development application; and
- c. concurrence is received by the Ward Councillor.

Notwithstanding the above, cash payments towards affordable housing are likely to be held for a number of years in order to accumulate enough funds to be used as effectively as possible. As a result, funds may be allocated but not spent within the above noted three-year timeframe. Affordable housing funds will only be reallocated if recommended by General Manager of Community and Social Services and the above-noted requirements are satisfied.

The City and all parties to the agreement or their successors on title, must approve the change and execute an amending agreement.

### **8.3 Secondary increase in GFA**

Secondary increases in GFA is defined in Section 2.0 of these guidelines. Secondary increases in GFA:

- a) do not need to meet the thresholds identified in Section 4.0 because the original application requested an increase in GFA that met the requirements of Section 37;
- b) will be calculated using the current annual uplift value rate determined for that year of the proposed GFA increase;
- c) will require an amendment to the original agreement to reflect the additional Section 37 benefit or a new agreement;
- d) will require an amendment to the original by-law; and
- e) concurrence is received by the Ward Councillor.

The City and all parties to the agreement or their successors on title, must approve the change and execute an amending agreement.

### **8.4 Secondary decrease in GFA**

Secondary decreases in GFA is defined in Section 2.0 of these guidelines. Secondary decreases in GFA will need to be re-evaluated to determine if the development threshold for Section 37 is met.

If it is determined that the Section 37 development threshold is still met but the density is less than the previously proposed density at the time of Zoning By-law amendment approval:

- a) the original agreement will remain in effect, unless the zoning is amended reducing the density on the site;
- a) a new uplift value will be calculated using the current annual uplift value rate determined for that year for the proposed GFA;
- b) an amendment will be made to the original agreement to reflect the reduced Section 37 benefit;
- c) an amendment to the original Section 37 by-law may be required; and
- d) concurrence is received by the Ward Councillor.

If it is determined that the Section 37 development threshold is not met:

- e) the original agreement will remain in effect, unless the zoning is amended reducing the density on the site;
- f) an amendment to the original agreement will be made to indicate that the reduced density is not subject to a Section 37 benefit;
- g) an amendment to the original Section 37 by-law may be required; and
- h) concurrence is received by the Ward Councillor.

In either case, the City and all parties to the agreement or their successors on title, must approve the changes and execute an amending agreement.

