Bringing Community Benefits to Toronto Neighbourhoods

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Executive Summary

This paper provides a legal overview and analysis of how community benefits and Community Benefits Agreements (CBAs) can be used in the Toronto land-use planning context.

Community benefits help maximize the positive social and economic impact of infrastructure and real estate development projects. Through engagement with affected communities, benefits are negotiated that can include local procurement, workforce and hiring opportunities, and improved services and facilities. This engagement can also increase the potential for local support for developers' projects. While community benefits and similar tools have had great success in the United States and Scotland, they are just beginning to take root in Canada.

This paper proceeds in three sections. The first section overviews Ontario's hierarchical planning framework and City of Toronto planning tools. The second section looks at the potential of these tools – specifically site plan approval, development charges, zoning, and s. 37 – to secure different types of community benefits. The final section analyzes two clusters of policy options to encourage community benefits and CBAs: amendments to the planning regime and a range of potential City-initiated incentives. I conclude that:

- Community benefits are not a desirable component of every project. Incentives should be targeted so that community benefits assist neighbourhoods and populations most in need.

- Community benefits should be recognized within the Provincial and/or City planning framework. Developers and communities would be more likely to expend resources negotiating and implementing CBAs if these agreements were recognized as an element

of good planning. Amendments to specific sections of the *Official Plan* could help create a targeted approach to encourage community benefits.

- The City's current planning tools are not well-suited to incent community benefits or CBAs. But some of these tools could potentially be used, for example, making the provision of community benefits a condition precedent to the partial removal of holding provisions.

- S. 37 agreements have the greatest overlap of any planning tool with the types of benefits typically associated with community benefits. However, in order for s. 37 to be an effective delivery mechanism for community benefits, the City needs to amend its *Official Plan* and s. 37 protocols a) to allow for the provision of non-capital benefits and b) to require more significant consultation with affected communities.

- The City could reduce or waive various planning requirements or fees in order to incentivize community benefits – for example, by waiving parking requirements – but may be reluctant to do so due to the potential impact on the City's budget.

- Whatever approach is ultimately adopted should be transparent and pre-emptive. The City should conduct consultations with local communities through CS&F Studies, reinvigorated s. 37 consultations, or the Development Permit System *before* development occurs. This way local needs and aspirations can be clearly and objectively identified and developers can plan their buildings, fully knowing what the community expects of them.

Introduction:

The purpose of this paper is to provide a legal overview and analysis of how community benefits and Community Benefits Agreements can be used in the Toronto planning context.

Community benefits help maximize the positive social and economic impact of infrastructure and real estate development projects through engagement with affected communities, local procurement and hiring practices, and improved services and facilities. This engagement can also increase the potential for local support for developers' projects. While CBAs and similar tools have had great success in jurisdictions such as the United States and Scotland, they are only just beginning to take root in Canada.

This paper proceeds in three sections. The first section overviews Ontario's hierarchical planning framework and City of Toronto planning tools. The second section looks at the potential of these tools – specifically site plan approval, development charges, zoning, and s. 37 – to secure different types of community benefits. The final section analyzes two clusters of policy options to encourage community benefits and CBAs: amendments to the planning regime and a range of potential City-initiated incentives. I conclude that while community benefits should not be construed as a desirable component of every development, the City should create a policy framework for them that a) targets neighbourhoods and populations in the greatest need, and b) pre-emptively identifies those needs.

Section 1: Land-Use Planning in Toronto

Ontario pursues its diverse land-use planning objectives through a hierarchical planning regime. Municipal planning decisions are subordinate to provincial legislation and policies, which are interpreted and enforced by the Ontario Municipal Board (OMB), a quasi-judicial planning review body.[1] This section examines provincial and municipal land-use planning tools, the functions of the OMB, and current mechanisms the City of Toronto uses to recuperate the costs of development and to extract benefits from developers.

Provincial Planning Tools

The planning policy framework in Ontario is hierarchical. The *Planning Act*, *Provincial Policy Statement*, *Growth Plan*, and *Greenbelt Plan* create a broad vision for land-use in the Greater Toronto Area with which municipalities must comply.

The provincial planning hierarchy is established by the *Planning Act*, which has existed since 1946.[2] This law gives municipalities most of their planning authority, including the power to create official plans that lay out a broad framework for land-use, infrastructure, comprehensive zoning bylaws, and subdivision plans. All planning decisions must have regard for the provincial interests listed in s. 2 of the *Planning Act*. Many of these interests are economic or environmental, but also include:

- the adequate provision and distribution of educational, health, social, cultural and recreational facilities;
- the adequate provision of a full range of housing;
- the adequate provision of employment opportunities; and

[1] Paul Hess & André Sorensen, "Compact, Concurrent, and Contiguous: Smart Growth and 50 years of Residential Planning in the Toronto Region" (2015) 36:1 Urban Geography 127 at 130.
[2] *Planning Act*, RSO 1990, c P.13, s 71.

- the appropriate location of growth and development[3]

In other words, the provincial interests which are part of "good planning" include social services and employment, but exclude local community interests.

S. 3 of the *Planning Act* authorizes Ontario to create a *Provincial Policy Statement* (*PPS*).[4] The *PPS* – most recently updated in 2014 - sets out a province-wide vision for land-use, infrastructure provision, and environmental protection.[5] The *PPS* encourages intensification and redevelopment in designated areas to accommodate residential and employment growth. It directs growth to strategic nodes and corridors and encourages sustainable land-use patterns that increase the use of transit. S. 3(5) of the *Planning Act* requires that municipal planning decisions be consistent with both the *PPS* (and any other provincial plans).[6][7]

To provide more specific direction for growth management in the Greater Golden Horseshoe, the Province established the *Growth Plan for the Greater Golden Horseshoe: Places to Grow* in 2006.[8] In order to combat sprawl, the *Growth Plan* identifies density and intensification targets for municipalities, urban growth areas, and rules for settlement boundary expansions. The *Growth Plan*'s partner is the Greenbelt, which Ontario created through the *Greenbelt Act*[9] and the *Greenbelt Plan*.[10] Currently, the Greenbelt is a 1.8 million acre band that protects green space, farmland, forests, wetlands, and watersheds within the Greater Golden

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[3] *Planning Act*, *supra* note 2, s 2.
[4] *Planning Act*, *supra* note 2, s 3.
[5] Ontario, Ministry of Municipal Affairs and Housing, *Provincial Policy Statement*, (Toronto: Queen's Printer for Ontario, 2014) at 1.
[6] *Planning Act*, *supra* note 2 at s. 3(5).
[7] *Toronto (City) v R & G Management Inc.*, 2009 OJ No. 3358 at para 10, 63 OMBR 25.
[8] Ontario, Ministry of Infrastructure, *Growth Plan for the Greater Golden Horseshoe: Places to Grow*, 2013 update (Toronto, Queen's Printer for Ontario 2006).
[9] *Greenbelt Act*, SO 2005, c 1, s 2.
[10] Ontario, Ministry of Municipal Affairs and Housing, *Greenbelt Plan* (Ontario: Queen's Printer for Ontario, 2005).

Horseshoe. As mentioned above, municipal planning decisions must be consistent with these two provincial plans. The *Metrolinx Act* authorized the Province to create an additional component that would complement the *Growth Plan* and *Greenbelt Plan* - a transportation planning policy statement[11] -but this document has never been created. Instead, Ontario relies primarily on *The Big Move* – its regional transportation plan for the Greater Toronto and Hamilton Area - in relating transportation and land-use planning.

Municipal Planning Tools

Lower in the planning hierarchy are four instruments that municipalities use to implement provincial and local planning policy – official plans, zoning, site plans, and by-laws.[12]

First, Toronto's *Official Plan* sets out the City's land-use policies.[13] The *Official Plan* outlines broad planning goals related to housing, infrastructure, economic development, transit-oriented development, and environmental stewardship. A major component of the *Official Plan* is focusing development in areas of the City that have transportation and utility infrastructure in place. The *Official Plan* channels high-rise development to downtown Toronto and four other nodes in the City – the "downtowns" of Toronto's pre-amalgamation municipalities. The *Official Plan* also encourages midrise development along Toronto's avenues. Toronto planners can create secondary plans for areas that may expect significant redevelopment. A secondary plan is an amendment to the *Official Plan* which provides more specific planning objectives and land-use designations for a given area. As part of the *Official Plan*, a secondary plan must also be consistent with provincial policies.

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[11] *Metrolinx Act*, SO 2006, s 31.1.
[12] Bob Lehman, "The Growth Plan: The Role of Zoning (2013) 28:2 Ontario Planning J 10 at 10.
[13] City of Toronto, *Official Plan*, June 2015 consolidation (Toronto: Toronto City Planning, 2002).

Second, zoning by-laws link the planning goals and objectives that are in the *Official Plan* (and any relevant secondary plan) to every piece of land in a city.[14] Zoning by-laws attach land-use permissions and restrictions to either specific properties or groups of properties. Zoning by-laws state exactly what types of land-uses are permitted in various areas, e.g. residential, commercial, etc. They establish standards for development such as lot size and frontage, building setbacks, height and built form, the number and dimensions of parking spaces, and requirements for public space.[15] In 2013, the City of Toronto enacted a single city-wide zoning by-law that consolidated and harmonized 43 zoning bylaws the City inherited from its pre-amalgamation municipalities. Zoning by-laws must be consistent with the *Growth Plan* and PPS, as well as conform to the *Official Plan*.

Third, site plans allow City Staff to review and assess the specific details of a development proposal.[16] S. 114 of the *City of Toronto Act*[17] grants the City authority to designate "areas of Site Plan Control."[18] Under City by-law, all of Toronto is an area of Site Plan Control.[19] This means that for most redevelopment proposals, with certain exceptions, developers have to submit a site plan, which shows detailed schematics of the site and proposed building. City planners examine the design and technical aspects of the proposed development to ensure it aligns with building regulations and relates well to its surrounding context.

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[14] Jason Thorne, "Creating a Supportive Zoning Regime" (2013) 28:2 1 at 1.
[15] Requirements for parking spaces are particularly expensive for developers, costing around $27,000. In 2014, Toronto built its first condo with no permanent resident parking spaces; City Council had to give the development special approval.
[16] Other municipalities in Ontario exercise site plan control pursuant to s. 41 of the *Planning Act*.
[17] *City of Toronto Act*, SO 2006, c 11, s 114.
[18] *Planning Act*, *supra* note 2, s 41.
[19] City of Toronto, by-law No. 774-2012, *Site Plan Control*, (8 June 2012), s. 415-43.

Fourth, Toronto uses by-laws to achieve planning objectives other than those related to zoning. For example, in 2009 Toronto enacted a by-law requiring new buildings with a minimum floor area of 2,000m^2 to have green roofs.[20] Developers can apply for a variance or an exemption from this requirement. A variance allows the developer to create a smaller green roof than is required whereas an exemption allows the developer not to build a green roof at all. In exchange for either a variance or exemption, the City expects a cash-in-lieu payment of $200/m^2. Similarly, s. 42 of the *Planning Act* authorizes municipalities to require developers to set aside a certain amount of land for parkland when developing or redeveloping land or provide cash in-lieu of such a dedication.[21] Toronto's by-law for parkland dedication provides more details regarding such conveyances of the fee in lieu of parkland dedication.[22]

The Role of the Ontario Municipal Board

Any decision by the City regarding a development proposal can be appealed to the Ontario Municipal Board (OMB). The OMB is a provincially created quasi-judicial body whose primary role in land-use planning is to hear planning disputes concerning amendments to zoning by-laws and official plans.[23] The OMB derives most of its authority from the *Ontario Municipal Board Act*[24] and from the *Planning Act.*[25] However, many of the board's powers, procedures, and practices are not codified in law, but have been developed by the OMB itself.

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[20] City of Toronto, by-law No 583-2009, *Green Roofs By-Law* (27 May 2009), s 492-2(A).
[21] *Planning Act*, *supra* note 2, s 42.
[22] City of Toronto, by-law No. 1020-2010, *Harmonization of Parkland Dedication Requirements* (27 August 2010), s E-2.
[23] Aaron Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development* (Toronto: University of Toronto Press, 2013) at 38 [Moore].
[24] *Ontario Municipal Board Act*, RSO 1990, c O.28 s 34-53.
[25] *Planning Act*, *supra* note 2, s 34(19).

The OMB wields significant power in its role as a quasi-judicial appeals body. It can deny an appeal, overturn a municipal government's decision, substitute its own decision for that of a municipality, or choose not to hear an appeal at all. All settlement agreements must be presented and defended before the Board and, before granting approval, the Board must be satisfied that the agreement is in the public interest and in conformity with the principles of good planning.[26] The subjective nature of good planning gives the OMB great discretion in its rulings. The OMB cannot resolve many of the issues that come before it simply by interpreting and applying the law. As a result, it "essentially makes provincial land-use policy by default."[27] The Board is not subject to the doctrine of *stare decisis* and is not bound by its prior decisions.[28] However, it has developed principles over time to which it adheres. For example, in *Clergy Properties Ltd. v City of Mississauga*, the OMB created the principle, subject to certain exceptions, that applicants to an approval authority must be assessed against the rules in place at the time of the application. This way an approval authority cannot change the rules following the submission of an application so it can consider the application under more favourable policies that have been crafted in response to the application.

The OMB is controversial. Critics charge that it is undemocratic, unaccountable, and serves as a "surrogate planning board" that allows developers to do "an end-run around Toronto's planning department and City Council."[29] Developers are the appellant in over 60% of appeals to the OMB – neighbourhood associations and citizens appeal far less to the OMB. However, Aaron Moore argues that the OMB serves an important function. Municipalities in

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[26] *Glenarda Properties Ltd. v Toronto (City)* (2000), 40 OMBR 234 (OMB).
[27] Moore, *supra* note 23 at 41.
[28] *Blue Circle Canada Inc. v Burlington (City)* (1999), OMBD No. 889 (OMB).
[29] Martin Regg Cohn, "How the OMB Stifles Democracy in Ontario", *The Toronto Star* (27 August 2013), online: < http://www.thestar.com/news/queenspark/2013/08/27/how_the_omb_stifles_democracy_in_ontario_cohn.html>.

Ontario can easily manipulate and amend their own planning laws. According to Moore, the process of constant amendment erodes any significance that planning laws may have. Further, local councillors (who have enormous control over development in their wards) often make decisions to appease their constituents. These decisions often do not represent good planning and are not in the larger public interest. The OMB bases its decisions on its own perception of good planning. "The board persists because without it there would be little rhyme or reason to planning in Ontario's municipalities beyond municipal councillors' political calculations."[30] Essentially, the OMB takes some of the politics out of planning.[31] Privately, some councillors are happy to let the OMB make the important and controversial planning decisions. Also, the prospect of appeal to the OMB discourages councillors from making entirely political land-use planning decisions and gives them political cover to compromise.

Development Charges

Development charges are fees collected from developers when the City issues a building permit. The *Development Charges Act* states, "a municipality may by by-law impose development charges against land to pay for increased capital costs required because of increased need for services arising from development of the area to which the by-law applies."[32] Development charges can recover the capital costs associated with purchasing land, or acquiring, leasing, constructing, or improving a building, structure, or facility.[33] The *Act* also allows municipalities to recover the costs of certain services, including water and waste water services,

[30] Moore, *supra* note 23 at 184.
[31] Marcus Gee, "Is the OMB a beast that should be slayed?", *The Globe & Mail* (3 February 2016), online: <http://www.theglobeandmail.com/news/toronto/is-the-omb-a-beast-that-should-be-slayed/article28541017/>.
[32] *Development Charges Act*, SO 1997, c 27, s 2.
[33] *Ibid*, s 5(3).

electrical power services, police services, and fire protection services.[34] There are a range of prescribed services that are ineligible for development charges recoupment, including cultural facilities and acquiring land for parks.[35] In the Greater Toronto Area, development charges represent 32% of municipal capital funding - well above the provincial average of 15%.[36]

The *Development Charges Act* also imposes conditions for when and how much a municipality can charge a developer. To impose a development charge, there must be both an increase in needs for services *and* an increase of capital costs arising from the increased needs.[37] This means that a development charge cannot fund a new service.[38] Each municipality is required to produce a background study outlining its projected growth and providing justification for the level of its development charges. The municipality must base the projections on an average level of service for the preceding 10 years.[39] Furthermore, the *Development Charges Act* requires municipalities to give developers a 10% discount on development charges for services that are not specified in it.[40] Municipalities have criticized the restrictiveness of the legislation, arguing that it does not allow them to invest in critical infrastructure.[41] It is worth noting, however, that Toronto has the lowest development charges in the Greater Toronto Area.[42]

Toronto's *Development Charges By-law* calculates development charges on a municipal-

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[34] *Ibid*, s 5(5).
[35] O Reg 82/98, s 2.1(1).
[36] "Frozen in Time: Development Charges Legislation Underfunding Infrastructure 16 years and counting", Municipal Finance Officers' Association of Ontario (23 August 2013) [Frozen].
[37] *Supra* note 32, s 2(1).
[38] *Orangeville District Home Builders Association v Orangeville* (town), [2010] OMBD No 762, at para 33.
[39] Mia Baumeister, "Development Charges Across Canada: An Underutilized Growth Management Tool?" (2012) Institute on Municipal Finance & Governance Working Paper No 9, online: < http://munkschool.utoronto.ca/imfg/uploads/201/imfg_no.9_online_june25.pdf>
[40] *Supra* note 32, s 5(1).
[41] "Frozen", *supra* note 36.
[42] Natalie Kalata, "Condo Development Fees Could Double Next Year" *CBC News* (26 June 2013), online: < http://www.cbc.ca/news/canada/toronto/condo-development-fees-could-double-next-year-1.1306986>.

wide basis according to specified criteria, such as number and type of dwelling.[43] All projects meeting certain criteria pay the same charge regardless of the actual costs that the development creates. Ray Tomalty and Andrejs Skaburskis argue that this scheme is "totally disconnected from planning goals."[44] Development charges could promote planning goals by differentiating the fee depending on a project's attributes that affect its net external cost. For example, projects that are mixed-use, higher density, located in preferred centres, or in areas designated for intensification should enjoy lower development charges.[45] However, there are a few exceptions, which demonstrate that development charges can be used as fine-grained planning tools in Toronto. To encourage mixed-use developments and the provision of employment, the City only imposes development charges for the residential space in a mixed-use building.[46] Another exception is the *Toronto Green Standard*, which City Council adopted in 2009.[47] It is a two-tier set of performance measures for sustainable site and building design. Tier 1 is required for all new construction in Toronto. Tier 2 is a higher, voluntary level of performance; projects that achieve Tier 2 are eligible for a partial refund on development charges. The purpose of the *Toronto Green Standard* is to promote sustainable site and building designs. However, so far only five development projects have received Tier 2 certification.

Section 37

Another municipal financing tool is s. 37 of the *Planning Act*. It states that a municipality may through a by-law "authorize increases in the height and density of

[43] City of Toronto, by-law No. 1347-2013, *Development Charges By*-Law (11 Oct. 2013), s 415-7(A).
[44] Ray Tomalty & Andrejs Skaburskis, "Development Charges and City Planning Objectives: The Ontario Disconnect" (2003) 12:1 Canadian J of Urban Research 142 at 144.
[45] *Ibid.*
[46] *Supra* note 43, s 415-7(A)(1).
[47] *Ibid*, s 415-7(A)(2).

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."[48] In other words, s. 37 lets Toronto negotiate contributions towards local benefits for development applications that exceed a site's zoned height and density. As directed by the *Planning Act*, Toronto's *Official Plan* sets out a framework for the use of s. 37 agreements. While the language of the *Planning Act* is quite broad – including facilities, services, or other matters – the Toronto framework is more restrictive: it states that height or density increases may only be permitted in exchange for "capital facilities" that "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."[49] The *Official Plan* also states that regardless of the extent of the benefits negotiated, the "development must constitute good planning."[50] In other words, developers are not merely paying the City to accept a badly designed project. In practice, s. 37 contributions come in the form of "cash-in-lieu" contributions towards specific capital projects or "in-kind" benefits the developer builds for the local community. Toronto has secured hundreds of millions of dollars' worth of s. 37 benefits since it amalgamated.[51] Because s. 37 agreements are meant to provide benefits in proximity to development, they have been concentrated in the areas that have experienced the most rapid growth, i.e. the downtown core.[52]

There are restrictions on the types of in-kind benefits that can be procured through s. 37.

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[48] *Planning Act*, *supra* note 2, s 37.
[49] *Official Plan, supra* note 13 at 5.1.1.
[50] *Ibid.*
[51] Toronto, Gladki Planning Associates, *Section 37 Review: Final Report*, (Toronto: City of Toronto, 2014) at 1 [Gladki].
[52] Aaron Moore, "Trading Density for Benefits: Section 37 Agreements in Toronto" (2013) Institute on Municipal Finance & Governance Working Paper No. 2 [Moore Trading].

According to the Ministry of Municipal Affairs and Housing, s. 37 can "support intensification, growth management, and other community building objectives" and "provide desirable visual amenities to enhance the development site and the surrounding neighbourhood."[53]

The OMB has made two important points related to s. 37. First, there must be a 'nexus' between a development and the benefits secured from the developer. In *Toronto (City) Official Plan Redesignate Lands Amendment (Re)*, the OMB held, "There must be a real and demonstrable connection between the section 37 benefit being requested and the positive features of the development proposal, as stated in the Official Plan policy."[54] In *Sterling Silver Development Corp. v Toronto*, the OMB similarly stated, "there must be a nexus between the development and the section 37 benefits, demonstrating that the benefits pertain to the development (whether on site or off), not to unrelated municipal projects (no matter how meritorious)."[55] Second, municipalities must create s. 37 policy that is predictable. In *Toronto (City) Official Plan*, the OMB stated that "when seeking increases in height or density any applicant should be able to ascertain with some certainty what it will be required to provide in terms of a package of public benefits pursuant to s. 37."[56] However, if the rules were too formulaic, the OMB might declare it a tax *ultra vires* of municipal jurisdiction.

In response to the OMB's rulings, the City of Toronto has identified a list of benefits that the City can secure in the *Official Plan* and has adopted the *Implementation Guidelines for Section 37 of the Planning Act*. In addition to restating s. 37 policies in the *Official Plan*, this

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[53] Ontario, Ministry of Municipal Affairs and Housing, *Height and Density Bonusing (s. 37)*, (Toronto: Queen's Printer for Ontario, 2009).
[54] *Re Toronto (City) Official Plan Residential Development Amendment* (2000), OMBD No. 1102 (OMB).
[55] *Sterling Silver Development Corp. v Toronto (City)* (2005), 51 OMBR 403 (OMB).
[56] *Supra* note 54.

document states that, "community benefits should be specific capital facilities, or cash contributions to achieve specific facilities."[57] The document also states that no citywide formula can be used to determine the level of s. 37 benefits because it would constitute "an illegal tax," despite the fact that Toronto has embraced a formula-based approach for certain geographic areas, i.e. North York Centre.[58] In Toronto the amount of density, the value of benefits, and the type of benefit is secured on a case-by-case basis.

For reasons that will be explored below, City Councillors are the driving force behind s. 37 negotiations. The result is that s. 37 usually results in "desirable visual amenities" which a Councillor's constituents can see and remember.[59] Ute Lehrer and Thorben Wieditz argue that s. 37 is mostly used to provide art and park space rather than affordable housing or community centres because the former are more likely to increase property values.[60] As such, s. 37 agreements tend to facilitate gentrification rather than maximize the social value of dollars spent related to development. That said, there is an emerging practice in downtown wards among Councillors that a portion of s. 37 funds are dedicated to TCHC repairs and affordable housing.[61]

In short, Ontario's hierarchical planning regime allows it to accomplish a range of land use planning objectives. This regime is ultimately enforced by the OMB which plays an important role in rationalizing the planning system. Municipalities use development charges and s. 37 agreements to help finance the capital costs associated with development.

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[57] Toronto, City Planning Division, *Implementation Guidelines for Section 37 of the Planning Act* (Toronto: City Council, 2007) s 2(3).
[58] *Ibid*, s 2(5).
[59] Moore Trading, *supra* note 53.
[60] Ute Lehrer & Thorben Wieditz, "Condominium Development and Gentrification: The Relationship Between Policies, Building Activities and Socio-economic Development in Toronto" (2009) 18:1 Canadian J of Urban Research 140 at 149.
[61] Toronto, Toronto and East York Community Council, *Final Report – 43, 49 and 51 Gerrard Street West and 695 Bay Street – Zoning Amendment* Application (Toronto: 2014) at 3(a)(iii).

Section 2: Overlap between Planning Tools & Community Benefits

This section defines the term "community benefits," assesses Toronto's existing planning tools, and asks which – if any – of these tools promote the same types of benefits. The purpose of asking this question is to determine whether existing planning instruments can act as a delivery mechanism for community benefits, either

a) by having the City attach conditions to specific planning provisions or provide incentives in return for developers providing community benefits; or
b) by encouraging developers to enter CBAs with local communities or community coalitions.

What are Community Benefits?

The term 'community benefits' refers to physical, social, and economic benefits for a local community that are leveraged (for the most part) from dollars already being spent on major infrastructure or land development projects. There are two primary models for community benefits: private and public, although "hybrid" models which combine elements of both are also found.

The private model takes the form of CBAs, legally binding contracts generally signed by community groups or coalitions and developers that set forth specific local benefits for a project.[62] Found primarily in the United States, CBAs are usually the product of considerable negotiation with local community-based groups (often a coalition of these groups) which pledge to support the project in exchange for the local benefits.[63] A typical CBA contract a) describes the parties involved, b) describes the project affected by the agreement, c) lists the developer's

[62] Julian Gross, "Community Benefits Agreements: Definitions, Values, and Legal Enforceability (2008) 17:1-2 Journal of Affordable Housing 35 at 37.
[63] *Ibid.*

agreed-to commitments, and d) pledges the community to support the project, often including a settlement or cooperation agreement.[64] Developers enter into CBAs in order to gain the support of the local community, which forestalls litigation and can help expedite regulatory permissions required from a city or planning authority. Since CBAs allow communities to negotiate and offer input with respect to specific concerns near the beginning of the development process, it is far less likely that the project will be delayed down the road by local politicians or legal challenges.[65] CBAs allow for constructive engagement between private, public, and local interests. Even if unanimous consent is not secured, trust may grow amongst the various parties, making the overall success of the project more likely.[66] This can result in heightened support from regulatory and planning authorities for a project. However, there are potential problems with CBAs. First, there is the issue of whether community coalitions have the legal personality requisite to sign a CBA. Second, local community groups often do not have the financial, technical, or legal capacity to negotiate, monitor and enforce CBAs with developers.

The public model involves the delivery of community benefits through clauses in public procurement documents (community benefits clauses). In the United Kingdom, many governments and government agencies include community benefits clauses in Requests for Proposals (RFPs) when putting out tenders for the construction of public infrastructure projects. Bidders are required to provide a plan for targeted recruitment and training of low-income or traditionally disadvantaged communities, and/or local business and social enterprise

[64] Andrew Galley, "Community Benefits Agreements" (2015) 2 The Prosperous Province: Strategies for Building Community Wealth 8.
[65] Christine Fazio & Judith Wallace, "Legal and Policy Issues Related to Community Benefits Agreements" (2010) 21 Fordham Environmental Law Review 543 at 544.
[66] Steven Frank, "Yes in my Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements" (2009) 42:227 Indiana Law Review 227 at 249.

opportunities on the project.[67] Some UK governments are also moving to include community benefits provisions on service contracts, not just construction. In Scotland, the recently enacted *Procurement Reform Act* mandates consideration of a community benefit requirement in regulated procurements of £4 million or more.[68]

In Canada, governments and public agencies have largely taken the lead in negotiations with developers, in discussions with community representatives, and in providing the impetus for community benefits to occur.[69] The first Toronto-based example was the inclusion of community benefits clauses in the RFP for the redevelopment of the Regent Park neighborhood – one of Toronto's oldest and largest public housing developments. The project was preceded by 3 rounds of consultation over seven months, involving more than 2000 residents. The Toronto Employment and Social Services division developed an employment plan for the project and Daniels Corporation, the developer, worked to ensure its on-site contractors and off-site suppliers fulfilled the plan's requirements.

A third variation is the hybrid model. These are multi-party CBAs, where a developer, government or government agency, and one or more community groups are all parties to a contract. This was the model for the Vancouver Olympic Village in False Creek. The development agreement between the City of Vancouver and the developer, Millennium Properties Ltd., included a clause to negotiate a separate CBA between the developer and a non-profit agency which acted as a "community representative and negotiator, acting on the advice of

[67] The Scottish Government, *Community Benefits in Public Procurement*, by Richard MacFarlane, Mark Cook, & Anthony Collins Solicitors (Edinburgh: 2008) at 14.
[68] *Procurement Reform Act, 2014* (Scotland), asp 12, s 25.
[69] Lisa Bornstein, "Moving Beyond Indignation: Stakeholder Tactics, Legal Tools and Community Benefits in Large-Scale Redevelopment Projects (2015) 5:1 Oñati Socio-Legal Series 29 at 39.

a coalition of community organizations and representatives."[70] In the end, the City of Vancouver also became a signatory to this agreement.

In this paper, I look primarily at how Toronto can incent developers to undertake private CBAs, but also at how, in certain circumstances, the provision of certain benefits could be made a requirement of developers through the planning approval process. For some of the planning tools I consider, it is possible to envision transforming them into iterations of the public, private, or even hybrid community benefits models. Other planning tools may necessarily require either a public agreement between the City and developers embodied in the provisions of planning approvals or, on the other hand, a standalone legal contract between developers and communities.

Ontario and Community Benefits

Ontario has moved towards embracing the public model of community benefits. Infrastructure Ontario – the Province's public-private partnership agency – has included local training and employment plans in some of its project agreements.[71] Metrolinx – the transportation authority for the GTHA - has committed to integrating community benefits into two light-rail transit (LRT) projects, the Eglinton Crosstown LRT and the Finch West LRT. In June 2015, Queen's Park passed the *Infrastructure for Jobs and Prosperity Act* (the "Act").[72] S. 3 states that when making decisions respecting infrastructure, the Government and every public sector entity shall consider the following principle:

> 13. Infrastructure planning and investment should promote community benefits, being the supplementary social and economic benefits arising from an infrastructure project that are

[70] Dina Graser, "Community Benefits and Tower Renewal" (2015) Evergreen City Works Discussion Paper.
[71] Infrastructure Ontario, *Joseph Brant Hospital Project Agreement* (Toronto: Queen's Printer for Ontario, 2014) at 61.
[72] *Infrastructure and Jobs for Prosperity Act*, SO 2015, c 15, s 3.

> intended to improve the well-being of a community affected by the project, such as local job creation and training opportunities, […] improvement of public space within the community, and any specific benefits identified by the community;

Notably, ss. (13) gives a very broad definition of community benefits, classifying them as virtually anything that a community identifies as a community benefit. Because the principles enumerated in s. 3 are not enabling provisions in the Act, they are not subject to regulations – therefore ss. (13) may not have a great deal of legal weight.[73] Regardless, for reasons of self-interest, if public bid documents contain requirements for community benefits, contractors will likely respond even if it is not mandatory under the Act. In contrast, s. 9 of the Act is subject to regulations and therefore may have a stronger legal effect. S. 9 requires bidders that enter into certain procurement processes for the construction or maintenance of government infrastructure to commit and provide a plan to take on apprentices from marginalized groups (e.g. Indigenous persons, immigrants, at-risk youth, residents of the local community) from neighbourhoods close to the project.[74] The Act does not come into effect until May 2016 and no regulations have yet been made under it.

The City of Toronto has also moved towards embracing community benefits. In 2008, Toronto created the Imagination, Manufacturing, Innovation and Technology (IMIT) program which provides financial incentives to encourage the renovation or construction of buildings in targeted sectors throughout the City. The program functions by giving development grants or waiving the collection of municipal property taxes. Any applicant to the program must agree to develop an employment plan to support local hiring and training. More recently, on November 3, 2015, City Council approved a new poverty reduction strategy for Toronto. This document

[73] *Tower* Renewal, *supra* note 70 at 30
[74] *Supra* note 72, s 9.

calls for both a community benefits framework as well as a social procurement strategy for the City.[75]

Community benefits are also being considered by the Federal Government. On February 2, 2016, Ahmed Hussen, the Member of Parliament for York South-Weston, introduced a private members bill that would empower the Federal Government to require community benefits commitments from bidders for federal projects or projects that get federal funding.[76]

Types of Community Benefits

Community benefits vary between projects, reflecting the specific needs and input of local communities. Dina Graser breaks benefits into four categories[77]:

1) **Affordable Housing:** the developer commits to build, fund, or finance affordable housing (for example, units in market-rate projects geared to low-income households, affordable rental, or opportunities for affordable home ownership).

2) **Economic Opportunities (non-capital):** the developer commits to local hiring, training, and apprenticeship opportunities for local or targeted communities during construction. Where appropriate, developers can sometimes promise to create opportunities for operational jobs after construction is complete. Workforce provisions are not job creation tools: they specify who is eligible for jobs or training opportunities that are already required. For example, RBC opened a branch in Regent Park as part of the neighbourhood's redevelopment and prioritized local hiring to provide employment opportunities to residents. Developers can also commit to local procurement provisions during construction, allowing local businesses or social enterprises to bid on a portion of the work.

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75 City of Toronto, *TO Prosperity: Toronto Poverty Reduction Strategy*, (Toronto: 2015) at 4, online: < http://www.toronto.ca/legdocs/mmis/2015/ex/bgrd/backgroundfile-84562.pdf>.
76 Bill C-227, *An Act to amend the Department of Public Works and Government Services Act (community benefits)*, 1st Sess, 42nd Parl, 2016, (first reading 24 January 2016).
77 *Tower Renewal*, *supra* note 70.

3) **Community Assets and Public Realm Improvements:** the developer commits to building parks and open spaces, improving streetscapes, funding or providing space for public art, or creating community assets, such as space for local retailers, child care centres, health clinics, or food markets.

4) **Other:** the developer can make a variety of other contributions depending on the needs of the local community, e.g. interest free or affordable loans to non-profit organizations, free or subsidized internet access and computer hardware, or donations to the city or transit system.

Under the public model, most community benefits are targeted to workforce and local economic development, although it is possible to see other categories, depending on how closely government agencies are consulting with local communities. To optimize the positive impact of workforce benefits, opportunities can be channelled to designated groups that face barriers to employment such as persons with disabilities, at-risk youth, or new Canadians.

Susan McIsaac, CEO of United Way Toronto and York Region, stated that, when building, "we need to think about more than what we build – how we build is just as important."[78] Community benefits embody the movement toward 'social procurement': leveraging procurement dollars to generate a value-added, social impact and to support social policy objectives.[79] However, in addition to social objectives, community benefits also have a positive economic impact, which is a primary reason U.S. cities are entrenching them in policy. Unbundling contracts and creating opportunities for local businesses to bid on projects keeps tax dollars at home. Lifting people out of poverty has a positive economic return to the government

[78] Susan McIsaac, "Done Right, Infrastructure boosts our Economy and Society", *The Globe and Mail* (3 December 2015), online: < http://www.theglobeandmail.com/globe-debate/done-right-infrastructureboosts-our-economy-and-society/article27571482/>.
[79] Jo Barraket & Janelle Weissman, "Social Procurement and its Implications for Social Enterprise: a Literature Review" (2009) The Australian Centre for Philanthropy and Nonprofit Studies Working Paper No CPNS 48.

as people move from recipients of welfare to taxpayers.

Planning Tools

Which of Toronto's planning tools encourage the same types of benefits as commonly fall into the basket of goods associated with private or public community benefits as discussed here? Answering this question can help determine whether existing planning instruments can either encourage the use of CBAs or act as an alternative delivery mechanism for community benefits.

Site plan control

Site plan control is a planning tool that helps regulate development.[80] As noted earlier, all of Toronto is designated as an area of site plan control. As a result, to undertake development in Toronto, a person must first submit a set of plans to the City, which it then approves subject to a set of approval conditions. Site plan control is limited to a technical review of the building site that addresses physical issues to ensure that the development proceeds in a safe and aesthetically pleasing way.

There are two issues with using site plan control as a mechanism to provide community benefits. These issues might be surmountable.

First, s. 41 of the *Planning Act* does not monitor for the types of benefits that are commonly associated with CBAs; site plan control is mainly limited to the design of the building in question and the spaces immediately surrounding it, such as the sidewalk. Although s.

[80] According to the *Planning Act*, development is defined as "the construction, erection or placing of one or more buildings or structures on land or the making of an addition or alteration to a building or structure that has the effect of substantially increasing the size or usability thereof." The definition also includes the creation of a commercial parking lot or a site for three or more trailers.

114(11) of the *City of Toronto Act* allows the City to make site plan approval conditional on the provision or maintenance of certain types of infrastructure, this tool is highly limited, pertaining to items such as highway widening, pedestrian walkways, floodlighting, etc. Furthermore, it is unlikely that site plan control can be used to encourage social hiring or procurement strategies. s. 114(6) specifically states that "the manner of construction and construction standards" are not subject to site plan control.[81] In *Reynolds v Cobourg*, the OMB held that s. 41(7) of the *Planning Act* – the equivalent of s. 114(11) of the *City of Toronto Act* – provides a "finite list of the types of conditions that can be imposed through this section."[82] In *Reemark Holdings*, a municipality purported to impose conditions on a site plan that regulated the pricing and occupancy of units. The OMB struck the conditions, stating that they were outside the purview of site plan control.[83] However, *High Meadow Ltd. v Cambridge* held that municipalities may impose conditions not specifically enumerated in s. 41(7) where there is agreement between the municipality and the applicant.[84] Developers may acquiesce to using site plan approval as a mechanism for securing community benefits if there is an adequate reason or incentive for the developer to agree to the provision of such benefits.

Second, site plan approval is not designed to be a public process. The legislation makes site plan approval a process directly between the applicant and the City. Unlike rezoning applications, site plan approval does not have a third party right of appeal. That said, the legislation does not preclude community engagement. Sometimes communities are invited to participate in site plan approval informally; the community gets a chance to express its

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[81] *Ibid*, s 114(6).
[82] *Reynolds v Cobourg (Town)* (2012), OMBD No 769 (OMB).
[83] Reemark Holdings No. 12 Inc. v Burlington City (1991), 25 OMBR 451 (OMB).
[84] *High Meadow Ltd. v. Cambridge (City)* (1999) OMBR 251 (OMB).

preferences in terms of building cladding, tree species, etc. Site plan approval has the potential to allow for more extensive, informal community engagement.

Site plan approval might be used to facilitate community benefits if City fees were waived or applications were fast-tracked for developers who agreed to provide community benefits or sign a CBA of a certain value. S. 69 of the *Planning Act* allows municipalities to recover costs associated with processing development applications. It states that tariffs should be designed to meet only the anticipated costs to a municipality of "processing" each application.[85] In *Hancock v Rideau (Township)*, the OMB held that such fees must be "reasonable."[86] That said, these fees tend to be very high because most municipalities use a cost-recovery approach. The *City of Toronto Act* allows the City to waive or reduce these fees.[87] Furthermore, these applications to the City tend to be very time-consuming. The average timeline for an application is three months. But for high-rise buildings in Toronto, it takes nine months in 45% of cases. According to the Ontario Association of Architects, for a condominium with 100 units, each month of delay costs roughly $1,930 per unit.[88] Waiving these fees or fast-tracking applications could create an incentive for developers to allow for the provision of community benefits through the site plan approval process, but both of these approaches would affect the Planning Department's cost-recovery mechanism for reviewing site plan applications.

In short, site plan approval is not an ideal mechanism to require developers to provide community benefits. The structure of s. 41 suggests that site plan approval is meant to be a

[85] Planning Act, *supra* note 2, s 69.
[86] *Hancock v Rideau (Township)* (1992), OMBD No. 1035 (OMB).
[87] Planning Act, *supra* note 2, s 69(2).
[88] "A Review of the Site Plan Approval Process in Ontario" (2013) Ontario Association of Architects Report.

technical and predictable process.[89] That said, it is possible for its scope to exceed what is described by the *City of Toronto Act* and for site plan approval to engage local communities, but both of these matters would require the agreement of a developer.

Development Charges

The *Development Charges Act* allows municipalities to impose charges on builders in order to recover the net capital costs of services related to development. Unless and until Ontario amends the *Development Charges Act*, it is unlikely municipalities will be able to use development charges to require financial contributions towards community benefits. The City may be able to provide relief or exemptions from development charges on a case-by-case basis.

Pursuant to the *Development Charges Act*, municipalities can leverage fees on developers to pay for the costs of certain facilities or services. The City of Toronto levies development charges to recover, among other things, the costs of subway and TTC expansions, libraries, affordable housing, civic improvements, child care, and pedestrian infrastructure.[90] Development charges do not have to take the form of monetary payments to the municipality. S. 59 of the *Development Charges Act* authorizes municipalities to require developers to construct "local services" either "related to a plan of subdivision or within the area to which the plan relates."[91] In *Marnucci v Richmond Hill*, this section was applied to off-site services external to the plan under consideration. A developer built a road not specifically within the boundaries of a subdivision, but the road was required to serve that subdivision as well as future subdivisions.

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[89] *Ibid.*
[90] City of Toronto, *Residential Development Charges Rates* (1 February 2016), online: < http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=acd97487cdd61510VgnVCM10000071d60f89RCRD&vgnextchannel=a90b285441f71410VgnVCM10000071d60f89RCRD>.
[91] Development Charges Act, *supra* note 32, s 59.

The municipality, as condition of approval, required the developer to build the road.[92] Municipalities can force developers to build – or at least pay for - infrastructure not immediately proximate to the new construction, as a 'local service.' However, absent the use of area-specific development charges in the City of Toronto, a developer may indirectly pay for services on the other side of the City as a part of paying development charges.

Landowners may enter into credit agreements with a municipality to provide infrastructure works and services instead of paying all or a portion of the applicable area specific charge. The *Development Charges Act* states, "if a municipality agrees to allow a person to perform work that relates to a service to which a development charge by-law relates, the municipality shall give the person a credit towards the development charge."[93] However, these credits can only be issued for listed services in *Development Charges Act* and must be related to the development charges by-law of the municipality. They are often used to refund developers who build or extend a road adjacent to their development in exchange for a refund for the transportation component of a development charge.

Credits are a potential mechanism to incentivize developers to deliver community benefits. The problem with credits is that the list of services in the *Development Charges Act* for which municipalities can refund development charges is relatively limited. Would it be legal for the City to give credits if a developer signs onto a community benefits agreement early in the development process? There is, at most, a tenuous connection between the infrastructure and services listed in the *Development Charges Act* and many typical community benefits, such as local hiring and business opportunities, which are not mentioned in the *Development Charges*

[92] *Marinucci v. Richmond Hill (Town)* (1999), 1 MPLR (3rd) 105 (OMB).
[93] Development Charges Act, *supra* note 32, s 38(1).

Act's list of eligible services. Accordingly, this casts doubt on the ability of the City to use credits to encourage community benefits. A further issue is that credits, like development charges, are not allowed to fund an increase in the level of service that exceeds the average level of service that existed before the development.[94] But why would a local community be incentivized to support a project if a developer is merely offering to pay for the increase in service that this new development requires?

S. 5(1) of the *Development Charges Act* allows municipalities to provide in the city by-law for exemptions from development charge. S. 5(1) states, "the rules may provide for full or partial exemptions for types of development and for the phasing in of development charges."[95] Toronto's development charges by-law provides for exemptions from development charges for certain non-residential uses such as hospitals, colleges and universities, places of worship, and industrial uses.[96] Other exemptions are for non-profit housing, temporary buildings, and – most interestingly of all – "land, buildings or structures that are the subject of a written agreement entered into by the City or a Former Municipality which agreement in words expressly exempts the land, buildings or structures from development charges."[97] In other words, the City of Toronto can enter into a contract to exempt specific construction from development charges; this is the most promising existing route to use development charges to incentivize community benefits. The City of Toronto can enter agreements with developers to waive development charges if that developer promises the City to provide community benefits or enters a CBA with

[94] *Ibid,* s 38(3).
[95] *Ibid,* s 5(1)(10).
[96] *Development Charges By-law, supra* note 43, s 415-6(A)
[97] *Ibid,* s 415-6(C)(2).

the local community to do so. However, the wording of the provision does not allow for a reduction on development charges – only a full exemption.

Due to the restrictiveness of the *Development Charges Act*, relief from development charges through credits likely does not provide a viable channel for community benefits. The basket of services for which a credit is available is constrained by the legislation and the complicated formula for services and infrastructure required to support development. However, it is open to the City of Toronto to enter into contracts with developers to waive development charges if they have entered CBAs.

Zoning

Zoning by-laws regulate land use on specific properties and establish standards for development in terms of building height, requirements for public space, etc. Four zoning tools overlap somewhat with the benefits ordinarily associated with community benefits - in particular, community assets and public realm improvements. I will review four tools that municipalities can use to manipulate zoning: a) holding by-laws, b) conditional zoning, c) rezoning applications, and d) s. 37 agreements.

a) Holding By-Laws

S. 34 of the *Planning Act* permits the use of holding by-laws. These specify the ultimate zoning of a piece of land once the municipality removes a "holding provision" on the property when certain conditions are satisfied. The purpose of a holding provision is to give someone a zoning permission which can include use, height, density, etc., but also includes a precondition that must be fulfilled before the land-use is permitted (or permitted to the extent specified in the holding by-law). Holding by-laws are a tool to manage and stage growth. They can ensure that

"infrastructure is in place prior to development and site plan control to ensure that trees and landscaping are provided and that development is well designed, functional, and integrated into the urban fabric."[98] When Toronto zoned the former "Railway Lands" in the downtown core for redevelopment, it divided the 200 acre site into 14 precincts, all but one of which had a holding provision on development. The intent of the city was to ensure, "the controlled, incremental development of the Railway Lands over some 20 years, phased with necessary improvements to the transportation system and local and Metro services."[99] Some of the conditions depended on municipal action, such as building a Spadina LRT. The holding provision also required the developer to carry out a number of environmental studies such as a noise impact statement and an air quality study.

Pursuant to the *Planning Act*, in order for a municipality to use holding by-laws, a municipality's official plan must include provisions governing the use of this tool.[100] Toronto's *Official Plan* states, "a holding provision may be placed on lands where the ultimate desired use of the lands is specified but development cannot take place until conditions set out in the plan or by-law are satisfied."[101] These conditions can include improvements to parks and open space, transportation, and other services or the construction of facilities for recreational and community use.[102] There is some overlap between these conditions and the community asset and public realm improvements often associated with CBAs. Although the purpose of a holding provision is to ensure that the zoned land is itself ready for development, based on the wording of the *Official Plan* it seems likely that an element of staging development could include the provision

[98] *Official Plan, supra* note 13 at 5.1.
[99] Re Toronto (City) Official Plan Amendment 333 (1986), OMBD No. 3 (OMB).
[100] Planning Act, *supra* note 2, s 36(2).
[101] *Official Plan, supra* note 13 at 5.1.2.
[102] *Ibid.*

of a grocery store or some other non-residential space for the community. Nonetheless, it appears that the range of the benefits Toronto can require through the holding by-law process is somewhat limited.

Could Toronto use holding provisions to create an incentive for developers to provide community benefits to the neighbourhood around development? An advantage of this approach is that the City would have a great deal of leverage in forcing developers to consult the community and provide benefits before the hold is lifted. Staging development would be central to using holding by-laws to encourage community benefits. Developers might like this approach because they would obtain zoning approval for a larger development and be able to phase its build-out. Through the partial remove of holding provisions, developers could include the negotiated community benefits in a similarly phased fashion or in the initial phase (depending on what the benefit is). This way developers can manage issues of cash flow and reduce the financial risk of providing benefits before completing construction. Although it is unlikely a developer would want to provide community benefits before being allowed to build anything at all on a site, some benefits (such as local employment opportunities) could feasibly involve no additional risk for developers as they would pass through those requirements to their contractor (at least for construction jobs).

This approach, analogous to the public community benefits model, would also allow for significant community consultation. Regulation requires the City to give notice of an intention to pass an amending by-law to remove a hold symbol through the newspaper and by mail to local residents.[103] This notice has to include "a statement of the earliest date on which the council or

[103] O Reg 545/06, S. 8.

planning board proposes to meet to pass the amending by-law"[104] However, the Toronto *Official Plan* states that there is no requirement to hold a public meeting to lift a holding by-law or 3rd party right of appeal.[105] The process to remove a holding provision is objective and only involves the municipality and the applicant; City Council gauges whether the precondition has been fulfilled. Nonetheless, given that the local community has an opportunity to participate in the process leading to the establishment of a zoning by-law amendment, which can include a holding provision, this might be used as an avenue for the negotiation and provision of community benefits. It would matter little that the removal of the holding provision is a direct process between the developer and the City, if the preconditions were fulfilled.

In short, holding by-laws might provide a feasible mechanism for the delivery of community benefits, particularly for larger developments that will involve a phased build-out. This approach would be driven and monitored by the City, rather than involve privately signed contracts with local communities.

b) Conditional Zoning

In contrast to holding by-laws, conditional zoning is a zoning by-law that is of full force and effect as of the date it is passed, subject to a requirement that certain conditions be fulfilled after its enactment. Unlike holding by-laws, conditional zoning does not entail a temporal gap between the provision of the benefit in question and the potential start of construction. As a result, conditional zoning would not allow the same degree of phasing in the provision of community benefits as holding by-laws.

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[104] *Ibid*, s 8(7).
[105] *Official Plan*, *supra* note 13 at 5.1.2.

The problem with conditional zoning is that it is a legal grey area. Traditionally, Ontario's municipalities were not permitted to impose conditions upon a specific owner of land when passing a general zoning by-law.[106] Sometimes municipalities did so anyway, but these arrangements were of questionable legal validity and enforceability.[107] In 2006, Ontario amended s. 34 of the *Planning Act* to allow for conditional zoning; this change is mirrored in s. 113(2) of the *City of Toronto Act* which grants Toronto the same conditional zoning authority.[108] This allows Toronto to enact a zoning by-law with conditions; the City can impose one or more "prescribed conditions" on the owner pursuant to an agreement. The agreement can then be registered against title to the lands so it is enforceable against future owners in addition to the current one. However, the conditional zoning provisions in the *Planning Act* and the *City of Toronto Act* are of no force and effect because the legislation requires Ontario to publish regulations defining the "prescribed conditions" under which conditional zoning can be used. No such regulations have been published. Accordingly, conditional zoning is not presently a legally viable option for the provision of community benefits.

However, the lack of a regulatory framework also presents an opportunity for community benefits advocates. In 2006, Toronto's then Chief Planner, Ted Tyndorf, submitted a report to the Planning and Transportation Committee suggesting that the eventual regulations should allow Toronto to set conditions with developers pertaining to transportation related improvements, housing matters (providing more forms of social housing), and community

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[106] John Mascarin, "Canada: Conditional Zoning" (9 February 2009), *Real Estate and Construction* (blog), online: < http://www.mondaq.com/canada/x/73350/agriculture+land+law/>.
[107] *Canadian Institute of Public Real Estate Cos. v Toronto (City),* [1979] 2 SCR 2, 1979 SCJ No. 20.
[108] *City of Toronto Act*, *supra* note 17, s 113(2).

services and facilities.[109] While the forthcoming inclusionary zoning rules may reduce the need to use conditional zoning to encourage the provision of affordable housing, advocates of community benefits could lobby the province to create regulations that allow for social procurement and local or targeted hiring as a condition for rezoning. On the other hand, the success of such a strategy would depend on the provincial government's willingness to publish regulations respecting conditional zoning – a willingness which has, so far, not been evinced.

c) Rezoning Applications

Developers frequently apply to the City to change the zoning attached to a property. Under s. 113(1) of the *City of Toronto Act*, Toronto has the zoning authority set forth in the *Planning Act*, including "regulating the use of land" and "restrict the erecting, locating or using of buildings"[110] These changes legally require public consultation under the *Planning Act* and its regulations.

Rezoning applications are currently an unattractive instrument for the procurement of community benefits. If Toronto denied a specific rezoning application because it was not accompanied by community benefits, the developer would simply appeal to the OMB, which would make its decision based on its understanding of good planning and the provincial interests articulated in the *Planning Act*. While these interests do include the provision of certain physical assets such as the provision of educational, health, social, cultural, and recreational facilities, these interests do *not* include local benefits or local economic opportunities. There is no provincial policy for the OMB to determine whether such community benefits are a part of good

[109] Toronto, Chief Planner and Executive Director, *Staff Report: Bill 51*, (Toronto: 2006) at 10, online: < http://www.toronto.ca/legdocs/2006/agendas/committees/plt/plt060306/it001.pdf>.
[110] Planning Act, *supra* note 2, s 34(1).

planning. In other words, there are likely limits to what can be negotiated within the confines of what represents good planning. Even if the province integrated local benefits into the *PPS*, it is unclear whether Toronto could reject a rezoning application on the grounds that a specific development was not accompanied by such benefits. On the other hand, if the province gave direction for community benefits through the *PPS*, the City could then enact a more general policy on community benefits through its *Official Plan*. The *PPS* already includes provisions on affordable housing, which has allowed the City to put requirements in the *Official Plan* for developers to build affordable housing under specific circumstances (large sites or plans that involve demolishing existing residential units).[111] An analogous approach could be used for community benefits.

d) Section 37 Agreements

S. 37 agreements enable municipalities to negotiate contributions towards local capital projects in exchange for the developer being permitted to exceed a site's zoned height and density limits. S. 37 of the *Planning Act* states that a municipality may through a by-law "authorize 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."[112] This legislative provision is highly flexible and, as I demonstrated above, the OMB has interpreted it fairly broadly. However, Toronto's *Official Plan* and *Section 37 Implementation Guidelines* are less flexible. The *Official Plan* requires that s. 37 benefits take the form of specific capital facilities, or cash contributions to achieve specific capital facilities.

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[111] *Official Plan*, *supra* note 13 at 3.2.1.
[112] *Planning* Act, *supra* note 2, s 37.

Toronto secures a large variety of capital facilities from developers through s. 37 agreements including:

- community and recreation centres;
- child care facilities;
- space for non-profits;
- libraries;
- park improvements;
- roads and streetscape improvements;
- public art installations; and
- affordable housing.[113]

These benefits overlap with the basket of benefits commonly associated with CBAs. In fact, city documents regularly refer to s. 37 benefits simply as "community benefits."[114] That said, s. 37 agreements have not included any consideration of jobs, training or procurement as they have been used to secure one-time capital expenditures.[115] Most s. 37 benefits have come in the form of "desirable visual amenities" and only 6% in the form of affordable housing.

It is unlikely that a s. 37 agreement can include non-capital benefits – such as employment or procurement benefits – without an amendment to the *Official Plan*. In *Building Industry and Land Development Association v Toronto*, the OMB held that the clear intent of the *Official Plan* is that s. 37 benefits not be used for non-capital purposes.[116] Because the City of Toronto wanted to use s. 37 to fund studies of Heritage Conservation Districts, the City had to amend the *Official Plan*. In *Toronto City Official Plan Amendment (Re)*, the OMB went even

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[113] *Supra* note 53.
[114] City of Toronto, *Section 37: An Essential Tool for Building Healthier Neighbourhoods*, (Toronto: City Planning), online: <http://www1.toronto.ca/City%20Of%20Toronto/City%20Planning/SIPA/Files/pdf/S/SECTION37_Final_JK.pdf>.
[115] *Supra* note 65.
[116] *Building Industry and Land Development Assn. v Toronto (City)* (2009) OMBD No. 1017 (OMB).

further. A community activist lobbied the City of Toronto to use part of a developer's $200,000 s. 37 contribution to fund a breakfast program for young school children who resided in the neighbourhood. The OMB considered the argument that non-capital benefits, such as social programs, were not envisaged by the *Planning Act* in addition to the Toronto *Official Plan*, which stated benefits are designed for capital facilities improvements "which have a longer-term impact on the community."[117] Resolving the case did not require the OMB to rule on whether or not s. 37 of the *Planning Act* would allow non-capital programs. I would argue, however, that the wording of s. 37, allowing for facilities, services, or matters, is sufficiently broad to allow for such non-capital programs. It is only the *Official Plan* that is an impediment to using s. 37 for local job and procurement initiatives.

Another issue with s. 37 is that the agreements are not generally the result of consultative processes. City Councillors are the main negotiators and decision-makers behind s. 37 agreements. The City Planning Department calculates the value of the additional density the developer is requesting; city planners in Toronto seek to secure between 15 and 20 percent of that value.[118] With this information in hand, the Councillor from the affected ward enters into negotiations with the developer. Councillors have a great deal of discretion in these negotiations, and their differing levels of negotiating skills lead to various outcomes. This level of councillor engagement in the process "distinguishes Toronto from other cities like Vancouver, where staff are largely insulated from political involvement."[119] S. 37 negotiations often occur near the end of the approval process and decisions are often rushed and made with little community input.[120]

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[117] *Re Toronto City Official Plan Amendment* (2004) OMBD No 1094 (OMB).
[118] *Ibid.*
[119] *Ibid.*
[120] Gladki, *supra* note 52 at 8.

The *Protocol for Negotiating Section 37 Community Benefits* encourages the pre-emptive determination of local benefit priorities for areas anticipating intensification. This would involve consultations with councillors, city divisions, planning staff, and the local community. Councillors have to push for this sort of collaborative framework for s. 37 benefits in their wards. Otherwise, the *Protocol* does not require the councillor to engage the community with regard to what sorts of community benefits it needs. Instead, other "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 s. 37 community benefits."[121] Any consultation beyond that is entirely at the discretion of the councillor.[122] Although councillors are representatives of their constituents and have the interests of their constituents in mind during negotiations, these negotiations tend to be secretive and have inconsistent results. Councillors are also predisposed to favour tangible benefits which are visible to their communities. In order to use s. 37 as a substitute or channel for community benefits, negotiations would need to become more transparent and open to public participation. This could be achieved through an amendment to the *Official Plan* or by passing a revised protocol for negotiations.

Gold Star Program

The City of Toronto's Gold Star program expedites the approval process for eligible industrial, commercial office, and institutional planning and building projects. The City provides customized one-on-one assistance to help businesses navigate the review and approval process. City staff works proactively with the applicant, other City divisions, and agencies involved in development review, to identify approval requirements, resolve issues and ensure that the Gold

[121] Toronto, City Planning Division, *Protocol for Negotiating Section 37 Community Benefits* (Toronto: City Council, 2007) s 2(3).
[122] *Ibid.*

Star project receives prompt attention. The purpose of this program is to encourage economic development and to create new jobs. As part of the City's *Open Door* affordable housing program, Toronto has also been considering expanding the gold star fast-track planning approval process for residential projects that include affordable ownership, affordable rental, and mid-range rental applications.[123] City staff are to report back on the feasibility of such a program in May 2016.

It is unclear whether expanding the Gold Star program to projects, including residential developments, that include community benefits would require explicit City Council approval. Nonetheless, the rationale for giving projects a gold star is that they have large positive benefits for Torontonians as a whole. Do projects that include community benefits meet that same standard? Community benefits are in the public interest in that they engender a less antagonistic development process, encourage economic development, and reduce poverty. They are clearly desirable. Whether community benefits are, in general, desirable enough to prioritize their attached projects over other development proposals without an attached community benefits package is likely a question for City Council.

In short, several municipal planning tools could serve as conduits for community assets and public realm improvements. But for the most part these planning tools are ill-suited to compel developers to build affordable housing or offer non-capital opportunities to affected residents.

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[123] City of Toronto, *Affordable Housing Open Door Program*, (Toronto: 2015) at 2-4, online: < http://www.toronto.ca/legdocs/mmis/2015/ah/bgrd/backgroundfile-85805.pdf>.

Chart: Overlap between Planning Tools and Types of Community Benefits

	Affordable Housing	Economic Opportunities (Non-Capital)	Community Assets & Public Realm Improvements	Other Contributions
Site Plan Approval			✔	
Development Charges	✔		✔	
Holding By-Laws			✔	
Conditional Zoning				
Rezoning Applications				
S. 37 Agreements	✔		✔	✔
Gold Star				

Section 3: Two Ways to Incentivize Community Benefits

This section considers two potential policy avenues through which the City of Toronto and, to a lesser extent, the Province of Ontario can incentivize the negotiation and provision of community benefits and/or CBAs. First, due to Toronto's hierarchical planning framework with appeals to the OMB, community benefits should be recognized somewhere within the Provincial and/or City planning framework. By making community benefits – including non-capital benefits – considered as part of the planning process, developers and communities will be more likely to expend resources negotiating and implementing them. Second, the City can reduce or waive various planning requirements or fees in order to incentivize CBAs or the inclusion of community benefits in a development. I will argue that the most practical and equitable approach would be to waive parking requirements for residential units. The possible tools discussed below are not mutually exclusive. They can be combined in different permutations to create a set of incentives for developers that encourage the adoption of community benefits on a systematic basis.

1) Changes to the Planning Framework

What distinguishes Toronto from cities in Scotland and the United States is Ontario's hierarchical planning regime and the potential for appeals to the OMB. Community benefits and CBAs should be explicitly integrated into the provincial and/or municipal planning framework so that they have a policy justification for consideration in the planning process, including before the OMB.

The *Planning Act* and *Provincial Policy Statement*

Community benefits or a CBA would not currently be recognized as something important

to a development proposal or an appeal. City Council is the initial decision-maker regarding the determination of 'good planning.' On appeal, the OMB's legislated task is to determine what is 'good planning' on the basis of the evidence put before it subject to statutory requirements, such as the *Planning Act*, and the policies of the *PPS* and *Growth Plan* - none of which are of assistance in giving legal weight to community benefits. The provincial interests laid out in s. 2 of the *Planning Act* exclude local interests, but include the adequate provision and distribution of educational, health, social, cultural and recreational facilities; and the adequate provision of "employment opportunities."[124] Whether or not these provisions give weight to community benefits depends on the *PPS*. In *Brennan v Ontario (Minister of Municipal Affairs)*, the Divisional Court held that the matters of provincial interest under s. 2 of the *Planning Act* must be read and exercised through provincial policy statements.[125] However, the *PPS* does not even tangentially mention local or community needs or benefits. S. 1 of the *PPS*, entitled "Building Strong Healthy Communities," makes no mention of community consultation or helping disadvantaged populations, besides improving accessibility for persons with disabilities.[126] Similarly, the section on employment discusses economic opportunities in terms of land-use and long-term needs, not the process of construction. Community benefits do not easily fit into the current *PPS*. An analysis of the *Growth Plan* leads to a similar conclusion.

Should community benefits be recognized as an element of good planning? Arguably, good planning is about more than land use. It involves social and economic considerations that municipalities can engage with through consultation with their communities. However, there are risks associated with recognizing community benefits as an element of good planning. First,

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[124] *Planning Act*, *supra* note 2, s 2.
[125] *Brennan v. Ontario (Minister of Municipal Affairs)* [1988] (63 O.R.) (2d) 236 (OMB).
[126] *Provincial Policy Statement*, *supra* note 5, s 1.1.1.

there is potential for it to be used to legitimize inappropriate proposals. What if a developer proposes a building which is not good planning (that is, from the perspective of built form and urban design), but a community supports that development because of the amenities it stands to gain? There is reason to doubt this possibility because communities are generally predisposed to *oppose* development, even if it is good physical planning, not *support* development which is not. A second consideration is the uncertainty involved in the City's review process and in the appeals process to the OMB. What if either planners or the OMB trigger changes to the community benefits agreed to by the local population, which leads to technical changes to the plan that were not contemplated during prior negotiations between the developer and residents? These changes could anger local communities and discourage the use of CBAs. Clearly, an issue for consideration is how to interject these discussions into the planning approval process.

The *Official Plan*

Amending Toronto's *Official Plan* could also bring CBAs inside the scope of the planning framework. In *Ontario (Communications, Energy and Paperworkers Union of Canada, Local 92) v Fort Frances (Town) Committee of Adjustment*, a mill's labour union disputed consents for a severance to separate the mill from a hydroelectric facility beside it on the grounds that the price of electricity would rise at the mill, which would mean loss of employment for the local town. The OMB held that there was no relationship between the provincial interests under S. 2 and the matter of local employment at the mill because there was no "tie-in to any matter that has been made the subject of a *Planning Act* subject matter such as the Official Plan or Zoning By-Law."[127] This suggests that the City must find a mechanism to 'tie' non-capital

[127] *Ontario (Communications, Energy, and Paperworkers Union of Canada, Local 92) v Fort Frances (Town) Committee of Adjustment* (2006), 54 OMBR 385 (OMB).

benefits, such as employment opportunities, to the provincial interests in S. 2 of the *Planning Act*, which could be done through the *Official Plan*.

The City could draft a new section of the *Official Plan* or integrate community benefits into one of two existing sections.

First, policy 3.2.1 discusses residential development on sites larger than 5 hectares. The section already requires that affordable housing be considered as a prior community benefit as part of the development of large sites. Due to the scale of these developments, this may be a practical place to insert requirements for CBAs. The redevelopment of large sites tends to be a long-term process that can create the time and scale necessary to consult with local communities and negotiate a robust package of benefits. A possibility is a hybrid approach involving tripartite negotiations between the City, the developer, and local communities that can shape some of the details related to the development and the package of benefits the community will receive.

Second, policy 3.2.2 addresses community services and facilities. It states "strategies for providing new social infrastructure or improving existing community service facilities will be developed for areas that are inadequately serviced or experiencing major growth or change and will be informed through the preparation of a community services strategy.[128] These strategies take the form of Community Services and Facilities (CS&F) Studies, which are triggered for projects on site larger than 5 hectares, new neighbourhoods, and regeneration areas. The undertaking of CS&F Studies allows for the identification of community infrastructure issues that exist within the study area and any improvements that may be necessary to enhance the quality of life for area residents. A CS&F Study can include: a demographic profile of the area

[128] *Official Plan*, *supra* note 13 at 3.2.2.

(labour force, socio-economic characteristics), inventory of services and facilities that exist in the study area in terms of capacity and gaps, and the identification of local priorities. Slight changes to the language of policy 3.2.2 of the *Official Plan* would allow for community benefits to be recognized as part of a larger, pre-emptive planning framework which the City of Toronto can undertake for areas which are low-income or expect development. The City can consult broadly with the entire community to come up with specific policies and objectives for the local area reflecting its known needs. These local goals would then become reality through either a city planning tool or a private CBA; or community benefits could be listed as a potential s. 37 benefit for developments in the area. (This would require revising the City's s. 37 policy so it applies to non-capital benefits.) Then, any developer interested in building would be aware of what interests the community has, saving time during development applications. This would give clarity and certainty to landowners and developers.

Third, policy 3.3 states that a "comprehensive planning framework" is required when developing "new neighbourhoods."[129] Because new neighbourhoods need to function as communities, this framework is supposed to make basic decisions regarding urban design, e.g. street patterns, mix and location of land uses. However, it is also supposed to include strategies for community services. Policy 3.3.1 states that new neighbourhoods should have community recreation centres, open space, public buildings, and services and facilities.[130] Similar to CS&F Studies, these comprehensive planning frameworks present an opportunity to identify local needs early and to integrate community benefits into the ultimate plan for the neighbourhood. Then, some other planning tool or a private CBA would translate these local goals into reality.

[129] *Ibid*, at 3.3.1.
[130] *Ibid*, at 3.3.2.

Changing Section 37

An alternative approach would be for the City to amend the part of its *Official Plan* relating to s. 37 agreements, as well as the *Implementation Guidelines for Section 37 of the Planning Act* and *Protocols for Negotiating Section 37 Community Benefits*. I argued above that despite the similarities between s. 37 benefits and community benefits, there are two major differences between them: City policy does not recognize non-capital benefits and s. 37 negotiations do not require extensive public input, although it sometimes occurs.

A new component of the *Official Plan* that recognizes non-capital, community benefits would allow s. 37 agreements to include economic opportunities in the form of jobs and procurement. An argument against this is that s. 37 is meant to create permanent community services and facilities required by increased density – not temporary benefits for business and workers. Aaron Moore points out that this argument does not hold water: "municipalities already use development charges to fund the upfront capital costs associated with new development."[131] It is more convincing to argue that the purpose of s. 37 is to share the wealth associated with density bonusing and to compensate neighbourhoods for the negative externalities associated with development. Therefore, there is no coherent reason why s. 37 benefits should be limited to capital projects.

The other point of concern is the lack of transparency to s. 37. Using s. 37 as a channel for community consultation and negotiation would require City Council to amend the *Official Plan* and *Protocols for Negotiation of Section 37 Community Benefits*. Interestingly, the latter document does not specifically envision city councillors driving the negotiation process. It states

[131] *Supra* note 53.

that there should be a broad consultation to determine the community benefits priorities of a neighborhood prior to intensification. City Planning staff are supposed to take the lead role in coordinating s. 37 negotiations and should "recommend an appropriate decision on the application, including an appropriate package of section 37 benefits."[132] However, the document leaves a loophole for councillors by stating, "Where the Ward Councillor independently pursues discussions with an applicant on s. 37 benefits, Community Planning Staff handling the application should be consulted prior to such discussions."[133] This has allowed City Councillors to take the lead on negotiations, allowing them to determine the extent of consultation. Using s. 37 as a channel for CBAs would require broadening the amount of consultations required and, ideally, making these benefits part of a broader, pre-emptive plan for local neighbourhoods.

Adopting a Development Permit System

A more comprehensive approach would be for Toronto to adopt a development permit system (DPS), starting in areas where development is most anticipated. The City is currently considering doing so; on July 11, 2014, the Toronto amended the *Official Plan* to designate the entire City as a development permit area.[134] This amendment is under appeal to the OMB.

Ontario adopted a regulation under the *Planning Act* in 2007 that authorizes municipalities to adopt a DPS. [135] S. 2 states that "The Council of a local municipality may by by-law establish a development permit system within the municipality for any areas or areas set out in the by-law."[136] S. 4 allows municipalities through development permits to "impose

[132] *Protocol*, *supra* note 120, at 31.
[133] *Ibid.*
[134] Both residents and developers are appealing this Council decision.
[135] O Reg. 608/06, s 2.
[136] *Ibid.*

conditions" on developers.[137] These conditions have to be "permitted by the official plan" and "reasonable for and related to the appropriate use of the land."[138] These conditions can relate to zoning, parking requirements, site plan control, or the conveyance of parkland. Essentially, a DPS combines and customizes existing planning tools (zoning, site plans, and minor variances) into one comprehensive as-of-right regulatory framework. This creates a predictable development framework with set levels of variation within fixed parameters.[139] In essence, a DPS would update the as-of right rules for a given area and make it only possible to build according to these rules. Theoretically, the City would promptly grant a development permit to any building proposal that fits these rules. Any building that does not fit these standards would be rejected by city staff and developers could not appeal the decision to the OMB.

The development permit planning process would involve the City engaging in extensive community consultation and neighbourhood background studies which would precede and be interwoven with the adoption of a development permit by-law for a given area. This would enable the City to "identify and prioritize community improvements (that have previously been secured through s. 37 agreements) and to entrench them on an area wide basis, in a transparent regulatory framework."[140] S.4(5) of the regulation mirrors s. 37 of the *Planning Act*, stating that municipalities can impose conditions requiring the "provision of specified facilities, services and matters in exchange for a specified height or density of development" so long as that conditions is articulated in the municipality's official plan. A DPS could create a proactive, collaborative,

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[137] *Ibid,* s 4.2.
[138] *Ibid,* s 4.4.
[139] Jennifer Keesmatt, "Myths and Facts About the Development Permit System" (March 2015), *Own Your City: The Official Blog of the Chief Planner of the City of Toronto*, online: <http://ownyourcity.ca/2015/03/myths-and-facts-about-the-development-permit-system/#more-1287>.
[140] *Ibid.*

and community-based approach to development and community benefits. In order to fit the DPS with community benefits, the *Official Plan* would have to allow for non-capital facilities to be part of density bonusing. Since the City will be updating as-of-right zoning in different neighbourhoods in order to implement the DPS, it is logical to require consideration of community benefits or CBAs as part of that extensive, consultative process.

2) Incentives for Community Benefits or CBAs

Another way to incentivize community benefits or CBAs would involve the City giving developers reductions or exemptions from City programs and fees, such as development charges, parking requirements, parkland dedication requirements, and application fees. In exchange, the developer would sign an agreement either with the City or the community affected by the development regarding the provision of community benefits.

Development Charges

In the preceding section, I argued that it is legally permissible for the City to exempt entirely a property from development charges by entering contracts with the landowner. This contract could include provisions regarding community benefits the developer must provide or simply state the value of benefits that will be part of a future, standalone contract the developer is obliged to negotiate with the affected community. However, the *Development Charges By-law* only allows such a contract to provide for a complete exemption from development charges, not partial reductions. This might be too costly an approach for the City to take, at least short of updating the by-law to allow for partial reductions to development charges.

An alternative is for Toronto to amend its development charges by-law to allow it to issue credits (or refunds) for development charges to construction that include community benefits.

The City of Toronto developed the Toronto Green Standard (TGS) to address the negative impacts associated with urban growth. It is a set of performance measures with supporting guidelines related to sustainable site and building design for new development. While Tier 1 requirements are mandatory for all buildings, the more stringent Tier 2 requirements are optional. Under the City's development charges by-law, "Where development charges have been paid with respect to land, buildings or structures which the City has certified as having met all of the Tier 2 requirements of the Toronto Green Standard Program […] a refund will be given in amount equal to the lesser of" either 20 percent of the development charges paid, or the amount calculated under another formula.[141] It is worth noting that this policy has not been particularly attractive for developers; only 5 buildings in Toronto have met Tier 2 requirements, despite the fact that the costs of making the building more efficient are recouped over a twenty year period by the condo owners.[142]

Nonetheless, could the development charges by-law be amended to include a credit for developers who agree to provide community benefits or promise to sign CBAs with the local community? The problem with credits is that they must be related to services listed under the *Development Charges Act*. S. 38(1) states, "If a municipality agrees to allow a person to perform work that relates to a service to which a development charge by-law relates, the municipality shall give the person a credit towards the development charge in accordance with the agreement."[143] It is likely outside of the municipality's authority to issue credits for non-capital community benefits, such as apprenticeships. On the other hand, the TGS only tangentially

[141] *Development Charges By-law, supra* note 43, s 415-7(A)(2).
[142] City of Toronto, Planning Department, Cost/Benefit Analysis of Proposed Energy Efficiency Requirements for the Toronto Green Standard: Final Report, (Toronto, Energy Profiles Limited, 2012).
[143] Development Charges Act, *supra* note 32, s 38(1).

relates to the services listed under the *Development Charges Act*. Toronto is currently giving a credit for the increased environmental sustainability of certain buildings. Tier 2 has not been challenged at the OMB, but an argument could be made that Tier 2 charges do relate to electrical power services, water supply services, and waste water services – all mentioned in S. 5(5) of the *Development Charges Act*. Although Tier 2 does not involve the building of specific infrastructure for the public, Tier 2 buildings do reduce the need for the City to build that infrastructure. On the other hand, it is more difficult – if not impossible – to relate the non-capital services associated with CBAs with the services listed in the *Development Charges Act*. As a result, it may not be legal for the City of Toronto to give credits in exchange for promises to provide community benefits or to negotiate CBAs.

Parking Requirements

Another possible planning incentive at the City's disposal is to reduce or waive development requirements, thus reducing the costs of development. A potential option would be to reduce or waive parking requirements for developers who enter CBAs. S. 34(6) of the *Planning Act* authorizes municipalities to pass zoning by-laws that require the owners or occupants of buildings and structures to provide and maintain parking facilities.[144] In Toronto, parking requirements are area-specific. In a by-law, the City has created various formulas to calculate a building's parking requirements: the amount depends on the size of apartments, the area of the city, and the availability of transit services.[145] S. 40 of the *Planning Act* allows municipalities to enter into agreements with owners exempting them, "to the extent specified in the agreement, from the requirement of providing or maintain the parking facilities."[146] It

[144] Planning Act, *supra* note 2, s 34(6).
[145] City of Toronto, by-law 569-2013, *Zoning By-Law*, 9 May 2013, c 200.
[146] *Planning Act*, *supra* note 2, s 40.

appears that there is no legal impediment for Toronto to promise to reduce parking requirements in buildings by a fixed amount in exchange for the developer promising community benefits. Of course, any reductions should be done in a responsible way in consultation with transportation planning staff and giving consideration to factors such as local access to transit.

Such a policy promises to be more effective than the TGS example. The cost of providing parking, particularly in areas of higher land costs and where underground parking is needed, can add significantly to development costs. Many developers have signaled that they are eager to reduce parking requirements, based on marketing and sales considerations and the desire to avoid being left with unsold parking spaces. The demand for parking spaces has declined as residents have embraced walking, biking, and public transit. In interviews with developers, Graham Haines has found that parking often generated a loss for most sites and, at best, was a breakeven proposition. Underground parking units cost between $40,000 and $75,000 and are typically sold for between $20,000 and $50,000. As a result, residents are not paying the full cost of parking, and parking requirements have an impact on the price of residential units.[147] In short, a targeted policy reducing parking requirements in exchange for the provision of community benefits or a promise to negotiate a CBA of a certain value has the potential to be attractive to developers seeking to cut costs and lower prices.

Parkland Dedication

Another option for the City is to waive or reduce the requirement for the dedication of parkland. S. 42 of the *Planning Act* states, "As a condition of development or redevelopment of land, the council of a local municipality may, by by-law applicable to the whole municipality or

[147] Graham Haines, *Assessing Toronto's Minimum Parking Requirements for Condominiums* (Master of Planning Thesis, Ryerson University, 2014) [unpublished].

to any defined area or areas thereof, require that land in an amount not exceeding, in the case of land proposed for development or redevelopment for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land be conveyed to the municipality for park or other public recreational purposes."[148] The problem with using this to encourage CBAs is that parkland dedication is not a targeted tool. Parkland dedication requirements are meant to apply to an entire municipality or, at least, specific geographic areas. The Act allows for cash-in-lieu payments to be reduced if the land being developed meets certain sustainability criteria, but the *Planning Act* does not envision other reductions. As currently laid out, the *Planning Act* and the relevant city by-law do not create pathways for exemptions or reductions of parkland dedication requirements in exchange for developers providing community benefits or promising to negotiate CBAs. Furthermore, because residents cherish greenspace, they would likely oppose proposals that reduce parkland dedication requirements in exchange for community benefits.

Waiving or Reducing Planning Fees

The City could also incentivize community benefits or CBAs by reducing or waiving planning fees. S. 69 of the *Planning Act* states that municipalities may charge fees "for the processing of applications made in respect of planning matters, which tariff shall be designed to meet only the anticipated cost to the municipality or to a committee of adjustment or land division committee constituted by the council of the municipality or to the planning board in respect of the processing of each type of application provided for in the tariff."[149] Ss. 2 states that municipalities may reduce or waive planning application processing fees where they are satisfied that it would be "unreasonable to require payment."[150] However, the City by-law makes

[148] Planning Act, *supra* note 2, s 42(1).
[149] *Ibid*, s 69.
[150] *Ibid*, s 69(2).

no mention of "unreasonable" fees and where it is appropriate to waive or reduce them.[151] Most appeals to the OMB have involved fees which were unreasonably high. In *Hancock v Rideau (Township)*, the OMB said that, "It is the duty of the Board to consider whether any such fee is reasonable."[152] In *R & D Investments Inc v Toronto*, the OMB held that it was unreasonable for Toronto to charge its normal fees for 10 interconnected applications (which do not involve the same amount of work as 10 individual applications).[153] The Ministry of Municipal Affairs and Housing published a document stating that municipalities can waive or reduce processing fees for applications involving affordable housing on the grounds that it would be unreasonable to require payment from the developers involved.[154] Based on this - as well as the lack of cases on whether a fee reduction is reasonable - it appears open to Toronto to create a policy for the reduction of planning fees in exchange for developers signing CBAs.

The by-law lists numerous fees which are applicable to residential development, the most relevant of which are listed below:

Excerpts from Toronto Municipal Code
Chapter 441, Fees and Charges
Appendix C – Schedule 13, City Planning

Fee Description	**Category**	**Fee Basis**	**Fee**
Review of application for official plan amendment	Full Cost Recovery	Per application	$17,531.19
Base fee for zoning by-law amendment	Full Cost Recovery	Base Fee	$17,403.20
Additional Fee: if buildings have gross floor area over 500 sq. m. – Residential	Full Cost Recovery	Per $/sq. m	$5.880972
Base Fee for site plan control	Full Cost Recovery	Base Fee	$5,013.31

[151] City of Toronto, by-law No. 1056-2006, *Fees and Charges* (27 September 2006),
[152] *Supra* note 86.
[153] *R & D Investments Inc. v Toronto (City)* (2006), OMBD No. 60 (OMB).
[154] Ontario, Ministry of Municipal Affairs and Housing, *Municipal Tools for Affordable Housing*, (Toronto: Queen's Printer for Ontario, 2011).

(approval of plans and drawings)			
Additional fee for site plan control for the first 200 square metres of chargeable area - Residential	Full Cost Recovery	Per $/sq. m	$11.75
Additional fee for site plan control if building gross floor areas – next 700 square metre - Residential	Full Cost Recovery	Per $/sq. m	$9.08
Additional fee for site plan control if building gross floor areas – next 3000 square metre - Residential	Full Cost Recovery	Per $/sq. m	$5.90
Additional fee for site plan control if building gross floor area is over 4,400 square metre – Residential	Full Cost Recovery	Per $/sq. m	$2.93
Legal services processing for zoning-by-law amendment for s. 37 agreement	Full Cost Recovery	Per application	$9,983.08
Base fee for official plan and zoning by-law amendment	Full Cost Recovery	Base Fee	$17,531.19
Additional fee for official plan and zoning by-law amendment for building if gross floor area is over 500 square metres - Residential	Full Cost Recovery	Per $/sq. m	$5.88
Legal services for processing official plan and rezoning combination s. 37 agreement	Full Cost Recovery	Per application	$9,983.08

The problem with using fee reductions or waivers to incentivize community benefits or CBAs is that money would be drained from the City planning budget. Effectively, the City would be – at least partially - subsidizing facilities, services, and economic opportunities for local communities. This is not necessarily undesirable, particularly if it can be shown in early CBAs that they provide good value for money. The risk of an untargeted approach, however, is that most CBAs will likely be located in the areas of the City where lots of development occurs, i.e. the downtown core. This occurs for s. 37 benefits which are concentrated in three downtown wards. However, developers entirely pay the cost of s. 37 benefits in exchange for building higher or more densely in the affected area. In contrast, if the City reduces fees it is effectively subsidizing community benefits – particularly community asset and public realm

improvements – out of the City Planning Budget. This may have an unintended, regressive effect. Downtown residents would stand to gain, while the City would be less capable of funding programs in the most depressed areas, i.e. the inner suburbs. A better approach might be a more targeted program for fee waivers and reductions, i.e. for infill development on Toronto Community Housing Corporation or tower renewal sites.

Creating a Workforce Hub

An additional way to incentivize community benefits and, in particular, private CBAs is to build off public sector community benefits and procurement initiatives. This approach would expand the scope of projects for which community benefits are a feasible tool, relying on the goodwill and corporate citizenship of developers to make them happen.

Ontario is in the midst of creating policies to encourage community benefits. *The Infrastructure for Jobs and Prosperity Act* envisions public infrastructure projects supporting community benefits and, in particular, training and workforce opportunities. In addition, Ontario's transportation planning authority for the GTHA, Metrolinx, negotiated a *Community Benefits Framework* with the Toronto Community Benefits Network - a coalition of local community groups – for the Eglinton Crosstown LRT. The Framework specifies that the Ministry of Training, Colleges, and Universities (MTCU) is to play an important role in coordinating and training."[155] MTCU has also, through the United Way, conducted a Labour Market Partnership to identify skills gaps in the neighbourhoods along the Eglinton Crosstown LRT. In addition to these provincial initiatives, the City is also considering opportunities to foster community benefits and social procurement initiatives via its *Poverty Reduction Strategy*

[155] Ontario, Metrolinx *Community Benefits Framework*, (Toronto, Metrolinx, 2014) at 2-3.

and long-promised *Social Procurement Policy*.

Jobs and training benefits for various projects can be consolidated through the creation of a "workforce hub" for the entire City, which any developer could access. The hub would partner with community organizations and government agencies to identify, engage, and recruit potential employees from target communities and areas. People would be assessed, trained, and placed, providing "a one-stop shop for employers."[156]

A workforce hub would increase the scope of projects for which CBAs are financially and technically sensible. According to Dina Graser, projects with CBAs usually have budgets that start in the hundreds of millions of dollars and extend over long timelines.[157] Condominium development is generally smaller in scale and less time consuming. A workforce hub would create a large pool of local apprentices, labourers, and businesses that could come to a project directly out of the hub, minimizing the delay and cost associated with training people on a project-specific basis. Developers – eager to build their reputations as good corporate citizens – might be open to integrating these non-capital benefits into their projects on a small scale, even without additional City incentives.

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[156] John Brodhead and Dina Graser, "Reaping the Benefits of Tower Renewal" (15 June 2015), *Atkinson Field Notes* (blog), online: < http://atkinsonfoundation.ca/atkinson-field-notes/reaping-the-benefits-of-tower-renewal-and-more/>.
[157] *Tower Renewal*, *supra* note 70.

Recommendation

CBAs are clearly a desirable way to maximize the positive social and economic impact of infrastructure and real estate development projects through engagement with affected communities, local procurement and hiring practices, and improved services and facilities.

There are several planning tools that can be tweaked or more substantially changed to be able to encompass community benefits. Although there is not currently a planning tool that can provide for non-capital benefits, this can be remedied by City-initiated amendments to the policies in its *Official Plan* regarding s. 37 benefits and its s. 37 protocols.

Because of the hierarchical planning framework with potential for drawn-out appeals, I recommend that whatever approach is adopted should be transparent and pre-emptive; the City should conduct pro-active consultations with local communities through CS&F Studies, reinvigorated s. 37 consultations, or the DPS planning system. These processes should involve City Planners and the Ward Councillor; residents and local businesses; and interested developers. This tripartite approach, analogous to the hybrid model of community benefits, would allow for the needs and aspirations of local communities to be objectively identified so development that responds to these needs can be recognized as part of good planning for that neighbourhood context. This streamlined process would allow developers to plan their buildings, fully knowing what types of benefits they are expected to provide. By engaging all parties in an open process early on, local communities will develop realistic expectations of development projects and opposition will be tempered. Because many communities in Toronto lack the necessary financial, technical, and legal capacity to negotiate CBAs, this more programmatic way to implement community benefits, likely involving such sort of City monitoring, is desirable. That

said, private CBAs should also be encouraged to the extent they do not require financial subsidy from the City. Although private CBAs are yet to emerge in Toronto, simple changes to the *PPS* and *Official Plan* recognizing community benefits as a part of good planning is a logical first step to inculcate a more consultative and socially beneficial development process.

The City must decide the extent to which it wishes to encourage community benefits. On the one hand, the creation of a workforce hub would make it more feasible to integrate targeted employment and training opportunities into a wide variety of development projects. On the other hand, to the extent this takes up finite financial and planning resources, the City must decide how much it wishes to encourage community benefits. Ultimately, the issue comes down to identifying where community benefits are most appropriate. CBAs should not be used in all development contexts – they are a tool that should be used strategically to bring greater social and economic value to areas of the City which are the most in need. Regardless of the planning tools that may be selected to foster community benefits, the City should consider and adopt a set of criteria to determine under what circumstances it is appropriate to bring the resources of the City to support them. Although this is a question for further research and for City Staff, there are several possibilities. Through the *Official Plan*, the City can mandate CBAs be considered for

1. Development over a certain size, i.e. number of units, or monetary value;
2. Development on large sites;
3. Development in "Priority neighbourhoods" (those with low social outcomes);
4. Large infill projects on Toronto Community housing sites; and/or
5. City lands which are sold to the private sector (e.g. closed schools)

I refrain from recommending which – if any – of these approaches the City should ultimately adopt, leaving that question for future research.