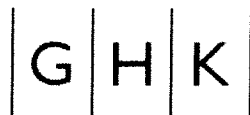


APPENDIX A

Town of Markham Section 37 Official Plan Policies and Guidelines

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1. Background

The Town of Markham has recently received a number of applications for additional density and height over and above the limits contained in Secondary Plans. These applications are generally located in attractive key development areas, such as Markham Centre, the Langstaff Gateway, and other locations along the Yonge Street, Avenue Seven, and Steeles Avenue Corridors, which either now have, or are anticipated to have, access to good transit services.

The Town has no previous experience with applications for bonus densities and is interested in assessing whether it would be appropriate to apply the provisions of Section 37 of the Planning Act to secure a range of public benefits in return for increased height and/or density. Some members of the Town Council are particularly interested in identifying these opportunities and have requested staff to develop an appropriate framework.

This report will review past practices with respect to the use of Section 37 in other municipalities and address a number of issues that have been raised by staff including:

- Which public facilities or services should be included in return for bonus density and in what order of priority;
- Can a municipality apply Section 37 to address operational costs as well as capital improvement costs resulting for additional density or height;
- To which geographic areas should Section 37 provisions be applied;
- How to distinguish between development which does not include bonus density and development which includes a bonus;
- How to ensure that the achievement of “good planning and design”, which is what all development should strive for, is not the subject of bonus density provisions (ie. good planning and design continues to be secured regardless of the use of the density bonus);
- Should the amount of the bonus be prescribed ahead of time (i.e. should there be a maximum bonus density prescribed in the Official Plan);
- How to assess (place a value on) the increase in density or height;
- How does increased density and height relate to area transportation, water and sewer capacity to ensure that early developers in an area do not compromise capacity from future planned developments
- Should there be a geographic relationship between the services and facilities and the impact of the additional density or height; and
- What, if any, services and facilities and other matters should be secured through a Section 37 Agreement, over and above the services and facilities that are the result of the bonus density.

2. Section 37 of the Planning Act

Section 37 of the Planning Act states as follows:

37. (1) The Council of a local municipality may, in a by-law passed under section 34, authorize increases in height or 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.
- (2) A by-law shall not contain the provisions mentioned in subsection (1) unless there is an official plan in effect in the local municipality that contains provisions relating to the authorization of increases of height and density of development.
- (3) Where an owner of land elects to provide facilities, services or matters in return for an increase in the height or density of development, the municipality may require the owner to enter into one or more agreements with the municipality dealing with the facilities, services or matters.
- (3) Any agreement entered into under subsection (3) may be registered against the land to which it applies and the municipality is entitled to enforce the provisions thereof against the owner, and subject to the provisions of the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land.

3. Existing Markham Section 37 Official Plan Policies

Markham's existing Official Plan Policies pertaining to Section 37 are as follows:

“SECTION 7.3...

d) Increased Height and Density (Bonus) Provision

- i) In accordance with Section 37 of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, Council may, in a by-law passed under Section 34, authorize increases in the height and density of development otherwise permitted in the by-law. In return, the owner granted the bonus, shall be required to provide the facilities, services and matters as set in the bonus provisions by-law.
- ii) A bonus provisions by-law may be enacted by Council to achieve the Town's objective of obtaining certain facilities, servicing or other matters which would not otherwise be secured by the normal development process and which may be of particular benefit to a specific area or the Town at large. Notwithstanding the generality of the foregoing, the intent of Council in passing such by-laws would be to encourage attainment of one or more of the following objectives:

- to preserve the unique character of a certain area or buildings of architectural or historical significance;
 - the provision of housing for senior citizens;
 - the provision of increased amounts of on-site open space or facilities such as day care centres, community centres, recreational facilities;
 - the preservation of woodlots or environmentally significant areas which would not be accepted as parkland dedication and;
 - to achieve additional road or servicing improvements.
- iii) Increased height and density (bonus) provisions under Section 37 of the Planning Act, R.S.O. 1990, c. P.13, as amended, will be implemented by by-laws passed under Section 34. Such a by-law will contain the standards of the basic zoning category applicable to the site if the bonus is not awarded as well as the standards that would apply when the bonus is awarded. The by-law will also specify the facilities, services and matters that are required to be provided before the bonus standards become applicable.

An agreement between the owner and the Town shall be entered into in regard to the relevant facilities, services and matters when an owner is being awarded the bonus and the bonus standards become applicable.”

4. Experience in Other Municipalities

The City of Toronto has had the most extensive experience with implementing Section 37 bonusing policies. Burlington has used the provisions of Section 37 to achieve services and facilities in a number of locations and Mississauga has also implemented a bonus policy for one site in Port Credit. Other municipalities such as Ottawa have policies in their Official Plans and are exploring ways to implement the policies, but have no experience implementing the policies through development applications.

City of Toronto

Toronto has had the most extensive experience with many developments that have contributed facilities or services in exchange for increased density. Increases are triggered by applications to amend the Zoning Bylaw. The approach to these applications has been to first assess the appropriateness of the application with respect to Official Plan objectives and then to determine if it meets the criteria for appropriate built form to ensure that the project will contribute positively to the growth of the City. The Section 37 benefits are negotiated with the applicant based the City’s Official Plan policies regarding bonusing as well as a set of implementation guidelines that were approved by Toronto City Council on November 20, 2007.

The City’s Official Plan bonusing policy applies to development (excepting non profit development) with over 10,000square metres of gross floor area (GFA), with the Zoning Bylaw amendment representing at least 1,500 square metres in GFA. The size of height

increases is not specified. The benefits that are identified in the Plan are significantly more extensive than Markham's and include:

- The conservation of heritage resources;
- Public art;
- Other non-profit, cultural, community or institutional facilities;
- Parkland and/or park improvement;
- Public access to ravines and valleys;
- Streetscape improvements on public boulevards not abutting the site;
- Rental housing to replace demolished rental housing;
- Purpose built rental housing with mid range or affordable rents, land for affordable housing or cash in lieu of land for affordable housing;
- Local improvements to transit facilities including pedestrian connections to transit facilities;
- Land for municipal purposes;
- Substantial contributions to the urban forest on public lands; and
- Other local improvements identified in Community Improvement Plans, Secondary Plans or other studies.

The Guidelines are intended to assist in the implementation of the Official Plan policies regarding bonusing. The Official Plan policies are quite general and the Guidelines provide a greater level of specificity regarding their implementation. The key principles that are included in the guidelines to be followed in the implementation of Section 37 are as follows:

- The development represents good planning;
- The community benefits and the increase in height and/or density must be set out in the Zoning By-law (usually a site specific zoning bylaw which contains a section that states that the owner shall enter into one or more agreements pursuant to Section 37 of the Planning Act to secure facilities, services and matters which are then specified in a subsequent section of the bylaw);
- The community benefits must be capital facilities which are either specifically identified or represent cash contributions to achieve specific capital facilities, including in some instances contributions to City wide funds such as The Revolving Fund for Affordable Housing or a Public Art Trust Fund (in other words, the benefits are not intended to cover operating costs); Note—Council amended this principle to add Heritage Conservation District Studies to the list of eligible “facilities, services or matters” despite planning staff recommending against this;
- There should be a reasonable planning relationship between the community benefits and the increase in height and/or density, most often reflecting a geographic proximity (i.e. on site or in the local area);
- Good architecture and good design are expected in all developments and are not eligible as Section 37 benefits;

- Section 37 benefits are not intended to replace services provided through Development Charges, but could include upgrades to services not included as part of the Development Charges calculation;
- Section 37 is seen as an important tool to implement Council's housing and heritage objectives (in other words these are seen as priorities);
- The Ward Councillor is to be consulted in the negotiation of Section 37 benefits;
- There is no City wide formula for determining the value of benefits under Section 37, although the Official Plan includes the option of defining a formula in Secondary Plans for sub areas of the City based on estimated costs of the community benefits to be secured within the area;
- The list of community benefits listed in the Official Plan is not exhaustive;
- Section 37 agreements can be used to secure a number of other matters that are appropriate to support a development; and
- Planning staff shall always be involved in discussing and negotiating section 37 benefits.

Negotiating the value of benefits in relation to the increase in height and/or density, usually entails an appraisal by the City's Real Estate staff to determine the additional land value of the increase in height/density. Staff then determine through negotiation what the appropriate contribution might be worth, with the rule of thumb that it should range between ten and thirty percent of the increase in land value to the development, depending on location and other circumstances.

Over the past 10 years, the City of Toronto has successfully negotiated Section 37 Agreements with over 280 developers who contributed cash, as well as a range of services and facilities including such things as affordable housing, public art, daycare facilities, community service facilities, improvements to park and recreational facilities and a range of other matters. Although not required by the legislation, the Guidelines are intended to clarify the City's approach to these negotiations and to establish a set of more consistent parameters for conducting negotiations. The development of the guidelines were informed by previous experience and assessment of issues raised through discussions with Councillors, communities and developers. Toronto's extensive experience offers the best starting point for assessing issues in the Town of Markham.

City of Ottawa

Although the City of Ottawa does not have any experience with the application of Section 37, recent experience with a development application that proposed to incorporate a Portrait Gallery which was not secured as part of a Section 37 Agreement, resulting in the loss of the benefit, has generated considerable interest in adopting a set of guidelines to apply to future negotiations regarding increases in density. Like many municipalities, Ottawa has had bonusing policies in its Official Plan for some time. Its policy includes the following:

“Increase in Height and Density By-law

8. Pursuant to Section 37 of the *Planning Act*, the City may authorize increases in the height and density of development above the levels otherwise permitted by the zoning by-law. Public consultation will be included in the development and approval of such a by-law. Limited increases will be permitted in return for the provision of such facilities, services or matters as are set out in the by-law. Such provisions that may be authorized include, but are not limited to:
 - a. Public cultural facilities;
 - b. Building design and public art;
 - c. Conservation of heritage resources;
 - d. Conservation/replacement of rental housing;
 - e. Provision of new affordable housing units; land for affordable housing, or, at the discretion of the owner, cash-in-lieu of affordable housing units or land;
 - f. Child care facilities;
 - g. Improvements to rapid-transit stations;
 - h. Other local improvements identified in community design plans, community improvement plans, capital budgets, or other implementation plans or studies;
 - i. Artist live-work studios.”

Staff have drafted a set of guidelines for negotiating Section 37 Agreements which will be submitted to Council within the next few weeks. The guidelines are not as extensive as Toronto’s, but contain a number of elements that may be worth considering for Markham. The following are the main points contained in the guidelines:

- Incentives will be focused mostly in intensification areas;
- Density incentives to be applied to projects which are larger than 2,500 sq m and where the proposed density will exceed 25% of the allowable height (staff are currently considering exempting all developments that are under 8 storeys in height);
- Density incentives will be considered where a Council Approved Community Design Plan exists and where the Official Plan supports high density development;
- Development must represent good planning;
- Design quality must not be compromised;

- Density increase will be approved by an amendment to the Zoning Bylaw and after consultation with community groups. An agreement will be entered into between the developer and the City prior to the enactment of the Bylaw;
- There should be a reasonable relationship between the community benefits and the proposed development;
- Negotiated benefits are to be over and above the facilities and services that would be otherwise required as part of the City's standard development process;
- The value of the benefit will be negotiated with the developer based on a reasonable relationship between the increase in land value accruing to the developer and the value of the benefits to be provided;
- Payment shall be secured prior to the issuance of a building permit; and
- Density incentives for non profit housing will not require the provision of benefits.

Other Municipalities

A number of other municipalities have limited experience with negotiating Section 37 benefits with developers. These include Burlington, London, Cambridge and Mississauga. The range of facilities and services that were secured through the Section 37 Agreements in these municipalities include: affordable housing, retention of rental housing, public art, streetscape improvements, urban design and contributions towards community facilities.

Many other municipalities have included policies in their Official Plans, although only Toronto has adopted a set of guidelines and Ottawa is in the process of adopting guidelines. A review of Official Plan policies for Mississauga, Halton Hills, Toronto and Ottawa prepared by staff in the Town of Kingston in May of 2008, provides a good comparison and overview of the type of policies that have been included in Official Plans. In all instances community benefits identified in Official Plans can be grouped under the following general headings:

- Sustainability and Environmental Management
- Housing
- Infrastructure
- Other amenities

While Toronto and Ottawa have the most extensive range of benefits identified in their Official Plans, as described earlier, Mississauga and Halton Hills are worth considering as well. These include:

- Sustainability and environmental management—protection of significant views, parkland, preservation of the natural areas system, preservation of heritage resources, conservation of significant built heritage features;
- Infrastructure—provision of road and servicing, public transit, which are over and above what would normally be addressed through development charges;
- Housing—affordable and special needs housing, long term care facilities or retirement homes—which are often provided for by Regional Governments, but are seen as benefitting the local community;

- Other amenities—public art, community facilities, any other public benefit identified in a Council initiated study

In terms of guidelines, both Mississauga and Halton Hills have a limited range of criteria to assess the appropriateness of density bonusing. These include: land use compatibility, adequacy of servicing, contributing to urban design policies and enhancing adjacent uses.

All municipalities assess the value of community benefits on a case by case basis, with the proviso that there be a reasonable relationship between the density increase and the value of the benefit. Although a number of municipalities have considered an approach based on a specific formula, all have followed the lead of the City of Toronto which concluded, after consulting their legal department, that a formula based approach may open up the municipality to a legal challenge that it constitutes a tax on development.

Municipalities have also not applied a maximum density ahead of time to the bonusing provisions, but as a general rule have referred to the need to conform to other Official Plan policies regarding good development and design. Contextual considerations, including servicing, traffic impact, achieving a harmonious relationship to neighbouring buildings and creating good urban design are generally acknowledged as the limiting factors on the amount of density that is appropriate in a bonusing scenario. Where a density limit exists in the Zoning Bylaw, any density above this limit could be considered a bonus and subject to the bonusing provisions.

To ensure that the benefits are secured, municipalities generally negotiate the increase and the appropriate benefit(s) at the same time, but prior to committing to the approval of the increase.

The issue of on or off site benefits is addressed in Mississauga and Toronto. In both instances, off site benefits are permitted, but must show a positive impact on the development. All municipalities require that an agreement be entered into to secure the benefits.

5. Policy Considerations for Markham

5.1 Community Benefits

The range of benefits identified in the Markham Official Plan that could be provided in exchange for increased density is quite limited. Many changes have happened in Markham since this section was enacted. With the current review of the Official Plan underway there is an opportunity to update the policy and expand the range of benefits. These can be related to various studies that are currently underway or have been completed over the past few years.

One firm conclusion from this review is that Section 37 benefits can only apply to capital facilities and not to ongoing maintenance costs. This was confirmed through discussion

with staff at the Ministry of Municipal Affairs and Housing, staff in other municipalities familiar with the implementation of Section 37 and through a review of policies and guidelines in other municipalities.

The following additions to the list of benefits identified in section 7.3 should be considered.

Sustainability and Environmental Management

A number of studies are currently underway as part of the Markham Official Plan review to establish a strong policy framework for the protection and enhancement of Markham's Natural and Built heritage. Based on these studies, the following should be considered as additions to the list of benefits help implement and achieve the objectives contained in the policy:

- Protection of significant views
- Substantial contribution to the urban forest on public lands
- Provision of public access to ravines and valleys.

Housing

Markham has taken a supportive position on achieving affordable housing objectives but has not taken a strong position on the direct provision of affordable housing to meet those objectives. However, the Provincial Policy Statement (PPS) under the Planning Act, the Growth Plan for the Greater Golden Horseshoe and the York Region Official Plan require municipalities to include policies in their plans directed at achieving affordable housing.

The PPS, amongst other things, states that:

“Planning authorities shall provide for an appropriate range of housing types and densities to meet projected requirements of current and future residents of the regional market area by:

- a) establishing and *implementing* (emphasis added) minimum targets for the provision of housing which is affordable to low and moderate income households.”

The Provincial Growth Plan states that all municipalities shall develop and implement through their Official Plans strategy and policies that will:

“plan for a range and mix of housing, taking into account affordable housing needs.”

The York Regional Official Plan has an extensive list of policies related to affordable housing as outlined below.

The OP states that having a range of affordable housing options in York Region is an “important step in building communities...that are inclusive and in creating communities that nurture full development of human potential.”The OP also notes the importance of

having a broad variety of housing choices to ensure that people who work in the Region can also live there if they choose.

The objective of the housing section is:

“To promote an integrated community structure and design that ensures a broad mix and range of lot sizes, unit sizes, housing forms, types and tenures that will satisfy the needs of the Region’s residents and workers.”

Some of the policies that are relevant to Markham are:

- To encourage and support the private sector to produce affordable housing and to promote innovation and excellence in site planning, architecture, energy conservation and natural resource conservation.
- To require a minimum of 25% affordable new housing units across the Region, in each of the area municipalities.
- To discourage conversion of the rental stock.

Section 37 offers an appropriate mechanism for the achievement of affordable housing objectives. All other municipalities that have been reviewed propose to use the authority under Section 37 to achieve a broader range of affordable housing objectives than is currently the case in the Town of Markham. It would seem appropriate, therefore, for the Town of Markham to consider adding the following to the benefits that it might secure under a Section 37 Agreement:

- Affordable and special needs housing
- Conservation and replacement of rental housing.

Infrastructure

With the improved provision of transit services to various parts of Markham over the past few years, there is now an opportunity to seek improvement to transit and access to transit services that may be secured by applying bonusing provisions in conjunction with the Region. Other municipalities have included public transit as benefits that could be achieved under Section 37. In addition, some municipalities, have included public parking as a community benefit, which may be relevant to Markham in certain areas adjacent to rapid transit or in the Town Centre. Based on this, the Town of Markham may want to consider adding the following to its list of benefits:

- Connections to transit facilities including pathways, improvements to public passageways and both access and physical improvements for the public across private lands;
- Local improvements to transit facilities;
- Cycling trails and laneways; and
- Public parking.

Other Amenities

The Town of Markham has initiated a study of public art to determine the most appropriate approach towards expanding and securing its range of public art resources. In addition, the Town has a number of cultural facilities that may need to be expanded in the future and has the potential to add to its stock of facilities. Most other municipalities have included public art and cultural facilities to the list of benefits that may be secured through Section 37 agreements. Finally there may be opportunities to use a Section 37 Agreement to secure one or more significant public views to an important natural or built feature. Based on this the Town may wish to add the following to its list of community benefits:

- Conservation of cultural heritage resources, including related studies;
- Public art;
- Non profit cultural facilities; and
- Protection of significant views.

In addition, the Town may wish to not limit the application of Section 37 only to those benefits identified in the Official Plan, in case other opportunities were to arise through Council initiated studies. The Town may wish to consider adding the following to its list of benefits:

- Other local improvements identified in Council initiated studies.

Summary

The recommended wording for the Town of Markham's Official Plan policy is contained in Appendix A. The following summarizes the complete list of benefits that could be included in a revised version of Section 7.3 of the Markham Plan (reflecting both the existing list of benefits in Section 7.3 and proposed new additions to the list of benefits discussed above).

- the conservation of cultural heritage areas or buildings, including necessary studies in support of cultural heritage conservation;
- the preservation of woodlots or environmentally significant areas and securing enhancement areas which would not be accepted as parkland dedication;
- substantial contribution to the urban forest on public lands;
- provision of public access to ravines and valleys;
- the provision of increased amounts of on-site open space or facilities such as day care centres, community centres, recreational facilities;
- the provision of affordable and special needs housing including housing for senior citizens;
- conservation and replacement of rental housing;
- connections to transit facilities;
- local improvements to transit facilities;
- to achieve additional road or servicing improvements;
- provision of public parking facilities;

- protection of significant views;
- public art;
- non profit cultural facilities; and
- other local improvements identified in Council initiated studies.

5.2 Conformity with Other Policies of the Official Plan (Good Planning)

A number of municipalities have policies in their Official Plan statements restricting the use of Section 37 to developments that conform to other Sections of the Official Plan, achieve good planning and neighbourhood compatibility. While this may seem self evident, it appears that many municipalities have concluded that it is prudent to clarify that achieving what is normally considered as “good planning” should be a pre-condition, and not the subject of negotiations regarding community benefits in return for Section 37 increases in development rights.

Toronto’s policy statement in this regard is the most succinct and relevant to the Markham context. It states that “development must constitute good planning, be consistent with the objectives and policies of the Official Plan, and comply with relevant built form policies and neighbourhood protection policies”.

It would seem appropriate for Markham to add a clause to its Section 37 Official Plan statement that the enactment of by-laws to permit more height and/or density in return for community benefits is subject to achieving good planning objectives as well as conforming to other policies of the Official Plan, built form objectives and neighbourhood compatibility.

On the other hand, while not constituting the basis for an increase in height and/or density, it may nevertheless be advantageous to secure some aspects of a development which may be considered as good planning (for example heritage conservation) through a Section 37 Agreement. This proviso need not be stated in the Official Plan, but could constitute part of the guideline for addressing Section 37 negotiations and agreements within the Town.

5.3 Benefits to be Over and Above What Could be Achieved Through the Planning Act and Development Charges

Most municipalities have not felt the need to clarify that Section 37 benefits are to be above and beyond what could otherwise be achieved under the Planning Act and the Development Charges Act. The City of Toronto makes this statement in its Official Plan, presumably to preempt any argument that in future Section 37 benefits could be discounted by the amount that is required through mechanisms such as Section 42 Parks dedications or development charges. While not absolutely necessary, it would seem prudent for the Town of Markham to add this clarification to its Official Plan, to avoid

any possible future misinterpretation. Such a statement would, of course, not limit the opportunity to obtain benefits, though Section 37 bonusing that are over and above what would normally be provided under Section 42 of the Planning Act or through Development Charges.

5.4 Geographic Areas for Applying Section 37

A number of municipalities limit the application of Section 37 benefits to particular areas within the municipality, for example intensification areas. Some municipalities leave the application of Section 37 benefits open to all areas within the municipality, but also specify particular areas for the application of these policies. For example, Burlington does has a section in its Official Plan dealing with Waterfront development that explicitly states that Section 37 bonusing may be used in this area to achieve a number of objectives.

For Markham, it would seem appropriate not to restrict the application of Section 37 to particular geographic areas, but to leave it open to all parts of the Town, with applicability to be determined on a case by case basis. Should the Town wish, it could also specify in its policies dealing with particular areas, such as the Langstaff lands or the Yonge Street corridor, that Section 37 bonus policies could be used to achieve specific objectives in these areas. Otherwise the issue of geographic applicability can be addressed through guidelines.

It is anticipated that the focus of most Section 37 benefits will be developments within identified intensification areas shown on the Town's intensification hierarchy, including the Regional Centres of Markham Centre and the Langstaff Gateway, Key Development Areas along the Yonge Street and Avenue Seven rapid transit corridors, and other areas identified as Major Corridors, Local Centres and Local Corridors in the hierarchy.

5.5 Prescribing the Amount of Bonus Density

An important issue that many municipalities have grappled with regarding bonusing is whether it makes sense to cap the amount of bonus density that might be considered. All municipalities that have considered this issue have concluded that it does not make sense to incorporate a maximum limit for bonusing. Yet, this is an important question for Markham where, unlike many other municipalities, land is most often not pre zoned and where there exist large areas of potential development, such as the Langstaff Gateway or Cornell Centre, where technical studies have determined that there may be a range of acceptable development intensity, from low to high, depending on how development unfolds and how infrastructure improvements are provided.

There are two related dimensions of this issue: one is whether to address density limits in the official plan and the other is how to address density in the zoning bylaw. Other municipalities address this issue in different ways. Unlike most other municipalities, the City of Toronto does not include any density or height limits in its Official Plan. Instead

in its official plan it describes the type, intensity and quality of development that is expected in various sub districts of the City using words rather than numbers. In Toronto therefore, density is only referred to in the zoning bylaw and any application to amend the zoning bylaw in respect of density or height for a particular site is potentially subject to the bonusing policies. This represents one way of proceeding.

Most other municipalities do have density restrictions in their official plans as well as their zoning bylaws. In some cases these limits are the same, while in others they are different, with the official plan limits sometimes higher than the limits in the zoning bylaws. In these cases any application to amend the zoning bylaw, whether or not it triggers an amendment to the official plan as well, could be subject to bonusing policies.

In Markham there are a number of unique circumstances that need to be addressed. These bonusing scenarios can be generally characterized and categorized using the Town's Intensification Hierarchy. For example, the Secondary Plan policies for the Cornell Centre Key Development Area located on the Avenue Seven rapid transit corridor, place limits on development, but provide for this limit to be exceeded on condition that the additional development does not compromise transportation, servicing, school, and other community infrastructure capacity. The underlying zoning is outdated (agriculture). The option for applying bonusing in this instance is to consider any application that exceeds the established Secondary Plan base development limit as an application to which the bonusing policy would be applied. A variation might be to update the zoning bylaw for the area to reflect the Secondary Plan base development limit with the result that all applications for rezonings would be subject to the bonusing policies.

Another situation exists in the Regional Centres of Langstaff Gateway and Markham Centre where an Official Plan Amendment is contemplated to update the Secondary Plans. Here too, the underlying zoning is out of date, based on either agriculture or old industrial categories. The policy framework that is likely to emerge here is that development over a certain base level would be permitted subject to infrastructure improvements. The simplest approach here would be to consider any application that exceeds the base level as subject to the bonusing provisions. One of the conditions that would need to be met to obtain approval for all applications in all parts of the Town including the Langstaff Gateway and Markham Centre, to which bonusing policies would apply, is that there needs to be adequate infrastructure to support the development (see Appendix A). So in this instance, a development that is above the base level, can be considered and would be subject to bonusing policies, provided there exists, or will exist, adequate infrastructure to support the development prior to the development being built.

A final circumstance relates to lands along the Major Corridors, Local Centres and Corridors such as Steeles Avenue, Milliken Centre and Thornhill Centre where new secondary plans place limits on height and density, but the underlying zoning is significantly lower. Here again, any application for development that requires a rezoning should be subject to the bonusing policies, provided the conditions for approving the development are complied with.

The rationale in each instance is that the process of changing the development limits, above what they were prior to the studies, represents an increase in height and density as described in Section 37 of Planning Act and therefore meets the criteria in the Planning Act for applying bonusing provisions. In addition, the increases in development potential also reflect an increase in value for the owner of land. In all of these instances it would seem appropriate to apply Section 37 bonusing provisions to applications that exceed the base development scenarios, whether or not reflected in the zoning.

5.6 Threshold Size for Developments Under Section 37

Both Toronto and Ottawa make reference to development size thresholds beyond which Section 37 bonusing policies would apply. Toronto's policy applies to developments over 10,000 sq. m. in size, with an increase in density of at least 1,500 sq. m. over what otherwise would be permitted as of right. In Ottawa, the size threshold is not embedded in its Official Plan statement, but will be included in its guidelines which are now under preparation. A threshold for a project of more than 2,500 sq. m. is under consideration with density increases amounting to more than 25% of project's gross floor area. Other municipalities do not include a threshold size above which Section 37 would apply.

Markham may wish to include a threshold size below which Section 37 bonusing would not apply, to make it clear to the development industry that Markham does not intend to target smaller projects for achieving its community benefits. As a practical matter, there is also a likely threshold below which the administrative arrangements may be too onerous for both the developer and the Town to justify the application of a Section 37 bonus policy. This threshold need not be included in the Official Plan statement, but could be incorporated into a set of Council approved guidelines. Given the size of development in Markham, a threshold of between 2,500 and 5,000 sq. m. would seem appropriate.

5.7 Method to Assess The Value of Community Benefits

No municipality has included a formula for calculating what the value of the community benefit should be in relation to the value of the increase in density. The City of Toronto has done a considerable amount of work in this area and in the end, concluded, based on legal advice, that providing a formula for this type of calculation might open it up to challenges that this would, in effect, constitute an illegal tax. Toronto has instead opted for a flexible approach that requires that benefits be calculated on a case by case basis with the value of the community benefit in relation to the value of the increase in height and/or density to vary from project to project depending on the circumstances. Ottawa at one point did consider including the formula in its guidelines, but has backed away from this approach based on advice from staff at the City of Toronto.

In its Section 37 guidelines, Toronto proposes that a financial impact statement be prepared to be attached to the report recommending approval of the development,

summarizing the community benefits that are to be secured, the value of the community benefits (based on estimates from staff in other Departments responsible for capital facilities) and the timing of the provision of the benefits.

A typical protocol for assessing the value of the increase in height and/or density in Toronto is to use City real estate appraisers to calculate the increase in the value of the land associated with the increase and to use this valuation as the basis for calculating the value of the community benefit to be secured. Other municipalities either use outside appraisers to do this and charge the developer for the cost, or require the developer to hire an independent appraiser to do the calculation and to share the information with the municipality.

Markham should determine the most appropriate method for calculating the increase in the value of land associated with the increase in height and density to suit its own unique circumstances (either using its own appraisers, hiring outside appraisers and covering the cost, or requiring the developer to hire an independent appraiser and share the information). As a matter of course, and to ensure transparency, Markham should adopt the protocol of including a financial summary as an appendix to its final reports dealing with section 37 bonus developments, summarizing the value and timing of community benefits to be secured.

5.8 On or Off Site Provision of Benefits

All municipalities state in their Official Plan statements that there should be a reasonable planning relationship between the community benefits and the proposed development that is the recipient of an increase in height and/or density. A number of municipalities also state that there should be a reasonable geographic relationship between the off site provision of community benefits and the development site. Toronto also includes this approach in its guidelines, but acknowledges in its guidelines that there may be instances where a City wide fund exists (for example, a revolving fund for affordable housing or a public art fund), which, while not explicitly meeting the geographic proximity test, may nevertheless meet the reasonable planning relationship test. Toronto thus makes provision for contributions from developments subject to section 37 negotiations to be provided towards City wide objectives which may not be able to be achieved on site.

Like other municipalities, the Town of Markham should include in its Official Plan Statement a condition that there be a reasonable planning relationship between the community benefits secured and the proposed development. It may also be prudent to clarify in its guidelines that in most instances this will mean that there is a close geographic proximity between the community benefit and the site, but where a city wide fund exists for a particular type of facility, a contribution to this fund may constitute a reasonable planning relationship.

5.9 Planning Staff to Take the Lead in Negotiations

It is essential that planning staff who are responsible for making recommendations on development applications to Council in accordance with the Planning Act and other Provincial policy, be the lead negotiators with developments that are the subject of Section 37 bonus discussions. It is also essential that planning staff coordinate input from other departments on the appropriate provision and costing of community benefits and securing those benefits in a Section 37 agreement satisfactory to the Town Solicitor. The timing of negotiations is often quite sensitive with the need to tie the approval of the development, including the increase in density, to a binding agreement to provide of the services, facilities and matters.

It is also important that the local Councillor be informed of these negotiations and that he or she have an opportunity to provide input into the nature of community benefits that might be appropriate in particular circumstances.

Ideally, there would be studies conducted ahead of time to identify community needs, based on community input and an assessment of opportunities by Town staff. These would then form the basis for negotiating community benefits in a transparent way that clarifies expectations ahead of time. However, in reality this is very difficult to achieve and to keep this type of information up to date for the Town as a whole, particularly given the likely continued dynamic evolution of the Town in the future. In the absence of such comprehensive studies, the guidelines that are summarized in Appendix B, should be followed to provide for a clear protocol and to avoid confusion about who should take lead responsibility in negotiations.

5.10 Benefits to be Identified in Site Specific Bylaws

The benefits to be secured through any particular bonusing application would need to be outlined in a site specific bylaw. Such a bylaw, in addition to containing all of the usual provisions that would govern development on the site, would include a section that requires the owner to enter into agreements under section 37 to secure the facilities, services and matters outlined in the bylaw. This section of the bylaw could include a specific list of benefits that would be provided to the Regional municipality, who would be responsible for delivering the service, such as transit or non profit housing, or possibly a non profit agency (e.g. daycare facilities).

In these instances the bylaw would state what the applicant is responsible for: either providing a certain amount of land for non profit housing, and/or funding for non profit housing, and/or the provision of a certain number of affordable housing units to be secured at affordable rents over a specified period of time, and/or funding for transit improvements and/or provision of space for daycare that meets Provincial requirements. Although the subsequent Section 37 agreement would be entered into with the Town it would specify that the land, funding or improved space would be provided to the Region or other organization as required.

5.11 Use of Section 37 Agreements to Secure Other Matters

As already mentioned in section 5.2 above, Section 37 Agreements may be convenient mechanisms to secure a number of other provisions that are not the subject of additional density or height, but may be over and above what can be secured in other sections of the Planning Act. In Toronto these types of provisions usually refer to retention or replacement of rental housing, securing re-housing agreements for displaced tenants, or securing heritage resources that may be difficult to achieve under the Heritage Act. These types of opportunities need not be addressed in the Official Plan Statement, but may be acknowledged in the guidelines for the Town of Markham.

6. Conclusion

This report reviews the Town's existing Section 37 Official Plan bonusing policies in light of experience with bonusing and approaches to Official Plan policies in other municipalities. As development in Markham has matured over the past few years, developers have applied recently for increases in height and density over those proposed in Secondary Plans. Markham is thus in a position to achieve a number of community benefits through negotiations surrounding these types of developments, subject to adherence to good planning principles, neighbourhood compatibility and a reasonable planning relationship between the negotiated benefit and the proposed increase in density and/or height.

The two appendices that are attached to this report provide a recommended policy framework for revising the Town's Official Plan and a set of guidelines to guide Section 37 negotiations and structure agreements.

The following elements are included in the proposed policy framework:

- The need for a reasonable planning relationship between the proposed benefit and the increase in height and density;
- The need for good planning;
- The need for adequate infrastructure to support the increase in height and density;
- The need for the benefits to be over and above what would otherwise be secured through other provisions of the Planning Act or the development Charges Act;
- The list of proposed benefits as described in Section 5.1 above;
- The need to determine specific benefits based on community needs, intensification issues and the other objectives of the Official Plan; and
- Implementation to be by way of a site specific amendment and an agreement between the owner and the municipality.

The guidelines address the following:

- The geographic areas to which section 37 will apply, with a focus on areas of intensification;

- A proposed size threshold above which bonusing policies would apply;
- Local area studies to inform negotiations;
- A process for valuation of community benefits; and
- A protocol for negotiating Section 37 increases including role of planning staff, other departments, local Councillor and community involvement.

Appendix A: Recommended Section 37 Official Plan Statement

SECTION 7.3

d) Increased Height and Density (Bonus) Provision

- i. In accordance with Section 37 of the *Planning Act*, Council may, in a by-law passed under Section 34, authorize increases in the height and density of development otherwise permitted in the by-law in return for the provision of community benefits in the form of facilities, services or matters provided:
 - a. the community benefits bear a reasonable planning relationship to the increase in height and/or density of the proposed development;
 - b. the development must represent good planning, be consistent with the other objectives of this Plan and meet all applicable built form and neighbourhood compatibility objectives; and
 - c. there is adequate infrastructure to support the development.
- ii. A bonus provisions by-law may be enacted by Council to achieve the Town's objective of obtaining certain facilities, services or other matters which would not otherwise be secured under the other provisions of the *Planning Act* or the *Development Charges Act*, and which may be of particular benefit to a specific area or the Town at large. Notwithstanding the generality of the foregoing, the intent of Council in passing such by-laws would be to attain facilities, services and matters such as, but not limited to:
 - the conservation of cultural heritage areas or buildings, including necessary studies in support of cultural heritage conservation;
 - the preservation of woodlots, environmentally significant and enhancement areas which would not be accepted as parkland dedication;
 - substantial contribution to the urban forest on public lands;
 - provision of public access to ravines and valleys;
 - the provision of increased amounts of on-site open space or facilities such as day care centres, community centres, recreational facilities;
 - the provision of affordable and special needs housing including housing for senior citizens;
 - conservation and replacement of rental housing;
 - connections to transit facilities;
 - local improvements to transit facilities;
 - to achieve additional road or servicing improvements;
 - provision of public parking facilities;
 - protection of significant views;
 - public art;
 - non profit cultural facilities; and
 - other local improvements identified in Council initiated studies.

- iii. Community benefits which are the subject of Section 37 bylaws will be determined based on local community needs, intensification issues in the area, and the objectives of this Plan with priority given to provision of benefits in proximity to the proposed development.
- iv. Increased height and density (bonus) provisions under Section 37 of the Planning Act will be implemented by site specific by-laws passed under Section 34. Such by-laws will contain the standards of the basic zoning category applicable to the site if the bonus is not awarded as well as the standards that would apply when the bonus is awarded. The by-law will also specify the facilities, services and matters that are required to be provided or provided for before the bonus standards become applicable.
- v. An agreement between the owner and the Town shall be entered into in regard to the relevant facilities, services and matters, when an owner is being awarded the bonus and the bonus standards become applicable.

Appendix B: Guidelines for the Implementation of Section 37 Increases

1 Good Planning

Good planning includes addressing all other policies contained in the Official Plan, including implementing plans or other documents and urban design policies and objectives. The relationship of a development to its context, the adjacent street, the creation of a good public realm, improvements to the public realm adjacent to the site (including off site improvements included under Section 41), a harmonious relationship to the natural environment, including sustainable design and good architecture should not be subject of negotiations regarding density increases, but should constitute the foundation for all development in the Town. Design quality must not be compromised.

2 Reasonable Planning Relationship

A reasonable planning relationship between the community benefit and the proposed development refers, in the first instance, to geographic proximity. The highest priority would be for on site provision of community benefits. The next level of priority would be in the immediate vicinity of the site. Where there exists a Town wide fund to address particular needs which cannot be economically provided on site, but which can be related to the development, such as the provision of affordable housing or public art, contributions to these funds will be considered as eligible in return for increases in height and/or density.

3 Geographic Applicability

While site specific bylaws including Section 37 benefits may be passed in all parts of the Town, the focus for most Section 37 developments will be intensification areas shown on the Town's intensification hierarchy including the Regional Centres of Markham Centre and the Langstaff Gateway, Key Development Areas along the Yonge Street and Avenue Seven rapid transit corridors, and other areas identified as Major Corridors, Local Centres and Local Corridors in the hierarchy.

4 Size Threshold

Density incentives will be applied mainly to projects which are larger than 5,000 sq m and where the proposed density will exceed 1,500 sq m over what would otherwise be permitted. Bonusing will not apply to non profit developments and all developments that are under 3 storeys or less in height.

5 Local Area Studies

Where Council has approved studies or plans for particular geographic areas of the Town, including Secondary Plans, outlining the range of community facilities, services or matters that should be provided or supported on a priority basis, these will inform negotiations regarding the provision of Section 37 benefits for these areas.

6 Valuation of Community Benefits

The value of the community benefit(s) will be negotiated with the developer on a case by case basis and will be based on a reasonable relationship between the increase in land value accruing to the developer by granting a bonus in height and density and the value of the benefits to be provided in return for the bonus. A financial impact statement will be prepared to be attached to the report recommending approval of the development, summarizing the community benefits that are to be secured, the value of the community benefits (based on estimates from staff in other Departments responsible for the facilities, services or matters contemplated) and the timing of the provision of the benefits.

The Town will use real estate appraisers to calculate the increase in the value of the land associated with the increase in height and/or density and this valuation will be used as the basis for calculating the value of the community benefit to be secured.

Payments in lieu of direct provision of services shall be secured prior to the issuance of a building permit.

7 No Exemptions from Development Charges or Section 42 of the Planning Act

There will be no exemptions for developments subject to Section 37 Agreements from Development Charges or parks contributions under Section 42 of the Planning Act.

8 Protocol for Negotiating Section 37 Benefits

Height and Density increases will be the subject of negotiation between willing parties – the developer and the Town, and will be approved by an amendment to the Zoning By-law after consultation with community groups. An agreement will be entered into between the developer and the City prior to the enactment of the Bylaw.

Planning staff who are responsible for making recommendations on development applications to Council in accordance with the Planning Act and other Provincial policy, will be the lead negotiators with proponents of developments that are the

subject of Section 37 bonus discussions. Planning staff will also coordinate input from other departments on the appropriate provision and costing of community benefits.

Local Councillors will be consulted regarding Section 37 negotiations and will provide input into the nature of community benefits that might be appropriate in particular circumstances. Local communities also will be consulted, as appropriate.

9 Agreements

In addition to securing community benefits that are directly related to density and/or height increases, Section 37 agreements may include other matters that may be important to the Town to meet its Official Plan objectives, but which may fall outside of the purview of other agreements, such as protection of rental housing or heritage features.