Critics weigh in on section 37 agreements

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In recent years, in response to the rise in real estate prices, increased demand for condominium development and popularity of downtown living, municipalities have been pressured to accommodate buildings with greater heights and densities than what is generally permitted in their zoning bylaws.

One of the approaches that municipalities have taken to ensure that development does not outpace good planning involves the negotiation of section 37 agreements under the Planning Act. These allow a municipality to pass a bylaw authorizing an increase in height and density of a development in exchange for "such facilities, services or matters" as set out in the bylaw. Terms of the agreements are negotiated between the municipality and the developer, and involve a commitment from the developer to provide a broad range of community benefits in exchange for an increase to height and/or density of the proposed development. The agreements are then registered on title to the lands.

Section 37 agreements have been used in various municipalities in Ontario, although the level of use varies dramatically. While some municipalities have executed only a few s. 37 agreements, the City of Toronto has negotiated more than 300 since 1998, leading to more than $225 million in community contributions.

Although the public may have benefited from the negotiation of these agreements, criticisms of the transparency and effectiveness of this system have recently caused Toronto officials to consider alternatives to s. 37. Nevertheless, the City of Ottawa recently approved the use of s. 37 agreements, based in part on Toronto's success.

The case against

One of the most common criticisms against s. 37 agreements involves the lack of transparency. Since negotiations occur behind closed doors, there is a potential danger that while broader public interests may be addressed, local communities are left out of the process. Furthermore, since city councillors and planning staff prefer to negotiate once the density and height of the development is finalized, s. 37 agreements are often negotiated only a few weeks before the zoning bylaw amendment is passed, leaving little time for consultation with the community.

The alleged lack of transparency leads to a second concern: the level of consistency among negotiated agreements. Critics have observed that s. 37 agreements may be construed as a bribe by developers to persuade city officials to approve of bad planning proposals; or, conversely, an illegal tax imposed by the city on developers and new homeowners.

Although inconsistencies are tempered by the fact that each agreement is negotiated on a case-by-case basis, Ontario Municipal Board rulings suggest that certain decisions made by municipalities are inconsistent, even when the proposed development is found to comply with good planning practices (See Haulover Investments Ltd. v. Richmond Hill

(Town), [2011] O.M.B.D. No. 803, leave to appeal refused, [2012] O.J. No. 1602 and Daniels HR Corp. v. Toronto (City), [2010] O.M.B.D. No. 711).

Addressing concerns

To address concerns, some municipalities have included implementation guidelines and protocols for s. 37. Toronto's guidelines and protocol, adopted in 2007, contain provisions stating that the ward councillor should always be consulted by planning staff prior to any negotiation of section 37 community benefits and that planning staff should always be involved in discussing or negotiating benefits with developers and owners. Examples of best practices for negotiating s. 37 benefits are also provided, including identification of potential community benefits in advance of a planning application and consultation with other interested parties.

Similarly, Ottawa's recently adopted guidelines state that the ward councillor, community groups and area residents shall participate in determining what benefits should be the subject of negotiation between the city and the owner/developer.

However, there are concerns that the guidelines for negotiating section 37 community benefits have not been implemented to the extent necessary to benefit local communities. Since there is no penalty for developers and no recourse to the public where agreements are negotiated without adequate community consultation, the public must essentially trust that the councillor and planning staff have sufficient understanding of local concerns and how the proposed development would affect the community.

Furthermore, while some communities have well-established resident or citizen association groups that actively pursue s. 37 benefits prior to development, other neighbourhoods are not as fortunate. Finally, since the duty to consult is often referred to in guidelines but is not included in the official plan, this duty does not rise to the level of official plan policies that are considered in determining the appropriateness of a planning application -- for example, policies regarding rental housing or the threshold requirement before s. 37 benefits can be engaged.

Conclusion

Section 37 agreements have the potential to significantly transform neighbourhoods where the market demands intensification and concerned parties have equal opportunities to negotiate. Instead of proposing alternatives to s. 37 agreements, municipalities should consider strengthening their implementation guidelines and official plan policies for s. 37 benefits to encourage greater accountability for developers, planning staff and city councillors to consult with local community groups.

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