

Section 37 of the *Planning Act*: **Community Benefit Guidelines**

City of Kingston

DRAFT

Planning, Building and Licensing Services
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Section 1

Introduction

1.1 Purpose

Section 37 of the *Planning Act* allows municipalities to authorize increases in height and density of a development, in a by-law passed under Section 34 of the *Planning Act*, in return for the provision of facilities, services or other matters (referred to as “Community Benefit(s)” or the “Benefit”) if the municipality has an Official Plan that contains provisions relating to the authorization of increases in height and density of development. The City of Kingston Official Plan (the “Official Plan”) contains policies to allow increases in height and/or density of development in exchange for Community Benefits through the provisions of Section 37 of the *Planning Act*.

The following Community Benefit Guidelines (the “Guidelines”) are intended to assist in the implementation of the applicable policies in the Official Plan in concert with Section 37 of the *Planning Act*. The Official Plan policies identify the type of facilities, services or matters that may be considered as Community Benefits. All proposals for an increase in height and/or density must constitute good planning and be consistent with the policies of the Official Plan. The Official Plan policies identify locational criteria for Community Benefits, consultation requirements and methods to legally secure the Benefits. The Guidelines must be read in conjunction with all policies of the Official Plan. If any conflicts arise between Official Plan policies and the Guidelines, the Official Plan policies shall prevail.

The purpose of the Guidelines is to improve clarity, consistency and transparency for the public, land owners, developers, City Staff and Council Members in the process related to negotiating and securing Community Benefits. City Staff and members of Council, the Planning Committee and Heritage Kingston will use the guidelines as they evaluate development applications.

Guidelines are not requirements of the *Planning Act*, and are not considered policies of the Official Plan, but they are useful tools to provide clarification with respect to the intent of the policies, the procedure to be followed and expectations for all involved.

The Guidelines can be revised through Council adoption of a report from the Commissioner, Community Services or through Council direction. In conjunction with future revisions to the Official Plan by Council or the Ontario Municipal Board, or modifications to any other governing Provincial legislation, these Guidelines may require revisions through adoption by Council.

1.2 Section 37 of the *Planning Act*

Under provincial legislation, a development triggers two financial obligations: to pay Development Charges intended to offset the extra pressures generated by the development on municipal services; and to dedicate parkland (or provide cash-in-lieu) under Section 42(1) of the *Planning Act*. As stated in the *Development Charges Act*, Development Charges are

intended “to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies”. As a component of the *Planning Act*, the use of Section 37 for Community Benefits is different from that of Development Charges and Parkland Dedication.

The use of Section 37 of the *Planning Act* must be grounded in fair, clear, transparent, predictable, specific requirements that are set out in the Official Plan and are not arbitrary in their application. Increases in height and/or density in exchange for Community Benefits must be governed by the principles of planning and the objectives of the *Planning Act*, which is a planning statute, not a revenue tool, and it must be clearly laid out in the policies of the Official Plan. There must be a clear connection between the proposed development and the Community Benefits, demonstrating that the benefits pertain to the development.

Where a community benefit is already required to be provided by the Official Plan, the *Planning Act*, the *Ontario Heritage Act* or any other relevant federal, provincial or municipal legislation, policy or by-law, credit as a Community Benefit will only be given where it exceeds that which is already required or that which is already given credit towards another objective.

Section 2

Governing Principles

2.1 Principles

The following principles must be satisfied in order for increases in height and/or density to be authorized in exchange for the provision of Community Benefits. Please refer to Sections 3, 4 and 5 of the Guidelines for additional information:

- a. **Increases in height and/or density must represent good planning on their own merits.** Community Benefits should not be used as a means to achieve “good planning” by making a “bad” application “good”, but might validly make a “good” application “better”. There may be instances where Community Benefits are required in order for an application to comply with the intent of the policies of the Official Plan.
- b. **Community Benefits must be set out in the site specific zoning by-law** authorizing the increases in height and/or density and they may be secured in a legal agreement that may be registered on title. Community Benefits requested by City Staff must be selected from the list of facilities, services and matters identified in the Official Plan.
- c. **Community Benefits must demonstrate a clear connection and reasonable planning relationship with the specific characteristics of the proposal.** This may refer to the proximity of the Community Benefit to the proposed development, the need for the Community Benefit based on the impact of the proposed development and the uplift value.
Community Benefits will be considered on the following basis:
 - c.1 **Highest priority will be given to community benefits located on-site or in the immediate vicinity** of the site to be interpreted as the surrounding area impacted by the development in the following order of priority:

- c.1.1.1 Provision of affordable housing as defined in the Official Plan will be the preferred community benefit where the existing affordable housing stock is impacted by the proposal or where the supply of affordable housing has been identified by the City as being deficient.
 - c.1.1.2 Provision of in-kind benefits that support the objectives of City-adopted plans applicable to the site or immediate vicinity of the site.
 - c.1.1.3 Provision of in-kind benefits that are identified in the Official Plan and not detailed in City-adopted plans applicable to the site or immediate vicinity of the site.
 - c.1.1.4 Other community benefits volunteered by the applicant that are not specifically identified in the Official Plan when deemed appropriate in consultation with the Ward Councillor and local community.
 - c.2 **The next level of priority will be given to the provision of cash-in-lieu payments** that are allocated towards specific facilities, services or matters in the following order of priority:
 - c.2.1 Cash-in-lieu contributions that result in a tangible benefit in the immediate vicinity by allowing a specific facility, service or matter identified in a City-adopted plan to be implemented.
 - c.2.2 Cash-in-lieu payments that make a general contribution to be held in a reserve fund to be used for specific facilities, services or matters for which funds to implement the project are not available in their entirety but will be collected to fund a larger project that the community has identified as a priority.
 - c.3 The lowest level of priority will be given to the provision of community benefits that are not located on-site or in the immediate vicinity of the site but have the potential to benefit the community at large.
- d. **The value of the Community Benefit will represent a reasonable proportion of the uplift value.** The value of the increased height and/or density and the Community Benefit must be appraised at the applicant's expense, on a case-by-case basis, so that there is an equitable relationship between the established value of the increased height and/or density and the value of the community benefit.
- e. **To ensure community benefits respond to community needs, community groups, the Councillor(s) of the local Ward(s), and the local community will be consulted** on the development application and potential Community Benefits as part of the statutory public consultation process.

Section 3

Community Benefits

3.1 Qualifying Threshold

Community Benefits will apply to every application for a Zoning By-law Amendment for a residential development proposal with more than 3,000 square metres, including the residential component of a mixed-use development proposal, where the proposal requests an increase in the applicable height and/or density limits. In cases where the Uplift Value is calculated on 100 square metres or less, the applicant will be provided with the option to forego an appraisal and voluntarily agree to an Uplift Value of \$100 per square metre.

Community Benefits are generally not intended to be requested from non-profit developments, non-residential developments or development projects that do not exceed the threshold identified above, but there may be circumstances where the proposed development may still be a suitable candidate to provide Community Benefits. In such instances, Planning Staff will advise the applicant that Community Benefits may be requested at the pre-application or application stage.

3.2 Link between the Benefit and the Development

The onus is on City Staff to ensure a direct connection between the proposal and the requested Community Benefits through an analysis which will be informed by the procedure outlined in Section 5.1.

In order to determine which Community Benefit is appropriate for Planning Staff to request from an applicant, an analysis must be done which works outward from the development and shows a connection between the Benefit and the specific characteristics of the subject property or the development proposal. For example, if the subject property is adjacent to and will increase the use of a transit stop, an appropriate benefit may be upgrades to the transit stop, if it can be shown that the Benefit meets all requirements laid out in the Guidelines.

A Community Services and Facilities Study (CSFS) will be required by the City to assist in determining the appropriateness of a Community Benefit in the event that City-approved plans have not identified Community Benefit needs within the immediate vicinity or when an analysis of Community Benefits identified in City-approved plans is needed to inform the decision-making process. A CSFS provides an inventory of publicly funded or publicly accessible services and facilities, including schools, child care facilities, community centres, recreation facilities, social services, community spaces, parks and libraries. Further, the Study examines demographic trends to identify changes in the demand for community services or facilities. The Study may highlight necessary improvements, services or facilities that may be required to support the health, safety and well-being of future residents.

An applicant may volunteer to provide Community Benefits that are not specifically outlined in the policies of the Official Plan. If the Benefits are deemed to be appropriate following a thorough review by City Staff, in consultation with the District Councillor and local community,

and they comply with the intent of the Official Plan policies, they may be considered appropriate to recommend to Council for approval. In this instance, the onus is no longer on City Staff to demonstrate the direct connection, as the Benefits will be provided on a voluntary basis by the applicant.

3.3 Appropriate Community Benefits

If a direct connection can be established in accordance with Section 3.2 of the Guidelines, the following items are appropriate Community Benefits for City Staff to request on-site, off-site or as a cash-in-lieu payment in a location that complies with Section 3.4 of the Guidelines:

- a. providing *affordable* housing beyond what is already required by the Official Plan.
- b. providing public parkland beyond what is already required by the Official Plan and the parkland dedication by-law including waterfront properties or universal public access to the waterfront whenever such lands become available;
- c. protecting *significant natural heritage features and areas* and linkages comprising the *natural heritage system* beyond the requirements of the *Planning Act*;
- d. enhancing transit facilities that maximize mobility and access for all;
- e. providing public areas, access to waterfront, pathways for all modes of active transportation, and connections to external public pathways/trail systems using universal design principles;
- f. providing above and/or below grade public parking, in contexts where this type of parking meets the City's objectives;
- g. providing new or upgrading existing community and open space facilities such as day care centres, community centres, *recreation* facilities, cultural facilities and libraries;
- h. maintaining, conserving, restoring, and/or adaptively reusing identified *cultural heritage resources* beyond the requirements of the Official Plan and the *Ontario Heritage Act*;
- i. commemorating identified *cultural heritage resources* in accordance with the City's Commemorative Strategy;
- j. funding the study or evaluation of *cultural heritage resources*, particularly for those resources that have not yet been reviewed;
- k. allowing public access to designated *cultural heritage resources* where appropriate;
- l. protecting or enhancing *significant views* beyond the requirements of the Official Plan;
- m. providing cultural amenities such as artist live/work spaces, exhibition venues, rehearsal and presentation spaces and public art in accordance with the Public Art Master Plan, Public Art Policy and the City's Commemorations Strategy;

- n. providing a *renewable energy system* or *green infrastructure* that supports initiatives for *resilience* and *sustainability*;
- o. providing streetscape improvements in accordance with Council-endorsed documents such as the Downtown Action Plan and that also enhance accessibility and wayfinding;
- p. providing publicly-accessible *urban agriculture*;
- q. including local improvements identified in community design plans, *community improvement plans*, secondary plans, community energy plans, capital budgets or other implementing plans or studies; and
- r. other community benefits that may be identified through the development proposal review process

3.4 Location

Community Benefits may be located on or off-site. If they are located on-site, they may be provided in-kind as a specific facility, service or matter by the owner. If they are located off-site, they may be provided by the owner in-kind as a specific facility, service or matter, or as a cash-in-lieu payment towards a specific facility, service or matter. The applicable policy of the Official Plan states:

9.5.27 “Community Benefits may be provided on or off-site. Any proposal to provide off-site community benefits must demonstrate an appropriate geographic relationship by demonstrating to the satisfaction of the City that the community benefits will have a positive impact on the area experiencing the development.”

Whether the Community Benefits are to be located on or off-site, Staff will ensure that the requested Community Benefit has a direct connection to the development and that the Community Benefit provides a direct benefit to the immediate area experiencing the development. To this end, Staff may require the applicant to provide supporting rationale to justify the proposal.

Each individual Benefit has its own unique impact and catchment area. As such, the appropriate location for the Benefit will differ depending on the type of facility, service or matter provided. All off-site locations for Community Benefits will be reviewed on a case-by-case basis to ensure the catchment area positively impacts all properties in the immediate area experiencing the increased height and/or density provision.

3.5 Valuation

An applicant is entitled to some degree of certainty in ascertaining what Community Benefits they will be required to provide, as guided by established policy. The applicable policy of the Official Plan states:

9.5.26.c “there is an equitable relationship between the established *uplift value* and the value of the community benefit. The value of the Community Benefit will represent a

reasonable proportion of the *uplift value*, which must be appraised at the applicant's expense.”

The value of Community Benefits is established as a percentage of the “Uplift Value”. The “Uplift Value” is the difference between the value of land when a development is built in accordance with the applicable provisions of the Zoning By-law, and the value of land when a development is built with density and / or height provisions that exceed those permitted by the Zoning By-law expressed as a value of gross floor area, measured per square metre. As part of an application for a Zoning By-law Amendment, the applicant will be required to pay for a real estate appraisal, completed in accordance with the Terms of Reference included in Appendix A to the Guidelines, to determine the Uplift Value.

The applicant will select the appraiser, based on quotes provided from qualified appraisers as determined by the City. The City will be the client, with instructions only to come from the City. The City will provide the applicant with a copy of the final appraisal upon completion.

For the purposes of the calculation of Community Benefits, the “as-of-right” maximum height and density shall be calculated based on the maximum height permission of the applicable Zoning By-law in effect at the time of the submission of the application. The “as-of-right” height will be the maximum height proscribed in the By-law for residential uses, where residential use is permitted. In circumstances where the zoning designation in effect does not permit residential uses, the “as-of-right” height will be interpreted to be the most permissive maximum height prescribed in the zoning designation, regardless of type of use. Where the applicable Zoning By-law does not include a density provision measured as a floor space index or maximum gross floor area in square metres, and the applicant is only requesting an increase in the height of the building, the community benefits will be calculated based on the gross floor area of the building located above the maximum height permission. An example of the gross floor area calculation is illustrated in the examples shown in Figures 3.5A and 3.5B below.

Figure 3.5A – As-of-Right Building with Maximum Height Limit of 25.5 metres.

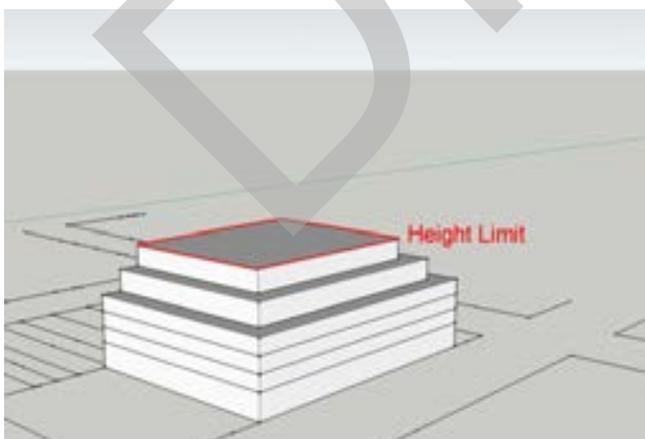


Figure 3.5B – Proposed Building identifying gross floor area subject to Community Benefits.



The Uplift Value determined through the completion of an appraisal will be used to determine the value of the Community Benefit required. The City of Kingston will seek a value of the

Community Benefit that is 20 percent of the Uplift Value. The value of the Community Benefits will be over and above what could otherwise be achieved through other Sections of the *Planning Act*, such as Sections 41, 42 and/or 50. Section 37 Agreements shall not in any way entitle reductions in Development Charges. Prior to finalizing the negotiations, the applicant will be required to submit to the City a cost estimate confirming the value of the negotiated Community Benefit (s).

Section 4 Implementation

4.1 Zoning By-law Amendment and Legal Agreement

Increases in height and/or density and Community Benefits must be approved through an amendment to the Zoning By-law. A Section 37 Agreement will be required and may be registered on title. The Agreement will identify the timing of the provision of the Community Benefit, as detailed in Section 4.2. If the Community Benefit is a cash-in-lieu payment, the Agreement will detail where the funds will be allocated and may also secure other matters as a legal convenience that are normally secured in the development process but do not form part of the Community Benefits.

4.2 Timing of Payments

The Section 37 Agreement will specify the timing of the provision of the Community Benefit. The Benefit may be secured within a defined number of days of the site specific by-law becoming final and binding, prior to the issuance of the first building permit, prior to the issuance of the first above-grade building permit, prior to the first occupancy permit for the development or on a phase by phase basis if the development will be constructed in phases. The timing of the provision of the Benefit in-kind or as a cash-in-lieu payment will be assessed on a case-by-case basis and will be dependent on the type of Community Benefit.

4.3 Administration

Cash-in-lieu payments received from a Section 37 Agreement will be collected by the Planning, Building and Licensing Services Department and held in a Section 37 Reserve Fund set up for that specific purpose. This fund will be managed by Financial Services who will work with other City departments to oversee related expenditures in accordance with an executed Section 37 Agreement. The funds will be spent only on the Community Benefits specified in the Section 37 Agreement and associated By-law.

Financial Services may invest the money in the Section 37 Reserve Fund in securities in which the City of Kingston is permitted to invest under the *Municipal Act*, 2001, and earnings derived from the investment shall be paid into the Section 37 Reserve Fund. The activities and status of the Section 37 Reserve Fund will be audited and reported out annually, as required.

The Treasurer of the City of Kingston shall each year, on or before the date specified by Council, give Council a financial statement relating to the Section 37 Reserve Fund. The

statement shall include all matters identified in Section 37(8) of the *Planning Act*, a copy of the statement shall be given to the Minister on request and Council shall ensure the statement is made available to the public.

Section 5 Procedure

5.1 Assessment and Negotiation Process

Planning Staff will always be involved in the negotiation of Community Benefits. Planning Staff have the responsibility to ensure that Official Plan policies are being complied with and must ultimately recommend which Community Benefits they believe should be secured as part of any approval. Although the order of the steps may vary depending on the nature of each application, in general, the process for negotiating Community Benefits is as follows:

Step 1: Advise Applicant

If Planning Staff identify that the application may require Community Benefits in exchange for proposed increases in height and/or density, they will advise the applicant as early as possible in the pre-application or application process that Community Benefits may be required if the proposed development is approved. When this determination is made, Planning Staff will provide the applicant with a list of Community Benefits needs within 400 metres that are identified in City-adopted Plans. If the City does not have needs identified in City-adopted Plans, the City will request that the applicant provide a Community Services and Facilities Study. This may be identified through the pre-application process and required as part of a complete application.

Step 2: Circulate to Commenting Departments

Upon receipt of the application, Planning Staff will include a description of the potential request for Community Benefits along with the list of Community Benefits needs previously provided to the applicant in the technical circulation to commenting departments, agencies and the District Councillor.

Step 3: Facilitate Real Estate Appraisal

The Uplift Value will be assessed through a real estate appraisal. Planning Staff will contact the applicant and provide a list of quotes from real estate appraisers in accordance with Section 3.5. The developer will select their preferred real estate appraiser from the list and provide payment. The City will facilitate the real estate appraisal process and act as the client.

Step 4: Assess Community Benefits

Planning Staff will assess the appropriate type of Community Benefits in accordance with these Guidelines and the Community Services or Facilities Study (CSFS) submitted for the

project to assist in determining the need for a specific Community Benefit and/or assessing priority of Community Benefits identified in City-initiated Plans within the immediate vicinity.

Step 5: Consult with Local Community

Planning Staff will consult with community groups and the local community at a statutory public meeting to gain input on community priorities of proposed Community Benefits. The public will have an opportunity to comment on the CSFS or Community Benefits identified in City-initiated Plans within the immediate vicinity and to suggest alternatives.

Step 6: Determine the Cost Estimate of the Community Benefit

The applicant will be required to provide a cost estimate to confirm the value of the agreed-upon Community Benefit. Planning Staff will work with the appropriate City departments to ensure the appraisal and cost estimate are satisfactory.

Step 7: Assess the “Uplift Value” against the Community Benefit

Planning Staff will compare the value of the Community Benefit against the Uplift Value to ensure that there is an equitable relationship between the established value of the increased height and density and the value of the Community Benefit in terms of financial cost and community importance.

Step 8: Negotiate with Applicant

Planning Staff will negotiate the Community Benefit with the applicant based on the comments received, the interests of the applicant and the estimated Uplift Value, involving the District Councillor where appropriate.

Step 8: Detail the Community Benefit in a Report

Planning Staff will include a detailed section regarding the Community Benefits in any report to the Planning Committee and Council where they recommend approval of a development.

Step 9: Incorporate into By-law and Legal Agreement

The Community Benefit will be incorporated into the site specific zoning by-law authorizing the increase in height and/or density and the City may require the applicant to enter in to a Section 37 Agreement.

5.2 Ontario Municipal Board

In the event that an application is appealed to, and may be approved by, the Ontario Municipal Board (the “OMB”), Planning Staff, at the direction of Council, may request Community Benefits to be applied by the OMB in accordance with the policies of the Official Plan and the Guidelines.

Appendix A



Development Application Guideline

Terms of Reference – Real Estate Appraisal

Description

The real estate appraisal is intended to provide a comprehensive evaluation of a development proposal demonstrating the increase in land value between the as-of-right height and density permission on a property and the land value of the height and density of a development proposal; this is referred to as the “Uplift Value”. The real estate appraisal will be used in the negotiation process related to community benefits under Section 37 of the *Planning Act*.

When Required

A real estate appraisal is required in conjunction with an application for a Zoning By-law Amendment, only where Staff have identified that a proposal will be subject to Community Benefits under Section 37 of the *Planning Act*, and where Staff have specifically requested a real estate appraisal from the applicant.

Applicable Legislation

Section 37 of the *Planning Act* gives a municipality the ability to authorize increases in height and density of development otherwise permitted by the by-law in return for the provision of such facilities, services or matters as are set out in the by-law, referred to as Community Benefits. In order to use this authority, the municipality’s official plan must contain provisions relating to the authorization of increases in height and density of development.

Qualified Persons

A real estate appraisal must be completed by an appraiser with AACI designation granted by the Appraisal Institute of Canada (AIC).

Required Contents

A real estate appraisal shall be a narrative report based on Real Property Appraisal Standards of the Canadian Uniform Standards of Professional Appraisal Practice (“CUSPAP”). A real estate appraisal must include and/or address all points listed below:

1. Executive summary;
2. Identification of the subject property and its ownership;

3. Statement that client is the “City of Kingston” with instructions only to come from the City;
4. Purpose and intended use of the appraisal which is to estimate the increase in land value resulting from an increase in development density and/or height which may be permitted through a Zoning By-law Amendment in accordance with the provisions of Section 37 of the *Planning Act*, the City’s Official Plan and the City’s Community Benefits Guidelines;
5. The “Uplift Value”, shall be defined as the difference between the value of land when a development is built in accordance with the applicable provisions of the Zoning By-law, and the value of land when a development is built with density and / or height provisions that exceed those permitted by the Zoning By-law.
6. City Staff will provide the appraiser with the “as of right” maximum height/density, the “as proposed” height/density as provided by the applicant and methodology to assist the appraiser to determine equivalent numbers for comparable sales;
7. Effective date of the appraisal as provided by City Staff;
8. Definition of market value;
9. History of property including last conveyance. If the property was acquired in the past year and there is a difference between the purchase price and the appraised value resulting from the appraisal, the appraiser must provide comments on differential;
10. Analysis of building conditions, Official Plan designation and zoning permissions;
11. Assumption that property is clean relative to environmental conditions;
12. Description of the proposed development including site plan, development statistics and schematics and zoning and/or official plan amendments required to achieve “proposed” height/density;
13. Discussion and rationale for methods of valuation used and those not used;
14. Analysis of the neighbourhood and comparable properties;
15. For comparable properties, Narrative analysis of each. Include confirmation for source of sales information, adjustments for time, size and location and other influences as appropriate, zoning designation and permitted height and density at time of purchase and any zoning amendments post purchase;
16. Location maps, site plans, and photographs of subject property and comparable properties;
17. Statement that highest and best use analysis not applicable for this real estate appraisal;
18. Analysis and statement of limiting conditions and assumptions;
19. Reconciliation is required when estimate of value is derived from using two or more approaches to valuation;

20. Reconciliation should include clear explanation of how final estimate was achieved including discussion and rationale for which method of valuation is more appropriate;
21. Reconciliation should include other comparables found that were not included and why so that City can be assured that the appraiser has considered all sales found; and
22. Appraisal to be signed by AACI appraiser confirming that they have inspected the subject property, the method used to complete the work, and the conclusions presented therein, and that they accept the final “Uplift Value” offered to the City and proponent.

Submission Requirements

Three (3) hard copies and one electronic PDF copy of the real estate appraisal shall be provided directly to the contact in the Planning, Building and Licensing Services Department who requested the appraisal.

Additional Information

For additional information, please contact the City of Kingston Planning, Building and Licensing Services Department at:

1211 John Counter Boulevard, Kingston

Phone: 613-546-4291 extension 3180

Email: planning@cityofkingston.ca

Or, visit the Ministry of Municipal Affairs and Housing website at:

<http://www.mah.gov.on.ca/index.htm>