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Land Value Capture and Social Benefits: Toronto and São Paulo Compared

Abigail Friendly

Abstract

This paper describes and compares land value capture (LVC) tools in São Paulo and Toronto. LVC refers to the public sector's recovery of part or all of the land value increments or "windfalls" accruing to new development through taxes, fees, exactions, or improvements that benefit the wider community. In São Paulo, a tool known as the onerous grant of the right to build (OODC) allows developers to pay for development rights in exchange for providing urban improvements of social interest to the community. In Toronto, a tool known as Section 37 allows developers certain development rights in exchange for cash or in-kind contributions. The paper has three goals: (1) to evaluate the effectiveness of, challenges to, and benefits derived from land value capture for generating urban financing; (2) to explore where such funds are allocated and how these allocation decisions are made; and (3) to identify who benefits from such decisions. The paper uses quantitative data to determine the benefits derived from the tools and expert interviews that explore the political and historical background associated with the use of both tools.

Keywords: Land value capture; redistribution; equity; urban politics; Toronto; São Paulo

JEL codes H23, H71

Land Value Capture and Social Benefits: Toronto and São Paulo Compared

1. Land value capture in two contexts: Toronto and São Paulo

In 2004, plans for a 22-storey mixed-use condominium development near St. Clair Avenue West and Bathurst Street in Toronto helped facilitate the development of the Wychwood Barns, an innovative community and cultural hub in the neighbourhood. The Barns benefited from $1 million in Section 37 funds that were used to develop 26 live-work units on the site.

Section 37 of Ontario's *Planning Act* allows a municipality to authorize increases in the height and density of a development in exchange for the provision of "facilities, services or matters" set out in a by-law. Using a negotiated process, city staff and councillors play a key role in determining how contributions are allocated (Moore 2013b). In the case of the Wychwood Barns, the funds were received between 2005 and 2006. They not only helped with the creation of the rent-geared-to-income live-work units, but also allowed Artscape, a non-profit group, to leverage additional provincial and federal funds. In 2009, a further Section 37 agreement for another condominium development at St. Clair and Bathurst contributed $350,000 to capital improvements and enhancements to the Wychwood Barns.

Similarly, in São Paulo within a context of vertical growth and city expansion (Fix 2007; Somekh 2014), developers hoping to build at higher-than-permitted densities may gain additional floors as a result of São Paulo's land use legislation, which allows for changes to height and density in exchange for financial compensation towards social benefits. The tool, known as the "onerous grant of the right to build" (*outorga onerosa do direito de construir,* or OODC), uses a standardized formula to calculate the charge levied on developers (Sandroni 2011). Money from OODC is deposited into a fund, and a management council, composed of equal numbers of public-sector staff and civil society representatives, allocates the money in the fund based on priorities established in the city's master plan. The money goes towards social housing, mobility projects, public spaces, green areas, environmental conservation, neighbourhood plans, urban and social tools, or cultural heritage projects in areas with insufficient infrastructure, as stated in the master plan.

This paper compares these land value capture (LVC) tools used in Toronto and São Paulo. LVC refers to the public sector's recovery of part or all of the land value increments or "windfalls" that landowners gain from public investments in infrastructure or administrative changes in land use norms and regulations, through taxes, fees, betterment contributions, exactions, and other financial tools used in large urban development projects. LVC is thus a fiscal, revenue-generating tool (Alterman 2012; Smolka 2013).

While Section 37 fits within the density bonus terminology used in North America (Yowell 2007), both Section 37 and OODC fit into what Alterman

and Kayden (1988) call "developer provisions," including land use regulations that allow a municipality to obtain public amenities from private developers. Depending on the local context and the way in which the tools are applied, different LVC approaches have distinct distributional and equity implications, evident in Toronto and São Paulo.

The research responds to calls for comparisons to reduce the conceptual divide between cities of the North and South (Kantor and Savitch 2005; McFarlane and Robinson 2012; Roy 2009; Ward 2008). While there are different LVC approaches around the world (Ingram and Hong 2012; Walters 2013), many draw on similar motivations, making a case for comparison (Hui et al. 2004; Smolka and Amborski 2000). This research is based on expert interviews[1] that explore the political and historical background associated with the use of both tools and on quantitative data to determine the efficacy of, challenges to, and benefits derived from LVC in both cities. I also consider the politics behind decisions about using funds raised by LVC, who benefits, and what learning experiences from both cities can be used to inform such practices.

To show how LVC has played out in different contexts, the next section explains the idea of the unearned increment before turning to the history and use of Section 37 in Toronto and OODC in São Paulo, followed by an analysis of the tools' use in both places and their varying distributional outcomes.

2. The unearned increment

Drawing on the work of David Ricardo on economic rents, John Stuart Mill proposed the idea of taxing what later became known as the "unearned increment" (Mill 1848).[2] The unearned increment describes any rise in land values due to public decisions or to the general economy that is not the result of landowners' own efforts (Alterman 2012). In the United Kingdom in the late 19th century, there was a growing concern that landowners were profiting from the land they owned, prompting a desire to return some of this profit to the state (Booth 2012). Mill argued that it was reasonable for the state to take all or part of the increased rents because the value was being created by the state as a whole. From the beginning, Mill argued that a land tax should not be seen as a tax but rather as a rent, "which has never belonged to or formed part of the income of the landlords" (Mill 1848: 222).

The idea was later taken up by Henry George (1881) in *Progress and Poverty,* noting that increases in the value of land should accrue to society as a whole and not to individual owners, because the collectivity created the value arising from the use of land. Based on the labour theory of value, the approach held that the owner

1. In Toronto and São Paulo, 16 interviews were conducted with city councillors, planners, lawyers, developers, and academics between December 2015 and April 2016.

2. Economic rent refers to excess price over the amount required to keep the resource in use. Increases in land prices directly raise the economic rents for land.

of a piece of land had not laboured to produce its worth. The profit constituted a pure rent, imposing an unfair burden on those whose activities gave it value (Fainstein 2012). George (1881: 378) noted that public capturing of land values represents "a taking by the community, for the use of the community, of that value which is the creation of the community."

Making the argument for a single tax, George maintained that if the rent from land were to be paid to governments continually, it would be enough to finance society's public needs to avoid causing economic turbulence (Alterman 2012; Brown and Smolka 1997). Suggesting the relevance of Henry George years later, Brown (1997: 1) notes, "We are still asking the same question: How do you strike an equitable balance between private property rights and public interests in land?"

3. The history and use of Section 37 in Toronto and OODC in São Paulo

3.1 Toronto's Section 37: The politicized approach through density bonusing

Density bonusing, sometimes referred to as incentive zoning, has been used in North American cities since the early 1960s to secure public amenities in exchange for granting height or density (Johnston et al. 1989; Yowell 2007). In New York, density bonusing was used to prevent overdevelopment at the expense of the public realm.[3]

While the idea has remained similar over time, the means by which benefits are exchanged as well as the benefits themselves have evolved. In Ontario, height and density bonusing has been part of the *Planning Act* since 1983 (it was originally Section 36 of the Act), although the practice was common for many years prior to the establishment of the legislation (City of Toronto 1988). The practice of entering into a subdivision agreement, whereby certain components could be secured to ensure good planning, influenced the legislation (Devine 2015a).[4]

In the 1970s and 1980s, Toronto's built form was shifting from a horizontal to a vertical form, prompting interest in a similar mechanism for this type of development. Section 37 agreements were intended to be the vertical equivalent to the horizontal agreements for subdivisions. In 1977, a report by the Planning Act Review Committee (1977) contributed to detailed regulations on what had until then been an *ad hoc* process. Two years later, a White Paper on the *Planning Act*

3. Incentive zoning is a zoning plan in which, in return for including certain features in a building, a developer is allowed to design the building in a way not otherwise permitted by the zoning ordinance (Benson 1969).

4. The practice of using subdivision agreements to require subdividers to build necessary infrastructure began in the United States in the 1930s, and was standard by the 1950s (Smith 1987). In Ontario, subdivision agreements became increasingly common to levy charges to pay for off-site services, including sewer and road improvements, trunk sewers and treatment plants, and even recreation centres and town halls. Cash-strapped cities transferred the risk of on-site infrastructure financing to developers by obliging them to install roads, sewers, and water facilities within their subdivision as a prerequisite of their development approval (Skaburskis and Tomalty 2000).

concluded that municipalities could grant incentives by awarding density bonuses in return for meeting a policy objective in an official plan (Province of Ontario 1979). The White Paper's recommendations laid the foundation for Ontario's 1983 *Planning Act*, in which Section 36 (now Section 37) granted legislative authority for bonus zoning.

Box 1: Excerpt from the Ontario Planning Act (Section 37)

Increased density, etc., provision by-law
37. (1) The council of a local municipality may, in a by-law passed under section 34, authorize increases in the height and density of development otherwise permitted by the by-law that will be permitted in return for the provision of such facilities, services or matters as are set out in the by-law.

Condition
(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 in height and density of development.

Agreements
(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.

Registration of agreement
(4) 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. R.S.O. 1990, c. P.13, s. 37.

The early 1980s in Toronto was an era of booming commercial development, what Fulford (1995) called the "bonus era" (1982–1986). This development allowed the city to negotiate public amenities in exchange for added density to meet specific planning objectives. Increasing public backlash in the late 1980s against density bonusing raised concerns about accountability and the agreements that were negotiated through backroom deals without policy guidelines. Noting the equity and consistency issues and the process by which density increases were authorized, one City planning report asked: "Should City Council secure public benefits…through the use of density incentives at all?" (Leonhardt 1988: 7). This query was posed in the context of a public perception that the social costs of density incentives were greater than the benefits received in return, including complaints about "let's-make-a-deal planning" (Fulford 1995).

Until 1993, Section 37 was used through site-specific official plan amendments because there were no policies in the City's official plan related to density bonusing (Devine 2008). The recession of the late 1980s and early 1990s meant

that developers were unable to meet bonusing requirements. When the economy picked up in the early 1990s, it provided an opportunity for the City of Toronto to establish provisions for density bonusing in its Official Plan of 1993, approved the following year (Tamir 2005). Provincially, the Ontario *Planning Act* (see Box 1 for an excerpt) underwent revision in 1990 and Section 37 became the new name for density bonusing.[5] Following the process of amalgamation in 1998, new attention was focused on Section 37.[6]

Section 37 allows developers to exceed height and density restrictions in exchange for "facilities, services or matters" through cash contributions or amenities (Province of Ontario 2012). The *Planning Act* does not specify what types of facilities, services, or matters can be requested in Section 37 agreements, instead leaving it up to each municipality to include a list of benefits in its official plan. Subsection 37(2) notes that there must be an official plan in effect that includes bonusing provisions to authorize height and density increases. In Toronto, community benefits must be related to policies outlined in the official plan (see Figure 1).

Figure 1: Section 37 community benefits, Section 5.1.1 of Toronto's Official Plan

1. Heritage
2. Childcare facilities
3. Public art
4. Other non-profit arts, cultural, community, or institutional facilities
5. Parkland/parkland improvements
6. Public access to ravines/valleys
7. Streetscape improvements
8. Rental housing to replace demolished housing or preservation of existing housing
9. Purpose-built rental housing
10. Rented residential condominium units
11. Local improvements to transit facilities
12. Land for other municipal purposes
13. Other local improvements

The way that the Ontario Municipal Board (OMB) has interpreted Section 37 has played a key role in shaping its application in Toronto.[7] In 2007, the City adopted Section 37 implementation guidelines in response to the OMB's concerns that the City's approach to Section 37 agreements could be interpreted as an illegal tax (Moore 2013b). The City notes that "No citywide formula, or quantum, exists…and [a Section 37 agreement] might not survive the challenge on the basis

5. Unlike Section 37 funds, development charges represent a revenue source that is channelled into general revenues to pay for citywide growth-related expenses. The *Development Charges Act* states that municipalities should not carry the financial burden of new development. Section 37 funds are, however, more flexible than development charge funds.

6. Amalgamation involved merging six lower-tier municipalities and the upper-tier municipality of Metropolitan Toronto into the single-tier City of Toronto.

7. The OMB is a quasi-judicial tribunal responsible for hearing disputes over planning decisions in Ontario municipalities. In May 2017, the provincial government announced plans to replace the OMB with a less powerful body called the Local Planning Appeal tribunal. What this change means for Section 37 negotiations is unclear, but it will likely affect how the process plays out.

that it constitutes an illegal tax" (Toronto City Planning Division 2016: 6).[8] The OMB has rejected the idea that Section 37 should be used to generate revenue (Devine 2012).

In fact, Section 37 was not intended to be a negotiated process. The decision to use negotiation rather than a formula was based on legal advice from a prominent municipal lawyer who advised that a formula would be challenged in court as an illegal tax (personal communication, March 4, 2016).[9] Opposition by developers to a standardized approach – as used in São Paulo – likely led this decision (Moore 2013b).[10] Although the *Planning Act* does not specify where benefits should be located, the OMB has determined that there must be a "nexus" or "an appropriate geographic relationship between the secured community benefits and the increase in height and/or density in the contributing development" (Toronto City Planning Division 2016: 5).[11]

Developments must also constitute good planning by remaining "consistent with the objectives and policies of" Toronto's official plan, and must "comply with the built form policies and all applicable neighbourhood protection policies" (City of Toronto, 2015c: 5–2). In Section 37 negotiations, good planning should be a prerequisite for the proposed development, rather than a benefit gained through density bonusing. Developments should observe good planning principles, including appropriate densities and built form and should conform to urban design guidelines (Jenset 2012). A counter-argument is that if an application constitutes good planning without the need for community benefits, the use of Section 37 is not appropriate (Devine 2008).

While the notion of "good planning" is often used in density bonusing agreements, the term is open to so many interpretations that it is essentially meaningless (Moore 2013b). Differing interpretations from the OMB and the Ministry of Municipal Affairs and Housing (now the Ministry of Municipal Affairs

8. Interestingly, this obstacle has not stopped municipalities like Ottawa and Orillia from implementing formulae.

9. In 2000, City Council adopted a Section 37 implementation framework that included a formula. In a hearing two months later, the OMB stated that if the City wanted a formula, it would have to be in the official plan. Ultimately, the implementation framework fell by the wayside as city staff developed official plan policies for Section 37 (personal communication, March 4, 2016).

10. In 2015, the City of Vaughan moved towards a formula-based system to make the process more transparent, consistent, and a best practice for Ontario (Item 18, Report No. 7, Committee of the Whole, City of Vaughan Council, February 17, 2015, available at: www.vaughan.ca/council/minutes_agendas/AgendaItems/CW0203_15_18.pdf).

11. In 2014, the City clarified its meaning of an appropriate geographic relationship as meeting one of the following characteristics: the contributing development is located within the catchment area of the facilities being constructed or improved; the contributing development is located within the community or neighbourhood that benefits from the provision of the community benefits; the occupants of the contributing development will have the opportunity to use the facilities being constructed or improved; or the contributing development will benefit from the provision of the community benefits through increased value or enhanced marketing or business opportunities (City of Toronto 2014).

and the Ministry of Housing) of what constitutes good planning demonstrate, in part, the nebulous nature of Section 37. Despite recent discussions, there is disagreement about the transparency of such decisions and the management of funds (Biggar 2015; Tang 2012), prompting a review of its use by the City of Toronto (Gladki Planning Associates 2014).

3.2 São Paulo's OODC: A bureaucratized approach

Like Toronto, São Paulo has a rich history and experience with LVC, dating back to the 1970s. In its most recent form, OODC was brought in by the 2001 Statute of the City (*Estatuto da Cidade*), the national law regulating the Brazilian Constitution's articles on urban policy (Fernandes 2011; Friendly 2013).[12]

OODC regulates charges for additional building rights, premised on a separation between the right to property and the right to build, which can be both regulated and sold by the state (Caldeira and Holston 2005). This approach enables governments to grant additional development rights to one parcel of land in exchange for urban improvements of social value to the community; developers thus compensate the municipality in exchange for additional building rights (Macedo 2008; Sandroni 2011).

Box 2: Section IX of the Statute of the City, law 10.257/2001

SECTION IX: Award with costs of the right to build

Article 28. The Master Plan can establish areas in which the right to build can be exercised above the basic floor area coefficient adopted, with a counterpart sum to be handed over by the beneficiary.

§1. For the purposes of this Law, floor area coefficient is the ratio between the built area and the lot size.

§2.The Master Plan can establish a single basic floor area coefficient for the entire urban area or a different coefficient relating to specific areas within the urban zone.

§3.The Master Plan will define the maximum limits of the floor area coefficient, taking account of the proportion between the existing infrastructure and the increased density foreseen in each area.

Article 29. The Master Plan can establish areas in which changes of land use can be permitted, with a counterpart sum to be handed over by the beneficiary.

Article 30. A specific municipal law will establish the conditions to be observed for the award with costs of the right to build and change of use, establishing:

I - the formula for calculating the charge; II - the cases that might be exempt from payment for the award; III - the counterpart sum to be paid by the beneficiary.

Article 31. The funds generated by the award of the right to build and change of use shall be applied for the purposes established in sub-clauses I to IX of Article 26 of this Law.

12. Article 4 lists a series of urban policy tools, including OODC, that municipalities may use in their master plans, the basic tool of urban development.

OODC imposes a charge for the right to develop land above a basic Floor Area Ratio (FAR)[13] up to the maximum the area can support (Smolka 2013). This refers to the right to additional floor space beyond the density restrictions established by the master plan, literally known as "created land," or *solo criado*. The rationale is based on the idea that to support additional building rights, the public sector has to invest in urban infrastructure and cannot favour one property over another when granting such rights, allowing all landowners to share the benefits resulting from public interventions (Smolka 2013). Thus, privileged property owners living in expensive high-rises – as most affluent households do in Brazilian cities – should contribute to paying for the costs of infrastructure in high-density neighbourhoods, making OODC potentially a distributive instrument in that "the charge levied for infrastructure by virtue of the increase in density [should have value] … not only for the area receiving the project, but for the entire municipal area" (Montandon 2009: 74; see also Souza 2001).[14] A fundamental difference from Section 37, then, is that OODC charges are used for urban improvements throughout the city rather than being used near developments, as in Toronto.

The motivation for OODC emerged in the mid-1970s, as academics considered how to separate the right to build from property rights, focusing on *solo criado,* the conceptual inspiration for OODC. In 1975, researchers at the Centro de Estudos e Pesquisas da Administração Municipal (CEPAM) expressed the idea of *solo criado* for the first time, inspired by the U.S. experience of transfer of development rights and the French experience of *Plafond legal de densité* (Rezende et al. 2009).[15] As Brazil's urban population climbed steeply, the problems of Brazil's cities – such as housing and overcrowding – became evident (Maleronka 2010).[16]

13. Floor Area Ratio (FAR) is the ratio of a building's total floor to the size of the piece of land upon which it is built.

14. For OODC to be in use, the city's master plan should include OODC provisions required by article 28 of the Statute.

15. The transfer of development rights (TDR), following the 1973 Chicago Plan, was intended to preserve urban landmark buildings by permitting the owner to sell unbuilt floor area to another landowner. Such unused development rights could have substantial value when attached to the parcel to be transferred, such as in high-density districts. Once the rights were sold, the economic incentive to demolish the landmark building for high-density development was removed. Thus, the municipality played an active role in making a market for development rights, also known as incentive zoning (Costonis 1973; Rose 1979). The idea of *Plafond legal de densité* (Legal Density Ceiling, or PLD) originated in 1975 in France through the *Galley Act,* which sought to control the density of projects in city centres while securing part of the benefits induced by higher densities. PLD limits the developer's right to build to a certain density ceiling, fixed to 1 square metre of floor area per square metre of land area. Where regulations allowed, developers could build at a higher density than the PLD in exchange for a fee equivalent to the value of the extra area (Calavita 2010).

16. Land policy and the scarcity of urban land was also a concern in other countries, as discussed at Habitat I in Vancouver in 1976. The Vancouver Action Plan recommended that "The unearned increment resulting from the rise in land values resulting from change in use of land, from public investment or decision or due to the general growth of the community must be subject to appropriate recapture by public bodies (the community)." See www.un-documents.net/vp-d.htm.

In 1976, a seminar held in Embu in São Paulo State to discuss urban issues resulted in the Embu Charter, in which three principles were highlighted (C. J. Arquitetura 1977). First, *a basic land use coefficient* and second, *the transfer of the right to build*, which, combined, involved setting a single FAR for the entire municipality, making it possible to transfer the right to build to another area. Finally, *the proportionality between public land and private land* implies a relationship between densification and the supply of land for social goods and urban services (Azevedo Netto et al. 1977; Nobre 2015). Thus, OODC's conceptual inspiration through *solo criado* is unlike Section 37's more practice-based approach.

The idea of *solo criado* gradually lost force prior to the approval of the 1988 Constitution. However, some early variants of OODC began to be applied at this time, though the interpretations varied since there were no standards for its application (Furtado et al. 2006).[17] Ultimately, *solo criado* was included in the 2001 Statute as OODC. The approval of the Statute can be interpreted as a way to harmonize the practices already developed in cities throughout Brazil, although it did not establish the requirement of a single FAR (Maleronka and Furtado 2013).[18]

São Paulo was among the pioneering Brazilian cities to adopt the principles of *solo criado* in advance of the Statute (Nobre 2015; Sandroni 2011). In São Paulo, there was a clear desire to experiment with *solo criado* through the use of precursor tools. The first use of *solo criado* was through a tool called interlinked operations (*operações interligadas*, or OI) in 1986 to promote urban renewal in São Paulo.[19] Drawing on the density bonusing practice from Toronto (the two cities had a partnership at the time), OI facilitated the provision of social housing in exchange for zoning law exemptions (Azevedo Netto 1994; Hewitt 2001), taking advantage of private-sector dynamism to resolve the problems of informal housing (Hewitt 2001).[20]

17. Examples included Florianópolis in 1989, Curitiba in 1990, Niterói in 1992, and Natal and Porto Alegre in 1994 (Câmara dos Deputados do Brasil 2005; Friendly 2013).

18. In applying OODC in Brazil, it is important to keep in mind the challenges of the policy. In 2015, Brazil's Municipal Management Survey (MUNIC) found that of all 5,570 Brazilian municipalities, only 34.9 percent or 1,946 had legislation related to *solo criado* or OODC (IBGE 2015). Moreover, having the legislation does not mean it is used in practice.

19. The original name of the OI was the law of de-favelization (*lei do desfavelamento*), no 10.209/86.

20. OIs granted higher densities in land occupied by *favelas,* sharing the value of the increase between the government and developer. The proceeds were used to construct social housing. Criticism of OI related to easing zoning controls and the small number of criteria used to calculate the contributions. Most proposals for OI were in the city centre and created huge gains for the real estate sector, while the creation of social housing in the city's peripheries augmented territorial segregation (Fix 2003; Wilderode 1994). OI generated 7,413 housing units through contributions of US$71,285,509 (the equivalent of US$112,121,192 in current values) between 1988 and 1996 (Montandon 2009). For more details on OI in São Paulo, see Azevedo Netto (1994), Rocco de Campos-Pereira (2002), and Wilderode (1994).

OI used a negotiated process (Maleronka 2010), but in 1998, OI was declared unconstitutional as it represented changes to the zoning law. Another tool known as joint urban operations (*operações urbanas consorciadas,* OUC) also uses the *solo criado* concept. OUC allows for urban interventions in predefined areas by exchanging development rights and releasing land use restrictions.[21] Used in São Paulo since 1991, OUCs define exceptions for each area. Despite challenges, OI and OUC served as learning experiences for the use of new urban tools in São Paulo, helping to instil in developers the culture of payment in exchange for building potential, while public servants gained expertise in valuing land and negotiating the increment value with the private sector (Maleronka and Furtado 2013; Sandroni 2011). The pioneering spirit of both tools may explain why São Paulo introduced OODC relatively late.

The São Paulo master plan of 2002 established the basis for applying OODC, including methods for calculating the charge and allocating resources.[22] At that moment, the validity of OODC went unquestioned due to the precursor experiences such as OI and OUC (Maleronka and Furtado 2013). Yet in the discussions leading to the master plan's approval, developers challenged the idea of a basic FAR of 1 for the entire city (Bonduki 2007).[23] In the 2002 master plan, FAR values from previous land use law (FAR 1 or 2) were maintained and maximum limits were adopted. This meant that a basic FAR of 1 or 2 was established for most of the city and of 4 for some areas with specific uses, such as in areas of OUC and priority public transport areas, so that there was considerable potential to construct at higher densities without paying for OODC.[24]

21. OUC was originally known as urban operations (*operações urbanas*) and came to be known as OUC when the Statute regulated the tool. There have been a number of challenges to the use of OUCs in São Paulo, including the exclusionary effects of real estate valuation, the effects of expelling low-income populations and increasing socio-spatial inequality, the regressive nature of the tool due to the low recovery of surplus value, and the emphasis on major road works to the detriment of investments in the social realm (Fix 2001; Maricato and Ferreira 2002; Montandon 2009; Nobre 2009).

22. The formula used in the 2002 master plan is as follows: Ct (financial contribution for each additional m^2 of built area) = Fp (planning factor) × Fs (social factor) × B (added economic benefit), calculated with the following formula: vt (value of m^2 of land based on the market value of the land, known as the *Planta Generica de Valores* ÷ CAb (basic FAR).

23. The belief was that by reducing the FAR, land market values and property tax revenues would decrease, urban property and unemployment would rise, and housing supply would decrease (Bonduki 2007; Sandroni 2011).

24. The master plan also revalidated a provision known as the "Adiron Formula," allowing the basic FAR to be increased by 1 without payment of the charge in exchange for a lower occupancy rate for vertical residential developments. As a result, the FAR was increased, reducing the value of the charge as a way of getting developers used to the new rules (Nobre 2015). This resulted in a basic FAR set by the master plan that was more restrictive than the previous maximum in some areas, such as those with high density and lower land coverage (Maleronka and Furtado 2013).

In 2014, a new master plan approved by Mayor Fernando Haddad of the Worker's Party (*Partido dos Trabalhadores, PT*) introduced a new OODC formula, shown in Figure 2. The biggest change was to set a basic FAR of 1 for the whole city, a return to the original *solo criado* idea.[25] This notion is framed within a rights discourse, on the assumption that additional density belongs to society, and thus, these gains should revert to the community by investing OODC funds in urban improvements throughout the city (Prefeitura de São Paulo 2014).

Figure 2: The OODC formula

$$C = (At / Ac) \times V \times Fs \times Fp$$

C	**Financial contribution for each additional m² of built area**
At	**Area of land (m²)**
Ac	**Area to be constructed**
V	**Value of m² of land in the Cadastral Land Value**
Fs	**Social factor:** exemptions (between 0 and 1) depending on the type of activity developed (e.g., social housing, education, health, cultural institutions, sports and leisure activities)
Fp	**Planning factor:** value varies (between 0 and 1.3) for different land uses to encourage higher densities in some areas to obtain greater financial compensation from OODC in areas in need of investment

To reverse the dominant paradigm of peripheral growth typical in Brazil (Maricato 2010), the purpose of the formula is to orient long-term development along transit corridors and to address the housing deficit; it is thus an urban tool to balance land uses in the city. The 2014 master plan set a maximum FAR of 4 for some parts of the city, such as transit corridors and in special zoning areas for informal settlements (known as ZEIS) to encourage development in these areas.[26] According to a planner, "These corridors began to bring real estate opportunities to regions that did not exist before, with higher density and more construction potential" (personal communication, December 7, 2015). To do this, the formula includes a *social factor* depending on the intended use, establishing exemptions in

25. In 2014, Brazil's Ministry of Cities recommended the adoption of a basic FAR of 1 by municipalities.

26. These corridors, known as *Eixos de Estruturação da Transformação Urbana*, are a priority of the 2014 master plan. They articulate two goals: mobility and urban development, by guiding the production of real estate to areas located along public transport routes and rebalancing the distribution of housing and employment, using the idea of transit-oriented development. ZEIS, sometimes known as special areas of social interest (*areas de especial interesse social,* or AEIS), are special areas with zoning conditions for informal settlements. Since the 1970s, provisions in some municipalities for treating some types of land subdivisions differently from others have aimed to deal with the growing numbers of *favelas*.

the cost of the charge for social uses (such as social housing or education), and a *planning factor* depending on the district to incentivize the production of real estate in areas in need of investment. Despite the more standardized approach of the São Paulo case compared with that of Toronto, São Paulo also faces challenges in the implementation of the tool, including the nature of the benefits applied and the way the tool has been defined by the *prefeitura*, the administrative entity of city hall.

This history of both tools highlights some key similarities, as both have been used for several decades and have complex histories. They are also part of detailed city-level provisions that set out the types of community benefits in each context, and are both governed by legislation at higher levels of government (respectively, the Ontario *Planning Act* and the Statute of the City).

There are also important differences. Section 37 allows for in-kind contributions, while OODC does not. Another important difference relates to the nexus argument in the Toronto case, as opposed to a more distributive approach in São Paulo.

The next section compares the two LVC tools, including the processes by which both tools are approved, how much is raised, what the benefits are, key distributional outcomes, and who benefits.

4. Issues in land value capture in Toronto and São Paulo

4.1 The process

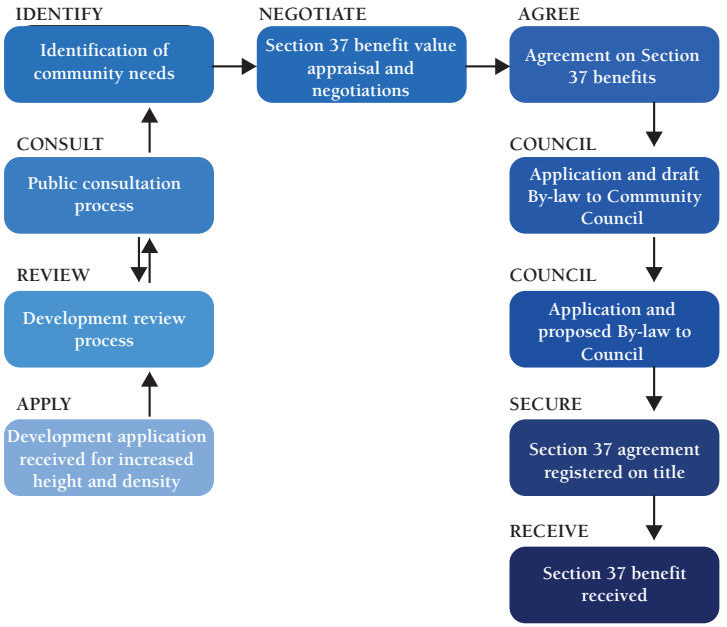
Toronto's Section 37 process (see Figure 3) begins when a developer submits an application requesting more height and density than the zoning limits allow.[27] City planners determine whether they can reasonably require Section 37 benefits and request an estimate of a range of land values of a unit of density for the site from the City's Real Estate Services Division. When the planning department receives the estimate, it calculates the value of additional density (the "uplift") against a base density, or the maximum area permitted (Moore 2013b).[28]

City staff then initiate a development review process, consulting the community and local councillor to discuss the development application and potential benefits from the proposed development (City of Toronto 2015a). Each Section 37 process is negotiated on a case-by-case basis led by City Planning staff in consultation with the councillor and developer to determine what should be exchanged for the extra density. Through these negotiations, staff determine what the appropriate contribution is worth based on the development proposal and the potential land value uplift.

27. Under the official plan, developments must exceed a threshold of 10,000 square metres of gross floor area to meet the requirement for Section 37.

28. As many of Toronto's zoning by-laws are outdated, planning staff can increase the base density, reducing the value of the uplift, but such adjustments usually only occur in response to developers' objections (Moore 2013b).

Figure 3: The Section 37 process (based on City of Toronto, 2015a)



The planning department's report on the proposal circulates to other departments, which have the opportunity to press for the inclusion of particular projects in the Section 37 agreement. After staff review the proposal, the development application goes to Community Council, where members of the public have an opportunity to express their opinions on the proposed benefits being sought. If Community Council approves the application, it proceeds to City Council. When Section 37 benefits are approved by City Council, the benefits are considered secured and an agreement is prepared by City staff between the applicant (developer) and the City. This agreement binds the developer legally to supply the benefits, which are considered received when the developer either pays a cash contribution or delivers an in-kind benefit (City of Toronto 2015a).

In São Paulo, if a developer wants to acquire additional density, the first step is to check how much potential additional density is available in that specific area of the city, which is shown in a table published on the *prefeitura*'s website.[29] Once availability is confirmed, the developer initiates the project, presenting

29. See www.prefeitura.sp.gov.br/cidade/secretarias/desenvolvimento_urbano/legislacao/estoques_de_potencial_construtivo/index.php?p=1384

a calculation of the amount of stock required by the project. The *prefeitura* calculates the value of the charge based on the formula and the project is approved only when the charge is paid in full (Maleronka and Furtado 2013).

According to the Statute, tools like OODC that generate resources must have a separate reserve "fund" to act as an accounting mechanism. The resources collected by OODC are deposited into an urban development fund known as FUNDURB. The funds resulting from OODC are overseen by a management council of FUNDURB, composed of public-sector staff and civil society representatives to approve allocation of moneys across the city. The existence of such a fund can lead to greater transparency in the application of resources because it is managed by a council (Furtado et al. 2006). Such funds also facilitate the application of tools for the social purposes specified in the Statute, preventing their management as part of the general budget.

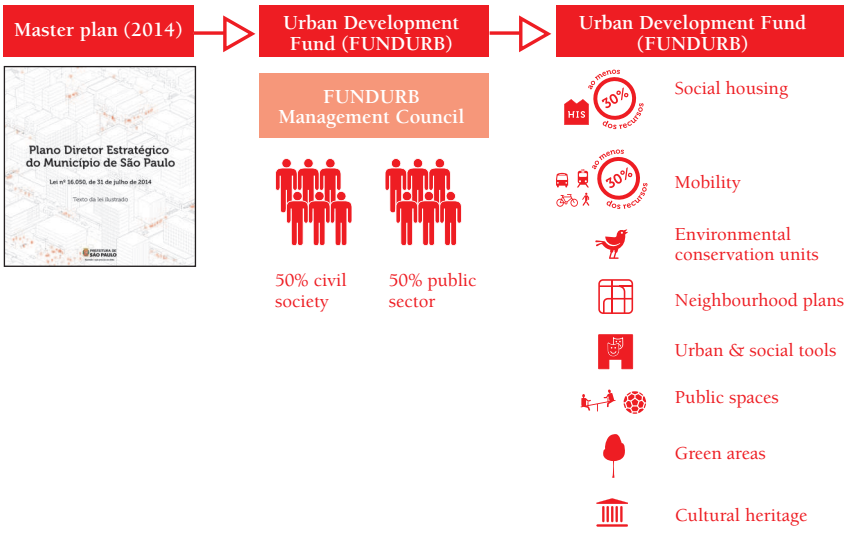
In 2002, the master plan did not specify the council's composition, noting only that the FUNDURB council includes "members appointed by the executive, guaranteeing the participation of society" (Prefeitura de São Paulo, 2002, Art. 235). This meant that the representation of civil society was at the discretion of the local government and dependent on the political inclination of the administration (Nobre 2016). With the 2014 master plan, the council's composition became evenly divided between public-sector and civil society representatives, instituting a more democratic, accountable process.[30] The council meets four times a year to approve the allocation of FUNDURB money and supervise the approval of resources; it is accountable to the Municipal Urban Development Council (CMPU). Although the FUNDURB council deliberates freely, the objective is to comply with the master plan's objectives and the city's 2013–2016 program goals.[31] Figure 4 shows the governance process for applying OODC in São Paulo.

The use of OODC in São Paulo provides a contrast to the application of Section 37 in Toronto. São Paulo's formula-led approach is more bureaucratized, compared with the politicized process in Toronto's Section 37 legislation. Indeed, Ejersbo and Svara (2012) distinguish between an approach based on the bureaucracy, linked to the political leadership of the local government and the

30. FUNDURB is composed of five councillors of the participating municipal secretariats, two representatives of the Municipal Urban Policy Council (*Conselho Municipal de Política Urbana*), and one representative of the following councils: Municipal Council of Housing (*Conselho Municipal de Habitação*), Municipal Council of Traffic and Transportation (*Conselho Municipal de Trânsito e Transporte*), and the Municipal Council for Environment and Sustainable Development (*Conselho Municipal de Meio Ambiente e Desenvolvimento Sustentável*). Before 2014, the FUNDURB council included 25 members, including 16 representatives of secretariats and municipal businesses and 9 representatives of civil society (Maleronka and Furtado 2013).

31. The program goals established for 2013–2016 aim to reduce inequalities in São Paulo. See http://planejasampa.prefeitura.sp.gov.br/metas/ for more information.

Figure 4: The governance of OODC in São Paulo



instruments of formal or political control.[32] In Toronto, as Makuch and Shuman (2015: 31–32) point out, "The true beneficiaries are the councillors (who gain political capital) and their supporters (who get to shop for new neighbourhood amenities with a developer's funds), rather than new residents who have not yet moved in to the development that was granted a density bonus, or even the surrounding neighbourhood."

The major divide between a bureaucratized and a political approach is also related to contrasting decision-making processes. The process for Section 37 in Toronto has been challenged for its *ad hoc* nature, disconnected from strategic planning goals (Moore 2013a). Criticisms come from developers who object to funds going towards councillors' pet projects rather than projects adjacent to the development (Lorinc 2006), and a planning process that allows changes to "agreed-upon land-use constraints so developers can have their way" (Sewell 2012).

The *ad hoc* negotiated process in Toronto stands in stark contrast to the use of a formula in São Paulo. One result of using a negotiated process is the perception that politics prevails, often referred to as "let's-make-a-deal planning" (Devine 2008). The highly politicized nature of Section 37 and the influence of

32. Makuch and Shuman (2015) provide a related dichotomy: the role of discretion as a trend in municipal planning decisions in Ontario versus the rule of law.

city councillors in negotiations is problematic; "there appears to be no clear policy or planning objective associated with their use" (Moore 2013b: 4). By contrast, OODC is tied to the city's master plan rather than city councillors' preferences.

However, despite the bureaucratic nature of the OODC process, the role of politics in the approval of laws, such as the master plan, is important in Brazil. As Caldeira and Holston's (2015) account of São Paulo's 2002 master plan shows, the process is political and the outcome influenced by politicians, the judiciary, and civil society. Referring to the differing interests in approving São Paulo's 2002 master plan, Caldeira and Holston (2015: 2010) note, "Ultimately, it was up to the legislators to orchestrate the different interests and pressures." Likewise, the 2014 master plan, like the previous plan, was approved in City Council among city councillors, and influenced by the range of interests prevalent in urban policy discussions in São Paulo.[33] While some parts of the process, such as approving the master plan, are political, the decision about the destination of FUNDURB funds originate with the administrative arm of the *prefeitura*.

4.2 How much is raised?

In Toronto, between 1998 and 2015, the amount collected through Section 37 reached just over CAD$400 million, not including in-kind benefits that cannot be quantified.[34] Figure 5 shows the trends in Section 37 funds raised between 1998 and 2015. Although funds have increased steadily since the late 1990s, they peaked in 2013. The turning point, however, was in 2006, when Section 37 funds began to increase steadily. One reason could simply be that starting in 2005, residential development experienced a surge (Rosen and Walks 2015). Also relevant were municipal and provincial policies that redirected growth to already built-up areas and stimulated new-build, inner-city residential development (Lehrer and Wieditz 2009).

In São Paulo between 2004 and 2015, the amount collected through OODC charges reached almost R$1.9 billion (about CAD$712 million). Figure 6 shows the funds raised by OODC between 2004 and 2015. According to Nobre (2015), this value corresponds to an additional area of 5.2 million square metres, the use of 7.9 million square metres of land, and an average of R$316.63 per additional square metre. Average collection per year was about R$145 million, although it peaked in 2011 with a total of R$339.9 million, showing the power of the tool to

33. For example, in discussions for the 2014 master plan, as a result of cumulative years discussing OODC, relatively little discussion focused on the basic FAR for the whole city, while more discussion focused on the maximum FAR limits.

34. For Toronto data, the City of Toronto's Section 37 database was used to explore the funds raised, the locations of the benefits, and the types of benefits approved. For São Paulo, data were based on two sources. The resources raised by OODC can be found in the Situação Geral dos Processos database. Although only released in 2016, FUNDURB spending for 2013–2015 is found on the Urban Development Secretariat's website. The challenges in access to data on FUNDURB spending are not unexpected, as Furtado et al. (2006) confirm, likely a result of the weak relationship between Brazilian planning departments that apply the instrument, and the Municipal Treasury, which collects the corresponding charge.

generate considerable funds (Maleronka and Furtado 2013).[35] To put this value in context, OODC represents about 1 percent of the city's gross revenue (personal communication, December 7, 2015).

Figure 5: Section 37 revenue in Toronto, 1998–2015 (in 1,000 CAD$)

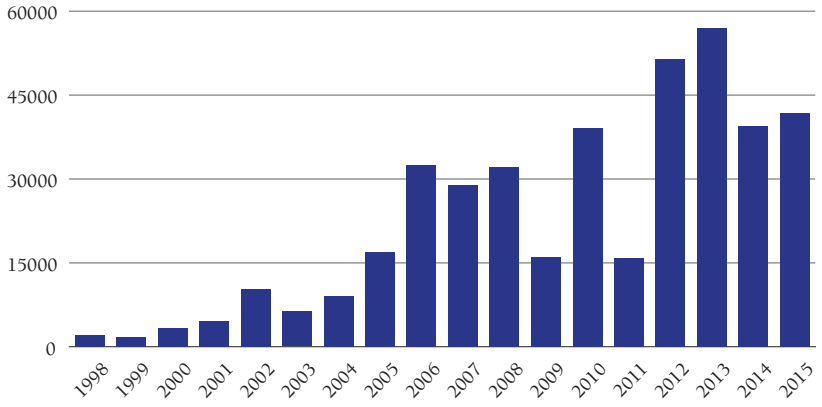
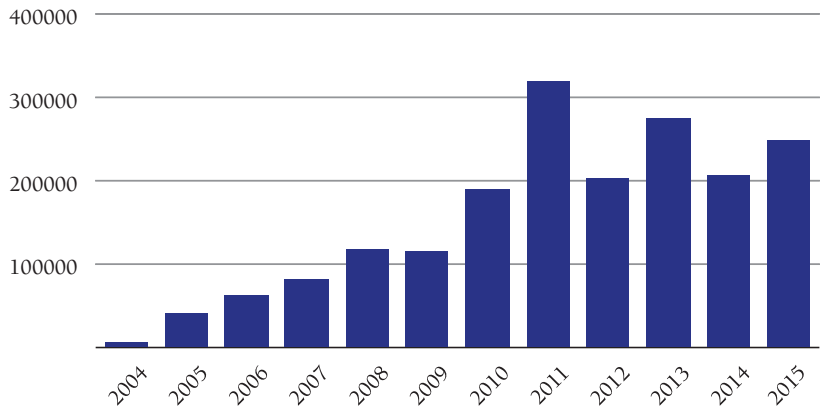


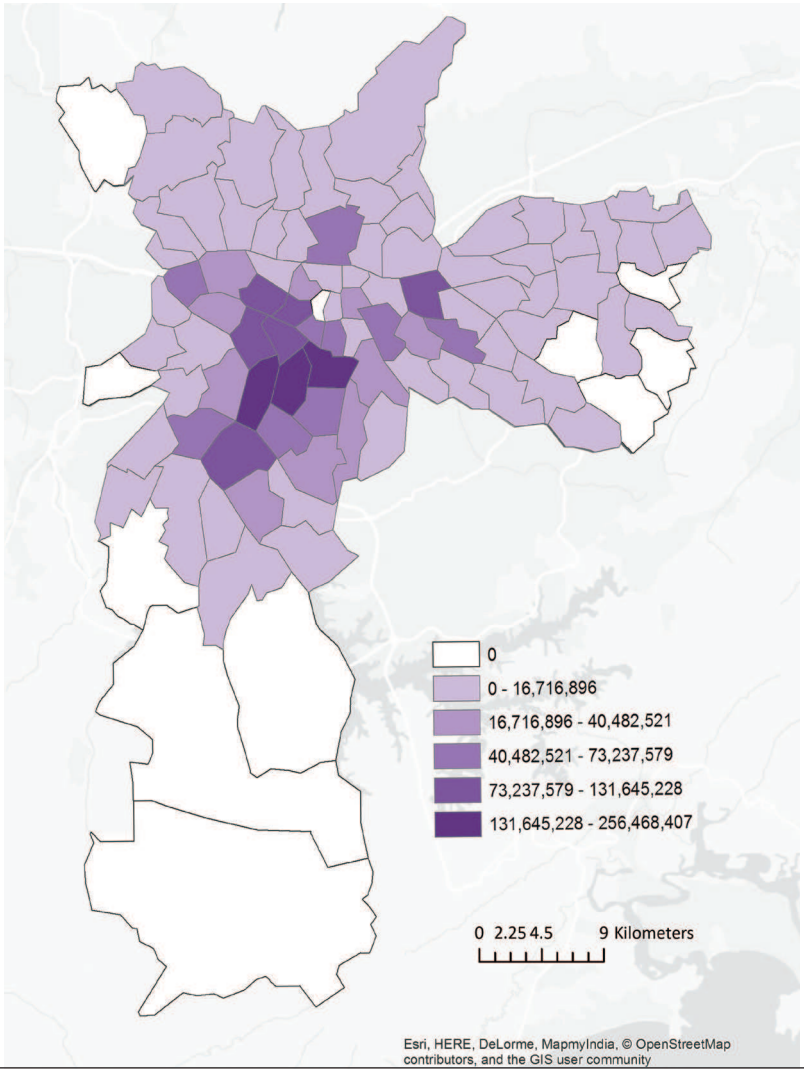
Figure 6: OODC revenue in São Paulo, 2004–2015 (in 1,000 Reais $)



35. One change in Brazil that may have affected the amount was that in 2007 and 2008, 31 construction companies issued shares on the stock exchange and started to buy land. Ultimately, these changes were reflected in 2011, when the projects were approved by the *prefeitura*. The total was also affected by the Land Value Register, as it is the reference used to calculate the amount to be paid. Until 2014 when the register was created, the values for property were generally low and outdated. With the 2014 master plan, these values were updated to make them closer to actual market values, creating an expectation of a considerable increase in OODC charges.

The collection of OODC has not been uniform throughout the city, but has been focused in areas of most interest to developers, especially those with the most concentrated wealth and the most developed infrastructure (Nobre 2016). This area is what Villaça (2011) has called the southeast quadrant, containing many of the more expensive neighbourhoods, while indicating the spatial segregation of the city. Figure 7 shows the location of OODC funds within the city by district.

Figure 7: OODC revenue by São Paulo district, 2002–2014 (in Reais $)



As with Section 37 agreements in Toronto, the collection of OODC is highest in central areas of the city of most interest to developers.[36]

As a result of the changes to the master plan, an increase of about R$480 million per year, or three times the average collected thus far, is likely (Nobre 2016). If this is the case, it may challenge assumptions made about limited revenues from OODC that have been shown in other cases (Furtado et al. 2006). However, the amount collected in 2015 by OODC was almost 20 percent lower than in 2013 (Santoro et al. 2016).

Despite its often modest financial results, OODC is valued by municipalities as a source of funding directly applicable to urban improvements. Between 2005 and 2013, of the total funds invested in the city of São Paulo, a range of between 4 to 12 percent came from FUNDURB, not an insignificant amount considering the massive size of the city. Comparing OODC funds for 2013 to 2015, FUNDURB spending represented a significant budget increase for some secretariats. For example, the budget of the Secretariat of Coordination of Subprefeituras increased by 10 percent, that of the Secretariat of Culture by 7 percent, and that of the Secretariat of Urban Infrastructure by 6 percent (Santoro et al. 2016).

4.3 What are the benefits?

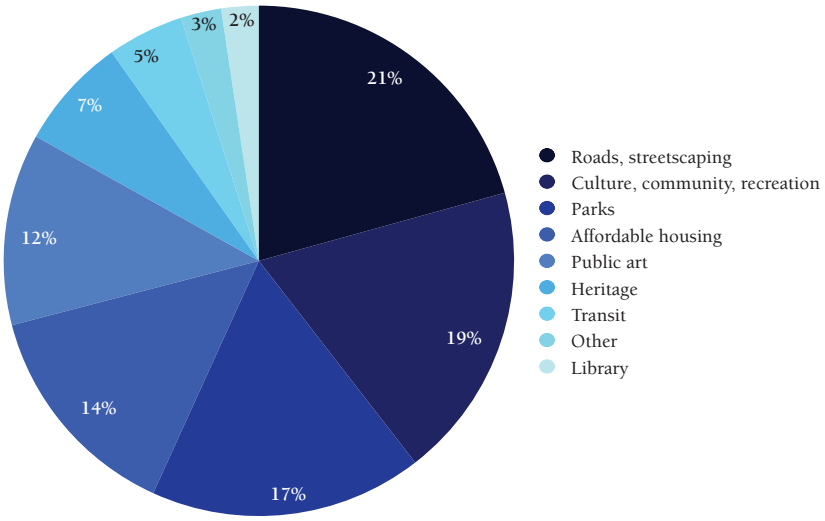
The Ontario *Planning Act* does not prescribe the benefits that can be negotiated within Section 37 agreements, instead requiring that each municipality include a broad list of possible benefits in the official plan (see Figure 1). Based on data from 1998 to 2015, Figure 8 shows the types of benefits as a percentage of all benefits secured in Toronto. Because Section 37 agreements often include several types of benefits, for each agreement noted in the data, multiple benefits were sometimes indicated. In those years, most funds were spent on roads and streetscaping (21 percent), followed by culture, community, and recreation (19 percent), parks (17 percent), affordable housing (14 percent), public art (12 percent), heritage (7 percent), transit (5 percent), other projects (3 percent), and libraries (2 percent). As Moore (2013b) points out, half of all benefits fall within what the Ministry of Municipal Affairs and Housing calls "desirable visual amenities" (roads and streetscaping, public art, and parks)[37] "which a Councillor's constituents can see and remember" (Hanff 2016: 16).

Providing a more detailed look at the breakdown of benefits, Figure 9 shows nine categories of Section 37 benefits negotiated between 1998 and 2015. Each box shows the number of agreements for each benefit category, and columns are divided by four-year election cycles. Note that the last column (2014) includes only two years of data. As Figure 8 showed, roads and streetscaping have received

36. Like Section 37, OODC relies on the dynamic of the real estate market, which would also explain why it is higher in some years than in others.

37. See the Province of Ontario's note on Section 37: http://www.mah.gov.on.ca/Page6845.aspx

Figure 8: Type of Section 37 benefits (1998–2015)



the most money from Section 37 agreements, while benefits related to libraries and other amenities received the least. Also relevant is that 2006 seems to be the year in which the number of agreements was highest. Alongside the details for all Section 37 agreements, Figure 10 shows only in-kind benefits.[38] However, unlike in Figure 9, most agreements went towards affordable housing. This result is telling, showing that developers may prefer to provide affordable housing when the in-kind option is used.

In São Paulo, the types of benefits allocated through the FUNDURB council are more clearly defined than those achieved using Section 37. In fact, FUNDURB was created with the goal of supporting investments to meet the 2014 master plan's objectives, plans, and projects, with six areas of focus: (1) social housing; (2) urban mobility; (3) urban infrastructure; (4) community equipment and public space; (5) historical heritage; and (6) environmental heritage.

In addition to these six priorities, the following eligibility criteria are also applied to FUNDURB spending: (1) Projects that result in local impacts for the development of neighbourhoods; (2) Projects that are "paradigmatic" (that is, they

38. It is hard to determine the value of in-kind benefits, as the value is not stated in Section 37 agreements.

Figure 9: Section 37 benefits by type (1998–2015)

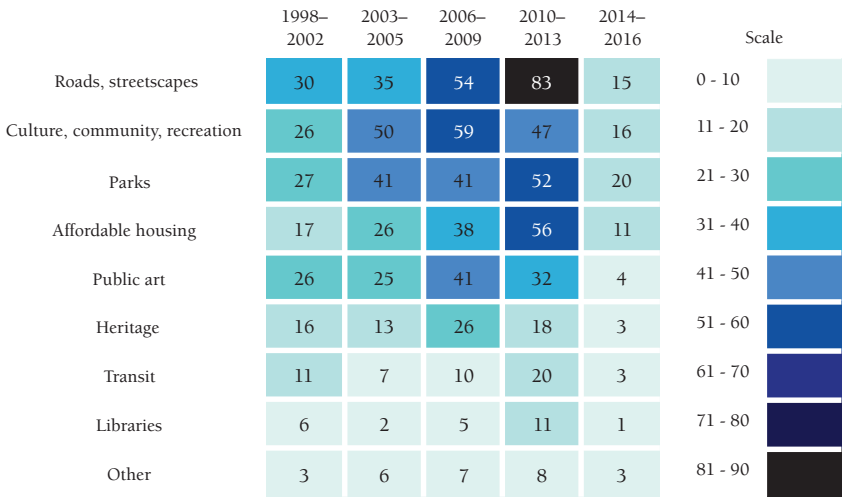
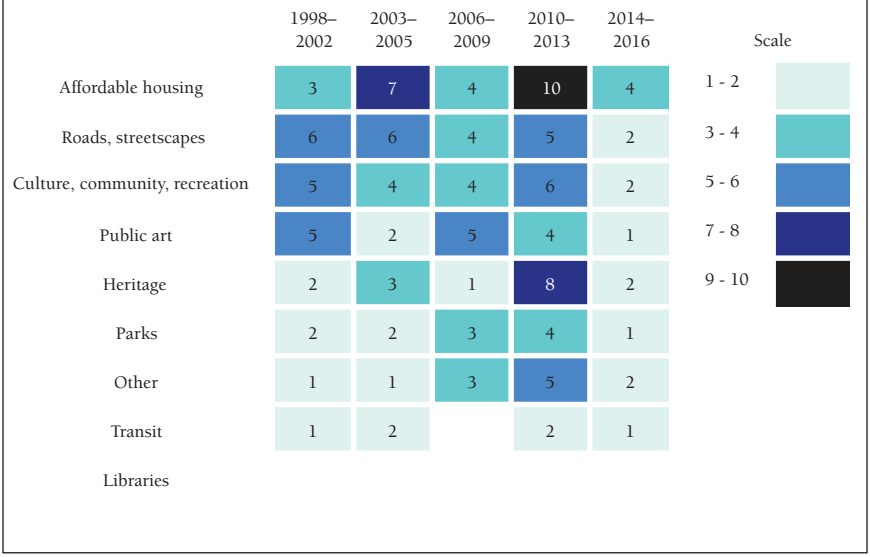


Figure 10: Section 37 in-kind benefits by type, 1998–2015



can serve as models) and induce urban and social development; and (3) Projects linked to program goals. This suggests that beyond having a specific council to direct the allocation of projects from OODC, a number of overarching principles helps to guide such decisions. Another innovation was to designate 30 percent of funds allocated by FUNDURB for social housing (preferably within ZEIS or special zoning areas) and 30 percent for mobility projects, such as bus and bicycle lanes or sidewalk improvements.

The results in São Paulo are also quite different from those in Toronto. Between 2013 and 2015, 28 percent of FUNDURB funds went to housing projects, nearly meeting the expected allocation of 30 percent for housing projects. In 2015 alone, housing projects totalled almost 40 percent of FUNDURB resources.[39] Indeed, of the R$695 million investment in housing projects in 2015, R$113 million (16 percent) came from FUNDURB (Secretaria da Habitação 2016). This 30 percent was allocated specifically for the acquisition of land to produce social housing. While there are other sources of funding for building social housing, there are no sources for acquiring land.

While 23 percent went to drainage and sanitation projects, 21 percent went to public transit, bicycle lanes, and roads, and 10 percent went to pedestrian projects, making up the 30 percent to be allocated towards mobility projects between 2013 and 2015. Indeed, Santoro et al. (2016) point out that increasing the share of funds spent on social housing and urban mobility was a demand of civil society groups, which actively participated in drafting the master plan. This result is a victory for the groups involved in this debate. A further 8 percent went to urban infrastructure and central hubs, 4 percent went to community and urban equipment, 3 percent to public space projects, and 3 percent to cultural heritage, green areas, parks, and neighbourhood plans. The total funds spent between 2013 and 2015 was over R$800 million.

Figure 11 shows the total FUNDURB funds applied by type of project between 2013 and 2015. This picture, however, is decidedly different when viewed from the total number of projects. Indeed, pedestrian projects such as sidewalks make up 59 percent of the total projects, while housing projects account for just 7 percent (see Figure 12).[40]

39. Projects that aim to supply social housing for the poor receive a discounted OODC charge as an incentive.

40. Data on the use of FUNDURB money were only made available in 2016, a result of the local government's more open attitude. Still, data were scarce in the years before 2012, which an assistant in the Municipal Urban Development Secretariat called "a black box" (personal communication, December 7, 2015). Yet because the 2014 master plan changed the formula and the distribution of funds, most important is the recent approach to distribution. Past distribution of FUNDURB funds included the following: transportation (6 percent), parks (10 percent), social housing (13 percent), accessibility/sidewalks (21 percent), historical and cultural heritage (23 percent), and drainage and sanitation (28 percent).

Figure 11: FUNDURB projects by type, total Brazilian Reais $ (2013–2015)

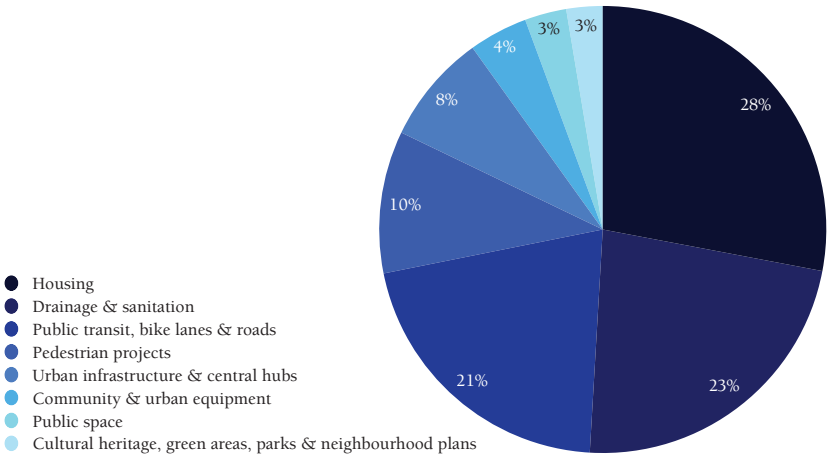
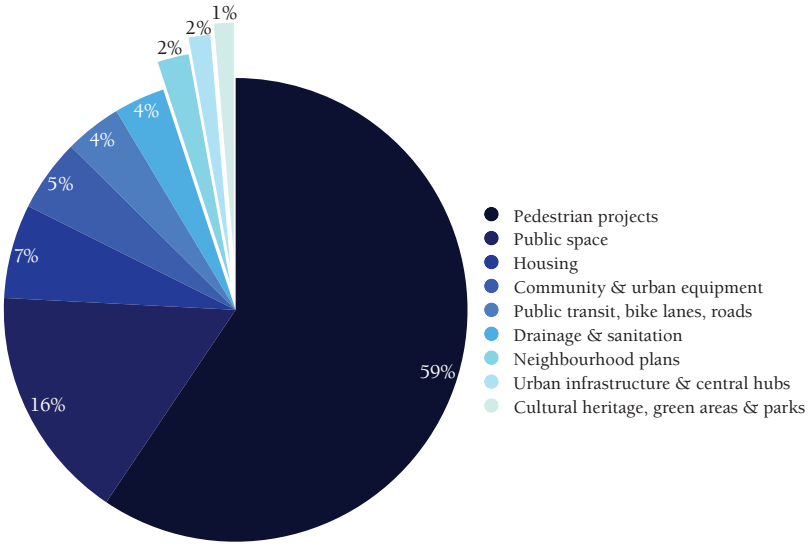


Figure 12: FUNDURB projects by type, percentage of total (2013–2015)

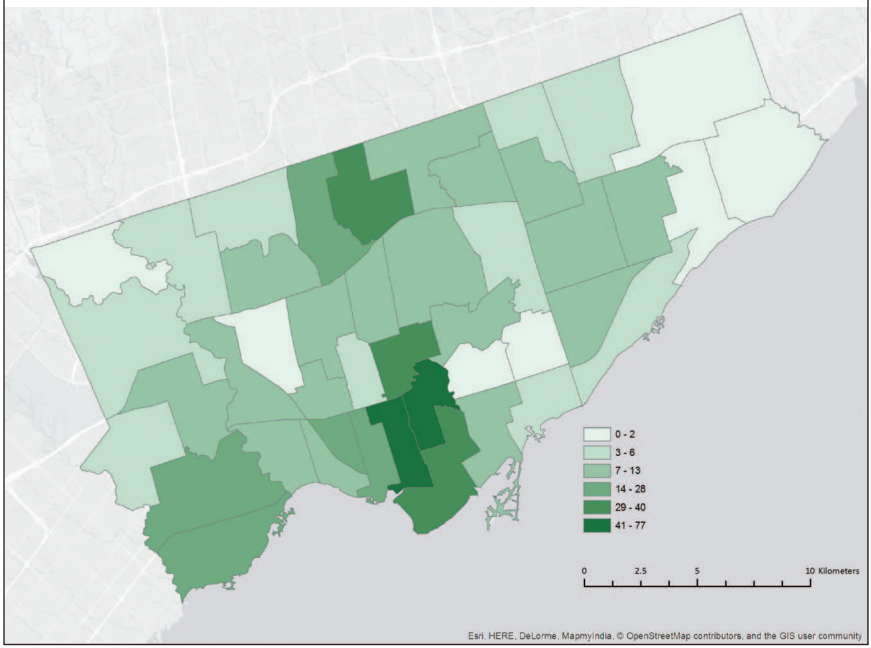


4.4 Where are the funds used?

Between 1998 and 2015, the City of Toronto entered into 926 Section 37 agreements across 43 out of the city's 44 wards.[41] The only ward without any Section 37 agreements during those years was Ward 1 (Etobicoke North). Figure 13 shows the location of community benefits by number of benefits in each ward between 1998 and 2015.

Looking at this map, it is immediately obvious that most Section 37 benefits are concentrated in the downtown core of Toronto and along Yonge Street to the north, with some concentration in southwest Toronto. As benefits should have an appropriate geographic relationship to developments and most development tends to be downtown, this result is not surprising. Collectively, Toronto's downtown has undergone rapid growth over the past decade. Indeed, Rosen and Walks (2015) show that condominium development began in the late 1990s and reached a record high in 2011. Development was particularly high in the pre-1998 City of Toronto boundaries (42 percent of all units), and to a lesser extent in the former cities of North York (27 percent), Scarborough (15 percent), and Etobicoke (12 percent).

Figure 13: Community benefits by number of benefits in each ward (1998–2015)

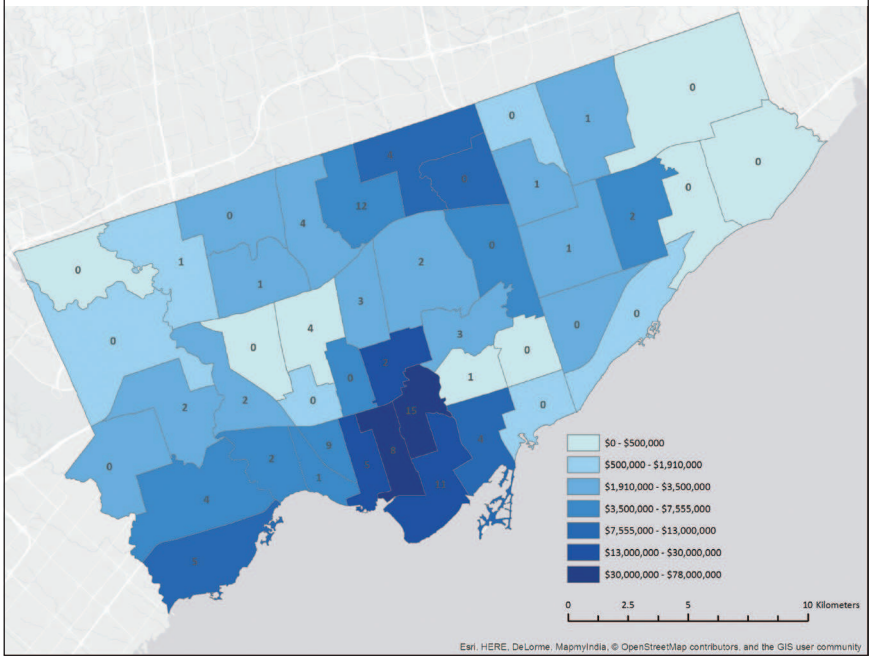


41. The City of Toronto has data for Section 37 agreements dating back to the 1990s. The most accurate data are from 2008 onwards. In using these data, it is important to note that inconsistencies dating to earlier Section 37 agreements are possible.

Similarly, Figure 14 shows the location of total Section 37 funds by ward for 1998 to 2015 as well as the number of in-kind benefits. Although the concentration is similar to Figure 13 showing the number of Section 37 agreements, the concentration of funds shown in Figure 14 is stronger in the downtown core.

In São Paulo, data from the 2013–2015 period show (Figure 15) where the projects with money from FUNDURB are located throughout the city by *subprefeitura*, the 31 administrative zones within São Paulo. Following the logic of OODC, the community benefits in São Paulo are located throughout the city such that the entire city gains from the benefits of the urbanization process. Indeed, FUNDURB resources were prioritized in the periphery of the city (Nobre 2016). As a recent blog post notes, "the prefeitura not only broadens the amount of resources to invest in the city, but also allows a better spatial distribution of infrastructure investments" (Santoro et al. 2016). In a general sense, the application of OODC and the use of FUNDURB have captured funds in the most expensive regions of the city, and applied those funds in the poorest regions in a "Robin Hood" approach to city building. The idea is also to promote expansion along the axes of urban transformation.

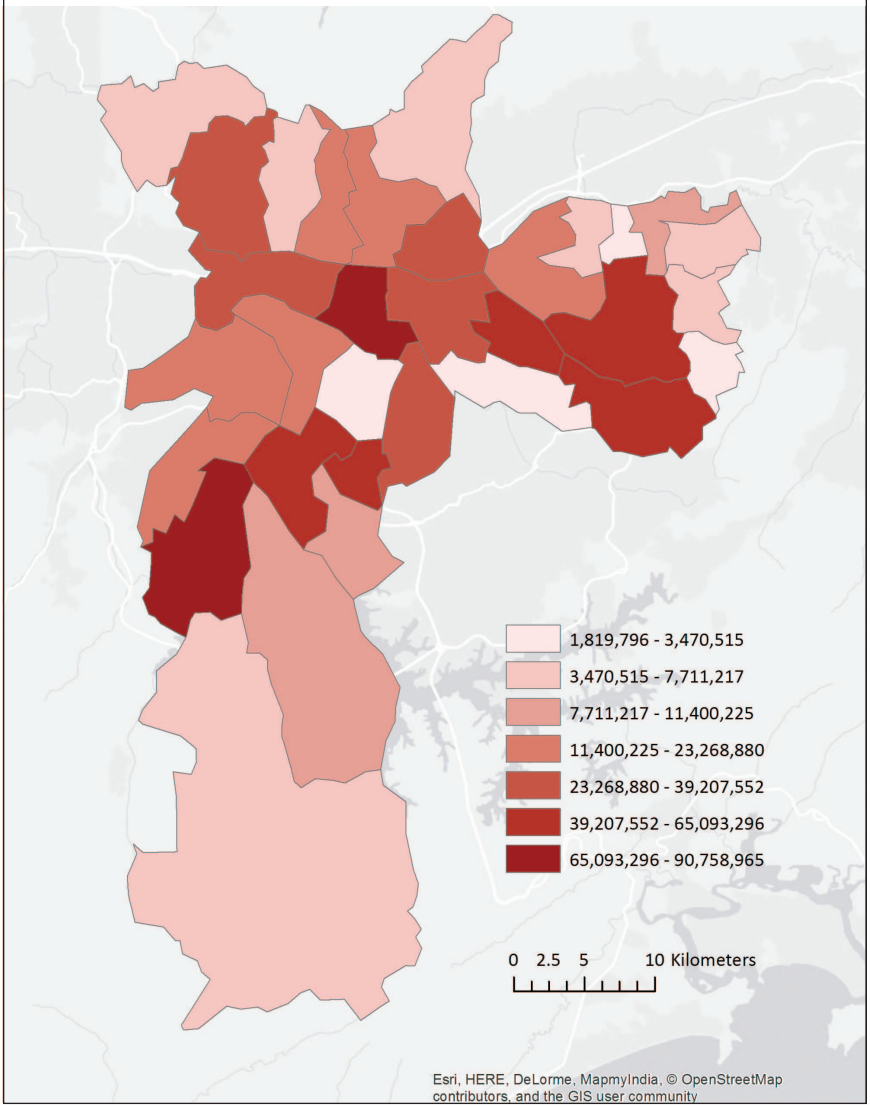
Figure 14: Location of community benefits in Toronto by total funds and in-kind (1998–2015)



4.5 Who benefits from LVC tools?

The distributional outcomes of the LVC tools in both cities are measured in terms of (1) who benefits from them; and (2) to what extent (Fainstein 2010). Fainstein (2010: 181) notes that using an analysis focused on "who gets the benefits and who bears the costs … can shift the debate toward a concern with equity."

Figure 15: FUNDURB spending by subprefeitura, (2013–2015)



To do this, the analysis distinguishes between wards with many Section 37 agreements and those with few, resulting in two distinct groups of wards (low-agreement group and high-agreement group),[42] shown in Table 1. When viewed from the perspective of the number of agreements, the low-agreement group accounted for 2 percent of all of Toronto's Section 37 agreements and the high-agreement group accounted for 56 percent. The disparity is even more compelling when viewed from the perspective of total Section 37 funds. While the low-agreement group accounts for just 1 percent of all Section 37 funds, the high-agreement group accounts for 72 percent. Taking just the Section 37 funds from the downtown wards (19 20, 22, 27, and 28), the concentration in the downtown is even more extreme, totalling over $230 million, or 64 percent of the entire city's Section 37 funds between 1998 and 2015. Table 1 shows the number of Section 37 agreements and Section 37 funds for the low- and high-agreement groups.

Table 1: Number of Section 37 agreements and total Section 37 funds for low- and high-agreement groups, Toronto wards, 1998–2015

	Ward	No. of agreements	% of total agreements	Total funds ($)	% of total funds for city
Low-agreement group	1 (Etobicoke North)	0		0	
	12 (York South–Weston)	2		275,000	
	29 (Toronto–Danforth)	2		300,000	
	31 (Beaches–East York)	1		300,000	
	42 (Scarborough–Rouge River)	1		242,000	
	43 (Scarborough East)	1		400,000	
	44 (Scarborough East)	2		350,000	
	Total low-agreement group	***9***	***2%***	***1,867,000***	***1%***
High-agreement group	6 (Etobicoke–Lakeshore)	21		8,105,040	
	19 (Trinity–Spadina)	28		28,229,149	
	20 (Trinity–Spadina)	66		72,023,612	
	22 (St. Paul's)	40		23,278,178	
	23 (Willowdale)	35		6,950,333	
	24 (Willowdale)	13		12,921,809	
	27 (Toronto Centre–Rosedale)	77		77,778,786	
	28 (Toronto Centre–Rosedale)	34		30,969,210	
	Total high-agreement group	***314***	***56%***	***260,256,117***	***72%***

42 To define these groups, the approach used was to include the six wards with the most and least Section 37 agreements between 1998 and 2015. Wards that fell in the middle were not included in the analysis.

To determine who is benefitting from Section 37 funds, Table 2 shows some key socio-economic data for the wards in the low- and high-agreement groups. The low-agreement group has a lower average household income relative to the high-agreement group and a higher average unemployment rate. The low-agreement group also had a much lower percentage of residents with a postsecondary certificate, diploma, or degree. Looking at indicators of first-generation immigrants in the community is also telling. Indeed, the average percentage of people born outside of Canada for the low-agreement group was higher than for the high-agreement group.

The two groups described above fit broadly into two of the three cities described by Hulchanski (2010). According to Hulchanski's classification, City#1 consists of neighbourhoods in central areas of Toronto where incomes have been rising steadily over time. Although the classifications are by no means exact nor the city areas cohesive, the comparison is revealing, pointing to the fact that most Section 37 benefits are located in more affluent downtown neighbourhoods. As Lehrer and Wieditz (2009: 156) point out, "Toronto's inner city has become increasingly homogenous, less diverse, less multicultural, highly exclusive and thus only accessible to higher income groups, who happen to be mostly white."

While research has documented spatial inequality in Toronto (United Way Toronto 2011; Walks and Bourne 2006), when combined with data on the spatial concentration of Section 37 benefits, it is clear that the benefits are going to the richer neighbourhoods. As Rosen (2016: 84) notes, "since redevelopment targets urban districts that can generate profit, only those areas that experience growth and that already enjoy reinvestment gain additional benefits, thus exacerbating socio-spatial inequalities." Nevertheless, distributional concerns may be relevant in the context of negotiations between local governments and developers. When piecemeal changes to zoning provisions result from requests from developers, conditional on providing public contributions negotiated by the local government, distributional concerns can be taken into account (Levine-Schnur and Ferdman 2015).

Following the approach used in the analysis of Section 37 data for the São Paulo case, FUNDURB spending by *subprefeitura* has been organized into two groups to identify what parts of the city have most benefitted from OODC funds (Table 3). The low- and high-project groups are the *subprefeituras* with the least and most FUNDURB spending for 2013 to 2015, respectively (Table 3). The low-project group accounts for 33 percent of all FUNDURB projects, but just 9 percent of the total funds spent by FUNDURB. By contrast, the high-project group accounts for 30 percent of all FUNDURB projects, and 57 percent of the total funds spent by FUNDURB.

While the analysis of Toronto's distribution of Section 37 benefits shows a clear division of socio-economic data between the low- and high-agreement groups, the data for the low- and high-project groups in São Paulo show less of a socio-spatial division, given the more dispersed nature of spending by FUNDURB.

Table 2: Key socio-economic variables for low- and high-agreement groups, Toronto wards

	Ward	Average household income (2010)	Unemployment rate	Average monthly rent	% with post-secondary certificate, diploma or degree	% born outside Canada	% of dwellings built after 2000
Low-agreement group	1 (Etobicoke North)	$66,001	12.8	$909	43	64	2
	12 (York South–Weston)	$61,271	10.3	$836	38	59	6
	29 (Toronto–Danforth)	$84,631	8.3	$946	62	38	3
	31 (Beaches–East York)	$71,471	10	$867	57	42	2.3
	42 (Scarborough–Rouge River)	$74,662	11.8	$990	51	64	26
	43 (Scarborough East)	$67,686	12.7	$771	50	52	4
	44 (Scarborough East)	$100,626	9.2	$937	60	47	8
Average for low-agreement group		***$70,954***	***10.9***	***$886***	***50***	***53***	***7***
High-agreement group	6 (Etobicoke–Lakeshore)	$79,279	7.8	$935	60	40	13
	19 (Trinity–Spadina)	$85,294	6.7	$1,184	65	38	25
	20 (Trinity–Spadina)	$84,382	7.8	$1,265	73	42	36
	22 (St. Paul's)	$128,973	6.4	$1,245	79	33	12
	23 (Willowdale)	$83,641	8	$1,338	72	65	39
	24 (Willowdale)	$91,433	9.3	$1,245	69	67	16
	27 (Toronto Centre–Rosedale)	$109,667	8	$1,233	76	42	24
	28 (Toronto Centre–Rosedale)	$75,284	8.5	$941	68	47	21
Average for high-agreement group		***$94,667***	***7.7***	***$1206***	***70***	***46***	***23***
Toronto		***$87,038***	***9.3***	***$1,026***	***58***	***51***	***12***

Source: 2011 Census; City of Toronto Ward Profiles

Table 4 shows a selection of socio-economic data for the *subprefeituras* in low- and high-project groups.[43]

The low- and high-project groups have a similar average of illiterate residents, although the high-project group is closer to the São Paulo average. For the average monthly income, the low-project group had a slightly lower average, while the average for the high-project group was higher than the São Paulo average. The average unemployment rate was higher in the low-project group than the high-project group, sitting just below the São Paulo average. For the percentage of households without a sewer connection in São Paulo, the low-project group was much higher than the high-project group, well below the São Paulo average. Similarly, the indicator for the percentage of *favela* households was also much higher for the low-project group than for the high-project group.

Although the project spending through FUNDURB is relatively evenly spread throughout the city, the majority of funding has not gone to the poorest neighbourhoods. Many of the differences between the cases are the result of context, history, and the legislation that developed in each setting, yet thinking beyond boundaries offers a number of recommendations, discussed in the final section.[44]

4.6 Distributional outcomes in Toronto and São Paulo

Although the underlying rationale for land value capture is not generally improved equity, it is nevertheless interesting to look at the socioeconomic characteristics of the neighbourhoods that receive the benefits.[45] In other words, is there a redistributional component to land value capture?

In Toronto, the few relevant documents related to Section 37 make no mention of an equity objective. Moore (2013b) notes that the rationale most often used in Toronto is that: "the potential or perceived negative effects of a new development on the surrounding areas can upset neighbouring residents, and [Section 37] offer[s] a means to compensate residents for the real or perceived effects of development by providing for new amenities in the neighbourhood"

43. The socio-economic characteristics used for the São Paulo case are different from those used in Toronto. This is explained by the availability of data at the city level, which is not standardized between the two cases.

44. While there is interest in reviewing Section 37 legislation, only the provincial government can change the system. Still, an incentive was present in initiating a Section 37 review (Gladki Planning Associates 2014). A scandal involving Councillor Mark Grimes prompted Mayor John Tory to remark that "a full review" is needed of Section 37's use, while Toronto Chief Planner Jennifer Keesmaat has spoken publicly about the need for changes (Keenan 2015). In São Paulo, it is unlikely that new OODC rules will be approved for some time, given that a master plan revision is not due until 2024.

45. Drawing on Henry George's view that urban land belongs to all inhabitants rather than those with ownership rights, Fainstein (2012) highlights the principle of equity within LVC. According to this criterion, "the benefits of urban land ownership should flow to all city users and should be used to redress disadvantage" (Fainstein 2012: 22).

Table 3: Number of FUNDURB projects and total FUNDURB funds for low- and high-project groups, São Paulo, 2013–2015

	Subprefeitura	No. of projects	% of total projects	Total funds spent (Reais $)	% of total funds for city
Low-project group	Parelheiros	24		5,529,554	
	Vila Mariana	12		1,819,797	
	Vila Prudente/Sapopemba	16		2,451,626	
	Cidade Tiradentes	27		2,481,207	
	São Miguel	5		3,470,515	
	Capela do Socorro	53		11,400,226	
	Cidade Ademar	23		8,995,879	
	Guainanases	16		5,765,191	
	Itaim Paulista	27		7,711,217	
	Ermelino Matarazzo	9		4,524,101	
	Jaçana/Tremembé	13		5,885,251	
	Freguesia/Brasilândia	13		6,110,855	
	Perus	16		7,446,587	
Total low-project group		***254***	***33%***	***73,592,006***	***9%***
High-project group	M'Boi Mirim	29		85,814,036	
	Santo Amaro	25		61,447,453	
	Jabaquara	15		60,201,979	
	Sé	91		90,758,965	
	Aricanduva/Formosa/Carrão	18		47,663,790	
	São Mateus	28		53,535,409	
	Itaquera	21		65,093,297	
Total high-project group		***227***	***30%***	***464,514,928***	***57%***

(Moore 2013b: 16). Since most developments are in affluent neighbourhoods, the benefits generally go to affluent neighbourhoods. When density bonuses are negotiated on a case-by-case basis, it is unlikely that the funds will go to more disadvantaged neighbourhoods.

Nevertheless, as Moore (2013b: 35) notes, as a rationale, "sharing the wealth, by redistributing benefits to lower-income neighbourhoods, plays less of a role, but is still important." Moore also points out that a sharing-the-wealth approach does not require a relationship between the development and the benefit, but Section 37 actually requires a nexus between the development and the benefit. Without an explicit redistributive objective in Toronto, low-income neighbourhoods likely would not receive Section 37 funds, even though many of these areas need improvements in public space and infrastructure.

Table 4: Key socio-economic variables for low- and high-project groups, São Paulo

	Subprefeitura	% illiterate population 16 years or more	Average monthly income (Reais $)	Average unemployment rate	% of households without sewer connection of total households in subprefeitura	% favela households of total households in subprefeitura
Low-agreement group	Parelheiros	4.89	1,293	11.1	-	10.14
	Vila Mariana	2.06	2,727	8.4	2.7	0.7
	Vila Prudente/Sapopemba	2.70	1,923	9.0	9.8	12.8
	Cidade Tiradentes	4.11	1,324	11.6	16.0	5.6
	São Miguel	4.11	1,324	11.6	14.9	1.5
	Capela do Socorro	4.89	1,293	11.1	32.6	15.6
	Cidade Ademar	4.89	1,293	11.1	37.1	19.7
	Guainanases	4.11	1,324	11.6	22.7	8.3
	Itaim Paulista	4.11	2,727	8.4	15.3	9.1
	Ermelino Matarazzo	4.11	1,324	11.6	17.8	6.6
	Jaçana/Tremembé	3.04	2,078	9.9	26.7	11.6
	Freguesia/Brasilândia	3.80	1,587	10.6	14.1	16.8
	Perus	3.80	1,587	10.6	28.2	18.0
Average for low-project group		***4.34***	***1,440***	***10.85***	***19.8***	***14.0***
High-project group	M'Boi Mirim	4.89	1,293	11.1	27.2	21.4
	Santo Amaro	2.06	2,727	8.4	10.0	3.8
	Jabaquara	2.06	2,727	8.4	18.9	19.8
	Sé	-	2,532	6.9	0.8	0.3
	Aricanduva/Formosa/Carrão	2.70	1,923	9.0	5.4	1.5
	São Mateus	4.11	1,324	11.6	16.4	11.5
	Itaquera	4.11	1,324	11.6	16.4	6.8
Average for high-project group		***3.32***	***1,978***	***9.57***	***13.6***	***9.3***
São Paulo		***3.53***	***1,840***	***10.00***	***18.9***	***10.8***

Note: totals may not sum, due to rounding
Source: Observatório Cidadão, www.nossasaopaulo.org.br

A contrasting approach in Vancouver explains why negotiation might involve some redistribution. In Vancouver, city staff "broker" among all the possible public goods demands to ensure relative equity among the needs in the city. As Beasley (2006: 7) notes, in Vancouver, this has been done by:

> Keeping negotiations strictly out of the hands of politicians. The council sets the policies and they approve finally, in public session, all of the bonuses; but they're not a part of the negotiations. We try to avoid those intimate, personal negotiations that have, frankly, plagued many of the systems around North America. This helps to maintain the focus on corporate policy and the management of equity among all kinds of public goods, but it also depersonalizes the system.

The idea that benefits should serve the community in which the development occurs implies that benefits should match community needs and be tied to planning objectives. Toronto's official plan is guided by enhancing sustainability, "based on social equity and inclusion, environmental protection, good governance and city building" (City of Toronto, 2015c: 1–2). As Joy and Vogle (2015) point out, the approach used through Section 37 is *ad hoc*, negotiated through city councillors rather than a comprehensive strategy to tackle, for example, affordable housing. As Mah (2009) notes, politically, it is more advantageous for councillors to advocate for a community facility that more clearly benefits the entire community rather than to negotiate for a few affordable housing units that seem to benefit only a few households.

Another argument is that "Section 37 agreements, which could be used for a strict provision of affordable housing in Toronto, are used to provide art and park space rather than community centres and affordable housing, as the former more likely enhances developer's property values" (Lehrer and Wieditz 2009: 149). Valverde (2012) makes a similar point about the way local governance operates in Toronto based on ward politics, resulting in the failure of city councillors to take long-term policy positions. Instead, councillors react to short-term citizen-led campaigns, such as through Section 37 negotiations.

In São Paulo, in contrast, the redistributive strategy of OODC as conceived by the Statute is driven by equity principles, as a professor pointed out: "The idea is to use it for other parts of the city… areas of inadequate urbanization. So the purpose of the grant is redistributive" (personal communication, January 19, 2016). One of the principles of the 2014 master plan is social and territorial equity, meaning "the guarantee of social justice starting with the reduction of urban vulnerabilities and social inequalities between population groups and between districts and neighbourhoods of São Paulo" (Prefeitura de São Paulo, 2014: 41 [Art. 5 IV]).

Solo criado is based on the principle that privileged property owners living in expensive high-rise apartments should contribute to the costs of infrastructure in high-density districts (Souza 2001). In general, OODC – the tool in the Statute that most directly applies the idea of *solo criado* – is premised on the idea that increases in the value of land should benefit the common interest and be used to redistribute resources throughout the city. However, the current interpretation of OODC in

São Paulo has changed, and become more about orienting long-term development in the city. While the two tools seem to serve a similar purpose – exchanging density for benefits – they clearly have different underlying rationales.

In São Paulo, the *prefeitura*'s approach to OODC has moved away from a redistributive function, a fact highlighted by the data on FUNDURB spending for 2013 to 2015. The planning factor (explained in Figure 2) and the corridors, now key priorities under the 2014 master plan, are supposed to bring more alternatives to areas without opportunities, in that higher planning factors are applied to already developed areas. The higher the planning factor, the less attractive the area for development as a result of a higher OODC charge. Paradoxically, the changes in 2014 resulted in a situation in which as the permitted FAR increases, the value of the OODC charge decreases. This resulted in a situation in which the more developers build, the less they pay as a way to stimulate an increase in construction. A competing argument used by some experts is that OODC cannot be an urban tool to balance uses in the city as it is now conceived, because that would mean exceptionality in access to land. Thus, using the planning and social factors as incentives means that OODC is no longer a truly redistributive tool, in contrast to a more regulatory approach as originally conceived.

5. Final observations

This paper compares LVC tools in Toronto and São Paulo, focusing on the efficacy, benefits, challenges, and politics of such decisions, as well as who benefits. Table 5 summarizes some of the main similarities and differences between the tools discussed throughout the paper. In both cases, there is a strong rationale for trading development rights for community benefits. Indeed, considerable funds have been raised from these tools, and these funds have been used for a range of social goods.

Table 5: Key similarities and differences between Toronto's Section 37 and São Paulo's OODC

	Toronto	São Paulo
Legislation	Ontario *Planning Act; City of Toronto Implementation Guidelines*	Master plan (2014); Statute of the City
Rationale	Negative externalities	Redistribution; reorienting development
Equity objectives?	No	Yes
Decision-making process	Negotiation (politics)	Decided in FUNDURB, even split between civil society and public sector, formula-based (bureaucracy)
Form of benefits	Cash or in-kind	Funds deposited into FUNDURB
Benefit location	Close to developments, primarily downtown	Throughout the city
Scope of benefits	Ward-based	Pooled

A major difference between the cases points to a possible recommendation: pooling LVC benefits. In Toronto, benefits must be located close to the development and thus there is a concentration of benefits downtown. In São Paulo, the benefits are used across the city by depositing the money into a fund to be used in the city's periphery where there is the most poverty. Fundamental to this logic is that additional construction rights as defined by a basic FAR belong to everyone. In Toronto, citywide pooling is unlikely to work in the same way as in São Paulo, despite the fact that development charges are already used on a uniform basis across the municipality (see footnote 5).[46] In any case, the nexus argument would make citywide pooling impossible.

Nevertheless, pooling does exist and makes sense at a smaller scale in Toronto. Several downtown wards require that 10 percent of every Section 37 process goes towards Toronto Community Housing (TCH) for capital expenses and resident-identified improvements through a process of community involvement. The practice is most robust in Wards 20 and 27, but other councillors have also implemented this practice.[47] In Ward 20, for example, the practice has been to layer the Section 37 process on top of the existing TCH participatory budgeting state-of-good-repair process. TCH reports that between 2009 and 2015, almost $5 million was received through Section 37 agreements (TCH 2016). Pooling such funds shows how Section 37 could be used to redistribute benefits to those in need.[48] Despite challenges around the vagueness of Section 37, an advantage is its flexibility in adapting to new ways of applying the process, as the TCH example makes clear.[49]

In both cases and especially in the case of Toronto, the process needs to be de-politicized. The ward-based nature of Section 37 agreements in Toronto and the fact that councillors are elected to represent wards, combined with the negotiated process, contribute to a highly politicized process. In São Paulo, although the bureaucratized approach takes most of the responsibility out of the hands of elected officials, as Flyvbjerg (2002) notes, such decisions are inherently political. Still, the changes to the master plan and the open approach seen under former

46. Former Mayor Rob Ford himself suggested the idea of pooling in 2012, although likely without understanding the implications of the argument (Metro News 2012).

47. The practice has also occurred in Wards 5, 10, and 38. However, there is no legislation governing this arrangement.

48. In 2016, the Province of Ontario released an updated affordable housing strategy, including likely legislation on inclusionary zoning. If passed, the legislation would give Ontario municipalities the option to make affordable housing mandatory for new residential development, but would require choosing between community infrastructure under Section 37 and affordable housing.

49. Another example of a flexible use of Section 37 funds is an experience in 2014 whereby the councillor in Ward 33 (Don Valley East) allocated $500,000 of Section 37 funds to a participatory budgeting process (Friendly 2016).

Mayor Haddad's government to providing information may help make corruption less common.[50]

A related lesson is the need for accountability within both processes. Brazilian cities have used a variety of participatory innovations for the last 25 years to promote accountability and trust in government (Wampler 2012), despite some challenges in their application (Coelho 2014; Friendly 2013). In both cities, there is a need to further enhance consultation (Baxamusa 2008; Beard and Sarmiento 2014; Jillela et al. 2015).

In São Paulo, members of FUNDURB are elected by the CMPU, rather than by the population at large, an approach used in other Brazilian policy councils where members are elected by another body invested in the issue (Friendly 2013). The purpose of councils such as the one managing FUNDURB is to provide greater transparency in the application of revenues (Furtado et al. 2006) and to further the social purposes set out in the Statute, such as social housing and tenure legalization. In Toronto, stronger requirements, accountability, clear benchmarks for community consultation to account for community needs, and more transparent reporting mechanisms are needed.[51] While representative democracy requires that politicians speak on behalf of their constituencies, the politicized nature of Section 37 results in a situation in which a councillor's pet projects, at worst, may be favoured, with little community input.[52] São Paulo has made the FUNDURB council a more balanced venue for decision-making, yet only time will tell as to the nature of deliberation within the council.[53] While in Toronto a council like the one used in São Paulo would be unlikely, reporting of Section 37 funds and negotiations must be communicated in a more transparent way, something that has already been initiated by the planning department (City of Toronto 2015b).

50. Fernando Haddad lost to João Doria of the centrist Brazilian Social Democracy Party in the 2016 local elections in São Paulo. Under Mayor Doria, the intention is to revise the master plan, which the government argues will boost the real estate industry and promote construction jobs. If the changes go ahead, the OODC formula would be revised, "balancing" the charge in high- and low-cost areas, thus effectively lowering OODC charges for the development industry (Ferraz 2017).

51. The Province of Ontario recently reformed its *Development Charges Act*, which affects Section 37 by creating clear reporting requirements. In fact, consultation on development charges revealed the need for better accountability in Section 37 funding allocation (MMAH 2013).

52. While on paper the public has a say in the process, the approach varies considerably across the city. In one downtown ward, the councillor noted how using a community-driven process has helped to mitigate the subjectivity of the process.

53. In São Paulo, the *prefeitura* has had an open attitude, council meetings are open to the public, meeting minutes are available online, and the members represent an equal number of representatives of civil society and the local government. As Santoro et al. (2016) point out, "there have been ongoing advances around transparency of governance, the expansion of possibilities of public debate and the participation of civil society."

Another proposal is a formula-based approach. A review by Gladki Planning Associates (2014: 5) recommends a standardized approach in Toronto to calculate the value of community benefits to "provide greater certainty for all participants" and "allow purchasers of land for development to factor in the additional cost of rezoning to increase height and density as a component of their land negotiation process." This predictability would likely reduce inconsistency, ease transparency concerns, and reduce resource inputs. Following the Gladki review, City staff recommended more clarity from the Province on the use of a value-based formula in Section 37 of the *Planning Act* (City of Toronto 2014).

One challenge of "developer provisions," as Alterman and Kayden (1988) term such programs, is that "a municipality could enact a density bonus program to 'print money,' effectively shifting the cost of providing public amenities to property owners and circumventing constitutional limits that are designed to ensure fairness and equity" (Yowell 2007: 538). This comment calls attention to the need to consider the implications of public policy based on private-sector concerns.

This point also highlights the need to think about land value capture tools such as Section 37 and OODC in terms of the beneficiaries and their socioeconomic characteristics (see Fainstein 2009; 2010). Overall, this research raises the need for a normative discussion about the purpose of both tools and the extent to which they could or should be used to redistribute funds from high-income neighbourhoods where development is occurring to low-income neighbourhoods where infrastructure is needed.

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