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Can New York State and Ontario become more productive, effective and greener if we free ourselves from municipal land use controls?
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On February 5, 2021 New York State Senator Harckham introduced an Act to amend the real property law. The amendment requires municipalities approve ordinances allowing accessory dwellings (ADU) in all areas zoned for residential use and on all lots with at least one residence. At least one ADU will be permitted on each lot. Reasonable architectural standards are to be prescribed for the ADU within minimal prescribed setbacks. Permitting standards beyond the legislation's minimal standards cannot preclude ADU approvals. Appeal processes are to be established where permit denials occur. No other municipal ordinance or multiple dwelling law can be used to refuse an ADU application. State review will be undertaken of each municipal ADU ordinance to ensure compliance.

In 2020, Ontario Provincial Minister of Municipal Affairs and Housing increased usage of rarely used Minister's Zoning Orders (MZO) provided for in Section 47 of the Planning Act. An MZO enables the Minister to bypass municipal council zoning approvals and public decision consultation and review that occurs together with the application of official plan (master plan) and zoning bylaw (ordinance) policy. The amendment came into effect April 12, 2021. On March 4, 2021, Bill 257 was introduced into the Provincial Legislature. Schedule 3 amends the Planning Act to rescind the requirement MZOs are to be consistent with the Provincial Policy Statement. In Ontario all other Provincial and municipal planning decisions must be consistent with the provincial government interests in the Provincial Policy Statement.

What is happening? Edward Glaeser offered his opinion in a recent Washington Post Op Ed entitled "*How Biden can free America from its Zoning Straight Jacket*" (April 12, 2021). He states "*America can become more productive, equitable and greener if we free ourselves from land use controls."*

Do these State and Provincial actions free us from land use controls? Will municipalities and State and Provincial legislatures successfully make the changes and remain competent legislators each in their respective areas of responsibility? Will we become more productive, equitable and greener?

In this editorial we compare New York State and Province of Ontario experience to answer this question and set out constructive responses. We use New York State municipalities to assess the implementation of the ADU legislation. In Ontario, we draw on our planning experience with MZOs. Here are the implications of both Provincial and State initiatives.

New York municipalities will be required to draft ordinances for ADU permissions acceptable to State authorities. **Community character** requirements set out in the master plan, zoning ordinance and other municipal ordinances addressing landscape character, flooding, site alteration and historical preservation cannot prohibit ADU approvals.

Where State legislation focusses on narrow State wide objectives, home rule provisions don't apply. Is the State ADU policy narrowly focused? Perhaps not, but other State experience with ADU initiatives suggests municipalities apply community character and lot coverage ordinance provisions and lot levies to obstruct ADU approvals. New York State's provisions apply experience gained elsewhere to design effective legislation.

We need to be careful when examining the legislation's community character provisions. Municipal ordinance setbacks, lot area requirements and lot coverage provisions can still apply provided those provisions don't preclude an ADU approval. But if these cannot be met, the minimum standards apply if health provisions are met. Ministerial administrative approvals and separate appeal provisions also apply so as to void permit application administrative constraints.

Under Ontario's Planning Act, municipalities are required to make planning decisions consistent with the Provincial Policy Statement (PPS). Some balancing of Provincial interests with local concerns is provided for in the PPS. Ontario exempts Ministers Zoning Order from the requirement to be consistent with the PPS. Their rationale is municipal councils asked for help promoting economic development. Previously, MZOs were used where high profile and Provincially significant issues were addressed: for example, approval of an international car manufacturing plant or casinos at horse racing tracks.

The current administrations use of this approval focused on the Toronto centred region initially. Application is expanding to other Ontario regions. Rationale for usage is opaque. MZO usage precludes the balancing of Provincial policies with local concerns that municipal decision making under the Planning Act provides for. The public cannot comment on and appeal the Minister's decisions. There is nothing comparable to the New York State home rule provisions in Ontario.

Glaesner's objectives may be achieved in part by Ontario's initiative. I don't think we can say whether New York State's initiative achieves Glaesner's end yet.

New York State municipalities may have ordinances and municipal policy addressing **flooding**. Automatically permitting accessory dwellings in flood prone areas may be inconsistent with these policies and the public interest. Where public or land trust acquisition is planned, implementation of a blanket policy approving accessory dwellings won't help acquisition.

Will the legislations public health requirements include flooding risk in defining reasons for refusal? Clarification is needed, especially as we begin to address increasing storm severity associated with climate warming. If the legislation's public health provisions don't address flooding and climate change, additional wording may be needed in the State legislation to address this shortcoming.

Ontario municipal floodplains are generally regulated by PPS policy implemented in part by Conservation Authorities. Authorities administer flood plain fill and construction regulations. Strict

policy is applied where permits are issued. But the Conservation Authorities Act was revised to require issuance of Authority permits to developments approved by MZOs. This creates a dichotomy among Ontario residents; those who access the Minister's ear and those who don't.

Many of the Conservation Authority regulations are based on the 100 year storm or Hurricane Hazel/Timmons storm standards. These increasingly underestimate potential flooding potential in a changing climate.

These State and Provincial flooding provisions meet Glaesner's objective: but these flooding provisions may not be in the public interest of either the Province or State.

New York municipalities will have to establish **ministerial approvals, and appeal boards** to review application and hear applicants' appeals where ADU applications are refused. Further information is needed to set out what are the grounds for a permit application refusal. Where large investments of municipal volunteer time on appeal boards is required, the additional requirements needed for a separate appeal board may be excessive. But staff approvals may be beneficial where clear and effective ordinances and grounds for refusal are set out.

In Ontario, no public or municipal MZO appeals are provided for in the Planning Act. However, revisions to municipal planning official plans and zoning bylaws may be required to address implementation of these Orders to address land use inconsistencies between lands addressed by MZOs and adjoining lands. These revisions and costs are borne by the municipality and those decisions will be appealable by land owners and the public.

In New York State and the Province of Ontario, municipalities have to conform to their **master/official plans**. Both ADU ordinances and MZOs may conflict with these plans. The citizen input in expended in developing and approving these plans is voided by both the ADUs and MZOs.

The skill of municipal planners and our professions will be tested by these planning initiatives!

In **summary**, both initiatives change municipal decision making. The State initiative is driven by the desire to provide more and a better balance of affordable housing locally. Many municipal ordinances require zoning, unit charges, conditional use permits and other approvals for multi-dwelling housing. The State ADU legislation voids these requirements in part. Where it may be less effective is in implementation for the following reasons:

- How many single family dwelling owners will build accessory dwelling units;
- Will the units be for family members, extra space for home offices etc. and grandparents as opposed to rental;
- State officials cannot count on ADU construction to meet housing needs; and
- Will mortgage authorities provide the funding to finance construction in sufficient scale to meet public needs?

ADUs are expected to address lower middle and low income housing needs, particularly where local ordinances give priority to single family residences and make multi-residential development

approvals difficult. If multi-residential approvals were made simpler, less expensive and more efficient would there be as much need for the State ADU legislation?

The merits of Ontario's use of MZOs is less clear. It is preferable for the Province to have identified, reviewed and amended those PPS policies deemed problematic through the Planning Act's public consultation and review provisions. Simply exempting MZOs from Provincial policy leads to a conclusion there is no rhyme or reason for their usage. As an administrative measure, its use has become more performative than effective Province wide policy.

In the State and Province there is a risk these initiatives will have unintended consequences within municipalities.

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