

Recommended Framework for the Use of Minister's Zoning Orders and Response to Bills 245 & 257

Date: April 8, 2021

To: Planning and Housing Committee

From: Chief Planner and Executive Director, City Planning

Wards: All

SUMMARY

This report recommends measures that the Provincial government should implement when utilizing Ministers Zoning Orders ("MZOs") powers to protect local public interest and ensure accountability. MZOs can be an effective tool when used judiciously, in consultation with the affected municipality and local communities. To that end, it is recommended that the Minister should consult with, engage and reach agreement with the affected municipality in advance of making a decision to issue a MZO. This would essentially mimic a development review or due diligence process that provides due diligence against policy and standards that would otherwise apply to any other public or private development proposal. The goal would be to ensure that any proposed development can be implemented at the local level giving consideration to potential land-use planning issues related to site plans and ensure that the development is compatible with the surrounding area and contributes to the economic, social, cultural and environmental vitality of the City.

In addition, the Province should consider some form of formal public engagement where appropriate in the use of the MZOs. Public engagement not only results in more informed residents, but also can generate more support for the final decisions reached by decision makers. Participation helps generate ownership. Involved residents who have helped to shape a proposed development will better understand the issue itself and the reasons for the decisions that are made. Good communications about the public's involvement in a local decision can increase the support of the broader community as well.

This report also responds to two recently announced proposed legislative changes. The first and which staff have concerns with are the proposed enhancements to the Minister's Zoning Order Powers (section 47 of the *Planning Act*) introduced on March 4, 2021 through Bill 257, Supporting Broadband and Infrastructure Expansion Act, 2021. The Bill proposes to amend the *Planning Act* to provide that ministerial

zoning orders made under section 47 are not required and are deemed to never have been required to be consistent with policy statements issued under subsection 3 (1) of the PPS.

Secondly, this Report addresses the legislative changes introduced on February 16, 2021, in Bill 245, the Accelerating Access to Justice Act, 2021. Bill 245 is an omnibus Bill affecting multiple pieces of legislation and the merging of existing land tribunals into one administrative body to be known as the Ontario Land Tribunal.

RECOMMENDATIONS

The Chief Planner and Executive Director, City Planning recommends that:

1. City Council advise the Province that the City of Toronto supports the Province's scoped use of Minister's Zoning Orders provided that its use:
 - a. includes collaboration with City staff and officials in advance of the issuing of these Orders, including public consultation where feasible;
 - b. is consistent with and/or in conformity with Provincial policies and legislation, including the Provincial Policy Statement and The Growth Plan and that it complies with the Ontario Heritage Act, as the case may be;
 - c. continues to ensure that Site Plan matters remain within the City's jurisdiction;
 - d. balances local planning policy, including the Official Plan and technical considerations in order to support complete communities and good planning;
 - e. ensures that there is a mechanism for guaranteeing the City's revenue neutrality and the collection of appropriate community benefits in the event that Section 37 or Community Benefit Charges become inapplicable due to a Minister's Zoning Order;
 - f. incorporates a provision for adequate affordable housing in the proposed development where appropriate.
2. City Council advise the Province that it does not support the proposed changes to the *Planning Act*, contained in Bill 257, Supporting Broadband and Infrastructure Expansion Act, 2021 which provide that ministerial zoning orders made under section 47 are not required and are deemed to never have been required to be consistent with policy statements issued under subsection 3 (1) of the *Planning Act*.
3. City Council direct the City Clerk to forward this Item to the Ministry of Municipal Affairs and Housing.

FINANCIAL IMPACT

The use of MZOs eliminates the ability of the City to collect development application fees that would have been required to process the application. In addition, the enhanced use of MZOs from the Province has also eliminated the City's ability to collect Section 37 benefits and future community benefits as no alternative means of securing community benefits is provided unless the MZO specifically requires benefits pursuant to Section 47 such as zoning provisions set out in the order e.g. provision of a community accessible space

The Chief Financial Officer and Treasurer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

On October 27, 2020, City Council considered and adopted Item MM25.30, Protecting Public Interest and Requesting Accountability from Minister's Zoning Orders (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2020.MM25.30>) which recommended that:

1. City Council express its displeasure with the actions taken by the Province through the Ministry of Municipal Affairs and Housing with regards to the issuing of O. Reg. 594/20, O. Reg. 595/20 and O. Reg. 596/20 without consultation with local residents, City Planning or with City Council, and send a copy of this Motion to the Ministry of Municipal Affairs and Housing.

BACKGROUND INFORMATION

Section 47 of the *Planning Act* allows the Minister of Municipal Affairs and Housing (Minister) to make “Minister’s Zoning Orders” (MZOs), to govern land uses within areas subject to the order. An MZO prevails over any other zoning by-law in effect in the area, giving the Minister complete authority to regulate land use on specific lands. Despite being a rarely used power for decades, the making of MZOs has become a frequent occurrence in 2020 and 2021.

The *Planning Act* has long afforded the Minister significant discretionary authority to directly zone land; however, the use of this extraordinary power was often limited to areas without municipal organization, cases of emergency or where there was a pressing provincial objective at stake.

In addition to the matters traditionally secured such as zoning standards, as of July 21, 2020, and pursuant to Bill 197, the COVID-19 Economic Recovery Act, 2020, the Minister can now make what are becoming known as “Enhanced MZOs” relating to any “specified land” to:

- Provide that traditional site plan control in respect of all or part of the specified land does not apply;
- Require a form of site plan agreement between the landowner and the municipality, and impose directions in respect of the agreement, including specified matters that shall not be dealt with in the agreement, or how certain matters shall be addressed; and/or
- Exercise inclusionary zoning (affordable housing) powers, which could direct that a specified building or development of specified lands include a prescribed number of affordable housing units, the term for which such units shall be affordable, and a host of other powers under subsection 35.2(2). This power resides with the Minister regardless of whether the host municipality has an official plan with policies addressing inclusionary zoning.

All of the above powers previously belonged only to municipalities and were beyond the scope of the pre-Bill 197 MZO regime and the Minister's powers.

The Province has indicated that the primary reasons for the need to use the MZO tool is to help to overcome potential barriers and development delays. The Province has also indicated the proposed new authority could be used to support the delivery of transit station infrastructure and the optimization of surplus lands (e.g., affordable housing and long term care homes), provide increased certainty for strategic projects, remove potential approvals delays, increase the availability of affordable housing, and provide for additional value capture to enable economic recovery.

COMMENTS

City staff are of the opinion that the regulatory ability to put in place a Minister's Zoning Order is appropriate and valuable, when used judiciously and following consultation with the affected municipality. The Province's unilateral decision to permit significant intensification on the properties in the West Don Lands, including one site that has not even been the subject of a formal application with the City, sidesteps municipal governance and public consultation. The use of the MZO in circumstances such as this, without engagement of the municipality, does not take into account potential liability, safety, noise mitigation as a result of development being adjacent to rail corridors, the impacts that additional unplanned development will have on the community such as community facilities and services, parks, the delivery of schools, transit, transportation infrastructure, and parking; it does not enable the City to collect application fees needed to study the impacts in certain instances, resulting in a loss of revenue; and in some cases sidesteps existing agreements that have been in place related to alterations to existing heritage listed buildings. In addition, there is the further concern of the lasting impact of the MZO if the permission establishes an unanticipated direction which alters or conflicts with the contextual planning that is undertaken through established area or Secondary Plans.

At its best, the use of Minister's Zoning Orders are effective and efficient when done in the spirit of cooperation and having regard for the greater public interest. There have been a number of instances recently where the use of the s.47 powers has occurred

successfully, with public support and effective and efficient delivery of the outcomes. For example, the City and the Province collaborated recently to respond to the immediate need for affordable housing and implementation of the modular housing initiative as part of the HousingTO 2020-2030 Action Plan. In this instance, the Province put in place two MZOs, and the City expedited and managed the site plan approvals. Similar co-operative efforts were utilized when the City worked with the Province to bring forward an MZO to implement the City's CaféTO program and to expedite a soon to be completed zoning process for Sunnybrook Hospital.

In order to protect public interests, provide transparency and to ensure accountability, it is recommended that a number of principles be implemented to ensure that best practices are followed. These changes are discussed in further detail below.

Collaboration and Consultation

Recently, three provincially-owned sites located in in the West Don Lands, were subject to Minister's Zoning Orders O. Reg. 594/20, O. Reg. 595/20 and O. Reg. 596/2. In these instances, the MZO was utilized without collaboration and consultation with the City. Historically, MZOs have been used in special circumstances to address matters of heightened significance to the Province or to impose controls where local planning instruments did not exist or were insufficient, particularly in areas lacking municipal organization. However, in the case of municipalities where land use controls and detailed polices are in place to regulate development, good planning requires a collaborative approach. It is therefore recommended that the use of this authority be consistently undertaken in collaboration with the affected municipality, and in full recognition and accounting for, where possible, the interests of those that may be impacted by the use of the MZO.

Collaboration and consultation with municipalities can encourage better quality development proposals, related to the proposed use of a MZO, by helping to identify technical concerns/issues, providing an opportunity to discuss any other matters that may be pertinent to the MZO, and allowing for early feedback and information sharing on the proposed regulation. Further consultation:

- Ensures that all relevant planning policies have been conveyed to the Ministry early in the process;
- Allows the Minister the opportunity to refine the proposed concept prior to making a MZO;
- Informs the municipality of upcoming developments to allow for co-ordination of potential impacts on other development proposals in the area;
- Allows the Minister to promote sustainability considerations by providing comments early in the design process of the proposal; and
- Ensures the development contemplated can advance having taken into account the required relief that may be contained within the MZO.

Informing Council and increasing public awareness on the importance of proposed development to be implemented by a MZO is important to the success of the project and its acceptance within a community. This occurs thru engaging Council, city staff and the public in the early stages of the project initiation and providing ongoing information.

Early consultation with the affected municipality is about getting the fundamentals of the development project right while managing expectations and obstacles. It is about having a clear vision grounded in durable and achievable principles that assure a successful and realizable future.

The Province should consider some form of public engagement prior to the enactment of the MZO. Public engagement not only results in more informed residents, but also can generate more support for the final decisions reached by decision-makers and a better understanding of why an MZO is being advanced. Engaged communities which have helped to shape a proposed development will better understand the issue itself and the reasons for decisions that are made in an expedited manner leading to more acceptance of the proposal.

While there is no *Planning Act* requirement with respect to public notice in advance of a Minister's Zoning Order, it is recommended that the public and municipality be informed of the permissions to be granted prior to the enactment of the MZO. Public notice is currently only required for amendments to existing Minister's Zoning Orders and not for the original order itself.

Consistency with and/or in Conformity with Provincial Policies, Plans and Legislation

On March 4, 2021, proposed enhancements to the Minister's Zoning Order Powers (section 47 of the *Planning Act*) were introduced through Bill 257, Supporting Broadband and Infrastructure Expansion Act, 2021. Among other things, the Bill proposes to amend the *Planning Act* to provide that MZOs are not required and are deemed to never have been required to be consistent with provincial policy statements (PPS) issued under subsection 3 (1) of the Act. The effect of this proposed change would be to allow the Minister to issue MZOs without having regard to the Province's own policies as set out in the PPS.

The PPS plays a key role in Ontario's planning system by providing the policy foundation necessary to regulate the development and use of land. It is the basis of the Province's policy-led planning system, and supports the provincial goal of strong, livable and healthy communities. Furthermore, the PPS provides for appropriate development while protecting resources of provincial interest, public health and safety and the quality of the natural environment. It supports improved land use planning and management, contributing to a more effective and efficient land use planning system. This proposed change is contrary to the policy led-system established by the Province and unilaterally allows the Minister to disregard provincial policies that may be inconsistent with a MZO. It is the opinion of staff that the proposed legislative changes provide unchecked power to the Minister to override land-use protections that the Provincial Government has itself put in place and which all other decision makers must be consistent with. The significance of this proposed change cannot be understated, since an MZO is an unappealable order that allows the Minister of Municipal Affairs to by-pass the local planning process and decide how land can be used.

The use of the MZO powers should be limited to demonstrated Provincial interests guided by provincial plans, planning principles and legislative requirements.

Municipalities best understand the local public interest, the requirements of the site in its surrounding context, and all aspects of what may be required to make the development of the site align with the all the goals of the Provincial Policy Statement (PPS), as well as local development requirements providing for safety, water, waste water, transportation servicing and technical feasibility, as well as the coherent and connected development of the site relative to its location. If the Minister is stepping into the role of the municipality in making a local decision then the MZO decision-making process should be more open and transparent, providing clear articulation of how the provincial tests were met and the rationale for decisions that put one priority over another.

The considerations for the use of the MZOs should be the same whether it is being used to advance works on provincially-owned property, or other publicly-owned or privately-owned property. The use of this tool should not by-pass the consideration of the provincial land use planning policy directions and legislative requirements including the Ontario Heritage Act. It is recommended that the use of the MZO power should be done in full consideration of its on-going impacts in a neighbourhood or community and at a minimum the Minister, as part of the adoption of a MZO, should explain how the Order is consistent with the PPS, conforms with a provincial plan and conforms with the municipality's official plan.

Ensure that Site Plan Matters are Reviewed and Approved by the City

Section 114 of the *City of Toronto Act* and Section 41 of the *Planning Act* grant the City the authority to include in its Official Plan areas to be designated as “areas of Site Plan Control.” Site plan is a technical review to ensure development complies with detailed aspects of development related to City guidelines and standards based on the specific locational context. This authority provides a process that examines the design and technical aspects of a proposed development to ensure it is attractive and compatible with the surrounding area and contributes to the economic, social and environmental vitality of the City. Features such as building design, site access, servicing, waste storage, parking, loading and landscaping are reviewed prior to approval. In the City, this can include specific details related to municipal infrastructure, site preparation and safety, environmental protection, sustainable design, transportation design and all manner of site specific detail that is best addressed at the local level.

The recently enacted changes to the *Planning Act* allow the Minister to address site plan matters for lands that are subject to an MZO. This new authority could be used in conjunction with a new Order or with an existing Order. This authority would supersede municipal site plan authority. Through the MZO, the Minister could require a municipality and owner/applicant to enter into an agreement to address site plan matters and the Minister will be able to give binding direction outside the zoning order regarding the agreement to scope the matters to be address or to specify how the matters are to be addressed. It should be noted that there is no obligation to involve the City in the creation of these agreements as proposed in the enacted changes.

Staff are not supportive of the Minister addressing site plan matters for lands subject to a Minister's Zoning Order. The effect of this would be to upload the site plan review function from the City to the Province. This is contrary to previous Provincial initiatives to delegate approval functions (i.e. Official Plan Amendments, Plans of Subdivision and

Plans of Condominium) to local municipalities to ensure that local requirements and standards are addressed. Site plan review has never been a Provincial function and has always resided with municipalities. Furthermore, it is unclear how allowing the Minister to address site plan matters would expedite development where technical review would still be required with key City divisions in order to make an informed decision on a site plan, or whether the Minister has the technical expertise to review site plan-related matters.

Site plan control is a tool to ensure a development is technically sound and in accordance with Council approved policies, by-laws and guidelines. Site plan control should continue to be the responsibility of municipalities as it provides the opportunity for municipalities to work with applicants and review and implement matters that address local standards. Should these matters no longer be the responsibility of municipalities, it is not clear if the Province would assume responsibility for the technical review of conformity with local zoning by-laws, other by-laws, guidelines and related policies. It is also not clear who will enforce the site plan requirements.

Accordingly, City Planning staff are of the opinion that the site plan provisions set out under the Minister's Zoning Order powers should be removed, as they are best addressed at the local level. Should the Province decide to maintain these powers, we are of the opinion that the powers should not be used without the full engagement and agreement of the City, to ensure the most efficient process of addressing the fulfillment of conditions or requirements of agreements, and that any potential municipal liability is appropriately addressed. It is our recommendation that at a minimum this approval be delegated to municipal staff who have the ability to complete the required review in the context of both the MZO and Council's approved plans. An example of where this successfully occurred was with the Province's issuance of Ontario Regulation 343/20 and Ontario Regulation 354/20 which provided for the development of two supportive modular housing projects. The site plan approval process occurred in lock step with the Minister's making of the MZO and ensured that the matters referenced above were addressed.

Continue to Balance Local Planning Policy, Including the Official Plan and Technical Considerations in Order to Support Complete Communities and Good Planning

The Province's unilateral decision to permit significant intensification on some properties, including one site that has not been the subject of a formal application with the City, sidesteps municipal governance, public consultation and the right to appeal options. For example, the West Don Lands has long been planned for growth, utilizing public land to create a new complete community with thousands of new affordable housing units, transit and new parkland and public realm. Removing the City from the zoning approval and potentially the site plan control process can reverse years of progress made in implementing master plans to achieve complete communities. It not only removes the municipality from the process but is unfair to landowners who have worked cooperatively with the City to deliver a high quality built environment.

The use of the MZO in the West Don Lands, without engagement of the municipality, did not appear to take into account potential liability, safety, noise mitigation as a result

of development being adjacent to rail corridors or the impacts that additional unplanned development will have on the community such as schools, parks, transit, transportation infrastructure, parking and social services. In addition, it does not allow the City to collect application fees needed to study the impacts, resulting in a loss of revenue; and in some cases sidesteps existing development agreements that have been in place between the Province and City related to alterations to existing heritage listed buildings.

The use of the MZO where new densities, height and built form entitlements are provided, that deviate from those provided for by the municipality through a master plan exercise, can and will set precedents that deviate from the Council approved plans which we anticipate will result in requests for amendments from other sites, potential LPAT appeals, and the resulting cascading effect on all elements of the master plan for the neighbourhood.

It is therefore recommended that there should be consistency of application of the MZO tool with the Minister collaborating with the City and residents to balance local planning policy, including the Official Plan and technical considerations in order to support complete communities and good planning.

Ensuring that there is a Mechanism for Ensuring Revenue Neutrality and the Collection of Appropriate Community Benefits

The enhanced use of MZOs from the Province has brought into doubt the City's ability to collect Section 37 benefits and future community benefits. Unless an alternative means of securing community benefits is provided, the Province has in effect downloaded the cost for future benefits such as off-site streetscape and park improvements or the provision of child care facilities or other non-profit arts, cultural, community or institutional facilities that may have been secured with these developments onto all taxpayers. Without a mechanism for ensuring revenue neutrality and the collection of community benefits, the use of MZOs could result in a reduction in revenue and will impact a municipality's ability to fund growth-related infrastructure.

In conclusion, City planning staff is of the opinion that the use of the MZO tool should be used judiciously and should address each of the following prior to its use:

- Engagement and consultation with the affected municipality in advance of making a decision to issue a MZO;
- Consideration and application of the provincial land use planning policy and its priorities;
- Openness and transparency of the decision making process and the Province's considerations in making its decision. Clear articulation of how the provincial tests were met and the rationale for decisions that put one priority over another; and
- Consistency of application of the MZO tool with other revenue generating tools permitted under the *Planning Act*.

Commentary on Bill 245 - Accelerating Access to Justice Act, 2021

On February 16, 2021, Bill 245, the proposed Accelerating Access to Justice Act, 2021 was introduced in the Legislature and is currently before a Standing Committee for consideration. Schedule 6 of the Bill proposes to amalgamate five provincial tribunals into a single body to be known as the Ontario Land Tribunal ("Tribunal"). Schedule 6 also sets out a number of procedural and substantive provisions regarding Tribunal proceedings. Most of the proposed procedural changes are already in practice before the Local Planning Appeal Tribunal ("LPAT"). For example, the Bill proposes to allow for more alternative modes of adjudication such as mandatory mediation in some cases and explicitly permits electronic and written hearings. Alternative forms of adjudicating a matter are already contemplated in the LPAT Rules of Procedure. Electronic hearings have been occurring throughout the Covid-19 pandemic. As well, the Bill proposes limitations on participants providing oral evidence at hearings. This has already been in practice at the LPAT, but will now be in place for all hearings before the Tribunal.

There are two amendments of note that the City should monitor. The first are proposed changes to limit the ability to seek judicial review of Tribunal decisions in some instances. The Bill proposes that unless the Tribunal's failure to follow its own rules causes a substantial wrong affecting the final disposition of the matter, this will not be a ground for setting aside the decision by a court. In addition, the Bill sets out that there is no appeal to Divisional Court of a decision rendered in a consolidated hearing, which can occur when a proposal triggers the need for a hearing under multiple statutes. The potential impact of this is difficult to determine at this point as it is not clear how many hearings will end up being consolidated. It's worth noting that the process for consolidating hearings has been in place for several years and very few have actually proceeded in this fashion in Toronto. Consolidated hearings are more commonly seen in areas outside of Toronto, where, for example, a Zoning By-law Amendment pursuant to the *Planning Act*, a license pursuant to the Aggregate Resources Act, and/or a Permit to Take Water pursuant to the Environmental Protection Act, are required to aggregate extraction.

The second amendment of note is the proposed addition of a ground for dismissing an appeal without a hearing. Currently, the LPAT can dismiss an appeal for several reasons including if there is no land use planning ground that forms the basis of the appeal or if the appeal is brought for frivolous or vexatious reasons or only for the purpose of delay or if there abuse of process. Bill 245 proposes to add a ground of dismissal if there is no reasonable prospect of success. There is no definition or criteria for how this will be measured or how to define success in any given circumstances. It will likely be determined through future motions brought under this provision.

The proposed changes are likely to have more impact on proceedings that were previously heard before tribunals other than the LPAT such as the Environmental Review Tribunal and the Board of Negotiations. In addition to amalgamating the Board of Negotiations into the Tribunal, Schedule 5 of the Bill proposes changes to the Expropriation Act to streamline expropriations proceedings. City staff will continue to monitor Bill 245 and will further report to City Council if necessary.

This report has been prepared in consultation with Legal Services.

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SIGNATURE

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ATTACHMENTS

Attachment 1: Chief Planner's Submission on the Proposed Changes to Minister's Zoning Orders and the *Planning Act* (ERO 019-3233) (Provided separately)