QUINLAN™

January 25, 2019 | Volume 13 | Issue 2

Zoning Bulletin

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Subdivision—Property owner proposes, and town approves, lot line revisions

Abutting neighbor argues lot line revisions constitute a subdivision with resultant lots too small to satisfy the minimum lot area requirements for lots created by subdivision

Citation: *Cady v. Zoning Board of Appeals of Town of Burlington, 330 Conn. 502, 196 A.3d 315 (2018)*

CONNECTICUT (12/11/18)—This case addressed the issue of whether a landowner's proposed map of his property that included revised boundary lines between adjacent lots constituted a subdivision.

The Background/Facts: In 2013, GM Retirement, LLC ("GM") purchased a lot (the "Claire Hill Lot") in the Town of Burlington (the "Town"). In 2014, GM purchased two more lots (the "Wark and Legowski Lots"), which were adjacent to the Claire Hill Lot. In 1959, those three lots had been four lots, which were affected when the state widened a bordering road. The state road project made one of those four lots non-conforming in size, leaving three conforming lots. In 1986, the non-conforming lot was combined with the Claire Hill Lot. Thus, as of 2014, GM's property consisted of three lots, totaling 1.63 acres.

After GM's purchase of the lots, GM submitted to the Town zoning enforcement officer (the "ZO") for approval a map of the three lots with revised property boundaries. GM proposed lot line revisions which reconfigured the three lots on its property. The ZO determined that there had been three preexisting lots which could be "reconfigured as needed to comply with current minimum bulk requirements of the R-15 zoning district for purposes of lot improvement and that no subdivision was required in order to proceed to do so." The ZO also concluded that the lot line revision map, reconfiguring the lots into conforming R-15 zone lots, permitted development.

GM's abutting neighbor, Bruce A. Cady ("Cady") appealed the ZO's decision to the Town's Zoning Board of Appeals ("ZBA"). The ZBA denied the appeal and upheld the ZO's decision.

Cady then appealed to the trial court. Among other things, Cady argued

that "the proposed realignment of boundary lines for the three lots constituted a subdivision under [Conn. Gen. Stat.] § 8-18 and that the resultant lots were too small to satisfy the minimum lot area requirements for lots created by subdivision after October 1, 1983." Section IV.B.5 of the Town's Zoning Regulations—which were adopted on October 1, 1983—required a minimum lot area of 43,560 square feet for "any lot created by subdivision and recorded after October 1, 1983," and a minimum lot area of 15,000 square feet for any "lot in existence as of October 1, 1983." The sizes of GM's reconfigured lots were 30,261 square feet, 16,866 square feet, and 24,057 square feet.

The trial court agreed with Cady and reversed the decision of the ZBA. The trial court determined that GM's proposed lot line revision did constitute a subdivision because "any change other than a 'minor lot line adjustment . . . whereby no new lot is created' constitutes a subdivision." More specifically, the trial court concluded that, here, the change proposed by GM was not a "minor lot line adjustment but was a subdivision" because a new lot was created and that lot failed to meet the greater area requirements of the Town's Zoning Regulations.

GM appealed. Among other things, on appeal, GM argued that its revisions of the lot lines did not constitute a "subdivision," and thus, the Town Zoning Regulation requiring a minimum lot area for certain construction did not apply to the proposed lots.

DECISION: Judgment of Superior Court reversed, and matter remanded with instructions.

Agreeing with GM, the Supreme Court of Connecticut concluded that substantial evidence supported the ZBA's determination that GM's lot line revisions did not constitute a subdivision.

In so concluding, the court looked to the statutory definition of "subdivision" found in Conn. Gen. Stat. § 8-18. The statute defines "subdivision" as "the division of a tract or parcel of land into three or more parts or lots made subsequent to the adoption of subdivision regulations . . . for the purpose . . . of sale or building development . . . ." (Conn. Gen. L. § 8-18.) Based on that definition, the court explained that in order to constitute a subdivision, two requirements must be met: "(1) [t]he division of a tract or parcel of land into three or more parts or lots, and (2) for the purpose, whether immediate or future, of sale or building development." With that definition of "subdivision" in mind, the court found that GM's line revision here did not constitute a subdivision "because one lot was not divided into three." The court found that the evidence showed that "three conforming lots simply were reconfigured into three differently shaped, yet still conforming, lots."

The court further concluded that because GM's lots were in existence prior to the adoption of the Town's Zoning Regulations, the proposed lots met the minimum size requirements of the R-15 zone.

See also: *McCrann v. Town Plan and Zoning Commission of Town of Bloomfield, 161 Conn. 65, 282 A.2d 900 (1971).*

Case Note:

In its decision, the appellate court addressed the trial court's determination that GM's revised lot lines constituted a subdivision because it was more than a "minor lot adjustment." The appellate court noted that nothing in the language of § 8-18 indicated that the determination of whether a particular proposal constitutes a subdivision "depends on the degree of the lot line adjustment." "Indeed, § 8-18 does not address a lot line adjustment or the size of an adjustment at all; instead, it addresses 'the division of a tract or parcel of land . . . .' " said the court. Similarly, the court

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POSTMASTER: Send address changes to Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

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ISSN 0514-7905

noted that, under § 8-18 "subdivision" definition, "division of a tract or parcel of land into three or more parts or lots" demonstrates that the creation of one new lot does not constitute a subdivision. Accordingly, the appellate court concluded that the plain language of § 8-18 did not support the interpretation of the statute adopted by the trial court.

Proceedings/ Jurisdiction—Local environmental groups argue that developer's exemption from state's Highlands Water Protection and Planning Act expired for failure to commence construction within three years of receiving final approvals

Developer and state Department of Environmental Protection contend exemption did not expire because conditions in planning board's final approval requiring additional approvals remained unsatisfied

Citation: *N.J. Highlands Coalition v. New Jersey Department of Environmental Protection, 2018 WL 6539897 (N.J. 2018)*

NEW JERSEY (12/13/18)—This case addressed the issue of whether Exemption 17—an exemption from New Jersey's Highlands Water Protection and Planning Act for the construction of affordable housing projects—had expired for failure to commence construction within three years after receiving all final approvals required pursuant to New Jersey's Municipal Land Use Law. Specifically, the case addressed the meaning of "all final approvals" under the Highlands Water Protection and Planning Act.

The Background/Facts: Bi-County Development Corporation ("BDC") owned property in the Borough of Oakland (the "Borough"). BDC sought to develop its property as an affordable housing project. In furtherance of the development project, BDC sought and obtained both preliminary and final site plan approval from the Borough's Planning Board (the "Board"). Notably, that approval came with 57 conditions.

As an affordable housing project, BDC's development project was eligible to qualify for exemption from New Jersey's Highlands Water Projection and Planning Act (the "Highlands Act" or the "Act"). Pursuant to Exemption 17 of the Act, development projects that meet certain, specified criteria are exempt from the Act's requirements. The exemption, however, "shall expire if construction beyond site preparation does not commence within three years after receiving all final approvals required pursuant to the 'Municipal Land Use Law' [the 'MLUL']" (N.J. Stat. Ann. §§ 13:20-28(a)(17), 40:55D-4.) BDC's project qualified for Exemption 17.

Eventually, N.J. Highlands Coalition and the Sierra Club, NJ (the "Petitioners") petitioned the State Department of Environmental Protection ("DEP"), arguing that Exemption 17 had expired for BDC because construction of BDC's project failed to commence within three years after receiving all final approvals required pursuant to the MLUL.

The DEP concluded that BDC's project could proceed under Exemption 17 because its qualifications had not expired. In so concluding, the DEP noted that several of the 57 conditions associated with the final site plan approval remained unsatisfied. Two of those unsatisfied conditions required BDC to obtain additional approvals from the Board and from DEP. Accordingly, the DEP determined that the Board's preliminary and site plan approvals were "not a 'final approval' " in reasoning that BDC had not obtained "all final approvals required pursuant to the MLUL" as Exemption 17 prescribed.

The Petitioners appealed. The Superior Court, Appellate Division, affirmed the DEP's determination.

The Petitioners again appealed. On appeal, the Petitioners argued that Exemption 17 incorporated the MLUL definition of "final approval." That definition provides that "final approval" "means the official action of the planning board taken on a preliminarily approved major subdivision or site plan, after all conditions, engineering plans and other requirements have been completed or fulfilled and the required improvements have been installed or guarantees properly posted for their completion, or approval conditioned upon the posting of such guarantees." (N.J.S.A. 40:55D-4.)

The DEP and BDC responded, arguing that this case did not involve an interpretation of the MLUL but instead involved an interpretation of the phrase "all final approvals required" contained in Exemption 17 of the Highlands Act.

DECISION: Judgment of the Superior Court, Appellate Division, affirmed.

The Supreme Court of New Jersey affirmed the deci-

sion of the DEP and the Appellate Division that BDC's project could proceed under Exemption 17 because its qualification had not expired.

In so affirming, the court emphasized that "the operative phrase to be applied" when examining whether Exemption 17 had expired for BDC's development project was the phrase "all final approvals" in the Highlands Act. The court noted that phrase used the plural form when referencing "approvals." The court found evidence that the Legislature intended there to be "not just one 'final approval' for purposes of Exemption 17" in its addition of the word "all" in the phrase, to underscore that point. Rejecting Petitioner's argument, the court noted that Exemption 17 had a "distinctly different language" than the singular "final approval" in the MLUL, and concluded that the legislative intent was not to import the MLUL definition of "final approval."

With this interpretation of the language, the court affirmed the determinations of the DEP and Appellate Division that because two conditions of the Board's final site plan approval required additional approvals that were not yet satisfied, "all final approvals" had not yet been met so as to trigger the three-year limitations period for Exemption 17 application to BDC's development project. Accordingly, the court affirmed that Exemption 17 had not expired here.

Case Note:

In its decision, the Supreme Court of New Jersey emphasized that its interpretation of the Highlands Act's language "should not be exported to MLUL controversies." The court said that its finding of a clear distinction between the Highlands Act's language of "all final approvals" and the MLUL's language of "final approval" "should prevent this decision from having an impact on application of the defined term 'final approval,' in the MLUL context." To be clear, the court further stated: "We make no findings about the finality of approval for purposes of the MLUL when conditions are imposed on a project by a planning board."

Referendum—City rejects petitions for referendum of zoning resolutions, finding the resolutions were administrative in nature

Petitioners argue the resolutions were legislative in nature and therefore referable

Citation: *Baker v. Carlson, 2018 UT 59, 2018 WL 6239919 (Utah 2018)*

UTAH (11/28/18)—This case addressed the issue of whether resolutions approving a developer's proposal to amend a site development master plan and approving a developer's proposal to amend an agreement for development of land were referable such that referendums on the resolutions could be placed on the ballot.

The Background/Facts: In the mid-2000s, the Cottonwood Mall in the City of Holladay (the "City") closed. In 2007, the owner of the Cottonwood Mall site (the "Site"), Cottonwood Mall, LLC ("CM"), asked the City to rezone the Site to permit mixed uses. The City then approved the creation of a new zoning district for the Site—a Regional/Mixed-Use ("R/M-U") zone. The City also developed regulations related to development in an R/M-U zone. Under those regulations, any developer wishing to build in an R/M-U zone was required to submit a site development master plan ("SDMP") to the City for approval. The SDMP would control the development of all property within an R/M-U zone and was meant to serve as a guide for the overall development of the entire site (similar to a City's general plan for a community). The City regulations also required that, once an SDMP was approved, the City and developer must enter into an Agreement for the Development of Land ("ADL"), which would grant specific rights pursuant to the SDMP and address additional development-related issues.

Under that framework, CM submitted and the City approved an SDMP (the 2007 SDMP) and an ADL (the 2008 ADL). However, CM ultimately abandoned the project. Then, in 2016, CM began negotiating with Ivory Development, LLC ("Ivory") for purchase of the Site and CM's rights in the redevelopment project. Ivory proposed to the City amendments to the SDMP and the ADL. In May 2018, the City passed Resolutions 2018-16 and 2018-17, which, respectively, approved Ivory's amended SDMP (the "2018 SDMP") and Ivory's amended ADL (the "2018 ADL").

A group of citizens from the City (the "Petitioners") petitioned to subject the Resolutions to a public vote by referendum. Upon receiving their petitions, the City determined that the Resolutions were administrative in nature and therefore not referable. The City declined to place the referenda on the ballot.

The Petitioners then initiated a judicial action. They asked the district court to order: (1) that the Resolutions were legislative in nature and therefore referable; and (2) the City to place the referenda regarding the Resolutions on the ballot.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court held that: (1) Petitioners were entitled to summary judgment as to the claims related to Resolution 2018-16 (approval of the 2018 SDMP) because Resolution 2018-16 was legislative in nature and therefore referable; and (2) Ivory and the City were entitled to summary judgment as to the claims related to Resolution 2018-17 (approval of the 2018 ADL) because Resolution 2018-17 was administrative in nature and therefore not referable. Accordingly, the district court ordered that the City place the referendum petition on Resolution 2018-16 on the ballot, putting the City's approval of the 2018 SDMP to a public vote.

All parties appealed.

DECISION: Judgment of Third District Court affirmed.

Agreeing with the district court, the Supreme Court of Utah held that Resolution 2018-16 (approval of the 2018 SDMP) was referable because it was legislative in nature, and Resolution 2018-17 was not referable because it was administrative in nature.

In so holding, the court explained that, in determining whether a municipality's action is legislative or administrative in nature, the court looks to whether the action has "two 'key hallmarks' of legislative power": (1) it involves the "promulgation of laws of general applicability"; and (2) it is "based on the weighing of broad, competing policy considerations." In comparison, the court noted that an "administrative power" would involve "applying the law to particular individuals or groups based on individual facts and circumstances."

Here, the court concluded that the City was exercising its legislative powers when it approved Resolution 2018-16 because the 2018 SDMP "promulgated a law of general applicability and its approval required the weighing of broad, competing policy considerations." Even though the site-specific rezoning here only affected one piece of property, the court found it was "generally applicable because all present and future owners of the [S]ite would be bound by the decision to rezone the property." Similarly, the court found that the 2018 SDMP applied to "all parties, present and future, that meet its terms by executing a corresponding ADL with the City." Moreover, the court found that in issuing Resolution 2018-16, approving the 2018 SDMP, the City "considered broad, competing policy considerations" including "everything from traffic impact in the area surrounding the Site to the City's economic stability as a whole."

The court also concluded that the City was exercising its administrative powers when it approved Resolution 2018-17 because the 2018 ADL "applie[d] only to the contracting parties and its approval involved the application of law to specific facts." The court found that the 2018 ADL was not generally applicable, but rather had "very limited and specific applicability in that it applie[d] only to those parties that negotiated its terms." Moreover, the court found that in approving Resolution 2018-17, the City did not weigh broad, competing policy considerations, but rather applied the 2018 SDMP to the specific circumstances of the parties negotiating the 2018 ADL.

See also: *Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).*

Case Note:

In reaching its conclusion regarding the legislative nature of the SDMP, the court emphasized that it did "not mean to suggest that every site development plan approved pursuant to a zoning ordinance will be legislative in nature." Rather, the nature of a site development plan depends entirely on how the municipality reaches its decision, said the court. An "open-ended" municipal decision made without reference to "fixed criteria" may be legislative, while a municipal decision involving "application of existing law to the facts presented by an individual applicant" or that is "limited to the evaluation of specific criteria fixed by law" would be administrative, said the court.

Exhaustion of Administrative Remedies/Jurisdiction—City argues developer's Land Use Petition Act action should be dismissed for failure to exhaust administrative remedies

Developer maintains it did exhaust administrative remedies before bringing judicial action

Citation: *Aho Construction I, Inc. v. City of Moxee, 430 P.3d 1131(Wash. Ct. App. Div. 3 2018)*

WASHINGTON (12/06/18)—This case addressed the issue of whether an applicant seeking rezone and subdivision of property took steps necessary to exhaust administrative remedies as required before it could bring a Land Use Petition Act action in court. More accurately, as described by the court, this case addressed the issue of "how loud, listing, learned, legally lucid, and longwinded a party's presentation of an issue or legal argument must be before an administrative agency in order to exhaust remedies."

The Background/Facts: Aho Construction I, Inc. ("Aho") owned a 22-acre tract of property (the "Property") in an R-1 single-family zone in the City of Moxee (the "City"). Aho sought to rezone and subdivide the Property. Aho submitted applications to the City to rezone and subdivide the Property. Pursuant to Washington's State Environmental Policy Act of 1971, chapter 43.21C RCW ("SEPA"), Aho also filed an environmental checklist with the City. It also submitted to the City a preliminary plat for approval. Of importance here, Aho's proposed plat map did not extend an existing City street, Chelan Avenue, through the proposed subdivision.

The City conducted a review of the preliminary plat application under SEPA and issued a preliminary mitigated determination of nonsignificance ("MDNS"). The preliminary MDNS was issued for "purposes of additional comments from the public, government entities, and Aho." The preliminary MDNS required Aho implement various mitigation measures, including extending Chelan Avenue across the entirety of the subdivision.

Aho requested from the City relief from the mitigation requirement of extending Chelan Avenue. Along with that request, Aho forwarded to the City a report by Aho's engineer, which disputed the need to extend Chelan Avenue. Aho's general counsel also wrote City officials, complaining about the lack of justification for extending Chelan Avenue across the plat.

Despite those requests, when the City issued its final MDNS, it retained the condition to the subdivision plat approval that Aho extend Chelan Avenue across the entire plant.

Aho appealed to a City hearing examiner the City's final SEPA MDNS, as well as the condition of the grant of the rezone and the subdivision plat approval on extending Chelan Avenue. Before the hearing examiner, Aho representatives argued about the "propriety of conditioning approval of the project on the extension of Chelan Avenue."

Eventually, the hearing examiner reversed the City's MDNS condition of extension of Chelan Avenue in that the avenue lacked an environmental impact. However, the hearing examiner upheld the condition of extension of Chelan Avenue on other grounds when reviewing the rezone application approval and the preliminary plat approval.

Neither Aho nor the City appealed the hearing examiner's SEPA determination. Pursuant to the City's Municipal Code (the "Code"), the City Council automatically conducted a closed record hearing to consider the hearing examiner's recommendations with regard to the conditions imposed on the rezone application and the preliminary plat. Aho's representatives appeared and made objections at that City Council hearing.

The City Council voted to approve the hearing examiner's recommendation to require extension of Chelan Avenue as part of the rezone application and the preliminary plat application approval.

Subsequently, Aho filed suit against the City in superior court. Among other things, Aho brought a petition under Washington's Land Use Petition Act ("LUPA") (RCW chapter 36.70C). In its LUPA claim, Aho contended that the City "adopted erroneous interpretations of the law and violated Aho's constitutional right against the taking of its property without just compensation." Aho also argued that the requirement of extending Chelan Avenue across the proposed subdivision constituted "an unreasonable exaction that lacks proportionality to the impact of [the] proposed [subdivision] and that fails an essential nexus between a legitimate state interest and the exaction imposed."

The City filed a motion to dismiss, asking the court to dismiss Aho's causes of action based on an argument that Aho failed to exhaust its administrative remedies before bringing the judicial action. More specifically, the City argued that Aho had failed to raise before the City Council the arguments that it was now making in court.

RCW 36.70C.060 addresses standing under LUPA and incorporates an exhaustion of remedies requirement for standing. The statute declares that standing to bring a land use petition under LUPA is limited to petitioners who have exhausted their administrative remedies "to the extent required by law." Thus, under LUPA, a superior court lacks jurisdiction over a LUPA petition if the petitioner has failed to exhaust his or her administrative remedies.

Here, the superior court agreed with the City that Aho had failed to exhaust its administrative remedies, necessitating dismissal of its land use petition under LUPA.

Aho appealed.

DECISION: Judgment of superior court reversed, and matter remanded.

The Court of Appeals of Washington, Division 3, held that Aho took the steps necessary to exhaust its administrative remedies and advance its position before the City Council such that it could bring a LUPA action against the City in superior court.

In so holding, the court noted that Washington's Administrative Procedure Act (RCW 34.05.554(1)) also requires exhaustion of remedies before challenging agency action in superior court. The court noted that the "same exhaustion principles" are applied "regardless of whether the exhaustion requirement arises from the Administrative Procedure Act, LUPA, or some other source." The court further explained that in order for a litigant (such as Aho, here) to establish exhaustion of administrative remedies, the litigant must first raise the appropriate issues before the agency. Thus, here, the court had to determine whether Aho apprised the City Council of the issues Aho then sought to litigate in its LUPA action.

The court explained that "[i]n order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record." The court thus concluded that "the Washington test for exhaustion of remedies imposes a minimal burden on the challenger of the administrative agency action," that cannot be mathematically measured. Still, the court listed factors "germane to determining sufficiency of exhaustion," which include (but are not limited to):

> the number of sentences devoted to an issue in any written brief given to the administrative agency; the amount of language devoted to the argument compared to the amount of language devoted to other arguments; the clarity of the presentation before the administrative agency; citations to statutes and case law and the accuracy of the citations; if the party asserts numerous issues in a brief, whether the issue on appeal was separated in the brief or introduced with a heading; and whether the challenger's presentation to the administrative agency applied facts to the law.

Analyzing those factors to the evidence here, the court found that Aho "repeatedly asserted to the [C]ity that the [C]ity's demand for an extension of Chelan Avenue lacked proportionality and a nexus to a public interest and constituted a taking of property without just compensation." The court noted that Aho did this in its submission to the City of: (a) its engineer's report disputing the need to extend Chelan Avenue; (b) its general counsel's letter to City officials complaining about the lack of justification for extending Chelan Avenue; and (c) its arguments before the hearing examiner concerning the propriety of condition approval of the project on the extension of Chelan Avenue.

The City argued, however, that Aho failed to exhaust administrative remedies before the City Council because it failed to specifically raise the Chelan Avenue extension issue before it. The court rejected this argument, holding that "[n]evertheless, exhaustion of remedies before the hearing examiner should extend to exhaustion of remedies before the [C]ity [C]ouncil since the [C]ity [C]ouncil merely reviewed the hearing examiner's record and decision in a closed record meeting." "If the [C]ity [C]ouncil did not understand that it was reviewing Aho's arguments of a missing nexus, a lack of proportionality, and a taking, one wonders what the [C]ity [C]ouncil believed itself to be reviewing," noted the court. The court concluded that "[n]otice to the [C]ity [C]ouncil of those issues by the hearing examiner's record fulfill[ed] the purpose of the doctrine of exhaustion of remedies."

Accordingly, the court reversed the dismissal of Aho's LUPA petition, and remanded the proceedings.

See also: *King County v. Washington State Boundary Review Bd. for King County, 122 Wash. 2d 648, 860 P.2d 1024 (1993).*

See also: *Citizens for Mount Vernon v. City of Mount Vernon, 133 Wash. 2d 861, 947 P.2d 1208 (1997).*

See also: *Wells v. Western Washington Growth Management Hearings Bd., 100 Wash. App. 657, 997 P.2d 405 (Div. 1 2000).*

See also: *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Bd., 160 Wash. App. 250, 255 P.3d 696 (Div. 2 2011).*

See also: *Washington Attorney General's Office, Public Counsel Unit v. Washington Utilities and Transportation Commission, 4 Wash. App. 2d 657, 423 P.3d 861 (Div. 2 2018).*

Case Note:

In its decision, the court also concluded that, "[b]ased on Washington case law . . . if a party fails to cite a statute or ordinance before the administrative agency, the party may not rely on the statute or ordinance in the superior court suit challenging the agency action." The party, however, may still rely on other statutes or constitutional clauses, said the court.

Zoning News from Around the Nation

NEW YORK

The Woodstock Town Board has drafted a "series of regulations" governing short-term rentals. Among other things, the proposed regulations would prohibit short-term rentals in multi-family dwellings of three or more units. They would also require annual fire and safety inspections in all registered short-term rentals. And, they would allow non-owner-occupied short-term rentals, limited to one unit per owner and 180 days per year. The regulations now await Town Planning Board review.

Source: *Hudson Valley One; https://hudsonvalleyone.com*

OKLAHOMA

In early December 2018, State Sen. Roger Thompson filed a bill that would give counties more authority over land use. More specifically, Senate Bill 10 would allow county commissioners to "create boards of adjustment with a resolution." Those boards of adjustment could then adopt zoning regulations.

Source: *The Journal Record; http://journalrecord.com*

PENNSYLVANIA

Dallas Township supervisors recently approved a new zoning law that "limits where natural gas companies can operate and requires them to appear at public hearings prior to getting approval for any work." The new zoning law reportedly shrinks to less than 20% the area of land in the township classified for natural gas operations.

Source: *The Citizens Voice; www.citizensvoice.com*