

Connecticut LawTribune

SEPTEMBER 15, 2008
VOL. 34, NO. 37 • \$10.00

An incisivemedia publication



CTLAWTRIBUNE.COM

EASEMENTS, BUDDHISTS AND SEXUALLY-ORIENTED BUSINESSES

Decision on proposed temple a 'must-read' for land use lawyers

By EDWARD V. O'HANLAN and
TYISHA S. HOVANEC

Real property law and land use law continue to occupy important positions in Connecticut Supreme Court and Appellate Court jurisprudence. Since August 2007, a number of decisions have clarified and refined the law in several areas. For example, in *Stefanoni v. Duncan*, the Supreme Court ruled that an access easement, by itself, does not convey riparian or littoral rights. Further, in *Smith v. Muellner*, Chief Justice Chase T. Rogers clarified the law regarding the extinguishment of easement rights, abandonment of easement rights, and the standard of proof for prescriptive easement claims.

Further, the Supreme Court in *Cambodian Buddhists Society of Connecticut Inc. v. Planning and Zoning Commission of the Town of Newtown*, carefully analyzed the legislative history behind the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), as well as Connecticut's statute against governmental burdening of the exercise of religion, in addition to several standard factors for special exception applications that were cited in denying an application for a special exception to build a Buddhist temple. This decision is a must-read for land use lawyers.

Justice Richard Palmer, writing for the court, found that, for land use regulation purposes, RLUIPA and Connecticut's statute provide the same protections. He then adopted the reasoning of certain federal circuits in

finding that land use regulations are neutral and generally applicable, notwithstanding individual scrutiny in procedures for obtaining special use permits or variances. This means that the "substantial burden" balancing that is required under RLUIPA for "individualized assessments" for government benefits does not apply. Thus, the burden is not shifted to a zoning commission to justify its decision. RLUIPA also expressly prohibits discrimination, so that an "as applied" analysis of a zoning decision will ensure that there has not been an abuse of discretion or application of a regulation in a discriminatory manner. But the burden for this claim lies with the claimant, not the commission.

Sovereign Immunity

In *Jeanne Rivers v. City of New Britain*, the Supreme Court ruled that when a municipality adopts an ordinance shifting to the owner of land abutting a public sidewalk the duty of care and liability for that sidewalk, the State of Connecticut is not affected by such action. Analyzing the doctrine of sovereign immunity, the court found that the State of Connecticut did not waive immunity so as to be subject to these types of ordinances.

In *Pond View LLC v. Planning and Zoning Commission of the Town of Monroe*, the Supreme Court ruled that environmental in-

tervenors, acting under Connecticut General Statutes §22a-19, do not have standing to raise procedural defects in a zoning application that are not related to environmental issues within the scope of Section 22a-19. In *Rural Water Compan, Inc. v. ZBA of Town of Ridgefield* and *Durkin Village Plainville v. ZBA of Town of Plainville*, regard-

ing variances, the Supreme Court and Appellate Court each affirmed the very rigorous application of the hardship standard to variance approvals, such that they continue to be the most

vulnerable form of land use approval. In *VIP of Berlin, LLC, v. Town of Berlin, et al.*, the Supreme Court found that town ordinances restricting the location of "sexually-orientated business" are valid exercises of the municipality's police power.

Finally, in *Gibbons v. Historic District Commission* and *Felician Sisters v. Enfield*, the Supreme Court sustained two appeals from denials of certificates of appropriateness, and reviewed in detail the "substantial evidence rule" that is applied to the articulated reasons for commission action.

There is no shortage of lessons learned for counsel and planner, in the variety of real property and land use decisions handed down this year by the Supreme Court and Appellate Court. ■



Edward V. O'Hanlan is a partner in Robinson & Cole's Land Use Practice Group in the firm's Stamford office. Tyisha S. Hovanec is an associate in the firm.