



BOOK REVIEW *Rhode Island Zoning Handbook (Second Edition)* By Roland F. Chase, Esq.

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Experienced land-use practitioners, as well as any attorney handling his or her first zoning matter, should welcome Roland Chase's recently published second edition of his well respected *Rhode Island Zoning Handbook*. The first edition was published in 1993, two years after the enactment of the Zoning Enabling Act of 1991. However, because the effective date of the Act was postponed until July 1, 1994, the first edition necessarily had to rely on cases decided under the former enabling act and special or local enabling legislation (all of which were repealed by the 1991 act). Without the benefit of cases interpreting or applying the 1991 Enabling Act, Chase could offer only his best assessment of the meaning and effect of the provisions of the new Act. Nevertheless, his expertise yielded a considered and sound exposition that would prove nearly always on target,¹ as evidenced by judicial citation to the Handbook in not fewer than 25 superior court decisions issued between 1994 and 2006.² While Chase regularly supplemented the first edition with updates, these patches eventually made apparent the need for a thorough revision that fully integrated both the changes in the act itself since 1994 as well as the body of case law developed under the act. The result, Chase's second edition, is an essential and practical guide to the current state of zoning law in Rhode Island.

The second edition follows closely the organization of the first edition; indeed, both editions consist of the same nine chapters presented in the same logical order: (1) Introduction; (2) Zoning Ordinances; (3) Zoning Restrictions; (4) Nonconforming Uses and Substandard Lots; (5) The Zoning Board of Review; (6) Zoning Enforcement [and] Administrative Appeals; (7) Relief from Zoning Restrictions; (8) Historic District Zoning;

and (9) Judicial Review. Yet within that common structure, Chase has substantially reorganized and expanded the text. There are three new subchapters - Protecting the Process of Zoning; Restrictions on Particular Uses; and The Jurisdiction of Zoning Boards of Review - and 214 sections where there used to be 184.

The material in the first of the added subchapters is mostly new to this edition and both merits and benefits from the separate treatment Chase has accorded it. The first two sections of this subchapter discuss the ethical restrictions on attorneys appearing before zoning boards and on zoning board members, before whom may come applications of friends or neighbors or ones that could potentially have an impact on their own property. The third and final section of the subchapter discusses Rhode Island's Open Meetings and Anti-SLAPP laws and the federal Noerr-Pennington doctrine, all of which promote and protect public participation in the zoning process.

While almost all sections of the *Handbook* have been updated, certain topics have been elaborated upon to a significant degree, resulting in better organization and greater substantive coverage. For example, the second edition includes an expanded discussion of constitutional challenges to the validity of zoning, including separate sections on procedural due process, equal protection, and first amendment challenges, all of which were previously treated in less detail under the amalgam "Other Constitutional Challenges." Further, Chase includes a new and helpful discussion of the federal Religious Land Use and Institutionalized Persons Act, as well as calling attention to other federal acts that have significant impacts on particular zoning determinations: the Federal Telecommunications Act of 1996 and

the Natural Gas Act and Natural Gas Pipeline Safety Act.

Other subjects that have received expanded treatment include changes of nonconforming uses and successive applications. With regard to the former, Chase provides a helpful discussion of the difference between changing an existing nonconforming use to a different nonconforming use and merely extending or expanding that use without changing it, while recognizing that there is no bright-line rule that can be easily applied by a zoning board.

Chase, somewhat less successfully, grapples with the enigmatic R.I. Gen. Laws § 45-24-40(c), which provides that "[a] use established by variance or special use permit shall not acquire the rights of this section." Section 45-24-40 grants no rights, however, but merely authorizes a zoning ordinance to permit a nonconforming development to be altered under specified conditions. Chase suggests that under a plain-language interpretation of this section, "if the particular use was established pursuant to a variance or a special-use permit granted by the zoning board, regardless of whether the zoning was later changed to prohibit the use, it cannot be altered under this section."³ First, a use established by a variance must already have been prohibited prior to the change in zoning or a variance would not have been needed to establish that use. Second, it is difficult, if not impossible, to conceive of a lawful zoning amendment that could prohibit the continuation of a use lawfully established by a variance. With regard to a use established by a special-use permit, when an ordinance amendment deletes the provision authorizing that use "[t]he prior specially permitted use becomes a lawful nonconforming use."⁴ It is difficult to understand, when that occurs, what public policy is

advanced by denying the owner of that now nonconforming use the same rights granted to other owners of nonconforming development. And, it is equally difficult to understand the basis of Chase's unequivocal assertion that the previously special but now nonconforming use "may be changed either as a matter of right or by obtaining another special-use permit."⁵ The true meaning of this enigmatic section can be revealed only by a decision of the Supreme Court.

Another open question is what procedure the Superior Court should follow when hearing an appeal of a zoning ordinance amendment under R.I. Gen.

Laws § 45-24-71. Should the court review only the record made before the city or town council and apply a deferential standard of review, or should the court hear evidence and determine *de novo* whether the amendment conforms to the municipality's comprehensive plan. Chase provides little guidance on this question, simply reporting that "[t]he court reviews the contested ordinance without a jury, examining it first to see if it conforms with the comprehensive plan."⁶

If there is any weakness to this otherwise thorough resource, it is the dearth of citations to Superior Court decisions –

there are only three Superior Court cases cited in the entire 214 sections of the *Handbook*. While it is certainly true that only Supreme Court decisions establish authoritative interpretations of the Zoning Enabling Act, more attention to Superior Court decisions would have yielded greater insight to current developments in zoning law, which now largely originate in the Superior Court.⁷ For example, the *Handbook* does not discuss whether a property owner who successfully challenges the denial of a zoning application may recover reasonable litigation expenses, including attorney fees, under the Equal Access to Justice Act,⁸ even though on at least one occasion the superior court has awarded fees in that circumstance.⁹ Likewise, the discussion of official zoning maps would have been a logical place to note that the Enabling Act requirements have been strictly interpreted by the Superior Court, resulting in nullification of a zoning district not depicted on a zoning map although described in the ordinance.¹⁰

In addition, it might have been beneficial to practitioners if Chase had occasionally gone beyond reporting the state of the law and reported on its actual practice in Rhode Island. For example, Chase could have warned practitioners of the frequency with which zoning boards (and some boards in particular) issue decisions that fail to contain adequate findings and conclusions, leading to timely and costly remands, notwithstanding that the Supreme Court has repeatedly instructed zoning boards on the need for sufficient decisions since at least 1970. The frustration of the justices of the Superior Court is palpable, yet to seemingly little effect. Yet, Chase simply notes the need for adequate findings and conclusions without alluding to this all too common failure of zoning boards to comply with that requirement.

At bottom, though, the desire for more Superior Court citations and occasionally more commentary and analysis simply reflects the fact that Chase's *Handbook* is the most authoritative resource on Rhode Island zoning law and the one to which practitioners turn first when a zoning issue needs to be researched. It is simply human nature to want even the best to be better. Until a third edition comes out, best will have to do.

There's only one ...

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ENDNOTES

1 One of the few examples of Chase arguably missing the mark was his explication of R.I. GEN. LAWS § 45-24-41(d)(2), which provided that an applicant for a dimensional variance must demonstrate "that the hardship that will be suffered...if the dimensional variance is not granted shall amount to mean more than a mere inconvenience, which shall mean that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property." While Chase recognized that the Rhode Island Supreme Court would ultimately have to answer the question whether the "no other reasonable alternative" clause added anything to the "more than a mere inconvenience" test, Chase opined that "it seems quite likely that drafters of the new act...did not intend to make any change in the Viti doctrine." HANDBOOK (1st ed) § 137, p. 160. When the question finally reached the court in 2001, it squarely rejected that view, holding that "[i]his new statutory burden of proof created by the 1991 amendment effectively sounded the death knell for the old Viti doctrine." *Sciaccia v. Caruso*, 769 A.2d 578, 583 (R.I. 2001). Notwithstanding the court's pronouncement, however, there is a good case to be made that Chase was indeed correct with regard to the drafters' intent, as evidenced by the speed with which the legislature amended § 45-24-41(d)(2) to eliminate the "no other reasonable alternative" clause and thereby reinstate the Viti standard. See 2002 R.I. Pub. Laws ch. 218, § 1; *Lischio v. Zoning Bd. of Review of North Kingstown*, 818 A.2d 685, 692 (R.I. 2003).

2 Surprisingly, the Rhode Island Supreme Court has never cited the Handbook in any of its opinions. This may be due, however, to the relative paucity of Supreme Court decisions construing or applying the 1991 act.

3 HANDBOOK (2d ed.) § 89, p. 126.

4 3 Edward H. Ziegler, Jr. et al., RATHKOPF'S THE LAW OF ZONING and PLANNING § 61:50, at 61-138 n.10 (Thomson/West 2006); *id.*, at 61-137 (stating that the effect of such an amendment is "the same as where an amendment deletes a use from among the uses permitted as of right").

5 HANDBOOK (2d ed.) § 89, p. 126.

6 HANDBOOK (2d ed.) § 196, p. 282. Earlier, Chase observes that most comprehensive plans contain "a harvest of bland general statements that can be used for or against the proposed rezoning" such that "there will be enough ammunition on each side so that the council...can go either way without much fear of being reversed on this issue." *Id.* § 35, p. 50 n.17.

7 From January 2005 through December 2006 the Supreme Court issued exactly one decision involving the zoning enabling act (*Duffy v. Milder*, 896 A.2d 27 (R.I. 2006)), whereas in that same period there were at least 30 Superior Court decisions issued in appeals taken under R.I. GEN. LAWS § 45-24-69.

8 R.I. GEN. LAWS §§ 42-92-1 to -8.

9 *Smith v. Warwick Zoning Bd. of Rev.*, 1997 WL 1526539 (R.I. Super. Ct. 1997).

10 25 *Ass'n, LLC v. Paxson*, 2004 WL 1351156 at *7 (R.I. Super. Ct. 2004) (holding that the provisions of a city of Providence ordinance purporting to create the Douncity Overlay District were invalid because the overlay district was not properly depicted on the city's maps and explaining

that the general description of the district's boundaries contained in the ordinance could not cure the city's failure to depict the district on the overlay maps in the accordance with the requirements of § 45-24-36).

11 *May-Day Realty Corp. v. Board of Appeals of Pawtucket*, 107 R.I. 235, 240, 267 A.2d 400, 403 (1970) ("The resulting disservice to the parties and to the public prompts us once again to advise zoning boards that it is common practice for administrative bodies to request counsel to submit proposed findings of fact and conclusions of law and to seek the assistance of their legal advisers in the decision-writing process.").

12 *E.g., Marsocci v. Piloizzi*, 2006 WL 1530259 at *7-8 (R.I. Super. Ct. 2006) (noting past admonitions to the board and characterizing board's failure to articulate its findings of fact and conclusions of law as "profound errors of

law"); *Dulude v. Town of Coventry Zoning Bd. of Review*, 2005 WL 704884 at *11 (R.I. Super. Ct. 2005) (querying "whether the Board is intentionally and impermissibly trying to thwart the Appellant's attempts to develop the property"); *Famiano v. Zoning Bd. of Review for Warwick*, 2005 WL 674876 at *5 (R.I. Super. Ct. 2005) (stating that "the Court is troubled by the conclusory, hollow findings of facts").

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