PARTY STATUS AND STANDING UNDER VERMONT'S LAND USE AND DEVELOPMENT LAW (ACT 250)

In 1970, the state legislature adopted the innovative Vermont Land Use and Development Law[1] in response to serious environmental threats posed by uncontrolled and uncoordinated usages of the land.[2] This law, commonly referred to as Act 250, created a permit-issuing system designed to complement, rather than replace, other state and local land use regulatory devices.[3] The Act 250 system requires a person[4] to obtain an environmental permit prior to selling or offering for sale any interest in any subdivision, or prior to commencing construction on what is classified as a subdivision or development.[5] By definition, the jurisdiction of Act 250 is limited essentially to developments involving more than ten acres, or one acre if the municipality in which the proposed project will be located has no permanent local zoning ordinance and subdivision bylaws, and all construction above the elevation of 2500 feet.[6] Sub-

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1. VT. STAT. ANN. tit. 10, §§6001-6091 (1973).

2. *Id.* §6001 (Findings and declaration of intent). *See also* F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 54 (1971); Erickson, *The Vermont Environmental Protection Act of 1970* (May 1971)(excerpts from unpublished paper on file at Harvard Law School), *reprinted in* L. JAFFE & L. TRIBE, ENVIRONMENTAL PROTECTION 678-86 (1971); Walter, *The Law of the Land: Development Legislation in Maine and Vermont*, 23 MAINE L. REV. 315, 316 (1971).

3. *See* VT. STAT. ANN. tit. 10, §6082 (1973); ENVIRONMENTAL BOARD, AGENCY OF ENVIRONMENTAL CONSERVATION, VERMONT'S LAND USE AND DEVELOPMENT LAW: ENVIRONMENTAL BOARD REGULATIONS ANNOTATED rule 13(C)(1976) [hereinafter cited as ENVIRONMENTAL BOARD REGS. ANN.]; Levy, *Vermont's New Approach to Land Development*, 59 A.B.A.J. 1158, 1159 (1973).

4. VT. STAT. ANN. tit. 10, §6001 (14) (Cum. Supp. 1976) reads as follows: " 'Person' shall mean an individual, partnership, corporation, association, unincorporated organization, trust or any other legal or commercial entity, including a joint venture or affiliated ownership. The word 'person' also means a municipality or state agency."

5. *Id.* §6081 (a)(1973).

6. *Id.* §6001 (3)(Cum. Supp. 1976).

> "Development" means the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes. "Development" shall also mean the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws. The word "development" shall mean the construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10

divisions, which comprise a classification distinct from developments, generally fall within Act 250 jurisdiction if they involve ten or more lots, each less than ten acres in size.[7]

The permit approval process established by the Act consists of three tiers. At the first level, an administrative hearing is usually conducted on the permit application before a district environmental commission.[8] Once the hearing is completed, and a decision on whether to issue an environmental permit is made, a *de novo* appeal may be taken to the second and final administrative level, the Vermont Environmental Board.[9] This appeal is subject to removal by

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> or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land. The word "development" shall not include construction for farming, logging or forestry purposes below the elevation of 2500 feet. The word "development" also means the construction of improvements on a tract of land involving more than 10 acres which is to be used for municipal or state purposes. In computing the amount of land involved, land shall be included which is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings. The word "development" shall not include an electric generation or transmission facility which requires a certificate of public good under section 248 of Title 30. The word "development" shall also mean the construction of improvements for commercial, industrial or residential use above the elevation of 2500 feet.

See ENVIRONMENTAL BOARD REGS. ANN., *supra* note 3, at rule 2 (A).

7. VT. STAT. ANN. tit. 10, §6001 (19)(1973) states:

> "Subdivision" means a tract or tracts of land, owned or controlled by a person, which have been partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on any lot, and within any continuous period of 10 years after the effective date of this chapter. In determining the number of lots, a lot shall be counted if any portion is within five miles.

See ENVIRONMENTAL BOARD REGS. ANN., *supra* note 3, at rule 2 (J).

8. For the purposes of administration of Act 250 the State of Vermont is divided into nine districts. VT. STAT. ANN. tit. 10, §6026(a)(Cum. Supp. 1976). A district commission has been created for each district. The district commissions are comprised of three members appointed by the governor so that two appointments expire in each odd numbered year. Two members are appointed for a term of four years and the chairman (third member) serves a two-year term. VT. STAT. ANN. tit. 10, §6026(b)(1973).

9. The Environmental Board is an idependent regulatory body within the Agency of Environmental Conservation, an umbrella agency which oversees all Vermont departments concerned with management of natural resources. *See* AGENCY OF DEVELOPMENT AND COMMUNITY AFFAIRS, HANDBOOK OF VERMONT STATE GOVERNMENT 19-29 (1974). The Environmental Board consists of nine members appointed by the governor with the advice and consent of the senate, so that five appointments expire in each odd numbered year. Eight members are appointed for a term of four years and the chairman (ninth member) serves for two years.

the applicant to superior court.[10] Third, an appeal from the Environmental Board or superior court may be taken to the Vermont Supreme Court.[11]

Since the law's inception, the issue of who can become involved in Act 250 hearings and appeals has arisen on numerous occasions at each of the three levels, but the issue has not yet been fully resolved. The major source of difficulty has been the language of the standing provision of the Act.[12] Under this provision, owners of property adjoining the land being developed and "other persons" who may be adversely affected by a proposed subdivision or development are allowed, and indeed encouraged, to participate in hearings at the threshold administrative level of the permit approval process.[13] However, the same provision limits those eligible to appeal to the permit applicant and specified governmental agencies. Nevertheless, the language of this provision is not dispositive of the right of appeal due to judicial interpretation and the relationship between Act 250 and the Vermont Administrative Procedure Act (APA).[14]

This note will explore the interrelationship of Act 250 and the Vermont APA. It will be demonstrated that even though adjoining property owners and other persons do not have the right of appeal to the Vermont Supreme Court under the standing provision of Act 250, the Vermont APA provides these persons with an alternate appellate avenue to initiate and participate in Vermont Supreme Court review of administrative decisions. The question of who can

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VT. STAT. ANN. tit. 10, §6021 (a)(1973). *See* F. BOSSELMAN & D. CALLIES, *supra* note 2, at 57; Erickson, *supra* note 2, at 684-86.

10. VT. STAT. ANN. tit. 10, §6089(a)(Cum. Supp.1976).

11. *Id.* §6089(b).

12. *Id.* §6085(c). *See* text accompanying note 51 *infra.*

13. *See* Levy, *supra* note 3 at 1159.

14. VT. STAT. ANN. tit. 3, §§801-820 (1973 & Cum. Supp. 1976). The Vermont APA is based upon the Revised Model State Administrative Procedure Act which was approved in 1961 by the National Conference of Commissioners on Uniform State Laws. The Revised Model Act has since been adopted at least in part by the District of Columbia and twenty-six states including Vermont. It is published in 13 UNIFORM LAWS ANN. 245-291 (Cum. Supp. 1977), and reprinted in a number of standard works on administrative law. *See, e.g.*, W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 1164-71 (6th ed. 1974); L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 1102-09 (3d ed. 1968). W. GELLHORN & C. BYSE, *supra* at 1160-64, contains a comprehensive listing of the states that have been influenced by the Revised Model State Act along with references to numerous commentaries. *See generally* F. COOPER, STATE ADMINISTRATIVE LAW (1965).

become involved in the permit approval hearings before the district environmental commissions and the Vermont Environmental Board will be addressed as well. It is first necessary, however, to give a brief overview of the permit-issuing system established by Act 250.[15]

I. The Administrative Framework and the Permit Process

A. *The Role of the District Environmental Commissions*

In order to obtain the required Act 250 permit, a developer must file an application with the appropriate district commission.[16] On or before the date of filing, the permit applicant must send notice and a copy of the application to the municipality and regional planning commissions having jurisdiction where his land is located.[17] If the land is on a boundary, notice must also be sent to the adjacent Vermont municipalities and planning commissions.[18] In addition, the permit applicant is required to post a copy of notice in the town clerk's office.[19]

Upon receipt of the permit application, the district commission must forward notice and a copy of the application to the Vermont Environmental Board, state agencies directly affected and any other municipality, state agency or person deemed appropriate by the commission.[20] The district commission is further required to publish notice in a local newspaper.[21] Acceptance of the application marks

15. For a detailed discussion of the Act 250 permit process see F. Bosselman & D. Callies, *supra* note 2, at 59-71; Environmental Board, Agency of Environmental Conservation, Report to the Governor on the Administration of Act 250, at 20-36 (1976) [hereinafter cited as Report to the Governor] (on file at Environmental Board).

16. *See* Vt. Stat. Ann. tit. 10, 6083(a), 6026(a)(1973 & Cum. Supp. 1976). The district commissions encourage permit applicants to secure other state and local permits prior to filing for an Act 250 permit. Environmental Board Regs. Ann., *supra* note 3, at rule 13(C)(5). Permits and certificates filed in accordance with the preferred practice create a rebuttable presumption that the proposed subdivision or development will not be detrimental to the public health and welfare with respect to certain criteria enumerated in the rules. *Id.* at rule 13(C)(6). Even though the district commissions prefer that the applicant obtain other permits and certifications first, it is not uncommon for an applicant to seek simultaneous approval from several agencies. Levy, *supra* note 3, at 1159.

17. Vt. Stat. Ann. tit. 10, §6084(a)(1973).

18. *Id.*

19. *Id.*

20. *Id.* §6084(b).

21. *Id.*

the commencement of the statutory time periods within which the district commission must fulfill its specified duties.[22]

Those persons required to receive notice from either the district commission or the permit applicant, as well as adjoining property owners are entitled to request a hearing on the permit application.[23] It is the general practice of the district commissions, however, to order at least one hearing on each proposed subdivision or development regardless of whether requests are filed.[24] At the hearing, the district commission considers the impact the proposed project will have upon the environment by analyzing the applicant's plans in terms of ten statutory criteria listed in the Act.[25] Before granting an environmental permit, an affirmative finding must be made that the proposed subdivision or development will not violate these cri-

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22. VT. STAT. ANN. tit. 10, §6085(a),(b),(d)(Cum. Supp. 1976).

23. *Id.* §6085(a).

24. Interview with Deborah J. Sisco, District III Environmental Coordinator, Sharon, Vt. (Oct. 7, 1976).

25. VT. STAT. ANN. tit. 10, §6086(a)(Cum. Supp. 1976) states in part that prior to granting a permit, the district commission must find that the subdivision or development:

(1) Will not result in undue water or air pollution.

. . . .

(2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.

(3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.

(4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

(5) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

(6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.

(7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.

(8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

. . . .

(9) Is in conformance with a duly adopted capability and development plan, and land use plan when adopted.

. . . .

(10) Is in conformance with any duly adopted local or regional plan or capital program under chapter 91 of Title 24.

See ENVIRONMENTAL BOARD REGS. ANN., *supra* note 3, at rule 13.

teria. The decision whether to issue a permit is accompanied by findings of fact and conclusions of law.[26]

In practice, permits are rarely denied.[27] As of February 28, 1977 less than three percent of the total number of applications acted upon since Act 250 took effect in 1970 had been denied.[28] However, most permits were issued subject to specific conditions that typically related to aesthetic, ecological and municipal impact considerations.[29] Violation of any conditions to the permit may result in revocation of the permit.[30]

B. *The Role of the Vermont Environmental Board*

The determination of the district commission may be appealed to the Vermont Environmental Board.[31] Once an appeal is filed with the Board, the permit applicant has the right of removal to the superior court of the county in which the proposed subdivision or development will be located.[32] No other person possesses the right

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26. The district commission must issue its findings and decision within 20 days of the final hearing day. VT. STAT. ANN. tit. 10, §6086(b) (Cum. Supp. 1976); ENVIRONMENTAL BOARD REGS. ANN., *supra* note 3, at rule 15(D). *See also In re* Wildlife Wonderland, Inc., 133 Vt. 507, 346 A.2d 645 (1975).

27. No permit application can be denied unless it is found that the proposed subdivision or development will violate the Act 250 criteria, *see* note 25 *supra*, and will therefore be detrimental to the public health, safety and general welfare. VT. STAT. ANN. tit. 10, §6087(a)(1973). A permit cannot be denied solely for the reasons stated in criteria (5),(6) and (7) of section 6086(a), but can be denied for noncompliance with any one of the remaining criteria. However, reasonable conditions may be attached to a permit to alleviate the burdens created. *Id.* §6087(b).

28. Environmental Board, Agency of Environmental Conservation, Statistics on Act 250 Applications (Feb. 28, 1977) (on file at Environmental Board).

29. REPORT TO THE GOVERNOR, *supra* note 15, at 32-33; *see* F. BOSSELMAN & D. CALLIES, *supra* note 2, at 68-69.

30. VT. STAT. ANN. tit. 10, §6090(b)(1973).

31. VT. STAT. ANN. tit. 10, §6089(a)(Cum. Supp. 1976).

32. *Id.* Removal to superior court occurs infrequently. In fact, of the 80 appeals taken from the district commissions to the environmental board since Act 250 was enacted in 1970, only nine cases have been removed to superior court. Environmental Board, *supra* note 28. It is believed by some that a permit granted by the district commissions will not receive the same impartial review by the Environmental Board that it would receive in superior court. *See, e.g., In re* Wildlife Wonderland, Inc., 133 Vt. 507, 521, 346 A.2d 645, 654 (1975)(Larrow, J., concurring); Sunday Rutland Herald, Feb. 6, 1977, at 1, col. 2, where developer of a controversial proposed game farm tourist attraction (Mount Holly Farm) reportedly stated that he would prefer to argue the validity of an Act 250 permit in superior court, rather than before the Environmental Board for the reason that he believed the Board to be composed of

of removal.[33] The Environmental Board or superior court then conducts a *de novo* hearing on those issues which the appellant assigns as error on the part of the district commission.[34] The Environmental Board or superior court follows basically the same procedures as the district commission in assessing the potential environmental impact of a proposed subdivision or development, but the rules of evidence are more strictly adhered to at this second tier in the process and an official record is kept for potential review by the Vermont Supreme Court.[35] As with the district commission, after the *de novo* hearing is completed the Environmental Board or superior court makes its decision in writing accompanied by findings of fact and conclusions of law.[36]

Keeping in mind the above description of what occurs at the two administrative levels of the Act 250 permit approval process, the issues concerning who can participate in the proceedings before a district commission and the Environmental Board or superior court should be examined, for the significance of Act 250 permit approval hearings is determined to a large extent by the people who become involved in the administrative process.

II. Party Status at the Administrative Levels

A. *The District Commission*

The provision of Act 250 governing who can actively participate in hearings at the district commission level of the permit process contemplates a significant amount of involvement by members of the public who may be affected by a proposed subdivision or development. However, it does not go as far as the very broad citizen suit provisions contained in some other state environmental control statutes which allow "any person" to become a party in the decision-

people who may be "too environmentally oriented." *Cf.* Erickson, *supra* note 2, at 685 (it would be inaccurate to think of the Environmental Board as an environmental advocate or defender of environmental quality).

33. Vt. Stat. Ann. tit. 10, §6089(a)(Cum. Supp. 1976); Report to the Governor, *supra* note 15, at 33.

34. Vt. Stat. Ann. tit. 10, §6089(a)(Cum. Supp. 1976).

35. Report to the Governor, *supra* note 15, at 34.

36. *See* text accompanying note 26 *supra;* Environmental Board Regs. Ann., *supra* note 3, at rule 13(D).

making process.[37] Rather, Act 250 sets forth three classifications of persons who are entitled to party status before the district commissions: (1) persons who have received notice; (2) adjoining property owners who request a hearing; and (3) such other persons as the Environmental Board may allow by rule.[38]

The Act itself opens the door to public participation by listing some classes of persons who are given an automatic right to become involved in permit approval hearings before a district commission, leaving it up to the Environmental Board to promulgate rules for the admission of other persons. For the purpose of admitting such persons, the Environmental Board has adopted rule 12(C) to function as a guideline for the district commissions in determining which "other persons" may be granted party status. The rule states in pertinent part:

> Prior to admitting a person as a party, the board or commission shall find that the person has adequately demonstrated that a proposed development or subdivision may *adversely affect* his interest under any of the provisions of section 6086(a)(1) through (a)(10) *or* that his participation will *materially assist* the board or commission by providing testimony and other evidence relevant to the provisions of section 6086(a)(1) through (a)(10).[39] (emphasis added).

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37. *See, e.g.*, CONN. GEN. STAT. ANN. §22a-16 (West 1975); MICH. COMP. LAWS ANN. §691.1202 (MICH. STAT. ANN. 14.528(202)(1)(Callaghan 1976)); MINN. STAT. ANN. §116B.01 (Cum. Supp. 1977); S.D. COMPILED LAWS ANN. §21-10A-1 (Cum. Supp. 1976). *See generally* J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1970). For literature on the law of other states see F. GRAD, TREATISE ON ENVIRONMENTAL LAW §2.03 (5)(c)(1975); Coggins & Hensley, *Environmental Law Creeps Into Kansas: A Commentary On The Concerned Citizens United Suit*, 23 U. KAN. L. REV. 421 (1975); Johnson, *The Environmental Protection Act of 1971*, 46 CONN. B.J. 422 (1972); McGregor, *Private Enforcement of Environmental Law: An Analysis of the Massachusetts Citizen Suit Statute*, 1 ENVT'L AFF. 606 (1971); Rothstein, *Private Actions for Public Nuisance: The Standing Problem*, 76 W. VA. L. REV. 453, 463 (1973-74); Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972); Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974); Note, *State Legislation to Grant Standing: Questions, Answers, and Alternatives*, 2 ENVT'L L. 313 (1972); Note, *The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management*, 2 FLA. ST. U. L. REV. 736 (1974); Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575 (1972); Comment, *Environmental Law: State Land Use Statutes*, 13 WASHBURN L.J. 232 (1974).

38. VT. STAT. ANN. tit. 10, §6085(c)(Cum. Supp. 1976). *See* text accompanying note 51 *infra*.

39. ENVIRONMENTAL BOARD REGS. ANN., *supra* note 3, at rule 12(C).

Under this rule, if a person can demonstrate that the proposed subdivision or development may either "adversely affect" his interests or that his participation will "materially assist" the district commission in arriving at a decision by providing testimony and other evidence, then he may be admitted as a party. Thus, rule 12(C) provides a means of obtaining party status for nearby landowners, conservation groups and others who would otherwise be precluded from actively participating in the administrative hearings before the district commissions.[40]

The Board rule gives a great deal of discretion to the district commissions. Although the commissions have generally exercised this discretion in a responsible manner, giving rise to few controversies over what private interests may be represented by whom,[41] problems arise when individual landowners or citizens' groups seek to participate in Act 250 hearings as representatives of the public interest.[42]

It is important to note the limits placed upon the scope of participation by adjoining landowners and rule 12(C) parties in hearings at the threshold level. In 1973 the legislature amended the party status and standing section of Act 250 by adding language stating that: "An adjoining property owner may participate in hearings and present evidence only to the extent the proposed development or subdivision will have a direct effect on his property . . . ."[43]

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40. *See In re* Application of Great Eastern Building Co., 132 Vt. 610, 326 A.2d 152 (1974).

41. Interview with Deborah J. Sisco, District III Environmental Coordinator in Sharon, Vt. (Oct. 7, 1976); *see* REPORT TO THE GOVERNOR, *supra* note 15, at 12.

42. At least one author has criticized the Act 250 limitations on public interest representatives. *See* Note, *Standing to Sue Under the Model Land Development Code*, 9 U. MICH. J.L. REF. 649, 663 (1976), stating: "A valuable point of view, in the form of the public interest litigant, has been excluded from land use litigation in Vermont through the mechanical application of overly narrow rules."

The subject of individual and organizational representation of the public interest in the administrative process generally, has received attention in numerous sources. *See, e.g.*, Cramton, *The Why, Where And How Of Broadened Public Participation In The Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972); Jaffe, *The Administrative Agency and Environmental Control*, 20 BUF. L. REV. 231 (1971); Markham, *Sunshine in the Administrative Process: Wherein Lies the Shade?*, 28 AD. L. REV. 463 (1976); Comment, *Public Participation In Federal Administrative Proceedings*, 120 U. PA. L. REV. 702 (1972); Note, *Selection Of Administrative Intervenors: A Reappraisal Of The Standing Dilemma*, 42 GEO. WASH. L. REV. 991 (1974).

43. VT. STAT. ANN. tit. 10, §6085(c)(Cum. Supp. 1976).

The apparent purpose of the amendment was to prevent delays that might result from allowing adjoining property owners to raise all the possible issues related to the ten criteria listed in Act 250.[44] Accordingly, adjoining property owners are inappropriate persons to submit evidence and participate on issues concerning the burden a proposal might have upon educational services provided by a municipality, or the project's conformity with duly adopted local and regional plans.[45]

The scope of participation by "other persons" admitted to Act 250 hearings under rule 12(C) is determined by the district commission on a case by case basis. In their petition for admittance to the process, such persons must specify either those interests relevant to the criteria of Act 250 which will allegedly be adversely affected by the proposed subdivision or development or the issues and related criteria upon which their participation will materially assist the district commission.[46] A detailed offer of proof must also be made under the criteria specified in the petition and the district commission rules as to whether the petitioners may be admitted as rule 12(C) parties on each offer of proof.[47] The petitioners may participate in the district commission proceedings only with regard to those issues and offers upon which they are admitted as parties.[48]

B. *The Environmental Board*

It is now settled under current decisional law that any person admitted as a party to hearings before a district commission is eligible to appeal and participate in a *de novo* hearing before the

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44. *See* REPORT TO THE GOVERNOR, *supra* note 15, at 13. The amendment was in response to the difficulties encountered in the *Preseault* application proceedings where adjoining property owners raised issues under the Act 250 criteria that did not directly affect their property, thereby resulting in several years' delay in issuing final approval of the requested Act 250 permit.

Final approval of the *Preseault* permit application came only after protracted litigation, *see In re* Application of Preseault, 132 Vt. 471, 321 A.2d 65 (1974); Preseault v. Wheel, 132 Vt. 247, 315 A.2d 244 (1974); Wright v. Preseault, 131 Vt. 403, 306 A.2d 673 (1973); *In re* Preseault, 130 Vt. 343, 292 A.2d 832 (1972).

45. *See* Memorandum of Law for Att'y Gen. at 4-5, *In re* Application of George F. Adams & Co., 134 Vt. 172, 353 A.2d 576 (1976).

46. Berlin Corners Associates Case, Environmental Board, (on file at Environmental Board). Declaratory Ruling No. 62 (Sept. 12, 1974).

47. *Id.*

48. *Id.*

Environmental Board or superior court, notwithstanding the language of Act 250 that enumerates those entitled to appeal.[49] The rationale underlying this rule was established by the Vermont Supreme Court in *In re Preseault,*[50] where the central issue before the court was whether adjoining property owners who had participated in the hearings at the district commission level could take part in an appeal before the Environmental Board. The adjoining landowners had challenged the issuance of an environmental permit for construction of a seventy-six unit apartment complex at the district commission level where the permit was denied. The developer appealed the commission's decision denying the permit to the Environmental Board. At the commencement of the appeal hearing, the Board construed the language of the following section and ruled that since adjoining property owners were not among those specifically enumerated as proper parties for the purposes of appeal, they could not participate in the *de novo* proceeding conducted by the Environmental Board:

> Section 6085. Hearings
>
> . . . .
>
> (c) Parties shall be those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule. For the purposes of appeal only the applicant, a state agency, the regional and municipal planning commissions and the municipalities required to receive notice shall be considered parties.[51]

Upon completion of the *de novo* hearing, the Environmental Board reversed the decision of the district commission and issued an environmental permit. The adjoining property owners then appealed the Environmental Board ruling denying them party status in the *de novo* proceeding to the Vermont Supreme Court. The court reversed the decision of the Environmental Board granting the permit to the developer and remanded the cause for a new hearing with the direction that the adjoining property owners be granted party status in the Environmental Board proceedings.

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49. *See In re* Application of George F. Adams & Co., 134 Vt. 172, 353 A.2d 576 (1976); *In re* Preseault, 130 Vt. 343, 292 A.2d 832 (1972).

50. 130 Vt. 343, 292 A.2d 832 (1972).

51. VT. STAT. ANN. tit. 10, §6085(c)(Cum. Supp. 1976).

The court reasoned that the language of the standing provision could not be interpreted literally, as it was by the Environmental Board, without resulting in an "unjust and unreasonable" departure from legislative intent as manifested in the "broad purposes of the Act, and in the Act itself, . . ."[52] In other words, the court concluded that the legislature intended to grant adjoining property owners the right to participate in Act 250 proceedings recognizing that adjoining property owners ordinarily have an interest in a permit application for development of land adjacent to their own, and that by forcefully preserving their interests, adjoining property owners also serve to insure that the land and environment are not used in a way which is detrimental to the public welfare and interests.[53] Furthermore, the court stated that the "unreasonableness" of a literal interpretation of the language in the standing provision, which would allow adjoining landowners to participate in hearings before the district commission but would exclude them from hearings at the Environmental Board level, is more manifest when one considers the fact-finding significance of the *de novo* proceeding conducted by the Board.[54] As the evidence is submitted and analyzed again in the *de novo* proceeding without reference to the findings made by the district commission, no justifiable purpose is served by the exclusion of adjoining property owners from the *de novo* hearing. Exclusion of these landowners would circumvent the apparent legislative intent to have persons with an interest in the outcome of Act 250 permit applications participate in the permit approval process in order to insure that all the issues are fully and fairly considered before decisions are made that cumulatively have an enormous impact upon the State of Vermont.[55] Therefore, the court found it necessary to read into the statute a right that was not expressly given to adjoining landowners in order to effectuate the broad purposes of Act 250 and to carry out the apparent intent of the legislature to have adjoining landowners participate in all fact-finding proceedings.

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52. 130 Vt. at 348, 292 A.2d at 836.

53. *See generally* VT. STAT. ANN. tit. 10, §6001 (1973)(Findings and declaration of intent).

54. 130 Vt. at 348, 292 A.2d at 836.

55. The potential impact of these permit application decisions is reflected in the total estimated cost of development under Act 250 jurisdiction from June 1, 1970 through February 28, 1977 which is $624,650,515. Environmental Board, *supra* note 28.

Although *Preseault* dealt with the rights of only adjoining property owners to participate in a *de novo* appeal before the Environmental Board that was initiated by the permit applicant, the reasoning of the court in that case formed the basis of decision in the subsequent case of *In re Application of George F. Adams & Co.*,[56] where the Vermont Supreme Court upheld a ruling of the Environmental Board allowing persons admitted under rule 12(C) to appeal to the Environmental Board from a district commission decision granting an Act 250 permit to a residential developer. After reaffirming its holding in *Preseault*, the court in *Adams* stated:

> Since . . . [appeal from the district commission to the Environmental Board] involves a de novo hearing, the *Preseault* case stands for the proposition that a party eligible for one is eligible for the other, presumably to implement the breadth of factfinding in the proceedings. This would also be true of transfers to superior court for a de novo hearing . . . .[57]

To summarize, the Vermont Supreme Court's conscious disregard of the literal language in the Act 250 standing provision in *Preseault* and *Adams* has created a situation where any person who participated in a district commission hearing is eligible to either initiate appeal proceedings at the Environmental Board level or participate in proceedings commenced by another. Removal to superior court by the permit applicant will not alter the eligibility of persons to take part in that *de novo* proceeding. It should be noted, however, that the court's expansive reading of the standing provision has been limited to *de novo* appeals at the second tier—the Environmental Board or superior court—in the Act 250 process. Several questions with respect to the right of appeal to the Vermont Supreme Court still remain unanswered. These questions are addressed below.

III. Vermont Supreme Court Review

A decision of the Environmental Board or superior court may be appealed to the Vermont Supeme Court.[58] Unlike the decision

56. 134 Vt. 172, 353 A.2d 576 (1976).
57. *Id.* at 174, 353 A.2d at 577.
58. Vt. Stat. Ann. tit. 10, §6089(b)(Cum. Supp. 1976).

makers at the second tier in the permit approval process, the supreme court will neither reweigh conflicting evidence, nor reassess the credibility of testimony.[59] Where disputed issues of fact are involved on appeal, the findings of the Environmental Board or superior court are regarded as conclusive if supported by "substantial evidence" on the record as a whole.[60] In other words, the supreme court will not conduct another *de novo* proceeding. Its function is limited to the traditional role of deciding questions of law that appear from the record, and determining whether the record reflects sufficient facts upon which the Environmental Board or superior court could have based its conclusions.

A. *Standing to Appeal to the Vermont Supreme Court Under Act 250*

Under the "Appeals" section of Act 250,[61] an appeal from a decision of the Environmental Board or superior court may be taken to the Vermont Supreme Court by a "party" as set forth in the standing provision of Act 250. It has been seen that a literal reading of the standing provision restricts the right of appeal to the permit applicant, a state agency, regional and municipal planning commissions, and municipalities given notice; however, the supreme court refused first in *Preseault*, and later in *Adams*, to limit the right to initiate or participate in an appeal to the Environmental Board or superior court to those persons enumerated as parties in the standing provision because of the *de novo* character of that appeal.

In contrast, the supreme court in *Preseault* and *Adams* recognized that adjoining property owners and other persons admitted to the administrative hearing under rule 12(C) are provided with no means of appeal to the supreme court under the appellate scheme established in Act 250 as a result of the language in the standing provision.[62] Consequently, whenever these two categories of persons seek Vermont Supreme Court review of a decision made by the Environmental Board or superior court under the Appeals provision

59. *In re* Wildlife Wonderland, Inc., 133 Vt. 507, 346 A.2d 645 (1975).

60. VT. STAT. ANN. tit. 10, §6089(c)(Cum. Supp. 1976).

61. *Id.* §6089.

62. *In re* Application of George F. Adams & Co., 134 Vt. 172,174,353 A.2d 576,577 (1976); *In re* Preseault, 130 Vt. 343,346, 292 A.2d 832,834 (1972).

of Act 250, they will not be recognized as proper parties to initiate such review, nor will they be regarded as appropriate persons to participate in briefing and argument as appellees in proceedings at the supreme court level.[63]

The most recent statement of the law concerning the right of appeal to the supreme court came in *Adams,* where nonadjoining landowners admitted to district commission proceedings under Board rule 12(C) challenged the permit applicant's plans for construction of a residential development involving approximately 555 acres in the town of Stowe. The environmental permit was granted by the district commission and the rule 12(C) parties appealed to the Environmental Board where they were allowed to participate over the objection of the permit applicant. Again, their opposition to the development was unsuccessful and the Environmental Board issued a permit. Appeal was then taken by the rule 12(C) parties to the Vermont Supreme Court under the Appeals provision of Act 250. The permit applicant moved to dismiss on the ground that these landowners were not proper parties to appeal to the Environmental Board, and therefore, they lacked standing to appeal to the supreme court. The motion to dismiss was granted.

The court was forced to cope with two issues stemming from the standing provision and it announced in a clear fashion the approach that would be taken in dealing with the vexatious problem of construing that provision. The first issue concerned the right of rule 12(C) parties to appeal a decision of a district commission to the Environmental Board. Reiterating and extending its basic position in *Preseault* by calling attention to the significance of the *de novo* nature of the proceeding conducted by the Environmental Board or superior court, the supreme court held that persons admitted to the Act 250 process under rule 12(C) are proper parties for the purposes of a *de novo* appeal.[64] The second issue in *Adams* involved the appeal from the Environmental Board or superior court to the Vermont Supreme Court. Here, the court held that even though persons admitted to the permit approval process under rule 12(C) are proper parties to appeal to the Environmental Board or superior court, they

63. *See In re* Wildlife Wonderland, Inc., 133 Vt. 507, 519, 346 A.2d 645,652 (1975).
64. *See* text accompanying notes 56&57 *supra.*

are not proper parties for the purposes of appeal to the supreme court as defined by the standing provision of Act 250. The court declared that the word "appeals" contained in the standing provision is used in a dual sense. One refers to the transfer from a district commission to the Environmental Board or superior court, and the other refers to the transfer from either of those two decision-making bodies to the Vermont Supreme Court. The distinction drawn by the court was grounded in the different functions served by the Environmental Board or superior court, and the Vermont Supreme Court. Whereas the former conduct a *de novo* proceeding and therefore hear all the evidence anew, the latter is concerned only with whether there is substantial evidence on the record from which the Environmental Board or superior court could have reached its conclusions of law and whether those conclusions were correct. The supreme court, it will be recalled, does not reweigh or reassess the credibility of evidence, nor does it engage in fact-finding.

On the basis of this distinction, and in line with its holding in *Preseault* that adjoining landowners are not foreclosed from participating in a *de novo* proceeding before the Environmental Board by the language of the standing provision of Act 250, the court in *Adams* held that the standing provision applies only to "appellate review," which was defined as appeal to the Vermont Supreme Court; and because the rule 12(C) parties did not fall within the enumerated categories of the standing provision defining parties for the purposes of appeal, they could not come before the supreme court.[65] Thus, it is clear after *Adams* that in order to obtain standing at the Vermont Supreme Court level, adjoining landowners and rule 12(C) parties must use some method other than the Appeals provision of Act 250. Such a method is made available by the Vermont Administrative Procedure Act.[66]

B. *The Vermont APA: An Alternate Avenue of Appeal*

Although it is well settled that Act 250 and the Vermont Administrative Procedure Act are *in pari materia* and must therefore

65. *In re* Application of George F. Adams & Co., 134 Vt. 172, 174-75, 353 A.2d 576,577 (1976).

66. VT. STAT. ANN. tit. 3, §§801-820 (1973 & Cum. Supp. 1976).

be construed together as parts of the same system,[67] confusion exists over the specific relationship between the judicial review section of the Vermont APA and the provisions of Act 250 relating to appeal procedures and standing.[68] The relevant statutory provisions that form the basis of discussion are set forth below. First, the pertinent section of the Vermont Administrative Procedure Act states in part:

> Section 815. Judicial review of contested cases
>
> (a) A person who has exhausted all administrative reme-

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67. *In re* Preseault, 130 Vt. 343, 292 A.2d 832 (1972).

68. The confusion is illustrated by the fact that in two recent appeals to the Vermont Supreme Court, appeal via the Vermont APA was not briefed by the appellants who relied instead on the Appeals section of Act 250 to obtain standing to appeal. *In re* Application of George F. Adams & Co., 134 Vt. 172, 353 A.2d 576 (1976); *In re* Wildlife Wonderland, Inc., 133 Vt. 507, 346 A.2d 645 (1975).

Moreover, in the REPORT TO THE GOVERNOR, *supra* note 15, at 13-14, it is stated that:

> These decisions [*Adams* and *Wildlife Wonderland*] have created a situation where persons who are recognized as having rights and interests under Act 250 at the District Commission level have curtailed and uncertain rights or no rights on appeal to the Environmental Board, Superior Court or Supreme Court. Foreclosing third parties and property owners from appeals seems contrary to the test of fairness and reasons initially noted in the first *Preseault* case; . . .

The Environmental Board then proposed an amendment to the standing provision of Act 250, VT. STAT. ANN. tit. 10, §6085(c)(Cum. Supp. 1976), that would have the effect of giving all parties at the district commission level the right of appeal to the Environmental Board and the supreme court. Such an amendment is not necessary to enable persons who participate in hearings at the district commission level to appeal to the Environmental Board. Under the *Adams* decision, any party eligible to participate at the district commission level, including adjoining property owners and rule 12(C) parties, is an eligible party for *de novo* proceedings before the Environmental Board or superior court. *See* text accompanying notes 56&57 *supra*. *But cf. In re* Wildlife Wonderland, Inc., 133 Vt. 507, 518, 346 A.2d 645,652 (1975)(an adjoining property owner is a "permitted participator, not a party").

With respect to appeals to the supreme court, it is significant that the two cases referred to by the Environmental Board in the report were both decided on the narrow ground that no appeal could be taken to the supreme court under the Appeals provision of Act 250. VT. STAT. ANN. tit. 10, §6089(b)(Cum. Supp. 1976). The court in *Adams* and *Wildlife Wonderland* did not consider the possibility of alternate methods of appeal such as the Vermont APA. In fact, the supreme court in *Adams* stated: "We are not here concerned with the availability or nonavailability of other appellate avenues, such as the one mentioned in *In re Preseault*, . . ." 134 Vt. at 173, 353 A.2d at 576. In the above-quoted passage, the *Adams* court referred to a specific page in the *Preseault* opinion where there is a discussion of the applicability of the Vermont APA to Act 250 appeals. Thus, even though Act 250 does not provide rule 12(C) parties and adjoining property owners with a right of appeal to the supreme court, this does not mean that these two classes of persons are necessarily foreclosed from appealing under the Vermont APA to the supreme court. *See* text accompanying notes 88-109 *infra*.

> dies available within the agency and who is aggrieved by a final decision in any contested case may appeal that decision to the supreme court, unless some other court is expressly provided by law.[69]

Second, under the Appeals section of Act 250,[70] an appeal from the Environmental Board or superior court can be taken to the Vermont Supreme Court only by a party as defined in the standing provision of Act 250 which reads as follows:

> Section 6085. Hearings
>
> . . . .
>
> (c) . . . For the purposes of appeal only the applicant, a state agency, the regional and municipal planning commissions and the municipalities required to receive notice shall be considered parties.[71]

In order to clarify the relationship between the APA and Act 250, two questions will be addressed — first, whether the Vermont APA can be invoked at all in order to obtain standing before the Vermont Supreme Court, and second, assuming that use of the APA is not precluded, who is entitled to invoke the provisions of the APA for the purpose of obtaining Vermont Supreme Court review.

1. *Does the Administrative Procedure Act Apply?*

The section of Act 250 dealing with "Procedure" states: "The provisions of chapter 25 of Title 3 [Vermont APA] shall apply unless otherwise specifically stated."[72] With this in mind, the relevant question is, in the absence of language expressly precluding the application of the Administrative Procedure Act, whether the specific scheme created by the Act 250 provisions with respect to appeal procedures and standing is the equivalent of specifically stating that the Vermont APA does not apply to supreme court appeals in Act 250 cases.

This question was answered in *In re Preseault,*[73] where the supreme court held that adjoining property owners were entitled to

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69. VT. STAT. ANN. tit. 3, §815(a)(Cum. Supp. 1976).
70. VT. STAT. ANN. tit. 10, §6089(b)(Cum. Supp. 1976).
71. *Id.* §6085(c).
72. VT. STAT. ANN. tit. 10, §6002 (1973).
73. 130 Vt. 343, 292 A.2d 832 (1972).

invoke the judicial review of contested cases section of the Vermont Administrative Procedure Act in order to obtain standing before the supreme court. In so doing, the court rejected the arguments made by the permit applicant that because Act 250 was enacted subsequent to the APA, the legislature intended to preclude use of the APA judicial review section in Act 250 proceedings and that if the Vermont APA were held to apply, the specific Act 250 procedures and requirements relating to supreme court appeals would be rendered meaningless.[74]

The court concluded that the relationship suggested by the permit applicant between Act 250 and the Vermont APA would unduly narrow the means of obtaining judicial review provided for in the APA, and that the APA is remedial in nature, and therefore deserves a "liberal construction in furtherance of the right of appeal."[75] Turning to a discussion of legislative intent, the court found that Act 250 and the APA are to be construed with reference to each other as elements of the same system.[76] It then cited the section of Act 250 which declares that the provisions of the APA shall apply "unless otherwise specifically stated."[77] Because the Act 250 sections that set forth the requirements and procedures for appeals do not contain language specifically precluding application of the APA, the court held that even though adjoining landowners are provided with no means of appeal under the Appeals section of Act 250, they are, nevertheless, entitled to invoke the Vermont APA in order to come before the supreme court.[78] Viewed in this respect, the provisions of Act 250 and those of the Vermont APA can be regarded as complementary rather than contradictory.

In addition to the reasoning used by the court in *Preseault,* a further argument can be advanced for the application of the APA for purposes of appeal to the supreme court. The courts of several other states which have adopted an administrative procedure act have recognized that there is a basic presumption favoring judicial review of administrative action.[79] In so doing, those courts have

74. *Id.* at 346, 292 A.2d at 834. *See* Brief for Appellee at 17.
75. *In re* Preseault, 130 Vt. 343, 346, 292 A.2d 832, 834 (1972).
76. *Id.*
77. VT. STAT. ANN. tit. 10, §6002 (1973).
78. 130 Vt. at 346-47, 292 A.2d at 834.
79. *See, e.g.,* Klein v. Fair Employment Practices Comm'n, 31 Ill. App. 3d 473, 334

accepted the doctrine articulated by the United States Supreme Court in *Abbott Laboratories v. Gardner,*[80] and restated in *Association of Data Processing Service Organizations, Inc. v. Camp,*[81] which provides that to preclude judicial review under the Federal Administrative Procedure Act[82] a statute must expressly withhold such review or it must be demonstrated that the statute upon its face gives "clear and convincing" evidence of legislative intent to withhold it by implication.[83]

There is no specific statement in either the Appeals section or the standing provision of Act 250 withholding judicial review from adjoining landowners and rule 12(C) parties, nor is there a specific statement which would prevent them from invoking the judicial review section of the Vermont APA in order to obtain standing at the Vermont Supreme Court level. As there is no express preclusion of judicial review, the question to be answered is whether Act 250 upon its face gives clear and convincing evidence of legislative intent to deprive adjoining landowners and rule 12(C) parties of Vermont Supreme Court review.

Although it may be asserted that the specific appellate scheme created by Act 250 is exclusive because judicial review is implicitly withheld from adjoining property owners and rule 12(C) parties under that scheme, the proposition is not supported by clear and convincing evidence upon the face of Act 250. The mere fact that adjoining property owners and other persons admitted to the permit approval process under rule 12(C) are not enumerated as parties for the purposes of appeal in Act 250 does not amount to clear and convincing evidence of legislative intent to withhold judicial review

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N.E.2d 370 (1975); Clermont Nat'l Bank v. Edwards, 27 Ohio App.2d 91, 273 N.E.2d 783 (1970); Greer v. United States Steel Corp., 237 Pa. Super. Ct. 597, 352 A.2d 450 (1975).

80. 387 U.S. 136 (1967). *See* Rusk v. Cort, 369 U.S. 367 (1962).

81. 397 U.S. 150 (1970). *See* Barlow v. Collins, 397 U.S. 159 (1970).

82. 5 U.S.C. §702 (1970) states in full:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

83. Association of Data Processing Serv. Orgs. Inc. v. Camp, 397 U.S. 150, 156 (1970); Barlow v. Collins, 397 U.S. 159, 167 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). *See* K. DAVIS, ADMINISTRATIVE LAW TEXT §28.04, at 513 (3d ed. 1972); 1 V. YANNACONE & B. COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES § 7:2, at 431-34 (1972). *See also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336-59 (1965).

from such persons in light of the section in Act 250 stating that the provisions of the APA shall apply unless specifically stated otherwise.[84] Indeed, when the legislature intended to preclude use of the APA in other sections of Act 250 it did not hesitate to make that intention crystal clear as in the "Public Hearings" section where it is stated:

> The provisions of chapter 25 of Title 3 [Vermont APA] shall not apply to the hearings under this section.[85]

Hence, it must be concluded that if the legislature had intended to prevent use of the APA for the purpose of appeal to the Vermont Supreme Court in Act 250 proceedings, specific language similar to that set out above would have been included in the appropriate sections of Act 250. At most, therefore, the sections of Act 250 relating to procedures for appeal and standing only provide evidence of legislative intent not to convey to adjoining property owners and rule 12(C) parties an automatic right of appeal to the Vermont Supreme Court.

One final argument supports the contention that the Vermont legislature did not intend to prevent application of the Vermont APA for the purpose of appeal to the supreme court. That is, when the legislature revamped Act 250 in 1973,[86] and thus amended the Appeals section and the standing provision, no alterations were made to prevent adjoining landowners and other persons from being able to invoke the APA to obtain Vermont Supreme Court review. Yet, it is clear that the legislature had in mind the case of *In re Preseault,* which permitted use of the APA as a method of obtaining judicial review, when it amended the standing provision.[87] The failure to change the relationship between the provisions of Act 250 and those of the APA which was expressed in *Preseault* reinforces the proposition that the legislature intended the APA to apply to Vermont Supreme Court appeals.

In summary, the Vermont Supreme Court has found that even though Act 250 set forth specific procedures and standing require-

84. VT. STAT. ANN. tit. 10, § 6002 (1973).
85. VT. STAT. ANN. tit. 10, § 6044 (1973).
86. 1973 Vt. Acts No. 85.
87. *See* note 44 *supra.*

ments relating to appeals to the supreme court which vary from those of the Vermont APA, there was no indication of legislative intent to foreclose application of the latter. To be sure, in light of the section of Act 250 stating that the provisions of the APA shall apply "unless otherwise specifically stated," use of the APA can be restricted only by express language stating that the provisions of the APA do not apply, and this type of preclusive language is not found in the provisions of Act 250 relevant to Vermont Supreme Court appeals. With this in mind, in addition to the supreme court's holding in *In re Preseault,* it is clear that the judicial review section of the Vermont APA is available as a means of obtaining Vermont Supreme Court review. The only question that remains unanswered concerns who is entitled to invoke that section of the Administrative Procedure Act.

2. *Prerequisites for Invoking the Vermont APA*

As a result of the Vermont Supreme Court's interpretation of the standing provision in Act 250, adjoining property owners and rule 12(C) parties are "forced" to resort to the judicial review section of the Administrative Procedure Act in order to obtain standing at the supreme court level.[88] Before these two classes of persons can be granted standing, however, they must meet the requirements of the Vermont APA. The Vermont APA makes judicial review accessible to a person[89] who has exhausted all administrative remedies available and who is "aggrieved" by a final decision in a contested case.[90] Once an appeal is taken to the Environmental Board and a decision is made to grant or deny an Act 250 permit, all administrative remedies have been exhausted, and such a determination is a final

88. *See In re* Preseault, 130 Vt. 343, 347, 292 A.2d 832, 834 (1972).

89. VT. STAT. ANN. tit. 3, § 801(6)(1972) states in full:

> 'person' means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency; . . .

In contrast to the judicial review section of the Vermont APA which refers to "A person," comparable sections in the administrative procedure acts of some other states restrict access to the courts to "A party." *See, e.g.,* ARIZ. REV. STAT. §§ 12-904, 12-908 (1956); MD. ANN. CODE art. 41, § 255 (1957). *See also* 2 F. COOPER, *supra* note 14, at 537.

90. VT. STAT. ANN. tit. 3, § 815(a)(Cum. Supp. 1976). *See In re* Preseault, 130 Vt. 343,347, 292 A.2d 832, 834-35 (1972).

decision in a contested case.[91] The remaining requirement that must be established is that of aggrievement.

The Vermont Supreme Court has addressed the issue of who is aggrieved within the meaning of the APA. In *In re Application of Great Eastern Building Co.*,[92] homeowners whose property abutted a public highway which was the sole access to a proposed forty-eight unit condominium development petitioned the district commission to be admitted as parties in the threshold permit application hearings. They asserted a right to be free from the consequences of increased traffic flow that would inevitably result from the proposed development. The district commission denied their petition for party status concluding that the homeowners, who were located approximately one-quarter of a mile away from the proposed project, were neither persons entitled to receive notice, nor adjoining property owners; and they were not among those admitted by rule since the Environmental Board had not adopted any rules expanding party status beyond the categories of persons specifically authorized to participate in the hearings. On appeal to the the Environmental Board, it was also determined that the homeowners should be denied party status. Appeal was then taken to the Vermont Supreme Court where the order of the Environmental Board denying party status to the homeowners at the threshold level was affirmed.

In affirming the order of the Board, the court rejected three arguments made by the homeowners for their admission to the district commission hearings, only one of which is relevant here.[93] It

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91. VT. STAT. ANN. tit. 3, §801 (2)(Cum. Supp. 1976) defines "contested case" as follows: "[A] proceeding, including but not restricted to rate-making, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing; . . ."

92. 132 Vt. 610, 326 A.2d 152 (1974).

93. The nearby homeowners also asserted that they should have been admitted as parties under the standing provision. See text accompanying note 51 *supra*. With respect to this argument, the court concluded that the homeowners: (1) did not fall within a class of persons designated to receive notice, nor did the district commission abuse its discretion in failing to provide the homeowners with notice; (2) were not adjoining property owners because of a stipulation to that effect; and (3) could not be admitted by rule for the reason that no rule was adopted at the time of the permit application. 132 Vt. at 612, 326 A.2d at 153. Additionally, the nearby homeowners argued that they had a right of intervention in the Act 250 hearing. This contention was rejected by the court on the ground that there was no statutory support. *Id.* at 614, 326 A.2d at 154.

was asserted by the homeowners that because their interests would be adversely affected by the proposed development, they were aggrieved persons and entitled as of right to be admitted as parties at the district commission level under the Vermont APA.[94] In response to this argument, the court concluded that joining Act 250 with the APA does not expand the categories of persons entitled to party status at the threshold, as opposed to the appellate levels.[95] The court then addressed the issue of aggrievement under the Vermont Administrative Procedure Act.

The Vermont Supreme Court discussed two leading federal cases dealing with the question of standing to seek judicial review under the Federal Administrative Procedure Act,[96] *Association of Data Processing Service Organizations, Inc. v. Camp,*[97] and *Sierra Club v. Morton,*[98] and then proceeded in a somewhat confusing manner to adopt the two-part test established in *Data Processing* for determining whether a person is aggrieved within the meaning of the Vermont APA.[99] The first step is to ask whether the plaintiff

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94. Brief of Appellant at 4,5.

95. 132 Vt. at 613, 326 A.2d at 154.

96. 5 U.S.C. §702 (1970). *See* note 82 *supra.*

97. 397 U.S. 150 (1970).

98. 405 U.S. 727 (1972).

99. The Vermont Supreme Court stated:

> The Federal Administrative Procedure Act, like the Vermont Administrative Procedure Act, requires that a person suffer from a legal wrong before procedural relief can be provided. Here the appellants have failed to assert any palpable legal injury. . . . [T]he meaning of legal wrong is construed expansively to include any injury arguably within the zone of interest which is protected or regulated by the statute, . . .

132 Vt. at 613-14, 326 A.2d at 154.

But, the Federal Administrative Procedure Act does not require that a person suffer from a legal wrong in order to obtain standing. In fact, the legal interest or legal wrong test was specifically rejected by the Supreme Court of the United States for the reason that, "the 'legal interest' test goes to the merits. The question of standing is different. It concerns . . . the question whether the interest sought to be protected . . . is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). *See* Sierra Club v. Morton, 405 U.S. 727, 733 (1972); K. DAVIS, *supra* note 83, at 423; Note, *supra* note 42, at 996.

Thus, the legal wrong test is distinct from the two-prong injury in fact and zone of interest test. Although the Vermont Supreme Court stated that the Vermont APA required a "legal wrong," the court construed those words expansively, so that the legal wrong test was equated with the two-prong *Data Processing* test.

alleges that the challenged administrative action "has caused him injury in fact, economic or otherwise,"[100] and the second step is to determine whether the interest sought to be protected by the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute . . . in question."[101] Applying this test to the facts in *Great Eastern,* the Vermont Supreme Court found that the interest sought to be protected by the nearby homeowners was not arguably within the zone of interests to be protected or regulated by Act 250. This was determined by an examination of legislative intent which led the court to conclude that the particular interest of the individual homeowners, who did not fall within any of the enumerated categories defining party status, was intended to be "subsumed" by the municipality which is granted the right to participate as a party at the threshold and appeal levels.[102] In light of the fact that *Great Eastern* illustrates the willingness of the Vermont Supreme Court to apply the standards established in federal cases for determining who qualifies as an aggrieved person within the meaning of the Vermont APA, it can be determined who may invoke the judicial review section of the Vermont APA to obtain standing.[103]

Adjoining landowners and rule 12(C) parties must allege injury in fact to meet the aggrievement prerequisite of the Vermont APA.

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100. 397 U.S. at 152.

101. *Id.* at 153. For a detailed discussion of the problems involved in applying the zone of interest test, as well as several reasons why this test may not be law, see K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-11 (1976)(supplementing ADMINISTRATIVE LAW TREATISE).

102. 132 Vt. 610, 614, 326 A.2d 152, 154 (1974).

103. The doctrine of standing and related issues under federal law have been discussed in numerous works. *See generally* K. DAVIS, *supra* note 101, at §§ 22.00-22.21; L. JAFFE, *supra* note 83, at 459-545; Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief,* 83 YALE L.J. 425 (1974); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?,* 78 YALE L.J. 816 (1969); Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450 (1970); Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601 (1968); Jaffe, *Standing Again,* 84 HARV. L. REV. 633 (1971); Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255 (1961); Kalodner, *Selected Procedural Issues in Environmental Litigation,* 47 N.Y.U.L. REV. 1093 (1972); Large, *Is Anybody Listening? The Problem of Access in Environmental Litigation,* 1972 WIS. L. REV. 62; Oakes, *Environmental Litigation: Current Developments and Suggestions for the Future,* 5 CONN. L. REV. 531 (1973); Sax, *Standing to Sue: A Critical Review of the Mineral King Decision,* 13 NAT. RESOURCES J. 76 (1973); Scott, *Standing In The Supreme Court — A Functional Analysis,* 86 HARV. L. REV. 645 (1973).

It must be remembered at this point that rule 12(C) parties are divided into two classes—those whose interests may be adversely affected by a proposed subdivision or development, and those who can materially assist in the decision-making process. The person admitted to Act 250 hearings by the "adversely affect his interest" standard should have no difficulties in meeting the injury in fact element of the two-part test for determining whether a person is aggrieved because that person has already demonstrated at the district commission level that he has a personal stake in the outcome of the permit application.[104] On the other hand, the person admitted to the Act 250 hearings solely by reason of the materially assist standard of rule 12(C) would be unable to fulfill the injury in fact requirement. Presumably, such a person has no personal stake in the outcome of the permit application. His interest is limited to seeing that the district commission is aware of all the facts before it makes a decision. This interest alone would not be sufficient to render the person aggrieved within the meaning of the APA.[105] Persons or groups seeking standing must allege and show that they personally have suffered some injury in fact[106] though it is not necessary that the alleged injury be substantial,[107] nor is it required that the injury be economic in nature. It has been firmly established that standing may also arise from injury to "aesthetic, conservational or recreational" interests.[108]

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104. *See generally* Warth v. Seldin, 422 U.S. 490, 498-99 (1975); Sierra Club v. Morton, 405 U.S. 727, 731-34 (1972); Barlow v. Collins, 397 U.S. 159, 164 (1970); Flast v. Cohen, 392 U.S. 83, 101 (1968); Baker v. Carr, 369 U.S. 186, 204(1962).

105. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). There, the Supreme Court stated why such an interest alone is insufficient to confer standing upon an individual or group:

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.

Id. at 740.

106. *Id.* at 734-35. *See* Warth v. Seldin, 422 U.S. 490, 502 (1975).

107. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). *But see* K. DAVIS, *supra* note 101, at 491; *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 205, 206 (1976).

108. *See* Sierra Club v. Morton, 405 U.S. 727, 734 (1972); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153-54 (1970); Scenic Hudson Preservation Conf. v. Federal Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965) *cert. denied,* 384 U.S. 941 (1966).

The second part of the test for determining whether a person is aggrieved, the zone of interests requirement, can be met by all adjoining property owners and rule 12(C) parties. Looking to Act 250, it can be seen that the legislature intended to protect the interests of adjoining property owners and "such other persons as the board may allow by rule."[109] By adopting rule 12(C) subsequent to the permit application in *Great Eastern,* the Environmental Board used the power delegated to it by the legislature in Act 250 to bring persons who may be adversely affected by a proposed development or who can materially assist in the decision-making process within the zone of interests to be protected by Act 250.

Thus, the judicial review section of the Vermont APA can be used as a method of obtaining Vermont Supreme Court review provided the person or group seeking such review has exhausted all administrative remedies available and is aggrieved by a final decision of the Environmental Board or superior court. In order to be aggrieved within the meaning of the APA, a person must allege that the administrative action has caused him "injury in fact, economic or otherwise," and the interest sought to be protected by that person must be "arguably within the zone of interests to be protected or regulated" by Act 250. Even though adjoining property owners and all rule 12(C) parties are able to fulfill the zone of interests portion of the two-part test, only adjoining property owners and persons admitted under the "adversely affect his interest" standard of rule 12(C) are capable of meeting the injury in fact requirement for being classified as an aggrieved person. Those admitted under rule 12(C) solely because it has been decided that they can materially assist in the Act 250 process presumably suffer no injury in fact and therefore cannot be aggrieved. Thus, only adjoining property owners and persons whose interests may be adversely affected by a proposed subdivision or development can invoke the judicial review section of the Vermont APA to obtain standing to appeal to the Vermont Supreme Court.

109. VT. STAT. ANN. tit.. 10, § 6085(c)(Cum. Supp. 1976).

CONCLUSION

Act 250, though limited in its jurisdiction, is "the centerpiece" of Vermont's environmental control legislation.[110] It was designed to insure that large scale development of the land is carefully planned and coordinated to have a minimal impact on the natural beauty and environmental quality of the state. The permit approval process created by Act 250 is a spirited attempt to delicately balance the economic and environmental considerations involved in such development.[111]

One aspect of the Act 250 process, the system of appeals, has led to considerable confusion and controversy. The various issues relating to who is entitled to appeal in the three-tiered scheme of Act 250, and the proper means to be used to initiate an appeal stem primarily from the language of the standing provision which, if literally interpreted, results in a deviation from legislative intent as manifested by the broad purposes of the Act. The Vermont Supreme Court has compensated for the legislative drafting in a way which enables all persons who were granted party status in hearings before a district environmental commission to also participate in *de novo* proceedings conducted on appeal to the Environmental Board or superior court. Furthermore, the supreme court has interpreted Act 250 in a manner which would give all persons who do not have an automatic right of appeal under the Act, but whose interests may be adversely affected by a proposed subdivision or development, a means to bring an appeal to the Vermont Supreme Court through the Administrative Procedure Act.

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110. REPORT TO THE GOVERNOR, *supra* note 15, at 4.

111. *See* Levy, *supra* note 3, at 1158.