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STANDING TO SUE UNDER THE MODEL LAND DEVELOPMENT CODE

The Model Land Development Code¹ was promulgated by the American Law Institute as the paradigm for state legislatures to follow when enacting land use laws for the future.² The Code is not intended to create uniformity among state laws.³ Instead, states may use the articles of the Code as models in drafting legislation that is more specifically suited to their needs.⁴ Article Nine,⁵ which states rules of standing to participate in land use disputes, poses a potential obstacle to would-be public interest litigants.⁶ This note will explore the effect of Article Nine on citizen plaintiffs and demonstrate how its ambiguous language, when combined with the particularized laws of standing in individual states, can produce widely divergent effects on the ability of public interest parties to gain access to the courts.

I. PROCEDURAL OUTLINE OF THE MODEL LAND DEVELOPMENT CODE

The Code creates two administrative land use control bodies.⁷ The decisionmaking process is initiated by proceedings before the Land Development Agency. This local body is empowered to approve "special development permits."⁸ These permits allow alterations roughly analogous to variances, special exceptions, and conditional rezoning.⁹ The permits can

¹ All references are to the ALI MODEL LAND DEVELOPMENT CODE (Proposed Official Draft, 1975) [hereinafter cited as CODE]. Some amendments to the Proposed Official Draft were made at the American Law Institute's May 1975 convention, and are not presently available in print.

² See generally Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAWYER 928, 929 (1974), where the author states:

[T]he Code covers four substantive areas of land development control law . . . [T]hese are: (1) the use of land, or zoning; (2) the division of land into parcels, or subdivision; (3) replanning and development of improperly or inadequately planned and used land, or urban redevelopment; and (4) direct governmental intervention in the land market for planning and development purposes, or eminent domain.

³ *Id.* at 949.

⁴ *Id.*

⁵ CODE, *supra* note 1, § 9-101 *et seq.*

⁶ 43 U.S.L.W. 2490 (May 27, 1975):

Dunham [the Chief Reporter] noted that the reporters intentionally did not use the term "aggrieved party" nor did they adopt the broad citizen suit provision found in some state environmental statutes authorizing "any person" to initiate suit.

⁷ Fox, *supra* note 2, at 932, 941.

⁸ CODE, *supra* note 1, §§ 2-201 to 2-212.

⁹ Fox, *supra* note 2, at 932.

allow land uses as mundane as a special exception from a set-back requirement, or as far-reaching as rezoning for a regional shopping center. Agency orders may be appealed directly.¹⁰ However, if an order would impose significant external costs on the region or state,¹¹ it may first be appealed to the State Land Adjudicatory Board¹² by any party to the initial administrative proceedings.¹³ The Board reviews the Agency's actions and issues an order of its own. This order is also subject to judicial review.¹⁴ The Adjudicatory Board's other function is to designate certain portions of the state as "Areas of Critical State Concern" which are subject to special development guidelines.¹⁵ The development guidelines of the Land Development Agencies and other local governmental bodies located in these areas must conform to those established by the Board.¹⁶ The Board's rules, and the underlying statutory authority to make specific rules, can also be attacked in the courts.¹⁷

Article Nine establishes standing and judicial review requirements for appeals from actions of the Land Development Agency and the State Land Adjudicatory Board.¹⁸ The three sections defining who has standing to initiate judicial proceedings differ in restrictiveness, with section 9-103, governing appeals from orders of the Land Development Agency, being the most restrictive section.¹⁹ Section 9-104, pertaining to standing to challenge rules of the Adjudicatory Board, is the most liberal,²⁰ while section 9-105, dealing with court challenges to orders of the Adjudicatory Board, falls somewhere in between.²¹

¹⁰ CODE, *supra* note 1, § 9-103.

¹¹ CODE, *supra* note 1, § 7-301. A decision made on the local level which imposes burdens on persons living beyond the boundaries of the locality is said to have "external costs."

¹² CODE, *supra* note 1, §§ 7-501 to 7-503.

¹³ CODE, *supra* note 1, § 2-304(5).

¹⁴ CODE, *supra* note 1, § 9-105.

¹⁵ CODE, *supra* note 1, § 7-201.

¹⁶ CODE, *supra* note 1, § 7-203.

¹⁷ CODE, *supra* note 1, § 9-104.

¹⁸ CODE, *supra* note 1, § 9-101 *et seq.*

¹⁹ CODE, *supra* note 1, § 9-103, Official Note, at 469 states:

[I]t is the purpose of this Article to prevent a non-party [to the administrative hearing] from starting an independent judicial proceeding to challenge the validity of an administrative order.

The parties denominated by section 2-304(5) do not include public interest litigants. The CODE, *supra* note 1, § 9-103, Official Note, at 470, states:

Other interested parties, such as civic organizations, or taxpayers who do not meet the statutory requirements (*e.g.*, own land near the land in question, designated by ordinance or State Land Planning Agency rule) can initiate review only by leave of court.

²⁰ CODE, *supra* note 1, § 9-104, Official Note, at 473 states: "Standing to make such attacks [on administrative rules] is broader than standing to review orders as set forth in § 9-103."

²¹ CODE, *supra* note 1, § 9-105, Official Note, at 476-77 states rather cryptically:

Citizen suit provisions are found in much recently enacted state environmental legislation. The policy behind these broad grants of standing is that activities of the state are of concern to the people of the state as a whole, and not just to persons in isolated situations or persons who suffer specific injury. Those statutes go even further than

Hearings before the local Land Development Agency are the first phase of the administrative process. An examination of section 9-103,²² governing standing to appeal orders of the Land Development Agency, reveals that attaining party status at the initial administrative hearings is crucial to obtaining access to judicial review. This section's limitations on standing are quite significant because, in the estimation of the draftsmen, 95 percent of all land use decisions will not involve external costs.²³ The administrative process in such decisions will then end with the Land Development Agency, since only decisions imposing external costs can be reviewed by the State Land Adjudicatory Board.

Section 9-103 enumerates those persons entitled to initiate judicial review of Land Development Agency decisions. Persons included are the owner of the land involved, the local government, neighboring landowners, and neighborhood organizations.²⁴ The narrowness of the foregoing classi-

this Section, allowing "any person" or "any citizen" to initiate suit, presupposing representation of the public interest. *Cf.* Michigan Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. § 691.1201 *et seq.* [(Supp. 1976)].

²² The full text of CODE, *supra* note 1, § 9-103 reads:

(1) A judicial proceeding concerning an order of a Land Development Agency granting or denying development permission or an enforcement order may be commenced only by:

(a) the owner of land involved in the order, or the applicant for the development permit involved;

(b) the local government which created the Land Development Agency; or

(c) a person to whom subsection (2), (3), (4), or (5) is applicable.

(2) If an order was required to be issued on the basis of a record after an administrative hearing, a judicial proceeding may be commenced by a person who became a party to the administrative hearing in the manner provided in § 2-305(5).

(3) If an order was not required to be issued on the basis for [sic] a record after an administrative hearing, a judicial proceeding may be commenced by:

(a) the owner of any land within [500] feet of the parcel on which development is proposed; or

(b) any neighborhood organization qualified under § 2-307 by the Land Development Agency if the boundaries of the organization include any part of the parcel on which development is proposed or of any land within [500] feet of that parcel.

(4) Notwithstanding the limitations on persons entitled to commence judicial proceedings in this section, a person who was improperly denied an opportunity to participate in a required administrative hearing may pursue a proceeding to review.

(5) The court may grant leave to pursue an action to review an order to a person not entitled under the preceding sections who establishes that he has a significant interest that has been affected by an order and that the interest was not adequately represented in the administrative proceeding.

(6) A judicial proceeding to determine the validity of an order of the State Land Adjudicatory Board under Article 7 may be commenced only by a person who was a party to the proceeding before the Board or by the local government in which the land involved is located.

²³ Fox, *supra* note 2, at 930: "The Reporters believe that as much as ninety-five per cent of all land use decisions do not have regional or state-wide impact."

²⁴ See note 22 *supra*. See also CODE, *supra* note 1, § 9-103, Official Note, at 465.

fications is relieved by section 9-103(5), which allows a "person" with a "significant interest" to obtain judicial review with leave of the court. The draftsmen intended to restrict the use of section 9-103(5) primarily to persons who were qualified to become parties to the original administrative proceeding of the local agency.²⁵ Section 2-304(5)(d) raises to party status "a person who satisfied the presiding officer that he has a significant interest in the subject matter of the hearing." Thus, the meaning of the term "significant interest" becomes crucial in determining the ability of the public interest litigant to gain standing under this section.

The "significant interest" test has met with disapproval in the federal courts. The Supreme Court in *United States v. SCRAP*²⁶ rejected a "significant interest" test in defining the federal law of standing.²⁷ The Court stated that such a test was "fundamentally misconceived"²⁸ and implied that the source of the misconception lay in the fact that some persons who had a direct stake in the outcome of a lawsuit would be excluded because their affected interest was not "significant" enough.²⁹ Similarly, even if the public interest litigant can prove the existence of a direct interest, he might still fail the test of party status under section 2-304(5)(d) for lack of a "significant" enough interest. Such a public interest litigant will therefore be precluded from obtaining standing under section 9-103.

If a land use issue before the local Agency involves significant external costs, it may be reviewed by the State Land Adjudicatory Board. Section 9-105³⁰ governs standing to appeal orders of the Board. The language of

²⁵ CODE, *supra* note 1, § 9-103, Official Note, at 468, in referring to subsection five states:

Usually, that person is one who was qualified to become a party to the administrative hearing but failed to do so or was denied permission by the presiding hearing officer in keeping with § 2-304(5).

²⁶ 412 U.S. 669 (1973).

²⁷ *Id.* at 689:

The government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.

²⁸ *Id.*

²⁹ *Id.*

³⁰ The text of CODE, *supra* note 1, § 9-105 reads:

A proceeding to review an order or rule of the State Land Planning Agency may be commenced only by

(1) an owner of land involved in the order or rule, or the applicant for the development permit involved;

(2) an applicant requesting the acquisition of land for large-scale development under Article 5, Part 2, and the owner of any parcel of land within the site of the proposed development;

(3) any governmental agency;

(4) a person claiming that the order or rule deprives him or persons he represents of rights given him by the constitution or laws of the United States or of his state;

(5) any person satisfying the court that he has a significant interest that has been affected by the order or rule.

this section has been altered by the draftsmen. In the original Proposed Official Draft, standing to appeal orders of the State Land Adjudicatory Board was granted to specified persons.³¹ The American Law Institute has recently amended the language of this section in several significant ways.³² The language of section 9-105 as it now reads represents a compromise born of a fierce debate over standing.³³ It is clear that the section was not intended to be a broad citizen suit provision.³⁴

The draftsmen also realized that, "An analogy can be drawn to the development of standing in the federal courts."³⁵ The federal law of standing was largely ignored in the legislative scheme which was adopted, however.³⁶ Finally, a plan to limit standing to certain specific and easily identifiable classes of persons was considered and then modified by the use of the "significant interest" terminology.³⁷

The three viewpoints represented in the standing debate are not synthesized into a cohesive position by the draftsmen in the Official Notes to the Code. The Notes merely discuss each point of view disjunctively without ever demonstrating how the disjuncts ought to fit together.³⁸ This lack of guidance to legislatures and reviewing courts can only lead to confusion in the adoption and application of the statutory language. Since the draftsmen apparently could not agree upon a single position, they should have written alternative versions of Article Nine with appropriate commentary, or the dissenters should have published a minority report. The present legislative confusion surrounding Article Nine only proves the point that some significant amendments both to the Notes and to the statutory language should be made before the Code is submitted to state legislatures for adoption.

Public interest litigants will only be able to come within the ambit of the section if they can meet the "significant interest" test of section 9-

³¹ *Id.*

³² 43 U.S.L.W. 2490 (May 27, 1975). At its May 1975 meeting the ALI made the following changes in the standing provisions of section 9-105:

Section 9-105(3) now reads, any governmental agency "having a significant interest" [in the action of the State Land Planning Agency].

Section 9-105(4) has been totally deleted.

Section 9-105(5) now reads, "any person who has a significant interest affected by the order or rule." [This provision is now followed by optional language which makes it clear that standing can be obtained under other state laws.]

³³ *Id.*

[T]he reporters intentionally did not use the term "aggrieved party" nor did they adopt the broad citizen suit provision found in some state environmental statutes authorizing "any person" to initiate suit. Section 9-105 was intended to confine judicial review of actions of the state planning agency

³⁴ *Id.*

³⁵ CODE, *supra* note 1, § 9-103, Official Note, at 464.

³⁶ See text accompanying note 46 *infra*, for a discussion of the possible effects which the federal law of standing may have upon the Code.

³⁷ See note 47 *infra* for an explanation of the most restrictive view of standing held by some of the draftsmen.

³⁸ CODE, *supra* note 1, § 9-103, Official Note.

105(5). This test poses precisely the same obstacles to standing as does the "significant interest" test of sections 9-103(5) and 2-304(5).³⁹ A more promising avenue to standing for the public interest litigant is through other state statutes with broader standing provisions.⁴⁰ However, unless such other state statutes exist, citizen plaintiffs will very likely find themselves denied the ability to challenge orders of the State Land Adjudicatory Board.

Section 9-104 governs standing to appeal rules of the State Land Adjudicatory Board. An examination of this section reveals that the citizen litigant must meet a more liberal test to challenge a rule than must be met to contest orders arising out of administrative hearings. Section 9-104 specifically enumerates the persons with standing to seek judicial relief from administrative rules.⁴¹ Like 9-103 and 9-105, section 9-104 grants standing to the landowner, certain neighboring landowners, neighborhood organizations, and governmental agencies.⁴² The public interest litigant who does not come within one of these classes of persons must try to satisfy the "significant interest" test of section 9-104(6), or the test of section 9-104(5), which grants standing to

[A] person claiming that the ordinance or rule deprives him or persons he represents of rights given him by the constitution or the laws of the United States or of his State⁴³

This provision is unique among the standing provisions of Article Nine. It is apparent from the Notes to section 9-104 that the draftsmen

³⁹ See notes 26-29 and accompanying text *supra*.

⁴⁰ CODE, *supra* note 1, § 9-105, Official Note, at 476 reads: "This section is not intended to change the existing [state] law governing taxpayers' suits or other specialized remedies."

The Michigan Environmental Protection Act, MICH. COMP. LAWS ANN. § 691.1201 *et seq.* (Supp. 1976), which is considered at notes 108-16 and accompanying text *infra* as a means of ameliorating the effects of Article Nine of the Code, is one such state law allowing "any person" to maintain an action for the protection of the air, water or other natural resource.

⁴¹ The full text of CODE, *supra* note 1, § 9-104 reads:

In the absence of an order, a proceeding to review a rule of the State Land Reserve Agency or a rule or ordinance of a local government may be commenced only by

- (1) an owner of land subject to the rule or ordinance;
- (2) an owner of land within [500] feet of any land subject to the rule or ordinance;
- (3) a neighborhood organization qualified under § 2-307 by the local Land Development Agency if the boundaries of the organization include any part of the land subject to the rule or ordinance, or any land within [500] feet of any land subject to the rule or ordinance;

(4) any governmental agency other than an agency created solely by the local government which adopted the ordinance or rule;

(5) a person claiming that the ordinance or rule deprives him or persons he represents of rights given him by the constitution or laws of the United States or of his State;

(6) any other person satisfying the court that he has a significant interest that has been affected by the ordinance or rule.

⁴² *Id.*

⁴³ *Id.*

intended this language to have a special significance. The Notes expressly state that standing to challenge rules is broader than standing to attack orders.⁴⁴ The draftsmen then state that section 9-104(5) was intended to give standing to nonresidents and nonlanded persons to challenge exclusionary zoning practices.⁴⁵ The language of section 9-104(5) is highly significant, since it incorporates federal and state constitutional rights. Federal rights should also include the right to claim standing under federal standards, which are considerably more liberal than the "significant interest" test of Article Nine.⁴⁶ Thus, public interest litigants may be able to challenge rules of the State Land Adjudicatory Board, provided that they can meet federal standing requirements.

II. STANDING POLICY OF THE CODE

As noted above, the policy of Article Nine represents a compromise on the standing issue.⁴⁷ Because of the lack of consensus among the draftsmen, the Article has no single coherent policy.

The entire Code is a model legislative act and is not intended to create uniformity from state to state.⁴⁸ The draftsmen examined existing state law for precedents on the standing question and found it to be riddled with contradictions and splits of authority.⁴⁹ For example, when deciding the crucial issue of whether to impose standing restrictions on those who could not achieve party status, the draftsmen were faced with a split of authority in the state laws.⁵⁰ In reaching their policy choice, resort was had to a minority rule, as exemplified by a line of Vermont cases.⁵¹ This minority rule requires a person to have party status at the hearing in order to have standing to challenge an order.

Another policy choice is embodied in sections 9-103(3)(a) and 9-104(2), which grant standing to the owner of land within 500 feet of the land which is the subject of the controversy. The draftsmen acknowledged that

⁴⁴ See note 20 and accompanying text *supra*.

⁴⁵ CODE, *supra* note 1, § 9-104, Official Note, at 474:

Section 9-104(5) makes it easier for non-residents and non-landed persons to challenge rules and ordinances that affect his rights under the laws and constitution of the state or the United States. For example, if a general development ordinance so restricts the development of land that certain persons are excluded from the community, it is difficult under existing standing rules for members of that class to secure a determination of their claim . . . Subsection (5) is designed to give a person who does not reside on land in an area to challenge the onerousness of the restriction.

⁴⁶ See note 27 and accompanying text *supra*.

⁴⁷ See note 33 and accompanying text *supra*.

⁴⁸ Fox, *supra* note 2, at 949.

⁴⁹ See, e.g., CODE, *supra* note 1, § 9-103, Official Note, at 468.

⁵⁰ *Id.*:

While most jurisdictions permit review by protestants without requiring participation in prior administrative proceedings . . . a growing number do require participation and status as a party to the proceedings to have standing to commence judicial review. See, e.g., *Wright v. Preseault*, 306 A.2d 673 (Vt. 1973) . . .

⁵¹ *Id.* See part IV *infra* for a detailed examination of *Preseault* and its progeny.

in some jurisdictions neighboring landowners are given standing if their land is reasonably close to the land in question, either without showing of specific injury, or by presuming aggrievement on no facts other than the location of the petitioner's land.⁵²

This rule would be imposed upon states whose laws do not accord a neighboring landowner any special status among persons seeking standing to sue.⁵³

If the foregoing discussion demonstrates the difficulty of making choices between conflicting policies, it also suggests that this model legislative act will by its very existence create difficulties for some states. If a state which does not otherwise require party status as a condition precedent to standing wishes to adopt the Code, it will have to reject section 2-304(5)(d) and Article Nine, or at least amend them in some very significant ways. It would be better if Article Nine imposed a uniform standing requirement upon the states. Even the proponents of restrictive standing requirements in the drafting committee found that by strictly enumerating those persons entitled to sue, they could impose a desirable degree of certainty and uniformity upon the states adopting the Code.⁵⁴

A response to these conflicting policies is that uniformity in standing is desirable, and that recourse should have been had to the federal law of standing to provide a national standard. Indeed, this is the approach that the draftsmen took when they dealt with exclusionary zoning problems in section 9-104(5).⁵⁵

III. THE FEDERAL LAW OF STANDING

The general philosophy of the Code in regard to standing is more restrictive than the federal law set forth in *Sierra Club v. Morton*,⁵⁶ *United States v. SCRAP*⁵⁷ and *Warth v. Seldin*.⁵⁸ In those cases, the Supreme Court required the plaintiffs to have a property interest or other personal right at stake before they would be granted standing to litigate in the public interest. This requirement puts "the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."⁵⁹ In *Sierra Club*, the Supreme Court exhibited an antipathy toward granting standing to those individuals or groups who had no affected property interest or other personal right at stake because of an expressed fear that

⁵² CODE, *supra* note 1, § 9-103, Official Note, at 466.

⁵³ *Id.* The draftsmen called the imposition of a rule according special status to neighboring landowners a "compromise."

⁵⁴ 43 U.S.L.W. 2490 (May 27, 1975):

Professor Charles Alan Wright said that the effect of the proposed Section 9-105(5) would be to force courts to spend time deciding who has standing and who doesn't. The Code ought to decide what classes of persons have standing and say so, according to Wright.

⁵⁵ See notes 43-46 and accompanying text *supra*.

⁵⁶ 405 U.S. 727 (1972).

⁵⁷ 412 U.S. 669 (1973).

⁵⁸ 422 U.S. 490 (1975).

⁵⁹ 405 U.S. at 740.

they "seek to do no more than vindicate their own value preferences through the judicial process."⁶⁰ *Sierra Club* has been criticized, since the dispute in that case involved long-range and permanent effects to the environment. It seems superfluous to have required the plaintiffs to have personal rights at stake in the traditional sense.⁶¹

If the organization is unable to find such a plaintiff, it proves nothing about the merits or nature of the suit sought to be instituted.⁶²

The standing requirements of *Sierra Club* were further explained by the Court in *SCRAP*. In this latter case, the plaintiffs did allege injury to a personal right, but the injury was very slight and the causal link between defendants' actions and the asserted harm was very tenuous.⁶³ The Court said that there were two requirements for standing to sue under the federal law. The first of these was that a personal right be affected.⁶⁴ However, the injury to this right can be very slight.⁶⁵ The second requirement was that plaintiffs be able to demonstrate a causal link between the alleged harm and the affected personal right.⁶⁶ The Court added the caveat that "pleadings must be something more than an ingenious academic exercise in the conceivable."⁶⁷

The *Warth* case presented a different set of possible external costs, since it involved a land use decision which was not claimed to have environmental impact.⁶⁸ At issue in *Warth* was a zoning ordinance alleged

⁶⁰ *Id.*

⁶¹ Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RES. J. 76, 88 (1973) states:

[T]he issues to engage our serious attention are risks of long-term, large scale, practically irreversible disruptions of ecosystems. By denying to persons who wish to assert those issues the right to come into Court, and granting standing *only* to one who has a stake in his own present use and enjoyment, the Court reveals how little it appreciated the real meaning of the test case it had before it.

⁶² *Id.* at 81.

⁶³ The plaintiff's claim was based on the assertion that:

[F]ailure to suspend the [railroad rate] surcharge would cause their members "economic, recreational and aesthetic harm." Specifically, they claimed that the rate structure would discourage the use of "recyclable" materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering and other extractive activities. The members of these environmental groups were allegedly forced to pay more for finished products, and their use of forests and streams was allegedly impaired because of unnecessary destruction of timber and extraction of raw materials

412 U.S. at 675-76.

⁶⁴ *Id.* at 687.

⁶⁵ *See id.*

⁶⁶ *Id.* at 688.

⁶⁷ *Id.*

⁶⁸ A decision made on the local level which imposes burdens on persons living beyond the boundaries of the locality is said to have "external costs." On the other hand, "[d]ecisions directly affecting the growth and development of a community are best made by that community through its own political processes." Fox, *supra* note 2, at 930.

to have the effect of excluding persons of low and moderate income from Penfield, New York.⁶⁹ The plaintiffs fell into three groups. As to the first of these groups, resident taxpayers of the neighboring city of Rochester, the Court asserted that there was no standing because the plaintiffs were attempting to assert the putative rights of third parties.⁷⁰ The second category of plaintiffs included nonprofit, public interest associations. Again, the Court denied standing to the associations under the *Sierra Club* doctrine that an association must allege injury in fact to one of its members.⁷¹ The final group, consisting of nonresident low income persons, was refused standing for failure to show a causal relationship between the zoning ordinance and some personal injury.⁷² The Court stated that these petitioners had failed to show that they were harmed personally.⁷³ It is apparent that the *Warth* Court was doing no more than applying the two-fold standing test of *Sierra Club* and *SCRAP* to an exclusionary zoning case.

The nonresident plaintiffs might have satisfied the Court's standing requirements by trying to obtain a rezoning amendment for a low income housing project in Penfield.⁷⁴ This action would have given them a personal stake in the issues which the Court required.⁷⁵ In any case, the result of filing a rezoning application under the Code would be to give the plaintiffs party status under section 2-304(5)(a), and hence provide them with a statutory right to appeal any order of the local Land De-

⁶⁹ 422 U.S. at 495. See also *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 44 U.S.L.W. 3473 (U.S. Feb. 24, 1976).

⁷⁰ *Warth v. Seldin*, 422 U.S. 490, 509 (1975):

[T]he only basis of the taxpayer-petitioners' claim is that Penfield's zoning ordinance and practices violate the constitutional and statutory rights of third parties, namely, persons of low and moderate income who are said to be excluded from Penfield. In short the claim of these petitioners falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.

⁷¹ *Id.* at 511; *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

⁷² 422 U.S. at 506-07: "In short, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury."

⁷³ *Id.* at 508:

We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention.

⁷⁴ *Id.* at 504:

Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.

An attempt to obtain a rezoning amendment, coupled with such "substantial probability" of purchase or lease thus may suffice for standing. However, it can be argued that more restrictive qualifications, such as the ability to carry through with the proposed development or an option on land to be developed, would be necessary.

⁷⁵ *Id.* at 508.

velopment Agency under section 9-103(1)(a), (2).⁷⁶ Since it would have been relatively easy for the plaintiffs to have made an unsuccessful attempt to obtain a rezoning amendment, the requirement that there be a personal right affected would appear to be a small burden, which would provide the judiciary with the assurance that the petitioners would be vitally interested in the issues and would prosecute the case vigorously. Thus, if Article Nine of the Code expressly adopted the federal law of standing as a uniform requirement, public interest litigants would not have to meet a large burden to obtain access to the courts.

The standing problems posed by *Warth* are very likely to arise again before state supreme courts where the Code has been adopted. Under the present legislative scheme, the state courts are not constrained to resolve the standing issue in the same way as the Supreme Court. However, it is to be hoped that the express language of the Code, especially section 9-103, will impel state courts to impose a *Warth* standing rule where zoning rather than environmental issues are involved. Some commentators have argued that since environmental cases involve a different set of factual issues, standing in such cases should be unlimited.⁷⁷ They argue that environmental issues affect the rights of every member of society, and it follows that anyone should be able to assert those rights in the courts.⁷⁸

IV. DIVERGENT STATE STANDING REQUIREMENTS UNDER ARTICLE NINE

Only Florida⁷⁹ and Vermont⁸⁰ have adopted land use statutes modeled upon prior tentative drafts of the Code. The Florida Environmental Land and Water Management Act of 1972, which is modeled on Tentative Draft Number Three of the Code, allows only the owner, the developer, governmental agencies, or "materially affected parties" to appeal from a development order of a local government to the state Land and Water Adjudicatory Commission.⁸¹ The "materially affected" test seems to be a

⁷⁶ See note 45 and accompanying text *supra*. It is clear that under section 9-104 if petitioners had wished to challenge a rule made before the state Land Planning Agency, they could have done so without attempting to obtain a development permit. However, in cases like *Warth*, no significant statewide concern may be involved, and plaintiffs must then concern themselves with the problem of gaining standing to appeal decisions of the local board.

⁷⁷ In an empirical study, Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004 (1972), the authors conclude that suits brought under the standing provision of the Michigan Environmental Protection Act, MICH. COMP. LAWS ANN. § 691.1201 *et seq.* (Supp. 1976), providing standing to "any person" in environmental matters, had not generally been frivolous but were brought primarily in cases involving issues of great significance.

⁷⁸ See notes 61-62 and accompanying text *supra*; Sax, *supra* note 61, at 88.

⁷⁹ FLA. STAT. ANN. § 380.012 *et seq.* (Supp. 1974).

⁸⁰ VT. STAT. ANN. tit. 10, § 6001 *et seq.* (Cum. Supp. 1975).

⁸¹ FLA. STAT. ANN. § 380.07 (Supp. 1974) reads in part:

- (1) There is hereby created the Florida Land and Water Adjudicatory Commission, which shall consist of the Administration Commission.
- (2) Whenever any local government issues any development order in

variant of the "significant interest" test of section 2-304(5)(d).⁸² It is likely that a potential plaintiff will have to show more than slight harm to his interests in order to demonstrate a "material" effect. It also appears that the Florida statute adheres closely to the Code's requirement that appellants have a personally affected right at stake in the action. However, there have been no cases decided under the statute, and how it will be read is uncertain.

The Vermont statute,⁸³ also modeled on the Code, has generated some litigation. Under the Vermont scheme, only parties to proceedings, which include only the landowner, the regional and municipal planning commissions, and municipalities, may appeal the decision of the district commission to the state Environmental Board.⁸⁴ Significantly, there is no language which would allow "any person" or a "person aggrieved" to come before the district commission or to appeal to the state Environmental Board.⁸⁵ Cases appealed to the Environmental Board may be removed to the appropriate county court, but removal may be had only by the applicant for the development permit.⁸⁶ In any case, issues before either the court or the Environmental Board may be raised only by parties.⁸⁷ The final

any area of critical state concern, or in regard to any development of regional impact, a copy of such order shall be transmitted to the state land planning agency and the owner or developer of the property affected by such order. Within thirty days after the order is rendered, either the owner, developer, an appropriate regional planning agency, or the state land planning agency may appeal the order to the Florida land and water adjudicatory commission by filing a notice of appeal with the commission . . . Upon motion and good cause shown the Florida land and water adjudicatory commission may permit materially affected parties to intervene in the appeal . . .

⁸² See notes 26-29 and accompanying text *supra*.

⁸³ VT. STAT. ANN. tit. 10, § 6001 *et seq.* (Cum. Supp. 1975).

⁸⁴ VT. STAT. ANN. tit. 10, § 6085(c) (Cum. Supp. 1975) provides:

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.* 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 under section 6086(a)(1) through (a)(10) of this title. (emphasis added).

The "municipalities required to receive notice" which are allowed to appeal under section 6085(c) are specifically described in VT. STAT. ANN. tit. 10, § 6084(a) (1973) as:

[A] municipality, and municipal and regional planning commissions wherein the land is located, and any adjacent Vermont municipality, municipal or regional planning commission if the land is located on a boundary.

⁸⁵ VT. STAT. ANN. tit. 10, § 6085(c) (Cum. Supp. 1975).

⁸⁶ VT. STAT. ANN. tit. 10, § 6089(a) (Cum. Supp. 1975) states in relevant part:

An appeal from the district commission shall be to the board. An appeal under this section may be removed by the applicant to the county court of the county in which any real estate of the applicant involved in the application is located . . .

⁸⁷ *Id.*

stage of the appeals process, from either the county seat or the Environmental Board to the state supreme court, is available solely to persons with party status before the district commission.⁸⁸ Vermont courts have been reluctant to grant standing to any person not falling within some express provision of the statute.⁸⁹ These courts have considered several of the arguments proposed for circumventing potentially restrictive standing provisions, and have either rejected or modified the arguments to such a degree that public interest plaintiffs will be unable to establish standing.⁹⁰

The Vermont Supreme Court was initially willing to supplement the Vermont Land Development Code with the state's Administrative Procedure Act, which gives any person "aggrieved" by an administrative action recourse to the courts.⁹¹ *In re Preseault*⁹² involved a dispute between the developer of a seventy-six unit apartment complex and the adjacent property owners. A development permit was denied before the district commission, and the developer took an appeal to the Environmental Board, which granted a permit.⁹³ The objecting adjoining property owners were not allowed to appear as parties before the Environmental Board.⁹⁴ An appeal was taken to the Supreme Court of Vermont, which held that "the intent of the legislature . . . is to accord to adjoining property owners the right to appear as parties at hearings before the Environmental Board."⁹⁵ In order to reach this result, the court read the state APA *in pari materia* with the judicial review provision of the Vermont Land Development Code and determined that the adjoining property owners were "aggrieved persons."⁹⁶ The court acknowledged that the restrictive judicial review provisions would work too harsh a result if not mitigated by the APA.⁹⁷ However, the persons seeking review in this case were adjoining landowners whom the Vermont Land Development Code allows to participate in hearings.⁹⁸ The real source of their difficulties stemmed from the fact that they had been omitted as parties in the proceedings before the district commission. The opinion does not make it clear precisely why the landowners were

⁸⁸ VT. STAT. ANN. tit. 10, § 6089(b) (Cum. Supp. 1975) provides:

An appeal from a decision of the board or county court under subsection (a) shall be to the supreme court by a party as set forth in section 6085(c) of this title.

For a description of parties under section 6085(c), see note 76 *supra*.

⁸⁹ See *In re Great Eastern Building Co.*, 132 Vt. 610, 326 A.2d 152 (1974); *In re Preseault*, 130 Vt. 343, 292 A.2d 832 (1972).

⁹⁰ *In re Great Eastern Building Co.*, 132 Vt. 610, 326 A.2d 152 (1974); *In re Preseault*, 130 Vt. 343, 292 A.2d 832 (1972).

⁹¹ VT. STAT. ANN. tit. 3, § 815(a) (Cum. Supp. 1975).

⁹² 130 Vt. 343, 292 A.2d 832 (1972). The *Preseault* case generated a plethora of subsequent litigation between various parties. 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).

⁹³ The full facts of the litigation are set out in *In re Application of Preseault*, 132 Vt. 471, 473, 321 A.2d 65, 66 (1974).

⁹⁴ *Id.*

⁹⁵ 130 Vt. at 348-49, 292 A.2d at 836.

⁹⁶ *Id.* at 347, 292 A.2d at 834-35.

⁹⁷ *Id.* at 348, 292 A.2d at 835.

⁹⁸ See note 76 *supra*.

omitted at this stage of the litigation. *Preseault*, therefore, was distinguishable on its facts, and was not subsequently read for the broader proposition that the public interest litigant, who, unlike an adjoining landowner, has no statutory basis for participating in the decisionmaking process, will be granted standing to appeal.

Preseault was cut back considerably by *In re Great Eastern Building Co.*,⁹⁹ where the parties attempting to gain standing were homeowners living a quarter mile down the road from a proposed development of condominiums. They asserted injury based on the traffic congestion and unsafe highway conditions which the development would cause, but the Environmental Board denied them party status at the hearing for the development permit.¹⁰⁰ In holding that the neighboring landowners could not intervene on appeal, the court said again that the state APA should be read *in pari materia* with the Vermont Code.¹⁰¹ However, the court went on to restrict the *in pari materia* doctrine by adding that the appellants could not appeal unless they had attained party status under one of the specific classes of the Land Development Code, or unless they could show injury to some legally protected right.¹⁰² It then concluded that the prevention of increased traffic flow was not a matter in which an individual has a legally protected personal right. Therefore, if the public interest litigant can not come within a classification of the Vermont Land Development Code, and can not show that some personal right is affected, the *in pari materia* argument will not meet with success in Vermont.

The *Great Eastern* court was also presented with the argument that those who can intervene as of right have standing to appeal.¹⁰³ The court never addressed the issue, however, since it decided that the appellants had no underlying right of intervention.¹⁰⁴ The appellants did not come under a class enumerated in the Vermont Land Development Code, which would have accorded them party status, nor did they come under any of the administratively formulated rules expanding party status beyond the

⁹⁹ 132 Vt. 610, 326 A.2d 152 (1974).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 613, 326 A.2d at 153-54.

¹⁰² *Id.* at 612-13, 326 A.2d at 153-54:

The appellants also argue that 10 V.S.A. § 6085 and 3 V.S.A. § 801 should be read *in pari materia*. *In re Preseault*, 130 Vt. 343, 292 A.2d 832 (1972). While *In re Preseault*, *supra*, establishes that these statutes should be construed with reference to each other as parts of one system, it does not convey an automatic right of participation to those not admitted as parties on the threshold level. The joining of Act 250 with the Administrative Procedure Act fails to enlarge those categories of persons entitled to party status as of right The appellants are not entitled as of right to party status under 10 V.S.A. § 6085(c). Party status is acquired by those who have received notice, by adjoining property owners who have requested a hearing and by those who are admitted in the discretion of the agency. Since the appellants do not qualify as members of these categories, allegations of harm do not constitute injury absent a legally protected right.

¹⁰³ *Id.* at 614, 326 A.2d at 154.

¹⁰⁴ *Id.*

narrow statutory definition.¹⁰⁵ The court decided that there was no right to intervene in the absence of an express statutory grant or an administrative rule.¹⁰⁶ Therefore, if a court, like that of Vermont, is inclined to accept the proposition that standing to appeal is inextricably bound up with intervention as of right, it is also likely to find that the public interest litigant who can invoke no statutory right of intervention has met an insurmountable barrier. The courts seem comfortable with restrictive intervention as of right because the interests of the intervenor are adequately represented by parties already present at the hearings.¹⁰⁷

Vermont thus provides an example of the very restrictive law of standing which Article Nine is capable of producing in the hands of some state courts. The federal law of standing has been completely ignored in Vermont, and the concept of party status has been restricted to a needless degree. 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. A uniform law of standing based upon the present federal standards would be preferable to standing laws such as those in Vermont.

In other states, however, restrictive judicial review provisions may be circumvented by gaining standing under some other state statute. Michigan has not adopted the Code, but should it ever do so it is likely that the liberal standing provisions of the Michigan Environmental Protection Act (MEPA)¹⁰⁸ would provide a significant right of standing in land use cases. The relevant section of MEPA provides that "any person" may maintain an action in the state courts "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."¹⁰⁹ The legislative history of MEPA reveals that the act was intended to allow suits by private citizens in the public interest, so long as it could be demonstrated that an issue of environmental significance was at stake.¹¹⁰ A showing of an affected right, therefore, is not necessary to gain standing to sue under MEPA.

¹⁰⁵ *Id.* at 612, 326 A.2d at 153.

¹⁰⁶ *Id.* at 614, 326 A.2d at 154:

The appellants' third argument rests on a right of intervention in an administrative proceeding. This contention is buttressed by no statutory support; consequently, any claim of right to intervention is unfounded.

¹⁰⁷ The *Great Eastern* court, 132 Vt. at 614, 326 A.2d at 154, assumed that the municipality and the planning commissions which had been accorded party status adequately represented the interests of the neighboring landowners.

The Michigan Court of Appeals in *Wayne County Dep't of Health v. Chrysler Corp.*, 43 Mich. App. 235, 236, 203 N.W.2d 912, 913 (1972) decided that under the terms of Michigan General Court Rule 1963, R. 209.1(3), the intervenor had to show affirmatively that his interest was not represented by the existing parties.

¹⁰⁸ MICH. COMP. LAWS ANN. § 691.1201 *et seq.* (Supp. 1976).

¹⁰⁹ MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1976).

¹¹⁰ In *Sax & Conner, Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004, 1073 n.283 (1972), Professor Sax, MEPA's chief draftsman, stated:

The legislative history of the EPA is clear that the Act was explicitly intended to allow suits by private citizens against regulatory

The Michigan Supreme Court has shown a willingness to read MEPA *in pari materia* with other state statutes.¹¹¹ In *Highway Commission v. Vanderkloot*,¹¹² the Michigan State Highway Commission sought to condemn eleven acres of defendant's land for the widening and improvement of U.S. Highway 24. The condemned land was a swamp, and the defendant argued that the Highway Commission had not taken the ecological consequences of its proposed action into account.¹¹³ The court decided that MEPA must be read *in pari materia* with the Highway Condemnation Act, and that the Highway Commission had to make findings on matters of environmental significance in its condemnation proceedings.¹¹⁴

It seems likely that the Michigan courts will require that MEPA also be read *in pari materia* with the Model Land Development Code if it should be adopted by the Michigan Legislature. This approach would give public interest litigants access to the courts in land use issues which would impose external costs upon the environment. MEPA will not be a panacea for public interest plaintiffs, however, since certain important land use issues, like exclusionary zoning, often do not involve environmental matters. In addition, only a minority of states have any environmental protection statutes.¹¹⁵ MEPA was passed pursuant to an express command of the Michigan constitution,¹¹⁶ and other states without such constitutional mandates may not feel the need to pass environmental statutes in the future.

agencies to require them to fulfill their legal obligations to prosecute polluters, and to treat their failure to do so as a violation of section 3 of the Act.

¹¹¹ At least one lower court in Michigan has exhibited a similar willingness to apply the *in pari materia* doctrine to MEPA. See *Payant v. Department of Natural Resources* (Cir. Ct. Dickinson Co., Mich. 1971), where the court granted plaintiffs standing under MEPA to challenge a Department of Natural Resources rulemaking proceeding concerning the hunting of antlerless deer.

¹¹² 392 Mich. 159, 220 N.W.2d 416 (1974).

¹¹³ *Id.*

¹¹⁴ *Id.* at 182, 220 N.W.2d at 426-27:

Legislation need not specifically refer to other legislation it affects to be read *in pari materia* . . . The Legislature is only enjoined [by MICH. CONST. art. 4, § 52] to enact legislation protecting natural resources from pollution, impairment and destruction. The responsive action of the Legislature can be in specific provisions in pertinent enactments or in the form of generally applicable legislation; in fact the Legislature has acted in general legislation [MEPA]. Such legislation must be read in concert with the Highway Condemnation Act.

¹¹⁵ 1 CCH POLLUTION CONTROL GUIDE ¶ 5430 (1974). There are only twenty-one states which currently require the filing of environmental impact statements. They are: Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, North Carolina, South Dakota, Texas, Virginia, Washington, and Wisconsin. *Id.*

¹¹⁶ MICH. CONST. art. 4, § 52:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

V. CONCLUSION

The best approach for Article Nine to adopt would be a uniform standing provision, preferably based unequivocally upon the federal standards. In its present form, the language of Article Nine can be read to achieve results similar to *Great Eastern*, or to impose a *Warth* rule, or even to grant standing to "any person" under certain environmental laws. It is unfortunate that the standing provisions of the Code are based upon a compromise, because this situation has created uncertainty and has allowed for arbitrary results in the application of Article Nine.

—*Richard L. Epling*