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Robert L. McCullough

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HISTORIC PRESERVATION AND LAND USE CONTROL AT THE STATE LEVEL—VERMONT'S ACT 250

*Robert L. McCullough**

I. INTRODUCTION

Vermont has enacted several types of legislation as a means of protecting its historic sites. The Vermont Historic Preservation Act established a division for historic preservation which coordinates historic preservation activities on behalf of the state.¹ The Vermont Planning and Development Act allows municipalities to adopt zoning regulations which contain design control districts. Buildings within these districts may not be modified or demolished without approval from a planning commission.² Perhaps the most innovative legislation is Vermont's Land Use and Development Law, commonly known as Act 250, which was enacted in 1970 with the broad objective of preventing Vermont land from being used in a manner detrimental to the environment.³

Act 250 established a state environmental board consisting of nine members, divided the state into nine districts, and created a three-member district environmental commission for each district. The primary strength of Act 250 is the requirement that permits must be obtained for certain developments and land subdivisions. Permit applications are filed with the appropriate district commissioner, and a determination must be made that the project will not result in adverse effects on a number of criteria, including water and air

*Candidate for M.A. in Historic Preservation Planning, Cornell University, 1987; M.S.L., Vermont Law School, 1983; J.D., Hamline University, 1976.

¹ VT. STAT. ANN. tit. 22, §§ 701-791 (1978 & Supp. 1986).

² VT. STAT. ANN. tit. 24 §§ 4301-4494 (1975 & Supp. 1986).

³ Pub. Act No. 250, 1969 Vt. Laws 237 (approved April 4, 1970; effective April 4, 1970 except § 6, permit for development and subdivision, effective June 1, 1970); codified as amended at VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1986).

quality, soil stability, availability of educational services, and several others. Permits may also be issued subject to conditions to be met at a later date.

Notable among the criteria is section 6086(a)(8) which provides, "(a) Before granting a permit, the board or district commission shall find that the subdivision or development: . . . (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."⁴ Section 6001(9) defines an "Historic site" as "any site, structure, district, or archeological landmark which has been officially included in the National Register of Historic Places and/or the state register of historic places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant."⁵ Clearly, Act 250 was intended to protect Vermont's historic sites as well as its environment. Further demonstration of this purpose is found in the Capability and Development Plan which was enacted to provide general and uniform policies on land use and development. Section 11 (Special Areas) provides in part:

Lands that include or are adjacent to sites or areas of historical, educational, cultural, scientific, architectural or archeological value . . . should only be developed in a manner that will not significantly reduce that value of the site or area. Sites or areas which are in danger of destruction should be placed in whatever form of public or private ownership that would best maintain and utilize their value to the public.⁶

The purpose of this paper is to evaluate Act 250's effectiveness as a means of protecting Vermont's historic sites. Several flaws have emerged in sections of the Act that define its jurisdiction; much of the analysis concentrates on these flaws. Another area of weakness is the absence of criteria for measuring the effect of development on historic sites. A third concern is that certain parties have limited access to administrative and judicial review under Act 250, particularly before the Vermont Supreme Court. None of these flaws is so serious that it renders Act 250 completely ineffective at protecting historic properties, and none of these flaws is without potential remedy. Moreover, Act 250 has been a significant asset to historic preservation by providing a forum in which the expression of concern

⁴ VT. STAT. ANN. tit. 10, § 6086(a)(8) (1984).

⁵ *Id.* at § 6001(9).

⁶ Act of April 23, 1973, Pub. Act No. 85, § 7(a)(11), 1973 Vt. Laws 246, 252; *see* VT. STAT. ANN. tit. 10, § 6042 (1984) (History of § 6042).

for historic sites can occur and in which effective negotiation can take place.

In a national context, Act 250 can be utilized as a prototype by other states considering land use and development control at the state level. In this larger setting, it must be remembered that Act 250 is designed to address a great number of complicated environmental concerns and that its capacity to protect historic properties is only one of its many functions. However, if this type of broad legislation is to hold appeal for other states, each of its parts must work. The purpose then of this paper in such a national context is to suggest ways to carefully craft the legislation in order to make it effective at the task of protecting historic properties.

II. JURISDICTION

It should be noted at the outset that Act 250 attempts to address a vast number of environmental issues, many of which are quite complicated. Consequently, the extent to which Act 250 is able to protect historic sites may be shackled by the complex and sometimes ambiguous provisions of the Act which define its scope. Act 250 is intended to apply only to certain developments and subdivisions and establishes by definition those developments and subdivisions for which permits must be obtained. The Act provides several definitions of development in part as follows:

“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 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.⁷

Thus, there are numerous elements to the definition of development, and the absence of any one of these elements may result in the inapplicability of Act 250.

A. Ten Acre Requirement

Perhaps the most significant jurisdictional limitation facing those who would seek to use Act 250 to protect historic sites is the requirement that improvements must involve more than ten acres in order to satisfy the definition of "development." The ten acre standard appears to have been an arbitrary one adopted as a means of designating projects which, because of their small size, do not have a substantial impact on values protected by Act 250. Quite simply, this rationale is incorrect when applied to projects that involve historic sites. Such sites are frequently located on parcels of land smaller than ten acres,⁸ particularly in cities or town centers. In such a case, the size of the development project has little or no bearing on the potential for damage to these historic sites. The harshness of this situation is eased somewhat by the fact that separate parcels of land may be combined in order to satisfy the ten acre requirement. These standards for combining parcels are discussed in the following section.

B. Involved Land

What parcels of land should be included in the calculation of ten acres was the primary issue in *Committee to Save the Bishop's House, Inc. v. Medical Center Hospital*.⁹ At the time of the case, Medical Center Hospital owned one of two noncontiguous parcels of land and leased the other. The first parcel, on which the hospital's

⁷ VT. STAT. ANN. tit. 10, § 6001(3) (1984).

⁸ A survey of historic sites listed on the National Register of Historic Places in nine Vermont counties indicated that 80% of the sites were located on parcels of land smaller than ten acres. Of the remaining 20%, more than half were historic districts containing numerous buildings in town centers, most of which were on small parcels of land. Thus, 90% is a more accurate figure. Almost all of those sites located on parcels of land larger than ten acres were farms. There are approximately four thousand buildings in Vermont which are listed on the National Register of Historic Places. Buildings in historic districts are counted separately. There are approximately twenty-three thousand buildings which are currently listed on the Vermont Register of Historic Places, and the number is growing.

⁹ 137 Vt. 142, 400 A.2d 1015 (1979).

Mary Fletcher Unit was located, was 26.7 acres, and the second parcel, on which the DeGoesbriand Unit was located, was 5.9 acres. The Bishop's House was located on a 1.44 acre parcel of land adjoining the DeGoesbriand Unit parcel and was part of an historic district included in the National Register of Historic Places.¹⁰ The Hospital sought to demolish the Bishop's House in order to construct a parking lot, but an injunction against demolition was obtained from the Vermont Environmental Board. The Board ruled that Act 250 was applicable and that a permit was required for construction of the parking lot. Crucial to the Board's decision was the conclusion that the Mary Fletcher and DeGoesbriand Units were sufficiently inter-related to justify adding the 26.7 acre parcel to the 5.9 acre parcel and 1.44 acre parcel on which the parking lot was to be built.

The Vermont Supreme Court rejected Environmental Board Rule 2(F) which defined "involved land"¹¹ and stated:

¹⁰ The Bishop's House, a frame house in the Italianate Style, was constructed between 1850 and 1860 for John Sullivan Adams by the building firm of H. Roby and Brothers. From 1918 to 1977, the house was used as the residence of the Bishops of the Burlington Diocese. See, Bishop's House File, Special Collections, Bailey-Howe Library, University of Vermont, Burlington, Vt. The Bishop's House was listed as part of the University Green Historic District, University of Vermont Campus, Chittenden County, Vermont, effective April 14, 1975. 44 Fed. Reg. 7416, 7609 (1979).

¹¹ Environmental Board Rules are found at VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(F) (Oct. 9, 1973). At the time of the case, Rule 2(F) provided:

"Involved land" includes all land within a radius of five miles which is part of, closely related or contiguous to or will or may be affected by the development, and which is owned or controlled by a person including but not limited to, interests created by trusts, partnerships, corporations, contencancies, easements and contracts.

The Vermont Supreme Court rejected Rule 2(F) as contrary to legislative intent and stated that "[i]t was the Legislature's intent to involve the state in land use decisions in cases where a permanent mechanism exists for their review at the municipal level only where activity on a very major scale is planned." 137 Vt. at 151, 400 A.2d at 1020. The court concluded that a liberal construction of "involved land" would dilute the authority delegated to municipalities to regulate land use decisions by providing too frequent review at the state level. *Id.* at 152, 400 A.2d at 1020.

The court's concern for dual review at both the municipal and state levels seems to be an overriding one, and implicit in its decision is the suggestion that this matter should have been resolved at the local level. However, the court's emphasis that regulation at the local level should not be diluted by frequent review at the state level is misleading and troublesome.

Initially, Act 250 represents an acknowledgment that land use problems are regional issues and not just local issues. The state legislature attempted to define those situations where duplicate review was unnecessary by limiting the jurisdiction of Act 250 and by specifically allowing state or municipal permits to be used in lieu of evidence in order to satisfy the criteria in § 6086. See VT. STAT. ANN. tit. 10, § 6086(d) (1984). Both § 6001(3) and § 6082 demonstrate an intention on the part of the legislature to limit the jurisdiction of Act 250. However, these sections cannot be isolated in support of the court's position. They must be read in conjunction with other provisions of the Act, some of which clearly indicate that Act 250 was intended to cause review at both the state and municipal levels.

We conclude that land is involved within the meaning of 10 V.S.A. § 6001(3) only where it is incident to the use within the meaning of that section, or where it bears some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the value sought to be protected by Act 250 will be substantially increased by reason of that relationship.¹²

The court concluded that the land involved in actual construction, a 1.44 acre parcel, did not bear a sufficient relationship to the 26.7 acre parcel under this test and denied jurisdiction of Act 250. Although the court acknowledged that use of the parking lot by the Mary Fletcher Unit might occur, it noted that the lot's primary purpose would be to serve the DeGoesbriand Unit. The court hinted that the parcel might be "involved land" within the court's nascent definition but noted that the combined size of the lots would fall short of ten acres. Unfortunately, few clues were offered to explain the lack of relationship between the 26.7 acre parcel and the 1.44 acre parcel.

Certainly the court's two-part definition of "involved land" narrows the scope of Act 250. The court seems to state that it is the special relationship of separate parcels of land which must be the cause of a substantial increase in harm to values protected by Act 250. Assume, for example, that the case had involved a proposal to demolish an historic building situated on a three acre parcel in order to build a parking lot for a nearby complex of stores located on a ten acre parcel. Assume also that the stores were located in an old mill which had been restored and that the building scheduled for demolition had been part of the mill complex. Would the two parcels' common history sufficiently establish the special relationship needed to satisfy the court's test? We are left with little to guide us in evaluating the circumstances that might create such a special relationship, and the standard itself is somewhat vague. To further confuse the matter, the special relationship must be the cause of an increase in harm to a value protected by Act 250. In this example,

Also troublesome is the potential for expansion of the court's language indicating that the legislature intended to involve the state in land use decisions only where activity is on a very major scale. This seems to place more emphasis on the size of the project rather than the

¹² 137 Vt. at 153, 400 A.2d at 1021. Envtl. Bd. Rule 2(F) has been amended to conform to the court's definition, effective March 11, 1982.

would the loss of an historic building be a greater loss if that building is part of a complex of historic buildings? Again, few guidelines are provided to assist in the measurement of the harm created. This hypothetical serves to focus more clearly the new and complex standard that the special relationship of separate parcels be the cause of a substantial increase in the impact on a value protected by Act 250.

Thus, the jurisdiction of Act 250 is made contingent, at least in part, upon a showing that a protected value will suffer an increase in damage as the result of this special relationship. It is arguable that the proximity of the Mary Fletcher and DeGoesbriand Units to the historic district in which the Bishop's House was located created a special relationship between the three parcels and that this spatial relationship created a potential harm to the historic district that was greater than the loss of a single building, for example the intrusion of a parking lot and an increase in traffic. The appellee Committee made the argument that the demolition of the Bishop's House would have an adverse effect on the historic district. In view of this, it is ironic that the court stated these allegations to be irrelevant to the issue of jurisdiction when, under the court's standard, they seem to bear directly on the issue.¹³

Nevertheless, it is clear from the case that in the future it will be more difficult to invoke the jurisdiction of Act 250 when separate parcels of land must be used to meet the ten acre requirement. As a result, efforts to use Act 250 to protect isolated historic sites on small parcels of land will be fettered.

Separately, it should be noted that the definition of "involved land" changes when the project is part of a plan or larger undertaking. In that case, all land involved in the project is included.¹⁴

C. Commencement of Construction

Of particular importance to historic preservation is the issue of whether the demolition of a building constitutes the commencement of construction, thus establishing the need for a permit. Environmental Board Rule 2(C) provides:

¹³ 137 Vt. at 147, 400 A.2d at 1017-18. In their supreme court brief, appellee Committee raised the argument that construction of a parking lot would have an adverse effect on the historic district. However, they placed greater emphasis on the effect of the demolition of the Bishop's House. Under the court's test, perhaps it would be prudent to emphasize both arguments.

¹⁴ VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(F)(3) (Oct. 9, 1973).

"Commencement of construction" means the construction of the first improvement on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of right-of-way or in any way incidental to altering the land according to a plan or intention to improve or to divide land by sale, lease or otherwise transfer an interest in the land.¹⁵

Environmental Board Rule 2(D) adds:

"Construction of Improvements" means any activity which extends, modifies, or initiates any use of the land, other than that which is principally for the preparation of plans and specifications that may be required and necessary for making application for a permit, such as test-wells and pits, percolation tests, and line-of-sight clearing for surveys, provided that no significant alteration of the land and land cover will result [u]nless a District Environmental Commission or Board approves more extensive exploratory work.¹⁶

It would seem that, under these rules, when the demolition of a building is a necessary phase of an overall plan to improve the land, the demolition would qualify as commencement of construction. A different interpretation could produce the unfortunate result of allowing a developer to raze a building or clear land before applying for a permit, and in so doing irreparably damage values protected by Act 250. The Vermont Supreme Court has addressed this issue and stated: "[d]emolition does not constitute the construction of improvements unless it is the first step in a proven development project."¹⁷ Thus, crucial under both rules 2(C) and 2(D) and the case law which has developed is the existence of a definite plan for construction of an improvement. The absence of this element would certainly jeopardize the applicability of Act 250 when demolition of a building is contemplated.

Whether or not a plan or project is definite enough to bring demolition within the definition of construction appears to be a question

¹⁵ VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(C) (Oct. 9, 1973). The Environmental Board has interpreted this provision in Environmental Board Declaratory Ruling (hereinafter D.R.) No. 71 (Nov. 12, 1975) where they stated, "Construction of improvements means that there must be some physical change to the land, no matter how minimal, which initiates the development such as placement of stakes or clearing of brush." The D.R.s cited in this article are available at the Environmental Board's offices in the Vermont State Capital, Montpelier, Vermont.

¹⁶ VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(D) (Oct. 9, 1973). This rule was stricken as overbroad in *In re Agency of Admin.*, 141 Vt. 68, 444 A.2d 1349 (1982). The court reasoned that the definition would apply to any activity, a result not intended by Act 250. *Id.* at 92-93; 444 A.2d at 1361.

¹⁷ *In re Agency of Admin.*, 141 Vt. at 93, 444 A.2d at 1362.

of fact. In *In Re Agency of Administration*,¹⁸ the Vermont State Building Division sought to demolish an historic wood frame house in Montpelier. This house was part of the capitol complex historic district in Montpelier. The Environmental Board determined that the demolition was part of a proposed development plan referred to as the "Capitol Complex" and required a permit. The precise issue presented was whether, under Environmental Board Rule 2(A)(4),¹⁹ a sufficient plan or larger undertaking existed so as to justify the inclusion of other parcels of land as "involved land" and thus satisfy the ten acre jurisdictional requirement of Act 250. Based on the legislative history of Act 250, the Vermont Supreme Court concluded that development was activity which "achieved such finality of design that construction can be said to be ready to commence."²⁰ The court then interpreted "plan" to require the same degree of specificity and concreteness. The court then embarked on a lengthy review of the origins of the terms "Capitol Complex" and "Masterplan" as those terms were used to describe a study of the state government's office space requirements. Although the review traced a number of legislative proposals for land acquisition, these proposals failed to provide specific details for planned acquisition and lacked legislative approval and funding. These factors led the court to conclude that the evidence did not support the position that a definite project existed, and to state that the studies amounted to only proposals, which were insufficient to qualify as a plan.²¹ Since no plan existed, demolition of the house did not constitute "construction of improvements," and thus did not require a permit.

¹⁸ 141 Vt. 68, 72, 444 A.2d 1349 (1982).

¹⁹ Rule 2(A)(4) establishes a definition of development when improvements are made for state, county, or municipal purposes. It provides in part:

In the case where a State or Municipal project is to be completed in stages according to a plan, or it is evident under the circumstances that a project is incidental to or a part of a larger undertaking, all land involved in the entire project shall be included for the purposes of determining jurisdiction.

VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(A)(4) (Oct. 9, 1973). Presumably the definition of "plan" under Env'tl. Bd. Rule 2(A)(4) is interchangeable with "plan" as used under Rule 2(C).

²⁰ 141 Vt. at 79, 444 A.2d at 1354.

²¹ In a dissent, Justice Billings argued for a broader interpretation of Rule 2(A)(4), noting that the activity must be part of a large undertaking. *Id.* at 97, 444 A.2d at 1364. He concluded that the "Capitol Complex" was more than a study, and that several acquisitions, demolitions, and constructions in furtherance of the plan had occurred. *Id.* at 97-98, 444 A.2d at 1364. Perhaps his most convincing argument is that frequently private developers must reassess aspects of a construction project at different phases and that the more complex process of reassessment inherent in government projects should not be a deciding factor. *Id.* at 99-100, 444 A.2d at 1365.

It is difficult to predict the effect of this case on projects begun by private developers, who presumably do not face the numerous obstacles inherent in the political process. However, it is clear that courts will look very closely at the nature and status of the project when faced with this issue. It is also clear that Act 250 is not equipped to prevent demolition of an historic site when that demolition is not part of a development plan or larger undertaking, or when the demolition occurs prior to the formulation of such a plan. Moreover, the burden of proving the existence of such a plan may be an onerous one if the developer is subdolous.

D. Commercial Purposes

The jurisdiction of Act 250 is also contingent upon the requirement that the improvements must be for commercial or industrial purposes. Environmental Board Rule 2(L) defines "commercial purpose" as the term is used in § 6001(3) and provides that "'Commercial purpose' means the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value."²² Environmental Board Rule 2(M) adds:

"Commercial dwelling" means any building or structure or part thereof, including but not limited to hotels, motels, rooming houses, nursing homes, dormitories and other places for the accommodation of people, that is intended to be used and occupied for human habitation on a temporary or intermittent basis, in exchange for payment of a fee, contribution, donation or other object having value. The term does not include conventional residences, such as single family homes, duplexes, apartments, condominiums or vacation homes, occupied on a permanent or seasonal basis.²³

The language in rules 2(L) and 2(M) is broad and appears to contemplate a wide variety of institutions, including both non-profit and profit-making organizations. The Vermont Supreme Court has adopted this interpretation unequivocally, reasoning that Act 250 speaks to land use and not to the particular institutional activity associated with the land use.²⁴ This point is an important one con-

²² VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(L) (June 24, 1974).

²³ VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(M).

²⁴ *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 639, 481 A.2d 1274, 1276 (1984).

sidering the large number of historic properties owned by churches, hospitals, and universities.

Rule 2(M) makes clear the point that dwellings such as hotels and apartments will be excluded from Act 250 jurisdiction if fewer than ten units are involved or if constructed for forestry, logging, or farming purposes below the elevation of 2500 feet.

It should be noted briefly that additions or modifications to buildings used for commercial purposes might escape Act 250 jurisdiction if the additions themselves are not for commercial purposes. For example, the Environmental Board has ruled that a house addition to a motel complex was not for commercial purposes.²⁵ Furthermore, any additions or modifications must result in a substantial change to the existing building before a permit will be required.²⁶ For example, permits were not required for a restaurant renovation that did not increase in seating capacity,²⁷ and for office and garage additions to existing buildings.²⁸ Certainly, minor additions or modifications to historic buildings can have a substantial impact on their historic value. The Environmental Board has been understandably cautious in its review of modifications to existing buildings, particularly in its interpretation of the "substantial change" test. However, to provide Act 250 with the expansive jurisdiction necessary to reach this type of project might create administrative disorder. This problem is probably best approached through local land use control rather than through state control.

E. Municipal and State Projects

One issue which frequently arises in the context of municipal and state projects is that of determining the amount of land involved in order to satisfy the ten acre requirement. Section 6001(3) provides that "In computing the amount of the land involved, land shall be included which is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings."²⁹ It is not entirely clear whether this sentence modifies the sentence immediately pre-

²⁵ In D.R. 48 (Feb. 16, 1974) the Environmental Board ruled that a house addition to a motel complex was not for commercial purposes.

²⁶ See VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(A)(5) (Oct. 9, 1973). For example, in D.R. 10 (May 6, 1973), no permit was required for a restaurant renovation with no increase in seating capacity. In D.R. 36 (Oct. 31, 1973), no permit was required for office and garage additions to existing buildings.

²⁷ D.R. 10 (May 6, 1973).

²⁸ D.R. 36 (Oct. 31, 1973).

²⁹ VT. STAT. ANN. tit. 10, § 6001(3).

ceding it, which contains the definition of "development" for municipal and state purposes, or whether it applies to the term "involved land" as it is used throughout section 6001(3). Certainly the more logical explanation is that it applies only to municipal and state projects. This interpretation would provide a solution to the problem faced by municipalities as the result of their extensive land holdings. Highways and other non-incident land would not be included in calculating the ten acres, and permits would be required less frequently. The State Environmental Board has summarized the issue succinctly, declaring "Had the legislature not made this distinction, practically every state and municipal project would come under the jurisdiction of Act 250 because the amount of related land within a five mile radius that is owned or controlled by these political entities would be more than 10 acres."³⁰ Nevertheless, this ambiguity could be removed by proper draftsmanship.

Consequently, the jurisdiction of Act 250 over municipal and state projects rests upon a two-part analysis. First, the land used to satisfy the ten acre requirement must be incident to the project use, pursuant to Section 6001(3) and Environmental Board Rule 2(A)(4). Second, the special relationship-substantial impact test established in *Committee to Save the Bishop's House, Inc. v. Medical Center Hospital* presumably must be met.³¹ While the first test is ambiguous, the second test appears broad enough to encompass the first. Consequently, historic buildings within the path of municipal or state projects are no less vulnerable to the quirks of Act 250 jurisdiction than are those in the path of private development.

The absence of Act 250 jurisdiction over certain state projects, however, does not affect the responsibility of heads of state agencies to consult directly with the Vermont Division for Historic Preservation when state projects have an adverse effect on historic sites.³² Moreover, to the extent that federal funding is involved in any projects, state or otherwise, it will be necessary for the heads of the appropriate federal agencies to afford the National Advisory Council on Historic Preservation opportunity to comment on the effect of

³⁰ D.R. 42 (Jan. 29, 1979). Envtl. Bd. Rule 2(A)(4), is consistent with this interpretation. See *supra* note 19. However, in *Committee to Save the Bishop's House Inc. v. Medical Center Hospital*, 137 Vt. 142, 400 A.2d 1015 (1979), the court seemed to rely on these examples of "involved land" in its search for a definition of that term. They failed to address the inherent ambiguity in the Act, and the effect of their opinion is unclear.

³¹ 137 Vt. 142, 400 A.2d 1015 (1979). For a discussion of this test, see *supra* notes 8-13 and accompanying text.

³² VT. STAT. ANN. tit. 22, §§ 742-743 (1978 & Supp. 1986).

the project on any historic sites.³³ In addition, the appropriate agency official is also required to consult the state historic preservation officer to determine what historic sites are known to be within the area of the undertaking.³⁴

F. Subdivisions

Act 250 also requires permits for certain subdivisions and defines the types of subdivisions for which permits must be obtained:

“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.³⁵

Section 6001(11) adds that “Lot” means “any undivided interest in land, whether freehold or leasehold, including but not limited to interests created by trusts, partnerships, corporations, cotenancies and contracts.”³⁶ By definition, a subdivision does not fall within Act 250 jurisdiction unless there are ten or more lots, and to the extent subdivisions of fewer than ten lots have an adverse impact on historic sites, the problem must be addressed at the local level.³⁷

III. CRITERIA FOR HISTORIC SITES

According to the terms of section 6086(a)(8), the environmental board or a district commission may not issue a permit for a proposed development or subdivision if the proposal will have an undue ad-

³³ 16 U.S.C. § 470(f) (1982).

³⁴ 36 C.F.R. § 800.4(a)(1) (1986).

³⁵ VT. STAT. ANN. tit. 10, § 6001(19) (1984).

³⁶ VT. STAT. ANN. tit. 10, § 6001(11) (1984) The definition of “lot” under this section is ambiguous. The term “undivided interest” has meaning only when it is used to describe the separate ownership of a parcel of land by more than one person, each owner with the right to possess and use the whole. The need for Act 250 to deal with undivided interests is not questioned. However, as Section 6001(11) is drafted, it fails to apply to anything but undivided interests. A possible definition is: “Lot means any interest, undivided or otherwise, in land” Env'tl. Bd. Rule 2(J) contains a similar ambiguous definition. VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(J) (Oct. 9, 1973).

³⁷ As originally enacted, Section 6001(11) provided that areas of land larger than ten acres were not considered to be lots. Thus, if all but nine of the lots were larger than ten acres, a subdivision did not exist, and Act 250 did not apply. This lacuna was closed by an amendment enacted in 1983.

verse effect on historic sites.³⁸ An initial question, then, concerns the definition of historic site. Section 6001(9) defines an historic site as one which is listed on the National or State Register of Historic Places, or one established as historically significant by the Vermont Advisory Council on Historic Preservation.³⁹ Neither Act 250 nor the Vermont Historic Preservation Act⁴⁰ furnishes a precise definition of the term "historically significant." In order to support the conclusion that a site is historically significant, the Advisory Committee would presumably rely on the criteria used in determining eligibility for the National or State Register of Historic places.⁴¹ Any uncertainty about the authority to rely on these criteria could be resolved by expanding the definition in section 6001(9) to include those sites that are eligible for inclusion in the National Historic Preservation Act, which requires the heads of federal agencies to consider the effects of federal or federally assisted projects on sites included in or eligible for inclusion in the National Register. To the extent the criteria established pursuant to the National Historic Preservation Act are insufficient to protect sites that are ineligible for the National or State Registers, the broad language of section 6001(9) might be used to provide an additional measure of protection.

A second point is the fact that the burden of proving that the issuance of a development or subdivision permit will have no undue adverse effect on historic sites is on the party opposing the applicant.⁴² Consequently, historic preservation groups which have cleared the jurisdiction and standing hurdles must be prepared to overcome the statutory presumption in favor of the applicant.

The lack of any objective standards by which the district commissioners and the environmental board are able to judge whether a proposed development or subdivision has an undue adverse effect on historic sites is, however, one of the most critical areas of concern in judging Act 250's effectiveness. This problem is obscured in cases such as *Committee to Save the Bishop's House, Inc. v. Medical*

³⁸ VT. STAT. ANN. tit. 10, § 6086(a)(8) (1984).

³⁹ VT. STAT. ANN. tit. 10, § 6001(9) (1984).

⁴⁰ VT. STAT. ANN. tit. 22, §§ 701-791 (1978 & Supp. 1986). The definitions under this act provide that "'Historic Property' or 'resource' means any building, structure, object, district, area or site that is significant in the history, architecture, archeology, or culture of this state, its communities or the nation." *Id.* § 701(6).

⁴¹ VT. STAT. ANN. tit. 22, § 723(a)(2) (Supp. 1986) (Duties and powers of division) provides: "(a) The division shall . . . (2) Adopt standards for the listing of an historic property on the state register consistent with the standards of the National Register and the relevant federal standards of preservation and care."

⁴² VT. STAT. ANN. tit. 10, § 6043 (repealed 1983, No. 114 (Adj. Sess.) § 5).

*Center Hospital*⁴³ and *In re Agency of Administration*,⁴⁴ where few would argue that demolition does not have an undue adverse effect on an historic building. However, it surfaces when disputes arise concerning the compatibility of proposed developments with existing historic sites or districts. These disputes strain the ability of the subjective standard "undue adverse effect" to withstand attack without objective standards to serve as reinforcements. Moreover, in any context the term "undue" is a vague and somewhat strict standard, and it has been suggested that the term "unavoidable" might be a more appropriate standard.⁴⁵

The danger which the absence of objective standards poses is that permit applications will be treated in an inconsistent manner by district commissioners when issues involving historic sites are involved. For example, what, if any, restrictions should be placed on building width and height, facade rhythm and proportions, doors, porches, windows, signs, roof styles and direction, or even building color in order to improve compatibility of proposed buildings with nearby historic buildings or districts. The inconsistent application of such restrictions could encourage constitutional challenge to section 6086(8). This challenge would probably have as a foundation argument that, absent proper guidelines, section 6086(8) is an improper delegation of legislative authority.⁴⁶ Crucial to this argument is the failure of the Vermont Legislature to adopt the state land use plan required by Act 250.⁴⁷ The state plan would have established broad categories for the proper use of land and would have guided the coordinated and efficient development of the state. Among other things, the state plan was to have encouraged local participation through regional and town plans, and through zoning and subdivision regulations.⁴⁸ Without the consistent and uniform guidelines intended for this state plan, district commissioners face great uncer-

⁴³ 137 Vt. 142, 400 A.2d 1015 (1979).

⁴⁴ 141 Vt. 68, 444 A.2d 1349 (1982).

⁴⁵ In a March, 1983 interview with Mr. Eric Gilbertson, Director of the Vermont Division for Historic Preservation, Mr. Gilbertson made the suggestion that the term "unavoidable" would be a more appropriate standard and would be in conformity with the National Advisory Council on Historic Preservation concerning methods of avoiding, mitigating, or minimizing adverse effects caused by agency projects. See 36 C.F.R. § 800.4 (1986).

⁴⁶ For an analysis of possible constitutional arguments and additional citations concerning § 6086(a)(8) of Act 250, see Note, *Leaving the Scene: Aesthetic Considerations in Act 250*, 4 VT. L. REV. 163 (1979).

⁴⁷ In 1983, the legislature repealed former section 6043, which required adoption of a state land use plan. See VT. STAT. ANN. tit. 10, § 6043 (1984).

⁴⁸ VT. STAT. ANN. tit. 10, § 6088 (1984).

tainty in applying the criteria of section 6086. While this may translate into an improper delegation of legislative authority, there are several arguments which can be used to answer such a challenge.

The best argument against the improper delegation challenge is based on the authority that the Vermont Advisory Council on Historic Preservation has been given to participate in the review of permit applications. Section 742(a)(8) of the Vermont Historic Preservation Act provides that "(a) The council shall . . . Advise on any participation in the review of federal, federally assisted, and federally licensed undertakings that may affect historic properties and sites; and approve any participation in the review of non-federal undertakings, but not limited to proceedings under the state land use and development act."⁴⁹ As a result, the district commissioners and environmental board have a well qualified resource to which they can turn for advice on matters involving historic buildings and districts, thus reducing the chance of inconsistent application of the permit process. While the adoption of a state land use plan appears unlikely, perhaps a politically more palatable solution is to amend section 723 of the Vermont Historic Preservation Act and vest the Division for Historic Preservation with the authority to establish compatibility standards and criteria for proposed development.⁵⁰ The final decision would be left to the district commissioners or the environmental board, but uniform standards would be adopted.

Second, where historic district zoning, formerly referred to as design control districts in Vermont, does exist, the design review criteria should be used by the district commissioners to aid in the process of considering the compatibility of new development. The absence of local land use planning in Vermont is a serious handicap, particularly so because of the current absence of uniform standards at the state level. The Village of Woodstock is an excellent example of a municipality in Vermont which has adopted a zoning ordinance which incorporates compatibility standards.⁵¹

⁴⁹ VT. STAT. ANN. tit. 22, § 742(a)(8) (Supp. 1986).

⁵⁰ VT. STAT. ANN. tit. 22, § 723(6), (1978) (Duties and powers of division) could be used as a model for this proposal; it provides that "(a) The division shall, and where required by section 742 of this title, with the approval of the advisory council on historic preservation (b) Establish standards and criteria for the acquisition of historic properties and for the preservation, restoration, maintenance and operation of properties under the control of the division." *Id.*

⁵¹ Woodstock Zoning Ordinance, Article IV, § 4.104 (Criteria for Approval). The ordinance includes design standards which address a number of issues including height, setback, proportion, pattern, materials, architectural features, continuity, direction of front facade, and roof shape.

Third, the Capability and Development Plan has defined the ambiguous "undue adverse effect" standard by providing that development near historic sites should not significantly reduce the value of that site. While the Capability and Development Plan may not be used as criteria, it may be used to help interpret the criteria in section 6086.⁵² This may be a difficult path to take, however, when the valuation of historic properties is troublesome.

Finally, the fact that permits may be issued subject to conditions is a tool which should not be overlooked.⁵³ To some extent, it may be necessary for district commissioners to recognize the weakness inherent in this section of Act 250 and to obtain concessions through the process of negotiation whenever possible. While this alternative does not encourage uniform application of standards, it nevertheless provides a forum for negotiation where compromise can be reached in lieu of expensive litigation.

To reiterate, Act 250's ability to protect historic properties could be improved by more clearly defining the term "historic site," by changing the "undue adverse effect" standard to an "unavoidable adverse effect" standard, and by transferring the burden of proof of adverse effect onto the permit applicant. The weakness created by the absence of criteria needed to measure adverse effect is a serious one. If a legislative remedy is not possible, then district commissioners should utilize the resources provided by the Vermont Division for Historic Preservation, rely on local plans and historic district zoning when they exist, apply the Capability and Development Plan when possible, and resort to negotiated permit conditions if all else fails.

IV. STANDING TO PARTICIPATE IN THE PERMIT PROCESS

A vital test of Act 250's effectiveness as a means of protecting Vermont's historic properties is the extent to which the Act is accessible to parties who desire to protect these properties. Unfortunately, the rules governing standing are complex, and special interest organizations and adjoining landowners have limited access to judicial review, particularly before the Vermont Supreme Court. Consequently, the Vermont Division for Historic Preservation must be prepared to intervene in appropriate cases.

⁵² VT. STAT. ANN. tit. 10, § 6086(a)(9) (1984); *In re Pyramid Co.*, No. 559-78 CnM (Chittenden Super. Ct. Oct. 14, 1980).

⁵³ VT. STAT. ANN. tit. 10, § 6086(c) (1984).

The initial application for a permit is heard before a district commission. Section 6085(c) establishes the proper parties at this hearing and provides in part that "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."⁵⁴ Environmental Board Rule 14(A) identifies statutory parties entitled to party status to include affected state agencies, municipalities, municipal and regional planning commissions, and other appropriate parties who receive notice.⁵⁵ In addition, Rule 14(B) provides:

Permitted parties. The Board or a district commission may allow as parties to a proceeding individuals or groups not otherwise accorded party status by statute upon written or oral petition if it finds that the petitioner has adequately demonstrated: (1) That a proposed development or subdivision may affect his interest under any of the provisions of section 6086(a); or (2) That his participation will materially assist the board or commission by providing testimony, cross-examining witnesses, and/or offering other evidence relevant to the provisions of section 6086(a).⁵⁶

Crucial to the right to party status under rule 14(B) is a showing that the development or subdivision would affect an interest protected by the criteria in section 6086(a), or that the participation would materially assist the board or commission. Under this provision, it appears that the district commissioners are granted wide discretion in conferring party status at the permit application hearing. Hopefully, organizations such as the Committee to Save the Bishop's House, Inc. would be granted party status.

However, access to administrative review of the district commission's decision by the state environmental board is more complicated for adjoining property owners and Rule 14(B) parties. As originally enacted, section 6089(a) provided in part:

[A]n appeal from the district commission shall be to the board.
An appeal under this section may be removed by the applicant

⁵⁴ VT. STAT. ANN. tit. 10, § 6085(c)(1984). Parties to whom notice must be sent under Act 250 are: (1) The municipality and municipal and regional planning commission where the land is located; (2) adjacent Vermont municipalities or commissions if the land is located on a municipal boundary; (3) state agencies directly affected; and (4) other municipalities, state agencies, or persons the district deems appropriate. *Id.* § 6084. Pursuant to Env'tl. Bd. Rule 14(A)(4), parties who receive notice marked "For Information Only" are not accorded party status.

⁵⁵ Env'tl. Bd. Rule 14(a) (copies available at the Vt. Env'tl. Bd., Montpelier, Vt.).

⁵⁶ Env'tl. Bd. Rule 14(b) (copies available at the Vt. Env'tl. Bd., Montpelier, Vt.).

to the superior court of the county in which any real estate of the applicant . . . is located.⁵⁷

A 1985 amendment to section 6089, however, eliminated the right of removal to superior court from the environmental board. Section 6085(c) clarifies the parties who are entitled to appeal:

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)⁵⁸

Environmental Board Rule 40(A) provides: "Any party aggrieved by an adverse determination by a district commission may appeal to the board . . . , and will be given a de novo hearing on findings of the commission."⁵⁹

An apparent discrepancy exists between section 6085(c) and rule 40(A). Under 6085(c), adjoining landowners are limited to review of the issue of the effect of the development on the adjoining property. Review is not granted to rule 14(B) parties. On the other hand, Rule 40(A) grants review to all aggrieved parties and no special limitation is placed on adjoining property owners. The resolution of this discrepancy can be found in two cases which have dealt with party status under Act 250.

The first of these cases, *In re Preseault*,⁶⁰ dealt with an applicant's appeal to the environmental board and request for a de novo hearing after a district commission denied the applicant's permit request. Adjoining landowners who participated at the district commission hearings were denied the right to participate before the environmental board. At the time of the case, section 6085(c) made no provision for appeal by adjoining landowners. The Vermont Supreme Court held that the adjoining landowners had the right to appear as parties before the environmental board, reasoning that a de novo proceeding is one in which all the evidence is considered without reference to an earlier proceeding and is one which contemplates participation by the original parties.⁶¹

⁵⁷ VT. STAT. ANN. tit. 10, § 6089(a) (Supp. 1986).

⁵⁸ VT. STAT. ANN. tit. 10, § 6085(c) (1984).

⁵⁹ Env'tl. Bd. Rule 40(A) (copies available at the Vt. Env'tl. Bd., Montpelier, Vt.).

⁶⁰ 130 Vt. 343, 292 A.2d 832 (1972).

⁶¹ *Id.* at 348-49, 292 A.2d at 835-36.

In *In Re George F. Adams Co.*,⁶² this rule was probably extended to rule 14(B) parties admitted at the discretion of a district commission and to both adjoining landowners and rule 14(B) parties who formerly sought de novo appeal before a superior court.⁶³ The Vermont Supreme Court distinguished between appeals from the district commissions to the environmental board or from the district commissions to superior court for purposes of a de novo hearing, and appeals from either the environmental board or superior court to the Vermont Supreme Court. Although the issue before the court involved only the appeal of rule 14(B) parties to the Vermont Supreme Court, the opinion attempted to clarify the matter by pointing out that appeals to either the environmental board or superior court were factfinding proceedings and hence were proper forums for all parties. The 1985 amendment to section 6089 now confines this opinion to appeals before the environmental board.

Subsequent to *Preseault*, section 6085(c) was amended to its present form to restrict the scope of review granted to adjoining landowners.⁶⁴ Rule 40(A) reflects the guidelines set by these cases, apparently in disregard of the limitation on adjoining landowners imposed by the statutory amendment. Consequently, access at the district commission and environmental board levels is available to a wide range of parties. Unquestionably, the vital bridge to participation at this level by historic preservation groups is rule 14(B).

Participation by such groups and by adjoining landowners beyond this level, however, has been limited. Section 6089(b), as amended in 1985, provides: "An appeal from a decision of the board under subsection (a) shall be to the supreme court by a party as set forth in section 6085(c) of this title."⁶⁵ The first case to interpret section 6085(c) subsequent to its amendment in 1973 was *In Re Wildlife*

⁶² 134 Vt. 172, 174, 353 A.2d 576, 577 (1976)(dicta).

⁶³ It should be noted that this issue was not directly before the Vermont Supreme Court and the pertinent language should be considered as dicta only. *See id.* The precise holding of the case is that under Act 250, Rule 14(B) parties (then Rule 12(C)) do not have the right to appeal to the supreme court from the environmental board or superior court. *Id.* at 174-75, 353 A.2d at 577. The case does not consider possible rights under the Vermont Administrative Procedures Act.

⁶⁴ The 1973 amendment added the language, "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." VT. STAT. ANN. tit. 10, § 6085(c) (1984).

⁶⁵ VT. STAT. ANN. tit. 10, § 6089(b) (Supp. 1986). Env'tl. Bd. Rule 40(E) provides: "Any party aggrieved by an adverse determination of the board may appeal to the Vermont Supreme Court under the provisions of Chapter 102 of Title 12 V.S.A."

*Wonderland, Inc.*⁶⁶ In that case, the supreme court held that section 6085(c), as amended, modified the party status granted by *Preseault* to adjoining landowners for de novo appeal before the environmental board. The court concluded that adjoining landowners are considered to be participators, not parties, and are not entitled to appeal to the supreme court under section 6089(b).⁶⁷

Then, in *In Re George F. Adams & Co.*,⁶⁸ a party who participated in hearings before a district commission or the environmental board pursuant to Rule 14(B) was denied standing to appeal to the Vermont Supreme Court. The court interpreted section 6085(c) narrowly to permit appeal to the supreme court only for the applicant, a state agency, regional and municipal planning commissions, and municipalities receiving notice.

These two cases make it clear that Act 250 alone does not provide access to appellate review at the supreme court level for any parties other than those identified in section 6085(c). To the extent that adjoining property owners and rule 14(B) parties desire to seek review before the Vermont Supreme Court, they must rely on the Vermont Administrative Procedure Act (APA) to do so.⁶⁹ Section 6002 of Act 250 provides that the Vermont APA applies to procedures under Act 250 unless the latter specifically states otherwise.⁷⁰

V. ACT 250 AS A FORUM FOR HISTORIC PRESERVATION

It is unfortunate that the two major cases, *Committee to Save the Bishop's House, Inc. v. Medical Center Hospital*⁷¹ and *In re Agency*

⁶⁶ 133 Vt. 507, 346 A.2d 645 (1975).

⁶⁷ *Id.* at 518-19, 346 A.2d at 652.

⁶⁸ 134 Vt. 172, 353 A.2d 576 (1976).

⁶⁹ VT. STAT. ANN. tit. 3, §§ 801-849 (1985).

⁷⁰ VT. STAT. ANN. tit. 10, § 6002 (1984). Section 815(a) of the Vermont APA provides "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in any contested case may appeal that decision to the supreme court . . ." VT. STAT. ANN. tit. 3, § 815(a) (1985). Thus, in order to invoke the Vermont APA, an adjoining landowner or Rule 14(B) party must exhaust all administrative remedies and be an aggrieved party. In *In Re Great E. Bldg. Co.*, 132 Vt. 610, 613-14, 326 A.2d 152, 154 (1974), the Vermont Supreme Court acknowledged the similarity between the Vermont APA and Section 10 of the Federal Administrative Procedure Act, and the court seemed to adopt the standards established by federal cases which have interpreted Section 10 of the Federal APA. For a thorough analysis of the issues concerning applicability of the Vermont APA to Act 250 and other issues pertaining to party status, including improper delegation of legislative authority, See Note, *Party Status and Standing Under Vermont's Land Use and Development Law (Act 250)*, 2 VT. L. REV. 163 (1977).

⁷¹ 137 Vt. 142, 400 A.2d 1015 (1979). For a discussion of *Bishop's House*, see *supra* notes 8-13 and accompanying text.

of *Administration*,⁷² which defined the perimeters of Act 250 jurisdiction, involved historic properties. Perhaps it is unfair to evaluate Act 250's effectiveness in terms of historic preservation on these cases alone. Both cases leave one with the impression that the Vermont Supreme Court is concerned with the extent to which Act 250 infringes upon private property interests that might be more properly controlled at the local level. In short, these cases should be evaluated in terms of the effectiveness of a land use permit system at the state level, not just in terms of historic preservation. In spite of these setbacks, Act 250 continues to provide a major asset to historic preservation by establishing a forum in which the concern for historic sites can be effectively expressed.

For example, a land use permit was issued for the renovation of the American Woolen Company Mill in Winooski into 147 apartments and additional office, commercial, and recreational space. A finding was made that no adverse effect on the historic building would occur because only minor exterior changes would be made, and proper exterior treatment techniques would be used.⁷³ In such cases, the developers have the opportunity to work closely with the Vermont Division for Historic Preservation, and design and preservation issues can be discussed and resolved.

In St. Albans, a developer proposed to construct a shopping center on land owned by the Central Vermont Railway known as the "Switchyard." The site at one time contained twelve buildings listed on the National Register of Historic Places.⁷⁴ A land use permit was issued by the District VI Commission allowing the shopping center plan to proceed on the conditions that an appraisal of potential adaptive use be made, that design plans for restoration be drafted, and that preparation work not jeopardize the historic value of the site. The permit also authorized the demolition of a locomotive fabrication and repair shop. Subsequent to the demolition of that building, a request was made by the developer to amend the permit to allow demolition of a two story tower which had adjoined the locomotive repair shop. This request was denied by the District Commission, but the Environmental Board overruled the Commission and amended the permit to authorize demolition. The Board rea-

⁷² 141 Vt. 68, 444 A.2d 1349 (1982). For a discussion of *Agency of Admin.*, see *supra* notes 17-20 and accompanying text.

⁷³ Land Use Permit 4C0418, State Environmental Board Office, Montpelier, Vt.

⁷⁴ Central Vermont Railroad Headquarters, Franklin County, Vermont; listed effective Jan. 21, 1974. 44 Fed. Reg. 7416, 7609 (1979).

soned that while demolition would have an adverse effect, it was not an undue adverse effect because without the locomotive shop the tower had no independent historic significance.⁷⁵ While it is unfortunate that demolition for the repair shop, a decision opposed by the Division for Historic Preservation, occurred and led to the demolition of the tower, the permit process did provide an opportunity to thoroughly review the impact of the development on the historic sites. In addition, some of the other buildings were restored.

In 1970, the Vermont Department of Forests and Parks purchased property to be used in the development of Knight's Point State Park, and an application for a land use permit required by Act 250 was made. The Knight's Tavern, a building constructed in 1845 in the Greek Revival Style, was located on the property, and a permit was issued subject to the condition that the building's exterior integrity be maintained. A wing of the building was subsequently demolished in violation of the permit, and the environmental board ordered its reconstruction.⁷⁶

Other cases have made it clear that state agencies, too, must comply with the requirements of Act 250. In 1973, the Vermont Agency of Transportation was held to be within the purview of Act 250 jurisdiction. The Agency had sought to construct an access road to Brookfield, a small village with an unpaved main street, now an historic district listed on the National Register of Historic Places.⁷⁷

It is clear from these cases that Act 250 is a medium for thoughtful analysis of the impact of development on historic sites. The Vermont Division for Historic Preservation has been capable in its advisory capacity when development has threatened Vermont's historic properties. Although some buildings have been lost, the impact of the development has been clearly assessed, the buildings themselves documented, and sincere efforts made at retaining the historic integrity of the building. This is one of the strengths of Act 250.

VI. PERMITS FOR ADAPTIVE USE AND RESTORATION

A complete evaluation of Act 250 from the perspective of historic preservation performance must discuss the fact that attempts to save

⁷⁵ Land Use Permit 6F0192, and Land Use Permit Amendments 6F0192-1 and 6F0192-1-EB, State Environmental Board Office, Montpelier, Vt.

⁷⁶ D.R. 77, Sept. 8, 1976; Land Use Permit 6G0062, State Environmental Board Office, Montpelier, Vt.

⁷⁷ D.R. 21, July 25, 1973. Brookfield Village Historic District, Orange County, Vermont; listed effective March 24, 1978; 44 Fed. Reg. 7609, 7614 (1979).

historic buildings may trigger Act 250 jurisdiction, thus requiring a permit. Acquisition of a permit is contingent upon satisfactory compliance with all the criteria enumerated in section 6086(a)(1) to (10).⁷⁸ This circumstance is most likely to occur when historic buildings are adapted to apartment or condominium use. Such a project will be considered to be a development if ten or more units are involved.⁷⁹ Similarly, if the project is large, involves ten or more acres, and is for commercial or industrial purposes, a permit will also be required. It should be noted that the ten acre requirement is reduced to one acre in municipalities without zoning and subdivision laws.

Furthermore, permits will be required for substantial changes to existing buildings which at the time of their construction would have been subject to Act 250 jurisdiction. Environmental Board Rule 2(A)(5) provides the following definition of development: "Any construction of improvements which will make a substantial change or addition to or expansion of an existing development over which the Board has jurisdiction or in an existing development that would have been subject to Board jurisdiction"⁸⁰

The "substantial change" standard is a broad one, but the factor which seems most critical is the potential impact of the change on the protected criteria.⁸¹ Certainly, any major work on historic buildings has an impact on the historic value of that building. An interesting and unanswered question is whether interior adaptive uses have a less significant impact than do exterior modifications. In other words, if the exterior of an historic building is left unchanged, but massive interior modifications are made, has there been a substantial change? Usually, concern for exterior changes is paramount, and the interior can be modified to meet adaptive reuse. However, on occasion the interior of a building can be historically significant, and it is reassuring that the language here may be broad enough to address this need.

VII. ACT 250 IN A NATIONAL CONTEXT

Vermont is one of only a few states to have enacted legislation controlling land use and development at the state level. Each of the

⁷⁸ VT. STAT. ANN. tit. 10, § 6086(a) (1984 & Supp. 1986).

⁷⁹ VT. STAT. ANN. tit 10, § 6001(3) (1984); see *supra* text accompanying note 7.

⁸⁰ VT. ADMIN. PROC. COMP. ENVTL. BD. R. 2(a)(5) (Oct. 9, 1973).

⁸¹ D.R. 85, Nov. 8, 1977. The District Commission stated:

In short, the Board in weighing substantiality looks not only at the size of the existing land use and the incremental size of the change, but at the overall environment in which the use takes place, and the potential for impact under the criteria set forth in detail under section 6086(a). *Id.*

several states has chosen a different approach to land use control, but each state incorporates into their legislation, to some degree, the capacity to protect historic properties.

There would be little value to placing this narrow evaluation of a single function of Act 250 into a national context for the sole purpose of measuring Act 250's ability to protect historic properties against the different approaches conceived in other states. A state's decision to implement a particular form of land use control will hinge on concerns much broader than just historic preservation. Moreover, political, social, and geographic peculiarities within a state may render some of the options impractical.

Instead, there is merit in briefly explaining how other states have chosen to approach the matter of land use control at the state level and how that legislation has included means of protecting historic properties. Within this context, then, it would also be useful to reiterate how Vermont's particular *style* of legislation can be more carefully crafted to protect historic sites.

In 1961, Hawaii became the first state to enact statewide zoning.⁸² A state land use commission was created, and four categories of land were established: urban, rural, agricultural, and conservation.⁸³ A 1983 amendment added a category for geothermal resource sub-zones.⁸⁴ Conservation areas included scenic and historic sites. Amendments to district boundaries and special permits for unusual uses within districts can be obtained by petition to the land use commission.⁸⁵ Although administration of zoning regulations within the districts occurs at the county level pursuant to a comprehensive statewide land use plan, conservation districts were placed under the supervision of the department of land and natural resources.⁸⁶ Thus, in Hawaii historic properties are protected through a state zoning mechanism.

Oregon, in contrast, created a state Land Conservation and Development Commission and vested it with the authority to coordinate a statewide system of comprehensive land use plans.⁸⁷ To this end, the commission was authorized to prepare goals intended to govern land use decisions, and each city and county was required to prepare a plan conforming to these goals.⁸⁸ Goal "five" included protection of

⁸² HAW. REV. STAT. §§ 205-1 to 205-37 (1985).

⁸³ *Id.* §§ 205-1 & 205-2.

⁸⁴ HAW. REV. STAT. § 205-5.1 (1985).

⁸⁵ *Id.* §§ 205-3, 205-4, & 205-6.

⁸⁶ *Id.* § 205-5(a).

⁸⁷ OR. REV. STAT. §§ 197.30-.45 (1985).

⁸⁸ *Id.* at §§ 197.040(2)(a) & .175(2)(a).

scenic and historic areas. The land use commission was also given the responsibility for hearing appeals from the land use decisions at the city and county level. This responsibility was later transferred to the Oregon Land Use Board of Appeals.⁸⁹ The primary focus of Oregon's legislation is a uniform statewide system of planning administered at the county level. Protection of historic properties is accomplished through local zoning ordinances.

Neither Oregon nor Hawaii relies on the permit system which is the backbone of Act 250. On the other hand, Vermont has failed to enact a comprehensive state land use plan similar to that used in Oregon. Florida offers a slightly different approach and utilizes the permit system in a somewhat restricted manner. The Florida Environment Land and Water Management Act of 1972 attempts to regulate development within areas of critical state concern by requiring permits for major development.⁹⁰ Areas of critical state concern may be designated for a variety of reasons including important historic or archeological sites.⁹¹ Florida and Vermont share a similar struggle at defining the type of development to include within the permit process, but Florida has taken a significant step toward protecting historic properties by including the demolition of a structure in the definition of development.⁹² However, Florida's legislation is aimed at isolating specific areas of major concern rather than incorporating the entire state into a system of land use control and selecting certain types of development which need to be reviewed.

Although Act 250 resembles in part some of the legislation which exists in Oregon and Florida, it is distinct in its inclusion of the entire state within a permit review process and its division of the state into administrative regions. Other states considering a similar approach will face many of the issues with which Vermont is currently struggling. Issues such as jurisdiction (determining what type of development to place within the review process), criteria (standards by which impact of development is measured), or standing (deciding whom to include in the administrative or judicial process), are issues which any state considering similar legislation must address. The most difficult task in resolving these issues is creating ways to reach the variety of problems which converge in land use and development. For example, Vermont chose to include certain

⁸⁹ *Id.* at § 197.805-.850.

⁹⁰ FLA. STAT. ANN. §§ 380.012-.12 (West 1974 & Supp. 1986).

⁹¹ *Id.* § 380.05(2)(b) (West Supp. 1986).

⁹² *Id.* § 380.04(2)(e) (West 1974).

development within the permit process based on the acreage of land the development affected. While this may be justified as an effective way to protect some criteria—soil erosion for instance—it was not an effective device for protecting historic properties. Consideration of flaws in Act 250 such as this, and comparison of Act 250 with land use statutes in other states, can provide useful guidelines for other states interested in historic preservation.

VIII. CONCLUSIONS AND RECOMMENDATIONS

Act 250 is not particularly well suited for the protection of isolated historic buildings from demolition or damaging modification by private owners, municipalities, or state agencies. The ten acre requirement will often place individual buildings on city or town lots outside the jurisdiction of Act 250, and at best application of the Act will be inconsistent. Moreover, it will be difficult to use separate parcels of land in order to meet this requirement. Furthermore, the extent to which land use legislation should encumber private property rights is a difficult issue, and the Vermont Supreme Court has tended to restrict rather than enlarge the jurisdiction of Act 250.

If Act 250 is to be consistently effective in protecting historic sites, its jurisdiction must be expanded by legislation. Perhaps this can be accomplished with facility by eliminating or reducing the ten acre requirement when historic sites are involved in development. Such an amendment would seem justified because small scale projects have a proportionally greater impact on historic sites than do many large scale projects on other values protected by Act 250. Moreover, there is precedent for such an amendment: condominium and apartment project developments containing ten or more units are "developments" for Act 250, but are not subject to the ten acre requirement.⁹³ Certainly the logic to this provision is the recognition that some small scale projects have a significant impact on values that should be protected. If legislative amendment is not possible, the other alternative is more vigorous protection of historic sites through municipal land use control.

Legislative amendment will also be necessary to correct the problem that demolition of an historic building alone, without a plan for further development, does not trigger Act 250 jurisdiction. Perhaps the easiest solution would be to make demolition *prima facie* evidence of the existence of a plan. This would shift the burden of proving

⁹³ VT. STAT. ANN. tit. 10, § 6001(3) (1984).

that no plan exists to the developer and would inhibit abuse of the Act.

A second major area of concern is the absence of objective standards by which district commissioners and the environmental board can consistently determine whether a proposed development or subdivision will have an undue adverse effect on historic sites. The continued absence of such standards may result in a successful constitutional challenge to Act 250. A solution to this problem is the active participation in permit decisions by the Vermont Advisory Council on Historic Preservation. Vermont's Historic Preservation Act should be amended to permit the Division for Historic Preservation to adopt compatibility standards and criteria for proposed development and subdivision. In addition, the standard "undue adverse effect" should be made less vague by changing the standard to "unavoidable adverse effect."

In conjunction with these issues, the determination by the Division for Historic Preservation as to whether or not a development has an unavoidable adverse effect on an historic site could be *prima facie* evidence of their conclusion. In other words, if they concluded that a development has an unavoidable adverse effect on an historic site, the developer would be forced to rebut this presumption.

Third, the definition of "historic site" should be amended to include those sites which are eligible for listing on the State or National Register of Historic Places. This will eliminate any doubt that the criteria used for determining eligibility to the State or National Register of Historic Places can be used by the district commissioners and Environmental Board when it is necessary to evaluate whether a site is historic.

Fourth, there seems little purpose in denying appellate review by the Vermont Supreme Court to adjoining property owners and rule 14(B) parties. Presumably, at that stage issues have been narrowed, and oral arguments and briefing do not create overwhelming administrative burdens for the court. However, to the extent this policy continues, the Vermont Division for Historic Preservation must be alert to their role as an affected state agency entitled to participate in appeals before the Vermont Supreme Court.

Fifth, minor legislative amendments should resolve the ambiguities apparent in the definitions appearing in section 6001. Section 6001(3) should be divided into subsections to accommodate the various definitions of development. This would clarify whether the examples of involved land apply only to municipal and state projects. Also, the definition of "lot" should be expanded to include all interests in land, not just undivided ones.

These criticisms should not be interpreted to mean that Act 250 is ineffective as a means of protecting historic sites, for that is untrue. Through its permit system, Act 250 provides an excellent method of insuring that the importance of historic properties is considered by developers. The concept is sound and is working. The extent to which land use legislation should envelop private property rights is a very difficult issue. Act 250 represents an admirable attempt to strike a balance between competing interests, and unavoidable flaws should be recognized as an opportunity for improvement.