VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter

RE: Esprit, Inc. by
Neal C. Vreeland, Esq.
Carroll, George & Pratt
P.O. Drawer 530(J)
Rutland, VT 05701

Declaratory Ruling 181

On November 4, 1986, the Concerned Citizens of Danby and Mt. Tabor filed a request for a declaratory ruling with the Environmental Board (Board) on the question of whether the proposed conversion by Esprit, Inc. of a house in Danby, Vermont, to provide treatment to chemically-dependent persons would require a permit pursuant to 10 V.S.A., Chapter 151 (Act 250). The petition was an appeal of Advisory Opinion #1-082 dated October 16, 1986, in which the District #1 Environmental Coordinator found that no Act 250 permit was required. The Town of Danby filed a second appeal on November 17.

On December 18, the Board notified the parties of its intent to appoint an Administrative Hearing Panel to take evidence in this proceeding, subject to objection by the parties. The hearing panel would follow the procedures set forth in Board Rule 41. No party objected to the use of the panel.

On February 5, 1987, the Board conducted a prehearing conference with the parties in South Londonderry, Vermont. At the prehearing, Esprit, Inc. moved to dismiss the appeal of the Town and objected to the party status of the Concerned Citizens. The Board deliberated on these motions on February 19, and in a Memorandum of Decision dated February 24, denied the motion to dismiss and deferred its decision on party status.

On February 23, the Administrative Hearing Panel convened a public hearing on the merits of the declaratory ruling request in Rutland, Vermont. The following parties/ persons participated in the proceedings:

Esprit, Inc. (Esprit), by Neal Vreeland, Esq.
Town of Danby (Town), by Joseph O'Dea, Esq.
Concerned Citizens of Danby and Mt. Tabor (Concerned Citizens) by Peter Zamore, Esq.

Following the conclusion of the public hearing, the parties submitted proposed findings of fact and conclusions of law. The Administrative Hearing Panel issued a proposed decision on April 13. The parties were given an opportunity to file written objections and present oral argument before the full Board. On May 14, following a review of the proposed decision, the evidence presented in the case,

DR # 181
6/3/87

and proposals and legal memoranda submitted by the parties, the Board declared the record to be complete and adjourned the hearing. The case is now ready for decision. To the extent the Board agrees with and found necessary any findings.proposed by the parties, it has incorporated them herein; otherwise, the parties' requests to find are hereby denied.

I. ISSUES IN THE APPEAL

The principal issue to be decided in this case is whether Esprit must secure an Act 250 permit prior to converting an existing facility located on Old Route 7 in Danby to a residential treatment center for alcohol or drug-dependent persons. Esprit's position is that the facility was built and used in a manner substantially similar to its proposed use prior to the adoption of Act 250 and is therefore exempt from jurisdiction under 10 V.S.A. § 6081(b). The Town and Concerned Citizens argue that the proposed conversion would be a "substantial change" pursuant to 10 V.S.A. § 6081(b) and Board Rule 2(G) and that therefore Act 250 applies. In particular, Concerned Citizens believes that the changes Esprit intends to make will have a significant impact on water pollution (Criterion 1), water supply (Criteria-2 and 3) and educational services (Criterion 6).

Before addressing the merits of this case, the Board must resolve the two preliminary issues referred to above which were raised by Esprit:

Motion to Dismiss. Esprit has moved to dismiss the Town's appeal on the basis that the appeal was filed more than 30 days after the issuance of Advisory Opinion #1-082, and that therefore the appeal was not timely. The issue turns on whether an advisory opinion constitutes a binding determination of jurisdiction, so that a party is bound by that determination if he fails to file a timely appeal.

The Board had an opportunity to discuss the differences between an advisory opinion and a declaratory ruling in another case currently pending before the Board. Re: Joseph Gagnon, Declaratory Ruling Request #173, Memorandum of Decision issued July 3, 1986. Relevant portions of that decision are quoted here:

> An Advisory Opinion is a formal interpretation of the law by a District Coordinator or the Executive Officer. The Advisory Opinion process was adopted by the Board under Rule 3(C) to provide the parties with a convenient method by which jurisdictional questions could be

> answered. A District Coordinator may render an Advisory Opinion simply upon the statements of one party and without notice to other parties. At the Executive Officer level, the statutory parties are usually notified of the request for an Advisory Opinion and invited to submit written statements or other evidence. Rarely, if ever, does a District Coordinator or the Executive Officer conduct a formal hearing.. It is clear from Rule 3(C) that the Advisory Opinion process is optional, and that any party may proceed directly to the Board with a petition for a Declaratory Ruling.
>
> Because Advisory Opinion proceedings are optional with no requirement of notice or opportunity for a hearing, they are advisory only and cannot be considered as binding jurisdictional determinations.
>
> By contrast, the procedure for obtaining Declaratory Rulings is more formal. The authority to act upon petitions for declaratory rulings rests solely in the Environmental Board. Board Rule 3(A). The proceedings are treated as a "contested case" under the Administrative Procedure Act. 10 V.S.A. § 6002. Notice is given to statutory parties and published in the newspaper. Board Rule 3(E). A hearing is conducted in which testimony is given by sworn witnesses under the rules of evidence. The decision of the Board is final, unless appealed to the Supreme Court.

This is not to say that an advisory opinion is without any legal effect. It may, for example, serve to put someone on notice that his activities may constitute a violation, and be relevant in an enforcement action to recover civil penalties. See 10 V.S.A. § 6006. It may also support a defense based upon estoppel if a person had received an advisory opinion that no Act 250 permit was required.

Advisory Opinion #1-082 did not constitute a final determination of whether there is Act 250 jurisdiction over the Esprit project. The Town is not prevented from seeking a declaratory ruling even though more than 30 days had passed since the issuance of the advisory opinion.

Party Status of Concerned Citizens. Esprit has objected to the participation of Concerned Citizens in the declaratory ruling proceedings. Concerned Citizens was organized in October 1986, essentially in response to public concerns over the Esprit project, although the organization claims to have other interests as well. There are approximately 50 members in the organization, including adjoining landowners Tom and Jackie Martin and Max and Inga Mearowitz. Concerned Citizens has not been officially incorporated, but it does appear to have a governing board.

Concerned Citizens claims that it is entitled to party status under Board Rule 14(A) and 14(B). Board Rule 14(A) describes the statutory parties, including persons who receive official notice of the proceedings from the Board, who are entitled to party status. Rule 14(B) allows the Board to admit other persons as parties if they show that their interests may be affected or that their participation will materially assist the Board.

In this case, the Concerned Citizens did receive official notice of the declaratory ruling proceeding and it appears that at least some of the members of the organization can demonstrate a sufficient stake in the proceedings to be "interested persons" under the Administrative Procedure Act./1/ In addition, by its presentation of witnesses, cross-examination and submittal of legal memoranda in these proceedings, Concerned Citizens has provided material assistance to the Administrative Hearing Panel and this Board.

Therefore, Concerned Citizens is granted party status, and the objections of Esprit are hereby overruled.

II. FINDINGS OF FACT

1. The property which is the subject of this proceeding consists of approximately 15 acres of land, a large house, two barns and several smaller outbuildings. It is located on Old Route 7, one mile north of the Danby business center. The house is served by an on-site septic system, and shares a well and water system with three other homes. The main house is 38' by 28' and has a 20' by 30' wing. The land is both wooded and open. A small seasonal stream crosses the property approximately 100 feet downhill from the septic system.

/1/ Declaratory Ruling proceedings are governed by the Administrative Procedure Act, 3 V.S.A., Chapter 25. See 10 V.S.A. § 6002 and Board Rule 3(B).

2. The property was purchased by the present owner Bernard Blinn in 1965. From 1965 until 1968, Mr. Blinn worked on renovating the entire house and wing, including the installation of the present bathrooms, septic system and water line. Beginning in 1968 and during the winter months, Mr. Blinn began to rent the main house and second floor of the wing as a "ski lodge" to skier clubs. Up to 30 people would stay at the lodge at one time. Visits occurred predominantly on the weekends, but there was some weekday use as well. Mr. Blinn occupied an apartment on the first floor of the wing.

3. In the spring of 1972, Mr. Blinn converted the lodge into a treatment facility for alcoholics and people with mental disorders. Up to seven residents lived there on a full-time, year-round basis. This use continued until the fall of 1974. In 1974, a 22' by 40' garage was added to the buildings.

4. Since 1974, despite Mr. Blinn's efforts to find more permanent tenants, the house has been rented out only occasionally to skiers, church groups, and others. Up to 18-19 people would use the property at a time, usually only for short periods.

5. There has been no credible evidence to suggest that during the period that the buildings were used as a skier lodge, alcoholic treatment center and retreat, Mr. Blinn experienced any significant difficulties with water supply or septic systems.

6. In 1986, Esprit signed a purchase and sale agreement with Mr. Blinn to purchase the property. Esprit plans to convert the facility to a residential treatment center for adolescents who suffer from drug or alcohol addiction. Up to nine adolescents will live at the center at one time. Between one and five counsellors will be on duty at all times, depending on the time of day. The counsellors will not live on the premises. The residents will be between 13 and 19 years of age, and will generally stay at the center for periods ranging from several months to one year. School-age residents will be assisted by tutors and will not attend the local schools.

7. Esprit plans to make a number of modifications to the house and wing, including painting and remodelling. Two bedrooms may be converted into a large therapy room. Modifications may be made to the bathrooms, although there are no plans to increase the number of sinks, showers or toilets. A new laundry room will be built with a relocated washer and dryer.

8. Esprit does not plan to make any changes to the exterior of the buildings or to construct any new buildings. The septic system is being evaluated as part of the process of applying for a Public Building Permit from the Protection Division of the Department of Water Resources, Agency of Environmental Conservation. Some further modifications may be required as a result of this and other State permits.

9. Danby has no zoning or subdivision regulations.

III. CONCLUSIONS OF LAW

If Esprit were constructing the treatment facility today, it would require an Act 250 permit as a commercial development on more than one acre of land. See 10 V.S.A. § 6001(3). However, because the facility was in existence and its commercial use established prior to the adoption of Act 250, it is generally exempt from jurisdiction, unless there has been a "substantial change." The term "substantial change" is defined in Board Rule 2(G) as follows:

> "Substantial change" means any change in a development or subdivision which may result in a significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a)(l) through (a)(10).

The Board has applied a two-step test in determining whether there will be a "substantial change." First, there must be some physical change to the property site, and second, it must be demonstrated that that change may result in some significant impact under one or more of Act 250's criteria. This method of analysis has been upheld by the Vermont Supreme Court. In re Orzel, 145 Vt. 355 (1985).

Applying the test to the case at issue here, the Board finds little evidence in the record to suggest that the first test (a physical change) has been met. The Board has not in the past asserted Act 250 jurisdiction over renovations or modifications to the interior of existing buildings. Esprit has no plans to construct new buildings or add new wings. If Esprit does have to modify or replace its existing septic system, there would still be no change within the meaning of the statute or Board rules if the replacement system is of a substantially similar size or capacity.

Even assuming that there has been or will be a physical change, the Board is unable to conclude that the change may result in a significant impact under any of the Act 250 criteria. Concerned Citizens has claimed that there would be significant impacts under Criteria 1 (water pollution), 2 (adequate water supply), 3 (burden on existing water supply), and 6 (burden on educational services). The evidence does not support these allegations. There is no evidence that the septic system is inadequate or will fail under the proposed use. On the contrary, it appears to have performed adequately when up to 30 people were housed there. The new facility will have fewer residents than the ski lodge, although over longer periods. The existing water supply has been adequate in the past to serve both the ski lodge and the other residents that are on the system. Moreover, there is no evidence to suggest that the residents will attend and thus burden the local school system.

The facts in this case are similar to those in a previous Board proceeding, Re: Jack and Ruth Eckerd, Declaratory Ruling #98, issued October 16, 1978. There, the owners wanted to convert a summer camp for children to a year-round camp for delinquent and unmanageable youths. Although the Board found that several buildings would be relocated, and new wells and sewage systems may be installed under the Public Building regulations, it concluded that in' all likelihood the relocations and adjustments in the activities at the facility would not cause much different environmental impacts from those associated with the children's camp previously.

In order to assert jurisdiction for a "substantial change," it is not sufficient that the Board conclude that the changes may have some impact under Act 250 criteria. The Board must also conclude that the impacts may be significant. From the evidence presented in this case, the Board believes that the changes proposed by Esprit will have little impact on either the environment or municipal or educational services. The Board therefore concludes that the conversion of the Blinn house and wing to a residential treatment facility for chemically-dependent adolescents does not constitute a "substantial change" to a pre-existing development, within the meaning of 10 V.S.A. § 6081(b) and Board Rule 2(G).

IV. ORDER

Because the Board has concluded that the project as proposed does not constitute a substantial change to a pre-existing development, no permit is required pursuant to 10 V.S.A. § 6081(b).

Dated at Montpelier, Vermont this 3rd day of June, 1987.

ENVIRONMENTAL BOARD

Darby Bradley, Chairman
Lawrence H. Bruce, Jr.
Elizabeth Courtney
Jan S. Eastman
Arthur Gibb
Samuel Lloyd
Roger N. Miller
Donald B. Sargent

DR 181