Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-109

AUGUST TERM, 2002

In re Appeal of J.D. Associates	}	APPEALED FROM:
	}	Environmental Court
	}	DOCKET NO. 83-5-99 Vtec
	}	Trial Judge: Merideth Wright

In the above-entitled cause, the Clerk will enter:

Appellant J.D. Associates appeals the Environmental Court's decision upholding a conditional use permit the Morristown Development Review Board granted to North Country Animal League ("NCAL") to operate an animal shelter facility in Morristown. We affirm.

NCAL is a nonprofit organization whose mission is to promote animal welfare. It offers the public educational classes and seminars on issues related to animal welfare, proper animal care, and pet obedience. It also offers seminars to law enforcement to address the links between animal cruelty and domestic violence. It relies on volunteers to help run the shelter and to perform fund raising activities.

NCAL applied for a conditional use permit to operate the animal shelter in an existing building on Route 100. The building, which NCAL plans to renovate, is located in Morristown's Rural Residential with Agricultural Use District. Community facilities are conditional uses in that district. NCAL's project will include administrative offices, indoor housing and exercise facilities for animals, isolation and examination rooms, "get acquainted" areas for prospective adopters to meet and play with the animals, a spay/neuter facility, an area for food preparation, and a store for the sale of pet care items. A second phase of the project includes a community meeting room and sixteen additional kennel spaces. NCAL's project is designed to accommodate up to sixteen dogs and twenty-eight cats and other small animals.

Appellant owns the Farm Resort and Golf Course, which is located approximately 1,130 feet from NCAL's building, but does not adjoin the three acre parcel on which the NCAL building is situated. In addition to appellant's business, the surrounding area contains a riding stable, other agricultural uses, and residences. Six private residences are located directly across from the NCAL facility on Route 100. Route 100 is the main road for the area and traffic on the road varies with the time of day. Noise from dogs barking is currently not a problem in the area as only a few of NCAL's immediate neighbors have dogs.

The Morristown Development Review Board ("DRB") considered NCAL's conditional use application in three public hearings in January, February, and March 1999, and in four deliberative sessions held February, March, and April that year. They took testimony from various witnesses, and considered the recommendations by three noise experts. The DRB also visited the area to personally observe the potential noise emanating from the shelter in the surrounding area. On April 22, 1999, the DRB granted NCAL a permit for the shelter, with conditions to address noise and traffic concerns. Appellant appealed the DRB's decision to the Environmental Court.

At the Environmental Court, appellant alleged, among other things, that the DRB erred in determining that the shelter

was a "community facility" under the Morristown zoning by-laws. The Environmental Court considered appellant's summary judgment motion on that issue, and entered summary judgment for NCAL. Appellant also alleged that the DRB's decision erroneously concluded that NCAL's project would not adversely affect the character of the area, in part because it would cause undue noise pollution. The Environmental Court set a briefing schedule for its on-the-record review of this claim and appellant's other claims. Although appellant filed its brief on time, NCAL did not. Appellant consequently moved for default judgment and asked the court to void the permit. The court denied the motion, noting that it would not consider NCAL's late filing in reaching its decision. On February 4, 2002, the Environmental Court upheld the permit, concluding that the DRB's decision was supported by substantial evidence. This appeal followed.

We first address appellant's argument that the Environmental Court erroneously granted summary judgment in NCAL's favor on whether the animal shelter is a "community facility" under Morristown's zoning by-laws. We review appellant's claim using the same standard as the Environmental Court: if no genuine issues of material fact exist, and a party is entitled to judgment as a matter of law, summary judgment is proper. V.R.C.P. 56(c); Wentworth v. Fletcher Allen Health Care, 171 Vt. 614, 616 (2000) (mem.).

According to the parties and the Environmental Court, Morristown's zoning by-laws define a community facility as "[a]ny meeting hall, place of assembly, museum, art gallery, library, school, church, or other similar type of establishment which is not operated primarily for profit, excluding government facilities."[(1)] There is no dispute that NCAL is a non-profit organization. Although the organization will sell items necessary for pet care, and will charge fees for certain services such as animal neutering, the money it collects is used to promote its nonprofit purposes. NCAL is not, therefore, operated primarily for profit. The remaining question then is whether the animal shelter can be considered an establishment similar in type to a museum, library, school, meeting hall, church or place of assembly.

The NCAL shelter offers the Morristown community services similar to those offered by libraries, museums, and schools. Like a library, museum or school, the shelter offers community educational opportunities through classes and seminars on animal care and obedience training. The shelter is a place the public may go to obtain information and assistance on the humane treatment of animals, animal behavior, and the relationship between animal cruelty to domestic violence. The shelter's proposed second phase will include a meeting room for the community. We agree with the Environmental Court that the facility is a community facility under the town's bylaws. The court therefore committed no error in granting summary judgment for NCAL on this issue.

Appellant next argues that the court and the DRB erred in determining that the shelter will not adversely affect the character of the area. Appellant's argument consists mainly of factual assertions without any citations to the record; thus we cannot discern whether the assertions have support in the evidentiary record. Appellant also fails to cite any relevant case law from this or any other jurisdiction to put its factual assertions in a context that would allow us to understand appellant's argument and why appellant should prevail in this Court. The lack of record citations and references to legal authority leaves us guessing as to whether appellant challenges the DRB's legal conclusion as unsupported by the findings or challenges the DRB's findings as devoid of any evidentiary support, or something else. To the extent that appellant seeks to challenge the fact findings, it has also failed to identify the findings it believes are erroneous and for what reason. Appellant's brief is thus inadequate for us to engage in meaningful appellate review of this claim, and we will not search the record for errors that are inadequately referenced or briefed. In re Tariff Filing of Cent. Vt. Pub. Serv. Corp., 167 Vt. 626, 627 (1998) (mem.).

Appellant's last claim fails as well. It contends that the Environmental Court should have granted it default judgment under V.R.C.P. 55 and invalidated NCAL's permit because NCAL filed its brief on some of the post-summary judgment issues after the court-imposed deadline had passed. V.R.C.P. 55 applies when a party "failed to plead or otherwise defend." V.R.C.P. 55(a). Appellant offers no authority to support its assertion that a party's late filing of a legal memorandum supporting the party's position in an on-the-record review of a municipal zoning decision is the equivalent of a failure to defend under V.R.C.P. 55. Moreover, where a motion for default is made after the defendant has appeared in the proceeding, the court has discretion not to enter a default judgment. See V.R.C.P. 55(b)(4) (when defendant appears, the court "may" enter default). The record in this case shows that NCAL appeared and participated throughout the proceeding. It therefore did not fail to defend its permit before the Environmental Court. We observe that appellant was not harmed in any way by the late filing because the court refused to consider NCAL's brief in making its decision.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice

1. Because there is no dispute about the definition, we use the one the parties and the Environmental Court used in the absence of a complete copy of the relevant regulations.