

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
OTTAWA COUNTY

In re: Application for Additional Use  
of Property at 22770 W. Trowbridge,  
Genoa, Ohio

Court of Appeals No. OT-12-008

Trial Court No. 10CV531F

v.

Allen Township Zoning Board  
of Appeals, et al.

Appellee

[Joseph Abraham and  
Susan Abraham—Appellants]

**DECISION AND JUDGMENT**

Decided: March 1, 2013

\* \* \* \* \*

Mark E. Mulligan, Ottawa County Prosecuting Attorney, for appellee.

James H. Hart, for appellants.

\* \* \* \* \*

**SINGER, P.J.**

{¶ 1} Appellants appeal a judgment of the Ottawa County Court of Common Pleas, granting a motion for relief from judgment and affirming a township zoning appeals board’s decision to grant a conditional use. Because the court’s decision was

supported by the evidence and appellants' complaints of procedural deficiencies were unfounded, we affirm.

{¶ 2} On June 16, 2010, Charles Palmer applied to appellee, Allen Township Zoning Board of Appeals, for conditional use to operate an automotive repair shop in a barn behind his rural Ottawa County home. Appellee considered the application at a July 20, 2010 hearing.

{¶ 3} During the hearing, appellee heard testimony from Charles and Tina Palmer and ten neighboring property owners in favor of the application. One couple, appellants Joseph and Susan Abraham, opposed the use, suggesting that the business would create additional traffic, be unsightly and lower property values. Appellee approved the conditional use on condition that Palmer maintain agreed business hours, keep the work inside as much as possible and put up a privacy fence within a year.

{¶ 4} Appellants appealed appellee's decision to the common pleas court, asserting that appellee failed to follow the applicable rules in making its decision and the decision was "contrary to the facts and circumstances presented." Appellants requested a de novo review of appellee's decision. Appellee responded, maintaining that appellants were not entitled to de novo review and that appellee's decision-making process was in conformity with applicable rules.

{¶ 5} The court initially ruled that appellee's decision was made in violation of the state's Open Meetings Act, R.C. 121.22, because the board went into executive session to consider the application. On this conclusion, the court invalidated the decision and

remanded the matter to appellee for a new hearing. A few weeks later, however, the court sua sponte issued an “amended decision” that reversed its conclusion of an open meetings violation and affirmed appellee’s decision.

{¶ 6} Appellants appealed the “amended decision”; however, this court, sua sponte, dismissed the appeal, finding the second decision a nullity as the common pleas court lacked jurisdiction to vacate its own judgment. *In re: Application for Additional Use of Property v. Allen Twp. Zoning Bd. of Appeals*, 6th Dist. No. OT-11-028 (Jan. 6, 2012).

{¶ 7} After return of the case to the common pleas court, appellee moved for relief from judgment, pursuant to Civ.R. 60(B). The common pleas court granted relief and affirmed the decision to grant the conditional use. From this judgment, appellants now bring this appeal.

{¶ 8} Appellants set forth the following single assignment of error:

The trial court erred in upholding the decision of the Zoning Board of Appeals by granting the Ohio Civil Rule 60(B) motion.

{¶ 9} Civ.R. 60(B) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

{¶ 10} In order to prevail on a Civ.R. 60(B) motion, the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus; *Covert Options, Inc. v. R.L. Young & Assocs., Inc.*, 2d Dist. No. 20011, 2004-Ohio-67, ¶ 7.

All three elements must be established, and “the test is not fulfilled if any one of the requirements is not met.” *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994); *Fifth Third Bank of W. Ohio v. Shepard Grain Co., Inc.*, 2d Dist. No. 2003 CA40, 2004-Ohio-1816, ¶ 10. On review, an appellate court may reverse a court’s ruling on a Civ.R. 60(B) motion only on a showing of an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion “connotes more than

an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 11} Appellee's motion was timely and the ground for relief may be categorized as a mistake, pursuant to Civ.R. 60(B)(1), or other reason justifying relief, pursuant to Civ.R. 60(B)(5). The question of whether appellee had a meritorious defense is crucial, because the court not only granted the motion for relief, but in the same entry rendered judgment on the merits, affirming appellee's decision to grant Palmer's request for conditional use.

{¶ 12} Appellants' argument to the merits of their appeal from the zoning board contains two branches: the zoning board's decision granting the conditional use was "contrary to the facts and circumstances presented"; and the zoning board failed to follow rules and regulations in reaching its decision.

{¶ 13} Concerning the procedural aspects of the zoning hearing, appellants suggest the absence of a quorum when the zoning board met, that the board improperly went into executive session prior to granting the conditional use, and a building inspector's report was required prior to considering the application. Neither at the common pleas court, nor here, does appellant offer any legal authority in support of these propositions, save citation to a case concerning application of the Sunshine Laws to board of elections' meetings.

{¶ 14} Appellee responds, citing to the Allen Twp. Trustees, *Allen Township, Ottawa County, Ohio Zoning Code*, <http://allentownship.us/ALLENZONING2009.pdf> (accessed Feb. 13, 2013), 64, Section 14(A)(1)-(3), which provides that the board of zoning appeals consists of five members, three of whom must be present for a quorum. The trustees may appoint an alternative to the board who may take the place of an absent member. *Id.* at Section 14(A)(4). An affirmative vote of a majority of the members in attendance is required for action. *Id.*, Section 14(A)(3). At the meeting in question, three regular members and one alternative were present. Thus, a quorum was present. The vote was two regular members and one alternative in favor; one regular member abstaining. This is sufficient to sustain the board's decision. An investigation by a zoning inspector is required only for the revocation of a conditional use, not antecedent to a grant. *Id.* at 14, Section 3(A)(6)(s)(9).

{¶ 15} With respect to the zoning board's recess into executive session to discuss the application, there is no Open Meeting Act violation. The action of a board of zoning appeals in reviewing an application for conditional use is a quasi-judicial function. *Goff-Knight v. Bd. of Zoning Appeals of Liberty Twp.*, 5th Dist. No. 03CAH08042, 2004 WL 3465744 (June 14, 2004). The Sunshine Laws do not apply to deliberations on such applications. *Id.* Accordingly, appellants' complaints about the procedural aspects of the zoning board are without merit.

{¶ 16} Concerning the common pleas court's conclusion that the decision of the zoning board should be affirmed, in an administrative appeal, the common pleas court

considers whether the zoning board's decision to grant or deny a conditional use is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record."

R.C. 2506.04. Absent finding one or more of these conditions, the common pleas court must affirm the zoning board's decision.

{¶ 17} An appeals court's review of the judgment of the common pleas court is more limited. *Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000). The appellate court reviews whether, as a matter of law, the decision of the court of common pleas is supported by a preponderance of reliable, probative, and substantial evidence. *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). "While the court of common pleas has the power to weigh the evidence, an appellate court is limited to reviewing the judgment of the common pleas court strictly on questions of law." *Carrolls Corp. v. Willoughby Bd. of Zoning Appeals*, 11th Dist. No. 2005-L-110, 2006-Ohio-3411, ¶ 10. (Citations omitted.) The appeals court must affirm the decision of the common pleas court unless it finds, as a matter of law, that the decision is not supported by a preponderance of reliable, probative, and substantial evidence. *Shamrock Materials, Inc. v. Butler Cty. Bd. of Zoning*, 12th Dist. No. CA2007-07-172, 2008- Ohio- 2906, ¶ 10.

{¶ 18} Here the only evidence submitted in opposition to approval of conditional use was appellants' complaint of too many cars being parked at the Palmer's home and an undocumented assertion that the home garage would reduce property values. This

evidence had to be balanced with the testimony of numerous adjacent or nearby neighbors who unanimously supported the application. On consideration, we cannot say, as a matter of law, that the zoning board's decision and, concomitantly, the common pleas court's decision were unsupported by reliable, probative and substantial evidence.

{¶ 19} Accordingly, appellants' sole assignment of error is not well-taken.

{¶ 20} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Thomas J. Osowik, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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