

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002046-MR

VANCE N. TRUE and MIDDY M. TRUE

APPELLANTS

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
CIVIL ACTION NO. 99-CI-00500

DANVILLE-BOYLE COUNTY BOARD OF ADJUSTMENTS

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge: Vance N. True and Middy M. True appeal from a judgment¹ which affirmed a decision of the Danville-Boyle County Board of Adjustments that denied the Trues' request for a variance in set back lines on a lot in the Old Bridge Subdivision on which the Trues had begun constructing a swimming pool complex.

The Trues are the owners of two lots in the Old Bridge Subdivision. About nine years ago, the Trues built a home on one of the lots. Eventually, the Trues decided to build a swimming pool complex on the other lot, and in late May or early June 1999,

¹ The judgment was designated variously as an "order" and a "judgment" by the circuit court.

construction began on that project. Subsequently, a plumbing inspector visited the site and approved the plumbing work, including the connection of the poolhouse plumbing system to an existing septic tank.

When the complex was approximately 90 percent complete, about the first of September 1999, the builder of the pool complex contacted the electrical inspector for final inspection of the project. At this juncture, the electrical inspector advised the Trues that a building permit had not been obtained. When the Trues sought a building permit they were informed that one could not be issued until a variance had been obtained because the swimming pool complex had been built beyond the required setback lines.² Construction was halted and the Trues initiated proceedings before the Board of Adjustments seeking a variance to allow them to complete the project.

On October 21, 1999, the board held a public hearing to consider the True's application for a variance. After testimony was heard, the board denied the application. The decision of the board was appealed to Boyle Circuit Court which affirmed the board's decision on August 2, 2000.

On appeal, the Trues contend that: (1) the board's decision was arbitrary, and (2) the evidence presented before the

² The setbacks required by ordinance were 35 feet across the front of the property and 8 feet for the side lot lines. Restrictions applicable to the subdivision in which the pool complex was located required a 50-foot setback from the street on which the property fronted. The swimming pool complex extended to within 10 feet of the front line and extended to within 7 feet for the first 30 feet of a side lot line.

board satisfied the requirements of Kentucky Revised Statute (KRS) 100.243.³

* * * * *

Unfortunately, the board has not filed an appellate brief. The Trues' brief was filed on November 27, 2000. On December 27, 2000, the board moved for additional time to file its brief or, alternatively, to allow it to use the brief it had filed in the circuit court as its appellate brief. On January 22, 2001, this Court granted the board's motion for additional time, rendering moot the alternative motion. However, even after we granted its motion for additional time, the board still did not file a brief.

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.⁴

In this case, we are not inclined to penalize the board by regarding its failure to file a brief as a confession of error. Under the circumstances, we choose to accept the statement of facts and issues submitted by the Trues as correct and to decide this case on its merits.

³ Text, infra.

⁴ Ky. R. Civ. P. (CR) 76.12(8)(c).

* * * * *

The Board of Adjustment is an administrative board performing specified legislative functions relative to zoning. Power is delegated to the board by the legislature. The board, consistent with that delegation, must conduct a trial-type hearing and make adjudicative findings of fact to support its legislative decision and to afford a basis for judicial review. In making these findings, the board is not held to strict judicial standards. However, the findings must contain sufficient information to afford a meaningful review as to the arbitrariness of the board's decision.⁵

The Kentucky Constitution condemns arbitrary power.⁶ "An administrative decision granting relief to one having the burden of proof must be supported by findings based upon substantial evidence."⁷ Substantial evidence is that which when taken alone or in light of all the evidence has sufficient probative value to induce conviction in the minds of reasonable men.⁸ "Without such support, the decision is arbitrary and cannot weather judicial review."⁹ However, "the failure to grant administrative relief to

⁵ Bourbon County Bd. of Adjustment v. Currans, Ky. App., 873 S.W.2d 836, 838 (1994) (citations omitted).

⁶ Ky. Const. § 2; and see id.

⁷ Bourbon County Bd. of Adj., supra, n. 3, at 838.

⁸ See Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

⁹ Bourbon County Bd. of Adj., supra, n. 3, at 838.

one carrying the burden [in this case, the Trues] is arbitrary if the record compels a contrary decision in light of substantial evidence therein."¹⁰

Typically, when an applicant fails to obtain the relief sought from the board, "attention should be directed to the administrative record in search of compelling evidence demonstrating that the denial of the relief sought was arbitrary. The argument should be that the record compels relief."¹¹

However, mindful that the failure to grant administrative relief to one carrying the burden of proof in the face of evidence that compels a contrary decision is one example of arbitrary power, the board can exercise its power arbitrarily in other ways. If the board does not afford due process to an applicant for a variance, then any action taken by the board is arbitrary.¹²

"The board shall have the power to hear and decide on applications for variances. The board may impose any reasonable conditions or restrictions on any variance it decides to grant."¹³ The board is guided in its determination of whether to grant a variance by Kentucky Revised Statutes (KRS) 100.243 which provides that:

- (1) Before any variance is granted, the board must find that the granting of the variance will not adversely

¹⁰ Id. (citation omitted).

¹¹ Id.

¹² See Morris v. City of Catlettsburg, Ky., 437 S.W.2d 753, 755 (1969)(holding that since procedural due process was not afforded, the action taken by the board was arbitrary).

¹³ Ky. Rev. Stat. (KRS) 100.241.

affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the board shall consider whether:

(a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;

(b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and

(c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

(2) The board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulation from which relief is sought.

Following the receipt of evidence by the board, its attorney, Kevin Nesbitt, stated the oral motion upon which the board voted as follows:

[A] variance may be granted when compliance with Section 423.11 through .14,¹⁴ compliance with those sections has been demonstrated, including special conditions and circumstances that literal interpretation would de[p]rive the applicant of rights commonly enjoyed by [o]the[r] property [in the same district] and the special conditions do not result from the actions of the applicant taken after adoption of the zoning ordinance, and it will not confer on the applicant any special privileges, and in this case the circumstances do arise from the result of actions of the applicant taken subsequent to the adoption of the current zoning regulations, and therefore the application should be denied.

The first portion of the motion simply reiterates the text of the local zoning ordinance affecting applications for variances, but the last phrase, "in this case the circumstances do arise from the result of actions of the applicant taken subsequent to the adoption of the current zoning regulations, and therefore the application should be denied[,]” is the material portion of the motion upon which the board voted to deny the Trues’ application for a variance.

The circuit court was faced with the argument that the board had based its decision on an erroneous interpretation of

¹⁴ “Section 423.11 through 14” refers to a local ordinance concerning variances and the conditions and procedures governing applications.

section 423.13 of the local ordinance. Beyond the other requirements of the ordinance, it must be demonstrated to be true, under section 423.13, "[t]hat the special conditions and circumstances do not result from actions of the applicant taken after adoption of this Zoning Ordinance, or previous applicable Zoning Ordinances[.]" According to the record, the Trues had not obtained a building permit before they applied for a variance. The board clearly perceived that this fact constituted a circumstance that resulted due to actions of the applicants taken subsequent to the adoption of the current zoning regulations. In response to this argument, the Trues argued, and the circuit court agreed, that failure to get a permit should not be conclusive in refusing to grant a variance.

The failure to obtain a building permit is not the type of "special circumstance" enunciated in KRS 100.243.¹⁵ "The board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant[.]"¹⁶ The Trues admit, the obvious: that there is evidence that they were negligent in their failure to obtain a building permit. However, no evidence in the record suggests the violation complained of, that is, the failure to obtain a building permit prior to construction, was willful. Therefore, there is no

¹⁵ For an example of a "special circumstance" which did not generally apply to land in the vicinity, see Menefee v. Board of Adj. of City of Taylor Mill, Ky., 494 S.W.2d 519 (1973), where the Court determined that evidence of a large sinkhole established an extraordinary situation or condition.

¹⁶ Id. (emphasis supplied).

basis for the denial of the variance in the case under consideration for that reason.

The Trues argued below that the failure to grant the requested variance would result in an unnecessary hardship and practical difficulty. The circuit court correctly observed that the record reflected that the board considered the facts underlying this argument and other relevant facts. We agree with the circuit court that this is but one factor¹⁷ to be considered under KRS 100.243.

Again, we note that in order to prevail on appeal, the Trues must point to compelling evidence that demonstrates that the denial of the relief they sought was arbitrary. In other words, they must demonstrate that the record, i.e., the evidence heard by the board, compels relief.¹⁸

The evidence heard by the board does not demonstrate that a variance is necessary because there are special circumstances that apply to the lot at issue that do not generally apply to other lots in the vicinity. While the Trues will undoubtedly suffer a hardship if the variance is not now granted, the hardship results not from restrictions upon development of the lot, but from the fact that they began and substantially completed construction of the pool complex before obtaining a variance or a building permit.

In short, the evidence does not compel a finding that the variance should have been granted. The board did not act

¹⁷ KRS 100.243(1)(b).

¹⁸ Bourbon County Bd. of Adj., supra, n. 3, at 838.

arbitrarily, and the circuit court properly upheld its decision not to grant a variance.

The judgment is affirmed.

EMBERTON, Judge, CONCURS.

DYCHE, Judge, DISSENTS.

DYCHE, Judge, DISSENTING. I must respectfully dissent. The result herein is so very harsh; the appellants acted with such good faith; apparently no neighboring property owners object to appellants' actions; the Board of Adjustment failed, after being granted an extension, to file a brief. I cannot agree with this opinion. I would reverse.

BRIEF FOR APPELLANTS:

NO BRIEF FOR APPELLEE

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