

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001718-MR

OWENSBORO METROPOLITAN BOARD  
OF ADJUSTMENT

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE HENRY M. GRIFFIN III, JUDGE  
ACTION NO. 01-CI-01177

DAVID LEE HICKEY; AND  
TAMMY A. HICKEY

APPELLEES

OPINION

REVERSING

\*\* \*\* \* \* \*

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from an order entered by the Daviess Circuit Court, reversing a decision by the Owensboro Metropolitan Board of Adjustment (board) denying appellees' request for a variance from local zoning regulations. For the reasons stated hereafter, we reverse.

The underlying facts are undisputed. Appellees' home, which preexisted the applicable zoning regulations, is located on a 1.786-acre tract of land adjacent to U.S. 231 in Daviess County. Because of a situation described by the circuit court as an "unexplained jag in the U.S. 231 right-of-way line," the front building setback line applicable to a portion of the house is located 75 feet from the highway's center line, while the setback line applicable to the remainder of the house is located 25 feet from the property line.

Appellees applied for a variance from the minimum setback provisions to allow the addition of a covered porch to the front of their house so that they could "sit on [our] front porch, watch the world go by, and . . . socialize with [our] neighbors." The requested variance would reduce the front building setback from 75 feet to 71.8 feet as to one section of the house, and from 25 feet to 11.8 feet as to the remaining section. After an investigation, the planning commission's staff recommended that the variance be denied, based on findings that although the desired variance would not adversely "affect the public health, safety or welfare," alter "the essential character of the general vicinity," or cause "a hazard or nuisance to the public," it would allow "an unreasonable circumvention of the requirements of the zoning regulations." The staff further noted that appellees had ample room at the

side and rear of their house for the construction of a covered porch. The board denied the requested variance. On review, however, the circuit court reversed and remanded the matter to the board with directions to grant the variance. This appeal followed.

The board contends that the circuit court erred by reversing the denial of the variance request. We agree.

A panel of this court addressed a similar situation in Bourbon County Board of Adjustment v. Currans, Ky. App., 873 S.W.2d 836 (1994), which also involved a circuit court's reversal of a local board of adjustment's denial of zoning variance requests. This court noted that such a board's "administrative decision granting relief to one having the burden of proof must be supported by findings based upon substantial evidence," while the "failure to grant administrative relief to one carrying the burden is arbitrary if the record compels a contrary decision in light of substantial evidence therein." Id. at 838 (emphasis added). Thus, once his variance request was denied, Currans bore the burden of proof and "[t]he question before the circuit court should have been whether the record compelled a finding" in his favor, rather than "whether the board's decision was supported by substantial evidence." Id. at 838. This court concluded that since the circuit court did not find, and this court's review of the

record did not show, that the evidence compelled a finding for Currans, the circuit court erred by directing the board to grant the requested variances.

Contrary to appellees' assertion, Currans clearly controls the matter before us on appeal. Here, the record shows that although the proposed covered porch would intrude only a few feet into one section of the setback, it would intrude some 13.2 feet, or more than halfway, into that portion of the setback which is located 25 feet from the lot line. The circuit court concluded that the proposed variance would not affect traffic conditions on the adjacent highway, that the alleged encroachment would simply cover an existing porch floor which was permitted by the zoning regulations, that a substitute porch on the side or back of the house would not be a reasonable alternative to the front porch, and that the board's denial of the requested variance was arbitrary and unreasonable. However, the circuit court did not address the issue of whether the evidence compelled a finding that the requested variance would not amount to an "unreasonable circumvention" of the applicable zoning regulations. Currans. Moreover, regardless of whether the members of this panel might have reached a different conclusion if sitting as triers of fact below, our own review of the record simply does not show that the evidence compelled a finding that the variance should be granted by the board. Id.

Therefore, we must conclude that the circuit court erred by directing the board to grant the requested variance.

The circuit court's order is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stewart B. Elliott  
Owensboro, Kentucky

BRIEF FOR APPELLEES:

T. Steven Poteat  
Owensboro, Kentucky