

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000469-MR

VANCE N. TRUE AND
MINDY TRUE

APPELLANTS

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

DANVILLE/BOYLE COUNTY BOARD
OF ADJUSTMENTS

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Vance True and Mindy True appeal from a judgment of the Boyle Circuit Court directing them to remove all structures constructed on their property for which they had not been granted a dimensional variance by the Danville/Boyle County Board of Adjustments. The Trues contend that the court was without authority to order the removal of the structures because the Board of Adjustments did not first consider the issue.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

This is the second appeal in this case. In the first, this court considered whether the Boyle Circuit Court properly affirmed a decision of the Board of Adjustments denying the Trues' request for a variance in set back lines in the Old Bridge Subdivision. Unfortunately for the Trues, they had completed almost 90 percent of a swimming pool complex consisting of a pool, a six foot high poured concrete fence and pool house, on two lots owned by them before they realized that they failed to obtain a building permit. When they applied to obtain the permit, they were told that one could not be issued without first obtaining a variance because the pool complex was built beyond the designated set back lines.

After a hearing was held to consider the Trues' application for a variance, it was denied; there was, however, no directive that the offending structures be removed. The Trues appealed the denial and the circuit court affirmed. On appeal to this court, we held that the denial of the variance was not arbitrary and affirmed. In doing so, a majority of the court recognized that the denial of the variance created a hardship for the Trues but noted that the hardship was created by their failure to obtain the required permit before substantially completing the complex. Again, however, there was no directive that the complex be removed. Discretionary Review was denied by the Kentucky Supreme Court.

After the Trues exhausted all available appellate remedies, the Board of Adjustments moved the circuit court to direct the Trues to remove all offending structures including the fence, pool house, pool and appurtenances, from the property. The Trues objected arguing that the circuit court was without authority to order the removal without a hearing and decision by the Board of Adjustments. The circuit court rejected the Trues' argument and ordered that the pool complex be removed and the property returned to its prior condition.

Planning and Zoning administrative bodies are bound by the general rule applicable to all administrative bodies that their authority is derived solely from the enabling statute and can not act beyond that power conferred by the legislature.² The powers and duties of the Board of Adjustments are set forth in KRS Chapter 100, et seq.,³ that provides uniform legislation for the use of planning and zoning controls on land development. The statutes give the Board of Adjustments the power to grant dimensional variances and conditional use permits and authority to hear appeals from decisions made by enforcement officers in the day to day administration of local ordinances.⁴ However,

² American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450 (Ky. 1964).

³ Kentucky Revised Statutes.

⁴ KRS 100.241; KRS 100.257; Burns v. Peavler, 721 S.W.2d 715, 717 (Ky.App. 1986).

there is no language that confers upon the Board the power of enforcement.

No case decided since the 1966 amendments to KRS Chapter 100 specifically addresses whether the Board has any enforcement powers. However, although decided in part on the basis of KRS 100.980(3), now repealed, we find persuasive the logic expressed in Board of Adjustment and Appeals of City of Shively v. Dixie Suburban Volunteer Fire Dept.⁵ In that case the court held that the board is without authority to interfere or prevent the construction of a fire station and its remedy was to seek compliance with the zoning regulations by initiating an injunction proceeding. "Since the board has no enforcement functions, there is no way in which it could interfere, with the result that the fire department, if it goes ahead with the construction of its station, will be violating the ordinance and will be subject to injunction proceedings. . . ." ⁶

Without success, the Trues have vigorously litigated the issue of whether the denial of the variance was arbitrary and capricious, and it remains undisputed that the pool complex is in violation of the setback requirements contained in the Danville city zoning ordinance. All administrative remedies have been exhausted and jurisdiction is properly in the court.

⁵ 320 S.W.2d 109 (Ky. 1958).

⁶ Id. at 110.

The only possible recourse for the board was to file suit in circuit court seeking removal of the offending structures by invoking its inherent power to grant injunctive relief. Although we find no language in KRS Chapter 100 purporting to interfere with the inherent power of the court to issue injunctions, we point out that such an infringement by the legislature would be an unconstitutional legislative encroachment onto the power of the judiciary.⁷

In this appeal, the Trues' attempt to persuade this court that the circuit court erred when it ordered all structures comprising the pool complex to be removed. Apparently for the first time during this lengthy controversy, they argue that only part of the entire complex is in violation of the zoning ordinance. It is clear from the prior administrative and judicial decisions in this case that the entire complex was found to be in violation. The law of the case doctrine precludes this court from addressing the Trues' contention that only certain structures in the complex are in violation of the ordinance.⁸

The judgment of the Boyle Circuit Court is affirmed.

ALL CONCUR.

⁷ Smothers v. Lewis, 672 S.W.2d 62 (Ky. 1984).

⁸ Bates v. City of Monticello, 190 S.W. 1074 (Ky. 1917).

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