RENDERED: APRIL 6, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

SUPREME COURT GRANTED DISCRETIONARY REVIEW: AUGUST 15, 2007
(FILE NO. 2007-CA-0315-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000068-MR

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CI-00386

TDC GROUP, LLC, D/B/A
MOLLY MALONE'S; COMMONWEALTH
OF KENTUCKY, ALCOHOLIC BEVERAGE
CONTROL BOARD — APPELLEES

AND NO. 2006-CA-000113-MR

TDC GROUP, LLC, D/B/A
MOLLY MALONE'S — CROSS-APPELLANT

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
V. HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 05-CI-00386

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT — CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,[1] SENIOR JUDGE.

WINE, JUDGE: Louisville/Jefferson County Metro Government ("Metro") appeals from an opinion and order of the Franklin Circuit Court which affirmed a final order by the Alcoholic Beverage Control Board ("ABC Board") reversing a decision by Metro's ABC Administrator to deny an application for a retail liquor drink license. While we agree with Metro that the ABC Board applied an incorrect rule of law in measuring the 700 feet distance between licensees required by KRS 241.075, we further conclude that this statutory requirement is unconstitutional as local or special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. Hence, we affirm.

The underlying facts of this action are not in dispute. The applicant, TDC Group, LLC, d/b/a Molly Malone's ("Molly Malone's"), is located at 933 Baxter Avenue in Louisville and currently holds a retail beer license, a restaurant drink license, a limited Sunday license, and three supplemental bar licenses. In September 2004, Molly Malone's applied for a retail liquor drink license to replace its restaurant drink license. Metro's ABC administrator denied the application on several grounds. First, the administrator found that there were two other retail liquor drink licensees, Burns & Bielefeld, Inc., d/b/a Wet Willy, and Outlook Inn, Inc., d/b/a Outlook Inn, located within 700 feet of Molly Malone's premises. In further support of denial of the application, the

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

administrator also cited to a lack of adequate off-street parking and public sentiment against issuance of the license. Molly Malone's appealed this decision to the ABC Board.

On appeal, the ABC Board concluded that a lack of parking was not a valid basis for denial of the application. The ABC Board noted that Molly Malone's previously had been granted a waiver reducing its number of required off-street parking spaces. The ABC Board determined that the change in Molly Malone's liquor license would not affect this waiver. Further, the ABC Board determined that public sentiment was not a sufficient basis to deny the application because petitions were presented both in favor of and in opposition to the application.

Rather, the ABC Board determined that the appeal turned on the proper method of calculating the distance from Molly Malone's to Outlook Inn or Wet Willy pursuant to KRS 241.075(2) and (3). The ABC Board concluded that the distance must be measured based upon the shortest route of ordinary lawful, regular and safe pedestrian travel. Because Metro's measurement would require pedestrians to cross Baxter Avenue in the middle of the block, purportedly in violation of KRS 189.570(6)(c), the ABC Board rejected Metro's calculation of the distances.

Instead, the ABC Board adopted the measurement offered by Molly Malone's, which assumed that pedestrians would cross Baxter Avenue only at the marked crosswalk. Based upon this measurement, the ABC Board found that Molly Malone's was more than 700 feet from the nearest retail drink licensee, and ordered that the license

application be granted. Metro appealed to the Franklin Circuit Court, which affirmed the ABC Board's decision. This appeal and cross-appeal followed.

The parties primarily dispute how the distance should be measured between Molly Malone's and the other retail drink licensees on Baxter. KRS 241.075(2) requires a minimum distance of 700 feet between retail drink licensees. KRS 241.075(3) further provides that the distance between the locations of such establishments

> shall be measured by following the shortest route of ordinary pedestrian travel along public thoroughfares from the nearest point of any present location of any such similar place of business to the nearest point of any proposed location of any such place of business. The measurement shall be taken from the entrance of the existing licensed premises to the entrance of any proposed location.

However, application of this standard is difficult due to the unique geography of Baxter Avenue in Louisville. Molly Malone's is located on the east side of Baxter Avenue; Wet Willy and Outlook Inn are located on the west side of the street. The nearest intersection with a marked crosswalk and four-way traffic lights is located at the intersection of Baxter Avenue and Highland Avenue. There are no cross-streets on the east side of Baxter Avenue between Highland Avenue and Cherokee Road/Broadway. But on the west side, three streets intersect with and terminate at Baxter Avenue: Morton Avenue, Christy Avenue, and Breckinridge Street, respectively. Further, directly across from Christy Avenue is an alley on the east side of Baxter.

Metro calculated the distance between Molly Malone's and Wet Willy to be 398 feet, with pedestrians crossing Baxter at a point opposite from the end of Morton Avenue. Similarly, Metro measured the distance to Outlook Inn to be 336 feet, with

pedestrians crossing Baxter at a point opposite from the end of Christy Avenue. In contrast, Molly Malone's measured the distance by turning left on Baxter, proceeding along the east sidewalk of Baxter to the intersection with Highland Avenue, crossing Baxter at the light, then turning right and proceeding along the west sidewalk of Baxter to Wet Willy and Outlook Inn, a distance of 1,238.37 feet and 1,508.06 feet, respectively.

The ABC Board and the circuit court found that Metro's interpretation would conflict with KRS 189.570(6)(c), which requires pedestrians to cross only at marked crosswalks "[b]etween adjacent intersections within the city limits of every city at which traffic control signals are in operation . . . ." In order to interpret the statutes consistently with each other, the ABC Board and the circuit court determined that the phrase "shortest route of ordinary pedestrian travel," as used in KRS 241.075(3), must be read to mean "shortest route of ordinary [**lawful, regular and safe**] pedestrian travel." Metro urges that this definition improperly alters the General Assembly's specific method for calculating distances set out in KRS 241.075(3).

As an initial matter, we agree with Metro's application of KRS 241.075(3). We agree with the ABC Board and the circuit court that the General Assembly did not intend that the "shortest route of ordinary pedestrian travel along public thoroughfares" be measured by a path which is both unsafe and/or unlawful. But for the following reasons, we disagree with their conclusion that Metro's proposed measurement is either illegal or unduly dangerous.

First, we disagree with the ABC Board's conclusion that Metro's method of calculating the distance conflicts with KRS 189.570(6)(c). KRS 189.570(6)(c) requires

pedestrians to cross at a marked crosswalk only between "adjacent intersections . . . at which traffic control signals are in operation[.]" The termination points of Morton Avenue and Christy Avenue at Baxter Avenue are clearly intersections within the definition of KRS 189.010(4)(a).[2] Since there are no traffic control signals in operation at adjacent intersections, KRS 189.570(6)(c) does not apply.

Second, we agree with Metro that there are unmarked crosswalks across Baxter Avenue at its intersections with Morton Avenue and Christy Avenue. The ABC Board argues that there are no curb cuts at these points along Baxter Avenue and consequently, handicapped pedestrians would be unable to make use of the crosswalks. Photos indicate there are curb cuts at each intersection which would allow wheelchair-bound individuals access to Baxter Avenue and the intersecting street. Further, while Metro may have an obligation to make these crosswalks accessible to the handicapped, the absence of curb cuts is not determinative of the existence of an unmarked crosswalk.

Rather, the definition of "crosswalk" in KRS 189.010(2) includes:

> That part of a roadway at an intersection within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or in the absence of curbs, from the edges of the traversable roadway[.]

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[2] KRS 189.010(4)(a) defines an intersection as:

> The area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two (2) highways which join one another, but do not necessarily continue, at approximately right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come into conflict[.]

Although Morton Avenue and Christy Avenue terminate at Baxter Avenue, the lateral lines of their sidewalks can be traced across Baxter Avenue. Indeed, the record shows that there is an alley opposite the terminus of Christy Avenue, along which the lines of the sidewalk clearly continue. Based on the statutory definition of crosswalk, these intersections have unmarked crosswalks where pedestrians may legally cross Baxter Avenue.

Third, we disagree with the ABC Board and the circuit court that pedestrians cannot safely cross Baxter Avenue at the intersections with Morton Avenue and Christy Avenue. KRS 189.570(6)(a) requires a pedestrian to yield the right of way when crossing a roadway at a point other than at a marked or unmarked crosswalk. Furthermore, we have already found that KRS 189.570(6)(c) does not apply due to the absence of traffic control signals at adjacent intersections. While pedestrians clearly must exercise caution when crossing Baxter Avenue at these points, the record establishes that pedestrians may legally and safely do so.

And finally, under KRS 241.075(2), the proximity of the places of business is the controlling factor to determine whether an applicant comes within the scope of the 700 feet restriction. *Bauer v. Alcoholic Beverage Control Board*, 320 S.W.2d 126, 130 (Ky. 1959). The statute expressly requires that the distance between licensees be measured by the "shortest route of ordinary pedestrian travel[.]" KRS 241.075(3). The path must follow public thoroughfares as ordinarily traveled by pedestrians, *Hunt Club, Inc. v. Moberly*, 407 S.W.2d 148 (Ky. 1966), and cannot be modified by artificial or contrived obstructions. *Bauer v. Alcoholic Beverage Control Board*, 320 S.W.2d at 131.

If pedestrians could not legally or safely cross Baxter Avenue at Morton Avenue or Christy Avenue, then it would be reasonable to expect that they would walk all the way to Highland Avenue to cross. But since pedestrians may legally cross Baxter at those closer points, it is not reasonable to assume that people would still walk more than 1,000 feet out of their way to cross at the light.

Therefore, we are of the opinion the ABC Board clearly erred by adopting the measurement offered by Molly Malone's over the measurement offered by Metro. Based upon Metro's measurement, Molly Malone's is within 700 feet of the nearest retail drink licensee. Consequently, the ABC administrator properly denied the license application based on KRS 241.075(3).[3]

However, this conclusion does not end our inquiry because Molly Malone's has challenged the constitutionality of that statute in its cross-appeal. Since Molly Malone's is aggrieved by the operation of KRS 241.075(2), it has standing to challenge the constitutionality of the statute. *Second Street Properties, Inc. v. Fiscal Court of Jefferson County*, 445 S.W.2d 709, 712 (Ky. 1969). Furthermore, Molly Malone's raised the constitutional issues in the proceedings before the circuit court, *see Popplewell's Alligator Dock No. 1 v. Revenue Cabinet*, 133 S.W.3d 456, 470-71 (Ky. 2004), and it gave notice to the Attorney General as required by KRS 418.075. Therefore, the constitutional issues are properly presented to this Court.

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[3] We recognize that another panel of this Court reached a different conclusion in *Louisville/Jefferson County Metro Government v. Commonwealth, et al.*, No. 2005-CA-000343-MR (December 8, 2006). But since that opinion was designated as not-to-be-published, that panel's conclusion is not binding precedent.

Molly Malone's primarily argues that KRS 241.075(2) constitutes local or special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. We agree. Section 59 of the Kentucky Constitution prohibits the General Assembly from enacting local or special legislation in twenty-eight enumerated subjects. The twenty-ninth paragraph further provides that "[i]n all other cases where a general law can be made applicable, no special law shall be enacted." Similarly, Section 60 prohibits the General Assembly from enacting local or special legislation which exempts any city, town, district or county from the operation of a general act. The purpose of the constitutional inhibition in these two sections is to require that all laws upon a subject shall operate alike upon all individuals and corporations. *Jefferson County Police Merit Board v. Bilyeu*, 634 S.W.2d 414, 416 (Ky. 1982). The legislature is prohibited from discriminating in favor of, or against, individuals or classes. *United Dry Forces v. Lewis*, 619 S.W.2d 489, 491 (Ky. 1981).

As a preliminary matter, it is clear that the requirement of a distance of 700 feet between retail drink licensees does not apply equally throughout the state. KRS 241.075(1) authorizes the state ABC Board to divide first-class cities into "downtown business areas" and "combination business and residential areas," for purposes of regulating retail package liquor and retail drink license in cities of the first-class or consolidated local governments. Subsection (2)'s requirement of a distance of 700 feet between retail liquor licensees applies only to licensees "in any combination business and residential area[.]" By definition, "a combination business and residential area" exists only in cities of the first-class or consolidated local governments. KRS 241.075(2)

further excludes "downtown business districts" from the application of the 700 feet distance requirement. Thus, the distance requirement is limited to certain portions of first-class cities or consolidated local governments.

The test for determining whether legislation violates Sections 59 and 60 is set forth in *Schoo v. Rose*, 270 S.W.2d 940 (Ky. 1954). This two-part test provides that (1) the legislation must apply equally to all in a class, and (2) there must be "distinctive and natural reasons inducing and supporting the classification." *Id.* at 941. Furthermore, legislation dealing with a particular class of city based on density of population is constitutional if it either (1) deals with the organization and structure of the government, or (2) bears a reasonable relation to the purpose of the Act. *United Dry Forces*, 619 S.W.2d at 492.

There is a strong presumption of constitutionality of legislative enactments. *Id.* at 493. And given the unique nature of the regulation and licensing of the sale of alcoholic beverages, "almost any content-neutral, legislative classification based on the types of businesses . . . eligible to sell alcoholic beverages would not constitute special legislation within the meaning of § 59." *Temperance League of Kentucky v. Perry*, 74 S.W.3d 730, 733 (Ky. 2002). Nevertheless, KRS 241.075(2) does not satisfy the reasonable-relation element under either the *Schoo* test or the *United Dry Forces* test.

The facts of the current case are virtually indistinguishable from the situation presented in *Mannini v. McFarland*, 294 Ky. 837, 172 S.W.2d 631 (1943). In *Mannini*, the owner of a poolroom challenged the constitutionality of a law that prohibited the sale of alcoholic beverages in bowling alleys and poolrooms in fourth-class

cities. *Id.* In holding that the statute violated Section 59, the former Court of Appeals found that the statute did not deal with the organization and structure of the government.

The Court in *Mannini* further found that the statute bore no reasonable relation to the purposes of the Act. The Court noted that a general prohibition against selling alcohol in poolrooms and bowling alleys across the Commonwealth would not violate the first part of the *Schoo* test. Likewise, the Court found that legislation giving cities and counties the option to decide individually whether to prohibit the sale of alcohol in poolrooms and bowling alleys also would not violate the first part of the *Schoo* test. *Id.* But the Court in *Mannini* concluded that "[t]here appears to be no rational basis for assuming that the sale of beer in a poolroom in Danville is fraught with other or different consequences than a similar sale in the nearby fifth class city of Stanford or the somewhat more distant second class city of Lexington." *Id.* at 634.

In the current case, Metro does not contend that KRS 241.075(2) relates to the regulation of municipal powers or the structure of local government.[4] Rather, Metro argues that there are rational bases for applying the 700 feet restriction only in combined business and residential areas of first-class cities and consolidated local governments. It argues that the number of alcoholic beverage licenses that can be issued is larger than the density of the population is higher, the amount of police protection is greater, and the character of first-class cities and consolidated local governments is different than

[4] The ABC Board takes no position on the merits of Molly Malone's cross-appeal challenging the constitutionality of KRS 241.075(2).

elsewhere in the state. Metro further argues that the exception for downtown business districts is justified due to the unique circumstances in such areas.

But unlike in *United Dry Forces*, *supra*, the General Assembly did not set out its reasons for the distinction in any part of the Act. Moreover, the reasoning of *Mannini* would seem to reject Metro's reasons for applying the 700 feet restriction only to a portion of Louisville Metro. There is no rational basis to presume that the evils associated with a concentration of liquor licensees in a mixed-use area are any different in Louisville Metro than they would be in Lexington, Covington, Newport, Paducah, Owensboro, or Bowling Green. Likewise, downtown business areas are equally subject to these problems, and the legislature has made no finding that the benefits from the concentration of liquor licensees in those areas would outweigh the detrimental effects.

Consequently, we must find that KRS 241.075(2) is unconstitutional as local or special legislation. Because the statute cannot be constitutionally applied, the ABC Board properly determined that the proximity between Molly Malone's, Wet Willy and Outlook Inn is not a valid basis for denying Molly Malone's application. Since Metro does not raise any other reasons which would justify a denial of the application, the ABC Board did not err by granting a retail drink license to Molly Malone's.

For the foregoing reasons, this Court finds that KRS 241.075(2) is unconstitutional as local or special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. Accordingly, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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