

RENDERED: APRIL 8, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000501-MR

DOROTHY J. HAWKINS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 06-CI-01149

HOPKINSVILLE-CHRISTIAN COUNTY
PLANNING COMMISSION AND
CHRISTIAN COUNTY, KENTUCKY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; AND LAMBERT,¹
CHIEF SENIOR JUDGE.

¹ Chief Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

STUMBO, JUDGE: This is an appeal from an order of the Christian Circuit Court dismissing Dorothy Hawkins' appeal from an administrative action and dismissing her petition for a declaration of rights. Hawkins argues that the trial court erred in dismissing her suit. She claims the trial court only ruled on her petition for declaration of rights and not the appeal from the administrative decision. She also claims the dismissal of her petition was in error because she presented a justiciable controversy. We agree with Hawkins' arguments and reverse and remand.

Hawkins owns real property in Christian County, Kentucky. For several years it was used and operated as an adult entertainment establishment known as Club Paradise. This establishment featured nude and semi-nude dancing. Hawkins did not own or operate Club Paradise; she only owned the property on which it was located.

In October of 2004, Christian County adopted an adult entertainment ordinance, Ordinance No. 2004-07. The ordinance purports to regulate adult entertainment establishments such as Club Paradise. The ordinance requires the licensing of such establishments, even if the establishment was in existence prior to the ordinance being adopted. The ordinance also sets out certain location restrictions. One such restriction is that the adult establishment cannot be located within 1,500 feet of a residence. There are residences within 1,500 feet of Club Paradise.

Club Paradise initially did not apply for an adult entertainment license and was forced to shut down in 2005. Subsequent to the closing of Club Paradise,

several people submitted applications for an adult entertainment license in order to reopen Club Paradise on Hawkins' property. Each applicant was denied because Club Paradise did not meet the location restriction set out in the ordinance.

Hawkins eventually filed for a license on her own behalf. She too was denied because of the location restriction.

On September 18, 2006, Hawkins appealed to the Christian Circuit Court. She sought judicial review of the Hopkinsville-Christian County Planning Commission's denial of her application. She also petitioned for a declaratory judgment declaring that the ordinance was unconstitutional on its face and as it applied to her and her property.

On July 18, 2007, Christian County filed a motion for summary judgment. It argued that the application was properly denied because the establishment did not conform to the location restriction. It also argued that Hawkins' challenge to the ordinance should be dismissed because she had yet to apply for an entertainment permit,² thereby making the issue not ripe for adjudication.

On September 18, 2009, the trial court entered an order dismissing Hawkins' petition with prejudice. It found that the case failed to present a justiciable controversy. In other words, under the Declaratory Judgment Act located in KRS 418.005 et seq.,

² In order to open an adult entertainment establishment in Christian County, one must apply for the license under Ordinance 2004-07 and a "place of entertainment" permit under KRS 231.020. A "place of entertainment" permit is required for any establishment being used as a public place for entertainment.

[t]he court may refuse to exercise the power to declare rights, duties or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances.

KRS 418.065. The court stated in its order that it therefore declined to make the requested declarations and that the order disposed of all issues. Hawkins then moved to alter, amend, or vacate the judgment. That motion was denied and this appeal followed.

Hawkins' first argument on appeal is that the circuit court's dismissal failed to take into account that she brought two separate but related claims, the declaratory judgment petition and the appeal from the planning commission's decision. We agree.

Hawkins brought both a petition for declaratory judgment and an appeal of the planning commission's decision to deny her application. They are separate issues. *Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, 602 S.W.2d 427 (Ky. 1980). The trial court only ruled on the declaratory judgment issue. We therefore remand this case to the trial court for a decision regarding Hawkins' appeal of the planning commission's denial of her application.

Hawkins also argues that the trial court erred in finding there was no justiciable controversy. As stated above, the trial court declined to make a declaration of Hawkins' rights because she had failed to apply for a place of entertainment permit. The court reasoned that because of this failure, even if

Hawkins had prevailed in the underlying action, she would still not be able to operate the business. In essence, without this other permit, Hawkins could not operate the business and any declaration of rights would be speculative and not terminate the controversy. We agree with Hawkins that the trial court erred in finding no justiciable controversy.

“Any person . . . whose rights are affected by statute, municipal ordinance, or other government regulation . . . provided always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his right or duties” KRS 418.045. The validity of a municipal ordinance can be determined by declaratory judgment. *City of Bowling Green v. Milliken*, 257 Ky. 245, 77 S.W.2d 777, 779 (Ky. 1934).

“The party seeking relief must show that an actual, justiciable controversy exists; proceedings for a declaratory judgment must not merely seek advisory answers to abstract questions.” *Mammoth Medical, Inc. v. Bunnell*, 265 S.W.3d 205, 209 (Ky. 2008) (citation omitted). “[A] declaratory judgment should not or cannot be made as to questions which may never arise or which are merely advisory, or are academic, hypothetical, incidental or remote, or which will not be decisive of any present controversy.” *Dravo v. Liberty Nat. Bank & Trust Co.*, 267 S.W.2d 95, 97 (Ky. 1954). “The criterion that should govern the courts is not that there is a present controversy but a justiciable controversy over present rights, duties or liabilities.” *Id.*

In the case at hand, Hawkins was denied declaratory relief because she had not obtained a place of entertainment permit pursuant to KRS 231.020. The trial court found that without this permit, any positive ruling on Hawkins' case would still not allow her to operate Club Paradise; therefore, there was no justiciable controversy. We disagree.

Hawkins was not denied the adult entertainment establishment license because she had not obtained a place of entertainment permit pursuant to KRS 231.020. She was denied the license because she did not meet the location restrictions set forth in the ordinance. She argues that the ordinance should not be applied to her or that it is unconstitutional as applied to her. She also brings to our attention that there is no rule that says she must first apply for the place of entertainment permit before the adult entertainment license. Requiring Hawkins to apply for a general entertainment permit before the adult entertainment license would be a futile gesture in light of the fact that she has been denied the adult entertainment license based on the restrictions of the ordinance.

We therefore find that there is a justiciable controversy ripe for declaratory judgment. A declaratory judgment on this issue would settle the controversy as it applies to the ordinance's constitutionality and application to Hawkins and her property. Hawkins has been denied the license she seeks. This is not a hypothetical or potential issue, but a controversy over her present rights.

Based on the above, we reverse and remand this case to the Christian Circuit Court for a decision regarding the direct appeal of the planning

commission's administrative action and for a judgment on the merits of Hawkins' petition for declaratory judgment.

ALL CONCUR.

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