

RENDERED: July 28, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001380-MR

PURE PLEASURE MEGACENTER OF
LOUISVILLE, LLC; DONALD KLEINHANS;
AND INTERLOCK REALTY COMPANY

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. McDONALD, JUDGE
ACTION NO. 03-CI-001960

LOUISVILLE-JEFFERSON COUNTY
METRO GOVERNMENT

APPELLEE

OPINION AND ORDER
DISMISSING

** ** *

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,¹ SENIOR JUDGE.

JOHNSON, JUDGE: Pure Pleasure MegaCenter of Louisville, LLC,
Donald Kleinhans, and Interlock Realty Co. (collectively PPMC)
have appealed an order of the Jefferson Circuit Court entered on
June 2, 2005, which granted the request of Louisville-Jefferson
County Metro Government (Metro) and permanently enjoined PPMC

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

from operating or maintaining any establishment having sexual material for sale or rent in any zoning district where such activity is prohibited. Having concluded that PPMC has abandoned this appeal, we dismiss.

The facts of the case are not in dispute.² On March 5, 2003, Metro filed a complaint against PPMC³ alleging (1) that PPMC operated or permitted to be operated an adult entertainment establishment, as that term is defined in the JCO, without a valid adult license, and (2) that PPMC further violated the zoning regulations of the LDC by being located in a prohibited enterprise zone. Based on these two allegations, Metro sought injunctive relief by filing two separate motions for temporary injunctions, pursuant to CR⁴ 65.04.

On March 21, 2003, after Metro filed its complaint, but before the trial court ruled on Metro's two motions for

² In its brief, Metro states "[Metro] generally accepts the factual statements of [PPMC's] Statement of the Case, but takes issue with the editorializing and argument included in the Statement." Otherwise, Metro provided no counterstatement of the case.

³ Prior to filing the complaint, Metro had issued a notice of zoning violation against PPMC on February 13, 2003, and had cited PPMC on February 18, 2003, for violation of Section 111.041 of the Jefferson County Ordinances (JCO). On March 14, 2003, PPMC filed an appeal before the Metro Board of Zoning Administration (BOZA). A hearing was held before the BOZA on April 21, 2003, wherein it was determined that PPMC was located in the EZ-1 zone. The EZ-1 zone allows the same uses as in the C-2 Commercial and the M-3 Industrial district, with three exceptions, one of those being, adult entertainment uses. The BOZA observed the site and reviewed the staff report submitted and denied the appeal. The BOZA stated that the same definitions in the Land Development Code (LDC) effective on March 1, 2003, were also in effect in the code at the time of the violation.

⁴ Kentucky Rules of Civil Procedure.

injunctive relief, the United States District Court for the Western District of Kentucky entered an order in another case, Cam I, Inc. v. Louisville/Jefferson County Metro Government,⁵ temporarily restraining application, enforcement, and action under Chapter 111 of the JCO, until further orders of the district court. In its Memorandum Opinion entered the same day, the District Court concluded as follows:

Conclusion

We find there is a substantial likelihood CAM I will succeed on the merits of the First Amendment challenge because the ordinance in question does not ensure that a licensing decision will be made within a reasonably brief period of time, and cannot ensure a prompt judicial decision on review. The ordinance is a prior restraint on CAM I's constitutionally-protected right of freedom of speech without the safeguards required by Freedman.⁶ Therefore, its enforcement will be enjoined.

Motion having been made and for the reasons set forth above, the motion of CAM I for a preliminary injunction and temporary restraining order will be GRANTED by separate order.

Metro conceded in its post-hearing brief that the terms of the District Court order precluded Metro from pursuing its claim that PPMC was operating without a valid adult entertainment license as a basis for seeking a temporary injunction. Thus,

⁵ Civil Action No. 3:02CV-715-S.

⁶ Freedman v. State of Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

the only issue before the trial court to decide was whether a temporary injunction should be issued on Metro's claim that PPMC was improperly operating in an EZ-1 enterprise zone under the LDC.

On March 25, 2003, the trial court held a hearing on Metro's remaining motion for temporary injunction and denied Metro's motion by order entered on May 23, 2003.⁷ The trial court stated, in pertinent part, as follows:

[T]he Court must determine if the complaint presents a serious question as to the merits. The issue of an adult entertainment license under JCO Chapter 111 is now moot, leaving only the issue that [PPMC] is improperly operating an adult entertainment establishment in an EZ-1 Enterprise Zone. [PPMC] has brought up several defenses to this argument. . . .

⁷ The trial court's May 23, 2003, order stated as follows:

Two witnesses testified on behalf of [Metro]. The first witness was Steve Lutz, a zoning officer. Lutz testified that adult entertainment uses are not permissive uses of property located in an EZ-1 Enterprise Zone under the current LDC (effective March 1, 2003) and under the previous code version. [Metro's] Exhibit No. 3 shows that the zoning classification for 3299 Fern Valley Road as being EZ-1 Enterprise Zone. On cross-examination, Lutz testified that there is no definition in the LDC for "adult entertainment use."

The second witness was Charles Weathers, a [Metro] employee with the Department of Inspections, Permits and Licenses, ABC Division. Weathers testified that he visited [PPMC] on February 19, 2003[,] and issued a citation because the business was operating without an adult entertainment license. He also took photographs inside the business and of its outside sign. See [Metro's] Exhibit Nos. 4, 5, and 6.

The actual overall merits of a case should not be determined on a motion for temporary injunction pursuant to CR 65.04. Maupin [v. Stansbury,] 575 S.W.2d [695], 699 [Ky.App. 1978]. The Court need only determine whether the complaint presents a serious and substantial question as to the merits.

Under the circumstances of this case, while the complaint does raise a valid and substantial question as to [PPMC] improperly operating in an EZ-1 Enterprise Zone, [PPMC] has offered numerous defenses to LDC § 2.6.1(A)(3).

Consequently, the Court finds that under the standard set forth in Sturgeon Mining Company⁸ the motion for a temporary injunction brought by [Metro] must be denied at this stage of the case.

The case was then scheduled for a full trial on the merits, but the case was taken off the trial calendar by agreed order and was decided by the trial court based on briefs submitted by the parties, including affidavits, exhibits, and stipulation of certain facts. Subsequently, the trial court entered an order on June 2, 2005, wherein it ruled in favor of Metro and permanently enjoined the operation of PPMC.

The trial court's opinion stated the facts of the case, as stipulated by the parties, as follows:

⁸ Sturgeon Mining Co. v. Whymore Coal Co., 892 S.W.2d 591, 592 (Ky. 1995) (setting forth a three-part test for the determination of whether to issue a temporary injunction).

FACTS

1. The Plaintiff, [Metro], is a consolidated local government established under the provisions of KRS 67C.101 et seq.
2. The Defendant[,] [PPMC][,] is a Florida limited liability company, registered in Kentucky, and operates a business at 3299 Fern Valley Road in Jefferson County, Kentucky and has operated the business continuously at that location since late January or early February of 2003.
3. [PPMC] advertises that it is "Louisville's #1 Adult Megacenter" with DVDs, sex toys, magazines and lingerie for sale and has private video booths with a 60-channel video arcade.
4. The Defendant[,] [Kleinhans][,] is an officer of [PPMC] and manages the business located at 3299 Fern Valley Road.
5. The Defendant[,] [Interlock][,] is a Kentucky limited liability corporation and is the owner of the real property located at 3299 Fern Valley Road in Jefferson County, Kentucky and leases the property to [PPMC].
6. The property located at 3299 Fern Valley Road is zoned EZ-1, Enterprise Zone District, and has been since 1987 and "adult entertainment uses" are not permitted uses in the EZ-1 zone and never have been [emphasis added].
7. [PPMC] and Interlock were cited by zoning enforcement officers for violations of the EZ-1 zone on 13 February 2003[,] for causing, allowing or permitting the operation of an "adult entertainment establishment" in an EZ-1 Zone District on the property located at 3299 Fern Valley Road in Jefferson County, Kentucky.

8. On 14 March 2003, [PPMC] appealed the notice of zoning violation to the Metro Board of Zoning Adjustment ("BOZA").

9. On 21 April 2003, [the] BOZA held a public hearing and after the hearing rendered its decision to deny the appeal and uphold the violation.

10. On 21 May 2003, [PPMC] appealed [the] BOZA's decision to the Jefferson Circuit Court. That appeal was dismissed on 21 August 2003.

11. Interlock did not appeal the zoning violation notice to either [the] BOZA or to any court with jurisdiction.

[Metro] seeks temporary and permanent injunctive relief to prevent [PPMC] from using the property at 3299 Fern Valley Road in violation of the zoning regulations. [Metro] alleges that the only issues before the Court are: (1) whether [PPMC] [is] operating an adult entertainment use in an EZ-1 zoning district in violation of the Zoning Regulations; and (2) whether the alleged violation entitles [Metro] to a permanent injunction. [PPMC] asserts that Section 2.6.1 of the [LDC] is unenforceable against them [footnote omitted].

OPINION

. . . .

There can be no doubt that [PPMC] is operating in continuing violation of the Zoning Regulations. [Metro] asserts that the continued violation constitutes irreparable harm warranting a permanent injunction. [PPMC], on the other hand, maintains that there is no evidence that its location causes any harm to the City or its residents.

CR 65.01 provides for a permanent injunction to restrict or direct the doing of an act. In City of Louisville v. Koenig, Ky., 162 S.W.2d 19 (1942), the court stated that there could be no objection to an injunction forbidding an unauthorized use of an otherwise conforming property. There, the property was zoned residential and Koenig obtained a permit for and built a garage on the property. However, after completion of construction, he began to use the garage for the manufacture of bleach. [Such] a use was prohibited by the applicable zoning regulations. That is much the situation in this case. The property in question cannot be used for the purposes of maintaining an adult entertainment activity or use. It is appropriate to enjoin the prohibited activity.

Further, in Polk v. Axton, Ky., 208 S.W.2d 497 (1948), the Court held that citizens are entitled to the benefits which accrue to them from the observance of the general zoning regulations by their neighbors. The Court went on to state that even though they suffer no specific pecuniary loss, their special damage is a sound basis for injunctive relief. [PPMC] does not have the right to maintain its activities in violation of valid ordinances.

ORDER

IT IS HEREBY ORDERED that [PPMC] [is] permanently enjoined from operating or maintaining any establishment having as one of its principle uses the sale, rent or display of pictures, books, periodicals, magazines, appliances and similar material which are distinguished or characterized by their emphasis on depictions of sexual activities or an establishment with a substantial segment or section devoted to the sale, rental or display of such material in any zoning district where such activity is prohibited. Sexual activities are

defined as the depiction of human genitals in a state of arousal; acts of human masturbation, sexual intercourse or sodomy; holding or other erotic touching of human genitals, pubic region, buttocks or breasts.

This Order is final and appealable and there is no just cause for delay.

On June 30, 2005, PPMC filed a motion for stay pending appeal, which does not appear to have been ruled upon. This appeal followed.

PPMC's argument on appeal has three main parts. First, PPMC argues that the zoning regulations are unconstitutionally vague and overbroad. Second, PPMC argues that even if the zoning regulations are not vague and overbroad, Metro failed to show that the zoning regulations apply to PPMC. Finally, PPMC argues that even if the zoning regulations apply to PPMC, they are "facially unconstitutional" and, thus, unenforceable. In support of this argument, PPMC argues that the zoning regulations lack a substantial governmental purpose and they fail to comply with KRS 154.45-00 et seq.

On July 10, 2006, this Court denied PPMC's motion to dismiss the appeal and ordered that the parties argue the issue of mootness at oral argument held on July 12, 2006. PPMC argues that the issues are moot as PPMC ceased doing business at the location. Metro argues that the issues are not moot since PPMC

is operating the same business under a new name in the same zone.

To the extent that PPMC's motion to dismiss is requesting this Court to determine whether the issues on appeal have become moot, we decline that invitation. However, counsel for PPMC having stated at oral argument that PPMC no longer wishes to pursue this appeal, we deem this appeal to be abandoned by PPMC. Thus, while we have reconsidered PPMC's motion to dismiss appeal and GRANT that motion, we do so on the grounds of abandonment and not mootness. It is not within the purview of this Court to make a factual determination as to whether the old business and new business are totally separate entities as contended by PPMC or if there is privity among the entities as argued by Metro. Metro's recourse is to seek enforcement of the injunctive order in the Jefferson Circuit Court, as upon dismissal of the appeal the judgment becomes enforceable against PPMC and its privies.⁹

Therefore, having reconsidered the motion to dismiss the appeal, the Court ORDERS the motion be, and it is hereby, GRANTED as the appeal has been abandoned.

ALL CONCUR.

ENTERED: July 28, 2006

/s/ Rick A. Johnson
JUDGE, COURT OF APPEALS

⁹ See State Farm Mutual Automobile Insurance Co. v. Shelton, 368 S.W.2d 734, 737 (Ky. 1963).

BRIEF FOR APPELLANTS:

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