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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001583-MR

O'SHEA'S-BAXTER, LLC, D/B/A
FLANAGAN'S ALE HOUSE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00991

COMMONWEALTH OF KENTUCKY,
ALCOHOLIC BEVERAGE CONTROL
BOARD AND LOUISVILLE/
JEFFERSON COUNTY METRO
GOVERNMENT

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: NICKELL, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: O'Shea's-Baxter, LLC, d/b/a Flanagan's Ale House
("Flanagan's") appeals from an opinion and order of the Franklin Circuit Court
denying its motion for summary judgment and granting summary judgment in

favor of the Louisville/Jefferson County Metro Government (“Metro”) and Commonwealth of Kentucky, Alcoholic Beverage Control Board (“ABC Board”) affirming a final order issued by the ABC Board upholding Metro’s denial of Flanagan’s application for a retail liquor by the drink license. Having heard oral arguments and considered the error raised by Flanagan’s, we reverse and remand this matter to the Franklin Circuit Court.

The underlying facts of this case are not in dispute. Flanagan’s operates an establishment at 934 Baxter Avenue in Louisville, Kentucky. It applied for a retail liquor drink license to replace its restaurant drink license. Metro denied the application on the basis that the license would be located within 700 feet of another similarly licensed establishment and would therefore violate KRS¹ 241.075(2). Flanagan’s appealed the decision to the ABC Board, which upheld the denial.

Thereafter, Flanagan’s appealed the decision of the ABC Board to the Franklin Circuit Court. Flanagan’s conceded that its establishment was located within 700 feet of a similarly licensed establishment, but argued that KRS 241.075(2) is unconstitutional because it constitutes local or special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. The parties filed cross-motions for summary judgment, and in an opinion and order entered August 9, 2011, the trial court granted summary judgment in favor of Metro and the ABC Board, finding KRS 241.075(2) constitutional because “an important public

¹ Kentucky Revised Statutes.

purpose is served by limiting the density of establishments authorized to serve and sell liquor in combination residential/commercial areas.” This appeal followed.²

On appeal, Flanagan’s maintains that KRS 241.075(2) is unconstitutional and that the trial court erred by relying on the statute to rule in favor of Metro and the ABC Board and effectively deny its liquor license application. We agree.³

The constitutionality of a statute is a question of law subject to *de novo* review. *Moore v. Ward*, 377 S.W.2d 881, 883 (Ky. 1964). Section 59 of the Kentucky Constitution prohibits the General Assembly from enacting local or special legislation for a variety of purposes. Specifically, Section 59 provides that “[i]n all other cases where a general law can be made applicable, no special law shall be enacted.” Ky. Const. § 59. Correspondingly, Section 60 bars enactment of special legislation indirectly exempting any city, town, district or county from the operation of a general act. Ky. Const. § 60. These two sections prevent the enactment of laws that do not operate alike upon all individuals and corporations.

² During oral arguments, we requested Flanagan’s to submit proof as to whether it notified the Office of the Attorney General (“OAG”) of the constitutional issues raised as required by KRS 418.075. On November 16, 2012, the parties to this appeal submitted a joint stipulation that Flanagan’s served the complaint filed with the trial court upon the OAG. The parties attached the certified mail receipt indicating the complaint was served upon the OAG.

³ This court previously addressed the constitutionality of KRS 241.075(2). *See Louisville/Jefferson County Metro Gov’t v. TDC Group, LLC*, No. 2006-CA-000068-MR (Ky. App. Apr. 6, 2007). On discretionary review, the Kentucky Supreme Court resolved the case without addressing the constitutionality of KRS 241.075(2). *See Louisville/Jefferson County Metro Gov’t v. TDC Group, LLC*, 283 S.W.3d 657 (Ky. 2009) (when a court can rely on non-constitutional grounds to resolve a matter, it should refrain from reaching the constitutional issues). Since the constitutionality of KRS 241.075(2) is the only issue before us, we must address it.

Jefferson County Police Merit Bd. v. Bilyeu, 634 S.W.2d 414, 416 (Ky. 1982) (citing *City of Louisville v. Kuntz*, 104 Ky. 584, 47 S.W. 592 (1898)).

The statute at issue in the case at bar, KRS 241.075(1), authorizes the ABC Board to divide cities of the first class or consolidated local governments into “downtown business areas” and “combination business and residential areas” for the purpose of regulating the location of retail package liquor and retail drink licenses. These classifications only exist in cities of the first-class or consolidated local governments. KRS 241.075(1).⁴ Subsection (2)’s requirement of a distance of 700 feet between retail liquor licenses applies only to licensees “in any combination business and residential area,” excluding the same requirement for “downtown business areas.” KRS 241.075(2).

We note that legislative enactments are entitled to a strong presumption of constitutionality. *Wynn v. Ibold, Inc.*, 969 S.W.2d 695 (Ky. 1998). And courts have previously held that “[g]iven 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 or organizations 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) (citations omitted). Nevertheless, for legislation to comply with Section 59, “(1) [i]t must apply equally to all in a class, and (2) there must be distinctive and natural

⁴ As a practical matter, these classifications can only apply in Louisville, Jefferson County, or Louisville Metro since Louisville is the only city of the first class, KRS 81.010, and Louisville Metro is the only consolidated local government. KRS 67C.101.

reasons inducing and supporting the classification.” *Schoo v. Rose*, 270 S.W.2d 940, 941 (Ky. 1954) (citations omitted). When regulating a particular class of city based on the density of its population, legislation is constitutional if it either (1) deals with the organization and structure of government, or (2) bears a reasonable relation to the purpose of the Act. *United Dry Forces v. Lewis*, 619 S.W.2d 489, 492 (Ky. 1981).

In *Mannini v. McFarland*, 294 Ky. 837, 172 S.W.2d 631 (1943), regarded as the linchpin case dealing with special legislation, *see United Dry Forces*, 619 S.W.2d at 492, the owner of a poolroom challenged the constitutionality of a law, applicable solely to cities of the fourth class, prohibiting the sale of alcohol in bowling alleys and poolrooms. Holding the statute to be special legislation in violation of Sections 59 and 60 of the Kentucky Constitution, the former Court of Appeals found no reasonable relationship between size or class of cities and the purpose of the Act. *Mannini*, 294 Ky. at 843, 172 S.W.2d at 634. The court 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.*, 172 S.W.2d at 634. We find the circumstances presented in the case at bar to be practically indistinguishable from those addressed in *Mannini*.

Metro argues that one of the most effective means of regulating alcohol is to limit the number of licenses based on factors such as density of population, amount

of police protection afforded, and the character of the territory where the licenses are sought, *i.e.*, business or residential.⁵ Based on these factors, it argues the number of alcoholic beverage licenses that can be issued is larger in the Louisville Metro, thereby creating unique circumstances in which regulation such as KRS 241.075 is reasonable. Metro further argues that “combination business and residential areas” maintain a residential character, including single family dwellings, as opposed to the “downtown business area,” in which residents’ expectations of the area differ. As a result, Metro maintains it has a constitutional right to create such classifications.

We acknowledge that larger cities of the first class present unique circumstances that require specific regulation; however, KRS 241.075 deals with the concentration of liquor licenses, rather than the number of licenses issued. Neither Metro nor the ABC Board set forth reasons for limiting the concentration of liquor licenses in a portion of Louisville/Jefferson County and not in other areas of the Commonwealth. While we can appreciate Metro’s arguments for purposes of limiting the amount of liquor licenses issued, we fail to appreciate its specific reasons for limiting the concentration of those licenses. Ultimately, we find no reasonable basis to presume that the circumstances associated with a concentration of liquor licenses in a “combination business and residential area” in Louisville are any different than they would be in the “downtown business area” of Louisville or

⁵ The ABC Board takes no position on the constitutional challenge of KRS 241.075(2).

other cities not designated as first class, such as Lexington, Covington, Owensboro, or Paducah.

Consequently, we find that KRS 241.075(2) is unconstitutional as local or special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. As a result, the ABC Board improperly denied Flanagan's application for a retail liquor license on the basis of KRS 241.075(2), and the trial court erred by granting Metro's and the ABC Board's motion for summary judgment.

The opinion and order of the Franklin Circuit Court is reversed, and this case is remanded with instructions to enter summary judgment in favor of Flanagan's.

ALL CONCUR.

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