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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Elijah Shaw & Patricia Raynor, Plaintiffs,	)	
v.	)	No. 17-1299-II
Metropolitan Government of Nashville and Davidson County, Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Metropolitan Government moves for summary judgment because there are no material facts in dispute and the Metropolitan Code provision preventing Plaintiffs from serving clients at their home-based businesses is rationally related to a legitimate governmental purpose.

The Supreme Court ruled many decades ago that whether to prohibit home businesses from operating at residential properties was a matter of legislative discretion. *Davidson Cty. v. Hoover*, 211 Tenn. 223, 229–31, 364 S.W.2d 879, 882 (1963). This remains true today.

FACTS

This lawsuit challenges the constitutionality of METROPOLITAN CODE § 17.16.250(D)(1) [1], which allows residents to use their homes for home occupations, so long as no clients are served on the property.

[1] Residential Uses…D. Home Occupation. A home occupation shall be considered an accessory use to a residence subject to the following:

1. The home occupation shall be conducted in a dwelling unit or accessory building by one or more occupants of the dwelling unit. No clients or patrons may be served on the property. No more than one part-time or full-time employee not living within the dwelling may work at the home occupation location.
2. The home occupation shall not occupy more than twenty percent of the total floor area of the principal structure and in no event more than five hundred square feet of floor area.
3. Signage. Any sign, as defined in M.C.L. 17.32.030.B, on a property used for a home occupation shall be governed by the provision of M.C.L Chapter 17.32 Sign Regulations.
4. The use of mechanical or electrical equipment shall be permitted in connection with a home occupation provided such equipment:

a. Would be used for purely domestic or household purposes;

I. PLAINTIFFS' ALLEGATIONS.

Plaintiffs wish to legally operate home-based businesses that involve having clients visit their homes (a beauty shop and a recording studio). Complaint, ¶ 96.

Plaintiffs allege that this prohibition on client-visits violates their due process and equal protection rights under the Tennessee Constitution. Complaint, ¶¶ 144, 151. Plaintiffs ask that the Court invalidate the prohibition on client-visits and allow them to serve up to 12 clients per day. Complaint, ¶ 152.

II. PROPOSALS LIKE THE KIND SUGGESTED BY THE PLAINTIFFS HAVE BEEN REPEATEDLY REJECTED BY THE METROPOLITAN COUNCIL.

Proposals to allow clients to visit home-based businesses have been considered by the Metropolitan Council numerous times within the last twenty years, without success.[2] In 2000, Councilmembers Arriola and Ponder filed BL 2000-173, which would have created an exception

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b. Is located entirely within the dwelling unit or accessory building and cannot be seen, heard or smelled from outside the dwelling unit or accessory building and has an aggregate weight of less than five hundred pounds; and
c. Does not interfere with radio and television reception on neighboring properties.
5. The storage of materials or goods shall be permitted in connection with a home occupation provided such storage complies with the following standards.
a. All materials or goods shall be stored completely within the space designated for home occupation activities.
b. Only those materials or goods that are utilized or produced in connection with the home occupation may be stored within the dwelling unit or accessory building.
c. All materials or goods shall be stored completely within the dwelling unit or accessory building.
d. All flammable or combustible compounds, products or materials shall be maintained and utilized in compliance with Fire Code NFPA-30.
6. External structural alterations not customary in residential buildings shall not be permitted.
7. Offensive noise, vibration, smoke, dust or other particulate matter, odorous matter, heat, humidity, glare, or other objectionable effects shall not be permitted.
8. The manufacture or repair of transportation equipment shall not be permitted as a home occupation.
9. Vehicles associated with the home occupation shall be limited to one vehicle with a maximum axle load capacity of one and one-half tons.

METROPOLITAN CODE OF LAWS § 17.16.250(D) (emphasis added). Title 17 of the Metropolitan Code was filed with the Court on January 26, 2018.

[2] Certified copies of these proposed ordinances are filed with the Court with a Notice of Filing.

allowing clients or patrons to be served at a hair salon home business. In 2010, Councilmember Stanley filed BL2010-754, which would have created a similar exception for home-based cosmetology and barber shops and allowed owners up to one chair and two customers at a time.

BL2011-858, which would have allowed up to two clients per hour, was introduced by Councilmember Jameson in 2011. Councilmember Jameson also filed BL2011-924, which would have created a separate land use for home businesses. In 2012 at-large-Councilmember Barry introduced BL2012-292, which would have allowed home recording studios and no more than ten clients, customers or musicians to visit per day. In 2013, Councilmember Stanley filed BL2013-451, which would have allowed up to ten visits per day for client visits to "professional service home businesses" (accountants, investment advisors, and attorneys).

And, in 2017, Councilman Davis filed BL2017-719, which would have changed Mr. Shaw's zoning from residential to SP (allowing his home recording studio) and Councilmember Syracuse filed BL2017-798, which would have changed Ms. Raynor's zoning from Residential to Specific Plan (allowing her home hair salon).

All of these proposals, including Mr. Shaw and Ms. Raynor's requests for SP zoning, were unsuccessful. Metro Council considered them and decided, as the local legislative body, not to adopt these zoning measures.

III. LEGITIMATE RATIONAL BASES HAVE BEEN PROFFERED BY THE METROPOLITAN GOVERNMENT.

In its discovery responses, the Metropolitan Government has proffered the following overview of its rational reasons for not allowing clients to be served in homes:

The client prohibition serves to protect and maintain the residential nature of residentially-zoned property and prevent commercial intrusion. Related are the goals of limiting non-residential traffic (both additional people and cars) in the neighborhood and avoiding parking

problems.

The more specific reasons listed below,[3] including many related to the need to preserve commercial districts, indicate there were many other arguments the legislature considered in keeping the client prohibition:

- Some homeowners selected residential areas because they did not want businesses near their house. There is plenty of room for businesses in commercial areas.
- It is difficult to ensure that the businesses will follow the restrictions that would be placed on these home businesses (e.g. limits on number of clients per day). Enforcement resources are already stretched very thin, and they do not have the manpower in Codes to enforce.
- The police department does not have resources to handle additional non-criminal related disputes.
- Would turn neighbor against neighbor, which is not what Nashville needs.
- Codes Dept. does not traditionally work on weekends or evenings, so it has difficulty enforcing Metro's ordinances during these times.
- There are alternatives (e.g. Weworks or rental of conference spaces) so that most home businesses can meet clients elsewhere.
- Allowing clients to visit home businesses is inconsistent with residential policy as currently set by the Metropolitan Code county-wide. For those areas that do not mind commercial intrusions, we already have a category designated as mixed use or SP (which also provides the procedural safeguards of a rezoning).
- This would create de facto mixed use all over the county, without a zoning change.
- It is a mass rezoning without procedural safeguards. A rezoning, such as to commercial, mixed use, or SP, requires public notice to nearby neighbors and has other procedural safeguards, such as a limit on what types of businesses will be allowed and a discussion of whether that location is appropriate for a zone change.
- A one-size fits all approach to this problem is not appropriate. Neighborhoods have different goals, expectations, histories.
- Delivery trucks and lawn care businesses coming into neighborhoods generally identify themselves when they come into neighborhoods, by their vehicles and/or uniforms or equipment. Clients would have no identification to show the reason they are in the neighborhood.
- The addition of unidentified strangers in the neighborhood means it will be more difficult for neighborhood watch groups to identify potential concerns for the neighborhood.
- Smaller steps toward allowing clients to visit home businesses in certain areas of town would be more appropriate.
- If start allowing one home occupation to have clients, other occupations will quickly ask

[3] These reasons were provided to Plaintiffs in the Metropolitan Government's Second Supplemental Responses to Plaintiffs' Interrogatory # 5-7. These Responses are submitted to the Court with a Notice of Filing.

to be included also (slippery slope).

- Overlap in customers arriving (late, early) means more than one at a time parking in the area.
- There is often inadequate parking for clients in residential areas.
- Neighbors do not want additional traffic in their neighborhoods.
- Neighborhood streets are often not wide enough to accommodate a lot of additional traffic.
- There often are not sidewalks in residential neighborhoods, so clients cannot walk to businesses.
- Commercial properties have or will have vacancies. They need tenants. Takes part of the market away from commercially zoned properties. Creates an unlevel playing field.
- Home business spaces are not taxed at a commercial rate, because they are accessory to the primary use (residential). This is not fair to other office spaces or to businesses that rent commercial space.
- Commercial electric, water and stormwater rates are also different from residential.
- Commercial businesses have different ADA standards than residences.
- Determining whether a home business is primarily a residence or business would be a new burden on the Metro Assessor.
- Some businesses might be more appropriate for having in residential areas than others.
- Some neighborhoods are historically more used to home businesses with clients visiting than others.
- Some neighborhoods are transitional (between commercial and residential) and better suited for clients visiting, or have existing businesses nearby, or are on very busy streets that are not as quiet. Most neighborhoods are not and do not have that expectation.
- Worried about unintentional and unknown consequences.
- People may buy in certain areas in order to use for a home-business and be able to pay higher prices; this may crowd out residential purchasers.
- If you had two home businesses in the house – this would double the number of client visitors allowed and double the issues above, such as traffic and parking.
- It creates burden for the HOAs to enforce their covenants prohibiting, if Metro allowed.

These reasons arose out of the public hearings where the client prohibition ban was debated, particularly from the July 5, 2011 Metro Council hearing on BL 2011-924.[4]

[4] https://www.youtube.com/watch?v=0UlVzksRJPI&list=PLAAE32390485B37DB&index=392&t=0s (minutes 17:30-1:07:30).

IV. LEGITIMATE RATIONAL BASES HAVE BEEN PROFFERED BY THE METROPOLITAN GOVERNMENT THROUGH THEIR 30.02(6) REPRESENTATIVE.

Former Councilmember Todd testified at length as the 30.02(6) witness for the Metropolitan Government and elaborated on the reasons provided in written discovery. He testified that there are four categories for why the client prohibition exists: order, certainty, quality of life, and safety. (Deposition of Carter Todd,[5] p. 19). Each of these categories has sub-categories within them. *Id.*

A. The Interest in Public Order.

Councilmember Todd testified that order and reliance on zoning categories is an important government interest that must be preserved. *Id.*, pp. 23-27. There is a value in a zoning code and knowing what you are buying, when you buy your house. *Id.*, p.33. "If you take out the very thing that makes residential zoning residential ... it's no longer residential… the whole zoning code will kind of collapse in on itself. It won't have any meaning." *Id.* "[W]hen you completely delete this requirement, to me the residential nature of residentially-zoned property has been diminished to the point of not really being residential anymore." *Id.* p. 108.

The biggest investment most Nashvillians make is in their home, and homes in residential neighborhoods were purchased in reliance on the residential zoning. *Id.*, pp. 23-27. They were purchased with the expectation that clients would not be served in those neighborhoods. It would not be appropriate to suddenly change all of them to de-facto mixed use. *Id.*; *Id.* p. 111-112. There is an orderly process that should be followed for rezoning, which involves procedural safeguards such as public notice, mailings, and an opportunity to participate in the process. *Id.*, pp. 29-30.

[5] Councilman Todd's deposition is submitted to the Court with a Notice of Filing.

Investments in commercial businesses, shopping centers and the central business district also must be preserved. If the client prohibition is removed, it will hurt those businesses and areas of town. *Id*.; *Id*. pp. 99-100. It would also be unfair to subject the commercial businesses to a different tax rate than residential properties who can serve customers, because it would put residential businesses at an advantage. *Id*., pp. 29-30.; *Id*. pp. 101-103. There are different water and storm water rates. *Id.* p. 116. The tax assessor would be burdened by having to determine what rate is appropriate for home businesses who frequently serve customers in the home. *Id*., pp. 29-30.

Affordable housing problems could also result, because property owners who chose to receive clients in their homes might be able to pay a higher price for the home. *Id*. p. 118. This crowds out potential homeowners who do not have that home business income.

It is possible that some neighborhoods may wish to accommodate client-visits, but it is not appropriate to impose this county-wide. *Id*., pp. 113-114. Neighborhoods have different goals, histories, and expectations. *Id*.

In addition, there are alternative workspaces, such as Weworks or rental of conference spaces, to allow most businesses to meet clients outside a home. *Id*. p. 110. Or, home-based businesses could rent space in commercial or mixed-use zoned areas. *Id*.p. 111.

B. <u>The Interest in Certainty of Outcome.</u>

Councilmember Todd testified that certainty of outcome is also an important interest. *Id*., pp. 27-28. The client prohibition is simple and therefore easy to enforce. *Id*. Picking a number of clients to allow would be both arbitrary (why pick 4 and not 5, why pick 8 and not 9?) and difficult to enforce (who keeps count of how many clients really come to the house?). *Id*.; *Id*. p. 126.

The Police and Codes Departments do not have the resources to enforce these restrictions and track visitors versus clients. *Id*. pp. 109, 122. Allowing a certain number of clients to come to the home would make the neighbors the entity that has to observe and track visitors versus clients. *Id.* p. 125. This can hurt neighborhood relationships.

C. <u>The Interest in Quality of Life.</u>

Councilmember Todd testified that many of his constituents had chosen, purposefully, to live in a residential area. *Id*. pp. 28-29. They did not want commercial activity near them. *Id*. Home businesses where no clients are served can exist without causing a disturbance, but once clients start visiting, it can bother the neighbors. *Id*. at 35.

There must have been someone in Lij or Pat's neighborhoods who objected to their receiving clients in their homes, or they would not have been reported to the Codes Department. *Id.* at p. 120.

D. <u>The Interest in the Safety of Clients and Neighbors.</u>

Councilmember Todd testified that clients of businesses are entitled to an expectation of safety. *Id.*, p. 21. Homes are typically not built with a view toward accommodating the general public, especially on a daily basis. But business districts and structures are designed as places of public accommodation, to be safe for visitors who are unfamiliar with an area and to comply with the Americans With Disabilities Act through properly graded sidewalks, wide aisles, and handicap bathroom facilities. *Id*.

The International Building Code, which is adopted and incorporated into the Metropolitan Code by reference (METROPOLITAN CODE § 16.08.010[6]), takes issues like this into consideration by setting different standards for buildings where professional services are transacted ("Business Group B"), buildings where merchandise is sold ("Mercantile Group M"),

[6] A certified copy is submitted to the Court with a Notice of Filing.

and structures used for sleeping purposes ("Residential Group R") (https://codes.iccsafe.org/content/IBC2015/chapter-3-use-and-occupancy-classification). There is a separate International Residential Code for One- and Two-Family Dwellings, which is also incorporated into the Metropolitan Code. METROPOLITAN CODE § 16.08.010.

Also, some types of businesses are more appropriate for receiving clients in neighborhoods than others. There are certain businesses that have an element of danger, potentially dangerous clients, or might be attractive nuisances. *Todd Deposition.*, pp. 19-22. Some businesses may have medical waste, chemicals, or sharp objects associated with them. Residential areas often have unsupervised children playing in them and there is a clear interest in locating these kinds of businesses in away from children, in commercial districts. *Id*.

Traffic and parking is another aspect of safety – many neighborhoods were built without sidewalks and many neighborhoods are not built to accommodate frequent parking on the street. *Id*., pp. 22-23. Some neighborhoods, such as 12 South, have to use permit parking on the street, in order to have enough parking for residents. *Id*. pp. 126-127.

ANALYSIS

I. AN ANALYSIS OF SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION UNDER THE TENNESSEE CONSTITUTION IS IDENTICAL TO ANALYSIS UNDER THE U.S. CONSTITUTION.

Tennessee courts have applied the same analysis for substantive due process claims brought pursuant to the Tennessee Constitution as they have applied in such challenges brought under the U.S. Constitution. *Gallaher v. Elam,* 104 S.W.3d 455, 463 (Tenn.2003); *Riggs v. Burson,* 941 S.W.2d 44, 51 (Tenn.1997), *cert. denied,* 522 U.S. 982 (1997). *Newton v. Cox,* 878 S.W.2d 105, 110 (Tenn. 1994), *cert. denied,* 513 U.S. 869 (1994).

The Tennessee Constitution's equal protection provisions confer "essentially the same protection" as the Equal Protection clause of the United States Constitution. *Riggs v. Burson,* 941 S.W.2d 44, 52 (Tenn. 1997); *Tennessee Small Sch. Sys. v. McWherter,* 851 S.W.2d 139, 152 (Tenn. 1993). "Both guarantee that all persons who are similarly situated will be treated alike by the government and by the law." *Consolidated Waste Sys. v. Metro. Gov't.,* 2005 WL 1541860, *7 (Tenn. Ct. App. June 30, 2005) (citing *Tennessee Small Schools,* 951 S.W.2d at 153).

II. THE PROHIBITION ON SERVING CLIENTS AT A HOME-BASED BUSINESS DOES NOT IMPLICATE A FUNDAMENTAL RIGHT.

Due process and equal protection analysis require strict scrutiny of a legislative classification only when the classification interferes with the exercise of a 'fundamental right' (e.g., right to vote, right of privacy), or operates to the peculiar disadvantage of a 'suspect class' (e.g., alienage or race). *State v. Tester,* 879 S.W.2d 823, 828 (Tenn. 1994); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973).

The classification made by the Metropolitan Government's ordinance (prohibiting business visitors to a residential home) does not interfere with the exercise of a fundamental right or involve any suspect class. *See Gallaher v. Elam,* 104 S.W.3d 455, 461 (Tenn. 2003)("A suspect class is one that has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process."); *King–Bradwell P'ship v. Johnson Controls, Inc.*, 865 S.W.2d 18, 21–22 (Tenn.Ct.App.1993) (holding that application of Tennessee's products liability statute of repose "involve[d] neither a fundamental right nor a suspect class."); *see also United States v. Kras,* 409 U.S. 434, 445 (1973) (applying rational basis review to economic legislation).

Therefore, the Metro ordinance is subject to a rational basis review. *Consolidated Waste*, 2005 WL 1541860, *5 (Tenn. Ct. App. Jun. 30, 2005)("Where government action does not deprive a plaintiff of a particular guarantee, that action will be upheld against a substantive due process challenge if it is rationally related to a legitimate state interest."). *Nat'l Gas Distributors v. Sevier Cty. Util. Dist.*, 7 S.W.3d 41, 45–46 (Tenn. Ct. App. 1999) ("The equal protection arguments and the due process arguments can be dealt with together, because they both require the same analysis. If there is a rational basis for the statute, and if the statute is not discriminatory, then it must be upheld."); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1224 (6th Cir. 1992) ("Even parochial motives, if not based on animosity toward a protected class or similar invidious purpose, will not invalidate local zoning.")

III. UNDER A RATIONAL BASIS REVIEW, COURTS MUST UPHOLD AN ORDINANCE IF THERE IS ANY CONCEIVABLE RATIONAL BASIS.

Courts cannot substitute their judgment on local land use policy for that of local legislative bodies. *McCallen v. City of Memphis,* 786 S.W.2d 633, 640 (Tenn.1990); *Varner v. City of Knoxville*, No. E2001-00329-COA-R3CV, 2001 WL 1560530, at *3 (Tenn. Ct. App. Nov. 29, 2001)("Courts are not 'super' legislatures. They do not decide whether a challenged legislative action is wise or unwise. It is not the role of judges to set public policy for local governments, nor do we decide if a municipality has adopted the 'best,' in our judgment, of two possible courses of action."). *Fielding v. Metro. Gov't of Lynchburg, Moore Cty.*, No. M2011-00417-COA-R3CV, 2012 WL 327908, at *2–3 (Tenn. Ct. App. Jan. 31, 2012), quoting *Fallin v. Knox Cnty. Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn.1983) ("The courts should not interfere with the exercise of zoning power and hold a zoning enactment invalid, unless the enactment, in whole or in relation to any particular property, is shown to be clearly arbitrary, capricious, or

unreasonable, having no substantial relation to the public health, safety, or welfare, or is plainly contrary to the zoning laws.").

If an ordinance bears a reasonable relationship to the public health, safety or welfare, it is a valid exercise of police power. *Davidson County v. Rogers*, 198 S.W.2d 812, 814 (Tenn. 1947). Where the question is whether the legislature had a rational basis for an ordinance, "[i]f any reasonable justification for the law may be conceived, it must be upheld by the courts." *Riggs v. Burson*, 941 S.W.2d 44, 48 (Tenn. 1997) (emphasis added).

The rational basis test is the same as the test for arbitrary and capricious action. *Varner v. City of Knoxville*, No. E2001-00329-COA-R3CV, 2001 WL 1560530, at *4 (Tenn. Ct. App. Nov. 29, 2001). Under both, "the burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute; and if any state of facts can reasonably be conceived to justify the classification or if the unreasonableness of the class is fairly debatable, the statute must be upheld." *Beaman Bottling Co. v. Huddleston*, 01-A-01-9512-CH00567, 1996 WL 417100, at *4 (Tenn. Ct. App. 1996) (quoting *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn.1978)).

It is irrelevant, for constitutional purposes, whether the reason proffered for the ordinance actually motivated the legislature. *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993).

IV. THE METROPOLITAN CODE PROVISION PROHIBITING CLIENT-VISITS TO HOME BUSINESSES IS A RATIONAL MEANS TO SERVE A LEGITIMATE GOVERNMENTAL INTEREST.

Past analysis of home-business client prohibitions.

The Tennessee Supreme Court ruled many decades ago that whether to prohibit home businesses from operating at residential properties was a matter of legislative discretion:

> Whether beauty shops *per se* are such that they cannot be engaged in on the premises without affecting the use of the premises as a residence is a legislative

> problem. This legislative act, that is the Zoning Ordinance which was passed by the city fathers of Nashville, does not *per se* permit beauty shops in this District, while the many many exceptions as permitted in Residential 'A' Estate Districts which are likewise permitted in Residential 'B' Districts, where this property is, do not cover beauty shops. Frankly, with the many things that are permitted in Residential 'A' Estate Districts, we cannot see why the legislative body did not permit beauty shops. Be that as it may, this is not a question for the Court's determination but is a legislative problem, which must be left to the judgment of the local municipal legislative body based on its knowledge of conditions peculiar to a locality.

Davidson Cty. v. Hoover, 211 Tenn. 223, 229–31, 364 S.W.2d 879, 882 (1963) (holding that beauty shops were not permitted under the definition of home occupations that could operate on a residentially zoned property) (emphasis added). Even earlier, the Court ruled that the local legislature had a legitimate interest in keeping residentially zoned property from being used for commercial purposes:

> In many instances residential property owners could derive much larger incomes if they were permitted to devote same to commercial purposes. The right, however, to restrict such areas has become the law in this and practically every jurisdiction in the United States. While such regulations frequently result in financial loss to property owners, they are based upon the idea that "the interests of the individual are subordinate to the public good." Des Moines v. Manhattan Oil Company, supra [193 Iowa 1096, 184 N. W. 828, 23 A. L. R. 1322]. It is not our province to pass upon the wisdom of such laws; that is the prerogative of the Legislature.

Howe Realty Co. v. City of Nashville, 176 Tenn. 405, 141 S.W.2d 904, 907 (1940) (emphasis added).

Rational Basis Test is Met

Through the discovery responses and testimony Councilmember Todd, the Metropolitan Government has provided the Court with numerous reasonable justifications on which the Court can rely in finding that the Council had a rational basis for its enactment. These include the justification of preserving residentially zoned property as a sanctuary from commercial and crowded spaces, which the U.S. Supreme Court has recognized and approved:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).[7]

In addition to protecting residential spaces, the client-prohibition serves the dozens of other legitimate governmental interests described by Councilmember Todd and in discovery, as well (described in Sec. III & IV of the Fact section of this memorandum).

A court's "standards for accepting a justification for the regulatory scheme are far from daunting. A proffered explanation for the statute need not be supported by an exquisite evidentiary record; rather we will be satisfied with the government's 'rational speculation' linking the regulation to a legitimate purpose, even 'unsupported by evidence or empirical data.'" *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *see also, Wagner v. Haslam*, 112 F.Supp.3d 673, 692–93 (M.D. Tenn. 2015) ("[T]here may be no actual proof supporting [the legislature's] decision (in fact, there could even be proof demonstrating that the policy does not,

[7] Many cases since have agreed that preserving the residential nature of residential properties meets the rational basis test. *Varner v. City of Knoxville*, 2001 WL 1560530, *3 (Tenn. Ct. App. Nov. 29, 2001) (rejecting rezoning that would allow commercial development and increased traffic, noise, and lighting adjacent to residences); *City of Jackson v. Shehata*, 2006 WL 2106005, *6–7 (Tenn. Ct. App. July 31, 2006) ("We also must remain cognizant of the overriding purpose for enacting residential zoning. A fundamental purpose of zoning legislation may be to create and maintain residential districts to exclude businesses."); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1224 (6th Cir. 1992) (concerns about the deterioration of the neighborhood, including traffic and over-commercialization are rationally related to the goals of zoning); *Hartman & Tyner, Inc. v. Charter Twp. of W. Bloomfield*, 985 F.2d 560 (6th Cir. 1993)("The record indicates that defendants based their decision on their desire to preserve the residential and quiet nature of the neighborhood. These concerns relate to the health, safety, and welfare of the community and are permissible motives for zoning decisions."); *Curto v. City of Harper Woods*, 954 F.2d 1237, 1243 (6th Cir. 1992) (Legitimate government interests include "preventing traffic congestion and overflow of parked vehicles into surrounding properties or the street, controlling harmful fumes and odors, reducing the risk of fire hazards, ensuring adequate ingress and egress by emergency vehicles, and preserving the aesthetic value of the property and surrounding neighborhood."). A limit on the intensity of a use passes the rational basis test. *Richardson v. Twp. of Brady*, 218 F.3d 508, 513-514 (6th Cir. 2000) (township's zoning ordinance limiting number of livestock on property was rationally related to purpose of ordinance, namely controlling odors in administratively feasible manner).

in fact, achieve the desired result).”). “[I]if any state of facts may reasonably be conceived to justify it, the classification will be upheld.” *Tennessee Small School Systems v. McWherter,* 851 S.W.2d at 153 (citing cases); *see also Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn.1978). The individual challenging the statute has the burden of demonstrating that the legislative classification is unreasonable.” *State v. Tester*, 879 S.W.2d 823, 828–29 (Tenn. 1994).

Because the client-prohibition is based on legitimate health, safety and welfare reasons, it withstands the rational basis test as a matter of law. Therefore, the Metropolitan Government is entitled to summary judgment.

V. RATIONAL REASONS FOR ACCESSORY USES.

Plaintiffs point to several uses that are permitted as accessory uses in residential areas to support their belief that the client-prohibition is arbitrary. This belief is mistaken, as there are legitimate rational bases for allowing these uses in residential areas.

The first use Plaintiffs point to are day cares. Complaint, ¶¶104-109. Day cares are permitted in residential neighborhoods under limited circumstances. They are permitted as of right (without special permission from Metro) as an accessory use to a single family dwelling for up to four children. METROPOLITAN CODE § 17.04.060. Day cares that do not meet this definition require obtaining a special exception permit from the BZA, which may impose conditions. Deposition of Bill Herbert, pp. 35-36; METROPOLITAN CODE § 17.08.030 (District Land Use Tables).

Allowing daycares in residential areas is not arbitrary or inconsistent with prohibiting clients to visit home businesses. Caring for children in a home is entirely consistent with residential use of a home. Allowing up to four children to be cared for in a single home is a traditional residential use and is consistent with the policy set by the State, which does not

require a license for a child care homes providing care for four or fewer children. TENN. CODE ANN. § 71-5-501.

Once the numbers get larger than four children, state licensing is required and the Metropolitan Code requires a special exception permit, which means only certain size lots are eligible, street standards must be met, and landscape buffers are required. METROPOLITAN CODE § 17.16.171. Daycares are subject to inspection by the State, employees must undergo background checks, and licenses may be revoked. TENN. CODE ANN. §§ 71-5-507-509.

It is not arbitrary to allow daycares in a residential area, because this is a traditional residential use and is subject to strict regulations. Councilmember Todd noted that parents drop off children in the morning and do not come back until the end of the day. (Todd Depo., pp. 72-73). This differs from home recording studios where band members and clients may come and go frequently during the day. Id. And, there is a public interest in allowing a daycare in a neighborhood, so that children are near their home for daycare. *Id.* pp. 77, 81.

The second use Plaintiffs point to are historic home events. Complaint, ¶¶ 116-122. Historic home events require a special exception permit from the BZA, which may impose conditions, including limits on the number and frequency of events. METROPOLITAN CODE § 17.16.160 (B). The general public is not invited into the home – it is open for special events. *Id*. The owner of the property must reside in the home, and the home must be a historically significant structure, as determined by the historic zoning commission. *Id*.

Councilmember Todd explained that there are not that many historic homes and that they host events that are not that different from opening a house to social guests. *Todd Deposition*, p. 83. The city has an interest in preserving these homes and the events they are permitted to host are a way for the historic homes to earn income. *Id*. And, the number of events can be limited in

number and frequency. METROPOLITAN CODE § 17.16.160 (B). This differs from a hair salon, which typically has a schedule of tightly packed appointments and operates daily.

The last use Plaintiffs point to are short-term rentals, which allow owners to rent their homes to visitors for fewer than 30 days at a time. Complaint, ¶¶ 110-115; METROPOLITAN CODE § 17.16.160(E). Short-term renters are basically renting a space to sleep, eat, and rest, which are activities typically done in a residential district by those that live there. *Todd Deposition*, pp. 79-81[8]. Allowing short-term rentals was in the public interest because of the shortage of hotel rooms. *Id*.[9] More recently, the Metropolitan Council has determined that such use is more "commercial" in nature and not suited for residentially zoned areas – so it has restricted non-owner occupied short-term rental use in one and two-family residential neighborhoods. Metropolitan Ordinance No. BL 2017-608.[10]

The role of courts in reviewing zoning is not to compare the rationales behind allowing certain uses while disallowing others:

> The notion that we would invalidate the City Council's 2006 action because of a perceived inconsistency with the council's stated rationale for an action on a similar matter, four years prior, totally misconceives our role in cases such as this. We are bound by the language of *Fallin.* If we can find any rational basis-or, stated even more broadly, "any possible reason"-to uphold the council's decision, we must do so, absent evidence of arbitrary, capricious, or illegal action by the council. The differences between the 2002 and 2006 application certainly constitute possible, rational reasons to reach a different conclusion in 2006,

[8] William Penn, Assistant Director of the Department of Codes and Building Safety opined that renters of short-term rentals are not "clients" visiting a home business:

> Q: I'm sorry, the people who are staying at the short-term rental are paying clients of the short-term rental?
>
> A: I would consider it more just a rental. I mean, a person who is renting – just like I would rent a hotel room. It depends on your point of view.

Penn Deposition, p. 17, provided to the Court with a Notice of Filing.

[9] Councilmember Todd notes that there are many Nashvillians who believe that even allowing this typically residential type of use for a home detracts from the residential nature of the neighborhood and are furious that it has been allowed. *Id*. at 80.

[10] A certified copy of this ordinance is provided to the Court with a Notice of Filing.

> regardless of how the council may have articulated its reasoning in 2002. The record simply does not demonstrate that the different results in 2002 and 2006 constitute either "discrimination" or arbitrary inconsistency. This contention is without merit.

Gann v. City of Chattanooga, No. E200701886COAR3CV, 2008 WL 4415583, at *5 (Tenn. Ct. App. Sept. 30, 2008). "Rational basis review begins with a strong presumption of constitutional validity," and "[i]t is [Plaintiff]'s burden to show that the law, as-applied, is arbitrary; and not the government's to establish rationality." Moreover, "[u]nder rational basis review, differential treatment must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Graham v. Mukasey*, 519 F.3d 546, 551 (6th Cir.2008) (internal citations omitted, emphasis added).

"Rational basis review does not empower … courts to 'subject' legislative line-drawing to 'courtroom' fact-finding designed to show that legislatures have done too much or too little." *DeBoer v. Snyder*, 772 F.3d 388, 404–405 (6th Cir. 2014).

> In sum, where rational basis review applies … the U.S. Constitution allows … legislators and policymakers to make both excellent decisions and terrible decisions, provided that the decisions are based on some conceivable modicum of rationality at the time of their passage or application in practice. The U.S. Constitution does not permit a … court to evaluate or rule upon the wisdom of these decisions, even where the policy may be unfair, misguided, or counter-productive. Thus, when a … court finds that a policy is "rationally related to a legitimate government objective," the court is not endorsing the policy, finding that it is empirically supported, or concluding that it is a wise idea. The court is merely ruling that the U.S. Constitution does not forbid a state or locality from adopting or applying that policy.

Id. at 693 (emphasis added).

Because there are important distinctions between allowing these accessory uses in residential areas and allowing clients to visit home-based businesses, the Plaintiffs cannot show

that the exceptions are arbitrary. They do not preclude granting summary judgment to the Metropolitan Government.

CONCLUSION

Plaintiffs are essentially asking the Court to substitute its judgment for the Metro Council. They ask not only that this Court invalidate the ordinance, but that it determine that 12 visitors a day are appropriate for a home-based business. This is not the role of the judiciary and is contrary to the will of the citizens of Metro Nashville, who have, though their elected representatives, rejected such proposals on several previous occasions.

Because the provision in the Metro Code preventing client-visits to home based businesses is rationally related to the legitimate goals of protecting the residential nature of neighborhoods, the commercial activity essential to commercial districts, and the order, certainty, quality of life, and safety that this provision provides, the Plaintiffs' substantive due process and equal protection are without merit. Therefore, the Metropolitan Government should be granted summary judgment, and this case should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been emailed by agreement to Braden Boucek, Beacon Center of Tennessee, P.O. Box 198646, Nashville, TN 37219 and Keith E. Diggs & Paul V. Avelar, Institute for Justice, 398 South Mill Avenue, Suite 301, Tempe, AZ 85281 on June 14, 2019. */s/ Lora Fox* Lora Barkenbus Fox