

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE**

ELIJAH SHAW and PATRICIA RAYNOR,)

)

)

Plaintiffs,

)

)

vs.

)

No. 17-1299-II

)

METROPOLITAN GOVERNMENT OF)

NASHVILLE AND DAVIDSON COUNTY,)

)

Defendant.

)

MEMORANDUM AND ORDER

This matter came to be heard on September 13, 2019 upon the cross motions for summary judgment filed by Plaintiffs, Elijah Shaw and Patricia Raynor (“Shaw” and “Raynor” or collectively “Plaintiffs”) and Metropolitan Government of Nashville and Davidson County (“Metro”). In this action, Plaintiffs assert that a Metro ordinance barring home-based businesses from allowing clients or patrons to visit is unconstitutional pursuant to the Tennessee and United States Constitutions as applied to them. The challenge claims an impairment of their due process rights and entitlement to equal protection under the law.

Both parties assert that this is a case appropriate for summary judgment and that it is unnecessary to take live proof or make credibility determinations. Metro argues that the Court does not need to consider the facts the parties have developed, as the resolution of this case turns purely on questions of law. The Plaintiffs, who have made significant efforts to discover information from Metro and develop facts they believe are relevant to their as-applied constitutional challenge, assert that there are no disputed material facts and they are entitled to summary judgment as a matter of law.

The Court agrees this is a case appropriate for summary judgment. The parties have provided voluminous materials in the form of depositions, written discovery responses and documents showing Metro's prior actions on proposed amendments to the subject zoning laws, as well as rezoning efforts specific to other properties and legal memoranda addressing the standards applicable to such challenges. Based upon the foregoing, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT RELEVANT TO CLAIMS

Plaintiffs have sought the ability to operate home-based businesses for which they will have clients visit their homes. Plaintiff Shaw lives in the house he owns at 2407 Brasher Avenue, Nashville, Tennessee. Plaintiff Raynor lives in the house she owns at 3233 Knobview Drive, Nashville, Tennessee. Shaw, a professional record producer, seeks to operate a recording studio at his home in what is known as The Toy Box Studio, a professional-quality recording studio he built in a detached, renovated garage on his property. Raynor, a professional hair stylist and licensed cosmetologist, seeks to operate a beauty salon in her renovated garage on her property. Without a zoning change, the Metropolitan Code of Laws ("Metro Code") prohibits Plaintiffs from having clients patronize their proposed home-based businesses (generally, "the Client Prohibition"). METROPOLITAN GOV'T OF NASHVILLE & DAVIDSON COUNTY, TENNESSEE CODE § 17.16.250(D)(1) ("METRO CODE").

In the past, both Plaintiffs have operated their home-based businesses, including servicing clients on their properties, contrary to the zoning requirements. Metro's Department of Codes and Building Safety ("Codes Department") administers and enforces the Client Prohibition and admittedly, there are likely many home-based businesses operating

in Nashville illegally in relation to the Client Prohibition. The law, however, is very clear regarding that prohibition.

Metro received an anonymous complaint about Raynor's business on November 11, 2013, and after investigating it, sent an abatement notice on November 26, 2013. Raynor complied with that notice.

Metro received an anonymous complaint about Shaw's business on August 13, 2015, and after investigating it, sent an abatement notice on September 1, 2015. Shaw complied with that notice.

Metro Zoning Code

The zoning provisions of the Metro Code were overhauled in 1998, including the creation of zoning categories, restrictions and permitted uses ("the Zoning Code"). The Zoning Code contains a number of different zoning classifications, each of which includes individually determined characteristics, permitted uses and restrictions. The purpose and intent of creating zoning regulations is set out in the Metro Code, as follows:

Land use development standards are necessary because certain land uses are more unique or impacting than other uses in the same zone district and therefore conditions are established to insure compatibility with surrounding land uses. Other uses require large land areas, have unique operating characteristics, or tend to dominate the area more intensely than do other uses permitted in the same zone district. Some uses are socially and economically necessary in a particular zone district even though the potential may exist for the use to be incompatible with existing and future development. The development standards are intended to lessen and minimize incompatible land use relationships. Because the potential impacts cannot be satisfactorily predetermined for every location, some land uses are permitted in a zone district only as a special exception. Finally, other uses are uniquely incidental to other principal land uses and are appropriate when certain minimum standards are satisfied.

METRO CODE § 17.16.010 (B).

The residential classifications in the Zoning Code include Residential Single family (“RS”), Residential 1 and 2 Family (“R”) and Residential Multi-Family (“RM”). Within each of these categories are different subcategories depending upon the size of the lots involved. In addition to the Residential categories, there are Office (“O”), Mixed Use (“MN”), Commercial (“CN”), Downtown (“DTC”), Shopping Center (“SC”), and Industrial (“I”), and subcategories within those classifications. One outlier or unique classification among the zoning classifications is Specific Plan (“SP”), which is site specific and described as follows:

The SP District is intended to implement the context sensitive development and land use compatibility provisions of the general plan for all land use policies. This district shall be used to promote site specific development in the location, integration, and arrangement of land uses, buildings, structures, utilities, access, transit, parking and streets. A site specific plan shall establish specific limitations and requirements, including any not addressed by this title, so as to respect the unique character and/or charm of abutting neighborhoods and larger community in which the property is located. A specific plan (SP) district may be applied to any property, or within any overlay district established by Chapter 17.36.

METRO CODE § 17.16.020(C).

In order for a property to be rezoned as SP, the property owner, the Planning Commission or a member of the Metro Council must submit an application accompanied by a development plan. The development plan must include materials that describe “existing conditions, the purpose and intent of the SP, the plan’s consistency with the principles and objectives of the general plan, a list of allowable land uses, height and size of proposed building types, and development standards and a conceptual site plan, regulatory plan, or site-specific plan for the development.” METRO CODE § 17.40.106. The SP proposal must first go through the Planning Commission, which will provide a recommendation on the

application. Ultimately, the SP rezoning proposal must be considered by the Metro Council, and is traditionally sponsored by the councilmember for the district that includes the subject property. If Metro Council takes no action on the rezoning request within six months of receipt of the Planning Commission recommendation, the proposal fails. *Id.*

The Zoning Code addresses home-based businesses as accessory uses incidental or subordinate to the principal uses of properties - in the case of Plaintiffs: residences. METRO CODE §§ 17.04.060(B), 17.16.240 and 250. The term “home occupation”, as used in the Zoning Code, means “an occupation, service, profession or enterprise carried on by a resident member of a family within a dwelling unit.” METRO CODE § 17.04.060(B). The zoning ordinance is specific as to how home occupations are regulated. In addition to the provision regarding the servicing of customers, it includes regulations regarding the number of non-resident employees; percentage of a residence that can be dedicated to the business; signage; mechanical or electrical equipment; external structural alterations; noise, dust and other potential emanations from the property; restrictions on manufacture or repair of transportation equipment; and the types of vehicles that can be used. METRO CODE § 17.16.250(D). The ordinance explicitly does not allow the service of clients or patrons on the property. *Id.*

Permitted Home-Based Businesses Servicing Customers

The Zoning Code includes three specific provisions allowing limited home-based business uses servicing customers. Those include:

- Short-term rental Property (STRP), defined as “an owner-occupied residential dwelling unit containing not more than four sleeping rooms that is used and/or advertised . . . for rent for transient occupancy by guests.” METRO CODE § 17.04.060.

Owner-occupied short-term rentals may serve up to twelve clients at a time and are permitted as accessory uses in all residential districts. METRO CODE §§ 17.16.250(E)(4)(f) and 17.08.030. As of July 11, 2018, there were 4,653 permitted owner-occupied short term rentals in Nashville, of which 3,001 were “active.”

- “Day care” is defined in the Metro Code as “the provision of care for individuals, who are not related to the primary caregiver, for less than twenty-four hours per day.” METRO CODE § 17.04.060. A “[d]ay care home” is a home at which day care is provided for up to twelve clients at a time. *Id.* The Metro Code allows for one day care home per street block, provided that the day care home meets the requirements for, and obtains, a special exception permit. METRO CODE § 17.16.170(D)(4). Metro has granted eleven special exception permits for day care homes to operate in residential districts.
- A “[h]istoric home event” is defined as “the hosting of events such as, but not limited to, weddings or parties for pay in a private home which has been judged to be historically significant by the historical commission.” METRO CODE § 17.04.060. The residence at issue has to have been classified as “historic” by the Metro historic zoning commission. METRO CODE § 17.16.160(B). Metro has granted seven special exception permits for historic home events to operate in residential districts.

Metro has asserted public policy reasons for these exceptions to the home-based business restrictions applicable to other residents. For instance, having small neighbor operated day cares to serve nearby families is a traditional residential use that allows the care of children by people they know close to their homes. The historic home exception is very

narrow, relates to a limited number of properties classified as historic, and allows the public the opportunity to enjoy these unique residences, while providing owners the ability to earn income for upkeep through events. This is a use that benefits the community at large and supports preservation efforts.

STRPs are a more difficult, and decidedly controversial, subject. Their regulation and management have been the subject of ongoing disputes among the citizens of Nashville, members of the Metro Council, and between city and state leadership. The requirements for STRPs continue to be the subject of revision, and it remains to be seen in what form STRPs will continue to exist in Nashville. The other two uses have been largely unchallenged or controverted.

Unsuccessful Efforts to Amend the Client Prohibition

Since 2000, members of the Metro Council have attempted to amend the Client Prohibition six different times. All of those attempts were unsuccessful after either being withdrawn or voted down by the Metro Council. There have been public hearings at the Metro Council and debate among its members. Several of the above-referenced efforts involve the home occupations that the Plaintiffs seek to conduct on their properties.

In 2000, councilmembers Michelle Arriola and Phil Ponder sought to amend the language regarding the client and patron prohibition to state “except for one-chair beauty or barber care.” Ordinance No. BL2000-173. This legislation was withdrawn on August 19, 2003, presumably for lack of support.

Ten years later, in 2010, councilmember James Bruce Stanley introduced a similar amendment that would allow “cosmetology and barber shops” with “one chair available to service customers, and no more than two customers” allowed at one time. Ordinance No.

BL2010-754. This proposal was withdrawn on August 16, 2011, also presumably for lack of support.

During the 2011 period, there were efforts by several members of the Metro Council to amend the Zoning Code to loosen the restriction on home occupation businesses with clients or patrons. Two ordinances were proposed in 2011, both by Councilman Mike Jameson. Ordinances BL2011-858 and BL2011-924. The first was withdrawn by Councilman Jameson on the same date the second, more comprehensive measure, was introduced. BL2011-924 included a number of changes to the home occupation restrictions, including an allowance for clients and patrons, only by scheduled appointment, between 8:00 a.m. and 6:00 p.m. during the week, with restrictions on the number per hour and total per day. The Metro Council held a public hearing on July 5, 2011 regarding BL2011-924 at which three citizens spoke in favor and nine spoke against. Councilman Jamison spoke in favor and at least four councilmembers spoke against. All acknowledged the countless hours Councilman Jamison and Planning Commission employee Jennifer Reagan spent putting together the proposal, meeting with community groups and attempting to create compromise legislation that would satisfy all sides of the debate. The provision was defeated 11 to 21, with 5 members abstaining and 3 absent, despite the Planning Commission's 6-1 vote for approval.

The members of the public who spoke, as well as the councilmembers against the legislation, had a number of objections. Those objections included: i) safety; ii) traffic; iii) change to the neighborhood character; iv) difficulty in enforcing limited client visit restrictions; v) the need to impose accessibility requirements designed for commercial spaces on residences; and vi) the difficulty in adjusting residential taxation and utility specifications

for commercial home use. One citizen commented that “Nashville residents want to keep neighborhoods residential.” There was particular concern that what was being treated as mere tweaking of the language was actually an overall change to the zoning classification and that allowing home occupations to serve customers on the premises was not a change appropriate for all residential neighborhoods in Nashville. The discussion was thorough, inclusive and thoughtful. The Metro Council voted down a change to the Metro Code that would allow on-site servicing of clients and patrons at home-based businesses. Thus, citizens such as the Plaintiffs would have to continue to rely on the SP rezoning process.

Two additional efforts to change the accessory home-based business regulation were initiated, one in 2012 specific to home-based recording studios, and one in 2013 for professional home-based businesses of accountants or investment advisors. These efforts were also unsuccessful and were withdrawn by the sponsoring councilmembers on August 15, 2015. Ordinances BL2012-292 and 2013-451. Those were the last efforts by the Metro Council to change this zoning provision.

History of SP Rezoning In Metro

The Tennessee Court of Appeals described the history of the SP zoning classification in its 2013 decision in *Brown v. Metropolitan Gov't of Nashville and Davidson Cnty.*, No. M2011-01194-COA-R3-CV, 2013 WL 3227568 (Tenn. Ct. App. June 21, 2013). As that court explained, SP was created by the Metro Council in 2005 with BL2005-762, now codified as §§ 17.40.105 and 106 in the Metro Code. *Id.* at *1. The SP zoning classification was created to allow Metro to have “a process involving individualized and detailed discretionary review of any significant development application.” *Id.* at *6. It was also

intended to “provide flexibility and control of development detail” in a “floating zone.” *Id.* at *7.

[A] “floating zone” is ... defined as a two-step zoning technique whereby a municipality first creates a particular use district in its zoning regulation so that the zone is said to “float” over the entire municipality until at some future time, in a second step, the municipality amends its zoning regulations and map to locate, or “settle” the zone on a particular parcel of land. The first step makes the floating zone available and the second step places it on the land by rezoning action, ordinarily at the request of an individual property owner.

Id. at *7 (quoting 80 A.L.R.3d 95 § 1[a]). Another description of “floating zone” credited by the Court of Appeals in *Brown* is

a special detailed use district of undetermined location in which the proposed kind, size and form of structures must be preapproved. It is legislatively deemed compatible with the area in which it eventually locates if specified standards are met and the particular application is not unreasonable. [It is created] without predetermining the exact location by leaving that decision to future needs and demands of a community as they are recognized from time to time. A floating zone is initiated on the instigation of a landowner within the district rather than that of the legislative body... If the zoning body, acting in its legislative capacity, determines that all relevant criteria and conditions have been or can be met, the zone change is approved and the zone floats down upon the designated area to establish physical boundaries.

Id. at *7 (quoting 8 MCQUILLIN MUN. CORP. § 25:100 (3d ed.)).

As explained in *Brown*, the codified SP classification is the enabling legislation for any future action to rezone property to SP. *Id.* at *8. The ordinance “requires a high degree of specificity and detail in the proposed development plan for a particular piece [of] property or development,” and although “an SP-zoned site must comply with any redevelopment or historical overlay district requirements, it is not required to comply with uses available in the zone existing at the time of the placement of the SP rezoning on the zoning map.” *Id.* at *9. The SP zoning classification is, in essence, a tool available to Metro to make an exception to the current zoning on a case-by-case basis. It allows the preservation of the overall integrity

of the zoning plan while recognizing exceptions are appropriate from time to time. In practice, the Metro Council relies heavily on the Planning Commission's recommendation, and the district councilperson's reasoning, in considering SP rezoning requests.

The record does not include information regarding how many property owners, since 2005, have sought to rezone their property to SP to allow home occupations. What is in the record is the number of times during that period where property owners have been *successful* in rezoning SP so that they were allowed to operate home-based businesses serving clients or patrons. On each of these occasions, the proposal was sponsored by the property owner's councilperson, and it went through the full legislative process. Those properties are as follows:

1. 2643 Smith Springs Road, BL2005-816
Disapproved by the Planning Commission 6-0
Approved by the Metro Council on December 20, 2005
Enacted on January 2, 2005 without Mayor signature
2. 2653 Smith Springs Road, BL2008-279
Approved by the Planning Commission 9-0
Approved by the Metro Council on September 16, 2008
Signed by the Mayor on September 19, 2008
3. 1812 Pearl Street, BL2009-554
Approved by the Planning Commission 7-0
Approved by the Metro Council on November 17, 2009
Signed by the Mayor on November 19, 2009
4. 4130 Andrew Jackson Parkway, BL2010-661
Approved by the Planning Commission 9-0-1
Approved by the Metro Council on June 15, 2010
Signed by the Mayor on June 18, 2010
5. 2898 Elm Hill Pike, BL2010-668,
Approved by the Planning Commission 10-0
Approved by the Metro Council June 15, 2010
Signed by the Mayor June 18, 2010

6. 4414 Westlawn Drive, BL2010-698
Approved by the Planning Commission 7-0
Approved by the Metro Council August 3, 2010
Signed by the Mayor August 9, 2010
7. 2901 Tuggle Avenue, BL2012-311
Approved by the Planning Commission with conditions 9-0
Approved by the Metro Council December 18, 2012
Signed by the Mayor December 19, 2012
8. 904 Chicamauga Avenue and 941 W. Eastland Avenue, BL2013-449
Approved by the Planning Commission with conditions 9-0
Approved by the Metro Council June 18, 2013
Signed by the Mayor on June 19, 2013
9. 69 Thompson Lane, BL2014-649
Approved by the Planning Commission with conditions 10-0
Approved by the Metro Council February 18, 2014
Signed by the Mayor February 19, 2014
10. 912 Robinson Road, BL2015-77
Approved by the Planning Commission with condition and disapproved without all conditions 6-0
Approved by the Metro Council January 19, 2016
Signed by the Mayor January 25, 2016
11. 716 and 718 McFerrin Avenue, BL2016-398
Approved by the Planning Commission with conditions and disapproved without all conditions 7-1
Approved by the Metro Council October 18, 2016
Signed by the Mayor October 19, 2016.

Thus, in nine years the Metro Council approved SP rezoning eleven times for at home businesses. In all but one of those, the Planning Commission recommended approval. Each had specific consideration by the Metro Council, and was introduced by the particular councilmember in whose district the property lay. Some, but not all, identify the type of home-based business involved. Most do not mention anything specific about the desire to have clients or patrons come to the business, although that is presumed, given the included details regarding parking and other related topics.

Metro's Asserted Reasons for Maintaining the Client Prohibition

Through discovery in this case, including the depositions of a number of Metro employees responsible for traffic, property standards, zoning and codes regulation, as well as former Councilman Carter Todd, Metro has provided what it asserts are rational basis for maintaining the Client Prohibition. Those are summarized as:

- Protection and maintenance of the residential nature of residentially-zoned neighborhoods, with the tool of SP zoning to allow for limited exceptions.
- The difficulty of enforcing specific restrictions if the Client Prohibition were relaxed to allow some clients and patrons, including on evenings and weekends.
- The potential for additional criminal activity in neighborhoods with non-resident patrons coming to home-based businesses.
- Home-based business owners have options such as co-working spaces to meet with clients and there are plenty of opportunities for commercial tenancy in properties that are in commercially zoned areas.
- Increased parking and traffic congestion in areas not designed for commercial use will create problems for residents.
- Residential sidewalks are not designed for commercial foot traffic.
- Residential properties with home-based businesses are not taxed, nor are their utility rates set, at commercial rates, which is an inappropriate inconsistency from what commercial businesses pay operating on commercial properties.
- Disability accessibility standards are different for residential and commercial properties.
- Property rates may escalate inappropriately because of the influence of commercial

opportunities in residential areas.

- Residential communities with homeowner associations may have more difficulty enforcing their contracted for restrictions.

This list is generally consistent with what was argued at the Metro Council in 2011 when BL 2011-924 was considered, the last time there was a serious attempt to change the Client Prohibition.

Plaintiffs' Applications to Rezone Their Properties

In 2017, Councilman Scott Davis filed BL2017-719, which would have rezoned Shaw's property from Residential to Specific Plan such that he would have been allowed to operate a home business and have clients visit his residence for those purposes. The Planning Commission, in considering the request, recommended disapproval 8-0. The Metropolitan Council did not adopt BL2018-719 and thus Shaw's property was not rezoned SP.

In 2017, Councilmember Jeff Syracuse filed BL2017-798, which would have rezoned Raynor's property from Residential to Specific Plan such that she would have been allowed to operate a home business and have clients visit her residence for those purposes. The Planning Commission, in considering the request, recommended disapproval 8-0. The Metropolitan Council did not adopt BL 2017-789 and thus Raynor's property was not rezoned SP.

Rather than file a writ of certiorari and ask a court to review for error these denials by the Metro Council, the Plaintiffs filed this lawsuit challenging the constitutionality of the home-based business ordinances as applied to their proposed exceptions.

LEGAL ANALYSIS

Summary Judgment Standard of Review

Tenn. R. Civ. P. 56.04 sets forth the summary judgment standard, requiring that summary judgment be granted “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Tennessee law interpreting Rule 56 provides that the moving party shall prevail if the nonmoving party’s evidence is insufficient to establish an essential element of her claim. Tenn. Code Ann. § 20-16-101; *Rye v. Women’s Care Center of Memphis, M PLLC*, 477 S.W.3d 235, 261-62 (Tenn. 2015).

Procedural Posture of Claims

Plaintiffs decided to file a declaratory judgment action asserting an as-applied constitutional challenge to the Client Prohibition rather than appealing the denial of their specific rezoning applications via a writ of certiorari. Given the procedural posture of this case, the Court must consider what standard of review is applicable versus an administrative appeal. The answer to this inquiry can be found in *Brown v. Metro, supra*, which also involved an SP rezoning denial in which the plaintiffs brought a declaratory judgment action rather than seeking certiorari review of the denial.

In *Brown*, the plaintiffs were title loan or check cashing businesses challenging the rezoning of 766 parcels in Davidson County to SP from various other classifications. The rezoning ordinances excluded 31 particular uses in the new SP zones, including the plaintiffs’ specific business. 2013 WL 3227568, at *2. Relying on *Fallin v. Knox Cnty. Bd. of Comm’rs*, 656 S.W.2d 338 (Tenn. 1983), the Court of Appeals explained that a declaratory

judgment action was the mechanism for someone seeking to *invalidate* an ordinance or resolution or other legislative action of a municipal legislative authority, and that a writ of certiorari was the mechanism for challenging the *application* of the zoning legislation. *Id. at* *3. “This distinction in remedies is made because the determinations made by a Board of Zoning Appeals are administrative determinations, judicial or quasi-judicial in nature, and are accompanied by a record of the evidence produced and the proceedings had in a particular case, whereas, the enactment of ordinances or resolutions, creating or amending zoning regulations, is a legislative, rather than an administrative, action.” *Id.* (quoting *Moore & Associates, Inc. v. West*, 246 S.W.3d 569, 575 (Tenn. Ct. App. 2005) (quoting *Fallin*, 656 S.W.2d at 342)). The Court in *Brown* specifically found that rezoning from another classification to an SP classification is a legislative act and thus a declaratory judgment action is an appropriate method for pursuing relief. *Id. at* **4-6.

In the present case, the Plaintiffs could have sought judicial review of their rezoning application denials pursuant to the common law writ of certiorari statute, set out at Tenn. Code Ann. § 27-8-101. They have chosen instead to bring an as-applied constitutional challenge to the Client Prohibition itself, relying upon due process and equal protection standards in seeking to invalidate it as it relates to their properties. The Court thus evaluates the Plaintiffs’ claims based upon the standards set out in state and federal court case law regarding the review of legislative actions, as compared to those that are administrative in nature.

Tennessee courts have traditionally exercised an extremely deferential standard to zoning ordinances. “[T]he *court should not interfere* with the exercise of the zoning power and hold the 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 relationship to the public health, safety, or welfare, or plainly contrary to the zoning laws.” *McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990) (quoting *Fallin*, 656 S.W.2d at 342-43). The Court’s role is limited to determining “whether any possible reason can be conceived to justify the instant ordinance.” *Id.* In such cases, as is true here, the challenge is typically a constitutional one based on theories of due process and equal protection. Their application in zoning cases was discussed at length in *Consolidated Waste Systems, LLC v. Metro Gov’t of Nashville and Davidson Cnty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005).

Constitutional Challenges in Zoning Cases

In *Consolidated Waste*, the zoning challenger was a business that desired to operate a construction and demolition landfill on a property on which it had a lease-purchase option. After the business obtained an interest in the property, the zoning was changed to exclude that particular type of landfill if it was located within three miles of a school or park. The ordinance only applied in those zoning districts where a construction and demolition landfill was permitted as a special exception to zoning that otherwise allowed landfills. Metro’s Planning Commission did not recommend adoption of the ordinance because of the selective affect to certain zoning districts, and the lack of a supportable basis for the three mile buffer. A second proposal was made with several changes, including altering the three mile restriction to two. Again the Planning Commission did not recommend adoption, for the same reasons. Both ordinances were passed by the Metro Council. *Id.* at *2. The landfill company sued Metro on several grounds, including due process and equal protection grounds pursuant to the United States and Tennessee Constitutions.

The Court of Appeals reiterated that the due process clauses under both constitutions are synonymous and thus the same substantive due process analysis applies in state and federal constitutional challenges. *Id.* at *6 (citing *Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn. 2003); *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997); *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994)). As that applies to zoning cases, “[c]itizens have a substantive due process right not to be subjected to arbitrary or irrational zoning decision” and “[z]oning ordinances `must find their justification in some aspect of the police power, asserted for the public welfare.” *Id.* at *5 (quoting *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114, 118 (1926)). Because zoning ordinances are a result of legislative action, to be declared unconstitutional “a court must find that the provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare.” *Id.* at *5 (citing *Euclid*, 272 U.S. at 395, 47 S.Ct. at 121).

Reiterating the deferential standard applied to government zoning ordinances in due process cases, the Court held that “a legislative body, through enactment of zoning legislation: ‘may impose any limitation on the use of property which it may deem necessary or expedient to promote and protect the safety, health, morals, comfort, and welfare of the people, provided only that this power shall not be exercised arbitrarily; that is, without reasonable connection or relation between the limitation imposed and the public safety, health, or welfare, etc.’” *Id.* at *6 (quoting *Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 612 (1927)). “Absent implication of a fundamental right, a legislative act will withstand a substantive due process challenge if the government identifies a legitimate governmental interest that the legislative body could rationally conclude was served by the legislative act.”

*6 (citing *Parks Properties v. Maury County*, 70 S.W.3d 735, 744-45 (Tenn. Ct. App. 2001)).

The same rational basis test is applicable to equal protection challenges to zoning laws, which require that “all persons who are similarly situated will be treated alike by the government and by the law.” *Id.* at *7 (citing *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993)). “[A]s in the substantive due process challenge, the zoning ordinances must be reviewed under the rational basis test. The rational basis analysis used in an equal protection challenge does not differ in substantial regard from the rational basis test used when considering a substantive due process claim. Equal protection requires only that the legislative classification be rationally related to the objective it seeks to achieve.” *Id.* at *7 (citing *Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir. 1998), *cert denied*, 5 U.S. 1139, 119 S.Ct. 1028 (1999); *City of Chattanooga v. Davis*, 54 S.W.3d 248, 276 (Tenn. 2001); *Newton*, 878 S.W.2d at 110)). The Court is required to presume an ordinance is constitutional “if any state of facts can reasonably be conceived to justify the classification or if the unreasonableness of the class is fairly debatable[.]” *Id.* at *7 (quoting *City of Chattanooga*, 54 S.W.3d at 276)).

In *Consolidated Waste*, the plaintiff was successful not because Metro could not proffer a rational basis for the ordinance, but because Metro could not show a rational relationship between the ordinance and the asserted public interest. In other words, the ordinance’s restrictions would not address or prevent the asserted threat; thus, the ordinance was arbitrary and capricious and violated the plaintiff’s substantive due process rights. *Id.* at **33-36. In that case, Metro singled out only construction and demolition landfills for increased restriction, and had imposed a two-mile buffer requirement between a proposed

construction and demolition landfill and any surrounding schools and parks without a rational basis, as attested to by the Planning Commission staff who reviewed the ordinance. The trial court found, and the Court of Appeals agreed, that the ordinance at issue was arbitrary and capricious from a due process and equal protection standpoint. *Id.* In essence, this is the argument the Plaintiffs make in this case, i.e., that the Metro ordinance has a rational basis, but that the reasons underlying it are not factually related to the Client Prohibition. They select out quotes from the Metro depositions, and cite to the lack of problems with their home-based businesses (when they were violating the Client Prohibition) as evidence to support their as-applied claim. In *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997), the plaintiff made a similar argument, which the Tennessee Supreme Court rejected. As the court explained, the inquiry is “whether there is a reasonably conceivable set of facts to justify the classification within the statute.” *Id.* at 53. The court further opined that “specific evidence is not necessary to show the relationship between the statute and its purpose. Rather, this Court asks only whether the law is reasonably related to proper legislative interests.” *Id.* at 52. (Citation omitted).

In *Davidson County v. Hoover*, the Tennessee Supreme Court reviewed a prior Nashville zoning ordinance restricting the right of a citizen to operate a hair salon in her home, holding that whether or not a beauty shop should be a barred home occupation under that particular ordinance “must be left to the judgment of the local municipal legislative body based on its knowledge of conditions peculiar to a locality.” 364 S.W.2d 879, 882 (Tenn. 1963). Although *Hoover* is a 1963 case decided in the context of prior zoning requirements that were presumably much less complex, that principle is in line with more recent cases adjudicating zoning law challenges.

In the present case, as in most modern zoning cases, there are supportable arguments on both sides. In *Varner v. City of Knoxville*, No. E2001-00329-COA-R3CV, 2001 WL 1560530 (Tenn. Ct. App. Nov. 29, 2001), the Court of Appeals addressed the Knoxville City Council's denial of a rezoning application from low density residential to commercial for the expansion of a used car lot. Although the court recognized the legitimacy of arguments on both sides, it declined to overturn the city council's decision, observing

'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. That is not our role. The concept of separation of powers precludes such an activist role on our part. As the *Fallin* case points out, ours is a "quite restricted" role.'

Id. at *3 (quoting *Citizens for a Better Johnson City v. City of Johnson City*, No. E2000-02174-COA-R3-CV, 2001 WL 766997, at *4 (Tenn. Ct. App. July 10, 2001)). *See also*, *Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904, 907 (Tenn. 1940) (In regard to an at-home business restriction, "It is not our province to pass upon the wisdom of such laws; that is the prerogative of the Legislature."). Similarly, this Court is required to apply a very deferential standard and not substitute its judgment for that of the Metro Council, instead only considering whether the reasons given for the Client Prohibition are rationally related to it. In the present circumstances, this Court finds that they are.

Preserving the residential nature of residential neighborhoods is at the heart of the public policy reason for modern zoning laws. As set out in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926) by the United States Supreme Court:

Building zone laws are of modern origin. . .with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.

272 U.S. at 386-87, 47 S.Ct. at 118. The regulation of what can be built where is central to the role of a metropolitan government in protecting the health and safety and quality of life of a community. The issue of the Client Prohibition has been proposed and re-proposed to several Metro Councils, and each time it was defeated because of concerns about the residential nature of neighborhoods; traffic and parking concerns; safety; and other rational and relevant considerations. The Plaintiffs attempt to discount these arguments by claiming there is no proof that allowing at-home businesses to service clients will increase parking woes or traffic congestion, or create safety problems. They assert that they, themselves, operated home-based businesses for some period of time, in violation of the Client Prohibition, without problems until the anonymous complaint. Respectfully, the Court does not believe the law requires Metro to prove that the predicted problems will absolutely occur, or have occurred; rather, the inquiry is whether it is a reasonable concern that has some basis in rationality. Successive Metro Councils have believed that to be the case. Members of the public who testified at public hearings believe it to be the case. The Court finds these concerns to be rational and appropriate considerations. It defies logic to say that customers coming into neighborhoods to call on businesses, in any number, will not affect parking and traffic. In fact, in almost all of the successful SP rezoning efforts detailed in this opinion, parking and traffic patterns were discussed in detail in the resulting ordinances. Controlling the number of at-home businesses, whether they have customers and what hours customers may call on them, is a particular challenge and will affect the neighborhood feel of residential neighborhoods. Metro's consistent decision that allowing customers will be the exception, and not the rule, is reasonable. The Plaintiffs sought the opportunity to be the

exception and, after a full legislative hearing, their requests were denied. The Court does not find any basis to substitute its judgment for that of the Metro Council.

Moreover, regulatory issues associated with home-based, client servicing businesses – taxes, utility rates and the like – are very valid legislative concerns. There is a reason that businesses are taxed differently, and their utility rates and consumption calculations differ. To use a residential property as a business and to service customers there some days a week, at any volume, changes the nature and quantity of the consumption of resources.

Another issue of significant concern is accessibility for the disabled. Residential properties are not required to be accessible to the public, as only invitees of a private nature come to homes. However, if an at-home business is inviting the public to come onto its property, it opens itself up to an entirely different set of legal obligations. *See generally*, Title III of the Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990). It is well within Metro’s obligations to protect the health and welfare of its citizens by ensuring that businesses who invite the public onto their property comply with accessibility requirements.

The fact that the Metro Code selectively exempts a few categories of businesses from the Client Prohibition, or that some real properties have been rezoned as SP so they could serve the public, is not a basis to invalidate the law. As held in *Gann v. City of Chattanooga*, No. E2007-01886-COA-R3-CV, 2008 WL 4415583 (Tenn. Ct. App. Sept. 30, 2008):

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, 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. . . . It is not our role to re-weigh all the factors considered by the council; that would invade a legislative prerogative and would far exceed the scope of our review as defined by *Fallin*. It is sufficient for us to affirm the trial court’s conclusion that “this decision to rezone was debated by the City Council,” and that a rational basis existed for the council’s decision.

Id. at *5.

The Client Prohibition has a rational relationship to the reasons Metro has given for its imposition. Metro Council members and citizens have expressed genuine concern about the difference between at-home businesses without customers and those that allow customers. Limited exceptions exist in the Metro Code for daycares and historic home events. STRP’s are a more problematic exception and the Court does not dismiss their interference with the residential nature of Nashville’s residential neighborhoods. The Metro Council and Metro government generally are clearly grappling with that issue, which is not before the Court today. Just because they are allowed, however, does not invalidate the logic behind the Client Prohibition. Metro has proffered real, rational and appropriately-related reasons for the Client Prohibition. Those reasons meet Metro’s burden of defending the constitutionality of the Client Prohibition under both due process and equal protection provisions of the United States and Tennessee Constitutions. The doctrine of “sic utere tuo ut alienum non laedus”¹ applies here – a property owner is free to use his property as he sees fit as long as it does not cause harm to others. *Euclid*, 272 U.S. at 387, 47 S.Ct. at 118. Metro has determined that the Client Prohibition is a reasonable restriction on the use of

¹ Common law maxim meaning that one should use his own property in such a manner as not to injure that of another. BLACK’S LAW DICTIONARY 1380 (6th Ed. 1990).

residential property for the benefit of its citizens, and the Plaintiffs have not shown otherwise.

CONCLUSION

This is a case that was appropriate for summary judgment once the parties developed the facts sufficiently for the Court to evaluate Metro's rational bases for the Client Prohibition. The Court reviewed the history of attempts to modify the Client Prohibition, the history of the SP zoning classification, the circumstances in which SP rezoning was allowed, and the limited exceptions in the Zoning Code for the allowance of clients at home-based businesses. The Client Prohibition is an appropriate exercise of the Metro Council's legislative authority and has a rational relationship to the public safety, health, morals, comfort, and welfare of the people of Nashville. Although the Plaintiffs assert that, as applied to them, the Client Prohibition is unconstitutional, the Court disagrees. Their businesses are like any others in that if the public is allowed to come to their residences as customers, it could disturb the residential nature of their neighborhoods, as well as foment a potential host of other problems.

There is a reason residential properties can only be used for commercial purposes in limited circumstances, and designating client/customer influx to a neighborhood as an area of particular concern is logical. The Plaintiffs assert that their businesses are benign and would not be ones that would create problems for neighbors, but the Court is not going to substitute its judgment for that of the Metro Council, which gave due consideration to the Plaintiffs' applications, neither of which was recommended by the Planning Commission.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Metro's motion for summary judgment is GRANTED, the Plaintiffs' motion for summary judgment is DENIED, and this matter is DISMISSED.

Costs are taxed to the Plaintiffs.

s/ Anne C. Martin

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RULE 58 CERTIFICATION

A copy of this order has been served by U.S. Mail upon all parties or their counsel named above.

MB
Deputy Clerk and Master
Chancery Court

October 1, 2019
Date