IN THE SUPREME COURT OF TENNESSEE

ELIJAH "LIJ" SHAW and PATRICIA "PAT" RAYNOR, Plaintiffs/Appellants,	)	No. M2019-01926-SC-R11-CV
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant/Appellee.	)	

THE METROPOLITAN GOVERNMENT'S BRIEF

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QUESTION PRESENTED

Did the Court of Appeals err in finding that this case is moot when the provision challenged by Plaintiffs has been repealed and replaced by a new ordinance which permits client visits at home-based businesses?

No merits issue?

STATEMENT OF THE CASE

This case involves a challenge to a now-repealed provision of the Metropolitan Code of Nashville and Davidson County. The Complaint challenging this provision[1] was filed on December 5, 2017. (T.R. 1-27). The Metropolitan Government filed a motion to dismiss, arguing that the prohibition on allowing clients to visit home-based businesses was rationally related to the legitimate goal of protecting the residential nature of neighborhoods. (T.R. 66). This motion was denied. (T.R. 481).[2] The Metropolitan Government answered the Complaint on May 21, 2018. (T.R. 501).

Plaintiffs took substantial discovery, both written and by deposition. Over its objections, the Metropolitan Government was ordered to produce a Tenn. R. Civ. P. 30.02(6) witness to explain all the reasons that the legislative body (the Metropolitan Council) had not passed an ordinance allowing clients to visit home-based businesses. (T.R. 592-94; 611-13). Former Metropolitan Councilman Carter Todd served as the Metropolitan Government's 30.02(6) witness and offered a multitude of rational reasons for why ordinances seeking to lift the client prohibition had not passed. (T.R. 740-866).

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1 Plaintiffs have never filed a motion to amend to challenge the new ordinance and have never filed a lawsuit challenging the new ordinance.

2 This Order was entered by Chancellor William E. Young. The remainder of rulings in the case were made by Chancellor Anne C. Martin.

The Plaintiffs and Metropolitan Government both moved for summary judgment on June 14, 2019. (T.R. 618, 640). In making its ruling, the Court reviewed both motions and the voluminous record that had been developed. (T.R. 2309-34). The Court also spent time identifying the appropriate standard for analyzing an as-applied challenge.[3] *Id.* The Court concluded that there were multiple rational bases for the client prohibition:

- "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. . . . It defies logic to say that customers coming into neighborhoods to call on businesses, in any number, will not affect parking and traffic. . . . 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." (T.R. 2330).

- "...[R]egulatory 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." (T.R. 2331).

- "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

[3] This was significant because the Plaintiffs had chosen *not* to appeal the denial of their re-zoning application (this change in zoning would have allowed them to have clients visit their home businesses).

> obligations. ... 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." *Id.*

Plaintiffs appealed to the Court of Appeals on October 28, 2019. (T.R. 2335). After the record was filed in this matter, the Metropolitan Council enacted Ordinance BL2019-48, which repealed METROPOLITAN CODE § 17.16.250(D) in its entirety (including the prohibition on client visits) and replaced it with new regulations that allow up to six client visits a day at certain home businesses. (Aug. 7, 2020 Motion to Consider Post-Judgment Facts and Dismiss as Moot, Ex. A). The new provisions of METROPOLITAN CODE § 17.16.250(D) expire on January 27, 2023 "unless extended by resolution by the metropolitan council." *Id.*

The Metropolitan Government filed a motion before the Court of Appeals requesting that the case be dismissed as moot due to the enactment of Ordinance BL2019-48. (Aug. 7, 2020 Motion). The Court of Appeals issued an Order reserving judgment pending oral argument and submission of the case for a decision on the merits. (Order, August 28, 2020).

Both parties submitted briefs, and the Court of Appeals heard oral argument on January 6, 2021. On February 11, 2021, the Court of Appeals issued its opinion, dismissing the appeal as moot and remanding the case to the Trial Court to vacate the judgment and dismiss the case. *Id.* at *7-8.

STATEMENT OF THE FACTS

This lawsuit challenges the constitutionality of a provision of the Metropolitan Code that has been repealed. METROPOLITAN CODE § 17.16.250(D)(1)[4] allowed residents to use their homes for home occupations, so long as no clients were served on the property.

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[4] 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;
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.

I. PLAINTIFFS' ALLEGATIONS.

Plaintiffs sought to legally operate home-based businesses that involve having clients visit their homes (a beauty shop and a recording studio). (T.R. 1, ¶ 96).

Plaintiffs alleged that this prohibition on client visits violates their due process and equal protection rights under the Tennessee Constitution. (*Id.*, ¶¶ 144, 151). Plaintiffs asked that the Court invalidate

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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.

(T.R. 80 – METROPOLITAN CODE OF LAWS § 17.16.250(D) (emphasis added)). As explained in the Statement of the Case and addressed in Section II of this Brief, this version of § 17.16.250(D) was repealed in its entirety by Ordinance BL2019-48 and replaced with a new ordinance, which permits client visits to certain home businesses.

the prohibition on client-visits and allow them to serve up to twelve clients per day. (*Id.*, ¶ 152).

II. PROPOSALS OF THE KIND SOUGHT BY THE PLAINTIFFS HAVE BEEN REPEATEDLY REJECTED BY THE METROPOLITAN COUNCIL.

The Metropolitan Council has considered proposals to allow clients to visit home-based businesses numerous times within the last twenty years, without success (until the recent enactment of Ordinance BL2019-48, of course). In 2000, Councilmembers Arriola and Ponder filed BL2000-173, which would have created an exception allowing clients or patrons to be served at a hair salon home business. (T.R. 1006). 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. (T.R. 1009).

BL2011-858, which would have allowed up to two clients per hour, was introduced by Councilmember Jameson in 2011. (T.R. 1012). Councilmember Jameson also filed BL2011-924, which would have created a separate land use for home businesses. (T.R. 2301). 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. (T.R. 1017). 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). (T.R. 1022).

And, in 2017, Councilman Davis filed BL2017-719, which would have changed Mr. Shaw's zoning from residential to SP (allowing his

ongoing issue: why some biz's + not others?

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). (T.R 1026, 1032).

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

Mr. Shaw and Ms. Raynor did not challenge the Council's denial of their zoning request, although they later attempted to attack the denial through this lawsuit. The Trial Court rejected this collateral attack. (T.R. 2333 ("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 Metropolitan Council, which gave due consideration to the Plaintiffs' [rezoning] applications, neither of which was recommended by the Planning Commission.")).

III. LEGITIMATE RATIONAL BASES WERE PROFFERED BY THE METROPOLITAN GOVERNMENT THROUGH WRITTEN DISCOVERY.

In its discovery responses, the Metropolitan Government 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.

There were many other arguments the Metropolitan Council

considered in keeping the client prohibition, including:

- 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.
- There are alternatives (e.g. WeWorks or rental of conference spaces) so that most home businesses can meet clients elsewhere.
- This would create de facto mixed use all over the county, without a zoning 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.
- Smaller steps toward allowing clients to visit home businesses in certain areas of town would be more appropriate.
- Neighbors do not want additional traffic in their neighborhoods.
- 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.
- 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.
- 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.

(T.R. 2134). These reasons arose out of the public hearings where the client prohibition ban was debated in the context of BL2011-924 (T.R 2301) at the July 5, 2011 Metropolitan Council hearing.[5]

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

Former Councilmember Todd testified at length as the TENN. R. CIV. P. 30.02(6) witness[6] 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, each with sub-categories: order, certainty, quality of life, and safety. (T.R. 1172). Each is discussed in turn below.

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. (T.R. 1176). There is a value in a zoning code and knowing what you are buying, when you purchase a home. (T.R. 1186). "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

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5 https://youtu.be/0UlVzksRJPI?t=1060 (minutes 17:40-1:07:30).

6 Although Councilman Todd gave a thorough and careful explanation the reasons behind the client-prohibition, the Metropolitan maintains that his 30.02(6) testimony should not have been required by the Trial Court.

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." (T.R. 1261).

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. (T.R. 1182-83). The biggest investment most Nashvillians make is in their home, and homes in residential neighborhoods are purchased in reliance on the residential zoning. (T.R 1176-1178). They are purchased with the expectation that clients will not be served in those neighborhoods. It would therefore not be appropriate to change all of them to de-facto mixed use without notice and process. (*Id.*; T.R. 1264-65).

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.*; T.R. 1252-53). 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. (T.R. 1252-56). There are different water and storm water rates. (T.R. 1269). The tax assessor would be burdened by having to determine what rate is appropriate for home businesses who frequently serve customers in the home. (T.R. 1252-53).

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. (T.R. 1271). 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. (T.R. 1266-67). Neighborhoods have different goals, histories, and expectations. *Id.*

In addition, there are alternative workspaces, such as WeWork or rental of conference spaces, to allow most businesses to meet clients outside a home. (T.R. 1263). Or, home-based businesses could rent space in commercial or mixed-use zoned areas. (*Id.*; T.R. 1264).

B. The Interest in Certainty of Outcome.

Councilmember Todd testified that certainty of outcome is also an important interest. (T.R. 1180-81). The client prohibition is simple and therefore easy to enforce. *Id.* Permitting a particular number of clients would be both arbitrary (why pick 4 and not 5, or 8 and not 9?) and difficult to enforce (who keeps count of how many clients really come to the house?). (*Id.*; T.R. 1279).

The Police and Codes Departments do not have the resources to enforce these restrictions and track visitors versus clients. (T.R. 1262, 1275). Allowing a certain number of clients to come to the home would effectively burden the neighbors with having to observe and track visitors and clients. (T.R. 1278). This can hurt neighborhood relationships.

C. The Interest in Quality of Life.

Councilmember Todd testified that many of his constituents had chosen, purposefully, to live in a residential area. (T.R. 1181-82). 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. (T.R. 1188).

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. (T.R. 1273).

D. The Interest in the Safety of Clients and Neighbors.

Councilmember Todd testified that clients of businesses are entitled to an expectation of safety. (T.R. 1174). 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 (T.R. 1038-39 – METROPOLITAN CODE § 16.08.010), 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"), 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. *Id.*

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. (T.R. 1172-174). 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 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. (T.R. 1175-76). Some neighborhoods, such as 12 South, must use permit parking on their streets, in order to have enough parking for residents. (T.R. 1279-80).

ARGUMENT

I. STANDARD OF REVIEW.

Summary judgment is appropriate when "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 a judgment as a matter of law." TENN. R. CIV. P. 56.04.

A trial court's ruling on a motion for summary judgment is reviewed de novo without a presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC,* 477 S.W.3d 235, 250 (Tenn. 2015) (*citing Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997)); *Martin v. Rolling Hills Hosp., LLC*, No. M201602214SCR11CV, 2020 WL 2065528, at *4 (Tenn. Apr. 29, 2020).

Likewise, "[t]he issue of whether [a] court erred in dismissing the case for mootness is one of law, and thus our standard of review is de novo with no presumption of correctness." *Melton v. City of Lakeland,* No. W2018-01237-COA-R3-CV, 2019 WL 2375431, *2 (Tenn. Ct. App. June 5, 2019); *see also All. for Native Am. Indian Rights in Tenn., Inc. v. Nicely,* 182 S.W.3d 333, 338-39 (Tenn. Ct. App. 2005) ("Determining whether a case is moot is a question of law[.]").

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THIS CASE IS MOOT.

Plaintiffs' Complaint explicitly states:

> Plaintiffs challenge a single sentence within the Zoning Code for Metropolitan Nashville and Davidson County. It states, with respect to most (but not all) home-based businesses

> (termed "home occupations" by the Zoning Code), that "[n]o clients or patrons may be served on the property." Nashville. Tenn. Metro. Code § 17.16.250(D)(1). Plaintiffs shall refer to this sentence as the "Client Prohibition."

(T.R. 2). In their Prayer for Relief, Plaintiffs request entry of judgment declaring the Client Prohibition unconstitutional and a permanent injunction prohibiting the Metropolitan Government from enforcing the Client Prohibition against the Plaintiffs. (T.R. 25).

There is no dispute that the "single sentence" challenged by the Plaintiffs is no longer part of the Metropolitan Code. *After* the Trial Court issued its Order *upholding* the "Client Prohibition," Ordinance BL2019-48 was enacted and became law. This new ordinance amended METROPOLITAN CODE OF LAWS § 17.16.250(D) by "deleting it in its entirety and replacing" it with a new subsection (D), which allows a maximum of six client visits per day (by appointment) between 8:00 a.m. and 7:00 p.m. Monday through Saturday at home-based businesses. (Aug. 7, 2020 Motion, Ex. A).

"Tennessee's courts believe[] that 'the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions.' Accordingly, they limit[] their role to deciding 'legal controversies.' A proceeding qualifies as a 'legal controversy' when the disputed issue is real and existing, and not theoretical or abstract, and when the dispute is between parties with real and adverse interests." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 203 (Tenn. 2009). "Although a showing of present injury is not required in a declaratory judgment action, a real 'case' or 'controversy' must

nevertheless exist." *Thomas v. Shelby Cnty.*, 416 S.W.3d 389 (Tenn. Ct. App. 2011).

"A case must remain justiciable (remain a legal controversy) from the time it is filed until the moment of final appellate disposition." *Norma Faye,* 301 S.W.3d at 203–04. "A moot case is one that has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case." *Id.* at 204. A case is moot when the prevailing party will be provided no meaningful relief from a judgment in its favor. *Knott v. Stewart Cnty.*, 207 S.W.2d 337, 338 (Tenn. 1948); *Cnty. of Shelby v. McWherter,* 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996).

This Court explained how the mootness doctrine is applied in *Norma Faye*:

> Tennessee courts do not apply the mootness doctrine mechanically. Rather, when the question of mootness is raised, they consider many factors, including the reason that the case is alleged to be moot, the stage of the proceeding, the importance of the issue to the public, and the probability that the issue will recur. Over time, the courts have recognized several circumstances that provide a basis for not invoking the mootness doctrine. These circumstances include: (1) when the issue is of great public importance or affects the administration of justice, (2) when the challenged conduct is capable of repetition and of such short duration that it will evade judicial review, (3) when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain, and (4) when the defendant voluntarily stops engaging in the challenged conduct.

Norma Faye, 301 S.W.3d at 204.

The Plaintiffs assert that this case matches the first and forth circumstances, and therefore, the Court of Appeals erred in dismissing the appeal as moot. But as explained below, the circumstances of this case justify placing the burden on the Plaintiffs to demonstrate that the case is not moot, and the Plaintiffs have not met that burden. In the alternative, the Court of Appeals' decision to rely on the standard set out by the United States Court of Appeals for the Sixth Circuit is supported by Tennessee and United States Supreme Court case law on voluntary cessation by governmental entities, and the Metropolitan Government adequately demonstrated that the enactment of BL2019-48 mooted the case. In either instance, the Court of Appeals' decision to dismiss the appeal as moot was correct.

A. This Court's decision in *Norma Faye* supports placing the burden on the Plaintiffs to demonstrate that the case is not moot.

In *Norma Faye*, this Court set forth governing principles on the issue of voluntary cessation, drawn from United States Supreme Court case law:

> The Court's decisions reflect a jaundiced attitude about permitting a litigant to cease its wrongful conduct temporarily to frustrate judicial review and then be free to resume the same conduct after the case is dismissed as moot. Accordingly, the United States Supreme Court has concluded that, as a general rule, the voluntary cessation of allegedly illegal conduct does not suffice to moot a case.
>
> The United States Supreme Court has not completely ruled out finding mootness based on the voluntary cessation of illegal conduct. The Court has determined that a case may be dismissed as moot when it is absolutely clear that the

> allegedly wrongful conduct cannot be reasonably expected to recur. This standard purposely places a heavy burden on the party attempting to convince a court that its voluntary cessation of allegedly illegal conduct has mooted the case. Many states have adopted the United States Supreme Court's approach to assessing the effect of voluntary cessation on mootness.

Id. at 205 (internal citations omitted).

This Court also noted that while the United States Supreme Court has not addressed the question directly, many courts (including the United States Court of Appeals for the Sixth Circuit) have "viewed voluntary cessation of allegedly illegal conduct by governmental actors with 'more solicitude' than similar conduct by private parties." *Id.* at 206. Ultimately, this Court set out the following standard:

> We are wary of adopting an approach to mootness through voluntary cessation that treats government litigants and private litigants differently. However, we also recognize the long-standing rebuttable presumption that government officials will discharge their duties in good faith and in accordance with the law. Like the justiciability doctrines themselves, this presumption arises from the separation of powers provisions in Article II, Sections 1 and 2 of the Constitution of Tennessee.
>
> We have determined that the mandates of the Constitution of Tennessee and the interests of the parties are best served by holding that the burden of persuading a court that a case has become moot as a result of the voluntary cessation of the challenged conduct is and remains on the party asserting that the case is moot. However, when the party asserting that the case has become moot based on the cessation of its own conduct is a government entity or official, the court may, if justified by the circumstances of the case, require the

> opposing party to demonstrate why the proceeding should not be dismissed for mootness.

Id. (internal citations omitted).

Although this Court has not yet provided any guidance as to what circumstances would justify shifting the burden to the party opposing a finding of mootness, the circumstances of this case present ample justification for such an approach. Unlike in many cases where voluntary cessation has been determined not to moot an issue, here, the Metropolitan Government was successful at the Trial Court in defending the challenged regulation. Thus, the Metropolitan Council had no reason related to the pending lawsuit to repeal the Client Prohibition. Rather, the Council provided the following reasons for the change in the text of the BL2019-48:

> WHEREAS, current regulations prohibit even one client from visiting a home based business; and
>
> WHEREAS, these regulations create a hardship on residents seeking additional income to survive in a city with a skyrocketing cost of living; and
>
> WHEREAS, these regulations create a significant barrier for children seeking tutoring services, music lessons, and other enrichment; and
>
> WHEREAS, 5.7% of Nashville workers aged 16 and older work from home; and
>
> WHEREAS, permitting limited home-based business activity will protect the residential character of neighborhoods while allowing more Nashvillians to earn supplemental income to remain in their homes.

(Aug. 7, 2020 Motion, Ex. A).

In *Norma Faye*, the City and County had "changed their practice for [the] plaintiff," but "they [had] not completely and permanently abandoned the challenged practice." *Id.* at 207. This Court determined that "[w]here a governmental entity is likely to resume or continue engaging in the allegedly offending conduct as to others but not the plaintiff, we simply do not believe that voluntary cessation provides an adequate basis for rendering the action moot." *Id.* at 208. There is no such issue in this case.

Here, because the challenged provision has been repealed and replaced, it has been completely and permanently abandoned by the Metropolitan Government, and neither party has any interest in the matter – the Plaintiffs are no longer affected by the repealed Client Prohibition, and the Metropolitan Government no longer has any interest in defending a repealed ordinance. *See Hooker v. Haslam,* 437 S.W.3d 409, 417 (Tenn. 2014) ("Where the plaintiff challenged the constitutionality of a statute and the statute was repealed after the case was initiated but before it was heard, the repeal rendered the case moot, since the challenged statute was no longer the law of the land."); *see also Tini Bikinis-Saginaw, LLC v. Saginaw Charter Twp.,* 836 F.Supp.2d 504, 519–20 (E.D. Mich. 2011) ("Indeed, declaring a repealed ordinance void and enjoining its enforcement . . . would be an empty act. In the vernacular, declaring it void would be as meaningful as shooting a dead horse. And enjoining its enforcement, moreover, would be shooting the horse once again."); *Kentucky Right to Life, Inc. v. Terry,* 108 F.3d 637, 644 (6th Cir. 1997) ("Legislative repeal or amendment of a challenged

statute while a case is pending on appeal usually eliminates [the] requisite case-or-controversy because a statute must be analyzed by the appellate court in its present form."); *Brandywine, Inc. v. City of Richmond, Ky.*, 359 F.3d 830, 836 (6th Cir. 2004) ("Plaintiffs ask this court to declare unconstitutional the zoning scheme as it existed when their license was revoked and to enjoin Richmond from enforcing that scheme. We can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect.").

While the new subsection (D)(8) includes a sunset provision, which states, "The provisions of this subsection D shall expire and be null and void on January 7, 2023 unless extended by resolution of the metropolitan council," the language in Section 1 of BL2019-48, which repealed the former provisions, does not itself expire. (Aug. 7, 2020 Motion, Ex. A, emphasis added). Therefore, the Client Prohibition will not return automatically upon the passage of the sunset date, and there is no reason to believe that the repealed Client Prohibition would be re-enacted by a future Council.

After all, the purpose of the voluntary cessation exception to the mootness doctrine is to prevent "permitting a litigant to cease its wrongful conduct temporarily to frustrate judicial review and then be free to resume the same conduct after the case is dismissed as moot." *Norma Faye,* 301 S.W.3d at 205. Under these circumstances as described above, there is no basis for believing that the Metropolitan Council's repeal of the challenged regulation is temporary or that the Metropolitan Government will resume enforcing a repealed Code provision. Instead,

these are circumstances that justify "requir[ing] the opposing party to demonstrate why the proceeding should not be dismissed for mootness." *Id.* at 206.

B. In the alternative, the Sixth Circuit standard utilized by the Court of Appeals is supported by Tennessee and United States Supreme Court case law.

Despite the circumstances described above, the Court of Appeals did not shift the burden to the Plaintiffs. Rather, it kept the burden of persuasion on the Metropolitan Government and utilized the Sixth Circuit's approach to voluntary cessation, described in *Speech First, Inc. v. Schlissel,* 939 F.3d 756 (6th Cir. 2019):

> Although the bar is high for when voluntary cessation by a private party will moot a claim, the burden in showing mootness is lower when it is the government that has voluntarily ceased its conduct. When a private party has voluntarily ceased its alleged illegal conduct, the Supreme Court has explained that "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). We have noted, however, "that 'cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties' and that '[the government's] self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine.'" *Bench Billboard Co. v. City of Cincinnati,* 675 F.3d 974, 981 (6th Cir. 2012) (quoting *Mosley v. Hairston,* 920 F.2d 409, 415 (6th Cir. 1990)). As the Ninth Circuit has commented, government action receives this solicitude because courts assume "that [the government] acts in good faith." *Fikre v. FBI,* 904 F.3d 1033, 1037 (9th Cir. 2018) (citation omitted). Namely, we presume that the same

allegedly wrongful conduct by the government is unlikely to recur. *See Friends of the Earth,* 528 U.S. at 189, 120 S. Ct. 693. *See also* 13C Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 3533.7 (3d ed. 2008) ("Courts are more likely to trust public defendants to honor a professed commitment to changed ways; individual public defendants may be replaced in office by new individuals, with effects that have little parallel as to private defendants; remedial calculations may be shaped by radiations of public interest; administrative orders may seem to die or evolve in ways that leave present or future impact unclear."). We have employed this solicitude for both legislative and non-legislative governmental actions. *See Hanrahan v. Mohr,* 905 F.3d 947, 961-62 (6th Cir. 2018); *Ammex, Inc. v. Cox,* 351 F.3d 697, 705 (6th Cir. 2003).

. . .

Where the government voluntarily ceases its actions by enacting new legislation or repealing the challenged legislation, that change will presumptively moot the case unless there are clear contraindications that the change is not genuine. *See Hill v. Snyder,* 878 F.3d 193, 204 (6th Cir. 2017) ("Legislative action ordinarily moots a case midstream, when a challenged provision is repealed or amended during the pendency of the litigation."); *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 n.10, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (finding that legislative action did not moot the case because of the legislature's announced intention of reenacting the statute). *See also Jones v. Haynes,* 736 F. App'x 585, 589 (6th Cir. 2018); *Bench Billboard Co.,* 675 F.3d at 982; *Ky. Right to Life, Inc. v. Terry,* 108 F.3d 637, 645 (6th Cir. 1997); *Mosley,* 920 F.2d at 415.

Id. at 767-68.[7]

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[7] Since the lower court's decision in this case, the Tennessee Court of Appeals made a similar ruling in *Allen v. Lee,* M2020-00918-COA-RV,

This approach is supported by "the long-standing rebuttable presumption [in Tennessee case law] that government officials will discharge their duties in good faith and in accordance with the law." *Norma Faye,* 301 S.W.3d at 206; *see also Mitchell v. Garrett,* 510 S.W.2d 894, 898 (Tenn. 1974); *Reeder v. Holt,* 418 S.W.2d 249, 252 (Tenn. 1967); *Mayes v. Bailey,* 352 S.W.2d 220, 223 (Tenn. 1961); *State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle,* 63 S.W.3d 734, 775 (Tenn. Ct. App. 2001).

In addition, the United States Supreme Court's traditional practice of vacating and remanding a case when the challenged regulation is repealed and replaced also supports this result. *See Lewis v. Cont'l Bank*

2021 WL2948775 (Tenn. Ct. App. July 14, 2021):

> We have previously noted that 'the rationale behind the voluntary cessation exception to the mootness doctrine is to prohibit a litigant from temporarily ceasing its wrongful conduct in order to frustrate judicial review, only to resume such conduct after the case has been dismissed as moot.' A finding of mootness is not foreclosed simply because a defendant's voluntary conduct is what removed the live controversy. Moreover, the Tennessee Supreme Court has noted that when a case has become moot based on the cessation of conduct by a governmental entity or official, as occurred here, courts may 'require the opposing party to demonstrate why the proceeding should not be dismissed for mootness.' In any event, this Court has recently endorsed the notion that the bar for showing mootness is lower when a governmental entity's conduct is at issue, quoting favorably to the approach taken by the Sixth Circuit in *Speech First, Inc. v. Schlissel,* 939 F.3d 756 (6th Cir. 2019).

Id. at *4 (internal citations omitted).

wtf

Corp., 494 U.S. 472, 482 (1990) ("Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.") (internal citations omitted); *see also Kremens v. Bartley,* 431 U.S. 119, 126-27 (1977) ("On July 9, 1976, after the decision below and after this Court had noted probable jurisdiction, Pennsylvania enacted a new statute substantially altering its voluntary admission procedures. Mental Health Procedures Act, Pa. Act No. 143. The new Act completely repeals the provisions declared unconstitutional below except insofar as they relate to mentally retarded persons . . . Because we have concluded that the claims of the named appellees are mooted by the new Act, and that the claims of the unnamed members of the class are not properly presented for review, we do not dwell at any length upon the statutory scheme for voluntary commitment in Pennsylvania or upon the rationale of the District Court's holding that the 1966 Act and regulations did not satisfy due process."); *Hall v. Beals,* 396 U.S. 45, 48 (1969) ("[T]he recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in light of the Colorado statute as it now stands, not as it once did. And under the statute as currently written, the appellants could have voted in the 1968

presidential election. The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law.") (internal citations omitted); *U.S. Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto,* 477 U.S. 556, 559 (1986) (finding that when a new statute is enacted which "significantly alters the posture of [the] case" the judgment of the District Court should be vacated and remanded).

As the Court of Appeals correctly noted, there are no "clear contraindications that the change is not genuine" in this case to overcome the presumption that the Metropolitan Council acted in good faith in enacting the new ordinance. *Shaw v. Metro. Gov't of Nashville and Davidson Cnty.,* M2019-01926-COA-R3-CV, 2021 WL 515887, at *7 (Tenn. Ct. App. Feb. 11, 2021); *see also, Allen,* 2021 WL2948775 at *5 ("In the present case, there is no indication that the repeal of the closure requirements was animated in any way by a desire to thwart judicial review, and consistent with the discussion above, there does not exist any reasonable expectation in our view that the Governor will reinstate the requirements as part of the State's response to COVID-19. The complained-of requirements were repealed over a year ago, and as noted, businesses are now reopening, vaccinations are widely available, and citizens are continuing to get back to more 'normal' lives. In the exercise of our discretion, we decline to reach the merits of this appeal. Given this conclusion, we vacate the trial court's judgment and remand the case to the trial court with instructions that it enter an order dismissing the case on grounds of mootness.").

"Unlike in *Melton,* Metro repealed the challenged code provision and was not forced to do so by federal or state law. Unlike in *Norma Faye,* Metro has not announced a continuing belief that it can or will prohibit clients at certain home-based businesses." *Shaw*, 2021 WL 515887 at *7. Also, as explained above, the sunset provision will not reinvoke the Client Prohibition automatically if the Metropolitan Council takes no action. Rather, a future Council's action or inaction will be based on the new ordinance's effects, which are not yet known.

Under these circumstances, the Court of Appeals' decision to vacate and remand the case as moot is consistent with the Sixth Circuit's approach to voluntary cessation, the United States Supreme Court's practice when a challenged regulation has been repealed, and Tennessee case law providing for a presumption of good faith for government actors.

C. The circumstances of this case do not justify invocation of the public interest exception to the mootness doctrine.

Plaintiffs argue that this case also invokes the public interest exception to mootness. "[U]nder 'exceptional circumstances where the public interest clearly appears,' the appellate courts may exercise their judgment and discretion to address issues of great importance to the public and the administration of justice. To guide their discretion, the courts should first address the following threshold considerations: (1) the public interest exception should not be invoked in cases affecting only private rights and claims personal to the parties; (2) the public interest exception should be invoked only with regard to 'issues of great importance to the public and the administration of justice'; (3) the public

interest exception should not be invoked if the issue is unlikely to arise in the future; and (4) the public interest exception should not be invoked if the record is inadequate or if the issue has not been effectively addressed in the earlier proceedings." *Norma Faye,* 301 S.W.3d at 210–11.

"If the threshold considerations do not exclude the invocation of the public interest exception to the mootness doctrine, the courts should then balance the interests of the parties, the public, and the courts to determine whether the issues in the case are exceptional enough to address. In making this determination, the courts may consider, among other factors, the following: (1) the assistance that a decision on the merits will provide to public officials in the exercise of their duties, (2) the likelihood that the issue will recur under similar conditions regardless of whether the same parties are involved, (3) the degree of urgency in resolving the issue, (4) the costs and difficulties in litigating the issue again, and (5) whether the issue is one of law, a mixed question of law and fact, or heavily fact-dependent." *Id.* at 211.

Plaintiffs argue that this case involves more than private rights and claims personal to these particular plaintiffs. But their Complaint alleges only as-applied challenges to the Client Prohibition and requests relief only for these Plaintiffs. (T.R. 23-25). This Court has determined that the public interest exception should not be invoked in these types of cases where only private rights are involved. *Hooker,* 437 S.W.3d at 418 ("All that is still at stake is Mr. Hooker's personal right, if any, to have been a

candidate for Judge Bivens' seat on the bench. This is not a class action; no other rights are involved."). NICE CONCESSION!

Similarly, while working from home is an issue of great importance to the public, deciding whether a client prohibition that no longer exists would violate these Plaintiffs' rights does not serve the public interest. *See id.* ("To be sure, the question of how judges are selected in Tennessee is one of immense public importance. Since the judicial nominating commission portions of the statute no longer exist, the statutory Judicial Nominating Commission no longer affects future appointments and any opinion as to its constitutionality would be advisory only. An advisory opinion on the constitutionality of a now-lapsed judicial nominating commission process would not serve the public interest.").

As to whether this issue is likely to arise in the future under similar circumstances, there is nothing in the record to support a probability that the Metropolitan Council is likely to resurrect the Client Prohibition after the new ordinance's sunset date. Rather, the reasons provided in Ordinance BL2019-48 for its enactment indicate that the Council is attempting to strike a balance between homeowners' needs in working out of their homes and maintaining the residential character of neighborhoods.

Even if the threshold considerations were met, the balancing factors do not weigh in favor of invoking the public interest exception. A decision on the merits will not assist any public officials in the exercise of their duties – the Client Prohibition no longer exists, so the Metropolitan Codes Department is not enforcing it anymore. There is no

really? it wouldn't stop Metro Council in future decide?

urgency in addressing this moot ordinance. And if a client prohibition is re-enacted at some later date, any lawsuit challenging it will have to address the particular version adopted at that time.

Therefore, the public interest exception should not be invoked, and the Court of Appeals' decision finding the case to be moot should be upheld.

III. THE TRIAL COURT PROPERLY DETERMINED THAT THE CLIENT PROHIBITION WAS CONSTITUTIONAL.

The Metropolitan Government contends that the merits of this case (i.e., the constitutionality of the old Client Prohibition) are not properly before this Court. Thus, if the Court determines that the Court of Appeals erred in finding that the case is moot, the matter should be remanded to the lower court for a determination on the merits of the new ordinance. However, because Plaintiffs' brief addresses the constitutionality of the old Client Prohibition, the Metropolitan Government will provide its position on the merits out of an abundance of caution.

they don't raise this as an issue

A. An analysis of substantive due process and equal protection under the Tennessee Constitution is identical to the analysis under the United States Constitution.

Tennessee courts apply the same analysis to substantive due process claims brought under Tennessee Constitution as to those brought under the United States 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,* 941 S.W.2d at 52; *Tenn. 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." *Consol. Waste Sys. v. Metro. Gov't.,* 2005 WL 1541860, *7 (Tenn. Ct. App. June 30, 2005) (citing *Tenn. Small Sch. Sys.,* 951 S.W.2d at 153).

Plaintiffs are mistaken when they attempt to differentiate the Tennessee and United States Constitution's due process and equal protection analysis. This is not a case about privacy or the right to work. It is about an economic regulation and limitations on the location of businesses, and this analysis is identical under both constitutions. The Court of Appeals elaborated on the *Riggs* standard in *Brown v. Metro. Gov't of Nashville,* M2017-01207-COA-R3-CV, 2018 WL 6169251 (Tenn. Ct. App. Nov. 26, 2018):

> Our Supreme Court stated in *Riggs* that:
>
> This Court has held that the "law of the land" provision of article I, section 8 of the Tennessee Constitution "is synonymous with the due process clause of the Fourteenth Amendment to the United States Constitution." *Newton v. Cox,* 878 S.W.2d [105] at 110 [(Tenn. 1994)]; *State ex rel. Anglin v. Mitchell,* 596 S.W.2d 779, 786 (Tenn.1980). Thus, unless a fundamental right is implicated, a statute comports with substantive due process if it bears "a reasonable relation to a proper legislative purpose" and is "neither arbitrary nor discriminatory." *Newton v. Cox,* 878 S.W.2d at 110. *6 941 S.W.2d at 51.

In our analysis, we address whether the distance requirement is reasonably related to a legitimate legislative purpose. Stated somewhat differently, "[a] zoning ordinance is the product of legislative action and, before it can 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." *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *5 (Tenn. Ct. App. June 30, 2005) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). Courts do not "inquire into the motives of a legislative body or scrutinize the wisdom of a challenged statute or ordinance." *Martin v. Beer Bd. for City of Dickson,* 908 S.W.2d 941, 955 (Tenn. Ct. App. 1995) (citations omitted).

The Petitioners concede that "concerns about property values and economic redevelopment are valid concerns and a proper state interest for consideration in enacting zoning regulations"; they argue that the distance requirement "is not reasonably related to advancing" that interest. The preamble to the ordinance includes concerns related to the detrimental effect of clustering alternative financial services on property values; the location of the businesses in areas that are disproportionately minority and low income; the permissive regulatory environment, which allows the businesses to charge an annual interest rate of up to 459 percent; and new regulations, effective January 1, 2015, that regulate three new types of alternative financial lenders. Taken in their entirety, the statements in the preamble reflect legitimate legislative purposes, specifically, protecting the welfare of economically vulnerable citizens. The Metropolitan Council chose to restrict the location of alternative financial service providers in order to regulate the proliferation and clustering of these services; this decision reasonably advances the governmental interests identified in the preamble to the ordinance. Accordingly, we affirm the dismissal of the Petitioners' due process claim.

Brown, 2018 WL 6169251 at *5-6 (emphasis added); *see also In re Walwyn*, 531 S.W.3d 131, 138 (Tenn. 2017); *Consol. Waste*, 2005 WL 1541860 at *7.

B. The rational basis test is a question of law, not fact.

The Sixth Circuit has explained the relationship between the Fourteenth Amendment and constitutional challenges:

> A first requirement of any law, whether under the Due Process Clause or Equal Protection Clause, is that it rationally advance a legitimate government policy. Two words ("judicial restraint") and one principle (trust in the people that "even improvident decisions will eventually be rectified by the democratic process") tell us all we need to know about the light touch judges should use in reviewing laws under the standard. So long as judges can conceive of some plausible reason for the law—*any* plausible reason, even one that did not motivate the legislators who enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens.
>
> . . . The signature feature of rational basis review is that governments will not be placed in the dock for doing too much or for doing too little in addressing a policy question. . . . [R]ational basis review does not permit courts to invalidate laws every time a new and allegedly better way of addressing a policy emerges, even a better way supported by evidence and ... by judicial factfinding. If legislative choices may rest on "rational speculation unsupported by evidence or empirical data," it is hard to see the point of premising a ruling on unconstitutionality on factual findings made by one unelected federal judge that favor a different policy. Rational basis review does not empower federal courts to "subject" legislative line-drawing to "courtroom" factfinding designed to show that legislatures have done too much or too little.

DeBoer v. Snyder, 772 F.3d 388, 404–405 (6th Cir. 2014) (emphasis added).

The federal courts of appeals which have directly addressed this issue, whether in the context of equal protection or substantive due process, have concluded that whether a classification is rationally related to a legitimate governmental interest presents a question of law for a court, not a question of fact. *See, e.g., Myers v. Cnty. of Orange,* 157 F.3d 66, 74-75 & n. 3 (2d Cir. 1998); *FM Props. Operating Co. v. Cty. of Austin,* 93 F.3d 167, 172 (5th Cir. 1996); *Midnight Sessions Ltd. v. Cty. of Philadelphia,* 945 F.2d 667, 682 (3d Cir. 1991), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Twp. of Warrington,* 316 F.3d 392, 410 (3d Cir. 2003); *Izquierdo Prieto v. Mercado Rosa,* 894 F.2d 467, 471 (1st Cir. 1990).

Judge Aleta Trauger of the United States District Court for the Middle District of Tennessee has described the meaning of the phrase "rational basis" as a term of art:

> The term "rational" has a special meaning in constitutional law. It does not mean that a law must be reasonable, sensible, well-founded, effective, or supported by evidence. In fact, in many contexts (including public education), state legislatures and policymakers can make "rational" decisions that, when implemented, are unreasonable, counter-productive to a stated goal, or contrary to all past experience and evidence. When a federal court conducts a rational basis review, the review is limited to determining only whether there is a *conceivable* rational *relationship* between the policy and a legitimate governmental objective. The rational relationship need not even be articulated by the policymakers defending the policy choice, and there may be no actual proof supporting that decision (in fact, there could even be proof demonstrating that the policy does not, in fact, achieve the desired result).

Wagner v. Haslam, 112 F. Supp. 3d 673, 692-93 (M.D. Tenn. 2015) (emphasis added). Judge Trauger explained that an "irrational" policy would be one completely unrelated to the classification at issue:

> By contrast, one can conceive of performance metrics that would be truly irrational, such as basing a Tennessee teacher's evaluation on the test scores of students in Arizona, whether the Nashville Sounds baseball team had a winning season that school year, or the State of Tennessee's economy on evaluation day. It is inconceivable that a Tennessee teacher's "value added" to a student's performance would bear any relationship to those metrics. By contrast, it is rational to believe that a teacher can impact the school-wide performance of both her own students and other students at that school by being an effective teacher and by improving the overall educational environment at the school.

Id. at 696.

C. 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*, 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.*, 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 Cnty. 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,* 941 S.W.2d at 48 (emphasis added).

The rational basis test is the same as the test for arbitrary and capricious action. *Varner*, 2001 WL 1560530 at *4. 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,* 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 Commc'ns,* 508 U.S. 307, 315 (1993). So contrary to Plaintiffs' assertions, evidence is not required to support a rational basis:

> The plaintiffs' arguments that there is no evidence in the record to establish a genuine safety risk from helicopter operations, and that the law will increase any potential risk and disruption by forcing longer flights, do not establish that the statute is irrational. To the contrary, under the rational basis test, specific evidence is not necessary to show the relationship between the statute and its purpose. *See Newton v. Cox,* 878 S.W.2d at 110. Rather, this Court asks only whether the law is reasonably related to proper legislative interests. *Id.* We conclude that it is.
>
> . . .
>
> Although the plaintiffs contend that there is no evidence to support classifying helicopter operators within nine miles of the park differently from any others in Tennessee, such evidence is unnecessary; the relevant inquiry is whether there is a reasonably conceivable set of facts to justify the classification within the statute. We have concluded that there is such a set of facts which justifies the classification.

Riggs, 941 S.W.2d at 52-53 (emphasis added).

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) (emphasis added); *see also Wagner,* 112 F.Supp.3d at 692–93 ("[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, in fact, achieve the desired result).") (emphasis added).

"[I]f any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153 (citing cases); *see also Harrison*, 569 S.W.2d at 825. Further, "[t]he individual challenging the statute has the burden of demonstrating that the legislative classification is unreasonable." *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994).

D. The Trial Court correctly determined that the prohibition on client visits to home businesses is a rational means to serve a legitimate governmental interest.

1. Past analysis of home-business client prohibitions.

This 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 Cnty. v. Hoover, 364 S.W.2d 879, 882 (Tenn. 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 local legislatures have 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, 141 S.W.2d 904, 907 (Tenn. 1940) (emphasis added).

2. The Metropolitan Government provided numerous justifications for the client prohibition that have a conceivable rational relationship to a legitimate governmental objective.

Through its discovery responses and the 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 United States 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).[8]

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[8] Many cases since have agreed that preserving the residential nature of residential properties meets the rational basis test. *Varner,* 2001 WL 1560530 at *3 (rejecting rezoning that would allow commercial development and increased traffic, noise, and lighting adjacent to residences); *Cty. 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).

If this = Q of law, why is it in your statement of Facts?

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 Statement of Facts section of this Brief).

3. Plaintiffs did not meet their burden to negate every reasonably conceivable state of facts that provide a rational basis for the client prohibition.

Plaintiffs make numerous arguments to challenge the client-prohibition as applied to themselves, in attempting to negate the rational reasons provided by the Metropolitan Government. These are addressed in turn below, *although, notably, only one rational reason needs to be accepted by the court for the ordinance to pass the rational basis test.*

i. Allowing other types of home-based businesses in residential districts does not violate equal protection.

Plaintiffs assert that the fact that the Metropolitan Government allows client visits in owner-occupied short-term rentals, certain specific plans, historic home events, and day care homes violates Tennessee's equal protection guarantee.

Importantly, legislation "does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). A law can be underinclusive or overinclusive without running afoul of the Equal Protection Clause. *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 592 n.38 (1979); *see also Millennium Taxi Serv., L.L.C. v. Chattanooga Metro. Airport Auth.*, No. E200800838COAR3CV, 2009 WL 1871927, at *8 (Tenn. Ct. App. June 30, 2009) ("A classification having some reasonable

basis 'is not unconstitutional merely because it results in some inequality.'").

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, 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. Cty. 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,* 772 F.3d at 404–405.

> 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.

Wagner, 112 F. Supp. 3d at 693 (emphasis added).

Plaintiffs identify several uses that are permitted in residential areas to support their belief that the client-prohibition is arbitrary. As the Trial Court pointed out, "[j]ust because [other uses] are allowed . . . does not invalidate the logic behind the Client Prohibition." (T.R. 2332). And Plaintiffs are mistaken that these allowed uses make the client-prohibition arbitrary because there are legitimate rational bases for allowing these uses.

Day cares

Day cares are permitted in residential neighborhoods under limited circumstances. They are permitted as of right (without special permission from the Metropolitan Government) as an accessory use to a

single-family dwelling for up to four children. METROPOLITAN CODE § 17.04.060. (T.R. 1038-39). Day cares that do not meet this definition require obtaining a special exception permit from the Board of Zoning Appeals, which may impose conditions. (T.R. 922-23; T.R. 116-24).

Allowing day cares in residential areas is not arbitrary or inconsistent with prohibiting clients to visit home businesses and, instead, is entirely consistent with the 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 child care homes providing care for four or fewer children. TENN. CODE ANN. § 71-5-501.

Once a day care cares for greater 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. (T.R. 174-76 – METROPOLITAN CODE § 17.16.170). Day cares 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 day cares in a residential area because this is a traditional residential use and is subject to strict regulations. Councilmember Todd's testimony further demonstrated the reasonableness of this zoning choice when he noted that parents drop off children in the morning and do not come back until the end of the day. This differs from home recording studios where band members and clients may come and go frequently during the day. (T.R. 1225-26). And,

there is a public interest in allowing a daycare in a neighborhood, so that children are near their home for daycare. (T.R. 1230, 1234).

Historic home events

Historic home events also require a special exception permit from the Board of Zoning Appeals, which may impose conditions, including limits on the number and frequency of events. (T.R. 173-74). 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 limited historic homes and that they host events that are not that different from opening a house to social guests. (T.R. 1235-37 – Deposition of Carter Todd). 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. (T.R. 173-74). This differs from a hair salon, which typically has a schedule of tightly packed appointments and operates daily.

Short-term rentals

Short-term rentals allow owners to rent their homes to visitors for fewer than 30 days at a time. (T.R. 184-85). 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. (T.R. 1232-34).[9] Allowing short-term rentals was in the public interest because of

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9 William Penn, Assistant Director of the Department of Codes and

the shortage of hotel rooms.[10] *Id.* 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. (T.R. 1040-56).

Plaintiffs argue that their case is comparable to *Consolidated Waste*. But in that case, the Court determined that the ordinances at issue "arbitrarily single out C & D landfills and the Metropolitan Government has articulated no rational reason for how the two (2) mile buffer for only these landfills serves a legitimate governmental purpose." *Consol. Waste,* 2005 WL 1541860 at *33. In contrast, the client prohibition does not single out the Plaintiffs – it is applied consistently to all residential properties with relatively few exceptions (one being owner occupied short-term rentals). Also, unlike *Consolidated Waste,* the

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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.

(T.R. 994).

10 Councilmember Todd also 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. (T.R. 1233).

Metropolitan Government has provided rational bases for those limited exceptions, including short-term rentals.

they want addressing Dave Phillips' report at all

Specific Plans

Specific plans are described in the Metropolitan Code as follows:

> The specific plan (SP) district is an alternative zoning process that may permit any land uses, mixture of land uses, and alternative development standards, of an individual property or larger area, to achieve consistency with the general plan. In return, a SP district requires the specific plan to be designed such that, at a minimum, the location, integration and arrangement of land uses, buildings, structures, utilities, access, transit, parking, and streets collectively avoid monotony, promote variety, and yield a context sensitive development.

(T.R. 414 – METROPOLITAN CODE § 17.40.105). An application for an SP must contain a development plan, which "describes 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." *Id.* Applicants must then go through the rezoning process, which involves review of the plan by the Planning Commission at a public hearing and consideration by the Metropolitan Council. *Id.*

Both Plaintiffs failed in their efforts to rezone their properties to an SP that would allow visitors to their home businesses. (T.R. 19-21). They could have challenged the denial of the rezoning through a declaratory judgment or inverse condemnation action but chose not to do so. *See Brown v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2011-01194-

COA-R3CV, 2013 WL 3227568 (Tenn. Ct. App. June 21, 2013); *Varner*, 2001 WL 1560530 at *1. In fact, Plaintiffs represented to the Trial Court that this lawsuit does not challenge the Metropolitan Council's denial of their SP rezoning applications. (T.R. 468).

Under these circumstances, there is no basis for any kind of equal protection analysis comparing the Plaintiffs' situation (residing in a residential district) with properties that are zoned SP (a different zoning classification). Further, there is nothing arbitrary about requiring home-based businesses to go through an extensive rezoning process to determine whether a particular property is properly suited for client visits despite being within a residential area. This allows for an individualized analysis on the very issues that the Metropolitan Government identified as being its rational bases for the client prohibition. Plaintiffs appear to be complaining about the denial of their rezoning requests, which as stated above, is *not* part of this lawsuit.

Because there are important distinctions between the above-described uses and allowing clients to visit home-based businesses in residential districts, the Plaintiffs failed to show that the zoning classifications are arbitrary. Therefore, the Trial Court was correct in determining that these uses did not preclude granting summary judgment to the Metropolitan Government.

ii. The Plaintiffs' arguments and the evidence does not demonstrate that the rational bases provided by the Metropolitan Government are irrational or arbitrary.

Plaintiffs' Brief examines each of the ten reasons mentioned by the Trial Court in its Order and attempts to demonstrate that they do not support the client prohibition. This Brief will take each in turn as well.

Residential nature of residential property

Plaintiffs suggest that because the Metropolitan Government allows certain types of commercial activity to occur in residentially-zoned districts, it is oppressive not to allow client visits to their home-based businesses. But this argument ignores the legal standard at issue in this case. Under rational basis review, the Court is not empowered to step into the role of the legislature and "'subject' legislative line-drawing to 'courtroom' factfinding designed to show that legislatures have done too much or too little." *DeBoer,* 772 F.3d at 404–405. This is exactly what Plaintiffs are suggesting, and the Trial Court was correct to disregard these arguments.

The Plaintiffs' proposed use of the property (twelve visits by clients per day to their home businesses) is obviously commercial in nature, and therefore, logic dictates that allowing such use would detract from the residential nature of their neighborhoods. The fact that other commercial uses might also cause harm is not relevant.

Enforcement by Metropolitan Codes Department

Plaintiffs point out that the enactment of the client prohibition provision creates an enforcement problem that would not exist if such

provision did not exist in the first place. This is an absurd argument. Obviously, enforcing any rule is harder than enforcing no rule, but Plaintiffs' requested relief was to be able to serve twelve clients per day at their home businesses. And logically, enforcing a limit on the number of clients (rather than an outright ban on client visits) would be much more difficult for the already understaffed Codes Department.

Crimes by nonresident clients

Plaintiffs argue that the Metropolitan Government has not produced any evidence that allowing client visits would result in increased crime. But again, this is Plaintiffs' burden, not the Metropolitan Government's *See Ziss Bros. Const. Co., Inc. v. City of Indep., Ohio*, 439 Fed. Appx. 467, 476 (6th Cir. 2011) "Because a plaintiff bears the entirety of the burden in demonstrating that the challenged action had no rational basis, the government entity, in this case the City and the Commission, 'has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data.'").

Metro
~~Carter~~ Todd testified as to the concern of unknown persons entering residential neighborhoods (T.R. 1238), and this concern has been endorsed by the U.S. Supreme Court as a rational reason for restricting commercial businesses from residential areas:

> [T]he exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business

> neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. ...

Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 391-395 (1926) (emphasis added).

Opportunities for commercial tenancy

Plaintiffs also claim that that the Metropolitan Government's concern that commercial spaces will be vacant if residential businesses may receive customers is an illegitimate interest. Plaintiffs characterize this interest as illegal "economic protectionism," but it is not. Both cases cited by Plaintiffs involve unrelated legal concepts favoring one type of business over another.

Bean v. Bredesen, No. M200301665COAR3CV, 2005 WL 1025767, (Tenn. Ct. App. May 2, 2005), involved the standard *under the commerce clause*, which requires that a state cannot favor in-state interests over out-of-state interests unless it is tethered to a legitimate local purpose unrelated to economic protectionism and the purpose cannot be served as well by other reasonably available non-discriminatory means. Here, the standard is rational basis review, which involves an entirely different analysis.

In *Craigmiles v. Giles*, the United States Court of Appeals for the Sixth Circuit invalidated a state statute that *explicitly favored one commercial group over another* (funeral directors versus casket retailers). *Id.* at 228. Finding no rational relationship to any of the articulated

...such as privileging one group of HBBs over another?

they keep failing to note that Carter Todd = Metro, per TRCP 30.02(6)

purposes of the state, the only logical conclusion was that the statute existed as a form of economic protectionism for the funeral directors. *Id.*

In this case, the client prohibition is not favoring one business over another for no rational reason – it is carrying out the important governmental interest in preserving a healthy residential area and a healthy commercial district. These are legitimate rational reasons, as discussed in *Nordlinger v. Hahn*, 505 U.S. 1 (1992).

In *Nordlinger*, the United States Supreme Court stated that the government has a legitimate interest in local neighborhood preservation, continuity, and stability and "can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established, 'mom-and-pop' businesses by newer chain operations. By permitting older owners to pay progressively less in taxes than new owners of comparable property, the Article XIIIA assessment scheme rationally furthers this interest." *Id.* at 12.

The *Nordlinger* Court also endorsed additional rational bases articulated by ~~Carter Todd~~ Metro (T.R. 1252-53 – Deposition of ~~Carter Todd~~ Metro) – specifically, a legitimate governmental interest in stability of a community and in investment based expectations:

> This Court previously has acknowledged that classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws. "The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification..."

Id. at 13. These reliance interests are significant here – it is appropriate for a government to want investments in commercial areas to be stable, and to honor the wishes of homeowners who chose not to buy a home in a mixed-use neighborhood and do not expect or desire commercial visitors in their residential neighborhoods. Plaintiffs' personal desires to have their properties be zoned differently, to allow clients, cannot trump the legitimate expectations of all their neighbors to the continuation of their homes' residential zoning.

they don't say shit about the actual record re traffic

Traffic and parking

Plaintiffs admit that their businesses would affect traffic and parking in their neighborhoods but claim that it would be negligible. This argument misses the point of rational basis review. The question is not whether Plaintiffs' businesses will reach some threshold amount of traffic but whether the client prohibition is rationally related to the issue of traffic and parking. Plaintiffs have not demonstrated that it is not.

Concern about the generation of additional traffic has been approved by the U.S. Supreme Court as a legitimate rational basis for governmental action. *Vill. of Euclid,* 272 U.S. at 391-395. ("[T]he segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections....").

Likewise, Tennessee Courts have approved this concern as a rational basis for taking steps to prevent adding hundreds of cars to a neighborhood each week. *Fallin*, 656 S.W.2d at 343 (adding traffic to the point where a road would become inadequate and hazardous is a rational reason for disapproving a rezoning); *MC Props., Inc. v. Cty. of Chattanooga*, 994 S.W.2d 132, 135 (Tenn. Ct. App. 1999) (limiting commercial development where appropriate infrastructure had not been built passed the rational basis test).

Pedestrians and sidewalks

Plaintiffs argue that there is no evidence to support a concern over pedestrian traffic and sidewalks and assert that the Metropolitan Government's corporate representative stated that he was "not concerned with sidewalks." But Plaintiff mischaracterizes ~~Mr. Todd's~~ Metro's testimony. ~~Mr. Todd~~ Metro stated in his deposition that many residential neighborhoods are not equipped with sidewalks, which is a serious safety concern when those residences might be serving clients. (T.R. 761-62). Plaintiffs produced no evidence to negate this concern, so the Trial Court was correct to identify it as one of the rational bases for the client prohibition.

Administration of tax and utility rates

Plaintiffs suggest that because tax and utility rates are within the Metropolitan Government's control and there is no evidence that allowing client visits would be difficult to administer, tax and utility rates are not a valid basis for the client prohibition. But again, Plaintiffs misunderstand the rational basis analysis. The Metropolitan Government is not required to produce evidence to support its arguments

– the client prohibition "may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns, Inc.*, 508 U.S. at 318. What Plaintiffs suggest – a complete overhaul of the taxation and utility rates – would plainly burden the Metropolitan Government.

Access by disabled

Plaintiffs argue that because the Metropolitan Government does not enforce the ADA, it does not have a legitimate interest in promoting access by disabled persons. Obviously, the Metropolitan Government has a legitimate interest in making sure its citizens have equal access to places of public accommodation, and Plaintiffs' argument otherwise is absurd. In that same vein, as explained above, the Metropolitan Government has adopted the International Building Code, which distinguishes between residential and commercial properties and has different safety requirements for each.

Property price inflation

Plaintiffs assert that there is no evidence to support the Metropolitan Government's concern that allowing client visits would result in property price inflation and that there is no reason to believe this would occur. Again, it is not the Metropolitan Government's burden to produce such evidence, but the Metropolitan Government's concern is a logical one. Plaintiffs have improved their properties in ways that allows them to be income-producing, which, in turn, affects their value.

Enforcement by HOAs

Lastly, Plaintiffs argue that the concern that HOAs may have more difficulty enforcing their contractual restrictions is not legitimate under

a rational basis analysis because HOAs are private entities. However, this concern relates to the need for order and certainty of outcome testified to by ~~Mr. Todd.~~ Metro (T.R. 1180-81). Currently, the Codes Department is responsible for enforcing the client prohibition. Suddenly changing that by striking down the client prohibition would necessarily have an adverse effect on multiple neighborhoods who have relied on the Codes Department's enforcement but would now have to determine how to enforce their contractual restrictions on commercial activity. ...but Metro "suddenly" repealed the CP?

Because the client-prohibition is based on legitimate health, safety, and welfare reasons, and Plaintiffs failed to establish that its bases are irrational or arbitrary, it withstands the rational basis test as a matter of law. Therefore, the Trial Court correctly granted summary judgment to the Metropolitan Government.

CONCLUSION

In *Norma Faye,* this Court made clear that there may be circumstances for which placing the burden on the party opposing a finding of mootness for voluntary cessation of the challenged conduct would be justified. These are those circumstances. The Metropolitan Government prevailed in defending the Client Prohibition at the Trial Court. While this case was on appeal and for reasons unrelated to this litigation, the Metropolitan Council repealed the Client Prohibition and replaced it with provisions that allow client visits for certain home-based businesses (including the Plaintiffs'). Plaintiffs have never filed a motion to amend or a new lawsuit to challenge the new law. And although the new ordinance contains a sunset provision, there is no evidence in the

record to imply that the repealed Client Prohibition will be re-enacted by a future Council.

Under these circumstances, there is no valid risk that the Metropolitan Government will resume enforcing the repealed Code provision, which is the reason behind the voluntary cessation exception to the mootness doctrine. Further, there is no basis for invoking the public interest exception because the case involved only the interests of these Plaintiffs. Thus, the Court of Appeals' decision should be affirmed.

Respectfully submitted,

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