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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

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

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT
[TENN. R. CIV. P. 12.02(6)]

The Metropolitan Government moves to dismiss this lawsuit because the Plaintiffs fail to state a claim upon which relief may be granted.

Grounds for this 12.02(6) motion are that there is no private right of action to enforce the Tennessee Constitution. Additionally, the Metro Code provision preventing Plaintiffs from serving clients at their home-based businesses is rationally related to a legitimate governmental purpose, and therefore, the Complaint does not state a claim for a violation of substantive due process or equal protection. The Tennessee Supreme Court ruled many decades ago that whether to prohibit home businesses from operating at residential properties was a matter of legislative discretion. *Davidson Cty. v. Hoover*, 211 Tenn. 223, 229–31, 364 S.W.2d 879, 882 (1963).

FACTS

Plaintiffs seek to invalidate Metropolitan Code[1] § 17.16.250(D)(1), which prevents them from serving clients at their home-based businesses.[2] Plaintiffs wish to legally operate home-

[1] A certified copy of Title 17 of the Metropolitan Code of Laws will be filed within the next week.

[2] 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.

based businesses that involve having clients visit their home (a beauty shop and recording studio). Complaint, ¶ 96.

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

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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.
b. Only those materials or goods that are utilized or produced in connection with the home occupation may be stored within the dwelling unit or accessory building.
c. All materials or goods shall be stored completely within the dwelling unit or accessory building.
d. All flammable or combustible compounds, products or materials shall be maintained and utilized in compliance with Fire Code NFPA-30.

6. External structural alterations not customary in residential buildings shall not be permitted.
7. Offensive noise, vibration, smoke, dust or other particulate matter, odorous matter, heat, humidity, glare, or other objectionable effects shall not be permitted.
8. The manufacture or repair of transportation equipment shall not be permitted as a home occupation.
9. Vehicles associated with the home occupation shall be limited to one vehicle with a maximum axle load capacity of one and one-half tons.

METROPOLITAN CODE OF LAWS § 17.16.250(D) (emphasis added).

ANALYSIS

I. THERE IS NO PRIVATE RIGHT OF ACTION FOR A VIOLATION OF THE TENNESSEE CONSTITUTION.

In Tennessee, the burden of proving the existence of a private right of action is on the plaintiff. *Premium Finance Corp. v. Am. v. Crump Ins. Serv. Of Memphis, Inc*., 978 S.W.2d, 93 (Tenn. 1998) (affirming dismissal for failure to state a claim where insurance company failed to comply with state statute requiring it to return certain premiums for canceled insurance and where there was no private cause of action in the statute).

A private right of action must be expressly created:

> (a) In order for legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right.
>
> (b) In the absence of the express language required by subsection (a), no court of this state, licensing board or administrative agency shall construe or interpret a statute to impliedly create or confer a private right of action except as otherwise provided in this section.

TENN. CODE ANN. § 1-3-119 (emphasis added). The Supreme Court has read this statute very strictly, recently finding no private cause of action in the State's "tip" statute where an employee asserted she had been under-paid by a private dining club. *Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427 (Tenn. 2017).

The Court of Appeals has recently restated the rule that even when a plaintiff requests only declaratory and/or injunctive relief, a private right of action is required to support the claim. *Tennessee Firearms Ass'n v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2016-01782-COA-R3-CV, 2017 WL 2590209, at *8–10 (Tenn. Ct. App. June 15, 2017).

There is no private right of action allowing an individual to enforce the Tennessee Constitution:

> The trial court held that there is no private cause of action for damages based on violations of the Tennessee Constitution and accordingly dismissed the claims of violation of the Tennessee Constitution. On appeal, Mr. Moncier argues that Article 1, Section 17[10] grants him a cause of action against Ms. Jones for "violations of other Bill of Rights in Tennessee's constitution; violation of Tennessee statutes; violations of Tennessee rules; and violations of Tennessee established torts." We have reviewed the cases cited by Mr. Moncier and considered his argument and decline to hold that Article 1, Section 17 creates a substantive cause of action to enforce other constitutional provisions or laws.

State ex rel. Moncier v. Jones, No. M2012-01429-COA-R3CV, 2013 WL 2492648, at *6 (Tenn. Ct. App. June 6, 2013); also *Morton v. State*, No. M200802305COAR3CV, 2009 WL 3295202, at *1–2 (Tenn. Ct. App. Oct. 13, 2009). Because Plaintiffs have no private right of action to enforce the Tennessee Constitution, this case must be dismissed.

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

Tennessee courts have applied the same analysis for substantive due process claims brought pursuant to the Tennessee Constitution as they have applied in such challenges brought under the U.S. Constitution. *Gallaher v. Elam,* 104 S.W.3d 455, 463 (Tenn.2003); *Riggs v. Burson,* 941 S.W.2d 44, 51 (Tenn.1997), *cert. denied,* 522 U.S. 982, 118 S.Ct. 444 (1997). *Newton v. Cox,* 878 S.W.2d 105, 110 (Tenn. 1994), *cert. denied,* 513 U.S. 869 (1994).

The Tennessee Constitution's equal protection provisions confer "essentially the same protection" as the Equal Protection clause of the United States Constitution. *Riggs v. Burson,* 941 S.W.2d 44, 52 (Tenn. 1997); *Tennessee Small Sch. Sys. v. McWherter,* 851 S.W.2d 139, 152 (Tenn. 1993). "Both guarantee that all persons who are similarly situated will be treated alike by

the government and by the law." *Consolidated Waste Systems, LLC v. Metro. Gov't of Nashville and Davidson Cty.,* 2005 WL 1541860, *7 (Tenn. Ct. App. June 30, 2005) (citing *Tennessee Small Schools,* 951 S.W.2d at 153).

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

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

The classification made by the Metro ordinance (prohibiting business visitors to a residential home) does not interfere with the exercise of a fundamental right or involve any suspect class. *See Gallaher v. Elam,* 104 S.W.3d 455, 461 (Tenn. 2003); *King–Bradwell P'ship v. Johnson Controls, Inc.,* 865 S.W.2d 18, 21–22 (Tenn.Ct.App.1993) (holding that application of Tennessee's products liability statute of repose "involve[d] neither a fundamental right nor a suspect class."); *see also United States v. Kras,* 409 U.S. 434, 445, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973) (applying rational basis review to economic legislation).

Therefore, the Metro ordinance is subject to a rational basis review. *Consolidated Waste Systems, LLC v. Metro. Gov't of Nashville and Davidson Cty.,* 2005 WL 1541860, *5 (Tenn. Ct. App. Jun. 30, 2005)("Where government action does not deprive a plaintiff of a particular guarantee, that action will be upheld against a substantive due process challenge if it is rationally related to a legitimate state interest."). *Nat'l Gas Distributors v. Sevier Cty. Util. Dist.,* 7 S.W.3d 41, 45–46 (Tenn. Ct. App. 1999) ("The equal protection arguments and the due process

arguments can be dealt with together, because they both require the same analysis. If there is a rational basis for the statute, and if the statute is not discriminatory, then it must be upheld."); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1224 (6th Cir. 1992) ("Even parochial motives, if not based on animosity toward a protected class or similar invidious purpose, will not invalidate local zoning.")

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

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

If an ordinance bears a reasonable relationship to the public health, safety or welfare, it is a valid exercise of police power. *Davidson County v. Rogers*, 198 S.W.2d 812, 814 (Tenn. 1947). Where the question is whether the legislature had a rational basis for an ordinance, "[i]f

any reasonable justification for the law may be conceived, it must be upheld by the courts." *Riggs v. Burson,* 941 S.W.2d 44, 48 (Tenn. 1997) (emphasis added).

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

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

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

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

> Whether beauty shops *per se* are such that they cannot be engaged in on the premises without affecting the use of the premises as a residence is a legislative problem. This legislative act, that is the Zoning Ordinance which was passed by the city fathers of Nashville, does not *per se* permit beauty shops in this District, while the many many exceptions as permitted in Residential 'A' Estate Districts which are likewise permitted in Residential 'B' Districts, where this property is, do not cover beauty shops. Frankly, with the many things that are permitted in Residential 'A' Estate Districts, we cannot see why the legislative body did not permit beauty shops. Be that as it may, this is not a question for the Court's determination but is a legislative problem, which must be left to the judgment of the local municipal legislative body based on its knowledge of conditions peculiar to a locality.

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

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

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

Many cases have held that preserving the residential nature of residential properties meets the rational basis test. *City of Jackson v. Shehata*, No. W2005-01522-COA-R3CV, 2006 WL 2106005, at *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).

Plaintiffs argue at ¶¶ 104-122 that the zoning code treats them differently from those residential properties that are permitted to have certain kinds of business-like activity, such as short term rentals, historic home event spaces, and daycares. There are many possible rational reasons for treating these uses differently. It is very possible that the Metro Council saw the STRP and Historic Home Event uses as focused on weekends, rather than the daily clientele the Plaintiffs wish to receive at their residence. It is also possible that the Metro Council determined that allowing the use of homes for daycares is very compatible with a residential use, or is a high priority that should be located in residential areas, so that children do not have to be taken too far from their homes.

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. City of Chattanooga, No. E200701886COAR3CV, 2008 WL 4415583, at *5 (Tenn. Ct. App. Sept. 30, 2008).

Plaintiffs also express frustration with the failure of their effort to rezone their properties to SP ("Specific Plan"), a classification that would allow visitors to their home business. (Complaint, ¶¶ 123-134). But there is no right to have your property rezoned to allow a different use. *Anderson v. Weaver*, No. W1999-01714-COA-R3CV, 2000 WL 33975583, at *5–6 (Tenn. Ct. App. Apr. 17, 2000)("the failure of the board to pass Ordinance 427 at its third reading in December, 1997, was not arbitrary, capricious or unreasonable, and neither the trial court nor this Court has the authority to substitute its judgment for that of a legislative authority of the City board."); *Day v. City of Decherd*, No. 01A01-9708-CH-00442, 1998 WL 684533 (Tenn.Ct.App. July 1, 1998) ("Legislators, however, do what legislators do: they listen to their constituents; they test the wind; they try to please as many people as possible, consistent with the constitution and a good conscience. And they are not to be condemned for doing so. That is their job."). *Varner v. City of Knoxville*, No. E2001-00329-COA-R3CV, 2001 WL 1560530, at *3 (Tenn. Ct. App. Nov. 29, 2001) (rejecting rezoning that would allow commercial development and increased traffic, noise, and lighting adjacent to residences).

CONCLUSION

Plaintiffs are plainly asking the Court to substitute its judgment for the Metro Council. They ask not only that this Court invalidate the ordinance, but that it substitute its judgment and determine that 12 visitors a day is appropriate for a home-based business. This is not the role of the judiciary and is contrary to the will of the citizens of Metro Nashville, who have, though their elected representatives, rejected the legislative efforts made to remove this prohibition.

Because the provision in the Metro Code preventing client-visits to home based businesses is rationally related to the legitimate goals of protecting the residential nature of neighborhoods, the Complaint fails to state a claim for substantive due process and equal protection. Therefore, the Plaintiffs' lawsuit should be dismissed.

Respectfully submitted,

DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, #023571
Director of Law

/s/ Lora Fox
Lora Barkenbus Fox, #17243
Catherine J. Pham, #28005
Metropolitan Attorneys
[redacted]

NOTICE OF HEARING

THIS MOTION IS EXPECTED TO BE HEARD ON THE 9TH DAY OF FEBRUARY, 2018, AT 9:00 A.M, OR AS SOON THEREAFTER AS POSSIBLE. FAILURE TO FILE AND SERVE A TIMELY WRITTEN RESPONSE TO THIS MOTION MAY RESULT IN THE MOTION BEING GRANTED WITHOUT FURTHER HEARING BY THE COURT.