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

ELIJAH SHAW and PATRICIA RAYNOR,	)	
Plaintiffs,	)	
vs.	)	**No. 17-1299-II**
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

FINAL MEMORANDUM AND ORDER

This matter came to be heard on September 21, 2023, upon cross motions for summary judgment filed by Plaintiffs, Elijah Shaw and Patricia Raynor ("Shaw" and "Raynor" or collectively "Plaintiffs") and Metropolitan Government of Nashville and Davidson County ("Metro"). This round of summary judgment motions was heard almost four years to the day from when the Court heard them in 2019 under a prior version of the disputed Metro ordinance. The prior version barred home-based businesses from allowing clients or patrons to visit under any circumstances, with limited exceptions. The current version allows some such businesses to operate on residential properties, but with restrictions and the same limited exceptions. As with the prior version, Plaintiffs assert the modified version is unconstitutional pursuant to the Tennessee Constitution as applied to them. The challenge claims an impairment of their entitlement to equal protection under the law.

Previously, on October 1, 2019, the Court issued a Memorandum and Order granting Metro's motion for summary judgment and dismissing Plaintiffs' challenge. Plaintiffs appealed and, by the time the matter was heard in the Court of Appeals, Metro had amended the ordinance.

The Court of Appeals agreed with Metro's argument that the case was moot, but in a September 12, 2022 decision, the Supreme Court held that it was unclear whether the new version of the ordinance caused Plaintiffs harm, and vacated the Court's decision under the prior ordinance and remanded the case for review under the amended ordinance. It is pursuant to that remand that the Court again is hearing cross motions for summary judgment in this matter.

Plaintiffs filed an amended complaint addressing the specifics of the amended ordinance, and dropped their substantive due process claims under Article 1, Section 8 of the Tennessee Constitution. They continue to assert that the ordinance, even as amended, is unconstitutional as applied to them. Metro continues to assert that it is not.

As before, the Court has the same voluminous materials in the form of depositions, written discovery responses and documents showing Metro's prior actions on proposed amendments to the subject zoning laws, as well as rezoning efforts specific to other properties and legal memoranda addressing the standards applicable to such challenges. In addition, Plaintiffs have supplemented the record with additional discovery from Metro and new declarations from themselves specific to the amended ordinance, as well as updated materials regarding the post-2019 amendments to the ordinance. The new materials in the record include links to the four Metro Council meetings at which the ordinance modifications were discussed, including two public hearings. Based upon the foregoing, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT RELEVANT TO CLAIMS

Plaintiffs have sought the ability to operate home-based businesses for which they will have clients visit their homes without limitations or restrictions. Plaintiff Shaw lives in the house he owns at 2407 Brasher Avenue, Nashville, Tennessee. Plaintiff Raynor lives in the house she

owns at 3233 Knobview Drive, Nashville, Tennessee. Shaw, a professional record producer, operates a recording studio at his home in what is known as The Toy Box Studio, a professional-quality recording studio he built in a detached, renovated garage on his property. Raynor, a professional hair stylist and licensed cosmetologist, operates a beauty salon in her renovated garage on her property.

When this case was initially filed, in 2017, the Metropolitan Code of Laws ("Metro Code") prohibited Plaintiffs from having clients patronize their proposed home-based businesses (generally, "the Client Prohibition" and the "Ordinance"). Metropolitan Government of Nashville & Davidson County, Tenn., Code § 17.16.250(D)(1) (2017) (repealed 2020). The Client Prohibition was in the zoning section of the Metro Code regarding Residential Accessory Uses which allowed home occupations, subject to certain restrictions including (D)(1) which stated "No clients or patrons may be served on the property." *Id.* For home businesses operating under the Client Prohibition, there were also restrictions regarding property layout, signage, storage of materials, offensive noise and emissions, and vehicles. *Id.* at § 17.16.250(D)(2)-(9). The manufacture or repair of transportation equipment was not permitted under any circumstance. *Id.* at § 17.16.250(D)(8).

Permitted residential accessory uses included short term rental properties ("STRP"), defined as "an owner-occupied residential dwelling unit containing not more than four sleeping rooms that is used and/or advertised . . . for rent for transient occupancy by guests." Metro. Code §§ 6.28.030(A), 17.16.250(E), and 17.04.060. "Day cares" of up to twelve clients at a time and one per block were permitted as institutional accessory uses pursuant to a special exception permit. *Id.* at §§ 17.04.060 and 17.16.170(D)(4). "Historic home events" were also allowed as a residential special exception and included "the hosting of events such as, but not limited to, weddings or

parties for pay in a private home which has been judged to be historically significant by the historical commission." *Id.* at § 17.04.060. Further, any property, including residential property, may apply for rezoning as a specific plan district ("SP"), and the Metro Council can approve an SP to allow a resident to conduct an occupation, service, profession or enterprise inside a residential dwelling unit. Metro. Code § 17.40.106(B).

The Supreme Court, in reviewing the Court's prior ruling, sets out the changes to the Client Prohibition since that ruling was issued that Plaintiffs are now challenging:

> While the [Plaintiffs'] appeal was pending, the Metro Council repealed the Client Prohibition provision that was the subject of the [Plaintiffs'] complaint. *Shaw v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2019-01926-COA-R3-CV, 2021 WL 515887, at *1 (Tenn. Ct. App. Feb. 11, 2021), *perm. app. granted*, (Tenn. July 12, 2021). Metro replaced the Client Prohibition with a new ordinance that allowed home businesses such as the [Plaintiffs'] businesses up to three customer visits per hour and six visits per day ("Six-Client Ordinance"). *See* Metro. Code § 17.16.250(D)(3) (2020) (amended 2022). The Six-Client Ordinance contained a sunset provision stating that it "shall expire and be null and void on January 7, 2023 unless extended by resolution of, the metropolitan council." *Id.* § 17.16.250(D)(9).

Shaw v. Metro. Gov't of Nashville & Davidson Cnty., 651 S.W.3d 907, 910 (Tenn. 2022). In addition to the six visits per day restriction, the Ordinance, through BL2019-48, was amended to include other significant changes that were negotiated through amendments, resubmissions and consultation with multiple Metro departments ("BL2019-48" or the "Amended Ordinance"). Plaintiffs take issue with the restrictions set forth in Metro. Code § 17.16.250(D)(3), which limit customer visits and require a log or register of customer appointments for each calendar year (the "Client Visit Restrictions").

BL2019-48 was discussed at four Metro Council meetings in 2020: March 5, June 9 and 16, and July 7.[1] The March meeting included a public hearing at which over thirty Nashville

[1] There is clearly some prior legislative history because the amendment is numbered 2019 and was scheduled for a public hearing at the March 5, 2020 Metro Council meeting. In addition, several times during these hearings the principal sponsor, Councilmember Dave Rosenberg, referred to the "nine-month" time period it took to get approval

citizens spoke for and against the Amended Ordinance, including the Plaintiffs and their representatives. The Plaintiffs were in favor of the version of the Amended Ordinance presented at that time, as were many who spoke.[2] There were also many who spoke against the measure. The lines were primarily drawn between those in the music industry and other industries such as hairdressers and tutors/music teachers, and neighborhood groups generally concerned about their residential areas commercializing. *See* March 5, 2020 Metro Council Meeting, https://www.youtube.com/watch?v=mOJ5BH3KKvM.

The June 9, 2020 meeting included a second public hearing at which many citizens spoke, some of whom spoke at the first public hearing, including the Plaintiffs. The version of the Amended Ordinance being presented included some amendments made during the interim based upon feedback from the public, councilmembers and Metro staff. It included what became subsections (D)(5)(b)-(c) and (6)(d)-(g). The Amended Ordinance was passed on second reading. *See* June 9, 2020 Metro Council Meeting, https://www.youtube.com/watch?v=DIy0jV_vElk.

On June 16, 2020, the Amended Ordinance was briefly discussed, with the third reading deferred until July 7, 2020. Amendments continued to be made which were described by the bill sponsor, Councilmember Dave Rosenberg, as building in "protections to ensure properties were owned by individuals" and to address concerns about enforcement. They included amendments to subsections (D)(1)(b) regarding property dimensions, (D)(2)(b) limiting employee numbers, (D)(3)(c) to clarify the reference to customer appointments, (D)(6)(b) regarding application

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at the July 7, 2020 meeting. These meetings, and the amendments and substitute proposals included with Metro's Notice of Filing dated May 19, 2023, constitute the total record the Court has regarding the proposal, consideration and approval of BL2019-48.

[2] The Court notes although there were amendments that occurred after the March 5, 2020 public meeting, which amendments were included with the final Amended Ordinance, the Client Visit Restrictions were in the Second Substitute Ordinance considered at that time and about which Plaintiffs spoke in support.

requirements, and (D)(7)(b) regarding revocation. *See* June 16, 2020 Metro Council Meeting, https://www.youtube.com/watch?v=FAJZgYijW-A.

On July 7, 2020, the Amended Ordinance was considered for a final reading, including three additional amendments that were approved and several others that were not approved. The almost two-hour portion of the Metro Council meeting dedicated to the Amended Ordinance included extensive debate among the councilmembers. The final version of BL2019-48, approved at that meeting on third reading, had been tweaked and modified during its pendency to, per Councilmember Rosenberg, consider the language and the way it could be abused, identify protections to ensure "worst case" elimination, and to allow "good neighbors who want to play by the rules" some clarity about how to do so. The amendments added and approved at that meeting included further changes to the application materials ((D)(6)(b)(ii)), the addition of expiration and renewal requirements ((D)(8)) and a sunset provision unless extended by resolution of the Metro Council ((D)(8)). *See* July 7, 2020 Metro Council Meeting, https://www.youtube.com/watch?v=wPJXMTu9dbE.

The resulting Amended Ordinance was as follows:

D. Home Occupation. A home occupation shall be considered an accessory use to a residence subject to the following:

1. Location

    a. A home occupation must be conducted entirely within the dwelling unit or accessory building.
    b. The home occupation shall not occupy more than twenty percent of the total floor area of the principal structure and shall not occupy more than one thousand square feet of total floor area within the principal structure and area of any legally permitted accessory buildings.

2. Employees and Vehicles

a. No more than one part-time or full-time employee not living within the dwelling may work at the home occupation location.
b. No more than five employees may reside within the dwelling at a home occupation location.
c. Parking a commercial vehicle on the premises or on a street adjacent to residentially zoned property is prohibited. Vehicles associated with the home occupation shall be limited to one passenger vehicle such as a motorcycle, automobile, pick-up truck, sport utility vehicle, van or similar, with a maximum axle load capacity of one and one-half tons.
d. No truck deliveries or pick-ups, except by public or private parcel services, are permitted.

3. Customer Visits

a. Customer visits must occur by scheduled appointment and only between the hours of 8:00 a.m. and 7:00 p.m., Monday through Saturday.
b. Customer visits shall be limited to no more than three visits per hour and a maximum of six total visits per day.
c. The permit holder shall maintain and make available to the codes department a log or register of customer appointments for each calendar year.

4. Outward Appearance

a. Signs, as defined in Section 17.32.030.B, exterior or interior displays of goods visible from the outside, or any exhibit that would indicate the dwelling unit or accessory building is being used for any purpose other than a residence are prohibited.
b. The residential character of the lot and dwelling must be maintained. A home occupation that requires a structural alteration of the dwelling to comply with a nonresidential construction code is prohibited. This prohibition does not apply to modifications to comply with accessibility requirements.
c. A home occupation may not produce noise, vibration, smoke, dust or other particulate matter, odorous matter, heat, glare, humidity, fumes, electrical interference, waste run-off, or other objectionable effects outside the dwelling unit or garage.

5. Activities

a. The storage of materials or goods shall be permitted in connection with a home occupation provided such storage complies with the following standards.

i. All materials or goods shall be stored completely within the space designated for home occupation activities.
ii. 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.
iii. All materials or goods shall be stored completely within the dwelling unit or accessory building.
iv. All flammable or combustible compounds, products or materials shall be maintained and utilized in compliance with Fire Code NFPA-30.

b. The following are permitted as home occupations that are allowed customer visits under subsection D.3:

i. Personal instruction, defined for the purposes of this section as services for training individuals or groups in academics, arts, fitness, personal defense, crafts, or other subjects of a similar nature;
ii. General office, defined for the purposes of this section as provision of executive, management, administrative, or professional services, but not involving medical services;
iii. Personal care services, defined for the purposes of this section as spa services and beauty and barber care. Personal care services do not extend to the care of or services for animals;
iv. Multimedia production, defined for the purposes of this section as staging and recording of video or audio productions that occur indoors and do not require sound to leave the premises; and
v. Artisan manufacturing, defined for the purposes of this section as the shared or individual use of hand tools, mechanical tools, and electronic tools for the manufacture of finished products or parts as well as the incidental storage, sales, and distribution of such products within the limitations of this section.

c. The following are not permitted as home occupations regardless of whether customer visits are allowed:

i. The manufacture or repair of automobiles and other transportation equipment.
ii. The repair of equipment that takes place outdoors.
iii. The outdoor storage of construction, scrap, or salvage materials.
iv. Animal grooming activities.

6. Permit Requirements

a. Home occupations that meet both of the following conditions are not required to acquire a permit for activity under this section:

i. The home occupation does not serve customers on the property; and
ii. The home occupation does not employ anyone who does not live within the dwelling.

b. Prior to issuance of a permit, the applicant shall provide the codes department with an affidavit verifying:

i. that the applicant has confirmed that operating the proposed home occupation would not violate any home owners association agreement or bylaws, condominium agreement, covenants, codes and restrictions, lease or any other agreement governing and limiting the use of the property proposed for the home occupation;
ii. that the property is the applicant's primary residence. Two documents indicating proof of primary residence shall be provided. Each document must be current and show the owner's name and address matching that of the property to be utilized for a home occupation. Acceptable documentation includes: (a) Tennessee Driver's license; (b) other valid State of Tennessee identification card; (c) Davidson County voter registration card; (d) current employer verification of residential address or a letter from the employer on company letterhead with original signature. (If the employer does not have letterhead, the signature of the employer must be notarized.); (e) current automobile, life or health insurance policy. (Wallet Cards not accepted); (f) paycheck/check stub, (g) work ID or badge, (h) Internal Revenue Service tax reporting W-2 form; or (i) a bank statement; and
iii. if the applicant is not the property owner, that the property owner is aware of the application and does not object to pursuit of the home occupation permit.

Further, the applicant shall provide proof of written notification to the owner of each adjacent property prior to filing the application. For each such adjacent property, proof of written notification shall be: (a) a signature of an owner; (b) a signed receipt of U.S. registered or certified mail addressed to an owner; or (c) notice from the U.S. Postal Service that registered or certified mail to an owner was refused or not timely accepted.

c. In single-family and two-family zoning districts, no more than one home occupation permit may be issued per lot.
d. The owner of the property: (1) must be a natural person or persons or trust; (2) may not be a limited liability entity, including without limitation a corporation or limited liability company; and (3) may not be an unincorporated entity, including without limitation a partnership, or joint venture.

e. The permit applicant must be the owner of the property, a relative of the owner of the property, or, if a renter, must have at least a one-year lease for the property. The applicant shall verify by affidavit that they comply with this subsection.

f. Only one permit may be issued per property owner, regardless of the number of properties owned by the property owner and regardless of whether the property owner is the applicant.

g. No person may be issued more than one permit.

7. Transferability and Enforcement

a. Permit Transferability. A permit issued for activities under this section shall not be transferred or assigned to another person, entity, or address, nor shall the permit authorize any person, other than the person named therein, to commence or carry on the business. Upon termination of the occupant's residency, the home occupation permit shall become null and void.

b. Revocation of Permit. Upon the filing of two or more verified complaints within a calendar year regarding a permit issued for activities under this section, the zoning administrator, or his or her designee, shall notify the permit holder in writing of such complaints and the zoning administrator, or his or her designee, will determine whether such complaints are valid. If it is determined that violations have occurred, the zoning administrator may revoke a permit as provided in Section 17.40.590. Once a permit has been revoked pursuant to this subsection, no home occupation permit shall be issued to the applicant for the same property for a period of one year from the date of the revocation. The permit holder may appeal the zoning administrator's decision to the board of zoning appeals for a public hearing as provided in this title. Other violations of this Subsection D are punishable by a fine of fifty dollars per day, per violation.

8. Permit expiration and renewal

a. A home occupation permit shall expire three hundred sixty-five days after it is issued unless it is renewed prior to its expiration.

b. The codes department may promulgate additional regulations by which a renewal application may be submitted.

c. The renewal application must include a statement verified by affidavit that the home occupation remains in compliance with Section 17.16.250.D.

9. Sunset date. 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.[3]

Metro. Code § 17.16.250(D) (2020).

The comprehensive changes to the Ordinance were the result of significant input from different stakeholders and multiple amendments. In addition to the Client Visit Restrictions, discussed in more detail below, highlights include:

- Limitations on employees, parking and deliveries;
- Limitations on signs, structure alterations and noise and emissions;
- Limitations on the storage of materials outside the property;
- A permitting process that includes confirmation of compliance with homeowners' association requirements and other deed restrictions, and confirmation that the business owner is the primary resident either through ownership or a lease (with landlord approval of the permitted activity);
- Limitations on transfer and numbers of permits per property;
- A revocation process;
- A renewal process that requires certification of compliance; and
- A sunsetting provision that required review and approval for continuance by the Metro Council.

Id. Many of these provisions were added through amendment and were designed to meet the goals set out by the sponsor at the July 7, 2020 Metro Council meeting when the Amended Ordinance was passed.

[3] Section 1 of Res. RS2022-1380, passed Feb. 15, 2022, states: That the existing provisions of Section 17.16.250.D of the Metropolitan Code of Laws are hereby extended indefinitely until otherwise acted on by the Metropolitan Council.

The Client Visit Restrictions are set forth in (D)(3) and limit customer visits to scheduled appointments between 8:00 a.m. and 7:00 p.m., Monday through Saturday, a total of three visits per hour and six total visits per day, and maintenance of a log or register of customer appointments made available to the Codes Department. Metro. Code § 17.16.250(D)(3) (2020). The ordinance at issue includes a permitting requirement, which permit is not transferable but is revocable by the zoning administrator. Metro. Code § 17.16.250(D)(6) & (7) (2020) (amended 2022). Plaintiffs do not challenge any other provision of the Amended Ordinance although it is important to appreciate the context in which the Client Visit Restrictions fit into the statutory scheme.

Metro conceded, in its briefing and at oral argument, that the term "customer visits" can include multiple customers at one time and referenced (D)(5)(b)(i) regarding group personal instruction as implying this clarification. Plaintiffs assert this is an example of a lack of clarity that supports its position that the restriction is unconstitutional.

Metro also asserted, at oral argument, that a customer log or register could be as simple as a daily number of customer visits rather than a detail of customer identities. The Court is unclear how a document in that form would be useful or probative of anything from a compliance standpoint. Regardless, the language defines the required document as "a log or register of customer appointments for each calendar year."

Prior to the filing of the initial lawsuit, both Plaintiffs had operated their home-based businesses, including servicing clients on their properties, contrary to the then-zoning requirements. The Codes Department, which administered and enforced the Client Prohibition, received anonymous complaints about both Plaintiffs' businesses and sent abatement notices with which they complied. After the Amended Ordinance was enacted, both Plaintiffs obtained a Home Occupation permit pursuant to that provision. (Pls.' Exh. 12, ¶¶ 24-25 and Ex. 13, ¶ 28). Despite

the ability to operate home businesses with clients, and their public support of the Amended Ordinance at the Metro Council public hearings, Plaintiffs assert the Client Visit Restrictions are an unconstitutional restriction on their activities. Specifically, Shaw asserts as follows:

> 27. I need the ability to have more than three clients at a time or per hour because a single recording session often requires more than three clients at a time, such as when recording a band.
>
> 28. I want to again have more than three clients at a time or in the same hour at The Toy Box Studio but am prohibited from doing so by Metro. Code § 17.16.250(D)(3)(b).
>
> 29. I need the ability to have more than six clients per day because a single recording session with a band often requires more than six people and some of the classes I teach are affordable for students only if there are more than six students in the class.
>
> 30. I want to again have more than six clients a day at The Toy Box Studio but am prohibited from doing so by Metro. Code § 17.16.250(D)(3)(b).
>
> 31. I need the ability to have clients to The Toy Box Studio on Sundays and after 7 p.m. because many independent musicians only have time to record on weekends or evenings and many students also only have time to take lessons.
>
> 32. I want to again have clients, including musicians and students, at The Toy Box Studio on Sundays or after 7 p.m., but am prohibited from doing so by Metro. Code § 17.16.250(D)(3)(a).
>
> 33. Although I do not accept "walk-in" clients, I want the flexibility to not have to schedule appointments, maintain a log or register of all customer appointments, or make this log or register available to the Codes Department, but I am prohibited from doing so by Metro. Code § 17.16.250(D)(3)(c).
>
> 34. Having to make available to the Codes Department a log or register of all my customer appointments is an invasion of my and my clients' privacy that I object to.

(Pls.' Exh. 12, ¶¶ 27-34).

Raynor makes similar assertions:

> 32. I want the flexibility to again occasionally have more than six clients a day at my salon but am prohibited from doing so by Metro. Code§ 17.16.250(D)(3)(b).

> 33. I want the flexibility to again occasionally have more than three clients at a time or in the same hour at my salon but am prohibited from doing so by Metro. Code § 17.16.250(D)(3)(b).
>
> 34. Although I do not accept "walk-in" clients, I want the flexibility to not have to schedule appointments, maintain a log or register of all customer appointments, or make this log or register available to the Codes Department, but am prohibited from doing so by Metro. Code§ 17.16.250(D)(3)(c).
>
> 35. Having to make available to the Codes Department a log or register of all my customer appointments is an invasion of my and my clients' privacy that I object to.

(Pls.' Exh. 13, ¶¶ 32-35).

In its October 1, 2019 Memorandum and Order, the Court set out in detail the history of Metro's Zoning Code, including then-exceptions to the Client Prohibition, prior unsuccessful efforts to amend the Client Prohibition, and the history of SP rezoning in Metro. (10.1.19 Mem. & Ord., pg. 3-12). That information remains the same and relevant to these pending motions, and the Court incorporates those provisions of its prior Order herein without restatement. The sections that follow, regarding Metro's asserted reasons for the Client Prohibition and Plaintiffs' prior attempt to rezone their properties (*id.* at pg. 13-14) remain relevant, although the amendment to the Client Prohibition through the Amended Ordinance has changed the landscape.

As set out above, Plaintiffs have obtained Home Occupation permits under the Amended Ordinance, and at footnote 2 of its brief, Metro refers the Court to the legislative history specific to that amendment at four Metro Council meetings in 2020, which meetings the Court has detailed herein. (Metro's 5.19.23 Mem., pg. 10, n.2). The Court notes a softening toward acceptance of home-based businesses that serve customers from when this issue was last considered by the Metro Council in 2012 and 2013. Prior public hearings had been much more one-sided than the public hearings regarding the Amended Ordinance. Additionally, after the first reading, BL2019-48 was heard in the context of the onset of COVID. The first public hearing was days before the

COVID pandemic shut down governments and businesses, and there was no mention among the public speakers or councilmembers of the pending shut down. The pro-change community members and councilmembers were organized, presented their positions in a clear and cogent manner, and had logical and appropriate arguments to support a modification to the home business customer ban. Other community members, including neighborhood association representatives and councilmembers sharing constituent concerns, raised some of the same issues previously raised, which the Court summarizes as a preservation of the residential nature of neighborhoods. Nashville's experience with STRPs, the perceived lack of regulations or enforcement of restrictions, and the perceived abuse of the allowed use informed and provided a "cautionary tale" for many of the anti-change speakers. The bill sponsor and others insisted the two were totally different concepts, but there was a robust discussion regarding that issue every time the measure was debated. Despite those concerns, the Metro Council passed BL2019-48 on third reading with a vote of 25 for, 14 against and 1 abstention. The Plaintiffs request the Court strike the Client Visit Restrictions as unconstitutional pursuant to the Tennessee Constitution's equal protection clause and argued such on appeal. The case was remanded to this Court to address that claim.

LEGAL ANALYSIS

Applicable Legal Standards

Tenn. R. Civ. P. 56.04 sets forth the summary judgment standard, requiring that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tennessee law interpreting Rule 56 provides that the moving party shall prevail if the nonmoving party's evidence is insufficient to establish an essential element of her claim. Tenn. Code Ann. § 20-16-101; *Rye v.*

Women's Care Center of Memphis, MPLLC, 477 S.W.3d 235, 261-62 (Tenn. 2015). Both parties assert that there are no disputed material facts and that this case can be resolved at summary judgment.

Tennessee courts have traditionally exercised an extremely deferential standard to zoning ordinances. "'[T]he *court should not interfere* with the exercise of the zoning power and hold the zoning enactment invalid, unless the enactment, in whole or in relation to any particular property, is shown to be clearly arbitrary, capricious, or unreasonable, having no substantial relationship to the public health, safety, or welfare, or plainly contrary to the zoning laws.'" *McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990) (quoting *Fallin v. Knox Cnty. Bd. of Comm'rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983)). The Court's role is limited to determining "whether any possible reason can be conceived to justify the instant ordinance." *Id.* (quoting *Fallin*, 656 S.W.2d at 343-44). In such cases, the challenge is typically a constitutional one based on theories of due process and equal protection. Their application in zoning cases was discussed at length in *Consolidated Waste Systems, LLC v. Metro Gov't of Nashville and Davidson Cnty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005), and analyzed in detail at pages 17-20 of the Court's October 1, 2019 Memorandum and Order. The Court will not repeat that here other than to briefly quote the *Consolidated Waste* opinion which states that, in relation to equal protection challenges to zoning laws, it is required that "all persons who are similarly situated will be treated alike by the government and by the law" and applying the rational basis test, "the legislative classification be rationally related to the objective it seeks to achieve." *Consol. Waste Sys.*, 2005 WL 1541860 at *7 (citing *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993); *Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir.

1998), *cert denied*, 5 U.S. 1139, 119 S.Ct. 1028 (1999); *City of Chattanooga v. Davis*, 54 S.W.3d 248, 276 (Tenn. 2001); *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994)).

Equal protection challenges involve questioning government classifications that affect the rights of citizens, in which similarly situated individuals assert interference with that right through government regulation or action. "The concept of equal protection espoused by the federal and our state constitutions guarantees that 'all persons similarly situated shall be treated alike.'" *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153 (quoting *Doe v. Norris*, 751 S.W.2d 834, 840-42 (Tenn. 1988)). "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011).

Other Tennessee courts have described the rational basis test as requiring a presumption of constitutionality "whether there is a reasonably conceivable set of facts to justify the classification within the statute." *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997). "'If some reasonable basis can be found for the classification [in the statute] or if any state of facts may reasonably be conceived to justify it, the classification will be upheld.'" *Id.* (quoting *Tennessee Small Sch. Sys.*, 851 S.W.2d at 153). The specific expectation is that the law at issue "bears a reasonable relationship to the public health, safety, or welfare; if so, it is a valid exercise of police power." *Consol. Waste Sys., LLC*, 2005 WL 1541860 at *6; *see also Smith v. State*, 6 S.W.3d 512, 519 (Tenn. Crim. App. 1999) ("A legislative enactment will be deemed valid if it bears a real and substantial relationship to the public's health, safety, morals or general welfare and it is neither unreasonable nor arbitrary.") (citing *Nashville, C & L. Ry. V. Walters*, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949 (1935); *Estrin v. Moss*, 430 S.W.2d 345, 348 (Tenn. 1968)). The rational basis test

is a deferential standard to determine if a statute "should be deemed arbitrary, capricious, and unreasonable." *In re Bonding*, 599 S.W.3d 17, 24 (Tenn. 2020) (quoting *Fallin*, 656 S.W.2d at 342). In *State v. Tester*, the Court summed up this standard as follows:

> "[T]he classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others should be so preferred or discriminated against. ***There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification.*** If legislation arbitrarily confers upon one class benefits, from which others in a like situation are excluded, it is a grant of a special right, privilege, or immunity, prohibited by the Constitution, and a denial of the equal protection of the laws to those not included.... ***The fundamental rule is that all classification must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law....***"

879 S.W.2d 823, 829 (Tenn. 1994) (quoting *State v. Nashville, Chattanooga & St. Louis Railway Co.*, 124 Tenn. 1, 135 S.W. 773, 775-76 (1910)) (emphasis in original).

Tennessee courts have also held that the proffered rational basis cannot be one of general application but must be specific to the circumstances or person(s) affected. In *Livesay v. Tennessee Bd. of Exam. in Watchmaking*, 322 S.W.2d 209, 211 (Tenn. 1959), for instance, the subject regulatory board required an applicant be "a person of good character" to, in part, avoid "incompetency and fraud." The Court found this type of generic requirement insufficient to establish a rational basis for this particular profession. "And if the opportunity for a dishonest person in pursuit of a private occupation to defraud his customer is to become a justification for the regulation under the police power rule of an otherwise private occupation, then the legislature may well regulate every conceivable business, and 'the claim of the police power rule would * * * become * * * a delusive name for the supreme sovereignty of the state to be exercised free from

constitutional restraint.'" *Id.* at 213 (quoting *State v. Greeson*, 174 Tenn. 178, 124 S.W.2d 253, 258 (1939)).

In *Consolidated Waste*, the plaintiff was successful not because Metro could not proffer a rational basis for the ordinance, but because Metro could not show a rational relationship between the ordinance and the asserted public interest. In other words, the ordinance's restrictions would not address or prevent the asserted threat; thus, the ordinance was arbitrary and capricious and violated the plaintiff's substantive due process rights. *Consol. Waste Sys., LLC*, 2005 WL 1541860, at *33-36. In *Riggs v. Burson*, the plaintiff made a similar argument, which the Tennessee Supreme Court rejected. As the court explained, the inquiry is "whether there is a reasonably conceivable set of facts to justify the classification within the statute." 941 S.W.2d at 53. The court further opined that "specific evidence is not necessary to show the relationship between the statute and its purpose. Rather, this Court asks only whether the law is reasonably related to proper legislative interests." *Id.* at 52. (citing *Newton*, 878 S.W.2d at 110).

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

This Court is required to apply a very deferential standard and not substitute its judgment for that of the Metro Council, instead only considering whether the reasons given for the Client

Visit Restrictions are rationally related to it. In the present circumstances, this Court finds that they are.

Application of Legal Standards to Client Visit Restrictions

Preserving the residential nature of residential neighborhoods is at the heart of the public policy reason for modern zoning laws. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926). The Client Prohibition, which this Court found to meet the rational basis test, was replaced with the Client Visit Restrictions. The matter was considered and reconsidered at several Metro Council meetings, including two public hearings. The Court finds the concerns raised during the process to be rational and appropriate, and the resulting Amended Ordinance balances all interests. The Court does not find any basis to substitute its judgment for that of the Metro Council, nor have Plaintiffs demonstrated entitlement to relief.

Plaintiffs contend that there is no real and substantial difference between them and the "privileged" home-based businesses that are not subject to the Client Visit Restrictions, pointing to owner-occupied STRPs, daycares, historic home events, and SPs. Plaintiffs contend that Metro's decision to regulate Plaintiffs more than these businesses despite having the same or less effect on their neighborhoods violates Plaintiffs' equal protection rights. However, the fact that the Metro Code selectively exempts a few categories of businesses from the Client Visit Restrictions, or that some real properties have been rezoned as SP so they could serve the public, is not a basis to invalidate the law. As held in *Gann v. City of Chattanooga*, No. E2007-01886-COA-R3-CV, 2008 WL 4415583 (Tenn. Ct. App. Sept. 30, 2008):

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

> differences between the 2002 and 2006 application certainly constitute possible, rational reasons to reach a different conclusion in 2006, regardless of how the council may have articulated its reasoning in 2002. The record simply does not demonstrate that the different results in 2002 and 2006 constitute either "discrimination" or arbitrary inconsistency. . . It is not our role to re-weigh all the factors considered by the council; that would invade a legislative prerogative and would far exceed the scope of our review as defined by *Fallin*. It is sufficient for us to affirm the trial court's conclusion that "this decision to rezone was debated by the City Council," and that a rational basis existed for the council's decision.

Id. at *5.

The Client Visit Restrictions have a rational relationship to the reasons Metro has given for its imposition. Metro Council members and citizens have expressed genuine concern about the commercialization of their neighborhoods and the need to put guardrails in place if customers were allowed to visit home-businesses. Limited exceptions to the Client Visit Restrictions exist in the Metro Code for daycares and historic home events. STRPs are a more problematic exception and the Court does not dismiss their interference with the residential nature of Nashville's residential neighborhoods. The Metro Council and Metro government generally are clearly grappling with that issue, which is not before the Court today. Just because they are allowed, however, does not invalidate the logic behind the Client Visit Restrictions or persuade the Court that they are arbitrary or otherwise unreasonable.

The Client Visit Restrictions do place some limits on the Plaintiffs that they would prefer not to have on their businesses. For instance, Plaintiff Shaw does not like the limit on the number of clients or visits because sometimes what he is doing requires more people. (Pls.' Exh. 12, ¶¶ 27-30). He would also like to operate his business, with clients, on Sundays and after 7 p.m. *Id.* at ¶¶ 31-32. He also would like the flexibility not to make appointments, although he acknowledges not accepting walk-ins. *Id.* at ¶ 33. Plaintiff Raynor would like to "occasionally have more than six client a day" and more than three at a time, as well as accept walk-ins. (Pls.'

Exh. 13, ¶¶ 32-34). Both perceive keeping a client log as an invasion of privacy. (Pls.' Exh. 12, ¶ 35; Pls.' Exh. 13, ¶ 35)

Respectfully, Plaintiffs testified at two public hearings and were agreeable to the Client Visit Restrictions, and now have submitted sworn statements saying otherwise. Our courts have advised that "[t]he law deliberately makes the plaintiffs' burden high, out of deference to the legislative power over zoning matters." *Gann*, 2008 WL 4415583, at *3. The Court does not find Plaintiffs' arguments to be persuasive, and they do not overcome the presumption of constitutionality.

An equal protection challenge must fail "if some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify" the classification. *Tennessee Small School Systems v. McWherter*, 851 S.W.2d at 153; *see also Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978). Metro has proffered real, rational and appropriately related reasons for the restriction on Plaintiffs' home-based businesses. Those reasons meet Metro's burden of defending the constitutionality of the Client Visit Restrictions under the equal protection provision of the Tennessee Constitution. The doctrine of "sic utere tuo ut alienum non laedus"[4] applies here – a property owner is free to use his property as he sees fit as long as it does not cause harm to others. *Euclid*, 272 U.S. at 387, 47 S.Ct. at 118. Metro has determined that the Client Visit Restrictions are a reasonable restriction on the use of residential property for the benefit of its citizens, and the Plaintiffs have not shown otherwise.

<u>CONCLUSION</u>

This is a case that was appropriate for summary judgment once the parties developed the facts sufficiently for the Court to evaluate Metro's rational bases for the Client Visit Restrictions.

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

The Court reviewed the legislative history of BL2019-48, the history of the SP zoning classification, the circumstances in which SP rezoning was allowed, and the limited exceptions in the Zoning Code for the allowance of non-limited clients at home-based businesses. The Client Visit Restrictions are an appropriate exercise of the Metro Council's legislative authority and has a rational relationship to the public safety, health, morals, comfort, and welfare of the people of Nashville. Although the Plaintiffs assert that, as applied to them, the Client Visit Restrictions are unconstitutional, the Court disagrees. The Amended Ordinance as a whole, including the Client Visit Restrictions, represents a balance between the rights of homeowners like Plaintiffs who want to operate home-businesses, and neighbors who are concerned about preserving the residential natures of their neighborhoods.

There is a reason residential properties can only be used for commercial purposes in limited circumstances and with restriction. The Plaintiffs assert that their businesses are benign and would not be ones that would create problems for neighbors, but the Court is not going to substitute its judgment for that of the Metro Council and balance the nature of problems that could arise in general and put in place reasonable restrictions to address that potential.

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

Costs are taxed to the Plaintiffs.

s/Anne C. Martin
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RULE 58 CERTIFICATION

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

s/Megan Broadnax
Deputy Clerk and Master
Chancery Court

10-10-23
Date