IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Metropolitan Government moves for summary judgment because there are no material facts in dispute, and the Metropolitan Code provision limiting the number of client visits each day at their home-based businesses is rationally related to a legitimate governmental purpose.

The Supreme Court ruled many decades ago that the decision whether or not home businesses should be prohibited 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). In this case, the Metropolitan Council has determined that home businesses may operate and have three customer visits per hour and a maximum of six total customer visits per day. The Council limited the number of customer visits to balance the interests of the home occupations and the neighbors. The Court should not second-guess that balance.

FACTS

This lawsuit challenges the constitutionality of revised METROPOLITAN CODE § 17.16.250(D), which allows residents to use their homes for home occupations with a limited number of customer visits to the property:

> Residential accessory uses…(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. [Editor's note—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.]

METROPOLITAN CODE OF LAWS § 17.16.250(D)[1] (emphasis added).

Plaintiffs operate a beauty shop and a recording studio in their respective homes. (Amended Complaint, ¶ 2). They have home occupation permits. (*Id.*, ¶ 80). They ask that the Court invalidate the provision limiting customer visits to no more than three visits per hour and a maximum of six total visits per day. (*Id.*, ¶¶83-85). They seek to serve up to 12 clients per day

[1] A certified copy of Title 17 is provided to the Court with a Notice of Filing.

with no restrictions on the number of clients per hour or times and days of the week these visits may occur, and without being required to accept clients only by scheduled appointment and maintain a log of their customer visits. (Amended Complaint, Prayer for Relief, p. 24). Plaintiffs allege that these limitations and restrictions on client-visits violate their equal protection rights under the Tennessee Constitution. (Amended Complaint, ¶¶ 145- 156).

ANALYSIS

I. THE RATIONAL BASIS TEST APPLIES TO AN EQUAL PROTECTION CHALLENGE.

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

In its Order granting summary judgment to the Metropolitan Government in 2019, the Court summarized equal protection analysis as follows:

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

In *Consolidated Waste*, the plaintiff was successful not because Metro could not proffer a rational basis for the ordinance, but because Metro could not show a rational relationship between the ordinance and the asserted public interest. In other words, the ordinance's restrictions would not address or prevent the asserted threat; thus, the ordinance was arbitrary and capricious and violated the plaintiff's substantive due process rights. *Id.* at **33-36. In that case, Metro singled out only construction and demolition landfills for increased restriction, and had imposed a two-mile buffer requirement between a proposed construction and demolition landfill and any surrounding schools and parks without a rational basis, as attested to by the Planning Commission staff who reviewed the ordinance. The trial court found, and the Court of Appeals agreed, that the ordinance at issue was arbitrary and capricious from a due process and equal protection standpoint. *Id.* In essence, this is the argument the Plaintiffs make in this case, i.e., that the Metro ordinance has a rational basis, but that the reasons underlying it are not factually related to the Client Prohibition. They select out quotes from the Metro depositions, and cite to the lack of problems with their home-based businesses (when they were violating the Client Prohibition) as evidence to support their as-applied claim. In *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997), the plaintiff made a similar argument, which the Tennessee Supreme Court rejected. As the court explained, the inquiry is "whether there is a reasonably conceivable set of facts to justify the classification within the statute." *Id.* at 53. The court further opined that "specific evidence is not necessary to show the relationship between the statute and its purpose. Rather, this Court asks only whether the law is reasonably related to proper legislative interests." *Id.* at 52. (Citation omitted).

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

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

> `Courts are not "super" legislatures. They do not decide whether a challenged legislative action is wise or unwise. It is not the role of judges to set public policy for local governments, nor do we decide if a municipality has adopted the "best," in our judgment, of two possible courses of action. That is not our role. The concept of separation of powers precludes such an activist role on our part. As the *Fallin* case points out, ours is a "quite restricted" role.'
>
> *Id.* at *3 (quoting *Citizens for a Better Johnson City v. City of Johnson City*, No. E2000-02174-COA-R3-CV, 2001 WL 766997, at *4 (Tenn. Ct. App. July 10, 2001)). *See also*, *Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904, 907 (Tenn. 1940) (In regard to an at-home business restriction, "It is not our province to pass upon the wisdom of such laws; that is the prerogative of the Legislature."). Similarly, this Court is required to apply a very deferential standard and not substitute its judgment for that of the Metro Council, instead only considering whether the reasons given for the Client Prohibition are rationally related to it. In the present circumstances, this Court finds that they are.

(Order, 10/1/2019, pp. 19-21).

II. THIS COURT CORRECTLY FOUND IN 2019 THAT PROHIBITING CLIENT-VISITS TO HOME OCCUPATIONS WAS A RATIONAL MEANS TO SERVE LEGITIMATE GOVERNMENTAL INTERESTS.

In its Order granting summary judgment to the Metropolitan Government in 2019, the Court found that preserving residential neighborhoods, commercial development, traffic and parking concerns, and safety were rational and relevant considerations for not allowing client-visits to home businesses. (Order, 10/1/2019, p. 22). The Court also found that there was no basis for substituting its judgment for that of the Metro Council:

> 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. … The Court does not find any basis to substitute its judgment for that of the Metro Council.
>
> Moreover, regulatory issues associated with home-based, client servicing businesses – taxes, utility rates and the like – are very valid legislative concerns. 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.

(*Id*. pp. 22-23).

III. THE METROPOLITAN CODE PROVISION LIMITING THE NUMBER OF CUSTOMER VISITS TO HOME BUSINESSES IS A RATIONAL MEANS TO SERVE LEGITIMATE GOVERNMENTAL INTERESTS.

In the first iteration of this lawsuit, when no clients were allowed to visit home businesses, this Court summarized the Metropolitan Government's list of rational reasons for that policy as follows:

- Protection and maintenance of the residential nature of residentially-zoned neighborhoods, with the tool of SP zoning to allow for limited exceptions.

- The difficulty of enforcing specific restrictions if the Client Prohibition were relaxed to allow some clients and patrons, including on evenings and weekends.

- The potential for additional criminal activity in neighborhoods with non-resident patrons coming to home-based businesses.

- Home-based business owners have options such as co-working spaces to meet with clients and there are plenty of opportunities for commercial tenancy in properties that are in commercially zoned areas.

- Increased parking and traffic congestion in areas not designed for commercial use will create problems for residents.

- Residential sidewalks are not designed for commercial foot traffic.

- Residential properties with home-based businesses are not taxed, nor are their utility rates set, at commercial rates, which is an inappropriate inconsistency from what commercial businesses pay operating on commercial properties.

- Disability accessibility standards are different for residential and commercial properties.

- Property rates may escalate inappropriately because of the influence of commercial opportunities in residential areas.

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

(Order, 10/1/2019, pp. 13-14).

Metro relies on the reasons presented in the Metropolitan Council meetings, where BL2019-48 was discussed and debated,[2] to explain the reasons for why it changed policy and now allows a limited number of customer visits:

- It is in the public interest to allow music and voice professionals to use home studios reasonably; obstacles should not be put in front of entrepreneurs; eliminating overhead can help these small businesses and may allow them to stay in their homes because they will have a source of income.

- The limited number of customer visits being allowed by this ordinance will not cause too much traffic.

- The limited number of customer visits strikes a balance between keeping neighborhoods quiet and allowing vibrant activities.

- The music industry does not have the budget for commercial studios that it used to. Noise ordinances are in place to assist with enforcement.

- Metro did not understand all the consequences that would arise from short-term rentals and would have put more restrictions if it had understood the consequences.

- During the pandemic, many were able to work from home without terrible consequences for neighborhoods. This allows homeowners more opportunities to get by in increasingly expensive Nashville.

- More than 5,000 signatures were gathered in Davidson County to allow music studios in homes.

The Council's decision to change course and allow a limited number of customer visits per day is a balance based on the legitimate health, safety and welfare reasons above. The interests in preserving neighborhoods, commercial developments, and avoiding traffic and

[2] BL2019-48 was discussed at:
- The 3/5/20 meeting at 1:10 – 1:30 and 1:05:38 – 2:33:49
  03/05/2020 Metro Council Meeting - YouTube
- The 6/9/20 meeting at 3:00 – 3:32 and 50:47 – 2:51:15
  06/09/20 Metro Council Meeting - YouTube
- The 6/16/20 meeting at 8:52:17-9:26:07
  06/16/20 Announcements and Metro Council Meeting - YouTube
- The 7/7/20 meeting at 4:48:04 – 6:40:28
  07/07/20 Metro Council Meeting - YouTube

congestion were rational bases that supported allowing no clients to visit home-based businesses. The same types of interests, with the policy balance modestly tilted in favor of home-based businesses, constitute rational bases to allow a limited number of customer visits (up to six per day). *See Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904, 907 (Tenn. 1940) (In regard to an at-home business restriction, "It is not our province to pass upon the wisdom of such laws; that is the prerogative of the Legislature."). There is no authority for this Court to alter the policy balance from six customer visits per day to twelve individual clients per day – this would be the judiciary performing a legislative act. "Rational basis review does not empower … courts to 'subject' legislative line-drawing to 'courtroom' fact-finding designed to show that legislatures have done too much or too little." *DeBoer v. Snyder,* 772 F.3d 388, 404–405 (6th Cir. 2014).

Indeed, the entire ordinance is a balancing act between preserving the sanctity of residential neighborhoods but allowing home occupations to thrive: only certain types of home businesses may have clients, only a limited number of customer visits may occur, no more than five employees may reside within the dwelling at a home occupation location, and parking of vehicles associated with the home occupation is restricted, as are deliveries and pickups. The balance of all these issues is likely the reason that Ordinance BL2019-48, which allowed clients to visit home based businesses for the first time in the history of the Metropolitan Government, was able to pass. Disturbing one aspect of this balance (the number of customer visits) cannot be done without affecting the rest.

Because this Court is required to apply a very deferential standard and not substitute its judgment for that of the Metro Council, the Council's measured decision to allow up to six

customer visits a day passes the rational basis test as a matter of law. Therefore, the Metropolitan Government is entitled to summary judgment.

IV. RATIONAL REASONS FOR OTHER ACCESSORY USES.

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

The first use Plaintiffs point to are short-term rentals, which allow owners to rent their homes to visitors for fewer than 30 days at a time. (Amended Complaint, ¶¶ 86-94); METROPOLITAN CODE § 17.16.160(E). Short-term renters are basically renting a space to sleep, eat, and rest, which are activities that typically occur in a residential district. Allowing short-term rentals across Nashville was determined to be in the public interest because of the shortage of hotel rooms. Metropolitan Ordinance BL 2014-951.[3] Later, the Metropolitan Council determined that this use was more "commercial" in nature and not suited for residentially-zoned areas – so it restricted non-owner occupied short-term rental use in one and two-family residential neighborhoods. Metropolitan Ordinance No. BL 2017-608.[4]

The second use Plaintiffs point to are daycares. (Amended Complaint, ¶¶ 95-104). Daycares are permitted in residential neighborhoods under limited circumstances. They are permitted as of right (without special permission from Metro) as an accessory use to a single-family dwelling for up to four children. METROPOLITAN CODE § 17.04.060. Daycares that do not meet this definition require obtaining a special exception permit from the BZA, which may impose conditions. METROPOLITAN CODE § 17.08.030 (District Land Use Tables).

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

Allowing daycares in residential areas is not arbitrary or inconsistent with restricting customer visits to home businesses. Caring for children in a home is entirely consistent with residential use of a home. Allowing up to four children to be cared for in a single home is a traditional residential use and is consistent with the policy set by the State, which does not require a license for childcare homes providing care for four or fewer children. TENN. CODE ANN. § 71-3-501.

Once the numbers of children are greater than four, state licensing is required and the Metropolitan Code requires a special exception permit, which means only certain size lots are eligible, street standards must be met, and landscape buffers are required. METROPOLITAN CODE § 17.16.170. Daycares are subject to inspection by the State, employees must undergo background checks, and licenses may be revoked. TENN. CODE ANN. §§ 71-3-507-509.

It is not arbitrary to allow daycares in a residential area, because this is a traditional residential use and is subject to strict regulations. The Court can take judicial notice that parents likely 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. And, there is a public interest in allowing a daycare in a neighborhood, so that children are near their home for daycare.

The third use Plaintiffs point to are historic home events. (Amended Complaint, ¶¶ 105-3/17/18114). Historic home events require a special exception permit from the BZA, which may impose conditions, including limits on the number and frequency of events. METROPOLITAN CODE § 17.16.160 (B). The general public is not invited into the home – it is open for special events. *Id.* The owner of the property must reside in the home, and the home must be a historically significant structure, as determined by the Historic Zoning Commission. *Id.*

Finally, Plaintiffs express frustration with the failure of their effort to rezone their properties to SP ("Specific Plan"), a different zoning classification that might allow visitors to their home business without any restrictions. (Complaint, ¶¶ 115-126). Plaintiffs could have challenged the denial of their December 2026 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 v. City of Knoxville*, No. E2001-00329-COAR3CV, 2001 WL 1560530, at *1 (Tenn. Ct. App. Nov. 29, 2001). Plaintiffs represented to the Court, early in this lawsuit, that they were not challenging the Metropolitan Council's denial of their SP rezoning applications. (Plaintiffs' Response in Opposition to Motion to Dismiss, 3/17/18, p. 21). A denial of a rezoning does not disprove the rational basis for the limit on clients to home businesses with a home occupation permit.

Because there are important distinctions between allowing accessory uses in residential areas or rezoning; and allowing clients to visit home-based businesses, the Plaintiffs cannot show that the exceptions are arbitrary. 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. *New York Transit Authority v. Beazer*, 440 U.S. 568, 592 n.38 (1979); *also see 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.""). They do not preclude granting summary judgment to the Metropolitan Government.

And this Court recognized in its 10/1/19 Order, the role of courts in reviewing zoning is not to compare the rationales behind allowing certain uses while disallowing others – the Court quoted from *Gann*:

> 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.

Gann v. City of Chattanooga, 2008 WL 4415583, at *5 (Tenn. Ct. App. Sept. 30, 2008). The 10/1/19 Order continued to explain that the Court's concentration must focus on the law being challenged, not peripheral laws:

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

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

(Order, pp. 24-25, emphasis added).

Although the Metropolitan Council has changed the home occupation law to allow a limited number of customer visits, the analysis above remains the same. The different land use rules for STRPs, daycares, Historic Home Events and SPs do not invalidate the logic and rational for allowing a limited number of customer visits at home-based businesses.

CONCLUSION

Plaintiffs are essentially asking the Court to substitute its judgment for the Metro Council. They ask not only that this Court invalidate the six customer visita per day limitation, but that it determine that 12 individual visitors a day are appropriate for all home-based businesses. 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, adopted a carefully balanced and precise scheme to allow some customer visits but still preserve neighborhoods.

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

Respectfully submitted,

/s/ Lora Fox

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been emailed and served through the Chancery Court filing system on Meggan S. DeWitt, meggan@beacontn.org, Paul V. Avelar and Keith Neely, Institute for Justice, pavelar@ij.org, kneely@ij.org on May 19, 2023.

/s/ Lora Fox
Lora Barkenbus Fox