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September 11, 2023

Sent Via Email

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Re: The City of Sacramento's Unconstitutional Home Occupation Code Sections

Dear City Attorney Alcala Wood, Mayor Steinberg, Councilmember Talamantes, other members of the City Council, and staff working on the 2040 General Plan,

My name is Tiffany Clark. I am an attorney and long-time resident of Sacramento. I am writing to you about the City's restrictions on home businesses, and other "home occupations," as they are called in the City Code. They are unusually strict, actively harming Sacramento families, undermining City policy priorities, and are also likely unconstitutional.

Unlike most cities, Sacramento limits households to at *most* two home businesses—even if *they are just home offices or studios*, with *no* visitors or other discernible neighborhood effects (*fewer* than two if more than one of the household's vehicles, three residents, or 10 percent of the home's square footage would be involved). Making matters worse, to apply for a waiver, or "conditional use permit," the City requires at least 4-6 months, a non-refundable fee of over \$4,000, and a public hearing—with no guarantee of success.

So, as a practical matter, if each member of a family of four wants to work indiscernibly from home for their own home business without breaking the law, they are out of luck. They need to pick and choose amongst themselves as to who will be able to do so, or go their separate ways.

That is exactly the dilemma continuing to face my family, after previous City advice left us with a loss of over \$12,000 (and counting) in “virtual office” fees, without solving our dilemma.

Beyond our family, the City’s home occupation restrictions disproportionately impact low-income, minority, immigrant, and female residents, undercutting countless City policy priorities in the process, especially during a housing crisis and in the wake of the pandemic, when working from home became both necessary and commonplace.

These restrictions are also likely unconstitutional. They violate residents’ constitutional right to economic liberty, meaning the right to have an occupation or run a business without unreasonable government regulations. They also violate the right to freedom of association by punishing family members or other people who choose to live together.

Therefore, I urge the City Council to act quickly to remove these restrictions. Alternatively, I ask that the City clarify its home occupation restrictions do not apply to home offices, studios or other home occupations that have little to no impact on neighbors. I ask that in the interim, my family be allowed our proposed indiscernible home occupations.

The City’s Unconstitutional Home Occupation Code Sections

Like many municipalities, the City of Sacramento regulates home businesses, or “home occupations.” However, Sacramento’s regulations are unusually strict and far-reaching.¹

The City requires \$156 permits for all home occupations, even though “home occupation” is defined broadly enough to include mere home offices and studios that have *no discernable impact* on neighbors. According to the Code, a “home occupation” is “a nonresidential use conducted in a dwelling unit that is clearly incidental and subordinate to the use of the dwelling for residential purposes.” City Code § 17.108.090 “H” definitions. The Code further indicates that this definition is *meant* to include even home offices and studios that are typically solitary and low impact. For instance, the Code states that home occupations include “general office uses,” including attorneys, consultants, artists, administrative assistants, answering services, and word processing services, making no exceptions for “general office uses” that involve no visitors coming to the home. City Code § 17.228.210 (A).² In addition, the Code specifically requires a home occupation permit for other types of indiscernible home occupations. *See e.g., Id.* at E., F, J, L. For example, “healing arts professional[s]” must obtain a permit, even though “office visits and treatment shall not occur at the permitted residence.” *Id.* at J. In other words, if a healing arts professional is just managing their business online in the comfort of their living room, while meeting all patients elsewhere, they still need to pay \$156 for a permit and comply with all of the City’s other home occupation restrictions.

Compounding the problem, these other restrictions limit each dwelling unit to at *most* two home occupations and three involved residents, with *no exceptions* stated for indiscernible home office or studio occupations. City Code § 17.228.230(A)6, 4. Moreover, the City effectively tightens these limits further by confining *all* of a home’s occupations to the *combined* use of no more than 10 percent of a home’s square footage and one of its otherwise permitted vehicles, with no exceptions stated for mixed business/personal use square footage or vehicles. *Id.* at (A)1, (A)2, (A)8. This means if just *one* resident runs *one* indiscernible home occupation using the permitted square

¹ This was confirmed in discussions with staff at the Institute for Justice (IJ), a public interest law firm expert in this area. *See also* JENNIFER McDONALD, INSTITUTE FOR JUSTICE, ~~WORK~~ ENTREPRENEUR FROM HOME (2022) (surveying 1,902 home business owners in 20 mid- to large-sized U.S. cities), <https://ij.org/report/entrepreneur-from-home-how-home-based-businesses-provide-flexibility-and-opportunity-and-how-cities-can-get-out-of-their-way/>.

² *See also* https://www.cityofsacramento.org/-/media/HOP-App--info_FILLABLE.pdf, page 2.

footage and household vehicle—apparently even if this use is just occasional—then that household cannot have even one *additional* home occupation, however innocuous.

Likewise, if each member of a family of four adults wanted to work indiscernibly from home—let alone at multiple home occupations each, or using more than the allowed square footage or single household vehicle in total—they could not legally do so. And for no apparent purpose. What legitimate interest can there be in limiting the number of home occupations that by their very nature have zero discernable neighborhood effects?

Even limiting the number of otherwise permitted home occupations that *might* have an impact is questionable, since the Code imposes *other* restrictions that more than suffice to mitigate potential impacts from home occupations. These include strict visitor, parking, and signage limits on all a home's permitted occupations combined. City Code § 17.228.230(A)1, 3, 5, 9. They also include restrictions which completely *forbid* home occupations that would create a nuisance, such as “readily discernible” noise, dust, vibrations, fumes, smoke, or electrical-disturbances. City Code § 17.228.240(C), (E), (F). Furthermore, the City has many additional code provisions for preventing nuisance. City Code §§ 8.04.010-8.140.060.

It seems unlikely that the City is enforcing its home occupation restrictions against every remote worker in Sacramento, although its definition of “home occupation” is broad enough. Rather, the practical effect of these requirements seems to just impact home business owners. That is because anyone who wants to legally operate a business in the City needs to apply for a business license or “Business Operations Tax” certificate (BOT), allowing them to open business bank accounts, segregate business and personal funds, accept payment in the name of their business, and otherwise operate in a legal and professional manner. Yet, the City's online BOT application requires applicants state whether they plan to operate from home and, if so, agree to comply with the City's home occupation rules.³ So, if a household wants to register a third indiscernible home occupation or exceed the City's other numerical limitations, be honest on their BOT application, and operate legally, they are in a bind. That is exactly what is happening to my family.

The City's Home Occupation Code Sections Are Hurting My Family

The City is prohibiting my family of four adults from having more than two indiscernible home office or studio occupations. That is, in keeping with its unusual approach, the City is enforcing its cap on two home occupations against our family even though none of our existing or proposed home occupations—a law practice, a consulting practice, arts-related studios, and a non-profit—do or would produce effects discernible from normal and usual residential activity.

Indeed, the City is taking this position despite the fact that, like many indiscernible home occupations, ours would actually *reduce* neighborhood impact, since *combined* they would not even generate the kind of traffic that a *single* commuter would. As is typical of those working from home these days, we do or would rely entirely on remote communication, e.g., phone, internet, Zoom, in addition to only occasional travel. Notably, this occasional travel involves our two mixed-use household vehicles, which arguably violates the City's one involved vehicle limitation. Yet, both vehicles are otherwise permitted where we live, fit on our property, and are together driven less frequently than they would be if even one of us commuted daily. Likewise, our arts-related home occupations may violate the square footage limitation, at least if mixed business/personal use square footage counts. Some of our artistic work includes video creation and modern dance, involving sound no louder than an ordinary home stereo, but taking up a fair amount of space. Yet, the number of square feet used *inside* a home is immaterial if indiscernible to those *outside* a home.

³ See <https://sacramento.hdlgov.com/Apply/Apply1/BOT>.

Nevertheless, the City’s Community Development Department confirmed *via* email, between May of 2021 and August of 2023 that not only *our* home occupations, but *all* indiscernible home business occupations, require \$156 permits and are subject to the City’s other home occupation restrictions, including the combined numerical limits on home occupations, involved residents, square footage, and household vehicle use. In addition, the City made clear these limits apply regardless of home business income (e.g., even if under \$100 per year), hours worked (e.g., even if part-time), or clientele (e.g., even if clients are primarily other residents and/or their businesses)—traits each applicable to one or more of our desired or existing home occupations.

The City’s approach has resulted in great hardship for our family. In order to save a home occupation permit for our family’s predicted future use, over 13 years ago my husband started renting a “virtual office” located in a business district downtown for his consulting practice. This was consistent with advice the City gave our family around that time. However, it has so far cost us over \$12,000 and not solved our problem. While we have been able to obtain home occupation permits for my indiscernible law-practice and our young adult son Keegan’s indiscernible arts-related studio, Patrick is still paying an average of \$143 a month for a virtual office with mail forwarding, even though he would rather just receive a permit to allow him to operate legally at home too. On top of that, our other young adult son Elliot has been forgoing income opportunities for *years*, because he cannot start his planned indiscernible computer programming/arts-related home business. I have also postponed income opportunities, in order to avoid transforming my indiscernible arts-related hobby into a permit-requiring home business. In addition, I cannot start the indiscernible home-based non-profit I have been contemplating.

While Assistant Planner Anthony Leung said we could apply for a conditional use permit (CUP) to waive the Code restrictions, he said this would cost \$4,263.84—with no guarantee of success. Assistant Planner Monica May cited an even higher cost, \$4,853.52, noting that fee was just a “minimum” and that “if you need other entitlement, and/or if we needed to route the project to other departments for comments, the fees would increase.” Additionally, Ms. May explained, “[A] CUP and other Planning Entitlements are discretionary requests. Your project could be approved, denied, or approved with conditions. The processing time is about four to six months to get to the public hearing. There is NO guarantee of approval, and there is NO refund if the request is denied.”

Especially in the wake of the pandemic and amid a housing crisis, it is too much to ask a family to spend thousands of dollars, wait up to half a year or more, and endure a public hearing, just for the *chance* of being allowed to live together *and* work indiscernibly from home. Yet that is exactly what families like mine are being asked to do.

The City’s Home Occupation Code Sections Are a Policy Problem

Beyond my family, low-income, immigrant, minority and female residents are likely those hardest hit by these restrictions, undermining the City’s equity aspirations. Indeed, the City’s home occupation code sections run directly counter to *many* of the City’s stated policy priorities—from equity to sustainability, livability to mobility, environmental to economic, housing to youth opportunities—with no upside, as residents are incentivized to move apart, operate illegally in secret, or give up on their home occupations altogether.

The City’s home occupation restrictions disproportionately impact marginalized residents, undercutting the City’s equity objectives. A recent study found that home-based business owners are more likely than other small business owners to be minority, female, single and/or renters.⁴ In

⁴ McDONALD, *supra* note 1, at 1. See also Nicole S. Garnett, *On Castles and Commerce: Zoning Law and the Home Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1216-1219 (2000-2001).

addition, low-income, often minority residents routinely need to work multiple jobs, “gigs,” or “side hustles” each just to make ends meet,⁵ where such work frequently makes them independent contractors,⁶ i.e., in business for themselves, and so effectively home business owners. Moreover, new immigrants are typically only legally *eligible* for work as independent contractors.⁷ Furthermore, low-income, minority and/or immigrant households often have larger, extended families living in smaller dwellings⁸—especially during the housing crisis, when many have *no choice* but to live together. Low-income workers are also more likely to engage in physical occupations,⁹ using more square footage and vehicles. All this means low-income, minority, immigrant, and female residents are at higher risk of violating the City’s limits on number of home occupations, involved residents, square footage, and vehicles. Such residents are also less likely to have the time or money to apply for a waiver.

Although marginalized residents are particularly vulnerable to the City’s home occupation restrictions, the whole City suffers, whether aspiring home business owners react by moving apart, operating illegally, or giving up. No one benefits when family members move apart, least of all the City. The City is going to great lengths to tackle its housing crisis, as described in the City’s 2021-2029 Housing Element.¹⁰ Why work at cross purposes by discouraging family members from living together—especially when being stretched too thin can lead to homelessness, a related crisis plaguing our city? Likewise, no one benefits when residents run businesses illegally, in secret. The City forgoes tax revenue, as well as the ability to regulate and support those businesses. Home business owners lose the chance to operate in the kind of legal and professional manner that would help them thrive and grow. Lastly, no one benefits when residents give up on their home businesses altogether. More than two-thirds of respondents in a recent study said their home-based businesses were important or very important to their households’ financial security.¹¹ Relatedly, for low-income families going without for even a short while can lead to disastrous consequences, while the City and all its residents lose out on multiple fronts as well, with:

- Lost City revenue, not only ordinary business operations tax revenue, but potentially much greater revenue, and jobs too. That is because some home businesses eventually incubate into larger enterprises, move out of the home, and generate significant jobs and tax revenue for a city, sometimes *very* significant. This is not mere hyperbole. Five of the most valuable companies in the world, Apple, Amazon, Google, Microsoft, and HP started in a California founder’s garage.¹²

⁵ MONICA ANDERSON ET AL., PEW RESEARCH CENTER, THE STATE OF GIG WORK IN 2021, <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>.

⁶ This is especially likely with legal exemptions, in AB 5, AB 2257, and Proposition 22, allowing many workers to be classified as independent contractors with relative ease. *See e.g., Olson v. California*, No. 21-55757, 2023 WL 2544853, 8-9, 25 (9th Cir. Mar. 17, 2023) (finding Uber and Postmates plausibly allege that their exclusion from the exemptions list violates their equal protection rights); *Castellanos v. State of California*, No. A163655 (Cal. Ct. App. Mar. 13, 2023) (upholding Proposition 22’s exemption for app-based transportation and delivery companies).

⁷ *See* Mathew Miranda, *Migrants arrived in Sacramento wanting to work. Here’s why they can’t legally secure jobs*, SAC. BEE, Aug. 1, 2023, <https://www.sacbee.com/news/equity-lab/article277550213.html>.

⁸ D’VERA COHN ET AL., PEW RESEARCH CENTER, FINANCIAL ISSUES TOP THE LIST OF REASONS U.S. ADULTS LIVE IN MULTIGENERATIONAL HOMES 11-16 (2022), <https://www.pewresearch.org/social-trends/2022/03/24/the-demographics-of-multigenerational-households/>.

⁹ *See* Garnett, *supra* note 4, at 1219.

¹⁰ CITY OF SACRAMENTO, 2021-2029 HOUSING ELEMENT (2021), https://www.cityofsacramento.org/-/media/Corporate/Files/CDD/Planning/Major-Projects/generalPlan/PRD_2040_SacGPU_20230428_Compressed.pdf?la=en.

¹¹ MCDONALD, *supra* note 1, at 1.

¹² Mary Meisenzahl, *Starting in a Garage is Crucial to the Origin Story of Many Silicon Valley entrepreneurs*, INSIDER, Apr. 1, 2020, <https://www.businessinsider.com/google-apple-hp-microsoft-amazon-started-in-garages-photos-2019-12>.

- Fewer successful business start-ups, given the burden of commercial lease and other start-up expenses incurred by new businesses when not home-based;¹³
- Lost opportunity to reduce the number of commuters and distance shoppers, and in turn to improve walkability, air quality, climate change, traffic congestion, and lighten the burden on the regional transportation network.¹⁴
- Lost opportunity to reduce crime, with more residents working and home in the day;¹⁵
- Lost income opportunities for those less able to work outside the home, including single and stay-at-home parents, the elderly, and the disabled;¹⁶
- Lost opportunity to reduce residents' vehicle and childcare expenses,¹⁷ and increase their quality of life and work-life balance;¹⁸ and
- Lost shutdown readiness, even as pandemics are likely to *increase* in frequency.¹⁹

On top of all that, the City's home occupation restrictions are a vestige of the past. As far back as 2001, researchers recognized that home occupation policies of the 20th century would be out of step with the technological possibilities of the 21st century, which have dramatically increased work-from-home options.²⁰ The pandemic only super-charged that shift. Let us bring Sacramento up-to-date, because both policy considerations and the U.S. Constitution require it.

The City's Home Occupation Code Sections Are Unconstitutional

The U.S. Constitution provides protections for economic liberty and freedom of association. Sacramento's Code likely violates both.

Economic liberty is the right to run a business, free from restrictions lacking a rational connection to a legitimate government interest. This right is found in the Substantive Due Process Clause in the Fourteenth Amendment. California courts have previously struck down licensing restrictions on businesses that they held irrationally infringed economic liberty.²¹ The restrictions here are just as irrational, especially as they apply regardless of whether home occupations disturb neighbors; even in the wake of the pandemic, when working from home became a matter of life and death; and even during the housing crisis, when many have little choice but to live together.

For these reasons and more the restrictions are even less likely to survive heightened First Amendment scrutiny. Freedom of association is protected by the First Amendment and includes the right to intimate association. Courts have interpreted the right to intimate association to include the right to maintain close relationships with family members, and to decide with whom to cohabitate, whether they be family members or others.²² In fact, courts have struck down zoning restrictions of

¹³ See Garnett, *supra* note 4, at 1219. See also, McDONALD, *supra* note 1, at 1, 22 (citing \$1,200 home business median start-up costs and finding 64% of surveyed home business owners started at home to save on overhead).

¹⁴ See Patricia E. Salkin, *Zoning for Home Occupations: Modernizing Zoning Codes to Accommodate Growth in Home-Based Businesses*, 35 REAL EST. L.J. 181, 182-183 (2006); Garnett, *supra* note 4, at 1222-1228.

¹⁵ See Salkin, *supra* note 14, at 183. See also, Garnett, *supra* note 4, at 1224.

¹⁶ See McDONALD, *supra* note 1, at 2, 19, 22; Salkin, *supra* note 14, at 183; Garnett, *supra* note 4, at 1211-1215.

¹⁷ See Salkin, *supra* note 14, at 183.

¹⁸ See McDONALD, *supra* note 1, at 2, 5, 21-22; Salkin, *supra* note 14, at 183; Garnett, *supra* note 4, at 1211-1215, 1222-1226.

¹⁹ See Tulio De Oliveira, *Will Climate Change Amplify Epidemics and Give Rise to Pandemics?*, SCIENCE, Aug. 25, 2023, <https://www.science.org/doi/10.1126/science.adk4500>.

²⁰ See Garnett, *supra* note 4, at 1219-1222.

²¹ See, e.g., *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (striking down licensing restrictions on pest controllers as irrational); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (striking down licensing restrictions on those performing African hair braiding as irrational).

²² See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (acknowledging that, at a minimum, the freedom of

people cohabitating together before.²³ Here, the City’s home occupation code is actively infringing on the right of people to live together, in that it is punishing those who decide to do so by making it harder for them to start a business, for no legitimate or compelling reason.

The 2040 Draft General Plan Proposals Do Not Go Far Enough, Fast Enough

The most relevant Draft 2040 General Plan proposal is the “near-term” (2024-2029) implementing action “LUP-A.9: “Home Occupation Regulations. The City shall evaluate changes to the home occupation regulations in the Planning and Development Code to allow home businesses by-right and expand eligible home business permits to allow greater variety of home businesses as part of a strategy to remove barriers to entrepreneurship, support workforce participation, promote walkability, lower vehicle miles travelled [sic], and allow residents to provide services locally.”²⁴

I whole-heartedly endorse the proposal’s “by-right” approach, but we need more than “evaluation” by the end of 2029. We need *action*—and we need it as soon as possible. In addition, we need that action to *specifically* include removal of the restrictions described herein.

Conclusion

Therefore, I urge the City Council to act immediately to remove the home occupation restrictions discussed in this letter. Alternatively, I request that the City clarify that its home occupation code sections do not apply to home occupations that are essentially home offices or studios or otherwise have little to no impact on neighboring properties. Incidentally, I believe the latter could be accomplished simply by taking a fresh look at City Code § 17.228.200(A), in the light of legal and policy concerns addressed in this letter, and concluding that the regulations that follow could not reasonably apply to any home occupations that would *already* be “undetectable from normal and usual residential activity,” *without* their application. In any event, I request that in the interim, our family be allowed such home occupations, without having to go through the expensive, time consuming, and burdensome process of applying for a conditional use permit.

I ask that an authorized City representative contact me no later than September 15, 2023 to discuss the likelihood and timing of interim permission, interpretive clarification, and/or code section amendments. I can be reached at [REDACTED] or [REDACTED].

Sincerely,



Tiffany Clark
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Law Office of Tiffany Clark

association protects “choices to enter into and maintain certain intimate human relationships . . . as a fundamental element of personal liberty.”); *Moreno*, 413 U.S. 528, 541 (1973) (Douglas, J., concurring) (recognizing the right protects the right to form “households where they can better meet the adversities of poverty); *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1220-21 (9th Cir. 2012) (“[T]he right of intimate association . . . isn’t restricted exclusively to family [and] . . . [t]he roommate relationship easily qualifies.”).

²³ See *Zaatar v. City of Austin*, 615 S.W.3d 172 (Tex. App. 2019) (acknowledging, among other things, the right to assemble as fundamental and applying strict scrutiny to strike down a six-person cap on the number of unrelated people who could occupy a short-term rental).

²⁴ DYETT & BHATIA, CITY OF SACRAMENTO, PUBLIC REVIEW DRAFT SACRAMENTO 2040 GENERAL PLAN (2023) https://www.cityofsacramento.org/-/media/Corporate/Files/CDD/Planning/Major-Projects/generalPlan/PRD_2040_SacGPU_20230428_Compressed.pdf?la=en.