

CITY RESTRICTED PARK FOOD SHARING WITH HOMELESS

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In the case of *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 11235, 2018 U.S. App. Lexis 23562 (11th Cir. 8/22/2018), plaintiff Fort Lauderdale Food Not Bombs (FLFNB), a non-profit organization, alleged a City of Fort Lauderdale ordinance and a related park rule within the City of Fort Lauderdale Parks and Recreation Department violated the First Amendment.

FACTS OF THE CASE

FLFNB, which is affiliated with the international organization Food Not Bombs, engages in peaceful political direct action. It conducts weekly food sharing events at Stranahan Park, located in downtown Fort Lauderdale. Stranahan Park, an undisputed public forum, is known in the community as a location where the homeless tend to congregate and, according to FLFNB, "has traditionally been a battleground over the City's attempts to reduce the visibility of homelessness."

At these events, FLFNB distributes vegetarian or vegan food, free of charge, to anyone who chooses to participate. FLFNB does not serve food as a charity, but rather to communicate its message: "society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." Providing food in a visible public space, and partaking in meals that are shared with others, is an act of political solidarity meant to convey the organization's message.

FLFNB sets up a table underneath a gazebo in the park, distributes food, and its members (or, as the City describes them, volunteers) eat together with all of the participants, many of whom are homeless individuals residing in the downtown Fort Lauderdale area. FLFNB's set-up includes a banner with the name "Food Not Bombs" and the organization's logo—a fist holding a carrot—and individuals associated with the organization pass out literature during the event.

CITY ORDINANCE

On October 22, 2014, the City enacted Ordinance C-14-42, which amended the City's existing Uniform Land Development Regulations. Under the Ordinance, "social services" include:

any services provided to the public to address public welfare and health such as, but not limited to, the provision of food; hygiene care; group rehabilitative or recovery assistance, or any combination thereof; rehabilitative or recovery programs utilizing counseling, self-help or other treatment of assistance; and day shelter or any combination of same.

The Ordinance also regulates "social service facilities," which include an "outdoor food distribution center." An "outdoor food distribution center" is defined as:

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any location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service as defined herein. A food distribution center shall not be considered a restaurant.

The Ordinance imposes restrictions on hours of operation and contains requirements regarding food handling and safety. Depending on the specific zoning district, a social service facility may be permitted, not permitted, or require a conditional use permit. Social service facilities operating in a permitted use zone are still subject to review by the City's development review committee.

Stranahan Park is zoned as a "Regional Activity Center - City Center" and requires a conditional use permit. To receive a conditional use permit, applicants must demonstrate that their social service facilities will meet a list of requirements set out in the Ordinance.

### PARK RULE

The City's "Parks and Recreation Rules and Regulations" also regulated social services. In particular, Park Rule 2.2 provided:

Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with the City.

As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

The City had voluntarily not enforced Ordinance C-14-42 and Park Rule 2.2 since February of 2015.

### FLFNB LAWSUIT

FLFNB filed a lawsuit in federal district court contending: "the Ordinance and Park Rule 2.2 violated its rights to free speech and free association guaranteed by the First Amendment." (The First Amendment applies to the federal government, but is made applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment.)

In response, the City claimed the food sharing events at Stranahan Park were not expressive conduct protected by the First Amendment. Specifically, the City argued "the act of feeding is not inherently communicative of FLFNB's intended, unique, and particularized message." The federal district court agreed and granted summary judgment in favor of the City. In so doing, the district court agreed with the City that FLFNB's outdoor food sharing was not sufficiently expressive conduct to warrant First Amendment protection. FLFNB appealed.

Accordingly, the issue before the federal appeals court was whether FLFNB's food sharing activities were indeed expressive conduct protected by the First Amendment. On appeal, the

City claimed FLFNB's food sharing events were not inherently expressive conduct in the absence of "explanatory speech, such as the signs and banners."

#### PROTECTED EXPRESSIVE CONDUCT

As noted by the federal appeals court, constitutional protection for freedom of speech "does not end at the spoken or written word." On the contrary, the court acknowledged: "The First Amendment guarantees all people the right to engage not only in pure speech, but expressive conduct as well."

As described by the federal appeals court, the U.S. Supreme Court had formulated the following "two-part inquiry to determine whether conduct is sufficiently expressive under the First Amendment":

- (1) whether an intent to convey a particularized message was present; and (2) whether in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

The appeals court, however, acknowledged the "particularized message" would not necessarily require a "narrow, succinctly articulable message" to qualify for constitutional protection. According to the court, such constitutional protection is not "confined to expressions conveying a particularized message" because the First Amendment unquestionably applies to media and other modes of expression, including works without a clearly articulable message, e.g., abstract art, music and literature.

Most significant, "in determining whether conduct is expressive" to qualify for First Amendment protection, the federal appeals court would determine "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." (*Emphasis of Court*)

#### FOOD SHARING "MESSAGE"

Based on the record in this particular case, the federal appeals court had "no doubt that FLFNB intended to convey a certain message":

[T]he message is that society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all.

Further, according to FLFNB, food sharing in a visible public space was "meant to convey that all persons are equal, regardless of socio-economic status, and that everyone should have access to food as a human right."

#### CONTEXT IS IMPORTANT

According to the federal appeals court, the "critical question" in determining whether this particular food distribution or sharing event was expressive activity protected by the First

Amendment was "whether the reasonable person would interpret FLFNB's conduct as *some* sort of message." In making this determination, the federal appeals court noted: "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."

In particular, the appeals court noted: "the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not." For example, the court found context and circumstances would separate "the physical activity of walking from the expressive conduct associated with a picket line or a parade."

In the opinion of the appeals court, the district court had erred in finding FLFNB's outdoor food sharing did not convey a "particularized message unless it is combined with other speech, such as that involved in FLFNB's demonstrations." Specifically, the appeals court found the district court's focus on FLFNB's particularized message, or lack thereof, was mistaken because "the inquiry is whether the reasonable person would interpret FLFNB's food sharing events as *some* sort of message." Moreover, the appeals court found the district court had "failed to consider the context of FLFNB's food sharing events." In so doing, the appeals court concluded the district court had erroneously "relied on the notion that the conduct must be combined with other speech to provide meaning."

#### EXPRESSIVE CIRCUMSTANCES

In this particular instance, the appeals court found "the surrounding circumstances would lead the reasonable observer to view the conduct as conveying some sort of message." As cited by the appeals court, the following circumstances which would place "FLFNB's food sharing events on the expressive side of the ledger":

First, FLFNB sets up tables and banners (including one with its logo) and distributes literature at its events. This distinguishes its sharing of food with the public from relatives or friends simply eating together in the park.

Second, the food sharing events are open to everyone, and the organization's members or volunteers invite all who are present to participate and to share in their meal at the same time. That, in and of itself, has social implications.

Third, FLFNB holds its food sharing in Stranahan Park, a public park near city government buildings. The parties agree that Stranahan Park is a traditional public forum. That agreement is not surprising, for, public parks have, "time out of mind, been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Fourth, the record demonstrates without dispute that the treatment of the City's homeless population is an issue of concern in the community.

Fifth, it matters that FLFNB uses the sharing of food as the means for conveying its message, for the history of a particular symbol or type of conduct is instructive

in determining whether the reasonable observer may infer some message when viewing it.

#### HOMELESS ISSUE

The City had admitted on the record that its elected officials held a public workshop "on the Homeless Issue" in January of 2014. That workshop included several "homeless issues, including public feedings in the City's parks and public areas." The City's homeless population attracted local news coverage beginning years before that 2014 workshop.

In the opinion of the federal appeals court, "local discussion regarding the City's treatment of the homeless was significant" because it provided "background for FLFNB's events, particularly in light of the undisputed fact that many of the participants are homeless." As characterized by the court, this background information increased "the likelihood that the reasonable observer would understand that FLFNB's food sharing sought to convey some message."

Based on the agreed upon facts in this case, the federal appeals court found "FLFNB's food sharing events are more than a picnic in the park." Under the circumstances, the court found FLFNB had clearly established an intent to "express an idea through activity." Moreover, the appeals court found "the reasonable observer would interpret its food sharing events as conveying *some* sort of message."

#### EXPLANATORY SPEECH

In granting summary judgment in favor of the City, the federal district court had determined "explanatory speech is necessary" for an event to warrant First Amendment protection. Accordingly, the "critical question" on appeal was "whether the explanatory speech is *necessary* for the reasonable observer to perceive a message from the conduct."

Citing precedent from the U.S. Supreme Court, the federal appeals court found explanatory speech was not necessary for the reasonable observer to perceive a message from the conduct. Moreover, the court noted the context would determine whether or not explanatory speech, or the lack thereof, would create expressive conduct protected by the First Amendment.

#### SOME SORT OF MESSAGE

In this particular instance, the federal appeals court found "the presence of banners, a table, and a gathering of people sharing food with all those present in a public park is sufficiently expressive" to warrant First Amendment protection:

The reasonable observer at FLFNB's events would infer some sort of message, e.g., one of community and care for all citizens. Any "explanatory speech"—the text and logo contained on the banners—is not needed to convey that message. Whether those banners said "Food Not Bombs" or "We Eat With the Homeless" adds nothing of legal significance to the First Amendment analysis.

The words "Food Not Bombs" on those banners might be required for onlookers to infer FLFNB's *specific* message that public money should be spent on providing food for the poor rather than funding the military, but it is enough if the reasonable observer would interpret the food sharing events as conveying "some sort of message."

The appeals court, therefore, rejected the City's argument on appeal that First Amendment protection would require evidence that "the reasonable observer would infer a particularized message." As cited by the appeals court, U.S. Supreme Court precedent had clearly rejected the notion that a "narrow, succinctly articulable message is not a condition of constitutional protection."

## CONCLUSION

Based upon the "nature of FLFNB's activity, combined with the factual context and environment in which it was undertaken," the federal appeals court concluded FLFNB's outdoor food sharing was indeed expressive conduct protected by the First Amendment.

As a result, the federal appeals court reversed the district court's earlier grant of summary judgment in favor of the City. On remand, the federal district court would conduct further trial proceedings to "determine whether the ordinance and park rule violate the First Amendment." In so doing, the federal district court would determine whether the ordinance and park rule permit requirements imposed an unreasonable burden on FLFNB's expressive conduct. To pass constitutional muster, the City would have to prove the permitting requirements under the ordinance and park rule were a reasonable time, place and manner restriction on FLFNB's expressive conduct necessary to achieve a significant governmental interest.

Further, on remand, the federal district court would also consider FLFNB's claim that the challenged ordinance and park rule were unconstitutionally "vague." A law or regulation is unconstitutionally vague when it lacks sufficient clarity to put the reasonable person on notice of what is considered unlawful.

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