

PARK ORDINANCE TARGETS FEEDING THE HOMELESS

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In the case of *First Vagabonds Church of God v. City of Orlando* (M.D. Fla. 9/26/2008), plaintiffs alleged that "the City's Large Group Feeding Ordinance violates the First Amendment of the United States Constitution." Plaintiff Orlando Food Not Bombs ("OFNB") is a loosely structured organization of political activists, including anarchists, communists, vegans, and those generally opposed to war and violence who share a core belief that "food is a right which society has a responsibility to provide to all of its members." Plaintiff First Vagabonds Church of God ("FVCG") conducted weekly religious services and food sharing in a downtown city park for a congregation comprised of mostly homeless Christians. Lake Eola lies at the heart of downtown Orlando and is surrounded by Orlando's signature park.

In 2005, OFNB began conducting food sharing events in Lake Eola Park once a week on Wednesdays at 5:00 p.m., providing free food to hungry and homeless individuals. Shortly thereafter, the City began receiving complaints from individuals who lived or worked near Lake Eola Park about the large number of homeless people that had been dispersing into their neighborhoods after the food sharing events. In response, the city council drafted and enacted the Large Group Feeding Ordinance in June 2006. According to city council staff, the intent of the Ordinance was to "move the large groups of homeless out of downtown and create less of a 'situation' for the residents, businesses, etc. in the Lake Eola/Thornton Park neighborhoods when these groups disperse after feedings occur."

The Ordinance requires anyone conducting a "large group feeding" within the Greater Downtown Park District ("GDPD") to obtain a permit from the city director of parks and recreation. "Large group feedings" are defined as events that intend to attract, actually attract, or are likely to attract twenty-five (25) or more people. The Ordinance further limited the number of permits any person, group or organization can receive to two per park within a twelve-month period. The GDPD is a circular area that extends out in a two mile radius in all directions from city hall.

Following the passage of the Ordinance, the OFNB attempted to re-locate their food sharing events to nearby locations that would be in compliance with the Ordinance, without sacrificing visibility or having to limit their events to twice per year. Their efforts proved futile. In addition, the City police department informed OFNB that "the Ordinance applied to areas adjacent to downtown parks as well as the parks themselves."

EXPRESSIVE CONDUCT

The issue before the federal district court was whether OFNB's food sharing events were protected as "expressive conduct" under the First Amendment. Specifically, the issue was "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play." According to the court, the burden of proof was on "the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." In so doing, OFNB would have to establish that "an intent to convey a particularized

message was present " and "the likelihood was great that the message would be understood by those who viewed it."

According to OFNB, the intent of the food sharing events was to "convey the message that society can and should provide food for all of its members, regardless of wealth. " In response, the City argued that the message OFNB intended to convey was "not particularized" because "each of the witnesses described their intended message in slightly different terms." According to the federal district court, "minor differences do not undercut the fact that all the members of OFNB described the same basic substantive message." As a result, the court found OFNB had "sufficiently established the intent prong of the test."

Despite OFNB's intent, the City had argued that their food sharing message was "not likely to be understood by those who view their conduct." The court, however, found the City's argument was undercut by testimony that the mayor believed "OFNB provided food to the homeless only to convey their political message - not necessarily to help the homeless." Similarly, a city police officer had stated that "the feeding was being held mainly for political purposes." In the opinion of the federal district court, the likelihood of the OFNB message being received was further "enhanced by their use of signs, T-shirts and buttons."

CONTENT NEUTRAL

Since OFNB intended to convey "a message that is likely to be, and is in fact being, understood by the public," the court found "the group feedings held by OFNB qualify as expressive conduct under the First Amendment." Having done so, the federal district court then considered "the constitutionality of an ordinance restraining or regulating speech." In so doing, the court would "first inquire whether the Ordinance is content-neutral." As cited by the court, the Supreme Court had "articulated and applied various standards for determining whether a law is content based or content neutral" as follows:

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. On the other hand, a content-neutral ordinance is one that places no restrictions on either a particular viewpoint or any subject matter that may be discussed. A content-neutral ordinance applies equally to all, and not just to those with a particular message or subject matter in mind.

In this particular instance, the court found the Ordinance, on its face, applied "equally to all large groups who share food in downtown parks, regardless of whether the groups are engaging in expressive conduct." In so doing, however, the court noted that "the Ordinance clearly appears to have been passed with the intent of limiting, or even eliminating, the expressive conduct of OFNB at Lake Eola Park." According to the court, "political motives are not necessarily unconstitutional" in the absence of any evidence that "the City adopted the Ordinance because it disagrees with OFNB's message." As a result, the court held "the Ordinance is content-neutral."

GOVERNMENTAL INTEREST

The federal district then considered whether this content-neutral Ordinance was "adequately supported by an important governmental interest." As cited by the court, "when 'speech' and

'nonspeech' elements are combined in the same course of conduct." the Supreme Court has found that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Further, the "quality of the governmental interest" must appear to be "compelling; substantial; subordinating; paramount; cogent; strong."

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Accordingly, given the fact that "the Ordinance "clearly affects OFNB's effort to convey its political message," the court questioned "whether the Ordinance furthers a substantial governmental interest." In so doing, the court would consider "whether the incidental restriction on OFNB's First Amendment freedoms is no greater than is essential to further that interest."

PUBLIC SAFETY

In support of the Ordinance, the City had asserted a substantial governmental interest in public safety, in particular crime prevention. The court rejected this argument.

While the City had presented evidence at trial that crime in downtown Orlando increased slightly from 2005 to 2006, the court found the City had made "no showing that any of this crime was related to large group feedings." Moreover, the court found no evidence of "crimes committed on the days of the feedings, in the immediate vicinity of the feedings or by people who participated in the feedings." Further, the court noted that there was "absolutely no evidence of crimes being committed during the feedings." More importantly, "even if there was a connection between the feedings and crime," in the opinion of the court there was "no evidence that moving the feedings to different parks around the City would lessen the amount of crime."

In addition to crime, the City had contended that the Ordinance furthered a significant governmental interest in promoting public health by limiting litter and excess garbage. The court disagreed. The court found no evidence had been presented that there was "any problem with littering or garbage in the parks, let alone one connected to group feedings." In fact, the court noted that "OFNB does not use disposable items at their events, that they clean up when they are done and that they leave the park cleaner than it was when they arrived."

Even if litter was not left on the ground, the City had argued that "group feedings in the park result in more garbage which must be collected by the City." The court, however, found "no evidence that the amount of garbage to be collected has increased as a result of large group feedings." Assuming there was any increase in garbage, the court found "moving the feedings from one park to another does nothing to lessen the garbage collection burden placed on the City."

Finally, the City maintained that the Ordinance was related to a significant governmental interest in preventing crowding and overuse within parks in the GDPD. Once again, the court disagreed that the Ordinance would necessarily further a governmental interest. According to the court,

there was "no evidence that the parks in the GDPD are being overused." While the city director of parks and recreation testified that there had been an overall increase in park usage from 2005 through 2007, the court noted that the City had not "offered any credible evidence of overuse." Further, the court found the Ordinance "does not ameliorate overuse." On the contrary, the court noted that there was "nothing in the Ordinance limits the size of the groups or prevents 25 different groups from receiving permits to hold large group feedings at the same time, on a single day, and at the same park." Moreover, consistent with the Ordinance, the court found it was possible for a different group to hold "a large group feeding in any given park on every day of the year."

DISPERSE HOMELESS

As characterized by the court, the "final and perhaps real, though unstated, reason for the City's adoption of this ordinance" was "re-distributing the putatively negative socio-economic effects of the homeless dispersing into surrounding neighborhoods after food sharing events." In so doing, the court noted a statement by the mayor that the Ordinance was enacted in "an effort to spread the impact of large group feedings among Orlando's parks."

While acknowledging the "City clearly has the right to regulate the use of its parks," the court found this particular ordinance "does not do so." In particular, the court noted that the Ordinance "does not limit the number or size of groups using a park at a particular time; nor does it regulate their activities (e.g., noise), require litter controls, or enhance public safety." On the contrary, "if the expressed concerns were genuine," the court found that "existing ordinances - which do not place restrictions on First Amendment freedoms - already provide protection for the public." According to the court, "whatever problems may exist, this Ordinance does nothing but move them around to be shared by other parks."

Rather than address the problem of homelessness in these downtown neighborhoods directly, the City has instead decided to limit the expressive activity which attracts the homeless to these neighborhoods. While the Ordinance may very well accomplish the goal of diminishing the number of homeless in the Thornton Park and Lake Eola neighborhoods, the restriction clearly prevents OFNB from communicating its Constitutionally protected speech at a meaningful location which, from time immemorial, has been the traditional public forum for free speech. Although some incidental restrictions on First Amendment freedoms must be tolerated, the Court concludes that the restriction here goes too far.

Having found "no evidence that the Ordinance furthers a substantial governmental interest," the federal district court held the Ordinance "violates Plaintiffs' right to free speech under the First Amendment." In the alternative, assuming the Ordinance did further a substantial governmental interest, the court found that "the restrictions placed on First Amendment freedoms are much greater than that which are essential."

As a result, the federal district court issued an order prohibiting the City of Orlando from enforcing the Large Group Feeding Ordinance.