

IN THE COUNTY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION “C”

CITY OF WEST PALM BEACH CASE NO.: 2023MO001931A,B,C&DXXXMB

vs.

NICHOLAS CUBIDES,
CARLY TAYLOR PRINZO,
JACOB ROBBINS,
MADELINE MATKIVICH

Defendants

_____ /

ORDER GRANTING MOTION TO DISMISS AS TO ALL DEFENDANTS
(Cancels 11.13.23 Trial)

THIS MATTER comes before the Court on the Motion of Defendants CUBIDES, PRINZO, ROBBINS and MATKIVICH (“Defendants”) pursuant to *Fla. R. Crim. P.* 3.190(a) and (b) seeking a dismissal of the criminal charge alleging that they violated a West Palm Beach Ordinance that requires a permit for any large group feeding activity in public parks (“Motion”).¹ The City of West Palm Beach (“City”) filed its Response with attached exhibits. Without objection, the Court took judicial notice pursuant to §§ 90.202(10), and 90.203, *Fla. Stat.* of portions of a City of Orlando Ordinance.²

On October 27, 2023, the Court held a hearing on the Motion at which the four Defendants testified. Counsel for the parties³ presented extensive legal argument and case

¹ Defendants CUBIDES, PRINZO and ROBBINS are also charged with violating the same ordinance in Case No. 2023MO001858. With the exception of the date, the facts giving rise to the charge in that case are the same as those in the instant one. Accordingly, this Order will address that case as well.

² Chapter 18A, § § 18A.01, 18A.09-2, 18A.13, and 18A.14.

³ Defendant Matkivich is represented by the Office of the Public Defender. The other Defendants are represented by private counsel

law. The Court having considered the Motion together with the court file and otherwise being fully advised in the premises, makes the following finds and conclusions:

Factual Background

The Ordinance at Issue

1. In 2023, the City enacted Ordinance No. 5037-23 in an effort to address and regulate “large group feedings” within public parks and various public spaces throughout the City of West Palm Beach (“Ordinance”). The Preamble sets forth the City’s reasons for enacting the Ordinance:

... [T]he City has a substantial interest in protecting, conserving, and maintaining its parks, including but not limited to those in the greater downtown park district, in an attractive and intact condition, readily available to the thousands of people who wish to see and enjoy them by their presence; and ...

[T]he City of West Palm Beach encourages the use of its parks by City residents in a safe and sanitary condition; and ...

[T]he City Commission also recognizes the desire of various persons, groups, non-profit organizations, and religious organizations who seek to assist various populations of persons by providing free large group social service food sharing or large group feeding events... and the City recognizes that the current demands placed on public parks would benefit from spreading the burden imposed by large group feedings, which has heretofore not been subject to a permitting process; and...

[T]he City has a significant interest in avoiding concentration of similar park uses in a single area given sanitation and logistical problems that arise from crowded food distribution events; and ...

[T]he City has a substantial interest in managing its park property and spreading... the burden of large group feeding throughout its park system; and ...

[T]he City has considered the 2011 case U.S Court of Appeals for the 11th Circuit decision in *First Vagabonds Church of God v. City of Orlando*, as well as the 2021 case *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, wherein these cases have considered the First Amendment implications of large group social service food sharing and large group feeding events in

conjunction with appropriate standards that are tailored to further the City's interests in ensuring safety, appropriate allocation of City public resources, and park conservation; and ...

[T]he City recognizes that a permit requirement for large group social service food sharing activities or large group feeding events involving twenty-five (25) or more persons would provide the City the ability to spread the burden of such events and would provide sufficient notice of such events and to allow for the allocation of City resources to preserve safety and the good order upon which civil liberties depend; and ...

[T]he City may adopt reasonable time, place and manner regulations which will promote the health, safety, and welfare of its citizens by addressing the adverse effects associated with large group feedings like the orderly flow of access into and out of parks and parks facilities, the orderly and safe use and conservation of the parks and parks facilities; proper allocation of City services pertaining to public/first responder, sanitation, traffic and other public services; and ...

[T]he City Commission finds that it is in the best public interest to define certain terms and set forth the parameters for permitting the valuable efforts undertaken to meet the needs of both those in need of food through large group feeding efforts and those who seek the enjoyment of the City's park and park facilities thereof; and this Ordinance is necessary for the preservation and improvement of the public safety, health, and welfare of the City's residents and visitors.

2. "Large Group Feeding" is listed as a "special event," and

[I]nclude[es] the term social service food sharing, and means an event intended to attract, attracting, or likely to attract twenty-five (25) or more people, including distributors and servers for the delivery or service of food in a public space including space that is a dedicated or undedicated public street, highway, sidewalk, park, parkway, right-of-way, alley, public way, or any other public places within the city, including city-owned buildings or other city-property. Public space shall also include the buildings of any governmental agency within the city including federal, state, and county owned buildings. Excluded from this definition are activities of city permitted, licensed, or contracted concessionaires, lessees, or licensees. Sec. 78-151.

3. The Ordinance requires that anyone seeking to host a large group feeding as defined above must first obtain a permit from the City. Sec. 78-152.

4. The Ordinance lays out a fairly detailed and comprehensive procedure required in order to obtain a large group feeding permit:

Sec. 78-155. - Reservation of dates, application fee and deposit.

(d) Large Group Feeding:

(1) Application for a large group feeding must be submitted to the City no later than four weeks prior to the planned large group feeding event, and no earlier than sixty (60) days prior to the proposed large group feeding event date.

(2) In addition to information required by Sec. 78-153⁴, the application must contain the following information:

- i) The name of the individual(s) or organization that will be serving or distributing food;
- ii) The date(s) when food is anticipated to be served or distributed;
- iii) The times of day when food service and distribution is anticipated to be served or distributed on each date listed in the notice;
- iv) The approximate or expected number of food preparers and servers on the site where the food is anticipated to be served or distributed; and
- v) The approximate or expected number of individuals who will be served.

(3) Large group feeding permits will be limited to not more than two (2) Large Group Feeding Permits issued to the same person, group, or organization for large group feedings for the same park in a twelve (12) consecutive month period. Permits will be issued on a first come, first served basis, based on the availability of the desired designated feeding location.

(4) Any individual or organization is permitted a maximum of one large group feeding permit per week regardless of which designated feeding location is utilized. Individuals associated with an organization must indicate such association on any application for a large group feeding permit and this limitation will apply to the organization even if multiple individuals may desire to apply for a permit on behalf of the organization.

⁴ Section 78-153, titled "Application for a special event permit," sets forth additional requirements along with timelines the applicant must furnish to the City.

(5) Organizations who submit applications for a large group feeding permit through individuals without those individuals disclosing their association with the organization will be subject to being precluded from receiving large group feeding permits for a period of up to twelve (12) months.

(6) The permit holder shall remove or cause the removal of substantially all trash or debris from the feeding site that was generated by the service or distribution of food and deposit the trash or debris in the provided public trash receptacle(s) or in a private trash receptacle if permission from the receptacle owner was obtained.

(e) The application fee and deposits required shall be established by the resolution of the city commission from time to time

5. Additionally, Section 78-154 sets forth a detailed list of “Criteria for Review” of “Special Event Applications.” Section 78-154(f) states, “The city shall approve, approve with conditions, or deny any request for a special event permit based upon the applicable regulations in this article. In the event of a denial, the city shall specify in writing to the applicant the particular reason for such denial.”

6. Finally, Section 78-162 provides the procedure and timeframe for an appeal of a denial of an application for a “special event permit.” In its Response, the City attached a sample application it uses for a large group feeding permit. Nowhere contained in either the Ordinance or the application is a provision advising the applicant of the timeframe in which a properly filed application for a large group feeding permit must be either approved or disapproved by the City.

The Incident Giving Rise to the Charges Against the Defendants

7. According to the probable cause affidavit, on August 26, 2023, West Palm Beach Police officers responded to the Great Lawn in downtown West Palm Beach in response to a reported large group feeding activity. The Great Lawn is part of the City’s public park. Upon arriving, the officers observed approximately twenty people in line to receive free food. The officers also observed another ten to twenty people sitting at a table

eating in the same courtyard. They observed crock pots and bags of food “enough to feed 30+ people.” The Defendants were observed serving the food. When approached by one of the officers, Cubides stated he did not obtain a permit for the event. He told the officer that he and the organization “Food Not Bombs” (FNB) have been fighting for the right to feed the homeless throughout Florida and other states. The other three defendants likewise did not obtain a permit to for the event.

8. Cubides provided the following testimony. He described FNB as a mutual aid group. The group travels throughout public spaces protesting the building and funding of “bomb factories” instead of using those funds to feed the hungry within our Country. Distributing free food, predominately to the homeless, is part of this protest message. FNB is a nationwide organization and meets weekly to distribute free food. Simultaneous with distributing food, individuals in the name of FNB hand out literature, hang banners and hold “political protests.” The food distribution is part of its protesting message. FNB has engaged in these events at various parks throughout the City.

9. Prinzo testified that she participates in the FNB food distributions. She claims by doing so, she is expressing her First Amendment rights. Robbins testified he too participates in FNB food distribution events. He does so because he believes “people deserve to eat.” By distributing free food, he maintains that he is expressing his political belief.

10. Finally, Matkivich testified that she attends FNB events merely as an observer and is not directly affiliated with FNB and its activities. She helps the group by cleaning up after the feeding event ends. Sometimes she donates bags of fruit to FNB. She stands in solidarity with FNB. This is because as a Roman Catholic, her faith requires that

she “feed the hungry.” This, she claims is a deeply held belief. None of the Defendants make any attempt to obtain a permit to distribute food for the feeding events even though they were aware of the Ordinance. The defendants were charged with violating the Ordinance by failing to obtain a permit, a second-degree misdemeanor punishable by up to sixty days in jail and a \$500.00 fine.

Legal Discussion

11. The Defendants argue that the Ordinance as applied to them violate their right to free speech, religion and assemble in contravention of the First, Fifth and Fourteenth Amendments of the United States Constitution as well as Art. I, §§ 4 and 5 of the Florida Constitution. Additionally, Defendant Matkivich also argues the Ordinance as applied to her interferes with her right to practice her faith in violation the Florida Religious Freedom Restoration Act, § 761.03, *Fla. Stat.*⁵ Based on this, the Defendants argue the charge against each of them should be dismissed. The City responds in opposition arguing that the Ordinance is constitutional on its face and as applied to the Defendants.

12. *Strict- vs. Intermediate Scrutiny.* Initially, the Court must determine whether the Defendants’ conduct- i.e. the large group feeding, is expressive conduct worthy of First Amendment protection. The Eleventh Circuit in a similar case has held that large group feedings, like the one forming the basis of the charge in this case, constitute “expressive conduct.” As such, any attempt to regulate such conduct, such as the Ordinance, is subject to constitutional scrutiny. *See, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d. 1235, 1240-41 (11th Cir. 2018)(“FLFNB I”). The City does not dispute this.

⁵ Because the Court finds the Ordinance violates the First and Fourteenth Amendments, the Court need not address the Defendants’ other claims arising under s. 761.03 and the Florida Constitution.

13. Given this, the next question that must be answered is what level of scrutiny should be applied to determine whether the Ordinance is constitutional. The defendants argue that the Ordinance on its face is not content-neutral in that it specifically targets their expressive conduct- i.e. large group feedings. Thus, they claim “strict scrutiny” applies. *See, Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d. 342 (1989). The City on the other hand argues the Ordinance is facially “content-neutral” since it does not target any message, political or otherwise, but instead seeks to regulate feeding large groups in public spaces. Therefore, the City posits that “intermediate scrutiny” applies. The Court agrees with the City and finds the Ordinance is content-neutral. Therefore, intermediate scrutiny applies. *See, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4d. 1266, 1295 (11th Cir. 2021)(“FLFNB II”)(holding the City’s “Park Rule” regulating FNB’s large group feedings in city parks is content-neutral because it “is not related to expressive conduct; it has nothing to do with the [City’s] critique of society’s allocation of scarce resources between welfare and defense spending.”); *Vagabonds Church of God v. City of Orlando*, 638 F.3d. 756, 762 (11th Cir. 2011).

14. Under intermediate scrutiny, if a challenged law “is narrowly drawn to further a substantial interest... unrelated to the suppression of free speech,” then it will be upheld as constitutional. *See, id.* (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 S.Ct. 3065, 82 L.Ed.2d. 221 (1984); *United States v. O’Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d. 672 (1968)). Closely related to this is the principle that a law will be upheld as constitutional if it is a proper “time, place and manner restriction” on free speech. The test here is similar and asks whether the regulation is “narrowly tailored to serve a significant government interest” and “leave open ample alternative channels for

communication of the information.” *FLNBM II*, 11 F.4d. at 1292 (citing *Clark*, 468 U.S. at 293, 104 S.Ct. at 3065). The Court finds that the City has demonstrated it has a “substantial interest... unrelated to the suppression of free speech” in regulating large group feeding events throughout the City of West Palm Beach.

15. *Unconstitutional Prior Restraint.* The Defendants assert that even when “intermediate scrutiny” is applied, the Ordinance is not narrowly tailored to further the substantial interest of the City to maintain its City parks. Nor, do they argue, the Ordinance is a reasonable time, place and manner restriction since it vests too much unfettered discretion in the City in deciding whether to issue a permit for a large group feeding activity. The City responds arguing under either analysis, the Ordinance is constitutional in that the City has a substantial interest in regulating large group feedings throughout the City’s parks. Further, given the Ordinance’s criteria for issuance of a permit, it is narrowly tailored. The City further argues the Ordinance is a valid time, place and manner restriction on the Defendant’s expressive conduct.

16. The Defendants argue the Ordinance as applied to them amounts to an unconstitutional prior restraint on their First Amendment right to free speech. This is because nowhere contained the Ordinance or the permit application is there any time frame in which a properly and timely filed application must be approved or disapproved by the City. The Court agrees.

17. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d. 603 (1990), the Petitioners challenged a Dallas zoning and licensing ordinance regulating sexually oriented businesses. That ordinance required as a condition to

receiving a license to operate a sexually oriented business, an applicant must comply with certain zoning, licensing and inspection requirements. *Id.* at 220-21.

18. Recognizing that some of the businesses affected by the ordinance were protected by the First Amendment, the Supreme Court held that the Dallas ordinance amounted to an unconstitutional prior restraint on the Petitioner's First Amendment rights. This is because there was no time limit in which the City of Dallas was required to approve an application of a license. *Id.* at 607. The Court discussed the two "evils" associated with prior restraints:

Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places ... unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. ... It is settled by a long line of recent decisions of this Court that an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible. ... Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. ... The failure to confine the time within which the licensor must make a decision contains the same vice as a statute delegating excessive administrative discretion... Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decision maker creates the risk of indefinitely suppressing permissible speech...

The core policy ... is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied.

Id. at 226-27 (c.o.)(internal quotations omitted).

19. Applying this to the Dallas ordinance at issue, the Supreme Court explained why it was constitutionally infirm:

Although the ordinance states that the “chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application,” the license may not issue if the “premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.” ...

Moreover, the ordinance does not set a time limit within which the inspections must occur. The ordinance provides no means by which an applicant may ensure that the business is inspected within the 30-day time period within which the license is purportedly to be issued if approved. The city asserted at oral argument that when applicants apply for licenses, they are given the telephone numbers of the various inspection agencies so that they may contact them. ... That measure, obviously, does not place any limits on the time within which the city will inspect the business and thereby make the business eligible for the sexually oriented business license. Thus, the city's regulatory scheme allows indefinite postponement of the issuance of a license.

110 S.Ct. 596, 605–06, 493 U.S. 215, 227; *see also*, *Freedman v. Maryland* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d. 649 (1965).

20. The Ordinance in this case suffers from the same constitutional flaw as the one in *FW/PBS, Inc.* in that it fails to provide adequate procedural safeguards. *See, Id.* A careful review of the Ordinance’s application process indicates that while it includes a detailed appeal process for permit denials, it lacks any meaningful time frame in which a timely and properly filed permit application must be acted on by the City. The result is that someone seeking a permit for a large group feeding event may be forced to wait indefinitely, even beyond the date of the event. Just as in *FW/PBS*, the Court finds the City’s “regulatory scheme allows indefinite postponement of the issuance of a [permit for large group feedings].” As such this “undue delay results in the unconstitutional suppression of protected speech.” *Id.*

21. The City is encouraged to follow the suggestion made by the Eleventh Circuit in *FLFNB II* and look “218 miles to the northwest,” 11 F.4d. 1296, and review a similar ordinance enacted by the City of Orlando’s Ordinance regulating large group feeding activities. It appears to provide a constitutionally acceptable resolution to the defect present in the Ordinance in this case. *See, City of Orlando, Ord. Sec. 18A.14* (setting forth a requirement that the Chief of Police shall act promptly upon a properly filed application for a large feeding group permit “no less than seventy-two (72) hours prior to the event, or within twenty-four (24) hours of receipt of the application, whichever is later...”).

22. For the foregoing reasons, the Court finds that the Ordinance as applied to the Defendants is an unconstitutional prior restraint and thus violates their protections under the First and Fourteenth Amendments to the United States Constitution and Art. I, § 4 and 5, *Fla. Const.* Accordingly, the Motion is GRANTED and the charge in this case is DISMISSED. The Clerk shall cancel all future court dates.

DONE AND ORDERED in Chambers in West Palm Beach, Palm Beach County Florida, this 6th day of November, 2023.



THE 15TH JUDICIAL CIRCUIT
OF FLORIDA
ADMINISTRATIVE OFFICE OF THE COURT



AUGUST A. BONAVIDA
County Court Judge

Copies served:

Counsel of Record