CASE STUDY

SHOWDOWN ON MAIN STREET: SALT LAKE CITY, THE MORMON CHURCH, AND FREEDOM OF EXPRESSION

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Someone should have warned the members the City Council in Salt Lake City about the dangers inherent when a conversation turns to religion or politics. Those concerns are magnified significantly when one cannot avoid a discussion about religion and politics. And, the City Council cannot sidestep the nexus between religion and politics when deciding how to best address the consequences of its decision to sell a portion of a major downtown city block to the Church of Jesus Christ of Latter Day Saints (the LDS Church). One might observe, without drawing any theological connotations, that the Council is “damned if it does or damned if it does not” when it finally addresses the issue.

In 1995, Salt Lake City sold the subsurface rights to a portion of Main Street to the LDS Church. Specifically, the property is located in an important section of the downtown area. It is flanked on the east and west by buildings owned by the LDS Church including the Salt Lake City Temple – not only an important religious landmark but an edifice that is the source of enormous civic pride.

Just south of the property in question are downtown shopping malls and other prominent businesses. A residential neighborhood borders the property on the north. The agreement gave the Church the right of first refusal should the City ever attempt to sell the surface rights. Subsequent to purchasing the property, the LDS Church built an underground parking garage.

A year later the Council debated the merits of closing the property on Main Street to automobile traffic. The idea was the street would remain open as a pedestrian plaza. Proponents of the proposal surmised that the plaza would serve as a buffer between the business district and the residential neighborhoods. Too, they maintained that the property would facilitate a family friendly environment in the city. Although the Council initially rejected the proposal to close Main Street, the topic...
remained open for discussion – particularly when the LDS Church offered to buy the land with the understanding that the Church would construct the pedestrian plaza.³

In April, 1999, the City Council approved the sale of the property to the LDS Church. In the contract with the Church, the City imposed several conditions. First, the City insisted upon maintaining a perpetual pedestrian easement and required that the Church “maintain, encourage, and invite public use.” Second, the City retained the right of reverter to the portion of land on Main Street. The reverter permitted the City to reacquire the property should the Church fail to honor its commitment to keep Main Street open to general pedestrian traffic. Thus, the reverter served as a legal mechanism to enforce the pedestrian easement.⁴

Similarly, the LDS Church asked that reservations be placed within the contract. One of the reservations would limit the actions of those on the property to pedestrian passage. Despite the easement, the reservation placed a whole series of restrictions upon pedestrians. Some of the restrictions related to what could be termed particular actions: littering, partying, smoking, consuming alcohol, carrying firearms, sunbathing, and the like. Among the other restrictions specified in the reservation, many are generally thought to be constitutionally protected forms of expression: assembling, demonstrating, picketing, distributing literature, and erecting signs or displays.⁵

Furthermore, and as a means of reinforcing the restrictions on expressive behavior, another reservation stated unequivocally, “Nothing in the reservation or use of this easement shall be deemed to create or constitute a public forum, limited or otherwise, on the property.”⁶ Under the law, a public forum is an area of publicly-owned property where people – who might not otherwise have the means to afford a printing press or platform – can exercise their right to speak. Traditionally, sidewalks and public parks have been recognized as public fora.⁷ The reservation served to remove the property from public forum status and, as a result, permitted the LDS Church to limit expression on the plaza as it might see fit.⁸

After the transaction was completed, several groups filed suit against the City. The Plaintiffs included the First Unitarian Church of Salt Lake City, Utahns for Fairness, and the Utah National Organization for Women.⁹ In the lawsuit the Plaintiffs made several claims. First, they contended that the sale of the property violates the first amendment, the fourteenth amendment, and sections of the Utah Constitution by abridg-
ing freedom of speech. And, although the City might have thought it was protecting freedom of expression through the retention of an easement, the Plaintiffs maintained that the reservations within the contract between the City and the Church scuttle free speech.10

Second, they insisted that the contract violates the establishment clause of the first amendment by delegating to the LDS Church the right to interpret and enforce the restrictions on free speech.11 While the Constitution does not formally “separate” church from state, the first amendment and the fourteenth amendment prohibit government from establishing religion/a religion. Even those constitutional scholars most open to a healthy accommodation between government and religion would agree that the establishment clause forbids government from preferring one religion to all others.12 The Plaintiffs contended that by selling the property to the LDS Church, by far the largest church in the state of Utah, and by giving the Church the authority to determine how particular persons might act and speak on the plaza, the City has crossed a line that the Constitution protects.13

Finally, the Plaintiffs insisted that the City engaged in discrimination in favor of the Church. They claimed that this discrimination violates the fourteenth amendment’s equal protection clause.14

A federal district court judge in Salt Lake City rejected each of the Plaintiffs’ claims. Consequently, the Plaintiffs appealed their case to the Tenth Circuit Court of Appeals in Denver.15 The appellate court’s decision was fairly clear. First, the court held that the case was sufficiently “ripe” – the issues were fully developed enough for the panel of judges to render a decision. Since the restrictions on expression were ongoing, the court determined that there was a genuine case and controversy.16

Second, the court ruled that public forum analysis was appropriate – despite arguments to the contrary from the City and the LDS Church. Further, the court noted, the application of such analysis simplifies the issue. The purpose of the easement was to provide a pedestrian plaza for the general public. Despite the changes to the physical makeup of the property it is still essentially the same as the rest of the sidewalks on Main Street. No one would contend seriously that the remaining sidewalks are not public fora.17 Too, the court found the Church’s claim, that a public forum on the privately-owned plaza would place a significant burden on the usage of its own property (and might even compromise its own free speech rights), to be un-persuasive. Just as the owner of a downtown store, a company town, and even, under some circumstances, a privately-
owned mall cannot fully restrict free expression in a recognized public forum, neither can the LDS Church impose such restrictions. Granted, the City did agree to reservations that limited free speech in the contract with the Church but, the court observed, these restrictions cut against established case law that protects the first amendment. Consequently, the court concluded that it was unacceptable for the City to contract away essential constitutional rights.

Although the court struck down the provisions of the contract that placed restrictions on free speech, it did throw a constitutional bone to the City. While the reservations are indeed unconstitutional, the court held that the City might establish reasonable time, place, and manner restrictions on expression within the easement. Reasonable time, place, and manner restrictions are generally not inconsistent with the first amendment. The restrictions must be facially neutral and of general applicability but, should they satisfy that burden, they are likely to pass constitutional muster.

As to the other issues, the petitioner’s contention that the contract violated the establishment clause and the equal protection clause, the panel withheld judgement. The panel said that there was no longer any need to decide these issues since, upon applying public forum analysis, the restrictions are unconstitutional.

The LDS Church asked the Tenth Circuit to hear the case en banc — as a full court rather than a more limited panel of judges. The appellate court refused to hear the case en banc and therefore upheld the panel’s decision. They ruled that the restrictions cannot square with the first amendment. The Church opted to appeal the decision to the United States Supreme Court.

Almost immediately, speakers appeared on the plaza. Many of these speakers were preachers who, often loudly and with great vigor, denounced the LDS Church and its theology. The presence of the speakers on the plaza proved to be most disquieting for the Church since the sidewalk is between two of its more important buildings. Furthermore, the enthusiastic preaching often would disrupt activities that had been commonplace on the property, e.g., couples posing for wedding pictures on the plaza after taking their vows in the Temple.

The decision also exposed a significant divide among people in Salt Lake City and even throughout Utah — at least with respect to the showdown on Main Street. The divide is especially acute when one looks at the differences between members of the Church and those who are out-
side of the LDS faith. Nearly eighty percent of those who claim LDS Church membership – even those residing in Salt Lake City want the City to give up the easement. A majority of people of other faiths believe that the City should keep the easement. Seventy-eight percent of those polled indicated that the appellate court’s decision served to fan the flames of religious division in Salt Lake City.25

Since, clearly, the situation is both disruptive to the community and a political hot potato, the City Council has been forced to respond. Unfortunately, none of the options available to the Council are particularly appealing. The Council might create time, place, and manner restrictions but, unless they are fully unrelated to the expression of ideas that might be at odds with the LDS Church, the City will find itself right back in court again – only this time the establishment clause claim might have substantially more validity. It might get rid of the easement but that proposal was rejected by Salt Lake City Mayor Rocky Anderson. Anderson threatened repeatedly to quash just such a plan. Moreover, the proposal to give back the easement would be viewed by many residents, particularly those who are not LDS, as a capitulation by the City to the Church. Thus, the proposal would engender both political and constitutional problems.26

One recent solution, proposed by Mayor Anderson, is to release the easement upon the property in exchange for something of value to the residents of Salt Lake City. Mayor Anderson’s plan, proposed in mid-December, 2002, would release the easement on the sidewalk within the plaza and permit the LDS Church to reestablish the restriction on speech and behavior. In exchange, the Church would agree to donate two acres of land near a multi-cultural center on the City’s west side. A local committee, the Alliance for Unity, pledged to raise at least five million dollars for one or two community buildings near the center. Additionally, the LDS Church Foundation would agree to help develop the west side. What would happen should the plaintiffs, or others with legal standing, opt to bring the Mayor’s proposal to court? Anderson indicated that he would extinguish the contract’s reverter clause to diminish the likelihood of litigation.27

As expected, reaction to the Mayor’s proposal was mixed and often heated. Gordon B. Hinckley, President of the LDS Church, had a positive reaction, at least initially, to Anderson’s proposal, although representatives of the Church did acknowledge that the costs of the project keep mounting.28 Too, the Church continues its appeal to the Supreme Court
heartened by a recent decision by the Second Circuit that upheld reasonable prohibitions on speech in New York City’s Lincoln plaza.  

Many citizens still see the proposal as a plan that will swap free speech for land and question Mayor Anderson’s intentions. Until he introduced the proposal, Anderson seemed to be without equivocation in his resolve to reject any plan that might give up the easement. While some are heartened by the attention and resources that will flow to the City’s west side, they are concerned that it will come at a very precious price: their rights under the first amendment.  

Now the ball is back in the City Council’s court. It can: 1) live with the court’s decision (tally ho for the status quo!) – an option that would seem to have few supporters; 2) release the easement; 3) adopt time, place, and manner restrictions as the Tenth Circuit suggested; or 4) embrace an alternative such as Mayor Anderson’s plan to lift the easement in exchange for badly needed future development on Salt Lake City’s west side. Clearly, whichever option that the Council might choose will only serve to perpetuate the showdown on Main Street. Should anyone be surprised? Such are the complications when religion and politics provide the sub-text for proposed public policy.

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NOTES

1 First Unitarian Church of Salt Lake City; Utahns for Fairness; Utah National Organization for Women; Craig S. Axford v. Salt Lake City Corporation, No. 01-4111, slip op., 4 (10th Circuit, Oct. 9, 2002) [hereinafter First Unitarian Church].

2 Ibid.

3 Ibid., 5.

4 Ibid., 6.

5 Ibid.

6 Ibid.

8 First Unitarian Church, supra note 1, 6.
9 Ibid., 8.
10 Ibid.
11 Ibid., 9.
13 First Unitarian Church, supra note 1, 9.
14 Ibid.
15 Ibid., 9-10.
16 Ibid., 12.
17 Ibid., 12-35.
18 Ibid., 26-30.
19 Ibid., 34.
20 Ibid., 37.
22 First Unitarian Church, supra note 1, 38.
28 Ibid., 2.
30 Ibid.