When city planners and community leaders first envisioned a pedestrian plaza to replace a section of Main Street, they believed that such a place would strengthen our community by bringing citizens together. It would provide a peaceful location in an otherwise bustling city. Today, contrary to those dreams, the plaza stands as a symbol of a city divided. This is both unfortunate and unnecessary. Recent litigation has complicated matters, but it has not made a positive solution impossible. The City and other responsible parties now bear an ethical obligation to resolve this dispute in a manner that will bridge divided sections of the community while protecting core constitutional values.

Let’s begin with the constitutional principles. According to the Tenth Circuit Court of Appeals, it was unconstitutional for Salt Lake City to retain a public easement over land sold to the LDS Church without allowing the public to use the easement for private demonstrations. In other words, if the City retains a right of access it must allow the public to treat the plaza as a typical public sidewalk, even though the area was purchased, built, and is maintained at the LDS Church’s private expense. The decision was a surprise, given that other cities, such as Denver, have been allowed to create specialized pedestrian walkways without allowing a general right of free speech. As a consequence of the decision, an essential element of the parties’ agreement has been upset. The City now must either relinquish its easement (and perhaps the associated right of reverter), thereby trusting the LDS Church to provide public access; or it must retain the easement and allow disruptive demonstrations, thereby frustrating the LDS Church’s purposes for investing in the plaza. To be sure, if the City retains the easement, it may impose “time, place and manner” restrictions on the plaza, but we must recognize that this is an extremely narrow category of regulation. Time-place-manner regulations would enable the City to prohibit some highly offensive behavior, such as use of megaphones to create a public disturbance or public indecency,
but alone would not be sufficient to protect the atmosphere of peace the LDS Church contemplated when it agreed to purchase and develop the plaza property.

As far as the Constitution is concerned, it would certainly be permissible, if not preferable, for the City to relinquish the easement. The Tenth Circuit’s decision upholding a public right to protest on the plaza was based specifically on the fact that the City had retained a public right of access. If the City were to give up its legal right of access, the First Amendment would not require an open forum. Contrary to what some have said, this would not amount to a “bargaining away” of free speech rights—for it must be remembered that the public never has had a permanent right to engage in speech activities at any given location; all speech rights on public property are dependent upon how the government chooses to use or dispose of the property in question, which is always subject to revision.¹ Even if we consider constitutional values beyond what the First Amendment literally requires, it is difficult to see any ethical argument for why the public should have a right to protest specifically at Main Street plaza. Salt Lake City has hundreds of square miles of traditional sidewalks where such protesting is already allowed, and there are ample locations immediately surrounding Temple Square. If the plaza is a uniquely desirable location for those who would like to convey a message, it must only be because the LDS Church has made it such an attractive gathering place and has incorporated it with its other private property. It is ironic that those who would seek to take advantage of this new and unique location as a favorite place of protest would do so at the direct expense of the people who invested to make it possible, while at the same time doing so in a way that undermines their purpose for making such an investment. Neither the freedom of speech nor any underlying constitutional value requires such an outcome.

To say that the City legally may choose either to relinquish or retain the easement, however, does not yet answer what it should do. As the French writer Bernard Joseph Saurin wrote, “the law often permits what honor forbids.”² In considering what honor requires in this situation, two concerns are paramount. First, an ethical solution should seek to restore unity and good will to the community, rather than perpetuate further religious divisiveness. This means that the City must avoid resolving the dispute at the entire expense of one side or the other, or in the long run everyone will lose. To simply relinquish the easement without reciprocal compensation by the LDS Church would only fuel negative feelings of some that the LDS Church exercises too much power and does not
respect the beliefs of other members of the public. Likewise, to allow the plaza to become a place of demonstration without reimbursing the LDS Church would add to negative suspicions by others that LDS Church members are unfairly treated and unappreciated by people of other beliefs. The City and LDS Church now have an opportunity to prove both sets of beliefs wrong, which can only be done through compromise.

Second, an ethical solution should seek, to the extent possible, to comport with the original spirit of the 1999 bargain between the City and the LDS Church. It was designed as a win for both parties. An essential element of this agreement was that the LDS Church would retain the power to control conduct on the plaza and that it not be turned into a public forum; the LDS Church would not have agreed to purchase the property otherwise. An essential element for the City was that it retain a public right of access across the plaza. Although it is now legally impossible to fulfill both requirements, it may still be possible to create a win-win solution through some form of fair compensation.

There are those who argue that the LDS Church has already received the benefit of its bargain because a clause in the 1999 agreement provides that if any portion of the agreement is found invalid it must be stricken and the remainder will be enforceable. To be sure, this severability clause means that the City is not legally required to relinquish the easement or reimburse the Church. This purely legal conclusion, however, speaks nothing to the ethics of the situation. Contract law often produces situations where one party has the legal right to take advantage of another’s misfortune, and yet this does not make it ethical to do so. Nor is it accurate to suggest that the severability clause indicates some special awareness on the part of the LDS Church that the agreement was subject to realistic constitutional doubt. The clause is nothing more than a standard severability provision, which are commonly inserted in modern contracts and conveyances even where there are no reasons to suspect legal problems. It does not indicate that the parties consciously anticipated any specific legal weakness in the agreement. Indeed, based on legal precedent at the time, it was reasonable for the LDS Church and City to conclude that the 1999 agreement complied with the First Amendment. The Tenth Circuit’s recent decision to the contrary undoubtedly was a surprise and upset an essential element of the bargain.

Both ethical considerations suggest a compromise agreement. To simply retain the status quo or impose minimal time-place-manner restrictions would neither promote unity nor fulfill the spirit of the 1999 agreement. The same may be said for releasing the easement to the LDS
Church without any form of compensation. By contrast, Mayor Anderson's compromise proposal would go a long way toward fulfilling both objectives. It would allow the public to receive a substantial benefit in the form of a new west-side development. It would also allow the LDS Church to receive the benefit of its agreement. Because both the City and the LDS Church would be required to give up property interests of value in such an exchange, and because both would benefit, a compromise should avoid the long-term costs of a one-sided victory. It would be a win for the whole community.

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NOTES

1 While the ACLU has offered additional arguments based on the Speech and Establishment Clauses which do not depend on the presence of an easement, these arguments are quite weak and were appropriately rejected by the District Court.

2 Bernard Joseph Saurin, Spartacus, 1760.