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A Right of Passage: The Implications of the Tenth Circuit's Ruling in *First Unitarian v. Salt Lake City*

I. INTRODUCTION

The classic “bundle of sticks” metaphor in property law holds that property is, in essence, a bundle of rights that can be severed, sold, bequeathed, or devised. This analogy “is a combination of Wesley Hohfeld’s analysis of rights and A.M. Honoré’s description of the incidents of ownership.”¹ Hohfeld argues that property rights are a culmination of individual rights valid against all other owners. Honoré described property law not only as the rights associated with owning property but the duties, liabilities, and other aspects associated with owning property; thus, property is not only a list of rights, but a culmination of relations and obligations.² Scholars disagree about all the rights included in the bundle, but those most commonly identified “include the right to exclude others, the right to possess, the right to use, and the right to alienate (or transfer or dispose of).”³

The question raised in *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.* is whether a city can retain and restrict a stick in the bundle of property rights in a publicly held street that is sold to a private entity. More specifically, does a city have the “authority to prohibit all expressive activities on a public easement it reserved across otherwise private property, except for the speech permitted by the private owner of the underlying estate?”⁴ In answering this question, the Tenth Circuit Court of Appeals decided that Main Street Plaza in downtown Salt Lake City, a privately owned park that was a former street, is a public forum and, therefore, a restrictive easement placed on the Plaza violated the First Amendment.

After providing the background and context for *First Unitarian*, this note will address the right of states to create restrictive easements and the interrelation between the First Amendment and property rights in Utah.

1. J. E. Penner, “*Bundle of Rights*” *Picture of Property*, 43 UCLA L. REV. 711, 712 (1996).

2. *Id.* at 713.

3. Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 285-286 (2002).

4. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1121 (10th Cir. 2002).

In section IV, the comment will look at First Amendment analysis of the forum doctrine and its application in a marquee Tenth Circuit case: *Hawkins v. City & County of Denver*. This section will also include an analysis of the Second Circuit's competing conclusion in *Hotel Employees & Restaurant Employees Union v. City of N.Y. Dept. of Parks & Recreation*. In section V, the Note will challenge the Tenth Circuit's reasoning in reaching the conclusion that Main Street Plaza should be considered a public forum. In addition, the Note will discuss the implications of the ruling and the ramifications for the future of both government property rights and individual First Amendment rights in the Tenth Circuit. Through examining *First Unitarian* it will be shown that the Tenth Circuit's ruling is too far reaching and that governments should be able to terminate public forums while retaining a non-public forum easement.

II. CONTEXT AND BACKGROUND OF FIRST UNITARIAN V. SALT LAKE CITY

A. History of the Case

On April 13, 1999, the Salt Lake City Council approved the closure and sale of a portion of Main Street to The Church of Jesus Christ of Latter-day Saints ("the Church") subject to a restrictive easement.⁵ The easement was "planned and improved so as to maintain, encourage, and invite public use."⁶ The City of Salt Lake ("the City") recorded a warranty deed and reservation of easement that included the right of the Church to prevent uses of the property other than pedestrian use. The deed restricted certain forms of speech, lewd conduct, and activities such as smoking, skateboarding, and rollerblading.⁷ Those opposed to the

5. Alan Edwards, *S.L. Plaza Gets Green Light: Council Votes to Sell 2-Acre Stretch to LDS Church*, DESERET NEWS, April 14, 1999, at A1.

6. *First Unitarian*, 308 F.3d at 1126 (quoting Aplt. App. Vol. I at 191).

7. *Id.* at 1118-1119 (quoting Aplt. App. Vol. I at 362).

The reservation contains the following restrictions with respect to the use of the easement: 2.2 Right to Prevent Uses Other Than Pedestrian Passage. *Nothing in the reservation of use of this easement shall be deemed to create or constitute a public forum, limited or otherwise on the Property.* Nothing in this easement is intended to permit any of the following enumerated or similar activities on the Property: loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcohol beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace. Grantee shall have the right to deny access to the Property to persons who are disorderly or intoxicated or engaging in any of the activities identified above. The provisions of this section are intended to apply only to Grantor and other

restrictions filed suit against the City claiming a violation of the First Amendment.⁸ The American Civil Liberties Union (ACLU) represented those who opposed the reservation of easement, claiming that the City gave preferential treatment to the Church in violation of the First Amendment. The Church intervened as a party to the suit.⁹

To understand why the First Unitarian Church and the ACLU were so adamantly opposed to the restrictions placed on the easement, the underlying social climate of Salt Lake City must be examined. Salt Lake City is the world headquarters for the Church which was the driving force behind the settlement of Utah and the establishment of Salt Lake City. Consequently, the Church and its members have wielded significant influence over the social and political atmosphere in Salt Lake City. Over time, a rift has grown between some members and some non-members of the Church who feel that the Church improperly wields influence over local government leaders in order to foster its own position. In the case at issue, Stephen Clark, counsel for the Salt Lake chapter of the ACLU, stated that the restrictions placed on the easement resulted in the City of Salt Lake “essentially preferring one religion over others” and that Salt Lake leaders gave “the indelible impression that the LDS Church occupies a privileged position in the community and that the City endorses the LDS Church and its messages, without any secular purpose.”¹⁰ The ACLU also points to the fact that a majority of the Salt Lake City Council members belong to the Church and that all of them approved of the easement.¹¹ The City of Salt Lake has sold property to other churches while retaining easements in the past,¹² but it is this underlying tension with the Church that establishes the backdrop for *First Unitarian*.

users of the easement and are not intended to limit or restrict Grantee’s use of the Property as owner thereof, including, without limitation, the distribution of literature, the erection of signs and displays by Grantee, and the projection of music and spoken messages by Grantee.

Id. (emphasis added).

8. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155 (D. Utah 2001) (naming The First Unitarian Church of Salt Lake City, Utahns for Fairness, Utah National Organization for Women, and Craig S. Axford as plaintiffs in the suit).

9. *Id.*

10. Rebecca Walsh, *ACLU Suit Says City Railroaded LDS Easement*, SALT LAKE TRIB., March 2, 2000, at D3.

11. *Mormons Purchase Portion of Utah Public Street, Create Code of Conduct*, AP, May 5, 1999, available at <http://www.freedomforum.org/templates/document.asp?documentID=8668>.

12. *Salt Lake City Attorney Defends Sale of Street to Mormon Church*, AP, May 5, 1999, available at <http://www.freedomforum.org/templates/document.asp?documentID=8650> (Salt Lake City Attorney Roger Cutler noting that since 1986, the city has sold portions of over forty-nine city streets for a value of \$1.8 million. Included were sales to the Catholic, Baptist and Lutheran churches.)

At the district court level, summary judgment was granted for the City on all counts stating that the property had so changed through the sale of the property, as to extinguish the public forum and thus create a non-public forum.¹³ District Judge Stewart also determined that the restrictions placed upon the property were content neutral, and, therefore, the restrictions placed on the easement did not violate the First Amendment.¹⁴ Judge Stewart, speaking of the case, stated that “[t]his raises serious concerns about the plaintiffs’ free speech rights and private property rights. But in this case, we have a party that has paid fair market value and expended considerable money to alter the property. Free speech rights do not outweigh private property rights.”¹⁵ The case was appealed to the Tenth Circuit who disagreed with Judge Stewart’s ruling and analysis of the case.¹⁶

B. Reasoning of the Tenth Circuit in First Unitarian v. Salt Lake City

The Tenth Circuit found that “[e]ither government ownership or regulation is sufficient for a First Amendment forum of some kind to exist.”¹⁷ The Tenth Circuit ignored the City’s property law contentions and Judge Stewart’s analysis and went to the First Amendment forum analysis implying that a deed does not free the government from constitutional analysis when it is a party to an easement.¹⁸ The court also rejected the language of the restrictive easement that indicated the intent of the parties not to create a public forum¹⁹ stating that “[t]he government cannot simply declare the First Amendment status of property regardless of its nature and its public use.”²⁰

The Court ruled that it need only decide the nature of the government forum and, contrary to Stewart who looked at the purpose of the surrounding plaza, restricted its analysis to the nature and purpose of the easement stating that it was the only government interest in the property.²¹ The court utilized the objective considerations outlined in

13. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1166, 1170-72 (D. Utah 2001) (Judge Stewart relied upon Justice Kennedy’s concurrence in *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699-700 (1992) cited in *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999)).

14. *First Unitarian*, 146 F. Supp. 2d at 1177-79.

15. Rebecca Walsh, *Judge Rejects Suit Against Plaza Rules*, SALT LAKE TRIB., Jan. 3, 2001, at A1.

16. *First Unitarian*, 308 F.3d at 1114.

17. *Id.* at 1122.

18. See RESTATEMENT (THIRD) OF PROP. SERVITUDES §3.1 cmt. d (2000) [hereinafter RESTATEMENT].

19. See *supra* note 7.

20. *First Unitarian*, 308 F.3d at 1124.

21. *Id.* at 1125.

Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc. v. Lee* to determine the nature of the easement as a forum.²² The considerations include 1) whether the property retains similar characteristics of public forms, 2) whether government has granted or acquiesced in broad public access to the property, and 3) whether expressive activity would interfere with the intended government use of the property.²³ The Tenth Circuit then sought to "determine the easement's nature and purpose" while answering the question "whether expressive activity is compatible with the purposes and uses to which the government has lawfully dedicated the property, not whether the government has expressly designated speech as a purpose of the property."²⁴

The court, after careful analysis, concluded that the easement was intended to be used as a "pedestrian thoroughway for the general public."²⁵ The court claimed that the City's main purposes were to create public space in the downtown area and to generate more pedestrian traffic. The court also felt that the City meant to retain these rights even while selling the underlying land as seen through a reverter clause in the contract.²⁶ The court stated that the Salt Lake City planning council had discussed the issue and had indicated that it would require the Church to regulate speech as it would in a public park.²⁷ The court further determined that the City's sale of the land was contingent on several factors including a provision that the easement should be "planned and improved so as to maintain, encourage, and invite public use."²⁸ The court focused on the City's argument that the City would not have sold the land "but for" the easement.²⁹ The court also rejected the notion that the easement was for ingress and egress to the Church's two campuses that straddle the Main Street Plaza³⁰ as well as the argument that since Main Street had been turned over the restrictions on the easement had been limited.³¹ Ultimately, the court found that the easement was a public

22. *Id.*

23. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring).

24. *First Unitarian*, 308 F.3d at 1125.

25. *Id.* at 1126.

26. *Id.* at 1119 (quoting *Aplt. App. Vol. I* at 362) (The reverter clause states that if the Church "fails to use the Property for the purposes set forth . . . or fails to maintain the property thereafter" ownership may revert back to the City).

27. *Id.* at 1128.

28. *Id.* at 1126.

29. *Id.*

30. *Id.* at 1126-27.

31. *Id.* at 1129-1130.

forum and, therefore, the restrictions placed on the land violate the First Amendment.³²

III. EASEMENT PROPERTY RIGHT LAW

A. *General Concepts of Servitudes and Easements in Property Law*

The Restatement (Third) of Property provides a guideline into generally held property principles including servitudes.³³ A servitude is a “legal device that creates a right or an obligation that runs with land or an interest in land”³⁴ that includes easements or “a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.”³⁵ An easement is considered a non-possessory right because it “authorizes limited uses of the burdened property for a particular purpose. The holder of the easement or profit is entitled to make only the uses reasonably necessary for the specified purpose.”³⁶

Government agencies have increasingly used privately created servitudes to supplement “public land-use controls and environmental protections, shifting development costs to the private sector, and providing controls and governance structures for development and redevelopment projects”³⁷ in order to maximize the public good. Courts and legislatures have traded looking at rigid constraints on servitudes into “recognizing a general freedom to create servitudes”³⁸ and “[w]here servitudes are clearly intended, and do not appear to be obstructing useful development, courts frequently apply a stronger constructional preference in favor of interpreting a servitude to carry out the intent and expectations of the parties.”³⁹ It is recognized, however, that servitudes created by a governmental entity need to be reviewed under

32. *Id.* at 1130.

33. RESTATEMENT, *supra* note 18, at § 3.1, cmt. a (recognizing that the purpose of the Restatement (Third) of Property is to “identify more accurately the situations in which the threatened risks of harm to the general welfare justify judicial intervention to invalidate properly created transactions intended to create interests that run with land.”).

34. *Id.* at § 1.1(1).

35. *Id.* at § 1.2(1). There are several types of easements including non-exclusive easements (those that allow servitude holder to exclude anyone except the servient owner or those authorized by the servient owner) and exclusive easements (where the servient owner is excluded from certain uses of the land except those that do not unreasonably interfere with uses of the servitude). *Id.* at § 1.2(1), cmt. c.

36. *Id.* at § 1.2(1), cmt. d.

37. *Id.* at § 3.1, cmt. a.

38. *Id.*

39. *Id.*

constitutional law and if determined to violate fundamental constitutional rights, are subject to invalidation.⁴⁰

B. Utah Property Law

Utah statutes allow the state to sell public land for the public benefit.⁴¹ Additionally, it is generally held that “the right to control a [government-owned] servitude for the benefit of the public is located in the state.”⁴² The Utah Supreme Court has stated that the words of a deed or grant determine the scope of an easement, burdening the servient estate only to the purposes expressed in the grant.⁴³ Utah has established that deeds “should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed [W]hen the deed creates an easement the circumstances attending the transaction, the situation of the parties, and the object to be attained are also to be considered.”⁴⁴ Utah State Law has also held that “once the character of the easement has been fixed no material change or enlargement of the right acquired can be made if thereby a greater burden is placed on the servient estate.”⁴⁵ It, therefore, may be argued that courts cannot “expand the terms of the easement”⁴⁶ and thereby trump state law by allowing the easement use to be incompatible with the possessory estate’s main use.

Though it has been argued that the easement is not a significant enough property right to require a constitutional analysis,⁴⁷ the court determined that a constitutional analysis is appropriate whenever there is “government ownership or regulation.”⁴⁸ However, the intent of the parties should be construed liberally,⁴⁹ and, in this case, the court has

40. *Id.* at § 3.1, cmt. d.

41. UTAH CODE ANN. § 65A-4-1(1) (2003) (“All state agencies may acquire land . . . and are authorized to sell, lease or otherwise dispose of land no longer needed for public purposes . . .”).

42. RESTATEMENT, *supra* note 18, at § 2.18(2) & cmt. b.

43. *Weggeland v. Ujifusa*, 384 P.2d 590, 591 (Utah 1963); *Labrum v. Rickenbach*, 711 P.2d 225, 227 (Utah 1985) (“[T]he law in this state is plain: A right of way founded on a deed or grant is limited to the uses and extent fixed by the instrument.”).

44. *Wood v. Ashby*, 253 P.2d 351, 353 (Utah 1952).

45. *Big Cottonwood Tanner Ditch Co. v. Moyle*, 159 P.2d 596, 597 (Utah 1945), *modified on other grounds*, 174 P.2d 148 (Utah 1946) (holding that a ditch company with irrigation ditches across individuals’ land could not cement the ditches because the envisioned purpose of the ditches was to include seepage of water to landowner’s surrounding land).

46. *Labrum*, 711 P.2d at 227 (holding that restrictions placed on an easement only for a right of way to egress and ingress to cleaning out a ditch, were the only purposes and uses for the right of way).

47. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002).

48. *Id.*

49. *But see United States v. Grace*, 461 U.S. 171, 180 (1983) (The Supreme Court noting that the government could not transform the sidewalks around the Supreme Court into a non-public

overlooked the intention of both parties as manifested in the Deed of Reservation of the Easement. Additionally, the court, in its First Amendment analysis, failed to look at the purposes of the servient estate or the Church's intended use of the Main Street Plaza. The court then incorrectly labeled the Main Street Plaza a public forum although a public forum was clearly beyond the intent of the parties to the agreement.

IV. FIRST AMENDMENT FREEDOM OF SPEECH IN THE TENTH CIRCUIT

A. *An Overview of First Amendment Rights with Regard to Public Forums*

The character of the property in issue determines the standard for evaluating such property.⁵⁰ The purpose of a forum analysis is to determine whether the government's purpose in limiting the proposed speech on a property outweighs private individual uses of the property.⁵¹ There are three traditional designations for forums when dealing with the First Amendment: traditional public forums, government designated public forums, and non-public forums.⁵² Traditional public forums are those places that "by long tradition or by government fiat have been devoted to assembly and debate" in which "the rights of the State to limit expressive activity are sharply circumscribed."⁵³ Streets and parks have traditionally "been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁵⁴ In these public forums, the government cannot prohibit all communication.⁵⁵

The second designation, government designated public forums, refers to forums that have not traditionally been public forums but have been set aside by the government as public forums. Government designated public forums are "governed by different standards . . . [as] the 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government.'"⁵⁶ The "state may

forum by creating a statute). *Grace* is distinguishable from *First Unitarian* in that government retained possession of the land whereas the title to the Plaza was sold to a private third party. There is no statutory limitation placed on the land, except that the land is sold for its fair market value.

50. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983).

51. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

52. *Id.* at 802.

53. *Perry*, 460 U.S. at 45.

54. *Hague v. CIO*, 307 U.S. 496, 515 (1939)

55. *Perry*, 460 U.S. at 45.

56. *Id.* at 46 (citing *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981)).

reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."⁵⁷ The government, like private property owners, has the right to preserve property for lawfully dedicated purposes.⁵⁸

The last designation consists of forums that are either nonpublic forums or not forums. The restrictions in this group have to be "reasonable" in light of the purpose of the forum and such that public officials are not seeking to suppress an individual's views that they oppose.⁵⁹

In summary, the government must permit speech in public forums. The government can open up additional public forums for a specific use and it may retain property that is not designated as a public forum. A key distinction in determining between a public forum and a non-public forum is that the former requires "general access" while the latter permits "selective access."⁶⁰ Neither side disputes the fact that the Main Street corridor was a traditional public forum before the sale.⁶¹ The dispute arises around the nature of the property after the sale.⁶²

B. Eliminating a Public Forum

As the Tenth Circuit noted in its opinion, Justice Kennedy set forth the three ways to terminate a public forum in his concurring opinion in *International Society for Krishna Consciousness, Inc. v. Lee*.⁶³ The three ways are 1) selling the property; 2) changing the property's physical characteristics; or 3) changing the property's principle use.⁶⁴ The use of the word "or" signifies a "totality of the circumstances" analysis to determine whether a forum has been eliminated.⁶⁵ Justice Kennedy posited that the government retains the right to close a public forum as "[o]therwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public

57. *Id.*

58. *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129-130 (1981).

59. *Cornelius v. NAACP Legal Def. & Educ. Fund. Inc.*, 473 U.S. 788, 800 (1985) (quoting *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 46 (1983)).

60. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (quoting *Cornelius* 473 U.S. at 803, 805).

61. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1165 (D. Utah 2001).

62. *Id.*

63. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring).

64. *Id.*

65. *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999) (quoting *Lee*, 505 U.S. at 699-700).

forum doctrine to require.”⁶⁶ In determining whether property retains its public forum status, the overarching test is that if the “objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses” then the property should be considered a public forum.⁶⁷ In determining “objective” and “physical characteristics,” the most important considerations a court should look to include whether the “property shares physical similarities with more traditional public for[a], whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has, as a factual matter, dedicated the property.”⁶⁸

*C. Hawkins v. City and County of Denver: The Tenth Circuit’s
Prevailing Precedent in Forum Analysis*

Hawkins v. City and County of Denver is the prevailing case in the Tenth Circuit dealing with forum analysis and the elimination of public forums.⁶⁹ The Galleria is a 600-foot glass-covered converted public street owned by the City of Denver.⁷⁰ It is flanked on both sides by three performing arts theaters and a public parking garage that are part of the Denver Performing Arts Complex (DPAC). To the north of the Galleria is a public access street (Fourteenth Street) and, to the south is a sculpture park that separates the DPAC from Speer Boulevard.⁷¹ The court in *Hawkins* noted that the Galleria serves as “an extended lobby for the various performing arts venues.”⁷² A group of musicians representing a local musicians’ guild protesting on the Galleria was removed by Denver Police. However, the demonstrating musicians were allowed to carry on their protest on Fourteenth Street which the city considered to be a public forum.⁷³ The City of Denver admitted that the Galleria was open to the public⁷⁴ and the court recognized “[p]ublicly owned or operated property does not become a ‘public forum’ simply because

66. Lee, 505 U.S. at 699-700 (1992) (Kennedy, J., concurring).

67. *Id.* at 698.

68. *Id.* at 699.

69. *Hawkins*, 170 F.3d 1281.

70. *Id.* at 1284.

71. *Id.*

72. *Id.*

73. *Id.* at 1285.

74. *Id.* at 1287.

members of the public are permitted to come and go at will.”⁷⁵ The court, however, ruled that the DPAC was a nonpublic forum because it was not a public park or analogous to a public thoroughfare.⁷⁶ The mere fact the Galleria was constructed on a former public street does not render it a traditional public forum for the “government may, by changing the physical nature of its property, alter it to such an extent that it no longer retains its public forum status.”⁷⁷

The musicians’ guild claimed that the city’s restrictions favored some speech over others. The court stated that the speech was limited to that associated with the city owned DPAC⁷⁸ and that leafleting and expressing one’s views was at “odds with the DPAC’s limited purpose as an entertainment venue.”⁷⁹ The court also noted that the reasonableness of the restrictions was bolstered by the fact that up to fifty percent of the DPAC patrons entered the facilities using public sidewalks thus giving the plaintiffs other forums in which to disseminate their message.⁸⁰

D. Differing Opinions: The Second Circuit’s Forum Analysis in Hotel Employees & Restaurant Employees Union v. City of N.Y. Department of Parks & Recreation

Shortly after the Tenth Circuit’s October 9, 2002 decision, the Second Circuit decided a factually similar case. In *Hotel Employees & Restaurant Employees Union of New York Department of Parks & Recreation*, the Second Circuit concluded that Lincoln Plaza, a venue owned by New York City but maintained by a private entity, Lincoln Center Inc., was not a public forum even though there was a public thoroughfare across the plaza.⁸¹

A local Union wanted to hold a rally on Lincoln Plaza. The Union’s application was denied by Lincoln Center, Inc. because “the proposed use violated its policy against non-arts related events in the Plaza.”⁸² The court held that the private entity’s ban “limiting organized public expression in the Plaza to artistic and performance-related events” did not violate the First Amendment.⁸³ The court, in distinguishing between a public and non-public forum, examined the characteristic of the forum,

75. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 686 (1992)(O’Conner J., concurring) (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)).

76. *Hawkins*, 170 F.3d at 1287.

77. *Id.*

78. *Id.* at 1288.

79. *Id.* at 1291.

80. *Id.* at 1291 n.7.

81. 311 F.3d 534, 539 (2d Cir. 2002).

82. *Id.* at 542.

83. *Id.* at 556.

the property's use including location and purpose,⁸⁴ the purpose for constructing the space, the regulations placed upon the property,⁸⁵ and the traditional use of the property.⁸⁶ In analyzing the forum issue, the court refused to consider the 'throughfare' across Lincoln Plaza in isolation, but instead analyzed the Plaza as an entire entity.⁸⁷

Through its forum analysis, the court determined that the city did not intend to treat Lincoln Plaza as a city park.⁸⁸ Though one of the underlying purposes of Lincoln Plaza was to create a set of "parks and pedestrian thoroughfares," this goal was never adopted as official policy and, therefore, was considered by the court to be a description rather than a legal conclusion.⁸⁹ The Union argued that people often used Lincoln Plaza for purposes other than for simply accessing Lincoln Center and that the walkway through Lincoln Plaza was designed to be one of the "major thoroughfares" for the city.⁹⁰ The court stated that even though the Lincoln Plaza has characteristics similar to those of a thoroughfare, the "location" and "purpose" of the Lincoln Plaza must still be examined.⁹¹ The court thought Lincoln Plaza to be the centerpiece of the Lincoln complex and even though the complex was designed to be open to passers-by "[t]he ability of pedestrians to cross the Plaza as a short-cut between surrounding streets is merely an incidental feature of its principal function as the entrance plaza for the Lincoln Center complex."⁹² The court recognized that those who enter the Plaza have "entered some special type of enclave."⁹³ This enclave did not diminish individual access to surrounding parks that are open to public expression, thus indicating that the Plaza had a limited purpose.⁹⁴ Additionally, because Lincoln Plaza is not surrounded by government buildings, it is "easily distinguished from those plazas and squares in which political

84. *Id.* at 547.

85. *Id.*

86. *Id.*

87. *See Id.* at 546-47.

88. *Id.* at 548. ("[T]he Parks Department retains exclusive scheduling authority over neighboring Damrosch and Dante Parks and permits organized expression in those parks. In contrast, Lincoln Center, Inc., as the City's licensee, has limited organized public speech in the plaza to events having an artistic or performance-related component.") *Id.* at 549.

89. *Id.* at 549 n.11. (noting that a Lincoln Center document entitled "Plaza Policy & Usage Guidelines Revised Draft" was never adopted as official policy of the center and therefore does not prove intent)

90. *Id.* at 550.

91. *Id.*

92. *Id.*

93. *Id.* (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)).

94. *Id.* at 551. *See also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) ("[S]eparation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction.")

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speech has historically been protected.”⁹⁵ The Court concluded that, in considering the “relevant factors,”⁹⁶ permitting all types of expressive activity “would be incompatible with its ‘intended purpose’ and ‘how the locale is used.’”⁹⁷

V. FORUM ANALYSIS – FIRST UNITARIAN V. CITY OF SALT LAKE

The Tenth Circuit’s ruling in *First Unitarian* that an easement is a public forum⁹⁸ has implicitly extended the scope of the First Amendment while significantly limiting state authority over property rights.⁹⁹ The court has trumped Utah state law allowing the creation of an easement that is not bound by rights reserved in the deed and, ultimately, the intent of the parties. The Tenth Circuit’s decision is troublesome, as it supercedes state property law while unduly burdening the government entities’ ability to sell public land while trying to maximize public good.

A. *Treatment of the Main Street Plaza as a Public Forum*

1. *The former public forum status should be eliminated through reservation of deed.*

The City and the Church agreed that “[n]othing in the reservation of use of this easement shall be deemed to create or constitute a public forum, limited or otherwise on the Property.”¹⁰⁰ The agreement also established that the easement was to be solely for “pedestrian access and passage.”¹⁰¹ The Tenth Circuit, in considering this issue, insisted that a government entity cannot determine the nature of the forum for First Amendment rights regardless of the nature or use of the venue. The court took the position that a First Amendment forum analysis must be performed any time a government interest, including regulation and ownership, is at issue, regardless of express language in the parties’

95. *Hotel Employees*, 311 F.3d at 552.

96. *Id.* (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998)).

97. *Id.* (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth.*, 691 F.2d 155, 160 (3d Cir. 1982)).

98. Note that the court stated its intent was not to hold that the First Amendment applies to all easements, but only that the easement is open to scrutiny based upon the characteristics of the easement, forum principles, and context of each particular case. *Id.* at 1123 n.5. However, the ruling has effectively resulted in a *per se* result.

99. *Id.*

100. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1160 (D. Utah 2001) (quoting *Warranty Deed* at 1-3).

101. *Id.* at 1160 (quoting *Special Warranty Deed* at §1.3).

agreement to the contrary.¹⁰² However, the court took it upon itself in both *Hawkins* and *First Unitarian* to determine the nature of the property through a forum analysis, trying to determine what the intentions of the city were in creating the easement.¹⁰³

The result of the Tenth Circuit's ruling is that there is no certainty for government entities when contracting to create easements to determine the scope of property rights, in particular easements. As the Tenth Circuit indicated, its intention was not to hold that the First Amendment applies to all easements, but that easements are open to scrutiny based upon the characteristics of the easement, forum principles, and context of each particular case.¹⁰⁴ Though parties who feel their constitutional rights have been violated should be afforded a day in court, the Tenth Circuit's ruling provides no safe-harbor for government entities to work within when reserving easements. Even if the government entity specifically outlines in the Reservation of Deed of Easement that nothing more than "pedestrian access and passage" are intended,¹⁰⁵ the government must await a ruling from the courts to determine whether its intentions will be upheld. Parties, therefore, are left to the determination of the court. In the process of trumping settled state law, the Tenth Circuit has failed to outline what government entities can do to guarantee pedestrian access while not encroaching on the servient estate's rights.¹⁰⁶ By not honoring the express statements in the Reservation of Deed, the Tenth Circuit leaves both the government entity and buyer of property with uncertainty whether their intentions will be honored. Thus, the ruling undermines the government's ability to plan and utilize public land to maximize the public good.

It is settled Utah Law that a servient estate should only be burdened to the extent of the deed,¹⁰⁷ for to deem otherwise would diminish individual ability to contract. As Judge Stewart noted, the Church should not be penalized for paying fair market value for burdened property¹⁰⁸

102. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1122-1123 (10th Cir. 2002).

103. The Supreme Court has indicated that a government entity can create a designated public forum. *See Perry Educ. Assn. v. Perry Local Educators*, 460 U.S. 37, 46 (1983) (citing *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981)).

104. *First Unitarian Church*, 308 F.3d at 1123 n.5.

105. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1160 (D. Utah 2001).

106. *See First Unitarian Church*, 308 F.3d at 1131. (The Tenth Circuit stated that if the City wanted to retain an easement "the City must permit speech on the easement. Otherwise, it must relinquish the easement so the parcel becomes entirely private." In effect, the Tenth Circuit has stated that First Amendment considerations trump government entities' rights when contracting for easements across private land.)

107. *See supra* note 44.

108. Walsh, *supra* note 10, at A1.

because it was not the intent of the City or the Church to extend the easement beyond “pedestrian access and passage.”¹⁰⁹ The Church would not have purchased Main Street had it known it would be unable to maintain the same restrictions as it does upon the rest of its Church campus which flanks Main Street.¹¹⁰ The Tenth Circuit provides no convincing argument to support the proposition that First Amendment rights automatically trump a government agency’s right to contract the scope of the forum in a reservation of deeds. The court simply stated that if there is unconstitutional action, then the property right should be eliminated or changed into a form that is not unconstitutional.¹¹¹ The court then incorrectly classified the Plaza as a public forum and thereby invalidated the express language of the deed as a violation of free speech. By doing so, the court trumped state property rights and diminished the government’s ability to contract, all under the banner of the First Amendment.

2. The former public forum was eliminated with a non-public forum taking its place

Even if the notion that the government cannot limit the scope of the easement by deed is rejected, the Court still erred in its forum analysis. It is not disputed that before Main Street was sold it was a public forum.¹¹² The dispute centers around whether the three prongs of Justice Kennedy’s test have been satisfied: that of selling the property, changing the property’s physical characteristics, and/or changing the property’s principle use.¹¹³

a. Selling the property. In the *Hawkins* case, the city retained control over the entire plaza thus not selling or conveying any rights to a third party.¹¹⁴ In *Hotel Employees*, the city retained the rights to Lincoln Plaza but allowed a third party corporation, Lincoln Center Inc., to maintain the premises, including the scheduling of events.¹¹⁵ Clearly in both of these instances the first prong of Justice Kennedy’s analysis has not been

109. *First Unitarian*, 146 F. Supp. 2d at 1160.

110. Transcript, Salt Lake City Planning Commission Meeting, March 4, 1999 at 45. (on file with author) (Church attorney stated that it was crucial to the Church to protect the interests on the adjoining Church properties).

111. *First Unitarian*, 308 F.3d at 1122.

112. *First Unitarian*, 146 F. Supp. 2d at 1165.

113. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698-700 (1992) (Kennedy, J., concurring).

114. Brief for Appellee at 6-7, *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, *en banc denied*.

115. *Hotel Employees & Restaurant Employees Union v. City of N.Y. Dept. of Parks & Recreation*, 311 F.3d 534, 541 (2nd Cir. 2002).

met, that of selling the property, yet both these Courts determined that a non-public forum exists.

b. Changing the property's physical characteristics. The Tenth Circuit limited its review of the physical characteristics and property's principle use to that of the easement rather than examining the characteristics of the servient estate (the Plaza now owned by the Church). The court states "it is the purpose of the easement, the property that is a forum of some type, and not the purpose of the Church Plaza, the surrounding property, that is at issue."¹¹⁶ However, it is clear from both *Hawkins* and *Hotel Employees* that in the interest of completeness both interests of the servitude and servient owners need to be addressed. In *Hawkins*, the court did not limit its analysis to individuals' ability to cross, or "cut through" the plaza, but examined the nature of the DPAC as a whole.¹¹⁷ Again in *Hotel Employees*, the court looked at the characteristics of the entire Lincoln Complex. By limiting the analysis to a non-possessory interest such as the easement alone, it is clear that no physical characteristics can be ascertained. The court was, therefore, able to avoid meeting the second prong of the Kennedy test. The court simply stated that the easement has many similarities to a sidewalk that has traditionally been held to be a public forum.¹¹⁸ However, the court should not just make a broad characterization of all easements as maintaining the same physical characteristics as sidewalks. There are numerous examples of easements that do not constitute sidewalks such as running utility lines across individuals' property. It is necessary to look at the easement in light of its surroundings to properly balance First Amendment and private property rights.

Upon examining the changes that have taken place on Main Street, it is clear that a "special type of enclave" has been established.¹¹⁹ The Church, at its own expense, removed the street and sidewalks. The Church's name is conspicuously displayed on all entrances, there are many religious sculptures and images presented, and there is a large reflecting pool in front of the LDS temple.¹²⁰ No remnants of the former sidewalk or street exist. Instead, "reddish-grey granite pavers" now cover the Plaza.¹²¹ Additionally, the Church placed streetlights and garbage cans on the Plaza that are identical to those on the surrounding church

116. *First Unitarian*, 308 F.3d at 1128.

117. Brief for Appellee, *supra* note 114, at 6-7.

118. *First Unitarian*, 308 F.3d at 1129.

119. *Hotel Employees*, 311 F.3d at 550 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)).

120. Brief for Appellee, *supra* at note 114, at 3.

121. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1167 (D. Utah 2001).

campus.¹²² These changes indicate that this Plaza is not a public property but an ecclesiastical park that serves as an extension of the Church's downtown religious campus with the Church's Temple and World Headquarters flanking the Plaza.¹²³

The changes made on Main Street Plaza are consistent with those made on the Galleria in *Hawkins*. The Tenth Circuit court, however, argues that the nature of the property in *Hawkins* was changed because the street dead-ended into a park and not because a public street was converted into a 600-foot glass Galleria.¹²⁴ However, the term dead end is never mentioned in the *Hawkins* decision¹²⁵ and the court in *Hawkins* looked at physical changes to the entire DPAC.¹²⁶ By ignoring the vast physical changes made on the Plaza, the Tenth Circuit has ignored the *Hawkins* precedent.

c. Changing the property's principle use. The main thrust of the Tenth Circuit's analysis focuses on the third prong of Justice Kennedy's test, though one prong of the analysis should carry no more weight than any other prong.¹²⁷ The notion that the property's principle use should be limited to that of a public thoroughfare rather than the use for which the Church purchased the property is improper and both the City and Church's purpose behind the Plaza should be examined.

The *First Unitarian* court distinguishes *Hawkins* by arguing that the main purpose of the Galleria was for ingress and egress into the DPAC¹²⁸ and that the Plaza's main purpose is for pedestrian traffic.¹²⁹ From the language of the deed it is clear that the City and Church did not intend for anything more than mere "pedestrian access and passage"¹³⁰ across the Plaza: otherwise the reservation would not specify that "[n]othing in the reservation of use of this easement shall be deemed to create or constitute a public forum."¹³¹ The court implicitly refutes the specific intention of the deed to restrict certain activities by stating that the City first proposed that speech on the Plaza should not be more restrictive

122. *Id.*

123. *See supra* note 75 (the Tenth Circuit in *Hawkins* noted that the mere crossing of the plaza by pedestrians does not mean that a public forum exists).

124. *First Unitarian*, 308 F.3d at 1130.

125. Brief for Appellee, *supra* note 114, at 7.

126. *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999).

127. *Id.* at 1287 (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 686 (1992)).

128. *First Unitarian*, 308 F.3d at 1127.

129. *Id.* at 1128.

130. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1167 (D. Utah 2001) (quoting Warrant Deed at 1-3).

131. *First Unitarian*, 308 F.3d at 1118-1119 (quoting *Aplt. App. Vol II* at 362).

than a public park.¹³² However, this proposal came up during a planning commission meeting in which an individual suggested, after approving of the proposed Plaza, that restrictions should not be greater than a public park.¹³³ But this proposal was simply part of the Planning Commission's recommendation to the City Council and was not adopted in the final agreement approved by the City Council.¹³⁴ As in *Hotel Employees*, if something is not adopted as official policy of the governing body then it should not constitute a legal conclusion.¹³⁵ A mere discussion should not be used to trump the unambiguous language of the deed showing that nothing more than passage was intended.

The court also stated that "but for" the easement the City would not have entered into the agreement with the Church.¹³⁶ Statements made by Salt Lake City attorney Roger Cutler to the ACLU showed that, for the City, the sale of the property was never contingent on the easement. Cutler stated that, if forced to choose, "the [C]ity would elect to deed the easement to the purchaser, rather than face a remitter of all or any of the purchase price because of a claim of recession or deed reformation due to a mistake of fact and/or law on the forum status of this property."¹³⁷ The result would be the City would give up any rights it had to the Plaza.¹³⁸ It was also recognized that the City asked for the easement to appease critics who thought that the Church might not allow individuals to cross the Plaza,¹³⁹ not because City leaders' felt "there was a legitimate need for the easement."¹⁴⁰ This also refutes the contention that the reverter clause was in place to guarantee the rights of the citizens. It was instead intended only to appease certain critics to the Plaza, not as an indication of the main purpose of the Plaza as a pedestrian thoroughfare. The Tenth Circuit even acknowledged that the "City has attempted to change the forum's status"¹⁴¹ as the "City Council knew, understood, and acquiesced in the terms of a limited public access easement, including the fact that it was not to constitute or be used as a public forum."¹⁴² It is clear that the

132. *Id.* at 1128.

133. Transcript, Salt Lake City Planning Comm'n Meeting, *supra* note 110, at 37.

134. Transcript, Salt Lake City Council Meeting, April 13 1999 at 78-79.

135. *Hotel Employees & Restaurant Employees Union v. City of N.Y. Dept. of Parks & Recreation*, 311 F.3d 534, 549 (2nd Cir. 2002)

136. *First Unitarian*, 308 F.3d at 1126.

137. Letter from Roger F. Cutler, City Attorney for the City of Salt Lake, to Stephen C. Clark of the American Civil Liberties Union of Utah Found., Inc. (June 9, 1999).

138. Brady Snyder, *Letters Dispute Plaza Stance*, DESERET NEWS, Nov. 27, 2002, at A1.

139. Letter from Roger F. Cutler to Stephen C. Clark, *supra* note 137.

140. Brady Snyder, *supra* note 138, at A01.

141. *First Unitarian*, 308 F.3d at 1131.

142. Letter from Roger F. Cutler, City Attorney for the City of Salt Lake, to Stephen C. Clark of the American Civil Liberties Union of Utah Found., Inc. (May 17, 1999).

main purpose of the Plaza was not to increase the pedestrian flow of traffic, but as an extension of the Church's campus and ingress and egress to the Church's facilities.

The court reasoned that because the City and the Church planned for and encouraged public use, the main purpose of the Plaza was for pedestrian ingress and egress across the Plaza and not ingress and egress to Church facilities flanking the Plaza.¹⁴³ The court, in making such a conclusion, was clearly not examining the actual use of the Plaza. In fact, the Salt Lake transportation board noted that the majority of people who utilize Main Street Plaza do so to access adjacent church buildings¹⁴⁴ and if there was no easement across the Plaza the impact on pedestrian travel would be minimal as individuals would have to travel only an extra one-third of a mile.¹⁴⁵ It was estimated that between 19,000 and 30,000 individuals utilize the Plaza to reach Church owned properties daily as opposed to a much more minimal amount that actually walk through the property.¹⁴⁶ The Plaza can be compared to Lincoln Plaza in the fact that the public can "wander through the [C]hurch [P]laza, but most go there as a destination or to get to other [C]hurch buildings"¹⁴⁷ as people can wander through Lincoln Plaza, but go there to access the entertainment and artistic facilities.

In summary, the Tenth Circuit felt that "the district court erred in considering whether speech activities were compatible with an 'ecclesiastical park.' Providing for a religious park is the purpose of the surrounding Plaza property, not the easement, and must be the Church's purpose, rather than the [C]ity's."¹⁴⁸ In speaking during the approving phases of the Plaza, Church President Gordon B. Hinckley stated "[t]his beautiful place will inspire faith where now there is asphalt and moving cars."¹⁴⁹ Clearly, however, it was not only the Church's desire to create a "beautiful place" downtown; the City also recognized the value of the Church's Plaza. Salt Lake City Council Chairman Bryce Jolley stated, "[e]verything will be improved with that plaza. . . . It not only improves the landscape and architecture around there, but it [also] brings more

143. *First Unitarian*, 308 F.3d at 1126-27.

144. Heather May, *Advisory Board Backs City's Plaza Plan*, SALT LAKE TRIB., March 5, 2003, at B2.

145. Heather May, *Take the Deal, Abandon Easement on Plaza*, SALT LAKE TRIB., April 5, 2003, at B5.

146. Rebecca Walsh, *Fight Over Main Street Plaza Down to Meaning of 'Sidewalk'*, SALT LAKE TRIB., Dec. 19, 2000, at B2.

147. Heather May, *Sides in Plaza Suit Eye NYC Case*, SALT LAKE TRIB., Dec. 14, 2002, at B1.

148. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1128 n.10 (10th Cir. 2002).

149. Rebecca Walsh, *New Plaza Proposed on Main*, SALT LAKE TRIB., Dec 2, 1998, at A1.

people to downtown Salt Lake City, building the business community, restaurants, retailers and hotels.”¹⁵⁰ The City was not in a position to accomplish this and so it solicited the Church to create the downtown Plaza as an extension of its campus.¹⁵¹

B. Implications of Classifying a Public Forum: The Burden on Government Entities' Ability to Sell Public Land and Maximize Public Good

As the preamble to the Constitution points out, one of the underlying purposes of government is to “promote the general welfare” of its citizens.¹⁵² In fulfilling this charge, government entities often sell public land to generate revenue to foster the public good.¹⁵³ The Tenth Circuit’s ruling limits government entities to two options when selling public land.¹⁵⁴ The first option is selling the land unencumbered. While doing so generates fair market value for the land, it denies any possible future public access to the land. The costs associated with selling the land are also increased as leery buyers spend extra time and effort to make sure the land is unencumbered. These increased costs are not only assumed by the buyers but also passed onto government entities desiring to sell the land.

Alternatively, public land can be sold with an easement at a deeply discounted price. This discount results from the buyer giving up a stick in their bundle of property rights, the right to exclude others. This option however limits revenue that could be utilized in other areas to maximize the public good. In either case, the ruling deprives states and individuals the ability to negotiate and determine the scope of the easement that best benefits both parties.

Not only is government’s ability to sell land burdened, its ability to gain access across private individual’s lands is now hindered in the Tenth

150. *Id.* See also Mayor Ross C. “Rocky” Anderson, *Regarding Main Street Plaza Proposal*, Dec. 6, 2002 available at <http://www.slccgov.com/mayor/speeches/Main%20Street%20Plaza%20Solution%20Proposal%20Speech.htm> (Salt Lake City Mayor Rocky Anderson stated, “Salt Lake City government has a significant interest in preserving the beautiful, peaceful setting provided by the Main Street Plaza. Not only do millions of tourists visit the area each year, but also many Downtown workers and residents seek respite at the Plaza each day.”).

151. Rebecca Walsh, *Main Street Closure Ready for Approval*, SALT LAKE TRIB., April 3, 1999, at D1 (Salt Lake City Planning Director Bill Wright stating that City did not have money to build the plaza as “[i]t’s a very expensive proposition to build a plaza like this and maintain it.”).

152. U.S. Const. pmbl.

153. UTAH CODE ANN. § 10-8-2(1)(c)(2003) (city governments may “purchase, receive, hold, sell, lease, convey, and dispose of real and personal property for the benefit of the municipality, whether the property is within or without the municipality’s corporate boundaries”).

154. See Brief of Amici Curiae of the States of Utah, Alabama, Kansas, Nebraska, Texas, and West Virginia, Corporation of the Presiding Bishopric of The Church of Jesus Christ of Latter-day Saints v. First Unitarian Church of Salt Lake City *cert. denied* (No. 02-1350).

Circuit. Governments often negotiate with private individuals to gain access to public land, beaches, and state hiking trails.¹⁵⁵ Landowners will not grant easements for public use if there is a possibility their property will become a public forum. The Utah Attorney General, in an amicus brief on behalf of several states, argued that

[P]roperty owners would be most reluctant to allow easements on their property, particularly easements in favor of a government. Disregarding the plain terms of the easement . . . impos[es] a disruptive public forum on the Church Plaza. This is obviously a significant intrusion into the City's prerogative to dispose of its own property as it sees fit. But it is also an enormous intrusion into the State's authority to establish property-law principles that will best serve the interests of the State and its citizens.¹⁵⁶

State governments in the Tenth Circuit are now faced with the challenge of determining what servitudes they have already retained by deed that violate the First Amendment. The ruling of *First Unitarian* has opened up the door for other public servitudes to be deemed invalid. Under settled state law, easements should only be utilized to the extent of "the public purpose for which the easement was obtained,"¹⁵⁷ and, in the current case, the limitation was just for pedestrian passage. Regardless of the intentions of the parties, terms of the easement, and the abridgment of property rights the "First Amendment automatically injects an irrevocable public forum clause in most government-owned public access easements. To be sure, the court of appeals stated that it's holding did not mean that every easement creates a public forum."¹⁵⁸ Under the Tenth circuit ruling:

[T]he result is extraordinary: even if the physical appearance and primary use of a property have changed drastically, even if the property has been sold for fair market value, and even if there are no identified persons who will use the property as a thoroughfare, a public forum will nevertheless exist any time a hypothetical person has the legal ability to walk across that property.¹⁵⁹

155. *Id.*

156. *Id.*

157. *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 247-48 (Nev. 2001) ("[E]xistence of [a pedestrian access] easement alone, without more, does not transform private property into a public forum").

158. Brief of Amici Curiae, *supra* note 154, at 9-10.

159. Brief for Appellee, *supra* note 114, at 8.

C. First Unitarian Provides an Example of Unduly Burdening Public Land

The problems associated with the Tenth Circuit's ruling are evident in the Main Street Plaza case. Salt Lake City began talking with the Church over forty years earlier in an attempt to revitalize downtown through turning Main Street into an extension of the Church's downtown campus.¹⁶⁰ The purpose of the Plaza was to foster beauty and create harmony to the City's main tourist attraction; the Church's Temple Square and office building complex that straddle Main Street. It is argued that annually more than nine million tourists visit the Church's complex downtown, generating a significant portion of the downtown economy. During these talks, the Church made it clear that if the restrictions that existed on its adjoining properties could not be imposed on the Main Street Plaza, they would not enter into the deal. The City was never in a position to turn the street into a park but relied upon the sale to the Church to accomplish this goal. If the *First Unitarian* opinion were in place during the Church and City's negotiations, inevitably the Main Street Plaza would never have been erected. The City and its citizens would have lost a valuable downtown asset that consequently fulfilled the purpose of increasing pedestrian traffic in addition to the revenue generated through the sale.

As Nancy Workman, the Salt Lake County Mayor, pointed out:

Surely, the [C]hurch did not spend over \$8 million to buy a piece of property to serve as a platform for behavior it finds objectionable No private entity would enter into a transaction such as that, so why should the church be expected to? Let's be fair. And let's recognize the value the plaza has added to our community.¹⁶¹

Additionally, nobody yet knows how far reaching the Tenth Circuit ruling will be as the Main Street Plaza "public easement isn't the only right of way through private property in Salt Lake City."¹⁶² Other easements are found crossing another Church owned property, a downtown housing project, an outdoor shopping mall, and the back yards of individuals.¹⁶³ Two other easement contracts in particular contain many of the same provisions in the Main Street Plaza reservation.¹⁶⁴ The Tenth Circuit ruling effectively opens the door for "those hostile to

160. Walsh, *supra* note 149.

161. Thomas Burr, *Workman Backs LDS Plaza Rules*, SALT LAKE TRIB., Nov. 25, 2002, at C1.

162. Heather May, *Other Owners With Public Right of Way Wonder if LDS Plaza Ruling Affects Them*, SALT LAKE TRIB., Oct. 30, 2003, at A1.

163. *Id.*

164. *Id.*

[private organizations] to forcibly open [private] church grounds, gardens, camps, cemeteries, retreat centers and other private property for antagonistic demonstrations and marches.”¹⁶⁵ There is no certain way, when contracting with a government entity for an easement across private property, to avoid creating a public forum.

D. Resolution of the Easement Issue and the Continued Debate

The Tenth Circuit suggested that one solution to the problem would be to eliminate the public easement.¹⁶⁶ Accordingly, Salt Lake City and the Church reached a settlement agreement where the Church bought the rights to the easement for close to five million dollars in cash and land.¹⁶⁷ This result is ironic in two ways. First, the Church, a fair market purchaser, ended up paying more than fair market value and construction costs to build a Plaza whose main purpose, identified by the Tenth Circuit, was to increase the City’s pedestrian flow - - not for an Ecclesiastical Park. Secondly, at the end of the day the City was willing to give up what supposedly the Tenth Circuit argued was the City’s purpose in the Plaza, that of an easement.

But this settlement agreement has not ended the controversy. On August 3, 2003 the First Unitarian Church voted unanimously to file another lawsuit. The underlying arguments in this new lawsuit is that the city selling the right of way across the Plaza violated individuals First amendment rights as well “as the ban on endorsement of religion found in the U.S. and Utah constitutions.”¹⁶⁸ The suit claims that President Gordon B. Hinckley used religious code to improperly influence city councilmen to vote for the selling of the easement and that Mayor Rocky Anderson yielded to the Church’s influence in order to “shore up his flagging support” on the west side of the City where the Church gave property to the City.¹⁶⁹ However, as an editorial noticed

[t]he irony is too rich to ignore. Before casting a vote Sunday over whether to sue Salt Lake City for selling its public easement on the Main Street Plaza, leaders of the First Unitarian Church expelled everyone who isn’t a member of the congregation. Even the media had to wait outside in silence for nearly two hours until the vote . . . was

165. *Id.* (quoting Martin Nussbaum a Colorado Attorney who represented fifteen organizations in a brief in opposition to the Tenth Circuit’s ruling in *First Unitarian*).

166. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1132 (10th Cir. 2002).

167. Josh Loftin & Brady Snyder, *Main St. Plaza Deal Done*, DESERET NEWS, July 29, 2003, at A1.

168. *City Wants ACLU Main Street Plaza Lawsuit Tossed*, AP, August 29, 2003, available at <http://tv.ksl.com/index.php?nid=5&sid=45460>.

169. *Id.*

made known. Wait a second. Does this mean churches do have a right to suspend First Amendment rights on their own property? Well, of course they do.¹⁷⁰

The ongoing dispute over the Plaza typifies the real dispute in *First Unitarian*, the underlying tensions over the Church's influence in Salt Lake City.

VI. CONCLUSION

Whether the restrictions placed upon the Plaza would survive the non-public forum reasonableness standard is unclear and not addressed in this Note. Regardless of the tension between the Church and other factions, one thing is certain from the Tenth Circuits ruling, by ignoring the intent of the parties through the deed of reservation and by limiting its analysis of the Plaza only to the easement, the court incorrectly classified the Main Street Plaza as a public forum and has created uncertainty within Tenth Circuit property law. The right to exclude others might be included in the bundle of property rights, but in the Tenth Circuit, private property owners subject to government regulation and servitudes best beware.

Braden J. Montierth

170. *Main Street Saga Continues*, DESERET NEWS, August 5, 2003, at A10.