
M E M O R A N D U M

DATE: May 23, 2003
TO: City Council Members
FROM: Russell Weeks
RE: Briefing: Proposed Ordinance Closing, Vacating and Abandoning a Pedestrian and Passage Easement Located on the Former Main Street Between North and South Temple Streets
CC: Cindy Gust-Jensen, Ed Rutan, Rocky Fluhart, David Nimkin, Alison Weyher, Louis Zunguze, Tim Harpst, Gary Mumford, Steven Allred, Lynn Pace, Joel Paterson

This memorandum is intended to address a proposed ordinance to close, vacate and abandon a pedestrian access and passage easement located on the former Main Street right of way between North and South Temple Streets, pursuant to Petition No. 400-03-01. Nothing in this memorandum purports to be a legal opinion. The Administration is scheduled to brief the City Council on May 27. The City Council has scheduled a public hearing on the ordinance June 3. It should be noted that this memorandum is intended to focus mainly on the specific proposed ordinance based on Petition No. 400-03-01.

POTENTIAL OPTIONS

- Forward proposed ordinance for formal consideration.
- Pursue alternatives including time, place, and manner regulations or amending the ordinance to include zoning the Main Street Plaza as open space.
- Delay action until it is clear whether the U.S. Supreme Court will hear an appeal of a ruling by the 10th Circuit Court of Appeals.

ISSUES/POTENTIAL QUESTIONS FOR CONSIDERATION

- According to the City Attorney's Office, the fundamental point of the ordinance is that by relinquishing the pedestrian access easement on the Main Street Plaza the City and public will have no legally guaranteed right of pedestrian access across the plaza and that the Church of Jesus Christ of Latter-Day Saints, as the plaza's private property owner, will have the right to decide not to allow access.
- The proposed ordinance also appears to be the first step in the Settlement Agreement (outlined later in this memorandum) that would lead to the construction of community facilities near the Sorenson Multi-Cultural Center at 855 West California Avenue.
- Given the above, one question the City Council may wish to consider is: Does the proposed ordinance represent the greater public good in resolving issues associated with the Main Street Plaza?

Item A-2

- The City Attorney’s Office has suggested that if the proposed ordinance is forwarded for formal consideration, it should be revised before formal consideration to make clear that adoption of the ordinance is not an implicit endorsement of part of a March 5, 2003 letter from the Salt Lake City Transportation Advisory Board in which the letter said the Board “strongly recommended” that the LDS Church “maintain public access for pedestrians and bicyclists across the Plaza.” Again, the City Attorney’s Office said it wanted to make clear that the LDS Church as the plaza’s owner would be the sole entity to determine public access of the property.
- Do each of the conditions outlined in the Settlement Agreement have to occur in sequence? For instance, how would a lawsuit against the City or the Corporation of the Presiding Bishop affect closing the Settlement Agreement?
- Would zoning the Main Street Plaza as open space protect the plaza’s future use to a greater extent than requirements in the Settlement Agreement and the Amended Special Warranty Deed?
- Would the anticipated donations from the Alliance for Unity and James L. Sorenson be enough to provide adequate facilities and services to serve residents in the contemplated geographic service area of those facilities and services, or would additional revenue be required?
- Do people from the contemplated service area use the Sorenson Center now?
- What forms of transportation are or would be available for people from the contemplated service area to get to and from the expanded facilities?

DISCUSSION/BACKGROUND

On October 9, 2002, the U.S. 10th Circuit Court of Appeals ruled that speech protected by the *Constitution’s* First Amendment was allowed on the easement addressed in the proposed ordinance. The ruling observed in part that:

The actual purpose and use of the easement here is to provide a pedestrian thoroughway for the general public. This is not merely the use which the City has in practice permitted, but also the express purpose for which the City retained the easement. The City’s stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic between the residential area to the north of the plaza and the business areas to the south. ... The easement through the plaza was specifically retained in order to preserve and enhance the pedestrian grid in the downtown. (Circuit Court ruling – pages 22 and 23.)

The Circuit Court’s three-judge panel went on to say, “If it wants an easement, the City must permit speech on the easement. Otherwise, it must relinquish the easement so the parcel becomes entirely private.” (Circuit Court ruling – page 37.)

PROPOSED ORDINANCE

The ordinance proposes to “close, vacate and abandon” the easement on Main Street between North and South Temple streets. The stated purposes of the proposed ordinance are to address the 10th Circuit Court’s ruling and to “resolve the legal dispute over the Pedestrian Easement between the City and the Corporation of the Presiding Bishop ...” (Proposed Ordinance – Pages 2 and 3) The legal dispute involves whether the 10th Circuit Court ruling voided the easement or whether it voided only the conduct regulations that were in the original Special Warranty Deed recorded on April 27, 1999. Another stated purpose is the potential to build

Item A-2

community center near the Sorensen Center located at 855 West California Avenue. (April 9 Planning Commission meeting minutes – pages 24 and 25).

According to the City Attorney’s Office, the fundamental point of the ordinance is that by relinquishing the pedestrian access easement on the Main Street Plaza the City and public will have no legally guaranteed right of pedestrian access across the plaza and that the Church of Jesus Christ of Latter-Day Saints, as the plaza’s private property owner, will have the right to decide not to allow access.

Pared to its elements, the proposed ordinance would close, abandon and vacate the easement “upon fulfillment of the conditions provided in Section 3.”

Section 3 reads: “This closure, vacation and abandonment are conditioned upon the closing of the transactions pursuant to the terms of a Settlement Agreement between the City and the Corporation of the Presiding Bishop substantially in the form of Exhibit A and an Amended Special Warranty Deed substantially in the form of Exhibit B ...”

SETTLEMENT AGREEMENT

According to the document, the Settlement Agreement’s purpose is “to avoid litigation and resolve all of the Disputes ... between the City and the COPB (Corporation of the Presiding Bishop) relating in any way to pedestrian access, pedestrian passage, and the right to control conduct on the Main Street Plaza Property.”

The document contains 10 points of agreement including:

- A mutual release of all claims the City and the Corporation of the Presiding Bishop may have in relation to the 10th Circuit Court ruling and the Main Street Plaza pedestrian easement.
- The transfer of about two acres of land near the Sorenson Multi-Cultural Center from the Corporation of the Presiding Bishop to the City.
- The vacation and conveyance of the public access easement on the Main Street Plaza from the City to the Corporation of the Presiding Bishop.
- The amendment of the Special Warranty Deed recorded on April 27, 1999.
- A division of litigation costs arising from the appeal to the 10th Circuit Court and the Court’s ruling.
- A list of “Conditions and Events of Closing.”

The last item contains six conditions of which “each shall be considered a condition precedent to the others.” The conditions are:

1. The City Council “shall have” enacted the proposed ordinance, and the ordinance published.
2. “No lawsuit or administrative proceeding shall have been commenced against the City, the COPB, or the officers, agents or affiliates of either challenging the Ordinance, this Settlement Agreement, or any of the transactions or instruments contemplated in this Settlement Agreement.”
3. An escrow holder “shall be in receipt” of “at least” \$5 million in cash and land from the Salt Lake Alliance for Unity and James L. Sorenson “for construction and, in the City’s discretion, furnishings, fixtures, equipment and maintenance ...”

Item A-2

4. The City and the Corporation of the Presiding Bishop “shall have executed and delivered” to the escrow holder “the Deed Conveying Easement Rights.”
5. The Corporation of the Presiding Bishop “shall have executed and delivered” to the escrow holder “the Glendale Special Warranty Deed.”
6. The escrow holder “shall be irrevocably prepared” to issue the City a title insurance policy for the property at 1385 South 900 West Street, and the Corporation of the Presiding Bishop “shall pay the premium” for issuing the insurance policy.

AMENDED SPECIAL WARRANTY DEED

One key point in the Settlement Agreement involves amending the Special Warranty Deed recorded on April 27, 1999. The amendments include:

- Deleting paragraphs Nos. 1.3, 2 – including its subparagraphs, and 6.3. The first deleted paragraph involves the City’s reservation of a pedestrian easement across the Main Street Plaza. Paragraph No. 2 involves “conditions, limitations and restrictions” on all City easements across the plaza. Paragraph 6.3 involves how the original warranty deed may be amended.
- Adding language to Paragraph No. 1.4 of the original deed to require written approval of the City for the Corporation of the Presiding Bishop to build new “fences, walls or gates” on the plaza. According to the additional language, the intent is to preserve the plaza as a view corridor. However, the requirement “shall terminate” if a court determines that City approval to build those items results in creating “the basis for a First Amendment forum of any kind.”
- Rewriting Paragraph No. 4 of the original deed to state the City would have a right of reverter if the Corporation of the Presiding Bishop “fails to use and maintain the Property as a landscaped space” and if the Corporation prevents the City access to utility and public safety easements that also run through the plaza.
- Adding a new paragraph to terminate the right of reverter. Language in the paragraph says, “If a court ... holds ... that the right of reverter in paragraph 4 alone or in combination with any other factor creates ... the basis for a First Amendment forum of any kind, then ... the right of reverter shall immediately and automatically terminate.” However, if a court’s ruling is reversed by a higher court, “the reverter clause shall immediately and automatically revive.”

SPECIAL WARRANTY DEED FOR GLENDALE PROPERTY

The deed is a one-page document in which the Corporation of the Presiding Bishop would turn over about two acres near the Sorenson Multi-Cultural Center to the City for \$1 and “other good and valuable consideration.”

OTHER DOCUMENTS

Property Appraisals – The Administration commissioned two property appraisals in relation to the proposed ordinance – one for the Main Street Plaza pedestrian easement, the other for the roughly two acres of land at 1385 South 900 West. The Main Street Plaza pedestrian

Item A-2

easement was appraised at \$500,000. The land at 1385 South 900 West was appraised at \$275,000.

In response to Council Member queries about the property appraisal for the land at 1385 South 900 West, Council staff met with appraiser J. Philip Cook. Mr. Cook said he had arrived at the appraised price using a variety of factors. However, he said that in general neighborhoods display “value patterns” of property bought and sold, and he followed those patterns for the neighborhood where the property is located. He also said he looked at uses allowed under institutional zoning. Some uses allowed on property zoned for institutional use include: day care centers, medical and dental offices, and community and recreation centers. Mr. Cook will attend the May 27 briefing to answer questions Council Members may have.

Pedestrian Traffic Study – The Transportation Division, the Transportation Advisory Board, and the Planning Division staff support vacating and abandoning the easement in part because of a pedestrian traffic study conducted by the Transportation Division in February. It should be noted that a March 5, 2003, letter to the Planning Commission Chairman Jeff Jonas from the Transportation Advisory Board said that although the Board viewed the closure of the public easement as having a “minor” effect on the City’s public transportation system, the Board “strongly recommended that the Church of Jesus Christ of Latter-Day Saints maintain public access for pedestrians and bicyclists across the Plaza.”

As mentioned previously, The City Attorney’s Office has suggested that if the proposed ordinance is forwarded for formal consideration, it should be revised to make clear that adoption of the ordinance is not an implicit endorsement of the Transportation Advisory Board’s statement quoted above. Again, the City Attorney’s Office said it wanted to make clear that the LDS Church as the plaza’s owner would be the sole entity to determine public access of the property.

According to the study included in the Administration’s transmittal, the Transportation Division counted the number of people walking or riding bicycles through the Main Street Plaza from 6:45 a.m. to 6 p.m. on February 11, 12, and 13 – respectively a Tuesday, a Wednesday and a Thursday. The study acknowledged that the count took place in winter, and studies at different times of the year might produce different results.

According to the study, an average of 544 people a day used the plaza to get from South Temple Street to North Temple Street and vice versa. The study said an average of 209 people a day went from South Temple to North Temple Street, and an average of 335 people a day went from North Temple to South Temple. The study concluded that – if the plaza were not open to the public – people who traverse it now would have to walk from zero to two additional blocks, depending on where they started, where they were going, and how they planned to reach downtown destinations or public transportation.

Perhaps two things should be noted:

I. The study did not include people accessing LDS Church facilities on Temple Square or the Church Office Block east of Temple Square. However, the 10th Circuit Court ruling on Pages 24 and 25 contains the following:

The City and Church contend the purpose of the easement is solely for ingress and egress to Church facilities. They produced evidence in the district court that the vast majority of users were those with church business or tourists whose end destination was the plaza itself or various Church facilities. This argument is at odds with the publicly and

Item A-2

legislatively stated purposes of the easement noted above. In addition, to the extent individuals with church business enter onto the plaza, it is not clear they are actually using the easement because they are not utilizing the plaza for “pedestrian passage” and presumably the Church would permit those with Church business to enter the plaza in the absence of the easement. In other words, providing access to those with church business is more properly characterized as a Church purpose, and does not capture the actual or articulated purpose of the easement, a pedestrian walkway for the public at large.

Given that, the “public at large” appears to be represented in the Traffic Division study.

II. As recently as a May 19 public meeting hosted by City Council Member Nancy Saxton, representatives of the Corporation of the Presiding Bishop described the future use of the plaza as similar to the Church Office Building Block plaza – a plaza that can be traversed 24 hours a day, seven days week. (Tape of May 19 public meeting.) It should be noted that the LDS Church, as the owner of the Church Office Building Block plaza, has sole discretion in determining whether that plaza can be open to public access or closed.

Free Speech Study – The Administration has conducted a study of the number of permits issued under City Code section 3.50.020 titled *Commercially Related Special Events and Free Expression Activities*. The study surveyed the number of permits issued for free expression activities:

1. On the Main Street Plaza from October 18, 2002, to April 9, 2003.
2. All free expression activities in Salt Lake City during the same time period.
3. Free expression activities in the City in calendar year 1998 before the LDS Church purchased the section of Main Street between North Temple and South Temple streets.

According to the study:

1. Three free speech permits were issued for free expression activities on the Main Street Plaza between October 18, 2002, and April 9, 2003.
2. Forty-four permits were issued for free expression activities in other areas of the City during the same time period.
3. In 1998 no permits were issued for either side of Main Street between North Temple and South Temple streets, but 52 permits were issued for other areas of the City.

The study acknowledges that the City Code does not require people to obtain permits “if one or two people wish to speak or pass out literature,” or if the immediate need for a free expression activity outweighs the length of time it would take to obtain a permit.

A Turning Point for Peace – The Administration has used the document in a variety of public meetings regarding the proposed ordinance and settlement agreement. According to the document:

An expansion of programs in the Glendale area has been contemplated for several years. Current programs at the Sorenson Center are at capacity, and many have waiting lists. Residents and non-profit organizations have identified substantial needs in early childhood programs, after-school programs, business consulting, legal assistance, and health care. Existing infrastructure for these purposes in the area is minimal and cannot meet the demonstrated needs.

The document also notes that the health clinic at the Sorenson Center served 8,144 patients last year but “is at capacity and only serves residents of the 84104 zip code.” The 84104

Item A-2

zip code is bordered by Interstate 80, 600 West, 2100 South and 7200 West. Residents in the zip code area live east of Redwood Road. The area west of Redwood Road is an area largely of commercial and industrial development.

A map in the document outlines a geographical service area for proposed facilities and services near the Sorenson Multi-Cultural Center. The geographical service area is bordered by North Temple on the north, a “staircase” eastern border of 200 West, West Temple, State and 700 East streets, 2100 South on the south and Redwood Road on the West.

It should be noted that Mayor Ross C. Anderson told the Salt Lake City Planning Commission on April 9 that programs and partnerships involved in expanding facilities and programs at and near the Sorenson Multi-Cultural Center had not yet been decided. A public process to determine residents’ needs and expectations for expanded facilities and services would occur after action involving the relinquishment of the public access easement and the transference of property. (April 9 Planning Commission minutes: Page 5.)

Given the size of the service area contemplated, Council Members may wish to consider the following questions:

- Would the anticipated donations from the Alliance for Unity and James L. Sorenson be enough to provide adequate facilities and services to serve residents in the contemplated geographic service area, or would additional revenue be required?
- Do people from the contemplated service area use the Sorenson Center now?
- What forms of transportation are or would be available for people from the contemplated service area to get to and from the expanded facilities?

Alternatives

Since the 10th Circuit Court ruling about the pedestrian easement on the Main Street Plaza it has been acknowledged that there are two ways to address the ruling: Keep the pedestrian easement but enact time, place and manner restrictions or relinquish the easement.

Some City Council members also have considered the merits of relinquishing the easement but zoning the Main Street Plaza as open space. It should be noted that the proposed Settlement Agreement and the Amended special warranty deed address the issue of the Corporation of the Presiding Bishop failing “to use and maintain the Property as a landscaped space.” However, one question the City Council may wish to consider is whether zoning the Main Street Plaza as open space would give the plaza added protection if the pedestrian easement is relinquished.

After the 10th Circuit Court ruling the Administration proposed its own time, place and manner regulations for the pedestrian easement. However, the Administration chose to pursue the proposed ordinance before the City Council after it became apparent that the Corporation of the Presiding Bishop would not support time, place and manner regulations. One of the main issues involved in time, place and manner regulations was whether the Corporation of the Presiding Bishop would assent to defining areas within a relatively undefined easement for First Amendment speech activities.

Nevertheless, retainment of the pedestrian access easement and enacting time, place and manner regulations continues to generate discussion. Council Member Nancy Saxton hosted a

Item A-2

public meeting May 19 to explore the potential for enacting time, place and manner regulations for the easement.

According to an audio tape of the meeting, several alternatives were discussed including:

- A review of a proposal by former City Council Member Roger Thompson to create a “Hyde Park” setting near the Salt Lake Base and Meridian marker on South Temple Street. The area would be defined by gates, and the City would relinquish the easement through the plaza in exchange for the Hyde Park area.
- Two proposals to separate the easement by grade from the rest of the plaza to define the extent of the pedestrian easement.
- A proposal to build a pedestrian walkway between the parking garage below the plaza and the plaza itself.

City Council staff’s own research has found one municipal ordinance that directly regulates the picketing of “religious events.” Topeka, Kansas, adopted an ordinance prohibiting the picketing of religious events citywide “during the time period from one-half hour” before the starting time of an announced religious event until “one-half hour” after the end of an event “on public property.”

The ordinance defines a religious event as “any scheduled worship service, wedding, funeral rite, memorial service for the dead, or other observance of a religious sacrament, ritual, ceremony or celebration that takes place at a house of worship or on the property where a house of worship is situated.”

According to Topeka City Attorney Brenden Long, Topeka enacted the ordinance in the mid-1990s in response to the picketing of church congregations in that city by Topeka Baptist Pastor Fred Phelps. The Rev. Phelps gained national notoriety in 1998 when he and congregation members picketed a memorial service in Laramie, Wyoming, for Matthew Shepard, a gay college student who was beaten to death outside Laramie. Mr. Long said Topeka revised the ordinance after it was twice challenged in Kansas state courts. He said the current ordinance has been an effective means of regulating First Amendment activities of the kind used by the Rev. Phelps for the last seven or eight years.

It should be noted that at least portions of the Topeka ordinance were included in the Administration’s time, place and manner ordinance that was set aside in favor of pursuing the current ordinance. A copy of the Topeka ordinance is attached.

Another alternative suggested recently is to wait until it is clear whether the U.S. Supreme Court will hear an appeal of the 10th Circuit Court ruling regarding the Main Street Plaza. Some have estimated that the Supreme Court will decide in about 30 days whether to hear the appeal. If the Supreme Court decides to hear the appeal, a final decision would be issued in about a year. If the Court declines to hear the case, the proposed ordinance still would be available to consider. A copy of an editorial arguing in favor of delaying action until the Supreme Court makes its intentions known is attached.

Item A-2