Speech: Puerto Rico Municipalities Must Ensure that Gated Communities Provide Jehovah's Witnesses with Access to Public Streets

Watchtower Bible and Tract Soc'y v. Municipality of San Juan, Nos. 13-1605, 1718, 1719 (1st Cir. Nov. 20, 2014)

In the latest of chapter of a longstanding legal battle, the First Circuit has required that under Puerto Rico's "Controlled Access Law," municipalities must administer a system that ensures Jehovah's Witnesses receive keys to unmanned gated communities and allow access through manned gates upon presentation of an ID and statement of purpose.

In response to spiraling violent crime, Puerto Rico enacted a "Controlled Access Law" allowing for gated residential communities and tasking municipalities with the duty to administer them. These communities – called "urbanizations" - incorporate public streets within them.

The law has resulted in continuing litigation from the Jehovah's Witnesses, who use public streets to spread their message. They were effectively shut out of these gated communities, either because guards would not let them pass ("manned urbanizations") or because the gates were unmanned but required keys, which only residents possessed ("unmanned urbanizations"). They sued the municipalities and the Commonwealth of Puerto Rico, alleging that the Controlled Access Law was unconstitutional, both on its face and as applied to them. The District Court disagreed that the law was unconstitutional on its face, but declined to address the "as-applied" challenge. The Jehovah's Witnesses appealed. The First Circuit affirmed the denial of facial invalidity but on "as applied" grounds ordered the District Court to ensure the plaintiffs had access to spread their religious message to the urbanizations.

The District Court, on remand, ordered each municipal defendant to certify that all urbanizations within the municipality provide "unfettered" access to Jehovah's Witnesses who announce their affiliation and purpose to authorities. Both parties appealed the order.

HELD: Plaintiffs are entitled to access public roads to the gated communities, and the District Court's resolution—that municipalities must ensure Jehovah's Witnesses right to pass manned gates (upon providing adequate ID and a statement of their purpose) and unmanned gates (via the use of keys, to be maintained and distributed by the municipalities), is a narrowly-tailored, constitutionally-sound remedy.

DISCUSSION: The municipalities first challenged the lower court's grant of relief without factual findings that they (as opposed to the urbanizations) violated Plaintiffs' constitutional rights. Because the urbanizations were responsible for the harm, if any, to plaintiffs, under *Monnell* the municipalities could not be held liable. The appellate court agreed that the lower court never explicitly identified the municipalities as wrongdoers, but the record in total indicated that it was the municipalities' custom and practice of issuing permits – a duty assigned to them under the Controlled Access Law - to urbanizations without ensuring they would provide access to public streets for protected activities that infringed the Jehovah's Witnesses rights. The Circuit Court placed legal responsibility under *Monnell* on the cities, not the urbanizations.

Next, the municipalities argued the lower court erred by failing to sufficiently explain its reasons for issuing an injunction. The Circuit Court agreed that under FRCP 65(d)(1)(A) the lower court was required to "state reasons why it issued" the injunction, but, again relying on the record as a whole, found the lower court did so. The orders and hearing transcripts together "chronicled" the court's efforts to balance the competing interests of defendants' provision of security for residents against the plaintiffs' First Amendment rights and provided a meaningful basis for appellate review.

Both parties argued the lower court violated the mandate rule, which provides that an issue cannot be relitigated in the lower court if already decided on appeal. Plaintiffs claimed the District Court ignored the Circuit's pronouncement that "a manned guard gate for each urbanization is required, unless the urbanization carries a burden of special justification" allowing it to forgo hiring guards.

The cities, on the other hand, said the lower court should not have adopted a global solution and, instead, should have crafted a remedy for each defendant-city because of the Circuit Court's statement in the first appeal that "the District Court will have to determine whether and when it is reasonable to rely on a buzzer system of some limited guard access."

The Circuit Court admitted "readily" that its previous ruling created some "ambiguity" as to the scope and discretion available to the lower court in crafting a remedy, but held that was of no consequence since remedial considerations were not part of the issue appealed previously. The issue in "*Watchtower I"* had been whether the District Court erred in dismissing any or all of Plaintiffs' claims. Because that issue was unrelated to remedies, whatever the court may have said about remedies in that opinion did not support an argument that the lower court violated the mandate rule. The Circuit Court also dealt with Plaintiffs' core First Amendment argument. It noted that the First Amendment is not absolute, but rather allows for reasonable time, place, and manner restrictions on expressive activity. The lower court, it found, crafted a balanced scheme imposing justified restrictions on Plaintiffs' speech without reference to content. It opened the channel of communication they sought (access to urbanizations), and narrowly-tailored the remedy by allowing Jehovah's Witnesses to obtain, but share, a key to each and every urbanization they sought to visit.

While the court conceded that sharing a key between all Plaintiffs is a logistical challenge, it found the lower court was faced with a difficult scenario and found a "practical" solution. It disagreed with Plaintiffs' contention that the solution should have applied island-wide, rather than just for the few cities involved in the case—Plaintiff had chosen to sue a few representative municipalities rather than all Puerto Rican cities; and thus the remedy's limited application to the those cities was of the Plaintiffs' own creation.

The court also rebuffed the municipalities' challenge that the lower court's remedy burdened them administratively by requiring them to keep track of keys and distribute them. Because the legislature required cities to permit and regulate urbanizations under the Controlled Access Law, the lower court reasonably placed this administrative burden on them.

Finally, the court dealt with the lower court's order that unmanned urbanizations seeking an exemption from the remedial scheme do so through the cities. The Circuit Court found that the court, not the municipality, is the arbiter of this issue and therefore any evidence an urbanization might have on the question should be brought directly to the court or a court-appointed special master.

http://media.ca1.uscourts.gov/pdf.opinions/13-1605P-01A.pdf (last accessed Dec. 4, 2014)