

Denver Sports & Entertainment Law Journal

Volume 21
Issue 1 *Spring*

Article 5

2018

Ball v. City of Lincoln, Nebraska

Follow this and additional works at: <https://digitalcommons.du.edu/selj>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Sean M. Winebrenner & Leeann M. Lower, Ball v. City of Lincoln, Nebraska, 21 U. Denv. Sports & Ent. L.J. 13 (2018).

This Case Comment is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Sports & Entertainment Law Journal by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Ball v. City of Lincoln, Nebraska

BALL V. CITY OF LINCOLN, NEBRASKA

By: Sean M. Winebrenner and Leeann M. Lower***

ABSTRACT

On March 7, 2015, Larry Ball was cited for trespassing by the Lincoln Police Department when passing out religious leaflets outside the Pinnacle Bank Arena. Ball brought action against the City of Lincoln, Nebraska along with Pinnacle Bank/Spectator Management Group (“SMG”), alleging a violation of his First Amendment rights. More specifically, he claimed SMG violated his constitutional rights by denying his exercise of free speech based upon the premise that public property is a nonpublic forum. The District Court was tasked with evaluating Pinnacle Bank Arena’s Exterior Access and Use Policy to determine whether Ball’s First Amendment rights were violated.

Many questions came into play when evaluating the legal issues of this case. Were Larry Ball’s First Amendment rights violated? How are the rights of the individual weighed against the needs of the public? What are considered public and nonpublic areas? What are traditional public forums? Upon consideration of the aforementioned legal issues and the evidence presented, the U.S. District Court for the District of Nebraska denied Ball’s motion for injunctive relief.¹

FACTS OF THE CASE

Pinnacle Bank Arena (the “Arena”) is located in the city of Lincoln, Nebraska, hosting athletic, public, recreational, and entertainment events. In October of 2014, SMG (the “Defendants”), operator of the Arena, adopted the Exterior Access and Use Policy (the “Policy”), outlining certain exterior areas as *nonpublic* forum areas reserved for the use of tenants and the artists or productions they authorized. The Policy was created to protect the “Plaza Area” in front of the main doors for use by tenants, and to ensure safety and crowd management. With 12,000 to 15,000 people entering and exiting a facility during events, consistency and efficiency in relation to

* Power Skating Instructor, Indy Junior Fuel Hockey, Indianapolis, IN; M.A. Sport Administration, Ball State University, Muncie, IN.

**Assistant Professor, Department of Human Sciences, The Ohio State University, Columbus, OH; Ph.D. Sport Management, The Ohio State University, Columbus, OH.

¹ Ball v. City of Lincoln, Nebraska, No. 8:15CV95, 2015 WL 1781817 (U.S. D. Neb. April 15, 2015).

accessibility to patrons was considered important to Defendants. To further reduce crowd management issues and ensure safety, the Policy banned certain types of public communication within defined areas of the Arena perimeters, such as leafleting, merchandise sales, picketing, signature gathering, and promotional material distribution. The Policy was posted on the Arena's website and copies were made available to the public. Therefore, the specific exterior areas designated as nonpublic forums were communicated to citizens, such as Larry Ball (the "Plaintiff").

Plaintiff is a citizen of Lincoln, Nebraska, who expresses his Christian faith by passing out pamphlets with Christian messages. On March 15, 2014, he handed out religious items, directly outside the Arena doors, to individuals attending the boys' state high school basketball tournament. The Arena's staff approached him multiple times, each time asking him to move outside the Plaza Area to the sidewalk. Plaintiff returned later that afternoon and, again, began leafleting in the Plaza Area, albeit in a different location, north of the bollards. SMG staff then contacted the Lincoln Police Department after he refused to move. Lincoln police officers asked Plaintiff to move to the sidewalk outside the Plaza Area, but he again refused to move and was subsequently arrested and ticketed for trespassing and refusing to comply with the officers' directives. Plaintiff challenged the arrest and ticket, claiming a violation of his First Amendment rights, upon which the charges were dismissed.

Approximately one year later, on March 5, 2015, Plaintiff returned to the Arena to hand out more pamphlets. He was aware of the Policy, having received a copy from the Arena's staff. Plaintiff stood in the Plaza Area north of the bollards, approximately 25 feet from an Arena door. The Lincoln Police Department were, again, called and he was, again, ticketed for trespassing, but was not arrested. Two days later, Plaintiff distributed leaflets again on a sidewalk allegedly designated as a public thoroughfare outside the Plaza Area. Once again, he was cited for trespassing, at which time he left the Arena property. He subsequently filed a legal complaint in the U.S. District Court for the District of Nebraska in an attempt to seek injunctive relief and monetary damages for alleged violations of his First Amendment rights.

COURT ANALYSIS

The Supreme Court has outlined three categories of forums regarding free speech: (1) the traditional public forum, (2) the designated public forum, and (3) the nonpublic forum. Traditional public forums are "places which by long tradition or by government fiat have been devoted to assembly and

debate and the rights of the state to limit expressive activity are sharply circumscribed.”²

Traditional public forums are those that have “immemorially been held in trust for the use of public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”³ The Supreme Court has recognized sidewalks, streets, and parks as traditional public forums. In these public forums, the government cannot prohibit communicative activity. Alternatively, designated public forums are public property which the State government has unfolded for use by the public as a place for articulating activity and individuals are afforded the same protection provided to traditional public forums. Lastly, nonpublic forums are not specifically designated as open to public expression and individuals possess no protection.

In his complaint, Plaintiff asserted that his First Amendment free speech rights were violated by the Policy enforced by Defendants. He argued that the Arena is a traditional public forum; and, therefore, he has the right to express his freedom of speech at the facility’s perimeters. In support of his argument, Plaintiff claimed the Plaza Area has the physical characteristics of a traditional sidewalk. Appearance and location of a walkway are supportive factors in determining whether the walkway is a sidewalk, for purposes of the public forum analysis. For example, in *U.S. v. Grace*,⁴ the Supreme Court found the restriction of speech on the public sidewalks surrounding the Supreme Court building unconstitutional, as the sidewalks around the building were indistinguishable from any other sidewalk in Washington D.C. and should not be treated differently.

In response, Defendants argued that the Policy is a reasonable restriction on speech because the Plaza Area is a nonpublic forum. In *Cornelius v. NAACP*,⁵ the Supreme Court stated that “nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities.” Defendants claimed the Policy is designed to reduce disruption that might be caused by activities, such as Plaintiff’s, in the Arena’s perimeter. As Defendants are state actors, the First Amendment rights of private citizens must be balanced by the government’s interest in

² Perry Edu. Ass’n. v. Perry Local Educators Ass’n., 460 U.S. 37 (1983).

³ *Id.*

⁴ United States v. Grace, 461 U.S. 171 (1983).

⁵ Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985).

the needs of the public. In considering this balancing test, Defendants alleged that Plaintiff's activities within the Arena's perimeters caused safety concerns for the public using the Arena.

In response to Plaintiff's traditional public forum argument, Defendants claimed the markings of the Plaza Area's boundaries are nonpublic and reasonable (see Figure 1). Specifically, Defendants asserted that the sidewalks around the Arena's perimeter have distinctive colors and design and clearly do not match public sidewalks outside the perimeter. The boundary elements identified by Defendants, along the southern edge of the Plaza Area, are notably less distinctive than the landscaping and grassy area that separates the Plaza from the Arena.

COURT DECISION

The primary legal issue examined by the district court was whether or not the Arena's perimeters are considered a public or nonpublic forum and if the sidewalks look, act, and function like a public sidewalk. The court ultimately held that Plaintiff did not demonstrate a violation of his established constitutional rights. More specifically, he failed to demonstrate that the Policy's perimeters around the Pinnacle Bank Arena's entrance is a public forum. Plaintiff also failed to demonstrate that Defendants' Policy restricting certain expressive activity in the Plaza Area is unreasonable.

The district court found that the Arena's perimeters have several physical characteristics common to public forums and may function as a type of public thoroughfare; however, it noted that the use of the Plaza Area as a forum for unlimited public expression was inconsistent with the Plaza Area's traditional use and principle purpose. The city of Lincoln, Nebraska's purpose in establishing the Plaza Area, and the Policy implemented, suggested that the Plaza Area was not intended to be used as a public forum. Accordingly, the district court concluded that Plaintiff was not likely to prevail on his claim that the Plaza Area is a traditional public forum.

Furthermore, the district court found that enforcement of the Policy did not seriously impair Plaintiff's First Amendment rights, as he can equitably reach his target audience in the public sidewalk near his desired location, which preserves the government's interest in public safety. As a result, the district court denied Plaintiff's motions for preliminary injunction and temporary restraining order, instructing him to practice his activities in the future in public areas, across the street from the Arena's perimeters; otherwise, he will be subject to further arrest.

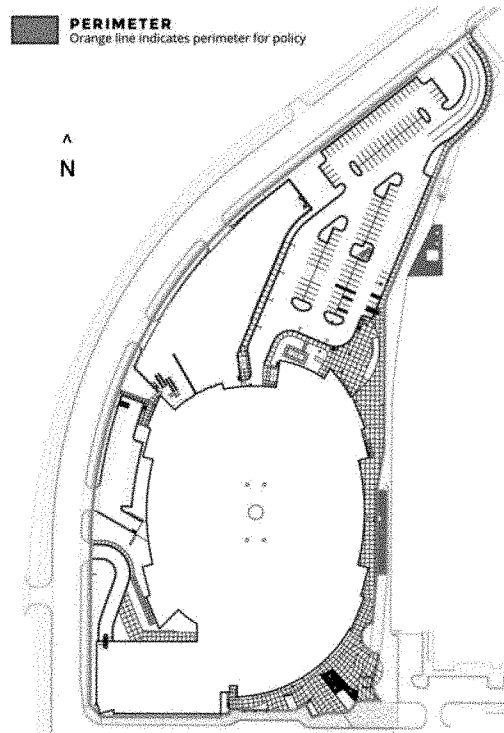


Figure 1. Pinnacle Bank Arena Policy Zone. Non-public forum exterior Arena areas depicted inside the orange line, defined as “areas that extend out to the public sidewalk perimeter and include walkways, steps, verandas, terraces, access ramps, parking lots, loading ramps, the Arena Festival Space/parking lot, and the Arena premium parking garage.”

