



March 5, 2014

Hon. Bill de Blasio
Mayor
City of New York
City Hall
New York, NY 10007

Re: Union Square Park

Dear Mayor de Blasio:

We are writing to ask that you join us in taking a stand against the City's decision to put a restaurant in the Union Square Park Pavilion. We appreciated your support on this issue when you were Public Advocate. You now have the power to rectify this bad decision before it is too late.

Your administration can decide how the Pavilion in Union Square Park should and will be used. We ask that you terminate the agreement between the City and Chef Driven Market, LLC, which you have the legal right to do. The concession agreement explicitly provides, and the Law Department explained to the court, the license is freely terminable "at will" at any time.

Historic Background

Since the 19th century, the pavilion in the north end of Union Square Park has served the recreational, social, and political needs of New Yorkers. Originally called the "Women's and Children's Pavilion" and later rebuilt as the "Children's Playroom," the Pavilion has long been a free play space for families – a recreational jewel in a neighborhood starved for playgrounds. Equally important, the Pavilion has been a focal point for labor rallies, social protests, and other public gatherings – including serving as a rostrum for historic speakers such as Emma Goldman and Paul Robeson. The Park is a National Historic Landmark in recognition of its importance to the labor movement. The nation's first Labor Day celebration was held there in 1882 when 10,000 workers paraded up Broadway and filed past the Pavilion. The Pavilion's traditional role as a vital public space has grown over time; protests were held there during the 2004 Republican Convention and Union Square Park is the most requested and permitted park in the entire city for special events and other First Amendment activities.

Recent Background

Despite this history and the critical need for additional recreational and sheltered public space, Mayor Bloomberg and the Union Square Partnership developed a plan in 2004 to convert the historic Pavilion into a high-end bar and restaurant, displacing the traditional community uses. An anonymous donor gave \$8 million dollars to the City through the BID, contingent on the conversion of the Pavilion to a restaurant. As their privatization plan is now on the eve of fruition, we need your help to protect the important public, social, and political uses of the Pavilion and Park.

The Union Square neighborhood has the least amount of playground space and highest concentration of restaurants in the City. There are only two playgrounds in Community Board 5, but there are more than 150 eating establishments, bars, and markets within a two-block radius of Union Square Park. Worse yet, the restaurant's bar area is directly adjacent to the existing Park playground, where children will be exposed to alcohol consumption despite the fact that drinking and smoking are prohibited in our City parks. Additionally, the proposed new seasonal restaurant and its outdoor seating area will spread out onto the north plaza, creating a conflict between the existence of the restaurant and the ability to hold free speech events.

Opposition and Public Policy

We and other elected officials and our constituents have long opposed this takeover of a public park. Protests against the proposed Union Square Park Pavilion restaurant began almost immediately after Mayor Bloomberg's 2004 announcement. Opposition came from more than 50 area block associations and civic organizations. We and the community explained that the Mayor's plan improperly subjugated the Park's role as a public gathering space and neighborhood respite to accommodate economic interests. It is terrible public policy to continue to transform municipal parkland into a commercial engine, placing a price tag on the community's enjoyment of public space. We urged that a clear distinction be made between revenue generators that enhance the public's enjoyment of an otherwise cost-free day at the park, such as food carts or a bike rental stand, and those that threaten to consume our public land, such as destination restaurants.

Unfortunately, those pleas fell on deaf ears as the City and the BID continued to move forward with their plans. In 2012, the Parks Department and a restaurateur signed a concession agreement to operate a 200-seat restaurant in the Pavilion every day of the week from April 15 through October 15 for the next 15 years, from 7:00 am until midnight. Initial prices of up to \$33.95 for dinner entrees and \$17.95 for eggs at brunch are not "concession" prices. The concessionaire is obligated to pay the City a minimum annual fee starting at \$300,000 for the first year and rising annually to \$453,777 in the 15th year, a paltry sum that would go to the City's general fund, rather than to the Park. The concession agreement goes so far as to contractually obligate the Law Department to represent not only the City but also the restaurateur in litigation (Agreement, § 22.2(c)).

A lawsuit was subsequently filed by the Union Square Community Coalition, Assembly Member Gottfried, and several individuals pursuant to the New York State common law public trust doctrine. One of the two amicus briefs in support of the plaintiffs was filed by then-Council Member Gale Brewer, State Senators Liz Krueger and Brad Hoylman, and Assembly Member Deborah Glick. In January 2013, the Supreme Court issued a preliminary injunction temporarily stopping the restaurant and ruling that:

All things considered, including the small size and large crowds of Union Square Park; the commercial character of the encircling neighborhood; the plethora of nearby restaurants of every description just beyond its perimeter; the prominence and importance of the Pavilion; the restricted views therein; and the operating hours and prices to be charged by the proposed restaurant...this Court finds that plaintiffs likely will succeed in proving that the proposed restaurant...would not serve a “park purpose.”

On February 20, 2014, the Court of Appeals dismissed the case, finding no illegality in the Bloomberg-era restaurant plan. With the litigation now concluded, the restaurant plans to open its doors next month.

Even if the restaurant is not unlawful, that certainly does not make it good public policy. The City should do what is right.

Legal Justification for Terminating the Concession Agreement

The City can terminate its agreement with Chef Driven Market, LLC. As the concession agreement provides and the Law Department explained to the court, the license is freely terminable “at will” by the Parks Commissioner at any time. The agreement provides:

Notwithstanding any language contained herein, this License is terminable at will upon written notice by the Commissioner at any time; however, such termination shall not be arbitrary and capricious. Such termination shall be effective twenty-five (25) days after the date of such written notice. The Commissioner, the City, its employees and agents *shall not be liable for damages* to Licensee in the event that the Commissioner terminates this License as provided for herein. In addition, in the event this License Agreement is terminated, *Parks will not reimburse Licensee’s unamortized capital improvement cost.* (Agreement, § 3.2, emphasis added).¹

¹The agreement further provides that “[u]pon ... termination of the License, all rights of the Licensee under the License are forfeited without claims for loss, damages, refund of investment, or any other payment whatsoever against the Parks Commissioner, the Parks Department, or the City” and “[u]pon ... termination of the License, the Licensee must immediately cease all operations pursuant to the License and must vacate the premises without any further notice by the City and without resort to any judicial proceeding by the City.” (Agreement, §§ 3.4, 3.6).

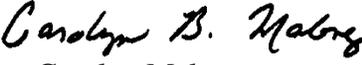
In defending the position that the City's agreement was truly a license and did not constitute a lease, the Assistant Corporation Counsel argued to the Court of Appeals on behalf of the City that "the arbitrary and capricious limitation is no limitation at all. The City has retained the right to terminate ... this license whenever it deems appropriate... and I would point out as well, it has a supremacy clause, notwithstanding any other part of the agreement... and it also expressly provides that the City will not reimburse capital expenditures or any other expenses in the event of a revocation" (Court of Appeals, Oral Argument Transcript, January 14, 2014 at 20:13-16; 23:6-11).

Accordingly, the City can readily revoke the license at no cost whatsoever to the taxpayers. The time has come to reject the previous administration's backdoor deals in which our parks were sold to the highest bidder at the expense of our children, the elderly, the community, and visitors. We ask for a new RFP that would restore the pavilion to public, community use 365 days of the year.

We appreciate the support you offered on this issue as Public Advocate and respectfully request that, as Mayor, you put an end to this gross injustice and return the Union Square Pavilion to its proper use as a community resource. But time is of the essence – the bar and restaurant plans to open in the Pavilion in less than two months. Please act in the public interest and please do so quickly.

Very truly yours,

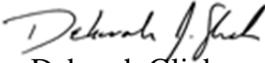

Richard N. Gottfried
NYS Assembly Member


Carolyn Maloney
US Congress Member


Gale Brewer
Manhattan Borough President


Liz Krueger
NYS Senator


Brad Hoylman
NYS Senator


Deborah Glick
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Corey Johnson
NYC Council Member

cc: Manhattan Community Board 5