



April 29, 2014

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

Re: Union Square Park

Dear Mayor de Blasio:

Thank you for the time and attention we received from your staff at the meeting in City Hall on April 16 concerning the future of the Union Square Park Pavilion. We remain steadfast in our opposition to the placement of a restaurant in the Pavilion, regardless of the length of its season or its price level.

We would like to respond to the main issues raised by your administration at the meeting.

“Termination at will” and precedent issue

We have urged that the City exercise its right to terminate the restaurant’s license at will (Agreement, §3.2). The administration stated that this would create a bad precedent. They said that in reality, the “terminate at will” authority has never been used except in a case where there was a substantial violation giving rise to the termination, and that the “at will” clause was only relied on to avoid having to have an extended argument about the real reasons for the termination. The administration further stated that the City would never want to use the clause without such a substantial violation, because it would scare off future concessionaires. The assertion is that prospective concessionaires would not want to invest in a concession if they did not have strong confidence that a terminable-at-will license would actually give them the same security as a lease.

This contradicts the City’s statements to the Court of Appeals in the litigation about the Pavilion. The restaurant and the administration both stressed to the Court of Appeals that the reason the concession for the restaurant is not a park alienation is that this is a mere license, not a lease. The administration stressed that a key reason this is not an alienation is that, unlike a lease, it is terminable at will:

“(T)he 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.)

The Court relied on this assertion in concluding that because this is not a lease, it is not an illegal alienation of parkland.

If the City had been candid and disclosed to the Court that the City actually regards that clause as effectively inoperable (merely a convenient cover for a termination for cause), the Court would have understood that the Pavilion arrangement is really a lease – as the plaintiffs said. And if the Court knew the arrangement is really like a lease, it would not have allowed the project to go forward.

If the courts get wind of the fact that “licenses” are actually the real-world equivalent of “leases,” then *legitimate* licenses will be harder and harder to get approved by the courts.

The administration said that they did not have a “clean slate” and was worried about setting a precedent. However, a hallmark of this administration is the willingness to correct polarizing policy decisions of the past. A lack of precedent need not be viewed as constraining, but instead, as an opportunity. The “precedent” to worry about is the precedent of this bad decision about commercial takeover of such an important feature of a park.

The restaurant’s investment was done with full knowledge that there was great opposition. The owners knew the project could have been wiped out by litigation or by a new administration coming in with very different views. Fully knowing those risks, they made the business decision to spend their capital. We are always told that it is fair that investors get big rewards when things work out well because sometimes they have to accept losses when things do not work out. This should be one of those times.

For future concessions, if the City wants people to invest in concessions in reliance on being able to stay a period of years, the City should do the honest thing and call a lease a lease. If investors in concessions want security, they should work with the community to make sure the community accepts what they are doing.

The City should reassure future concessionaires by stressing that the City cancelled the Union Square license because of the bad precedent the Pavilion deal was in the first place.

We were glad to learn that the anonymous donation to the Park was not contingent upon the conversion of the Pavilion to a restaurant. Thus, the money spent on park improvements will not have been wasted. In addition, it will be beneficial for community users to have access to a professional kitchen (with proper insurance, of course) for cooking classes or events.

City revenue

The City should not over-state the anticipated revenue from the Pavilion. CDM's agreement with the City provides for an annual license fee of only \$300,000 in the first year (increasing to about \$450,000 in the final year) or 10% of annual gross receipts, whichever amount is greater. However, the former outdoor food concession in Union Square Park, Luna Park, paid the city about \$183,000 for its licensing fee in 2005. And while claims have been made as to what the concession could earn for the City in taxes, a portion could be recovered with food kiosks.

If CDM invested in a restaurant at an ordinary location, it would generate taxes and economic benefit. In fact, it would actually generate substantially more, because it would operate year-round.

Community attitude as to the former Luna Park concession

While the community did not actively oppose Luna Park, one could not say that there was a clamor to replace it. It was a reasonable low-impact addition to the park at a time when people still felt unsafe to be there. It helped to make Union Square Park feel safer. That concern has now been dramatically overcome.

Inadequacy of the Southern End of the Park for Rallies

We disagree with the administration's notion that the southern end of the park is adequate for rallies. Even if one disregards the historic significance of the use of the pavilion and north end for speeches and demonstrations, the south end does not have as good a physical layout as the north for these events. It directly abuts a large, loud, nightmarish traffic intersection. In addition, while a city-wide candidate with union support can easily secure a stage/riser setup, that is not readily available to most groups, who do not have platforms or risers and a major sound system to run an effective rally there. The space at the north end, because of the presence of the pavilion and other aspects of the physical layout, is much more suitable for rallies and other large gatherings. That is why it has been the historical spot for holding free speech events.

The restaurant and its outdoor seating area create a serious conflict with free speech uses at the north end. The restaurant encroaches on the physical space. Also, any group seeking permits for an event to be held during the months the restaurant is operating will face opposition that the sound and disruption will be unacceptable to the restaurant.

In our work together to bring fairness to our constituents on so many issues, we urge you again to return to precedent that parks are for the people, not meant to be cash cows. The return on the public's investment is a restored pavilion, park, and the enjoyment of all its users.

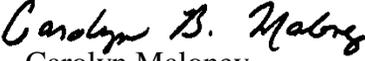
When you announced the appointment of the new Parks Commissioner, you said: "We believe that parkland is sacred. There have been a few proposals over time for private uses on

parkland, but we set a very, very high bar.” The restaurant in the Union Square Park Pavilion does not pass that test.

We ask the City Parks Department to reclaim control over the pavilion expeditiously to allow for public, community use 365 days of the year.

Very truly yours,

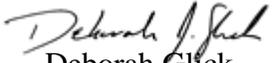

Richard N. Gottfried
NYS Assembly Member


Carolyn Maloney
US Congress Member


Gale Brewer
Manhattan Borough President


Liz Krueger
NYS Senator


Brad Hoylman
NYS Senator


Deborah Glick
Assembly Member


Corey Johnson
NYC Council Member

cc: Manhattan Community Board 5