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COURT OF APPEALS

STATE OF NEW YORK

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UNION SQUARE PARK COMMUNITY COALITION, INC., et al.

Appellants,

-against-

No. 17

NEW YORK CITY DEPARTMENT  
OF PARKS AND RECREATION, et al.

Respondents.

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20 Eagle Street  
Albany, New York 12207  
January 14, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 17, Union Square.  
2 Counselor, you want some rebuttal time?

3 MR. WEISBURST: I'd like to reserve three  
4 minutes, please.

5 CHIEF JUDGE LIPPMAN: Okay. One second  
6 'til your adversary's able to be seated. And go  
7 ahead, counselor.

8 MR. WEISBURST: Chief Judge Lippman, and  
9 may it please the court. My name is Sanford  
10 Weisburst, and I'm here on behalf of the Union Square  
11 Park Community Coalition and the individual  
12 plaintiffs.

13 I'd like to start by talking about where  
14 the Appellate - - -

15 CHIEF JUDGE LIPPMAN: Let me ask you, a  
16 park can be a public - - - a restaurant can be a  
17 public use, right?

18 MR. WEISBURST: In our view, a restaurant  
19 can be, depending upon the facts and the  
20 circumstances.

21 CHIEF JUDGE LIPPMAN: Why isn't it in this  
22 case, when there are so many provisions about what  
23 they're doing with the community and the park and  
24 whatever that they have to comply with?

25 MR. WEISBURST: A couple of reasons.

1 First, to clarify the record on that, there are only  
2 two hours per week of community activities that are  
3 chosen by the restaurant. So it's not really in the  
4 true sense - - -

5 JUDGE PIGOTT: Two hours per week in the  
6 restaurant?

7 MR. WEISBURST: Yes, in the restaurant.

8 JUDGE PIGOTT: Not in the park. I mean,  
9 the park's - - -

10 MR. WEISBURST: No, but this is in - - -  
11 this is a very unique structure. It goes back a long  
12 ways to the very first Labor Day; there was an  
13 important protest there. More recently, at the time  
14 of the Republican National Convention in 2004; even  
15 more recently, in 2011. This is an iconic public  
16 speaking place.

17 CHIEF JUDGE LIPPMAN: So how does this - -  
18 -

19 MR. WEISBURST: It's also - - -

20 CHIEF JUDGE LIPPMAN: - - - destroy this  
21 iconic nature of - - -

22 MR. WEISBURST: Well, if you had a  
23 restaurant there during its operating season, Chief  
24 Judge Lippman, you'd - - - you wouldn't be able to  
25 have speakers on the steps. And this is shown in the

1 addendum to our brief. The restaurant takes up the  
2 steps; it has tables even outside. And you wouldn't  
3 be able to have a speaker standing up there, as well  
4 as his equipment to project his voice to thousands of  
5 people, if you had an operating restaurant there.  
6 And it's not just about public speaking - - -

7 JUDGE GRAFFEO: Has there ever been food  
8 service in this park?

9 MR. WEISBURST: There has been food service  
10 on the other side of the Pavilion. And I think the  
11 geography's a little important here. So the place  
12 where the public speaking is typically taking place  
13 is on the north plaza, looking north from the  
14 Pavilion. On the south of the Pavilion there is  
15 what's called a sunken courtyard, and there once was  
16 a - - - a cafe operating solely outside the Pavilion  
17 on the south side of the Pavilion, never in the  
18 Pavilion or on the north plaza - - -

19 JUDGE GRAFFEO: So you're more concerned  
20 with the location than the fact that there's food  
21 being sold?

22 MR. WEISBURST: We're concerned certainly  
23 with the location, because it's displacing very  
24 important recreational and public speaking  
25 opportunities in this - - - in this park. It's - - -

1           it's really a unique structure.

2                   JUDGE GRAFFEO:  I - - - I thought you were  
3           concerned with disruption and noise and - - -

4                   MR. WEISBURST:  Well, there - - -

5                   JUDGE GRAFFEO:  - - - that type of thing,  
6           so how - - -

7                   MR. WEISBURST:  We are concerned - - -

8                   JUDGE GRAFFEO:  How is encouraging - - -

9                   MR. WEISBURST:  Absolutely.  There is a - -  
10          -

11                   JUDGE GRAFFEO:  - - - what you're talking  
12          about consistent with that concern?

13                   MR. WEISBURST:  There is a concern, which  
14          is that there's a playground that is immediately  
15          south of the Pavilion, and you're going to have the  
16          bar that serves alcohol to the patrons of the  
17          restaurant - - -

18                   CHIEF JUDGE LIPPMAN:  So if you put the  
19          restaurant in another place in the park, you might be  
20          okay with it?

21                   MR. WEISBURST:  Well, it would be a  
22          different - - - there would be different arguments.  
23          I think that it would be - - - this is - - - if you  
24          could pick the worst place in the park to displace  
25          park activities, this would be it.

1 JUDGE PIGOTT: But we're a law court - - -

2 MR. WEISBURST: You put it - - -

3 JUDGE PIGOTT: - - - what do we do, as a  
4 matter of law - - -

5 MR. WEISBURST: Sure.

6 JUDGE PIGOTT: - - - when we come down on  
7 somebody? What do we say?

8 MR. WEISBURST: Well, let me go back to  
9 where the Appellate Division went wrong. And it's  
10 important to remember this - -- this case is at the  
11 motion to dismiss stage. And we - - - the dismiss -  
12 - - the Appellate Division over - - - reversed the  
13 Supreme Court and granted dismissal of our complaint,  
14 and it did so based on a mistake - - - a legally  
15 mistaken view of restaurants and parks. It basically  
16 concluded, as the City has argued, that restaurants  
17 are per se proper park uses, that you don't even go  
18 past that. As long as it's a restaurant, it's okay;  
19 you don't need to go to the state legislature for  
20 authority for it. And that was where - - - that was  
21 where the Appellate Division went wrong.

22 JUDGE GRAFFEO: A lot of parks have  
23 restaurants.

24 MR. WEISBURST: They do, and not - - - none  
25 of those restaurants - - - first of all, the most

1 important restaurant that was challenged was in this  
2 court's 795 Fifth Avenue case. And this court did  
3 not dispose of the case using a per se rule; it  
4 looked at the facts and circumstances.

5 CHIEF JUDGE LIPPMAN: But looking - - -

6 MR. WEISBURST: Prior - - -

7 CHIEF JUDGE LIPPMAN: - - - at the facts  
8 here, what is so intrusive? It's just that you can't  
9 have these large speaking - - -

10 MR. WEISBURST: Well, it's that, but - - -

11 CHIEF JUDGE LIPPMAN: - - - is that the  
12 main - - -

13 MR. WEISBURST: - - - it's als - - - it als  
14 - - -

15 CHIEF JUDGE LIPPMAN: - - - the main thrust  
16 of your problem?

17 MR. WEISBURST: It also displaces  
18 recreational activities from inside the Pavilion  
19 space. And we - - - you can see this also in the  
20 addendum - - -

21 JUDGE SMITH: Any use displaces other uses.

22 MR. WEISBURST: It does, but this is a very  
23 small park and the opportunities for recreation are -  
24 - - are limited. Let me contrast this - - -

25 JUDGE SMITH: Why is that - - - why should

1 courts, rather than the Parks Commissioner, make a  
2 judgment like that, say this park is so small that  
3 it's not really good to put a restaurant in because  
4 there are so many other things. I can see the point,  
5 but why is that an argument - - - why - - - how can  
6 we overrule the Parks Commissioner's judgment on  
7 that?

8 MR. WEISBURST: It's not - - - it's not  
9 this court that would be overruling; it's this court  
10 saying that the state legislature has to decide. And  
11 there's a very important reason for that. This case  
12 - - - the City stands to make 300,000 dollars-plus a  
13 year, and it received an 8-million-dollar donation.

14 JUDGE SMITH: Yeah, but I mean - - -

15 MR. WEISBURST: There's a pressure on the  
16 City - - -

17 JUDGE SMITH: And most trustees, I agree  
18 with you, don't have that kind of conflict of  
19 interest. But this isn't a pure trust, in that  
20 sense. I mean, it isn't - - - it isn't the law that  
21 every time the City makes money on a use, that the  
22 state legislature has to approve it.

23 MR. WEISBURST: It is the law in parks, I  
24 would submit.

25 JUDGE SMITH: It is? And what says that?

1 MR. WEISBURST: Any - - -

2 JUDGE GRAFFEO: Are there other parks in  
3 the City that have gone to the legislature for their  
4 restaurants?

5 MR. WEISBURST: There are. And in fact,  
6 the most similar example - - -

7 JUDGE GRAFFEO: Give us some examples.

8 MR. WEISBURST: Bryant Park is a similar  
9 example. That case, it did not go to litigation, but  
10 the City voluntarily went to the state legislature to  
11 get approval. It received approval from the state  
12 legislature.

13 And Judge Graffeo, I would like to go back  
14 to your question about why is this park different;  
15 there are tons of restaurants in other parks. This  
16 is - - - this is really a unique park. And the  
17 Bryant Park is the most close analogy. If you look  
18 at something like Central Park, it's - - - it's  
19 orders of magnitude larger.

20 CHIEF JUDGE LIPPMAN: Yeah, but - - -

21 MR. WEISBURST: It's 800 - - -

22 CHIEF JUDGE LIPPMAN: - - - what percentage  
23 of space - - - it's a very small percentage that this  
24 restaurant is going to occupy, right?

25 MR. WEISBURST: It's - - - it's a small

1 percentage of the park as a whole, but this is a  
2 small park and - - -

3 CHIEF JUDGE LIPPMAN: No, but that's what  
4 I'm saying, though - - -

5 MR. WEISBURST: - - - and because - - -

6 CHIEF JUDGE LIPPMAN: - - - if you're  
7 talking about scale and Central Park, here you're  
8 talking about a tiny percentage of it.

9 MR. WEISBURST: But because the park is so  
10 small, you're going to have a bar serving alcohol to  
11 people two feet from a playground.

12 CHIEF JUDGE LIPPMAN: Aren't there  
13 restaurants all around the square in Union Square,  
14 where people are serving alcohol?

15 MR. WEISBURST: There are - - -

16 CHIEF JUDGE LIPPMAN: All - - - literally  
17 all around the park?

18 MR. WEISBURST: There are, but not - - -  
19 not a few feet from the playground. And moreover,  
20 the fact that those restaurants exist totally  
21 undermines one of the factors that this court should  
22 consider.

23 JUDGE SMITH: You're almost out of time.  
24 Could you talk about the lice leesense (sic) - - -

25 MR. WEISBURST: Absolutely.



1 mean, I understand - - - everybody seems to say,  
2 including your adversaries - - - everybody says, oh,  
3 you can't have a lease; you can only have a license.  
4 So I'm sure you must be right. I'm just sort of  
5 curious as to where it comes from.

6 MR. WEISBURST: I think it comes from  
7 common law. Van Cortlandt Park described the public  
8 trust doctrine, both of its branches, both park  
9 versus nonpark, as well as - - -

10 JUDGE SMITH: Okay, but you don't - - - it  
11 comes from common law, but you don't have a case to  
12 cite, right off hand, that says it?

13 MR. WEISBURST: Well, Van Cortlandt Park  
14 says that, we think.

15 JUDGE SMITH: Okay.

16 CHIEF JUDGE LIPPMAN: Why isn't it a  
17 license?

18 MR. WEISBURST: Why isn't it a license?

19 CHIEF JUDGE LIPPMAN: The City could  
20 terminate - - -

21 MR. WEISBURST: You've got a fifteen-year -  
22 - -

23 CHIEF JUDGE LIPPMAN: - - - there are  
24 conditions, all kinds of conditions.

25 MR. WEISBURST: The most important reason

1 is because the Chef - - - the private business is  
2 investing 1.3 million dollars upfront, and the City  
3 has said that we needed to give a fifteen-year term  
4 to the Chef in order so that he could recoup his  
5 investment. And that length of term suggests that  
6 whatever the provisions of the agreement say about  
7 termination, it, as a matter of fact, is not going to  
8 be terminated.

9 CHIEF JUDGE LIPPMAN: Okay, counselor.

10 JUDGE SMITH: Well, as a matter of fact - -  
11 -

12 CHIEF JUDGE LIPPMAN: I'm sorry, Judge  
13 Smith.

14 JUDGE SMITH: Is it a question of whether  
15 as a matter of fact it's going to be terminated or -  
16 - - let's suppose - - - suppose, hypothetically - - -  
17 I mean, you're saying I don't care what the lease  
18 says; there's a wink and a nod that they're not going  
19 to terminate. That's essentially what you're saying?

20 MR. WEISBURST: May I answer?

21 CHIEF JUDGE LIPPMAN: Yes, of course.

22 MR. WEISBURST: Okay.

23 CHIEF JUDGE LIPPMAN: Sure.

24 MR. WEISBURST: The - - -

25 JUDGE SMITH: Is that a fair summary of

1 what you're saying?

2 MR. WEISBURST: It's not just a wink and a  
3 nod, in answer to your question, Judge Smith. It's  
4 the implied duty of good faith and fair dealing. You  
5 can't treat a contracting partner, who you know has  
6 invested one million dollars, and fire them the next  
7 day.

8 JUDGE SMITH: Even though he signed the  
9 document that says throw me out whenever you want?

10 MR. WEISBURST: Well, it doesn't quite say  
11 that; it says - - -

12 JUDGE SMITH: As long as it's not arbitrary  
13 and capricious.

14 MR. WEISBURST: Right, and that's an  
15 ambiguous term which we haven't had the opportunity  
16 to - - -

17 JUDGE SMITH: So in your view, if - - -  
18 let's just suppose, hypothetically, there to be a new  
19 administration in the City, and hypothetically that  
20 administration might be less friendly to private  
21 business than the previous administration, and the  
22 new Parks Commissioner might say, you know what, I've  
23 read Mr. Weisburst's argument here and I'm convinced  
24 this is a terrible idea and I'm terminating. Can't  
25 he do that under the lease, as written?

1 MR. WEISBURST: He would be subjecting  
2 himself to a suit by the Chef for violating the  
3 arbitrary and capricious clause - - -

4 JUDGE SMITH: You think - - - is it your  
5 position that Chef could win that suit in the teeth  
6 of that termination clause?

7 MR. WEISBURST: I think that Chef would get  
8 past a motion to dismiss, certainly.

9 CHIEF JUDGE LIPPMAN: Okay, thanks,  
10 counselor. You'll have your rebuttal.

11 Counselor?

12 MS. BRENNER: May it please the court. I  
13 am Deborah Brenner. I am here on behalf of the City  
14 and its concessionaire, Chef Driven Market.

15 Restaurants are not the same as water  
16 treatment plants or safety museums.

17 CHIEF JUDGE LIPPMAN: Well, what about here  
18 where the restaurant is taking over this public  
19 speaking area that your adversary says is - - - is  
20 iconic in nature, that there were all kinds of  
21 significant events in the life of the City - - -

22 MS. BRENNER: Well, periodically, Your  
23 Honor - - -

24 CHIEF JUDGE LIPPMAN: - - - taking place  
25 there?

1 MS. BRENNER: Periodically, that was true,  
2 but there were also large periods of time when the  
3 Pavilion was off limits to any members of the public.  
4 It was actually used as a storage area for the Parks  
5 Department and for staff to use. And so obviously  
6 that can't be challenged. I mean, that's a - - -  
7 that's a legitimate use. And as long as it is being  
8 used for a - - - a park purpose, it is up to - - -

9 CHIEF JUDGE LIPPMAN: How is this  
10 restaurant a park purpose? Tell me.

11 MS. BRENNER: Restaurants, historically,  
12 have been held to be - - -

13 CHIEF JUDGE LIPPMAN: What about this - - -

14 MS. BRENNER: - - - a facility - - -

15 CHIEF JUDGE LIPPMAN: - - - this  
16 restaurant, this one?

17 MS. BRENNER: Well, restaurants, in  
18 general, are - - - they facilitate the free use - - -

19 JUDGE SMITH: You say that's the end of the  
20 inquiry? It's a restaurant; goodbye.

21 MS. BRENNER: Generally, yes, Your Honor.  
22 I mean, I could envision a case where if ninety-eight  
23 percent of a park were being turned into a food  
24 court, that that might be a problem.

25 JUDGE SMITH: Well, why did Justice

1 Markowitz have to write that long, long opinion in  
2 the 795 case, if all he had to say was oh, it's a  
3 restaurant, so don't bother me.

4 MS. BRENNER: Well, that's basically what  
5 this court said when reviewing that decision. They  
6 said - - - I mean, it's true that - - - that this  
7 court affirmed the denial and dismissal of that  
8 complaint and allowed the case to go forward to  
9 trial. But once it was reviewing the trial evidence,  
10 it only considered the record to the extent that it  
11 established three facts. One, restaurants have  
12 usually and historically been placed in parks. Two,  
13 they are generally regarded as appropriate, as the  
14 Luna Park restaurant was in this - - - in this park  
15 for over - - - over a decade.

16 CHIEF JUDGE LIPPMAN: Yeah, but that was  
17 more of a concession stand, right?

18 MS. BRENNER: No, Your Honor, oh, no. That  
19 was a sit-down restaurant with table service.

20 CHIEF JUDGE LIPPMAN: How many - - -

21 MS. BRENNER: It also served - - -

22 CHIEF JUDGE LIPPMAN: How many people did  
23 it serve?

24 MS. BRENNER: - - - alcohol. It - - -

25 CHIEF JUDGE LIPPMAN: How many people did

1 it serve?

2 MS. BRENNER: I think it was comparable. I  
3 couldn't tell you; I - - - I could get that  
4 information for the court - - -

5 CHIEF JUDGE LIPPMAN: It's okay.

6 MS. BRENNER: - - - if you wish.

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MS. BRENNER: - - - but it is comparable in  
9 size to the restaurant that's - - -

10 CHIEF JUDGE LIPPMAN: But they're saying -  
11 - -

12 MS. BRENNER: - - - contemplated here.

13 CHIEF JUDGE LIPPMAN: Their main argument  
14 is that you're destroying the character of the park.  
15 Why is that not the case?

16 MS. BRENNER: Because, Your Honor - - -

17 CHIEF JUDGE LIPPMAN: You would agree, if  
18 you had a restaurant that destroyed the character of  
19 the park for the public, that wouldn't be a good  
20 public use, right, or a valid use?

21 MS. BRENNER: Do I personally agree with  
22 that? I do. But I'm not the Parks Commissioner.  
23 Destroying the character of a park is a discretionary  
24 determination. As long as - - -

25 CHIEF JUDGE LIPPMAN: So it's a - - -

1 MS. BRENNER: - - - the use - - -

2 CHIEF JUDGE LIPPMAN: - - - decision for  
3 the policy makers, period?

4 MS. BRENNER: It is, as long as it's a use  
5 that has been determined to be an appropriate park  
6 use, which this court determined in 795 Fifth Avenue  
7 - - -

8 JUDGE SMITH: So - - -

9 MS. BRENNER: - - - it was determined - - -

10 JUDGE RIVERA: You were about to say three;  
11 what was the third one?

12 MS. BRENNER: The third one that there is -  
13 - - appropriate discretion resides, under the City  
14 charter, in the Parks Commissioner to make a  
15 determination that a restaurant would - - - would  
16 serve the public - - - the public good.

17 JUDGE GRAFFEO: So what distinguished this  
18 situation from the parks where the City had to go to  
19 the state legislature for special legislation?

20 MS. BRENNER: Right. And the only case - -  
21 - the - - - the Bryant Park is the only park where  
22 that has happened in recent history in New York, that  
23 I'm aware of, and that plaintiffs have put forth.  
24 The reason that - - - that the City went to the  
25 legislature was because that was a lease. A lease is

1 different from a license. The reasons why leases are  
2 different is because they are - - - although  
3 temporarily, they do alienate public park land, lands  
4 that have been entrusted to the public for park uses.  
5 And because a lease was contemplated, and ultimately  
6 came to being in that case - - - I believe it was a  
7 thirty-five year term - - - the City could not  
8 terminate the lease, except for cause or certain - -  
9 -

10 JUDGE GRAFFEO: What is it in this  
11 arrangement that makes it a license and not a lease?

12 MS. BRENNER: So many things. First of  
13 all, the arbitrary and capricious limitation is no  
14 limitation at all. The City has retained the right  
15 to terminate this - - - this license whenever it  
16 deems appropriate.

17 JUDGE RIVERA: So what does that language  
18 mean then?

19 MS. BRENNER: Not - - -

20 JUDGE RIVERA: But what - - -

21 MS. BRENNER: What it means - - -

22 JUDGE RIVERA: - - - would that language  
23 mean?

24 MS. BRENNER: What it means is it can't do  
25 it in bad faith, which is true in any contract - - -

1           whether it's in there or not, the court will read it  
2           in - - - and that it can't do it for an irrational  
3           reason.

4                        JUDGE RIVERA:   But what would that mean?  
5           But that sounds to me like limits.

6                        MS. BRENNER:   Well, it's a limit that - - -  
7           I mean, I can't imagine that - - - that the law would  
8           be - - -

9                        JUDGE SMITH:   But you say that limit would  
10          exist if the clause weren't in there because public  
11          officials - - -

12                       MS. BRENNER:   Because we're the City.

13                       JUDGE SMITH:   - - - could never be  
14          arbitrary and capricious.

15                       MS. BRENNER:   That's correct.

16                       JUDGE SMITH:   I understand - - - then how -  
17          - - but - - - but a couple of questions.  One, why  
18          would anybody sign - - - why would Chef sign a - - -  
19          a lease which has a nominal fifteen - - - or excuse  
20          me, a license which has a nominal fifteen-year term  
21          when Mayor de Blasio can kick 'em out tomorrow?

22                       MS. BRENNER:   Well, I think it's a  
23          calculated risk, Your Honor.  The last licensee who  
24          had that - - - that license was - - - was the  
25          operator of Luna Park - - -

1 JUDGE SMITH: So - - -

2 MS. BRENNER: - - - which was amazingly  
3 successful, very popular and stayed in place for over  
4 a decade.

5 JUDGE RIVERA: Well, isn't the real answer  
6 that if the City does go around entering these kinds  
7 of agreements and then just breaches them the next  
8 day or terminates at will, as you say it has the  
9 right to do, that no business will enter these  
10 agreements - - -

11 MS. BRENNER: And that - - -

12 JUDGE RIVERA: - - - and that would be to  
13 the detriment of the City and the public?

14 MS. BRENNER: Certainly, and that would be  
15 a motivation for the City to retain the right to do  
16 so and not to exercise that right.

17 JUDGE SMITH: You're saying it's just a  
18 business - - - there's no legal limitation; it's just  
19 a business limitation.

20 MS. BRENNER: That's correct, Your Honor.

21 JUDGE SMITH: My other question is, if the  
22 - - - what's the point of the clause in the lease  
23 that says you can terminate for cause on thirty days  
24 if you can terminate without cause on twenty-five  
25 days?

1 MS. BRENNER: Well, that's - - - that's a  
2 mystery to me, Your Honor, but I really couldn't  
3 answer that question. But of course, it's not  
4 directly at issue in this case because it's very  
5 clear that the City does have the right - - - and I  
6 would point out as well, it has a supremacy clause,  
7 notwithstanding any other part of the agreement. So  
8 the fact that there are - - - and it also expressly  
9 provides that the City will not reimburse capital  
10 expenditures or any other expenses in the event of a  
11 revocation.

12 JUDGE ABDUS-SALAAM: Counsel, I'd like to  
13 - - -

14 JUDGE RIVERA: Why - - -

15 JUDGE ABDUS-SALAAM: - - - go back to the  
16 original issue about whether this is - - - this is -  
17 - - your strongest argument is this is a motion to  
18 dismiss, and they - - - we have to look at what the  
19 complaint pleads. And you're saying what about the  
20 pleadings? That they're not sufficient to withstand  
21 a motion to dismiss?

22 MS. BRENNER: That's correct, Your Honor.  
23 When viewed against the backdrop of the 795 Fifth  
24 Avenue case, and the arguments that were put forth at  
25 trial there, and the way that this court dealt with

1           them, this court said, you know, the fact that there  
2           are lots of other restaurants in the area, the fact  
3           that they're easily accessible because it was at the  
4           edge of the park, the fact that it was going to be a  
5           very expensive restaurant, the fact that it was going  
6           to be mostly at ground level rather than among the  
7           trees and the verdant greenery, that is not relevant.  
8           That as long as the Commissioner has the discretion,  
9           that this is a valid park purpose, that the  
10          Commissioner has the discretion to place a restaurant  
11          in the park, the court's inquiry reaches the end of  
12          its rope.

13                    JUDGE RIVERA:  What about his point about  
14          the public speech in the Pavilion?

15                    MS. BRENNER:  The public speech in the  
16          Pavilion is - - -

17                    JUDGE RIVERA:  Does that make a difference?

18                    MS. BRENNER:  - - - an issue that's been  
19          thrown around in this case but never really fully  
20          briefed, Your Honor.  There certainly - - - this  
21          restaurant will take up 2.1 percent of the park,  
22          which means that 97.9 percent of the park is  
23          available for public speaking.  If you're familiar  
24          with the park, there - - - and it's also in the  
25          record - - - there is another plaza on the south end

1 of the park, which also has steps, which is  
2 frequently used for public speech.

3 JUDGE RIVERA: Isn't that also where  
4 there's a subway exit?

5 MS. BRENNER: The subway is on - - -

6 JUDGE RIVERA: There may - - -

7 MS. BRENNER: - - - actually on both ends,  
8 Your Honor. There's a subway entrance in the north  
9 and also - - -

10 JUDGE RIVERA: But as I recall, there's  
11 almost a gazebo over the subway exit on the south  
12 side that you're discussing. It sounds to me perhaps  
13 a little bit different than the Pavilion on the north  
14 side.

15 MS. BRENNER: It's definitely different. I  
16 mean, the Pavilion is the only covered structure in  
17 the park. But I would also point out that the - - -  
18 the Pavilion will be available for six months out of  
19 the year. Now, the plaintiffs are saying that that's  
20 not feasible because of the elements. But it is a  
21 covered structure. And I would note that the  
22 arguments that they made in the lower court, when  
23 they were trying to challenge the holiday market,  
24 which takes place during the six-week period that's  
25 probably the coldest point of the year, they were

1 saying that they were being displaced from using the  
2 south - - - the south plaza when they like to bask in  
3 the sun and engage in soapbox orations. It's very  
4 plain. I mean, this is a park that's heavily used  
5 year round, and maybe at the very coldest days of the  
6 year you would have some difficulty. But heat - - -  
7 heat lamps can be placed. I mean, really, the First  
8 Amendment issues here, there's adequate time, place  
9 and manner, alternate channels that can be used even  
10 if - - -

11 JUDGE ABDUS-SALAAM: Counsel, are you  
12 saying that a restaurant - - - you said that what the  
13 restaurant charges is not really important. If the  
14 restaurant were a restaurant that charged 100 dollars  
15 for appetizers, and of course entrees and everything  
16 else would be a lot more than that, that would be  
17 okay because - - -

18 MS. BRENNER: Well, there are some - - -

19 JUDGE ABDUS-SALAAM: - - - it's a  
20 restaurant?

21 MS. BRENNER: There are some park  
22 restaurants in the city that do have substantially  
23 higher prices. I mean, this - - - the RFP is in the  
24 record; it asks for proposals for - - -

25 JUDGE ABDUS-SALAAM: No, I'm not talking

1 about this particular - - -

2 MS. BRENNER: Okay.

3 JUDGE ABDUS-SALAAM: I'm talking about your  
4 premise, which seems to be that as long as the  
5 restaurant is a park purpose and the other two  
6 factors that you mention, that's the end of the  
7 inquiry. So I'm asking if a restaurant wanted to  
8 charge 100 dollars for appetizers, and of course, you  
9 know, proportionately more for entrees and so on,  
10 it's still a park purpose, so it's okay, even though  
11 only maybe a very few people would be able to eat  
12 there?

13 MS. BRENNER: I would say that is correct,  
14 Your Honor. It's obviously not this case, because  
15 the - - - the - - - you know, the plaintiffs can make  
16 allegations, and they think that that's enough to get  
17 them past a motion to dismiss, but we have a written  
18 instrument, and there's an approved menu with prices  
19 that must remain the same, other than CPI increases,  
20 unless Parks gives prior written permission to raise  
21 them. And we're talking about, by Manhattan  
22 standards, some very reasonable prices at the lower  
23 end. We have, you know, 7.95 for salads, 8.95 for  
24 sandwiches, and, like, a dollar or 2 dollars for  
25 brunch and breakfast items. I mean, the plaintiffs

1 keep pointing to the most expensive things on the  
2 menu which can be twenty-five, thirty-five dollars.  
3 And that may, you know, prove too expensive for  
4 certain park users. But there's no admission fee;  
5 there's no requirement that you spend a certain  
6 amount of money.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.

8 MS. BRENNER: And so - - - okay.

9 CHIEF JUDGE LIPPMAN: Thanks, counselor.

10 MS. BRENNER: Thank you very much.

11 CHIEF JUDGE LIPPMAN: Appreciate it.

12 Counselor, rebuttal?

13 MR. WEISBURST: Sure. Thank you, Chief  
14 Judge Lippman.

15 I'd like to start with Bryant Park. My  
16 adversary misstated the State law that was passed.  
17 It was not just because it was a lease. It - - -  
18 record, page 204, there's actually a copy of this  
19 law, and it mentioned specifically that it was going  
20 to be used as a restaurant. So if - - - if the state  
21 legislature was good enough for deciding Bryant Park,  
22 it should be good enough for deciding this.

23 JUDGE SMITH: Well, but her point, as I  
24 understand it, is they needed legislation because a  
25 lease was involved. You don't dispute that?

1 MR. WEISBURST: We think that they needed  
2 legislation both because a lease was involved - - -

3 JUDGE SMITH: You think - - -

4 MR. WEISBURST: - - - and because it was -  
5 - -

6 JUDGE SMITH: You think there were other  
7 reasons, but you're not saying that on - - - that  
8 even on your adversary's theory, they could have gone  
9 ahead in Bryant Park without a - - - without state  
10 legislation?

11 MR. WEISBURST: No, we agree that Bryant  
12 Park involved a lease. We think that this case also  
13 involves a lease.

14 CHIEF JUDGE LIPPMAN: Yeah, but you don't  
15 think every restaurant has to be - - - go up to the  
16 state legislature; that's the specific issue that  
17 triggers it - - -

18 MR. WEISBURST: No - - - no, but go - - -

19 CHIEF JUDGE LIPPMAN: - - - is the lease  
20 issue?

21 MR. WEISBURST: - - - going back to Judge  
22 Abdus-Salaam's point, we're at a motion to dismiss,  
23 and my adversary's reading of 790 (sic) Fifth, we - -  
24 - with respect, is wrong. 795 Fifth had sustained a  
25 complaint that alleged a restaurant was a nonpark

1 use. It allowed those plaintiffs to go to trial and  
2 prove their case. And the key dispositive factor in  
3 the lower court, after that trial had happened, was  
4 that the park - - - the part of the park that was  
5 going to be used for the restaurant was a previously  
6 unused, scraggly portion of the park. This Pavilion  
7 is the exact opposite of that. It's a very actively  
8 used - - - historically, it was used for speeches.  
9 It occasionally has been renovated and not useable  
10 for a few years, but if you look back over the course  
11 of a hundred years, it's been frequently used for  
12 recreational and public speaking activities.

13 JUDGE SMITH: I mean, I agree with you, but  
14 what your adversary says is that Justice Markowitz's  
15 opinion is very minute, but when we got to review  
16 that case, we wind up saying, you know, "Without  
17 showing the type and location of the restaurant to be  
18 unlawful, plaintiffs ought not to succeed in  
19 preventing public officers from exercising their best  
20 judgment." Doesn't that support her "all restaurants  
21 are okay" rule?

22 MR. WEISBURST: It doesn't, because that  
23 reserved the - - - for plaintiffs the right to argue  
24 that the type and location was unlawful. And I want  
25 to point out - - -

1                   JUDGE SMITH:  And that's what you're  
2                   arguing.

3                   MR. WEISBURST:  - - - this is very  
4                   important, is that 795 Fifth cited a case called  
5                   Blank v. Browne.  It was a previous Appellate  
6                   Division case which said that a snack bar in a park  
7                   was - - - was improper.  And there was another case  
8                   called Williams v. Hylan, which was prior to 795  
9                   Fifth, which also had said that a restaurant was  
10                  improper.  All we're asking here is the opportunity  
11                  to make that showing.  And ultimately, all we're  
12                  asking is the opportunity to have the state  
13                  legislature decide this.

14                  This court has - - - and I would like to  
15                  refer this court to Van Cortlandt Park where Chief  
16                  Judge Kaye said this is a very longstanding doctrine;  
17                  it requires state legislative approval as a check and  
18                  balance on local city officials.  And for this court  
19                  to say that restaurants are per se park uses would  
20                  really be - - -

21                  CHIEF JUDGE LIPPMAN:  We wouldn't - - -

22                  MR. WEISBURST:  - - - overturning that  
23                  doctrine.

24                  CHIEF JUDGE LIPPMAN:  We wouldn't have to  
25                  conclusively say that every restaurant is okay in

1 order to decide for your adversary?

2 MR. WEISBURST: No, and in fact, the  
3 balancing test that could be applied, which we've  
4 tried to lay out in our briefs, could be rather  
5 strict. But we think we meet that. We think - - -

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. WEISBURST: - - - if there were - - -  
8 if you could pick any place in the city, any park to  
9 put a restaurant, this is the wrong place, and we  
10 should be able to have a chance to satisfy that test.  
11 Thank you.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 Thank you both. Appreciate it.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Union Square Park Community Coalition, Inc., et al. v. New York City Department of Parks And Recreation, et al., No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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