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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Arthur F. Engoron **PART** 52
Justice

Index Number : 102734/2012
UNION SQUARE PARK COMM
vs.
NYC DEPARTMENT OF PARKS
SEQUENCE NUMBER : 001
PREL INJUNCTION/TEMP REST ORDER

INDEX NO. _____
MOTION DATE 9/14/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

1-9-13

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/8/13

AF
HON. ARTHUR F. ENGORON, J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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UNION SQUARE PARK COMMUNITY COALITION, INC., ASSEMBLYMEMBER RICHARD N. GOTTFRIED, CAROL GREITZER, EDITH SHANKER, GEOFFREY CROFT, WILLIAM BOROCK and MARGARET GONZALEZ,

Plaintiffs,

- against -

NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, ADRIAN BENEPE, in his Official Capacity as Commissioner of the New York City Department of Parks and Recreation, THE CITY OF NEW YORK, CHEF DRIVEN MARKET, LLC and URBAN SPACE HOLDINGS, INC.,

Defendants.

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Index Number: 102734/12

Sequence Number: 001

Decision and Order

Arthur F. Engoron, Justice[1]

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on this motion by plaintiffs for a preliminary injunction and cross-motion by defendants to dismiss or for summary judgment:

	Papers Numbered
Moving Papers	1
Cross-Moving Papers	2
Reply Papers (Plaintiffs)	3
Reply Papers (Defendants)	4

Upon the foregoing papers, the instant motion is granted and the instant cross-motion is denied.

Contrary to understandable belief, New York City's Union Square is not so-named for the Northern side in the Civil War or for the Labor Movement, but because it is situated at the junction of what is now Broadway and Fourth Avenue. Although it may not have the national and international renown of its uptown half-siblings Herald Square and Times Square, it has a jewel in its crown that they lack: a green oasis within its midst. Though small and crowded, and

[1] Full disclosure: the author of this opinion lives two blocks from Union Square Park; crosses by it frequently; crosses through it occasionally; uses it rarely; and has been inside its Pavilion never.

thus quintessentially like the island on which it is situated, the eponymous park has its ardent adherents. To borrow from Daniel Webster, though it may be little, "there are those who love it." Some of those who love it, including a few long-time neighbors, lunch-hour users, and a member of the New York State Assembly, now sue to prevent the City and its Parks Department from authorizing a restaurateur to open an eating and drinking establishment in the Pavilion, apparently the second iteration of an open air, colonnade structure that has anchored the north end of the park since the 1800's.

Background

Manhattan's Union Square Park consists of 3.6 acres[2] of dedicated municipal parkland situated between 14th and 17th Streets and Union Square East (essentially a section of Broadway) and West (essentially an extension of University Place). "In 1815, by act of the state legislature, this former potter's field became a public commons for the city, at first named Union Place."[3] In 1872 Frederick Law Olmsted and Calvert Vaux, by then well-known as the designers of Central Park, replanted the foliage.[4]

Listed on the National and State Registers of Historic Places, and a National Historic Landmark because of its significance in American labor history, Croft Moving Affidavit ¶ 14, dyed-in-the-wool New Yorkers know Union Square Park as the City's "soapbox," the trans-Atlantic equivalent of London's Hyde Park's "Speakers' Corner." "The park has historically been the start or the end point for many political demonstrations."[5] The North Plaza is still oft used by speakers and protesters. See Plaintiffs' Exh. 22 (photographs of recent North Plaza mass protests); Croft Reply Affidavit ¶¶ 25-26. Indeed, during the 2004 Republican National Convention, the City diverted protests from Central Park (ostensibly to protect the sod) to the North Plaza by denying a permit for the former.

The Pavilion has been a park fixture at its present site for over a hundred and twenty-five years. In 1882 it served as the reviewing stand for the nation's first Labor Day Parade (Plaintiffs' Exh.1), and since then it has been a rostrum or backdrop for political and social activists such as Emma Goldman and Paul Robeson (Croft Moving Affidavit ¶ 5; Plaintiffs' Exh. 1). It has often seen service as a bandstand.

The Pavilion and its environs have long been associated with childhood and recreational, particularly playground, use. An early map (plaintiffs say circa 1935) (Plaintiffs' Exh. 1A) of Union Square quaintly labels the Pavilion as "Band Stand & Childrens [sic] Playroom." In 1983

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[2] By way of contrast, Central Park is 843 acres, or a whopping 234 times larger.

[3] http://en.wikipedia.org/wiki/Union_Square_(New_York_City)

[4] Id.

[5] Id.

an official-looking sign posted on the playground's perimeter (Plaintiffs' Exh. 2A) proclaims, "This Area Reserved for Children & Guardians Only." Plaintiffs have submitted letters (Plaintiffs' Exh. 2)[6] recalling the Pavilion area as a magnet for local children's playgroups in or about the 1970's (see also Greitzer Moving Affidavit ¶ 8). In more recent times, the Pavilion has been used for such exotic activities as tango lessons, a Portuguese film festival, "Mommy & Me Yoga," and at least one (not-so-exotic) rock & roll band. Croft Moving Affidavit ¶ 30; Plaintiffs' Exh. 21.

What is appropriately called a "sunken courtyard" lies immediately south of the Pavilion. From approximately 1994 to approximately 2008, pursuant to a series of permits, an outdoor café named "Luna Park" operated there (but not in the Pavilion itself). A children's playground currently occupies the courtyard. See Defendants' Exh. 2 (photographs of the courtyard pre-playground); Plaintiffs' Exh. 19 (photographs of the playground in the courtyard, with the Pavilion in the immediate background).

The Pavilion itself is the only significant space in the park that provides shelter from the elements (e.g., Shanker Moving Affidavit ¶ 21). Immediately prior to the events here at issue, the Pavilion was renovated, and lately it has been utilized (some might say "underutilized") by defendant New York City Department of Parks and Recreation ("Parks Department") as office and storage space.

The neighborhood surrounding Union Square is largely commercial in character, but in recent decades has seen a significant residential influx, symbolized by the vast Zeckendorf Towers, which replaced the old S. Klein "On the Square" Department Store overlooking the Park's south-east corner. Area residents include many children; a Babies "R" Us occupies 24-30 Union Square East.[7] Restaurants abound;[8] "There are currently more than 150 eating establishments, bars and markets within a two block radius of the park,[9] including 18 facing it directly." Croft Moving Affidavit ¶ 10. The neighborhood is as short on playgrounds as it is long on restaurants, with only two in the entire Community Board 5 District, Croft Moving Affidavit ¶ 11. Nobody disputes the neighborhood's dearth of play space.

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[6] The letters are not technically admissible, because they are not sworn to, but defendants do not challenge their authenticity.

[7] http://www.toysrus.com/storeLocator/index.jsp.

[8] Including such tony establishments as Blue Water Grill and Union Square Café.

[9] Plaintiffs plausibly claim that this is the highest concentration in the City.

Recent Developments

The North End of the Park and the Prior Litigation

In 2004, New York City Mayor Michael Bloomberg announced plans to convert the Pavilion into a restaurant. In a March 21, 2005 letter (Plaintiffs' Exh. 3) defendant Adrian Benepe, then, as now, Commissioner of the Parks Department, updated the co-chairs of plaintiff Union Square Park Community Coalition ("USCC"[10]) on the Department's plans. On April 21, 2008, six USCC members commenced a CPLR Article 78 proceeding against the City on various grounds, including that the conversion was an alienation of parkland that, pursuant to the "Public Trust Doctrine," required State legislative approval. On or about April 28, 2008 Justice John Stackhouse temporarily restrained defendants (Plaintiffs' Exh. 4) from proceeding with the project. In a 16-page decision dated May 7, 2008 (Plaintiffs' Exh. 5), Justice Jane Solomon preliminarily enjoined the project, conditioned on petitioner's posting a $100 undertaking, noting (at p. 11) that "petitioners' argument that approval by the New York State Legislature ultimately will be required is persuasive, and it may well succeed when ripe." Union Sq. Community Coalition v New York City Dept. of Parks and Recreation, 2008 NY Slip Op. 31309(U) (Sup Ct, NY County). Almost a year later, in a "Decision, Order and Declaratory Judgment" dated March 27, 2009 (Plaintiffs' Exh. 6), Justice Solomon ruled, inter alia, that the parkland alienation claim was unripe, and she dismissed the petition.

The Concession Agreement

The City's plans proceeded apace. In a self-described "License Agreement" ("Concession Agreement") dated March 26, 2012 (Plaintiffs' Exh. 8), released publicly in early May, the City authorized defendant Chef Driven Market, LLC ("Chef"), a private, for-profit entity, to operate a seasonal restaurant in the Pavilion and a year-round food kiosk nearby. Defendants claim (Kloth Cross-Moving Affidavit ¶ 16), without attribution, but without contravention, that the kiosk and restaurant would "together occupy less than 2.1% of the park, and less than 8.2% of the North Plaza." The restaurant would seat some 200 people and operate from April 15 through October 15, 7:00 AM until midnight.[11] After dinner hours the restaurant would become something of a nightclub. An "outbuilding" would house restrooms, and underground space, complete with electricity, running water, and ventilation ducts, would house the kitchen. The restaurant and bar would spill out onto the North Plaza, where some or all of the tables would be for paying patrons only. The operator would have the right to host "special events" (i.e., private functions), closing the Pavilion even to members of the public willing to pay for food and drink.

Although only vaguely referenced in the agreement, as a practical matter, the restaurant proposal is contingent upon Chef's obtaining a liquor license for the establishment. Croft Moving Affidavit ¶ 37. The bar area is envisioned for the south side of the Pavilion (Defendants' Exh.

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[10] Plaintiffs' own acronym for their umbrella organization dropped the "P" for "Park."

[11] As the Pavilion is "open-air," the proposed half-year restaurant operating season could well be a concession not so much to other park purposes as to meteorological reality. The half season of restaurant operation presumably would be the half season most coveted for other uses.

17), adjacent to the children's playground in the sunken courtyard. According to defendants (Kloth Cross-Moving Affidavit ¶ 44), "The visual barrier between the playground and the Restaurant Concession required by Manhattan Community Board Five [and Chef's liquor license application, Cross-Moving Memo at 11-12] would impede the view of children in the sunken playground of the restaurant, but would not impede diners' viewscape of the park." Plaintiffs scoff at this assertion (Croft Reply Affidavit ¶¶ 2-8).

Initially, food prices would top out at $33.95 for entrees, $14.95 for appetizers and desserts, and $17.95 for eggs at brunch, with increases tied to the Consumer Price Index (or Parks Department approval). Plaintiffs claim that a full meal could easily cost $100 per person.[12] At the low end, breakfast and brunch bagels and croissants (or would it just be coffee or tea?) would be available for as little as $1.95 or $2.95. Concession Agreement Exh. C(3). So in theory, paupers, as well as plutocrats, could patronize the place.

The concessionaire is obligated to pay the City an annual fee, starting at $300,000 for the first year and rising annually to $453,777 in the 15th year, or 10% of annual gross receipts, whichever is greater. Concession Agreement ¶ 4.1(a). As required by the City Charter, this money would go to the City's general fund, rather than to any particular or general park purpose. As of June 2012, the concessionaire hoped to be "in business" as of April 2013.

The South End of the Park

Since about 1997, for the last six or seven weeks of every year, defendant Urban Space Holdings, Inc. has, pursuant to permits granted by the Parks Department, operated a "Holiday Market" on the park's South Plaza (see infra).

The Instant Action

Plaintiffs commenced the instant action on May 18, 2012 (see Complaint, Defendants' Exh. 1). The first cause of action claims that the Concession Agreement violates the Public Trust Doctrine because it alienates dedicated parkland for a non-park purpose without State legislative approval. The second cause of action claims that the Concession Agreement violates the Public Trust Doctrine because it is a lease, and thus per se an alienation of dedicated parkland, whether or not for a park purpose, without State legislative approval. The third cause of action claims that the Holiday Market on the South Plaza violates the Public Trust Doctrine because it alienates dedicated parkland for a non-park purpose without State legislative approval. Plaintiffs seek declaratory and injunctive relief and attorney's fees.

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[12] The Concession Agreement apparently does not (and Exhibit C certainly does not) indicate the price of drinks; but if we assume eight dollars apiece, a top end appetizer, entree, and dessert; coffee or tea; and two drinks would come to over $80, which with tax and tip would exceed $100. Defendants' reference (Reply Memo at 4) to $43.46 as the average cost of a restaurant meal (according to *Zagat's*) has a let-them-eat-cake feel. For that price, a family of four can feast on Chinese or Indian "takeout" and still have food left over.

The Instant Motion and Cross-Motion

Plaintiffs now move, pursuant to CPLR Article 63, on their first two causes of action only, for, simply put, a preliminary injunction restraining defendants from altering the Pavilion to accommodate a restaurant and/or bar, from granting any further approvals for the project, and from actually operating such an establishment, all unless the State Legislature approves the plan. Defendants oppose plaintiffs' motion and now cross-move to dismiss or for summary judgment.[13]

Discussion

Preliminary Injunctions

The New York standard for granting a preliminary injunction is well established: a movant must show (1) the likelihood of success on the merits; (2) irreparable injury absent the granting of a preliminary injunction; and (3) a balancing of the equities that favors the movant's position. Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 (1990); W.T. Grant Co. v Srogi, 52 NY2d 496, 517 (1981). Furthermore, a preliminary injunction is a "drastic" remedy, and the movant must make a "clear showing" of each of these elements. Faberge Intl., Inc. v Di Pino, 109 AD2d 235, 240 (1st Dept 1985). "If key facts are in dispute, the relief will be denied." Id. Here, the dispute is legal, rather than factual.

Likelihood of Success

The antecedents of legal protection of parkland have been traced at least as far back as Ancient Rome. David C. Slade, et al., Putting the Public Trust Doctrine to Work (2d ed. 1997),[14] at 1. In New York, the municipal sale of public parkland without State legislative approval has long been prohibited. See Brooklyn Park Commrs. v Armstrong, 45 NY 234, 243 (1871):

> the city took the title to the lands ... for the public use as a park, and held it in trust for that purpose. * * * Receiving the title in trust for an especial public use, it could not convey without the sanction of the legislature ... .

In the seminal, and quotable, Williams v Gallatin, 229 NY 248, 253-54 (1920) (Pound, J.), in preventing the Parks Commissioner from leasing the Central Park Arsenal to the "Safety Institute of America" for an exhibition seeking to prevent "physical suffering and premature death," the Court of Appeals stated as follows:

> A park is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment. * * * [Parks] facilitate free public means of pleasure, recreation and amusement and thus provide for the welfare of the community.

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[13] The Corporation Counsel of the City of New York represents all defendants except Urban Space Holdings, Inc., which apparently is unrepresented at present. Thus "defendants" will refer to all defendants except this last entity.

[14] http://media.coastalstates.org/Public%20Trust%20Doctrine%202nd%20Ed%20%20 1997%20CSO.pdf

> * * * [They] must be kept free from intrusion of every kind which would interfere in any degree with [their] complete use for this end.

Similarly, "to provide means of innocent recreation and refreshment for the weary mind and body is the purpose of the system of public parks." Id. at 254.

The Court of Appeals recently recognized and reaffirmed what it called the "Public Trust Doctrine":

> parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes.

Friends of Van Cortlandt Park v City of New York, 95 NY2d 623, 630 (2001) (Kaye, C.J.) (State legislation required to build Federally-mandated water treatment plant in park) (see fn. 3).

Without State legislative approval parkland cannot be (1) converted to any non-park purpose, cases cited supra; or (2) leased for any purpose, even a park purpose, Miller v City of New York, 15 NY2d 34, 37 (1964) (Desmond, J.) ("Since the property was a park impressed with a trust for the public it could not without legislative sanction be alienated or subjected to anything beyond a revocable permit."). These two principles frame the basic issues here.

Park Purposes

General Principles

"The letting of park property for restaurant purposes does not in and of itself constitute an improper use of such property." 795 Fifth Ave. Corp. v City of New York, 13 AD2d 733, 733 (1st Dept 1961). Whether a particular restaurant at a particular location in a particular park serves a "park purpose" is a question of fact. 795 Fifth Ave. Corp v City of New York, 15 NY2d 221, 226 (1965) ("the case comes down to the choice of location and type of facility").[15]

Plaintiffs propose, and this Court agrees with, a triage formulation: some uses clearly are proper; some uses clearly are not; and some uses depend on the particulars. Furthermore, all uses could be plotted on a spectrum, from, at one end, unvarnished, pristine nature, undisturbed by civilization, to, at the other end, private pecuniary interest and common-denominator commercialism. "Park purpose" is an esoteric concept rather than a set formula, and divining it is an art rather than a science. Some uses are obviously more "park" than others; but on what side of the "park-versus-non-park" dividing line does a particular use fall?

One obvious criterion is whether, de jure or defacto, the use is open to all. See Gewirtz v City of Long Beach, 69 Misc 2d 763, 777-78 (Sup Ct, Nassau County 1972):

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[15] Contrary to defendants' assertions, this Court does not read any of the several 795 Fifth Ave. opinions (see infra) as invalidating or casting doubt on any prior "park restaurant" case, despite the divergent, fact-specific results.

> It is thus clear that municipally-owned property that has been dedicated to use as a public park is held in trust for the public at large and may not be diverted to other uses or sold without express legislative authority. The same principle of a trust for the public prevents the municipality from taking action which operates to exclude the public at large from such a public park and to limit use of the public park to local inhabitants unless the municipality has been granted express legislative authority to do so. To hold otherwise would be to permit the municipality to achieve a result which violates the public trust principle since as to those who are excluded from the public park the exclusionary policy is as much a diversion of use as would be the case if the municipality changed the use of the park or sold it.

Cf. Port Chester Yacht Club v Village of Port Chester, 123 AD2d 852, 852 (2d Dept 1986) (remanding case for determination whether use was open to all). For example, a prohibitive entrance fee would run afoul of the "Public Trust Doctrine."

Parties' Arguments

As befits debate about a contentious public issue (involving Manhattan real estate, no less), the parties have submitted the subjective opinions of some public officials, and some private citizens, addressing the matter at hand. According to plaintiff State Assemblymember Richard N. Gottfried (Moving Affirmation ¶ 4), whose new district encompasses Union Square Park, "restaurants [in parks] . . . are essentially private commercial uses that exist in great numbers outside the parks and which invariably displace traditional park uses." Gottfried bemoans (id. ¶ 10) the idea of using "the Pavilion for a commercial restaurant, rather than as a place where children can play and be protected from the weather and adults can enjoy sitting and relaxing without having to pay for an expensive meal."

In testimony opposing an earlier version of the current plan,[16] Gottfried and co-Legislators Thomas K. Duane (Senate) and Deborah J. Glick (Assembly) wrote as follows:

> The increasing privatization of our parkland is an abdication of the City's responsibility to maintain and improve our parks and to prevent the harm that commercialization brings. It is not right for the public to be asked to accept trade-offs like this in exchange for park improvements. Parks should be supported by the City. We should not have to sell off pieces of our parks to pay for them.

According to plaintiff former City Councilmember Carol Greitzer (Moving Affidavit ¶ 11), "There is such an obvious and logical argument for using the Pavilion as a continuation of the playground. Anyone with an ounce of sense would realize that this is the perfect spot to hold indoor activities and as a shelter during inclement weather." In 2011 (Croft Moving Affidavit ¶

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[16] http://assembly.state.ny.us/mem/Richard-N-Gottfried/story/43033/

26) Manhattan Borough President Scott Stringer criticized "turn[ing] over precious parkland for private use" and "privatizing public interests over community needs."

To the contrary, says Commissioner Benepe (Cross-Moving Affidavit ¶¶ 8-11),

> a Restaurant Concession in the Pavilion is a beneficial use of the Park that will enhance the park experience for visitors and generally promote public parks purposes. In [deciding to grant the concession], I considered the character of the Park, the location and character of the Pavilion and surrounding area, and the benefits to the public of a Restaurant Concession in the Park.
>
> An outdoor dining opportunity in Union Square Park provides a unique and special experience for the user public … .
>
> Offering food and beverages in public parks is a long-standing and widely accepted use of parkland, going back to the original 1858 design for Central Park. Many parks throughout the City offer a variety of food and beverage options to park-goers.
>
> In my judgment a Restaurant Concession in the tranquil setting of Union Square Park … offers a unique experience and dining opportunity for park users and is consistent with the Charter mandate that the Parks Department improve parks for the beneficial use of the public.

Jennifer Falk, Executive Director of non-party Union Square Partnership, has submitted an affidavit essentially saying that the proposed restaurant would be the culmination of the vast improvements to the north end of the park that her organization and others have helped accomplish.

Of course, the question is not what one particular Legislator or Commissioner or neighbor or advocacy group (or judge, for that matter) would like to see; the question is whether the City defendants acted within the scope of their power in entering into the Concession Agreement without State legislative approval.

Paradigms

In this Court's view, a park restaurant could fulfill a park purpose pursuant to one of two paradigms. The first, what could be called the "refreshment" paradigm, is a facility in which one can quench thirst and/or hunger after several hours of ball playing or hiking or just soaking up the sun, without having to leave the park's environs. See Gushee v City of New York, 42 AD 37, 41 (1st Dept 1899) ("in the control and management of the public parks of a great city it is perfectly proper to furnish not only such innocent amusements as may enhance the pleasure of those who resort to the parks, but such opportunities for rest and refreshment for themselves and their animals as may be required"). The second, what could be called the "dining" paradigm, is a

facility in which one can dine *al fresco* in a pastoral setting, simultaneously enhancing the meal and one's appreciation of the park. An obvious example is Central Park's Boathouse Café.[17] Given the small size of Union Square Park, considerably too small for ball fields or hiking trails, and the ready availability of refreshment right across the street (no matter which street), the present proposal clearly does not fit within the first paradigm. Further, based on the general ambience to which the proposal aspires, defendants obviously have the second paradigm in mind.

Case Law

Not surprisingly, park restaurant proposals, of both paradigms, have had a mixed record in the courts. Instructive is Williams v Hylan, 126 Misc 807, 813-15 (Sup Ct, NY County) (preliminarily enjoining the City from leasing space in Battery Park for two refreshment stands), affd 217 AD 727 (1st Dept 1926):

> Battery Park is one of the group of small parks of the City ... covering an area of twenty-one acres.[18] * * * The streets contiguous to [the park] contain more than twenty stores selling the same class of merchandise as the lessee proposed to vend ... . As a consequence, it would appear that means for refreshment are now amply provided for, and no impelling reason is shown why it is necessary to furnish additional facilities, especially by the erection of permanent structures in a small park apparently already overcrowded.
>
> A serious question has also been raised ... as to the effect upon the playground activities of the children of the community by the erection of the proposed buildings. * * * The rights of the [children] to the use of their playground are unquestionably paramount to those of the owner of the place of refreshment ... .

Upon appeal after trial, the First Department found the proposal inconsistent with park purposes, in part because of the easy availability of nearby refreshment and the proposed establishment's propinquity to a children's playground. Williams v Hylan, 223 AD 48, 51 (1st Dept 1928), affd sub nom Williams v New York, 248 NY 616 (1928). Williams and Blank v Browne, 217 AD2d 624, 629-30 (2d Dept 1926) (prohibiting sale of refreshments available nearby), confirm that the "refreshment" paradigm could not sustain the instant proposal.

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[17] This Court finds it surprising that neither side seems to have discussed, or even mentioned, this well-known establishment. Plaintiffs may have eschewed it because it represents what they do not want to happen here, to wit, a restaurant operating in a park. Defendants may have eschewed it because, ensconced deep within a broad bosom of greenery, far from the madding crowd, looking out on a lake with row boats and swans, it represents everything a Union Square Park restaurant could never be.

[18] That is almost six times the size of Union Square Park.

The "dining" paradigm was eloquently sustained in 795 Fifth Ave. Corp. v City of New York, 40 Misc 2d 183, 191-92 (Sup Ct, NY County 1963) (approving construction of large, for-profit restaurant facility [that was never built]),[19] affd 15 NY2d 221 (1965). According to Justice Jacob Markowitz (apparently quite the *bon vivant*):

> food and drink are available at numerous traditional restaurants, but the savor of a meal or evening coffee, a snack or an *apéritif*, in the park setting is a unique one. Anyone who has enjoyed food and drink on the plazas and pavilions of Europe, or, for that matter, in other park settings ... will recognize this. The very nature and character of the important satisfactions which the [proposed restaurant] promises are intrinsically related to its park location, and this, rather than its attraction primarily to park users, qualifies it as a legitimate park facility.
>
> Plaintiffs concede that those who come to a park to relax amidst the rural surroundings and to gaze in quiet contemplation at the grass and upon the flowers and the other natural ornaments not normally found elsewhere in the city are using the park for park purposes. Thus, plaintiffs' contention that people sitting in a cafe-restaurant in the park, gazing at the very same scenery, are not using the park for park purposes, is unpersuasive.

In sustaining the proposal, Justice Markowitz considered, id. at 188, the uses, or lack thereof, of the particular parkland at issue. The Parks Commissioner described it thusly:

> The site itself was not used by human beings except for purposes that I wouldn't want to mention in this court. You cannot sit on it. You cannot play on it. The trees are scraggly .... There was a very steep bank of earth on which no children would play and no adults could sit, it is mud.

Fortunately, as all would agree, that is a far cry from the Pavilion and its milieu.

Justice Markowitz offered one caveat: if the restaurant "was intended to provide food and drink at luxury prices and thus be restricted to the elite, rather than open to broad segments of the public[, this] might cast doubt on the propriety of its operation as a public park facility." Id. at 192.

Justice Markowitz went on, id. at 193, to note the "satisfaction in sipping coffee or a liqueur seated at a table surrounded by trees." Nobody seated at a table or bar in the Pavilion would be "surrounded by trees." Rather, they would be surrounded by the columns and walls of the Pavilion; and outside diners would be surrounded by the North Plaza pavement. Even Chef's

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[19] Justice Markowitz issued his decision after a trial, noting, "Because of the obvious and substantial public interest in the issue, the plaintiffs were given the widest latitude of inquiry and of proof at trial." 40 Misc 2d at 187.

dramatic "artist's renditions" and floorplans (Defendants' Exhibit 17) show a setting that is not bucolic, unless a few trees off in the distance makes a setting bucolic.

Further Analysis

The Pavilion is long and narrow, and its potential *al fresco* attributes are limited. Diners inside looking south, the marquee view, towards the park's interior, to the extent that they could see past the Pavilion's small round columns and large rectangular supports (Defendants' Exh. 17), and the bar or bar areas, would have to contend with the barrier required by the Concession Agreement and Chef's liquor license application.[20] At best, by craning their necks, patrons might see some treetops. Inside diners looking north would see a paved plaza, beyond which would be traffic and the high-rise commercial buildings fronting the north side of 17th Street (Plaintiffs' Exh. 19, at 2). Diners looking east or west would not see much of anything, other than the Pavilion's thick rectangular supports, with a slice of green in between, beyond which would be typical Manhattan buildings. Diners on the plaza part of the proposed restaurant would see hardly any foliage at all. Thus, patrons would not, as Justice Markowitz would have it, id. at 192, be able to "gaze in quiet contemplation at the grass and upon the flowers and the other natural ornaments."

Commissioner Benepe's description of the park as "tranquil" is dubious. For all its charms, when one thinks of Union Square Park, "tranquil" is not the first word that comes to mind. The entirety is only one block wide (and three blocks long), meaning that from anywhere within the park one is at most a half block away from the teeming streets of "The City that Never Sleeps," including such major thoroughfares as Broadway and 14th Street. Similarly overstated is defendants' reference (Cross-Moving Memo at 40) to "the lush, verdant foliage of the Park." Everyone who lives, works, shops, and, yes, dines in the area is grateful for the trees and other flora in the park, but nobody would mistake it for Central Park's Ramble.[21]

Plaintiffs argue (Moving Memo at 1) that a Pavilion restaurant would "effectively expand the surrounding private commercial district – with its high density of eating and drinking establishments – into the park itself." As Justice Solomon mused (Moving Exh. 5, at 10), "In light of the concentration of restaurants of all kinds surrounding Union Square Park, it is not clear what benefit will be provided by another one inside this park." Operation of a Pavilion

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[20] This Court fails to see how a barrier tall enough to prevent children from looking into the Pavilion and seeing drinks mixed at the bar (shown in the floor plan) or bars (shown in the artists' renditions), with the tall supply-shelves behind where the bartenders would stand (Defendants' Exh. 17), would not severely limit, if not eliminate, the southern view.

[21] "The lush Central Park woodland ... known as the Ramble ... is composed of 38 acres of winding pathways between 73rd and 78th streets. Described by Frederick Law Olmsted as a "wild garden", the Ramble[contains a] maze of trails amidst its abundant flora and fauna ... ." http://www.centralpark.com/guide/attractions/ramble.html

restaurant and the Holiday Market would surround the more pastoral aspects of the park at both ends, albeit at different times of the year. Defendants' argument (Cross-Moving Memo at 35, 37) that the presence of other refreshment options in the vicinity of a proposed park restaurant is irrelevant is a misreading of the 795 Fifth Ave. Corp. holdings. There, the plaintiffs, who were nearby commercial property owners, argued that the proposed "cafe-restaurant" would be "a subsidized tax-free business which would compete with privately owned tax-paying businesses nearby." Id. at 185. The Court found this to be a political, not a legal, issue. Id. at 187.[22] Here, plaintiffs have proved beyond a peradventure of a doubt that a restaurant is not necessary to insure that park participants do not go hungry or thirsty.

Defendants urge that because, until recently, Luna Park operated in the sunken courtyard, a restaurant in the Pavilion would essentially be a continued, rather than a new, use. The Croft Reply Affidavit (¶¶ 15-24) convincingly delineates the many significant distinctions between the two facilities, one departed and one proposed. In any event, nobody ever legally challenged Luna Park's existence, rendering it at least largely, and probably completely, irrelevant to the issues presented here.

Defendants claim (Cross-Moving Memo at 34-35) that "the overall space available for children's playgrounds has dramatically increased as part of the larger renovation of which the Restaurant Concession was a component." However, the instant lawsuit is not a referendum on whether Union Square Park is better off for the recent changes to its northern end. Despite the old adage that "you take the good with the bad," this Court does not see a restaurant (and what might be considered an upscale one at that) as integral to such improvements as new paving, lighting, and shrubs, and a new children's playground.

Both sides agree with Justice Markowitz that one test of "park purpose" is "whether the facility concerned offers substantial satisfactions to the public, which would only be possible in a park setting." 40 Misc 2d at 191. Most people would say that eating dinner in a restaurant within a park offers "substantial satisfactions." Of course, eating dinner in a restaurant anywhere offers "substantial satisfactions." So the key phrase is, "only be possible in a park setting." From defendants' perspective, you can only dine in a restaurant in a park if, well, there's a restaurant in the park in which to dine. From plaintiffs' perspective, there are many other restaurants around this park, and there are many other parks around with restaurants. The question here is whether this particular restaurant, in this particular setting, in this particular park, offers a "park meal," or just "a meal in a park." Again, this Court finds that plaintiffs have demonstrated that they are likely to succeed in demonstrating that a meal in a restaurant in the Pavilion, however lovely, would be a generic experience, not a unique park experience. Even assuming Pavilion diners could see trees, which is questionable, the oxymoronic "semi-unique" would be a more accurate description; diners at outdoor cafés across Union Square Park West have a fine panoramic view

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[22] To add belt to suspenders, Justice Markowitz found, id. at 187, "that the intended purpose and design of the new facility [i.e., lots of glass] is so novel and unique that it is, in good part, noncompetitive with more traditional forms of eating establishments."

(Plaintiffs' Exh. 20) of the park's wonderful foliage, albeit at a somewhat greater distance and separated by a lane or two of traffic.

Plaintiffs' vision of a Pavilion *sans* restaurant is highly persuasive:

> the Pavilion could be used for ping pong, chess, checkers, craft and art work, table games, dancing and practice for the presentations to the community, community meetings, holiday and special programs, film screenings, tutoring, musical programs, or perhaps an information resource center for young and older residents related to health and financial issues, and other special needs support for senior citizens and people with disabilities.

Shanker Reply Affidavit ¶ 6. "Instead, all of these possible community uses will be displaced by a commercial bar and restaurant operating from 7 a.m. to midnight every day of the week."[23] Plaintiffs' Reply Memo at 14. Defendants' assertions that the community-based activities can be moved elsewhere in the park are problematic, given the lack of other sheltered space and the multi-faceted resources that a building can provide.

Likewise, on all the available evidence, plaintiffs' claim that defendants "are attempting to create a high-end destination restaurant, as opposed to a public amenity that will serve ordinary park visitors," rings true. The Pavilion restaurant's proposed prices would make broad swaths of the public think twice before entering. Of course, Central Park's Boathouse Café is (and the former Tavern on the Green was) not intended for "ordinary park visitors." But Central Park is more than big enough to get lost in; Union Square Park is not. Positioning a restaurant within a large park increases the uniqueness of the experience and decreases the disruption of more traditional park purposes. Here, that equation is reversed.

Defendants rightly tout the discretion of the Parks Commissioner to oversee our parks. Indeed, in 795 Fifth Ave. Corp. v New York, 40 Misc 2d 183, 193 (Sup Ct, NY County 1963), Justice Markowitz observed that "As times change, park uses change, and ... the New York City Charter gives the Commissioner of Parks abundant discretion to satisfy changing concepts of parkland use." However, that does not mean that he or she can do whatever he or she wants. Discerning, much less describing, the "changing concepts of parkland use" is beyond the scope of this opinion. We are well past the Hippie Sixties, but also past the "Greed is Good" Eighties. As we navigate the wake of The Great Recession, Trillion Dollar Deficits, Fiscal Cliffs, "Occupy" movements and "99% against 1%" class warfare, we would seem to be in an era of retrenchment and austerity, not conspicuous consumption and luxury, suggesting modest, toned-down park uses.

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

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[23] During the six-month proposed restaurant operating season.

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, and based on the record at this stage of the litigation, this Court finds that plaintiffs likely will succeed in proving that the proposed restaurant would be "in" the park, but not "of" the park, would be a "park restaurant" in name only, and would not serve a "park purpose."[24]

Lease or License

The second prong of the instant motion is based on plaintiffs' second cause of action, claiming that the Concession Agreement is a "lease," rather than a "license," which would require State legislative approval even if the restaurant were deemed to be for a "park purpose." See generally, Miller v City of New York, 15 NY2d 34 (1964); accord Terrell v Moses, 4 AD2d 171, 172 (1st Dept 1957) ("if the agreement in question be a lease, the [Parks] commissioner may not enter into it").

In this Court's view, even a cursory consideration of the Concession Agreement (Plaintiffs' Exh. 8) belies its self-proclamation to be a license and shows it to be a lease. The essence of the agreement, "the deal," is that Chef is to invest more than a million dollars to construct the restaurant and its appurtenances, and to pay the City the greater of a fixed fee or a percentage of the gross receipts, and the City is to transfer possession of the Pavilion and the necessary outlying areas for a 15-year term (allowing Chef to recoup its costs and profit to the tune of $15,000 a day [according to Chef's request for a particular undertaking amount]). On its face, that sounds like an ordinary, every-day lease.

Defendants have, helpfully, enumerated their main arguments (Cross-Moving Memo of Law, at 28-31). First, and most obviously, they note that the Concession Agreement calls itself a "License Agreement." However, the label applied by the parties is not determinative. Williams v Hylan, 126 Misc 807, 810-11 (Sup Ct, NY County), affd 217 AD 727 (1st Dept 1926); Miller v City of New York, 15 NY2d 34, 37-38 (1964) (finding a lease rather than a mere "revokable-at-pleasure license").

Defendants note (Cross-Moving Memo at 28) that in Lordi v County of Nassau, 20 AD2d 658, 659 (2d Dept), affd 14 NY2d 699 (1964), the Court stated that "[t]hough the labels attached to an agreement do not preclude the construction by the court of the effect of its provisions, the descriptions ... are necessarily factors for consideration to determine the intent of the parties." In this Court's strong, and oft-stated, view, the "intent of the parties" is the relevant inquiry when

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[24] In reaching this conclusion, this Court need not and does not reach or address a myriad of other arguments propounded by plaintiffs, such as the alleged ulterior motives (if not sinister purposes) of the proposed restaurant's proponents (see, e.g., Plaintiffs' Reply Memo at 15-16), or other analogies and comparisons, such as to the similarly-colonnaded pavilion in "Chinatown's" Columbus Park (used for "community" purposes, see Plaintiffs' Exh. 23), the Union Square Greenmarket (run by a non-profit organization with a Zeitgeist different from Chef's), and the Bryant Park Café (approved by the State Legislature in or about 1984).

the parties are, later, fighting in court between themselves. However, here, the interests of the parties to the subject agreement are completely aligned. Plaintiffs obviously had no direct role in drafting the agreement and should not be bound thereby. In any event, the "intent of the parties," i.e., the goal of both the City defendants and Chef, was, it seems, to transfer possession of park property for 15 years, without State legislative approval, in the way most likely to survive judicial scrutiny. Apparently, in an example of the tail wagging the dog, instead of entering into the obvious "lease," the parties have tried to shoehorn lease terms into a license framework.[25]

Second, defendants note (Cross-Moving Memo at 28) that "the Parks Department did not cede, nor intend to cede, absolute dominion and control over the subject premises." One would hope not! This is, after all, public property. The Concession Agreement provides that the Parks Department can dictate, or at least veto, all "plans, schedules, services, hours of operation, menu items, prices," etc. So in theory, the cook could hardly stir the soup without permission from the Parks Department. But what would actually happen in practice? Obviously, Chef would control the day-to-day operations. In finding a "license" actually to be a lease, the Miller court noted that "The controls are as to prices, times of operation and choice of employees, etc., rather strict and detailed but no more than would reasonably be demanded by a careful owner as against a lessee for such a business use and for so long a term." In any event, even if this factor, arguendo, were found to favor defendants, no one factor is determinative.

Third and finally, Section 3.2 of the Concession Agreement provides that it is "terminable at will ... at any time; however, such termination shall not be arbitrary and capricious." The parties hereto have engaged in an extended, abstruse debate whether an agreement can be considered terminable-at-will if termination cannot be arbitrary and capricious. Overall, plaintiffs seem to have gotten the better of the argument. If termination of an agreement cannot be arbitrary and capricious, then it must be for a reason (or, as lawyers like to say, "for cause"), meaning, despite defendants' vigorous arguments, that it is not terminable-at-will. Also, defendants' position simply proves too much; would the City, one day into the 15-year term, terminate, costing Chef well over a million dollars, and leaving it with no recourse? As plaintiffs note, the recourse is a lawsuit (which Chef undoubtedly would file faster than you can broil a filet mignon). The City's and Chef's public comments suggest a long-term relationship. Would the City ask Chef to pack its bags and leave because the City decided to build a bocci court? Would that be "arbitrary and capricious"? Courts should not be cynical, but neither should they be naive. Experience dictates that if this restaurant starts, it will not stop, whatever the Concession Agreement says.

In the final analysis, the Concession Agreement appears to be a lease masquerading as a license, given the long term (15 years); the reason for such a long term (to allow the concessionaire to recoup its initial capital investment); the concessionaire's day-to-day control over the space; and the conditional nature of the revocation clause. Simply put, Chef has assumed a large risk in hopes of garnering a large reward. Courts that have scrutinized similar agreements have found

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[25] Speaking of tails: "If you call a tail a leg, how many legs does a horse have? Four, calling a tail a leg does not make it a leg" (attributed to Abraham Lincoln).

them to be leases. Gushee v City of New York, 42 AD 37, 40 (1899) ("this agreement, involving, as it did, the possession of real estate and the payment of a monthly rent for it, was practically a lease"); Miller v New York, 15 NY2d 34, 37 (1964) (finding agreement to be a lease based, in part, on "exclusive use of a specifically bounded ... area; a 20-year term; rental fixed at a percentage of gross receipts; and construction and repair by grantee at its own cost of extensive buildings [etc.]"); Williams v Hylan, 126 Misc 807, 808 (1928) (agreement requiring significant initial investment held to be lease). Doubt, if there be any here, should be resolved against park encroachment. Miller, 15 NY2d at 37 ("But even if there were a doubt about it . . . it would be our duty to deny the existence of the power.") (citation omitted).

In sum, this Court finds that plaintiffs are likely to prevail on their argument that the Concession Agreement is a lease that defendants had no right to enter into, as they failed to obtain State legislative approval.

Irreparable Harm

Plaintiffs will suffer irreparable harm if a preliminary injunction is denied and they ultimately prevail on the merits.[26] E.g., Capruso v Village of Kings Point, 34 Misc 3d 1240(A), *7 (Sup Ct, Nassau County 2009), affd 78 AD3d 877 (2d Dept 2010):

> The threatened alienation or alteration of parkland in and of itself is recognized as irreparable injury warranting the grant of temporary injunctive relief. (State of New York v City of New York, 275 AD2d 740; Smith v State, 153 AD2d 737; Bass Building Corp. v Village of Pomona, 142 AD2d 657).

Money could not adequately compensate plaintiffs and other park users; you do not lose money by losing parkland.

Balancing of the Equities

A balancing of the equities favors plaintiffs. If plaintiffs are denied a preliminary injunction, but ultimately prevail, they will not be able to use portions of the park for an extended period of time, time that can never be replaced. If plaintiffs are granted a preliminary injunction and defendants ultimately prevail, the project will be delayed, but can then move forward. Given the history of the City's proposal, including the prior litigation and the intense opposition from some quarters, the instant lawsuit was not just predictable but inevitable. Indeed, the Concession Agreement provides for what it defines as "The Litigation." See generally, Doe v Dinkins, 192 AD2d 270, 276 (1st Dept 1993) ("defendants claim of hardship ... is ... negated by the notice and warnings they have received"); Capruso v Village of Kings Point, 34 Misc 3d 1240A, *7 (Sup Ct, Nassau County 2009), affd 78 AD3d (2d Dept 2010) (burden of construction delay "cannot override the fundamental principle of the Public Trust Doctrine, *to wit*, legislative approval before converting the use of parkland to a non-park purpose").

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[26] The Court is surprised that this issue is even being contested.

For the foregoing reasons, plaintiffs are entitled to a preliminary injunction.

A principal of Chef asks that any preliminary injunction be conditioned on plaintiffs posting a 1.35 million dollar undertaking (based on lost profits of $15,000 a day, for 90 days). Given the civic nature of this lawsuit, and mindful of Justice Solomon's $100 bond requirement in similar litigation, the preliminary injunction is conditioned on plaintiffs posting an undertaking of $1,000.

Cross-Motion

Defendants' cross-motion to dismiss or for summary judgment necessitates a brief look at plaintiffs' third cause of action, seeking to enjoin the use of the southernmost area of the park for the Holiday Market. According to Charles Kloth, the Parks Department's Director of Concessions (Cross-Moving Affidavit ¶ 8), vendors sell "handcrafted items, art, unique gifts, fine crafted jewelry and related items, and holiday-related food and beverage items such as holiday cookies and apple cider." The connection between these items and parkland is left to the imagination. Plaintiff Croft has a different take (Reply Affidavit ¶ 29):

> Starting a week before Thanksgiving and continuing for the next six weeks, a sizeable part of the south plaza ... is turned into a shopping mall. An assemblage of booths the size of a small tent city is erected and hawkers sell incense, scarves, ornaments, soaps, rings, bracelets, pendants, teas, candies, sweaters, hats, dresses, gloves, puzzles, toys, house wares and other merchandise of the kind that is ... sold in thousands of other places. The City even removes tables, chairs and otherwise permanent park benches to accommodate this commercial activity. The Holiday Market is the very antithesis of park use. It is pure, crass commercialism, which has as its only excuse for usurping public park space that it brings at least $1,000,000 to the City every year.

See also, Shanker Reply Affidavit ¶ 12 (claiming Holiday Market "turns our beautiful and precious South Plaza into a shopping mall mobbed with frenzied shoppers.").

Whether the Holiday Market sells "unique gifts" or, rather, garden-variety items "sold in thousands of other places" is irrelevant; nothing in the definition of "park" encompasses a merchandise mart, whether it is selling baubles and trinkets or high-end, hand-crafted handbags. As plaintiffs pronounce (Plaintiffs' Reply Memo at 29-30), "The definition of a park may have passed beyond Olmstead's [sic] pastoral vision, but ... it has never included shopping for consumer merchandise." Photographs of the Holiday Market in full swing (Plaintiffs' Exh. 25) depict a scene more like an outdoor Walmart on Black Friday than dedicated parkland. Plaintiffs also plausibly allege that the Market impedes pedestrian park crossings. Greitzer Reply Affidavit ¶ 19. While the Holiday Market use of the park is temporally and spacially limited, it is hardly de minimis.

Suffice it to say that were this Court to grant summary judgment to either side on this cause of action, it would not be in favor of defendants. See generally, 795 Fifth Ave. Corp. v City of New York, 13 AD2d 733, 734 (1st Dept 1961) ("the construction of a department store in Central Park" would be illegal *per se*). Thus, the cross-motion is denied.

Conclusion and Disposition

For the reasons set forth herein, defendants' cross-motion to dismiss or for summary judgment is denied; plaintiffs' motion for a preliminary injunction is granted; and defendants are hereby restrained from altering the Union Square Park Pavilion to accommodate a restaurant and/or bar, from granting any further approvals to do so; from implementing the March 26, 2012 "License Agreement" described herein (Plaintiffs' Exh. 8); and from actually operating a restaurant and/or bar in the Pavilion, or a food kiosk nearby, all without State legislative or court approval, conditioned on plaintiffs posting an undertaking of $1,000.

Dated: January 8, 2013

Arthur F. Engoron, J.S.C.