Understanding licenses and leases – A three-part series: Refreshments, but no concessions - by Darren Stakey

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This three-part series briefly examines the nuances of seminal New York cases concerning licenses, leases, and even easements, to assist the New York practitioner in more effectively utilizing all three tools in his or her regular practice.

Part I of III: Refreshments, but no concessions: Is an agreement to serve refreshments in a NYC park a license or a lease?

Generally, a “lease” is an irrevocable grant of absolute possession and control over the property of another at an agreed rental; whereas, a “license” conveys no interest in the property of another and is merely a revocable privilege to carry out acts of a temporary nature. Decisional law contemplating the distinctions among licenses and leases in New York goes back to, at least, the time of the American Civil War. See, e.g., Babcock v. Utter, 1 Abb. Dec. 27 (N.Y. 1864). Historically, and still today in the Empire State, an instrument’s character has depended on its particular terms and not merely the nomenclature employed in the instrument. As a result, our trial courts are regularly forced to delve deep into the morasses of fact-specific disputes, weighing often-countervailing considerations to assess what critical term(s) within a given instrument should determine when a license, as opposed to a lease or even an easement, is created. Although New York courts tend to consistently home in on the same factual issues as being determinative, different courts have reached opposite conclusions when considering surprisingly similar fact patterns, as illustrated by the following cases concerning the right to sell refreshments on New York City parkland.

In Williams v. Hylan, 227 N.Y.S. 392 (1st Dep’t 1928), the Appellate Division struggled to classify an instrument that granted a vendor the right to build and operate two concession stands in Battery Park. Under the terms of the agreement, which was called both a “permit” and a “lease,” the vendor was granted the right to use park property for a period of 10 years, terminable upon six months’ notice should the space be required for a public purpose, provided, inter alia, that the prices of all refreshments sold were approved by the park commissioner. In a 3-2 split decision, the majority found that the instrument contained “every element of a lease.” In the majority’s view, because the subject license could only be revoked if the city needed its property for a public purpose, the

agreement purported to convey exclusive possession against all the world, including the owner, and therefore created an irrevocable estate in the land, if valid.

Justice Proskauer, writing for the dissent, took the opposite position, finding the instrument was merely a revocable license because, by its terms, the vendor's improvements could be taken by the city at any time upon six months' notice. The dissent also found persuasive that the vendor was not free to set his own prices and had to conform to the park commissioner's directives. Seemingly in light of this tension, the court prevaricated, holding: "If the contract under review is intended to be a lease of park property, the commissioner was without power to execute it. If it is nothing more than a revocable license, the granting of same was a clear abuse of discretion."

More than 80 years later, the Department of Parks and Recreation again found itself litigating the nature of an agreement that allowed a vendor to serve refreshments at a New York City park. See Union Square Park Community Coalition, Inc. v. New York City Department of Parks and Recreation, 8 N.E.3d 797 (N.Y. 2014). In that case, the instrument at issue, termed a "license agreement," allowed the vendor to operate a seasonal restaurant in Union Square Park for a term of 15 years. As with the conditions placed on business operations in Williams, all prices and services offered at the Union Square pavilion restaurant were subject to pre-approval by the park commissioner. Analogous to the agreement in Williams, the Union Square agreement was terminable upon written notice, although such termination could not be arbitrary or capricious.

While again recognizing that a lease made by the park commissioner would amount to an illegal alienation of public parkland, the Court of Appeals nevertheless unanimously found that, on balance, the agreement in Union Square Park Community Coalition constituted a valid license, and not a lease. Integral to this determination was the extensive control the commissioner exerted over the restaurant's day-to-day operations, as well as the numerous environmental and community-based provisions with which the restaurant was obliged to comply.

Despite numerous factors boding in favor of construing the agreement in Union Square Park Community Coalition as a lease, most namely its 15-year term and definitive payment structure, the Court of Appeals appears to have deemed the city's ability to terminate the restaurant's occupancy at will as being dispositive to its determination that the agreement was, in fact, merely a license.

The takeaway: a broad termination clause reserving the grantor's right to cancel at will may be the most crucial factor in determining that an agreement is a license, and not a lease. Revocability is crucial when drafting a license. Therefore, avoid tying termination rights to a non-default-related condition subsequent — such as a grantor's need to utilize the premises for another purpose — as same may create a de facto lease, even where a license agreement is purported and actually intended.

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