Testimony By the Times Square Alliance Regarding Proposed Amendments by the Street Activity Permit Office ("SAPO") to Chapter 1 of Title 50 of the Rules of the City of New York

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I am Tim Tompkins, President of the Times Square Alliance. The Times Square Alliance wishes to thank Michael Paul Carey and the staff of SAPO for all the hard work they do throughout the year in connection with events on the Times Square Pedestrian Plazas. Theirs is not an easy job, and I applaud their effort to increase transparency, improve communication, and seek community consultation, while also maintaining the balance of uses that is essential to the continued success of pedestrian plazas throughout the city.

The Times Square Alliance respectfully submits these comments to the proposed rule changes amending Chapter 1 of Title 50 of the Rules of the City of New York relating to street activity permits (the “Proposed SAPO Rules”) as they apply to pedestrian plazas.

The Pedestrian Plazas in Times Square, first introduced in 2009, have been overwhelmingly successful at improving the quality of life in the Times Square area. However, at the same time, the very popularity of the plazas has created new challenges. For example, we have seen peak pedestrian counts increase from 350,000 per day up to as high as 480,000 per day. The City made an important step in addressing these challenges when the City Council passed Local Law Int. 1109-2016 which, among other things, empowered the Department of Transportation (“DOT”) to enact regulations creating Designated Activity Zones and Pedestrian Flow Zones in the Times Square Pedestrian Plazas to better manage the competing uses of these spaces.

Amending the SAPO Rules is the next, important step in more effectively managing the usage of Times Square and other pedestrian plazas throughout the City. With that goal in mind, we wish to express some concerns with the proposed amendments and propose the consideration of some changes.

The SAPO Rules scheme was originally (prior to the creation of pedestrian plazas) designed for streets and sidewalks, and is geared towards the needs of those types of public forum. Pedestrian Plazas are different. They are not merely thoroughfares—they are special gathering places that often serve community needs or allow for appreciation of an iconic location, and/or create valuable open space for New Yorkers to simply sit and enjoy the surroundings. In this regard, Pedestrian Plazas are more akin to an urban park than to a street or sidewalk. The SAPO Rules are designed to account for the disruption to vehicular and pedestrian traffic for streets and sidewalks, but do not take into account that, by definition, the permitting of an event in a Pedestrian Plaza does not merely impede traffic, it also displaces other uses of the space, including other expressive uses. SAPO’s broader goal in adopting new event-permitting rules should be “to coordinate multiple uses of limited space”—a role blessed by the U.S. Supreme Court in Thomas v. Chicago Park District, 534 U.S. 316, 322 (2002). The SAPO Rules should be drafted with the awareness that every time that SAPO issues a permit for Quaker Oats to sponsor a tasting event for its new oatmeal on the Times Square Pedestrian Plazas, for Epson to host a large event for its new printer, or for Esurance to build a tennis court as a marketing...
gambit, it displaces other competing uses of that space—whether it's tourists wishing to sit at the tables and take in the sights or guitarists wishing to perform for the many people passing through.

In Times Square in particular, the existing SAPO Rules have proven ill equipped to deal with the unique challenges of this part of the City. On the one hand, Times Square has throngs of pedestrians, including tourists who provide critical revenue for the City, as well as the highest concentration of hotel rooms and theaters. Every day, 170,000 New Yorkers commute to work in Times Square. Moreover, unlike an ordinary city street, which may experience reduced traffic outside of weekday rush hours, the pedestrian and vehicular traffic in Times Square is driven by other factors. For example, in the Theater District, many of the shows offer both matinee and evening performances on Wednesdays and Saturdays, leading to significant pedestrian and vehicular congestion at those times, especially between the performances. Conversely, on Sunday mornings or Monday nights, when many of the theaters are dark, pedestrian and vehicular traffic is much lighter. There must be mechanisms that use data and site-specific facts like these to distinguish and discern the different impacts of events at different times and places, even within the Times Square Pedestrian Plazas.

While Times Square grapples with scores of pedestrians, its iconic nature makes it of prime interest to commercial corporations as a locale for their marketing events. In principle, the Alliance has been open to this, and remains so – but within limits. After all, Times Square is a highly commercial place, and as such has a higher tolerance for commercial promotions than many plazas in quieter residential communities. As a result, most often with Alliance support (in the context of existing SAPO rules), SAPO has been issuing numerous permits for large commercial events in Times Square, often during peak hours, that, as we now have observed over the seven years of the plazas’ existence, place significant strains on all who work there or visit. The result, then, is that many of these commercial events have not only contributed to pedestrian congestion, but have also interfered with the public’s ability to simply use the space. While we are sensitive to the First Amendment rights to engage in commercial speech, the First Amendment does not require allowing every corporation to host a massive commercial launch in Times Square at any time with large stages, booths or souped-up vehicles in the middle of the plaza.

When the City Council and DOT passed the new law and regulations specific to Times Square, they recognized the unique reality of our district. Similarly, we encourage SAPO to take a close look at the Proposed SAPO Rules with two goals in mind: serving the unique public policy goals of the Pedestrian Plazas and Times Square in particular, and enhancing the constitutionality of the rules so that they will better withstand a potential legal challenge.

As detailed below, our proposed changes to the Proposed SAPO Rules include:

(a) re-drafting the grounds for denial or conditioning of a permit;

(b) identifying potential specific criteria for input by the Plaza Partners and community boards that focus on the impact of the event on the Pedestrian Plaza and surrounding community and provides factual support for the grounds for denial or conditioning of a permit;

(c) providing specific mechanisms within the SAPO Rules authorizing SAPO to require that the applicant host the event at alternative locations or times rather than as originally requested; and
(d) incorporating limits on the maximum number of annual permits for large and extra-large events in some or all Pedestrian Plazas, including the Times Square Pedestrian Plazas.

Further, we would encourage SAPO to consider the development of separate event permitting rules for the Times Square Pedestrian Plazas, and/or to perform or consider impact assessment studies (referenced in the new rules) in connection with its permitting to allow for more nuanced analysis of prospective events in response to Times Square's unique facts and demands.

The Times Square Alliance also endorses many of the concerns raised in the letter from the NYC BID Association, dated June 27, 2016.

SAPO SHOULD CLARIFY THE CRITERIA FOR DENIAL OR CONDITIONING OF A PERMIT

Amendment of Grounds For Denial of Permit

Now that the Proposed SAPO Rules are being expanded to apply specifically to Pedestrian Plazas, this is a good opportunity to explore whether certain provisions of the SAPO Rules should be amended to better withstand potential constitutional challenges.

“[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain ‘narrow, objective, and definite standards to guide the licensing authority.’” Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992) (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969)). The rule is grounded on the fear that “[w]here the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.” Thomas, 534 U.S. at 323.

The current and proposed SAPO Rules provide the Director with authority to deny an application where “approval of the application is not in the best interest of the community, City or general public for reasons that may include, but are not limited to, lack of good character, honesty, integrity or financial responsibility of the Applicant.” § 1-05(c)(1). The Director may also deny a permit where any other City agency has notified SAPO of its disapproval of the proposed permit—for any reason.

In 1998, the U.S. District Court for the Southern District of New York held that this “best interests” provision in an earlier version of the SAPO rules was unconstitutional. Million Youth March, Inc. v. Safir, 18 F. Supp. 2d 334, 344 (S.D.N.Y. 1998) (“The Activity Rules vest unconstitutional discretion in the director and commissioner to determine which speakers shall be licensed for street activity and which shall not. Indeed, Section 1–07(c)(4), which allows licenses to be denied in the ‘best interest’ of the community for unlisted or listed reasons—including the good character of the event’s sponsor—is a virtual prescription for unconstitutional decision making of the sort specifically struck down by the Supreme Court in Shuttlesworth.”).

In light of the vulnerability of this language to a further constitutional challenge, we urge SAPO to amend it. That said, it is in the City’s—and the Times Square Alliance’s—interests that SAPO exercise meaningful review of permit applications, and not simply approve all applications as a matter of course. We thus strongly recommend that SAPO adopt grounds for denial or conditioning of an event permit that are closely modeled on the event rules used by the City Parks Department, which were twice upheld as constitutional in two separate decisions in National Council of Arab Americans v. City of New York. See 331 F.Supp.2d 258 (S.D.N.Y. 2004); 478 F.Supp.2d 480 (S.D.N.Y. 2007).
A. Courts Approve Event Permit Schemes Aimed to Coordinate Multiple Uses of a Space

Many courts have upheld the criteria for approval or denial of permits for public events where “the object of the permit system . . . is not to exclude communication of a particular content, but to coordinate multiple uses of limited space . . .” Thomas, 534 U.S. at 322. This is because “allow[ing] unregulated access to all comers could easily reduce rather than enlarge the park’s utility as a forum for speech.” Id. In Thomas, the U.S. Supreme Court upheld a park’s permitting scheme that allowed denial of a permit on the grounds that, among other reasons, the use “would conflict with previously planned programs organized and conducted by the Park District”; the use is “inconsistent with the classifications and uses of the park or part thereof”; or where the use “would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public.” Id. at 319. The Court held that the grounds were “reasonably specific and objective, and do not leave the decision to the whims of the administrator.” Id. at 324. The Court explained that “[r]egulations of the use of a public forum that ensure the safety and convenience of the people are not inconsistent with civil liberties but . . . [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.” Id. at 323. See also Field Day, LLC v. Cty. of Suffolk, 463 F.3d 167, 178 (2d Cir. 2006) (holding that mass gathering law that allowed denial of permit when necessary to preserve “health and safety” or “security of life or health” were sufficiently definite to pass constitutional muster).

Those same rationales apply with equal force not only to parks but to streets or Pedestrian Plazas. For example, in Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011 (9th Cir. 2009), the court upheld a permitting scheme for events on public property (including streets), which provided that

[t]he city manager may condition any permit ... with reasonable requirements concerning the time, place or manner of holding such event as is necessary to coordinate multiple uses of public property, assure preservation of public property and public places, prevent dangerous, unlawful or impermissible uses, protect the safety of persons and property and to control vehicular and pedestrian traffic in and around the venue, provided that such requirements shall not be imposed in a manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions.

Id. at 1028 (quoting Long Beach Municipal Code § 5.60.020(D)) (emphasis in original). The court held that this scheme was sufficiently “objective and relatively precise.” Other courts have reached similar results, holding that the same concerns about managing competing uses apply to permits for the use of any public space, including streets, sidewalks and plazas. See, e.g., Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1026 (9th Cir. 2006) (upholding street event permitting law, explaining that,”[t]o manage competing uses of Santa Monica’s public spaces, streets, and sidewalks while protect[ing] the rights of people to engage in expressive activities in the City’s public places,” the ordinance at issue “establishes a permitting process for community events held in public spaces including parks, streets, and sidewalks”); MacDonald v. City of Chicago, 243 F.3d 1021, 1026 (7th Cir. 2001); Douglas v. Brownell, 88 F.3d 1511 (8th Cir. 1996) (holding that parade ordinance permitting Police Chief to determine whether parade route “will disrupt” the use of any street ordinarily subject
to “significant congestion or traffic” did not vest unbridled discretion in police). Indeed, the fact that Father Duffy Square is parkland under the jurisdiction of the NYC Parks Department illustrates both the breadth of what is considered a park and the close similarities between many parks and the Pedestrian Plazas.

B. Current Parks Department Rules Provide A Good Model

The current event permit rules used by the Parks Department are consistent with this line of cases. See 56 R.C.N.Y. § 2-08(c). They provide as follows:

Upon application, the Commissioner may deny a permit if:

1. the location sought is not suitable because of landscaping, planting, or other environmental conditions reasonably likely to be harmed by the proposed event;

2. the location sought is not suitable because it is a specialized area including, but not limited to, a zoo, swimming pool, or skating rink, or because the proposed event is of such nature or duration that it cannot reasonably be accommodated in that location;

3. the date and time requested have previously been allotted by permit;

4. within the preceding two years, the applicant has been granted a permit and did, on that prior occasion, knowingly violate a material term or condition of the permit, or any law, ordinance, statute or regulation relating to the use of the parks;

5. the event would interfere unreasonably with the enjoyment of the park by other users;

The Parks events permit rules were challenged in the context of applications to use the Great Lawn in Central Park for large protests during the Republican National Convention in 2004. The rules were twice upheld by a federal court. See Nat’l Council of Arab Americans, 331 F. Supp. 2d at 268-69; 478 F. Supp. 2d at 489-90. In the second decision, the court emphasized that it is “indisputable that the Parks Department has a great interest in regulating activities within the City’s parks to prevent damage to the parks and to maintain a safe and enjoyable environment for visitors. Because of these concerns, a city the size of New York cannot allow [large-scale events] to take place in city parks at the whim of promoters.” 478 F. Supp. 2d at 489.

Although not all of the specific concerns at issue with green spaces in a park are the same as those at issue with a Pedestrian Plaza, the broad principles are the same. Both involve the coordination of multiple uses of a finite space with broad and diverse uses by the public.

We would therefore recommend that SAPO consider permitting rules for Pedestrian Plazas along similar lines. Specifically, SAPO may wish to consider the following grounds for disapproval or conditioning of a permit for a Pedestrian Plaza:

1. the location sought is not suitable because of physical infrastructure, appurtenances, plantings or other physical or environmental conditions reasonably likely to be harmed by the proposed event;
2. the location sought is not suitable because it is a specialized area ill-suited to the event or because the proposed event is of such nature or duration that it cannot reasonably be accommodated in that location at that date and time;

3. the date and time requested have previously been allotted by permit or there is another event on that date and time authorized by another City agency or organized by a Plaza Partner pursuant to its Concession Agreement with the DOT;

4. within the preceding two years, the application has been granted a permit and, on that prior occasion, knowingly violate a material term or condition of the permit, or any law, ordinances, statute or regulation relating to the event;

5. the event would interfere unreasonably with the enjoyment of the Pedestrian Plaza by other users; and

6. the event would present an unreasonable danger to the health or safety of the applicant or other users of the Pedestrian Plaza.

C. The Rule Should Identify Criteria For Input by Plaza Partners and Community Boards

In order to foster SAPO’s consideration of these factors and enhance the constitutionality of the Proposed SAPO Rules, it would be useful for the Proposed SAPO Rules to identify potential areas of input by Plaza Partners and Community Boards in their contemplated recommendations that are keyed to the grounds for denial or conditioning of an event permit. Under the current rules, there are no criteria for the input expected of the Plaza Partners and Community Boards.

We believe that the Plaza Partners and Community Boards can be most useful by providing fact-based impact analysis regarding proposed events (including their proposed dates and times), both individually and cumulatively. This input would be unrelated to the content of the event and would therefore provide a role for Plaza Partners and Community Boards without undermining the constitutionality of the regulatory scheme. Indeed, we believe that the special knowledge that Plaza Partners have should be acknowledged more clearly in the revised rules. The Partners’ input, while not determinative, should be given consideration because of the unique facts, circumstances and community-driven nature behind the Pedestrian Plazas. Ideally, the SAPO rules could include “Plaza Partner Event” as a defined term, acknowledging the Partners’ roles as well as the unique relationship Plaza Partners have with DOT and the City of New York.

Criteria for input from Community Boards and Plaza Partners might include: (1) pedestrian and vehicular traffic counts; (2) plaza size and capacity; (3) analysis of demands on plaza at the requested date/day of week/time; (4) discussion of all competing uses of the Pedestrian Plaza space that would be displaced by the proposed event, including other expressive activities protected by the First Amendment; (5) density and nature of surrounding neighborhood and its needs; (6) other information relevant to whether the proposed event is of such nature or duration that it cannot reasonably be accommodated in that location at that date and time that is unrelated to the content of the speech;
(7) other information relevant to whether the event would interfere unreasonably with the enjoyment of the Pedestrian Plaza by other users that is unrelated to the content of the speech; (8) any other information relevant to whether the event would present an unreasonable danger to the health or safety of the applicant or other users of the Pedestrian Plaza that is unrelated to the content of the speech; (9) number of permit requests and granted permits per year and the cumulative effect on the Pedestrian Plaza and its users; (10) analysis of whether physical infrastructure, appurtenances, plantings or other physical or environmental conditions would be reasonably likely to be harmed by the proposed event; and (11) prior experience with applicant related to whether applicant knowingly violated a material term or condition of the permit, or any law, ordinances, statute or regulation relating to the event.

In part, the goal of taking this type of information into account would be to acknowledge that events have different impacts at different plazas (and at different times in the same plaza). The Plaza Partners are in the best position to provide this type of data and site-specific facts.

D. Addition of Provision Regarding Alternative Locations

In line with the Parks Department event permit rules, we would also recommend that the SAPO Rules contain more explicit provisions permitting SAPO to consider and discuss with the applicant alternative locations and dates/times for an event. See 56 R.C.N.Y. § 2-08(d) (requiring Department to “employ reasonable efforts to offer the applicant suitable alternative locations and/or times and/or dates for the proposed event”). Although SAPO may often in practice discuss alternative locations or dates/times with applicants, this should be codified in the Rules. In National Council of Arab Americans, the court took this provision heavily into account in determining that the Parks Department rules satisfied the Constitutional requirement that a time/place/manner regulation of speech leave open adequate alternative channels for communication. 331 F. Supp. 2d at 268. Such a provision set forth in the SAPO Rules could facilitate more effective, balanced use of the City’s resources by permittees.

SAPO SHOULD IMPLEMENT A CAP ON THE NUMBER OF PERMITS FOR CERTAIN CATEGORIES OF EVENTS IN CERTAIN PLAZAS

Under the current regime, Times Square in particular is being overwhelmed by numerous large commercial events, which preclude other competing uses of the space. While current demand for the use of the Times Square Pedestrian Plazas is incredibly high, with the proposed lower fees (which we support), there is a corresponding danger of events taking over every Times Square Pedestrian Plaza every day, which would detract from the ability to balance competing uses and needs and of the public to enjoy these spaces as they were intended. A cap that takes into account the specific facts and data of the area would prevent the Pedestrian Plazas from being overwhelmed by commercial events, and it would prevent events from taking place at times of peak congestion for the area.

Times Square is New York’s most iconic space, familiar to people throughout the world. It is a prime driver of New York’s image: it is the 3rd most Instagrammed place in the world, with 17,000 Instagram posts a day, of which 60% are on the Pedestrian Plazas. It is also a central business district, a transportation hub, a center of entertainment and culture and a huge economic driver with enormous value to the City as a whole. Though just 0.1% of the City’s land, Times Square accounts for approximately $1 of every $9 in economic activity and, directly and indirectly, one-tenth of all jobs in the City. Times Square is the heart of the City’s tourism economy, with one-fifth of the City’s hotel

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rooms. Times Square contributes $5 billion per year in City and State taxes. Times Square is a key City asset from which we all benefit and that needs proactive management to maintain its value.

In light of these facts, the Times Square Alliance recommends the implementation of a reasonable cap on the maximum number of large and extra-large events that would be permitted by SAPO in a given year in the Times Square Plazas (and other interested Pedestrian Plazas as well). The Parks Department rules contain a similar provision limiting the number of events that can be held on the Great Lawn each year. See 56 R.C.N.Y. § 2-08(t). Such a provision in the Proposed SAPO Rules would not only have the advantage of being completely content-neutral, and therefore resistant to constitutional challenge, but would substantially increase the public’s access to the Pedestrian Plazas and other competing uses without undue interference from numerous large-scale and extra-large scale events.

The cap should also take into account facts about the timing and nature of congestion levels that are specific to Times Square. For example, as explained above, traffic in Times Square is driven by factors unique to this part of the City—for example, tourism seasons and Broadway show schedules. Different caps could be implemented for specific times of day (or times of the year) to prevent an excessive number of events taking place during periods of peak congestion, but allowing more events to be held during times of less congestion.

While some further legal research may be needed, the Alliance would be open to the idea that the cap can be lifted in specifically defined extraordinary circumstances, such as a rally or event organized on short notice which cannot be safely and reasonably accommodated on such short notice in a venue other than Times Square.

**TIMES SQUARE-SPECIFIC RULES**

The Proposed SAPO Rules take a step toward recognizing the inherent differences among the plazas through the different fee structures, but this differentiation may not be sufficient. We urge SAPO to consider separate rules for permitting in the Times Square Plazas, in light of their dramatically higher pedestrian/transportation uses and a disproportionate amount of requests for event permits.

Alternatively, we urge SAPO to incorporate into the rules an authorization and procedures enabling it to perform impact assessment studies to inform its future permitting, including in collaboration with Plaza Partners and Community Boards. The Alliance could then work with the appropriate City agencies on gathering non-content-related, site-specific facts and analyses that could be considered by SAPO as it reviews event applications.

**ADDITIONAL CONCERNS REGARDING THE PROPOSED RULES**

**A. Political Events and Press Conferences/Rally/Stationery Demonstration**

We encourage SAPO to review how the Proposed SAPO Rules will apply to political events, which are at the core of First Amendment protection. On the one hand, the Proposed SAPO Rules for the first time seem to require a permit for a press conferences, rallies and stationery demonstrations on a public plaza, no matter their size. Would five “Grandmothers Against the War” require a SAPO permit? On the other hand, it is unclear how SAPO intends to deal with a wide range of political events that do not fall into the definitions of a Civic Event or Press Conferences/Rallies/Stationery Demonstrations. An example of one such event would be the event at issue in the Transportation
Alternatives litigation. See 340 F.3d at 76 (striking down increased permit fee for “New York Century Bike Tour,” which the plaintiff organization used “as a fundraiser and an opportunity for advocacy in support [its] goals,” where, for example, “participants are urged to sign petitions advocating a car-free Central Park” at rest stops along the route, but where the plaintiff organization also “solicit[ed] and receive[d] monetary and in-kind donations from various corporate sponsors,” whose names and logos were included in printed materials and on the website for the event).

B. Drafting Issues with the Proposed SAPO Rules

Finally, we encourage SAPO to address various drafting issues. It would be helpful to closely review the drafting of the various categories of event, such as Civic Events, Commercial / Promotional Events and Charitable Events. There are many events that would “fall through the cracks” and not qualify under any of the existing categories of events. In addition, the current definitions create the possibility of loopholes whereby a commercial entity can use a token non-profit “sponsor” in order to pay lower fees as a “civic” event.

We also wonder whether Extra-Large Street or Plaza Events and Large Street Events can include Civic Events.

Further, the Proposed SAPO Rules provide that a PlazaPartner event is exempt from a fee only if vendors and merchants donate all goods and services and do not receive any money. It would be helpful to clarify that this does not apply to the performers at an event – for example, a band hired to perform in the Pedestrian Plaza.

We thank you for this opportunity to submit testimony. We look forward to working further with SAPO on the proposed event rules.