

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of:

WEST HARLEM BUSINESS GROUP,

Petitioner,

VERIFIED PETITION

Index No. 116839/06

For a judgment pursuant to Article 78 of the CPLR

-against-

EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

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Your Petitioner, WEST HARLEM BUSINESS GROUP (hereinafter referred to as “WEST HARLEM” or “Petitioner”) respectfully shows and alleges, by its attorneys McLAUGHLIN & STERN, LLP, NORMAN SIEGEL, ESQ. and PHILIP R. VAN BUREN, ESQ., that:

1. This is a special proceeding brought against Respondent, EMPIRE STATE DEVELOPMENT CORPORATION (hereinafter “ESDC” or “Respondent”), pursuant to Article 78 of the CPLR, Public Officers Law §84, *et seq.* (The “Freedom of Information Law” or “FOIL”), and CPLR §3001.
2. This action arises out of ESDC’s denial of a FOIL request by Petitioner, including citing Public Officers Law §87(2)(c). The materials relate to an agreement between the ESDC and the Trustees of Columbia University (“Columbia”) to redevelop a 17 acre section of West

Harlem bounded by 125th Street, St. Clair Place, 12th Avenue, West 134th Street and Broadway in Manhattan, New York City (the “Manhattanville Industrial Zone”). After initial responsiveness to a prior FOIL request, ESDC has suddenly ceased all disclosure as the project nears a more politically sensitive stage. In denying a second request for the identical categories for the next ensuing time period, ESDC has inappropriately applied a narrow statutory exemption in a blanket fashion and claimed a sudden absence of records even though documentary evidence from the first disclosure and intervening public events indicate records of ongoing activity must exist.

PARTIES AND JURISDICTION

3. Petitioner is an unincorporated association of businesses owning property within the Manhattanville Industrial Zone established for the purpose of protecting their property rights against Columbia’s plans to have their property condemned by eminent domain.
4. ESDC, successor to the Urban Development Corporation, is a New York State agency created to redevelop blighted urban areas and authorized to condemn property for such purposes by eminent domain.
5. The actions of Respondent complained of herein are final in nature, and cannot be adequately reviewed by another court, entity, or officer. This Petition has been brought within four months of the administrative determination at issue.
6. This Court has jurisdiction over this matter pursuant to Article 78 of the CPLR, Public Officers §89(4)(b), and CPLR §3001.

FACTS

7. On July 30, 2004, Columbia entered into an agreement with ESDC for planning

and preparatory work for a large development project encompassing the entirety of the Manhattanville Industrial Zone (the “Project”). A true and correct copy of the Letter Agreement is attached as Exhibit “B” to the Affidavit of Steven J. Hyman (the “Hyman Affidavit”). This Agreement required ESDC to negotiate and draft not only “Transaction Documents” but also, more broadly, “necessary or appropriate documents related there to.” *See Id.* §1(b). In consideration for these services, Columbia paid \$300,000 into an “Imprest Account,” from which ESDC, after notifying Columbia, could draw payment for work accomplished. *See Id.* §4.

8. On November 1, 2005, Petitioner made a request to ESDC pursuant to FOIL for all records pertaining to the ESDC’s Agreement with Columbia, from July 30, 2004 to November 1, 2005 (the “Prior Request”). A true and correct copy of the Prior Request is attached as Exhibit “A” to the Hyman Affidavit.

9. On December 5, 2005, Antovk Pidedjian (“Mr. Pidedjian”), Records Access Officer for the ESDC replied, providing certain records (the “Prior Disclosure”). These records included the Columbia Agreement Letter and correspondence relating to the final execution of the Agreement, agendas and attendance sheets for various meetings between ESDC, Columbia, the New York City Economic Development Corporation (“EDC”) and the New York City Department of City Planning (“DCP”), reports prepared for such meetings on Condemnation Timing and Security Requirements and Questions to be Answered by Columbia, e-mail correspondence between counsel for Columbia and ESDC pertaining to condemnation process and timetable, requirements for findings and determinations, combining environmental review with that for a collateral re-zoning application, agreements for joint findings and litigation risks. These records also included financial reports confirming transfer of funds and purchase of legal

services. A true and correct copy of the balance of the Prior Disclosure beyond the Letter Agreement is attached as Exhibit “C” to the Hyman Affidavit.

10. By actions of Columbia and various public agencies after November 1, 2005, it is apparent that ESDC has engaged in continuing planning and preparatory work pursuant to and related to the Agreement. These actions include: (a) DCP publishing a draft scope of work; (b) DCP holding a public hearing on scoping for an Environmental Impact Statement (“EIS”) on November 15, 2005; and (c) the initiation of blight, neighborhood condition, and environmental impact studies of the neighborhood. *See* Hyman Affidavit ¶¶ 9-12. True and correct copies or relevant documents evidencing such activities are attached as Exhibits “D” through “G” to the Hyman Affidavit.

11. On June 15, 2006, Petitioner made a second request pursuant to FOIL for certain materials pertaining to ESDC’s agreement with Columbia (the “Present Request”). A true and correct copy of the Present Request is attached as Exhibit “H” to the Hyman Affidavit. The Present Request was identical to the first in all particulars, except that it requested records for the period of November 1, 2005 through June 15, 2006. Both the Prior and the Present Requests specified all records including but not limited to:

- (1) the Agreement itself;
- (2) all correspondence, memoranda and written communications within ESDC pertaining to the Agreement;
- (3) all correspondence, memoranda and written communications between ESDC and Columbia, and between ESDC and the State and/or the City of New York and their public officials, all City, State and Federal agencies, and members of the public regarding or related to terms of the Agreement, regardless of whether delivered before or after the Agreement; and
- (4) any reports, position papers, policy statement within the ESDC pertaining

to the Agreement.

12. On July 24, 2006, Mr. Pidedjian of the ESDC responded by letter (the “Pidedjian Letter”) denying WEST HARLEM’s Request. A true and correct copy of the Pidedjian Letter is attached as Exhibit “I” to the Hyman Affidavit. With respect to specified items (1) and (2) Mr. Pidedjian claimed that no documents existed responsive to such demand. With respect to item (3) Mr. Pidedjian denied the request on the ground that disclosure of the responsive documents “would impair present or imminent contract awards or collective bargaining negotiations,” citing Public Officers Law §87(2)(c). With respect to (4) Mr. Pidedjian offered no response.

13. By letter to ESDC’s General Counsel Anita W. Laremont (“General Counsel Laremont”), dated August 18, 2006 (the “Appeal”), Petitioner appealed ESDC’s denial of items (3) and (4) of the Present Request. A true and correct copy of the Appeal is attached as Exhibit “J” to the Hyman Affidavit.

14. By letter dated August 31, 2006, (the “Appeal Denial”), ESDC denied Petitioner’s appeal. A true and correct copy of the Appeal Denial is attached as Exhibit “K” to the Hyman Affidavit. With respect to item (3) of the Present Request, General Counsel Laremont merely affirmed the reason given in the Pidedjian Letter without further elaboration as to the nature of the documents in question, what contract might be impaired or how it might be impaired. With respect to item (4) of the Present Request, General Counsel Laremont merely stated she was informed that there are no responsive documents, and that the appeal was denied.

CAUSE OF ACTION

15. The action of ESDC in denying the Appeal was an arbitrary and capricious determination, an abuse of discretion, and was affected by an error of law, pursuant to CPLR

§7803.3, for the following reasons:

- (a) ESDC has failed to offer particularized and specific justification for denying access to demanded documents. In alleging the exemption of Public Officers Law §87(2)(c), it has indicated neither the nature of the records it is withholding, what present or imminent contract award is at risk of impairment, nor how disclosure of these records could impair such contract. Without any offer of factual support, ESDC's blanket claim to the exemption for all external communications regarding its agreement with Columbia is conclusory and without legal basis in law or fact;
- (b) Review of the Present Request on Administrative Appeal was inadequate as well. With regard to item (3) of the Present Request, the Appeal Denial provided no more detailed indication of the basis for the denial than did the initial denial. ESDC General Council Laremont's merely reiterated the ground for denial given in the Pidedjian Letter;
- (c) The application of the exemption of Public Officers Law §87(2)(c) is inappropriate to the category of all external communications regarding the Columbia Agreement because there is no factual basis asserted to support the conclusion that any such communication could pertain to contract awards for which there is competitive bidding, where disclosure would favor one party with an inequality of information to the detriment of the public. The Agreement between Columbia and ESDC, and the preparatory and document drafting work it specifies does not involve any competing developer, and as a fully executed contract it cannot be regarded as a "present or imminent" award. All communications relating to this agreement and its implementation, therefore, cannot categorically qualify for exemption on the grounds of impairment of imminent contract awards;
- (d) Nor can it be said that such impairment would apply to existing contracts for environmental impact, blight or engineering studies, and these studies were already well under way as of September 8, 2006. (*See* Letter of AKRF, Inc. to Manhattanville businesses, Exhibit "F" to the Hyman Affidavit and letter of AKRF Inc. of September 26, 2006 citing both their retainer by ESDC as well as that of Thornton Tomassetti, Inc.; *see also*, Exhibit "G" to the Hyman Affidavit). Further scoping for the Environmental Impact Study was already drafted by November 2005. Thus, these contracts had, upon information and belief, already been awarded by the time of the Appeal Denial on August 31, 2006, and are, therefore, not exempt from disclosure, nor are such communications and other records relating to the specification or performance of such contracts;

- (e) Communications pertaining to other possible contract awards that are merely preliminary in nature also do not qualify for the exemption of Public Officers Law §87(2)(c). Even if some communications regarding an imminent competitive contract award did qualify for the exemption, the necessary communications between ESDC and Columbia specifying the nature and purpose of such contract would not be exempt, nor would requests for proposals, solicitations or expressions of interest from potential contractors. As evidenced in the Prior Disclosure, extensive communication between ESDC and Columbia or its attorneys, and multiple meetings, with planning tables, time lines, memoranda of questions remaining to be answered, task lists and other reports and memoranda have gone into planning for each stage of work on the Project. Such materials, insofar as they are relevant to any particular contract award, cannot be regarded as competitively sensitive, but rather must be viewed as “preliminary” to any contract award;
- (f) Further, the fact that there may exist a communication or document that may qualify as exempt, does not mean that all other communications or documents that do not fall within such protection, can be withheld. The record herein clearly demonstrates by a showing of substantial evidence that other non-exempt records must exist;
- (g) The Columbia Agreement represents just the beginning of an ongoing planning process for what is proposed to be one of the major development projects in New York City history. By its own terms, the scope of the agreement is expansive, requiring ESDC to negotiate and draft “Transaction Documents,” defined not only as “restrictive deeds and land acquisition and disposal agreements(s) between ESDC and Columbia” but also as “necessary or appropriate documents related there to.” *See* Letter Agreement §1(b). Among the documents “necessary and appropriate” to the conveyance to Columbia of land acquired by ESDC are all the actions and documents necessary under the Urban Development Corporation Law (“UDCL”) for certification of a General Project Plan and under the Eminent Domain Procedure Law (“EDPL”) for the acquisition of property by eminent domain, including blight findings and environmental impact findings, as well as the studies upon which such findings would be based. UDCL §§ 10, 13, McKinney’s Unincorporated Laws §§ 6260, 6263; EDPL §204, McKinney’s Eminent Domain §204. The Agreement, by its own terms, provides for its own extension and for the making of other related agreements. *See* Letter Agreement, §§ 4, 6. The Prior Disclosure provided substantial evidence of such planning activity up through June 15, 2005. For such planning activity to end abruptly at that point is simply not credible;

- (h) The Prior Disclosure provides ample evidence that the parties, Columbia and ESDC expected to continue such planning activity after June 15, 2005 and had taken steps preparatory to such ongoing work. In their e-mail correspondence, ESDC Deputy General Counsel and Columbia Attorney Martin E. Gold (“Mr. Gold”) discuss plans for achieving various determinations and findings necessary for ESDC’s conveyance of property to Columbia. These plans including coordination with “the City” to develop blight findings upon which ESDC’s own blight findings would be based, as well as the need for an agreement with “the City” for joint findings (e-mail of Mr. Gold to Maria Cassidy of December 16, 2005) and with New York City Department of City Planning so that a single Environmental Impact Statement would serve for both an ESDC General Project Plan and Columbia’s 197c rezoning application (the “ULURP Process”) (email of Maria Cassidy to Mr. Gold of December 15, 2004). They also discuss a draft GPP (“General Project Plan”) (e-mail of Maria Cassidy to Mr. Gold of December 15, 2004) and a successor agreement between Columbia and ESDC to cover property acquisition activities and costs (e-mails of Maria Cassidy to Mr. Gold of December 15, 2004 and December 16, 2004). Further work on any of these plans would involve extensive external communication with Columbia, other agencies, and public office holders, further meetings, and the preparation of reports to be presented at such meetings. The memorandum report to the meeting of August 1, 2005, titled “Questions to be Answered by Columbia,” moreover, anticipates Columbia’s provision of extensive materials, including a detailed purchasing plan, a report of current ownership of parcels, description of program needs and engineering parameters necessitating acquisition of additional property, enumeration of benefits to the city of such additional acquisition and changes to the plan in the event no additional land acquisition is secured. With regard to below grade plans, this memorandum anticipates Columbia providing drawings of tunnel and survey drawings, timetable for need of tunnels and relocation of utility services, description of programming for tunnels and below grade spaces, changes in substructure facilities if no additional land acquisition is secured, description of other actions required to allow for disposition of street tunnels and security plans for all underground space. The memorandum shows an expectation that Columbia will provide plans for acquisition of properties owned by the Department of Housing Preservation and Development and a relocation strategy, plans to acquire the Metropolitan Transportation Authority bus depot and air rights above it from New York State, as well as program plans for that site. And finally this memorandum asks for a study by Columbia to establish a basis for blight beyond an existing EDC draft study, and provide reports on funds raised and financing planned for the Project, construction cost estimates

and show plans for public amenities beyond publically accessible private space. All of this vast amount of information would have to be communicated to ESDC for the project to proceed. Since ESDC has claimed no exemption for such communications on any basis other than the possible impairment of present or imminent contract awards, and since, as discussed above, such communications are pursuant to an executed, non-competitive contract, and at most only preliminary to any subsequent or related contracts, there must therefore remain undisclosed records responsive to the Present Request;

- (i) Evidence from the Prior Disclosure also indicates the likelihood of the existence of further financial reports and notices to Columbia pursuant to the Agreement dating to the period after November 1, 2005. The financial report of March 21, 2005 included in the Prior Disclosure shows \$235,758 of the original \$300,000 placed in the “Imprest Account” by Columbia as unspent as of that date. Further expenditure must have been involved in the activities and meetings documented in the Prior Disclosure after March 21, 2005 and up to June 15, 2006. The Prior Return offers evidence of at least one meeting on August 1, 2005 attended by real estate attorney Joseph M. Ryan, retained under the agreement for which no financial report or notice to Columbia was disclosed as required by the Agreement as of November 1, 2005. A subsequent agreement between Columbia and ESDC for “acquisition activities and costs,” moreover, is assumed as a prerequisite for all the events planned in the Condemnation Steps and Time Table chart of December 7, 2004 (e-mail of Maria Cassidy to Mr. Gold, December 15, 2004). It is more likely than not that records of ongoing expenditures and notices to Columbia exist for the remainder of the initial \$300,000 and for further expenditure after the exhaustion of the initial \$300,000 as provided by the Agreement;
- (j) From independently verifiable and public events there is evidence that actual planning and pre-acquisition activities have continued in fact after November 1, 2005. On or about November 11, 2005 the DCP published a draft scope of work for an EIS for an ESDC General Project Plan as well as for the collateral application for re-zoning under New York City Charter §197(c) that was discussed in the December 15, 2004 e-mail of Maria Cassidy to Mr. Gold. On November 15, 2005, the DCP held a public hearing on this proposed scoping for the environmental review. *See Hyman Affidavit ¶10.* On August 31, 2006, Matthias Stanislaus, a consultant engaged by Community Board 9 to prepare comments on Columbia’s EIS scoping, submitted to Community Board 9 a draft list of public comments that would not, after negotiations with the City Planning Department, result in changes to the Department’s Final Scope of Work. A true and correct copy of the Stanislaus report is attached as Exhibit “E”

to the Hyman Affidavit. On September 8, 2006 the environmental consulting and planning firm AKRF, Inc. sent an employment questionnaire to owners of Manhattanville businesses in connection with an “Environmental Impact Statement (“EIS”) for the proposed Manhattanville in West Harlem Re-zoning and Academic Mixed-Use Development.” On September 26, 2006 AKRF Inc. sent a letter to Manhattanville property owners requesting access for a “study of the general conditions of your neighborhood” for which it claimed that it and the engineering firm Thornton Tomasetti, Inc. have been retained by ESDC. *See* Exhibits “F” and “G” to the Hyman Affidavit. It is simply not credible that such activity, all fully anticipated in the communications and reports in the Prior Disclosure, should take place without any communication to or from ESDC, or without any meetings, reports or memoranda prepared by ESDC; and

- (k) ESDC’s Appeal Denial, therefore, is a determination that, as regards records responsive to item (3) of the Present Request is in error of law, and that as regards the alleged absence of other responsive records responsive item (3), item (4), or the request in general, is arbitrary and capricious and an abuse of discretion for failure do disclose records that substantial evidence indicates the agency must possess.

16. Petitioner seeks judicial review of this agency’s determination because of both its own and the public’s need to shed light on governmental actions and processes in furthering the Manhattanville Project. This vast project will likely reshape the physical shape, demography and economy of West Harlem. It will severely impact on the jobs, businesses prospects, housing, and property rights of all West Harlem residents and businesses.

17. No prior application has been made by Petitioner for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, this Court should enter judgement on Petitioner's behalf by:

- a. declaring that Respondent's denial of Petitioner's Request for correspondence, memoranda and written communications between ESDC and Columbia, and between ESDC and the State and/or the City of New York and their public officials, all City, State and Federal agencies, and members of the public regarding or related to terms and performance of the Agreement violates FOIL;
- b. directing Respondent to provide Petitioner with such responsive documents pertaining to correspondence, memoranda and written communications between ESDC and Columbia, and between ESDC and the State and/or the City of New York and their public officials, all City, State and Federal agencies, and members of the public regarding or related to terms and performance of the Agreement already identified by ESDC as responsive to item (3) of the Present Request;
- c. as regard all such other requested records other than those for which Respondents have claimed exemption on the grounds of impairment of present or imminent contract awards, directing Respondents to deliver to the court all ESDC files for the period of November 1, 2005 through June 15, 2006 pertaining to Columbia University, the Manhattanville Industrial Zone, the Manhattanville in West Harlem Academic Mixed Use Development, Columbia's 197(c) rezoning application a/k/a the "ULURP Process," the preparation of any General Project Plan involving Columbia University, the preparation of an Environmental Impact Statement for any project or governmental action in the Manhattanville Industrial Zone, or studies of blight or neighborhood conditions by ESDC, Columbia, EDC or any other New York City entity, all

related contracts already awarded or anticipated, or any other related matter, so that the Court might determine what responsive records do in fact exist;

d. awarding Petitioner the costs of this proceeding, including reasonable attorneys' fees; and

e. granting to Petitioner such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 8, 2006

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VERIFICATION

NICHOLAS SPRAYREGEN, being duly sworn, states the following:

I am President of TUCK-IT-AWAY ASSOCIATES, LTD., which is the General Partner of TUCK-IT-AWAY ASSOCIATES, L.P., who is a member of the WEST HARLEM BUSINESS GROUP, the Petitioner in this action. I have read the foregoing Verified Petition of Petitioner. I know the matters contained therein to be true, except as to the matters stated to be on information and belief. As to matters stated to be on information and belief, I believe them to be true.

NICHOLAS SPRAYREGEN

Sworn to before me this

day of November, 2006

Notary Public