

**Matter of Tuck-It Away Assoc., L.P. v New York City
Dept. of City Planning**

2008 NY Slip Op 33674(U)

October 6, 2008

Sup Ct, New York County

Docket Number: 111652/07

Judge: Nicholas Figueroa

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

PRESENT: LEN. NICHOLAS FIEDLER
Justice

PART 4C

TOOK IT AWAY
ASSOCIATES
- v -
NYC. DEPT OF CITY PLANNING

INDEX NO.

111652/07

MOTION DATE

September 9, 2008

MOTION SEQ. NO.

002

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3
4, 5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*It recognizes decision in
rules*

FILED

OCT 9 7 2008

COUNTY CLERK

Dated: Oct. 6, 2008

Oct. 6, 2008

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of
TUCK-IT AWAY ASSOCIATES, L.P.,

Index No. 111652/07

Petitioner,

For a Judgment Under Article 78
Article 78 of the Civil Practice Law and Rules

**DECISION
AND ORDER**

- against -

NEW YORK CITY DEPARTMENT OF CITY
PLANNING,

Respondent.

FILED
OCT 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

Nicholas Figueroa, J.:

Respondent moves for an order staying the *in camera* inspection this court ordered on April 10, 2008. The court will decide both that question and the question of which documents must be furnished to the petitioner under its Freedom of Information Law demand (Public Officers Law §87(2); Public Officers Law §87 *et seq.*). The documents relate to a proposed expansion by Columbia University and the actions by various city agencies, including respondent, relating to the expansion project.

Respondent argues that it is seeking leave to reargue or appeal the Appellate Division First Department's decision and order (in *Matter of Tuck-Away Associates, L.P. v. Empire State Development Corporation*, __AD__3d__, 861 NYS2d 51 (Catterson, J.)). That decision involved issues identical to those in the instant case. This court must follow that decision (*People v. Shakur*,

215 AD2d 184).

Respondent has provided the court with two sets of documents. One set of papers, contained in two boxes, consisted of documents respondent concedes petitioner is entitled to, under the decision in *Matter of Tuck-It-Away Associates, L.P. v. Empire State Development Corporation, id.* The other set of documents, are those, according to respondent, that it need not provide under the latter decision. The documents are contained in a redwell folder. The court has kept those documents and the respondent has submitted them. Respondent shall furnish all the documents in the boxes. It shall furnish the material in the redwell envelopes to the extent indicated in this order. The Appellate Division, denied the release of two categories of documents in that decision. The court held that although intra-agency communications are not always exempt from disclosure, various documents in that case were exempt.

The first category of intra-agency material that the Appellate Division held was exempt consisted of instructions on how the agency should respond to an inquiry from a member of the public about its role in the proposed project. That proposed project is the same project involved in the instant case. The court found that the instructions to the staff did not affect the public; therefore, they were not subject to disclosure under Public Officers Law §87(2)(g)(ii). The communications merely demonstrated that the agency had not determined how to respond to the inquiry about its role in the project.

The second category of communications the Appellate Division held was also not subject to disclosure, were “for the most part” e-mails discussing the scheduling of meetings involving the project. Although the disclosure of these “mundane communications would certainly not be contrary to the purpose of the intra-agency exemption...nevertheless the communications were not factual in

nature (Public Officers Law §87[2][g][i]) and do not otherwise fall within the specifically enumerated statutory exemptions to the intra-agency exemption.”

The first set of documents that respondent seeks to withhold are two e-mail messages, both dated November 1, 2006. These messages do not fall into the exempt categories articulated by the Appellate Division; therefore, respondents shall furnish this material to petitioner.

The second document, September 19, 2006 intra-agency e-mails, is not exempt. The document does not reveal deliberative discussions; rather, it states that a conclusion about an issue has been reached. Respondent shall disclose that material.

The third set of documents, a September 15, 2006 e-mail, briefly describes the various charts sent along with it. This document must be furnished to petitioner.

The fourth set of documents is an August 24, 2006 e-mail that merely serves as a cover document for an August 24, 2006 report that is not exempt from disclosure. Respondent must furnish this material to petitioner.

The fifth set of documents are two August 16, 2003 e-mails that refer to an attached August 16, 2003 report that states it was made in response to Community Board 9's request to incorporate its plan in the environmental assessment being prepared as part of the project's application. Respondent shall furnish this material to petitioner.

The sixth set of material consists of three e-mail messages. The first is dated August 21, 2006, 3:42 p.m. It asks the recipient, an attorney, for her comments on another document. This communication shall not be disclosed. Respondent apparently does not object to disclosing the remaining two pages and shall disclose them.

The seventh package of material is an e-mail dated August 16, 2006 covering a set of photographs of various New York City streets. Respondent must disclose this material.

Similarly, the eighth, ninth, tenth, eleventh and twelfth set of documents must be disclosed. These are e-mails, the first of which is dated August 14, 2006 at 9:11 a.m., and the remainders are e-mails dated August 15, 2006 set between 5:52 p.m. and 5:57 p.m. These e-mails are cover documents for various photographs and diagrams of New York City locations.

The thirteenth set of papers is an e-mail dated August 11, 2006 and the response to comments about the Columbia University project by persons other than members of Community Board 9. The document does not fall into the exemption from a disclosure category for communications concerning how an agency should respond to public inquiries. Respondent must furnish this material to petitioner.

The fourteenth set of papers, an e-mail dated July 24, 2005, similarly contain responses to comments. Respondent must furnish this material to petitioner.

The fifteenth set of papers consists of two e-mails and a report entitled Urban Design and Visual Resources describing the physical, and architectural, aspects of the project, including photographs and diagrams. This material must be furnished to petitioner.

The sixteenth set of documents is an e-mail describing the Greene Hall addition at Columbia University. An architectural diagram of the building is attached to it. Petitioner is entitled to this material.

The seventeenth, eighteenth and nineteenth documents are e-mails, dated August 11, 2006, May 1, 2006 at 2:34 p.m. and May 1, 2006 at 2:43 p.m. merely serve as covering documents for other documents not attached to them. These e-mails appear to have no significance by themselves;

however, because they refer to material that appears to be disclosable, respondent must furnish them to petitioner.

The twentieth set of papers is an e-mail dated May 10, 2006 and August 4, 2006, with attached diagrams of the affected geographical area. Petitioner is entitled to these documents.

The twenty-first, twenty-second and twenty-third documents are e-mails dated February 24, 2006, February 17, 2006 and June 10, 2005. With the exception of a portion of the February 17, 2006 material, these documents are intra-agency communications that need not be disclosed. However, the portion of the February 17th document that begins with a communication at 3:08 p.m. and continues to the next page is material that respondent must disclose to petitioner.

The twenty-fourth set of documents is an April 27, 2005 e-mail and an environmental impact statement draft dated April 25, 2005. Respondent must disclose that material to petitioner.

The twenty-fifth set of papers is an August 18, 2004 e-mail with two pages of a report attached. The attached contains markings, including underlinings. The markings are meaningless without reference to the e-mail communication. That communication is an intra-agency communication. Therefore, respondent may withhold the August 18, 2004 e-mail but must furnish the two pages attached to it.

The twenty-sixth through fortieth sets of documents are tables from documents that have already been furnished to petitioner. Although the documents are attached to e-mail messages, there is no basis to withhold either the e-mails or the attached documents. Therefore, respondent shall furnish all of the material to petitioner.

The forty-first set of documents, a group of reports, is not exempt from disclosure. The documents, Department of City Planning tables, are tables from documents that respondent has

already furnished to petitioner. However, several of the documents contain notes made by respondent's attorney. These notations are privileged and need not be disclosed. Therefore, respondent shall redact the attorney's notations and furnish the redacted material to petitioner.

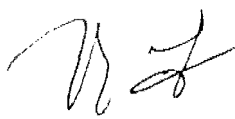
Accordingly, it is

ORDERED that the motion to stay the court's *in camera* review is denied, and it is further ORDERED that respondent, upon service of a copy of this order with notice of entry, shall furnish the documents listed in this order to petitioner.

This constitutes the decision and order of the court.

Dated: October 6, 2008

ENTER



J.S.C.

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