

Volume 23

Fall 2010

## **MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE**

**In a Wrongful Termination Claim, Terminating a Non-New York Resident from a New York Headquarters Is Insufficient to Invoke Subject Matter Jurisdiction in Our Courts Without Establishing that the Wrongful Termination had an Impact in New York .**

*Hoffman v. Parade Publ'n*, 15 N.Y.3d 285 (1st Dept. 2010).

Resolving a dispute among the New York Courts, the Court of Appeals in *Hoffman* clarified that non-residents bringing suit for wrongful termination stemming from actions taken in New York must establish an actual impact in New York as a result of the termination in order for New York courts to obtain subject matter jurisdiction over their lawsuit.

The Plaintiff in *Hoffman* was a managing director for Parade Publications ("Parade"), a nationally syndicated magazine distributed in various American newspapers. While Parade's office headquarters was located in New York City, Hoffman worked in the Atlanta, Georgia office, where he was responsible for developing and overseeing accounts that Parade had with newspapers located in ten different states in the South and Southwest. Hoffman was neither responsible for nor did he deal with any Parade accounts in New York.

Plaintiff brought suit after the President and publisher of Parade telephoned him from Parade's New York City headquarters to terminate him and inform him that the Atlanta office would be closing. Plaintiff alleged that he had been wrongfully terminated because of his age in violation of the New York City Human Rights Law ("NYCHRL") and the New York State Human Rights Law ("NYSHRL"), which both deem it an "unlawful discriminatory practice" to terminate an employee based on age.

In order to establish subject matter jurisdiction in his suit, plaintiff alleged that he attended quarterly meetings in New York City, that Parade's corporate contracts were all managed and negotiated through the New York City offices and that both the decision and phone call to terminate him came from Parade's New York City headquarters. While this argument convinced the First Department, the Court of Appeals rejected it and ultimately dismissed plaintiff's claim for want of subject matter jurisdiction.

The Court of Appeals acknowledged a long standing discrepancy among the New York State and Federal courts as to what a non resident plaintiff must establish in order to confer subject matter jurisdiction on the New York Courts and thus invoke the protection of NYCHRL and NYSHRL. While some Courts have held that plaintiffs need only establish that the discriminatory decision to terminate was made in New York City, others have held plaintiffs to a higher standard, requiring them to plead and prove that the alleged discriminatory termination had an actual "impact" in New York City. Ultimately, the Court

clarified that it is the latter, higher standard which must be met.

Quoting the very words of the NYCHRL and NYSHRL, the Court held that these statutes are only intended to protect "*inhabitants,*" those "*in the City of New York*" and "*the people of this State.*" Further, the Court opined that invoking the protection of the NYCHRL and NYSHRL based on a decision and phone call made in New York would expand the protection offered by these statutes regardless of where the plaintiff actually worked. The Court deemed it "impractical" to require only that plaintiffs establish that the alleged discriminatory decision to terminate them was made in New York, as setting this lower standard would lead to "arbitrary results" and expand statutory protection to those with merely "tangential" contacts with New York.

While an amendment to the NYSHRL expanded its applicability to include suits brought by New York residents and corporations for discriminatory practices committed outside New York, the Court held that this amendment did not extend to non residents like Hoffman, who allege that discriminatory practices *occurred* in New York but fail to establish the *impact* of these practices in New York.

With regard to Hoffman's New York contacts, the Court deemed them "tangential," and thus insufficient to establish the requisite impact in New York. Accordingly, the Court lacked subject matter jurisdiction and plaintiff's claims under the NYCHRL and NYSHRL were dismissed. The Court of Appeals has now established the "impact rule" as being a pre requisite to wrongful termination claims brought by non-New York residents such as Hoffman.

The Dissent held that the Court did have subject matter jurisdiction because Hoffman maintained "constant" communication with the New York City office, including personal visits that he made to New York in order to discuss his termination with management.

In distinguishing Hoffman's case from those cases that the majority relied on, the Dissent emphasized that unlike those cases where there were "few, if any" allegations of discriminatory practices occurring in New York, Hoffman successfully pleaded that he was wrongfully terminated based on a decision made in Parade's New York headquarters.

Noting that the "impact rule" appears nowhere in either the NYCHRL or NYSHRL, the Dissent opined that such a rule "unnecessarily precludes New York Courts from protecting individuals from discrimination within the City and State and handicaps the City and State from curbing such practices."

**Summary Judgment Granted in Favor of a School District Because Sexual Assault of One Student By Another was Unforeseeable Despite Offender Student's Troubled History.**

*Brandy B. v. Eden Cent. Sch. Dist.*, 15 N.Y.3d 297 (2010)

After an eleven year old boy sexually assaulted a five year old fellow student on the school bus, the Court of Appeals affirmed the Erie County Supreme Court and Appellate Division's grant of summary judgment for the Erie County School district, finding that the school district did not have notice or specialized knowledge of the offender student's tendency to commit sexual assaults and that the incident was unforeseeable.

Robert F., the offender student, had a troubled past including being removed from his home at age three, being hospitalized at age nine for severe aggressive tendencies, and undergoing years thereafter of specialized counseling programs and schooling to combat his behavior, which early assessment reports characterized as aggression towards himself and others, threats with weapons, fire setting, hyperactivity, poor peer relations, and history of suicidal injuries ideations. Robert had also been noted to have masturbated in public and exposed himself on occasion.

However, in early 2002, the Counseling Individualized Education Plan (IEP) that Robert was enrolled in noted Robert's progress in a summary report. The report emphasized that Robert had not displayed any physical aggression since his admission in IEP that same year and recommended that based on Robert's progress, he should be placed in a less restrictive environment. Based on this review, Robert was then enrolled in the fifth grade at Eden Central School District in September 2002. A report made later on in the year by the school committee noted that while he was friendly and polite with peers and teachers, he was immature, sought physical hugs and attention from adults, and would continue to need support for social and emotional development in the future. The school report further specified that Robert did not need escorts or restrains, but would be assigned individual counseling and group counseling once a week for the school year.

Robert, now an eleven year old boy, rode the same bus home with plaintiff Brenna B., a Kindergarten student enrolled within the Eden Central School District. In March 2003, plaintiff complained to her

mother that Robert had called her his girlfriend in several interactions between them on the bus. Plaintiff's mother then spoke to the bus driver and requested that the children not sit together on the bus, and allegedly requested that Brenna be made to sit next to her sibling. Following the talk that plaintiff's mother had with the bus driver, plaintiff reported to her mother that Robert had exposed himself to her and forced her to touch him inappropriately.

Plaintiff commenced suit against the School District, alleging that it had failed to properly supervise her child despite her complaints.

In deeming summary judgment for the school district proper, the Court of Appeals noted that while schools have a duty to supervise their students, they cannot be held liable unless the injury alleged is both foreseeable and proximately caused by the absence of proper supervision. The Court further emphasized that unanticipated, third party acts will not give rise to liability in negligence absent a showing by the plaintiff that the school had actual or constructive notice or specialized knowledge of prior similar conduct, or at least that the conduct complained of could have reasonably been anticipated.

The Court of Appeals found that the conduct complained of was not foreseeable being that Robert's troubling behavior had not manifested itself in over two years by the time the accident occurred and that the IEP report specifically noted his progress and approved him for a less restrictive schooling program. The Court also found it significant that Robert's prior history did not include any *sexually* aggressive behavior.

The Court also found the requests made by the plaintiff's mother insufficient to establish the district's liability because in speaking with the school bus driver, she did not name Robert specifically or attribute any misbehavior to the unidentified boy that she requested to be separated from her daughter.

The Dissent disagreed and found that a reasonable juror could have found both that the school had specialized knowledge and or actual or constructive notice of the likelihood of a sexual assault, and that the school's failure to adequately supervise the plaintiff proximately caused her injuries. Quoting decisions of the Third and Fourth Departments of the Appellate Division, the dissent noted that in egregious circumstances a school district can be liable based on lack of supervision without more specific notice. Specifically, the Dissent cited the Fourth Department decision in Doe v. Fulton Sch. Dist., and the Third Department decision in Doe v. Bd. of Educ. of Morris Cent. Sch., wherein a school district was liable when a twelve year old student had repeatedly sexually assaulted a six year old student.

The dissent asserted that while Robert's history alone was insufficient to give the district the requisite knowledge or notice, especially given his progress, the school did know that a child who was frequently interacting with a kindergarten student had a tainted history in which he had masturbated in public and exposed himself. The Dissent went further and emphasized that even the mother's complaints were sufficient to put the District on notice because Robert was a student with a history of mental illness, the plaintiff regularly sat with him, and the mother had

specified that the boy she spoke of was around twelve years old.

Both the Majority and Dissent agreed that the plaintiff's negligent supervision action was properly dismissed as against the Erie County Child and Family Services (CFS) because while plaintiff alleged that CFS failed to warn the school and Robert's foster family about a need for closer supervision of him, there was no evidence that they withheld any information about Robert or could have anticipated the sexually assault that ensued.

**Plaintiffs Were Not Entitled to Privileged Undercover Police Reports in Connection with the Republican National Convention Mass Arrest Processing Plan.**

*Dinler v. City of New York*, 607 F.3d 923 (2d Cir. 2010)

In an ongoing action involving the mass arrests that took place at the Republican National Convention in 2004, the Second Circuit Court of Appeals handed down a decision which not only overturned the opinion of the District Court for Southern District of New York, but provides detailed guidelines for similar cases to follow.

Plaintiffs in this case brought suit against the City of New York and the New York City Police Department ("NYPD") for their arrests at the Republican National Convention ("RNC"). Plaintiffs comprise a class of about 1,200 people, most of whom were protestors, claiming that their arrests at the RNC were made without cause, that their detention was unreasonably long and that they were fingerprinted without authorization. Said arrests were made pursuant



to a "mass arrest processing plan" that the NYPD had formulated in the months prior to the convention.

The mass arrest processing plan had been the product of months of NYPD investigation which included research of public information in order to assess the risk of chaos and violence that certain organizations posed with respect to the upcoming RNC. The results of the NYPD's public investigation were compiled into over 600 pages of "End User Reports." However, part of the NYPD investigation also involved undercover investigation in which members of the NYPD intelligence division infiltrated certain organizations in order to determine if any of these groups were devising plans to disrupt the RNC. The results of the undercover investigation were compiled into NYPD "Field Reports" and included memorialized discussions with various members of the infiltrated organizations and information that had been discovered at organizational meetings which were infiltrated.

After the City turned over the End User Reports to plaintiffs, plaintiffs subsequently sought production of the Field Reports. Despite the City's objection on the grounds that the information requested was privileged, the District Court for the Southern District of New York directed the City to produce the reports in an "Attorneys' Eyes Only" redacted form. The City sought a writ of Mandamus to the Second Circuit Court of Appeals with respect to the lower court's order. The Second Circuit ultimately found that not only was a writ of mandamus appropriate, but that the order of the District Court must be vacated.

In coming to its decision, the Court's analysis was both complex and lengthy. First, the Court had to determine if a writ of Mandamus was even an appropriate

remedy for the City to pursue, and to do so, the Court had to ascertain if (1) the City had no other avenue available to attain the desired relief; (2) if in its discretion the court deemed a writ to be proper under the circumstances; and (3) if the City's right to a writ of mandamus was "clear and indisputable." The Court emphasized that a writ of mandamus is typically reserved only for those cases which raise "novel" questions of law whose resolution will "aid in the administration of justice."

The Court noted that because a writ of mandamus is an "extraordinary" remedy reserved for "exceptional" circumstances amounting to a "judicial usurpation of power or a clear abuse of discretion," the Court would have to determine if the District Court abused its power and discretion by compelling disclosure of the Field Reports. Relying on previous precedent, the Court emphasized that any of the following could be deemed an abuse of discretion: (1) basing a ruling on an erroneous view of the law; (2) making a clearly erroneous assessment of the evidence; (3) or rendering a decision that cannot be located within the range of permissible decisions.

With regard to the first of the three requisite elements needed to issue a writ, the Court found that the City had no other adequate means of protecting its interests because the avenues of redress normally available to a party in the City's position were inadequate under the circumstances. For example, the Court found that the City could not pursue an interlocutory appeal of the District Court's order because the Supreme Court has clarified that such appeals are not available for disclosure orders which are adverse to a claim of privilege. Further, the City

could not file a certified appeal under 28 U.S.C. § 1292(b) because such appeals are only reserved for matters which "materially advance the ultimate determination of the litigation," and since it is in the Court's discretion as to what matters fall into this category, the Court held that the City would have likely failed arguing that a discovery dispute is material to the ultimate determination in plaintiff's underlying suit. With regard to an appeal after a final judgment, the Court similarly deemed this an inadequate method of redress for the City because the privileged information could not be unsaid even if an appeal was successful.

Finally, as to disobeying the Court's order and appealing an order of contempt, the Court deemed this an inadequate remedy for two reasons. First, because the City as a party in the action could not appeal a civil order of contempt until a final judgment had been made and second, while criminal contempt orders are immediately appealable, whether a contempt order is deemed criminal or civil is discretionary and therefore there was no guarantee that the City would be criminally sanctioned and be able to appeal immediately.

Still analyzing whether the City could establish the first element, the Court noted that the redacted disclosure to be made on an "Attorneys' Eyes Only" basis was inadequate to protect the information at issue because the attorneys who will be viewing the material must surpass security clearances. The Court refused to make a "blanket" statement about the reliability of all of plaintiff's fifty attorneys and noted that mere admission to the bar in itself does not establish the requisite security clearances. Overall,

the Court opined that disclosure on an "Attorneys' Eyes Only" basis would prevent the NYPD from being certain that their undercover operations would remain confidential, and that a larger issue of freedom of the press would then come into play if the NYPD's information leaked out to third parties. The Court similarly deemed filing the information under seal inadequate to protect the information from reaching improper hands because the Court openly admitted that Courthouses, as public institutions "opened to all comers" have methods of preserving confidentiality which are "relatively unsophisticated and altogether too fallible". Finally, the Court noted that compelled disclosure of classified security information is typically reserved for criminal cases to protect the accused's right to a meaningful defense, which was not the case here.

With regard to the second of the three requisite elements, the Court deemed a writ appropriate because while the Courts are typically reluctant to grant writs to overturn discovery rulings, the circumstances in this case were of the type of "extraordinary significance" which made issuing a writ appropriate. Specifically, the Court opined that the issues at hand presented "novel and significant questions of law" because there is little to no case law addressing law enforcement privileges, the legal standard for evaluating whether a privilege applies, the factors to be weighed, whether there is a presumption against disclosure and what, if any evidence can overcome a presumption that would apply. Further, the Court emphasized that issuing a writ would "aid in the administration of justice" because addressing the merits of the City's petition would "forestall future error in trial courts" in an "important, yet

underdeveloped" area of the law by setting clear guidelines by which the Court could decide if a qualified law enforcement privilege applies. The Court emphasized the public policy concerns at work by noting that declining to review the petition on the merits could have the effect of discouraging law enforcement from conducting undercover investigations thus rendering officers reluctant to partake for fear that their identities will be revealed.

With respect to the third element, the Court found that the City had a "clear and indisputable" right to a writ of mandamus because the District Court had abused its discretion in compelling disclosure of the reports. The Court found that the District Court had abused its discretion because it failed to apply a strong presumption against lifting the law enforcement privilege, it failed to make plaintiffs show a compelling need for the Field Reports, and it made an erroneous assessment of the evidence in deeming that the plaintiff's interest in obtaining the field reports outweighed the City's interest in maintaining the secrecy of confidential information.

After the Court found that the City had adequate grounds to request a writ of mandamus, the Court then had to decide if the Field Reports were in fact privileged information. The Court opined that the City, as the party asserting the privilege, had to establish that the reports contained information regarding law enforcement techniques and procedures and that disclosure would undermine the safety of the law enforcement agency to conduct future investigations. The Court clarified that once these elements were met, a privilege would apply and there would be a strong presumption against removing it, and that a party

seeking to do so must establish that (1) their suit is brought in good faith; (2) that the information sought is not available through other means; and (3) a compelling need for the information sought. Even assuming the party challenging the privilege can overcome the strong presumption of maintaining it, the Court must then balance the public's interest in non disclosure against the litigant's need for access to privileged information.

The Court held the law enforcement privilege did apply to the Field Reports, even in their redacted form, because the information contained within the reports could still disclose the identity of the undercover NYPD officers. Further, with respect to disclosure of the field reports impeding the NYPD's ability to conduct future investigations, the court asserted that pulling a "thread" of an undercover operation has the potential to "unravel the entire fabric."

The Court found that there was no dispute that the plaintiff's suit was non frivolous, brought in good faith, and that the plaintiffs could not obtain the Field Reports elsewhere. Plaintiff still had to establish a compelling need for information sought. With respect to this prong, the Court held that the plaintiffs could not establish a compelling need for the Field Reports because based on an in camera review of them, the reports did nothing to undermine the seriousness of the threat facing the RNC and that they rather reinforced the seriousness of said threats as outlined in the End User Reports.

With regard to the balancing test, the Court struck down the plaintiff's argument that the City could not use the NYPD's investigation as a "sword" in

plaintiff's suit yet seek to protect information relating to its investigation as privileged. The Court cautioned against broad generalizations and noted that an analysis regarding the fairness of disclosure should be made on a case by case basis. The Court emphasized that the NYPD was not using the Field Reports as a sword because it had specifically disavowed reliance on them in defending against plaintiff's suit, and further opined that based on the extraordinary circumstances, fairness required that the reports remain confidential.

The Court noted that in future cases an in camera review of allegedly privileged documents is appropriate and that in extreme cases where documents cannot be left in a judge's chambers overnight, the Court has discretion to allow the party submitting the documents to retrieve them each evening and return them to the judge if need be. Further, the Court noted that non privileged documents must be disclosed, although the Court has discretion to reveal the information requested in a "specified way" in order to minimize the effects of disclosure.

**The Court of Appeals Upholds Columbia University's Taking of 17 Acres in West Harlem and Rejects the First Department's De Novo Review Which Held to the Contrary.**

Kaur v. N.Y. State Urban Dev. Corp., 15 N.Y.3d 235 (2010).

Matter of Goldstein, 893 N.Y.S.2d 472 (2009).

A recent case Court of Appeals case has upheld Columbia University's proposal to purchase 17 acres of privately owned West Harlem property where it planned to build a new urban campus.

Columbia initially approached the New York City Economic Development Corporation ("EDC") and the Empire State Development Corporation ("ESDC") with the project in 2001, which would consist of constructing 16 new buildings including teaching facilities, housing and research centers along with facilities dedicated to serving the local community. The project also provided for creating and improving publicly accessible open space.

After Columbia made its proposal, the EDC conducted a study of the 17 acres at issue and concluded that the area was blighted and dilapidated. The EDC also hired Urbitran Associates ("Urbitran") to conduct a study examining the conditions of the area, which similarly found structural degradation and poor exterior conditions of the buildings.

In order to obtain approval for the project, ESDC retained Allee King Rosen & Fleming ("AKRF") to conduct a study of the physical conditions of the structures at the project site. ESDC chose AKRF specifically because they had worked with the ESDC before on similar projects. In conducting its study, AKRF took photographs of the area, made individualized inspections of each lot and factored in generally accepted indicators of divestment in a neighborhood such as structural conditions, vacancy rates, site utilization, property ownership and crime data. AKRF ultimately concluded that the project site in its current state was "substantially unsafe, unsanitary, substandard and deteriorated."

Plaintiffs, property owners in the 17 acres at issue, subsequently brought suit alleging that the ESDC had not established a sufficient "public use" so as to



entitle the ESDC to purchase the plaintiff's land under the doctrine of eminent domain.

When the lower court raised concerns about the objectivity of ARKF's study based on its prior dealings with ESDC, ESDC retained Earth Tech, whom it had no prior affiliation with, to conduct a second study of the project site. During its study, Earth Tech noted deteriorated facades which had been sealed by the Fire Department for safety reasons, widespread vermin and graffiti, and three times the average number of building code violations on parcels of property that Columbia had purchased in previous years. In considering current land uses, structural conditions, health and safety issues, utilization rates, environmental contamination, building code violations, and crime rates in the area, Earth Tech found a lack of investor interest therein and that the area had a "blighted and discouraging impact on the surrounding community."

Over 8,000 pages of documents, including the findings outlined in the reports of EDC, Urbitran, ARKF and Earth Tech were produced to the plaintiffs and the public in general during a duly noticed hearing wherein the plaintiffs were allowed to question, comment and voice concerns about the project.

Following the hearing, the ESDC approved the taking of the 17 acres as both a "land use improvement project" and a "civic project" pursuant to separate sections of the New York State Urban Development Corporation Act ("UDC"). In a detailed General Project Plan ("GPP"), the ESDC based its determination on the fact that the project would create over 14,000 jobs during the construction of the campus and 6,000 after completion of it, would generate substantial revenue,

and create 94,000 square feet of much needed public space and 28,000 square feet of widened sidewalks inviting east and west pedestrian traffic. The GPP further noted that many of the Columbia facilities, such as the libraries, computer centers and swimming center would be accessible to New York public school students and, in some cases, the public at large.

Nonetheless, plaintiffs alleged that ESDC's findings were contrary to the Eminent Domain Procedure Law ("EDPL") which requires that takings of private property be for "public use." In conducting a *de novo* review which disregarded the plethora of evidence ESDC provided, the First Department found that ESDC's determination that the project was for a "public use" was unsupported by precedent and the record. Further, the Court concluded that the ESDC has violated the plaintiffs' Due Process rights by failing to produce five documents concerning its approval of the Columbia project which had been deemed discoverable at an Article 78 proceeding pursuant to the Freedom of Information Law ("FOIL").

The Court of Appeals disagreed with both findings and approved the project on the grounds that it was both a "land use improvement project" and a "civic" project.

### **Land Use Improvement Project**

In holding that the Columbia project was a Land Use improvement project, the Court reaffirmed its decision in *Matter of Goldstein*, in which the Court found that the mere possibility of reasonable disagreement with the ESDC's findings did not permit judicial interference with them.

Echoing Matter of Goldstein, the Court opined that it is for the legislature, not the judiciary, to determine whether a project serves a public purpose and that it is "only where there is no room for reasonable difference of opinion as to whether an area is blighted" that judges may substitute their views as to the adequacy of the legislative findings. The Court reaffirmed that it is a purely a municipal and agency based determination whether an area is "blighted" such that redevelopment would constitute public use, and that only a baseless and irrational finding to this effect would allow a court to interpose its own judgment.

The Court found that because ESDC's determination was not irrational or baseless, the First Department improperly conducted a de novo review in arriving at its decision and that the Court in rendering the current opinion, was "bound" by the record upon which ESDC based its decision to approve the project. The Court struck down plaintiffs' argument that the decision was irrational and baseless because AKRF's findings lacked objectivity, noting that in addition to their being no evidence to support this argument, ESDC hired a second and entirely independent entity to conduct a study, a study which ultimately reached the same conclusion.

Applying the correct standard of review, the Court noted that for the Columbia project to constitute a "land use improvement project," the ESDC must establish the following under the UDC: (1) that the area to be improved is "substandard or unsanitary" and tends to "impair or arrest the sound growth and development of the municipality;" (2) that the project consists of a plan for the "clearance, replanning, reconstruction and

rehabilitation" of such areas for recreational and related purposes; (3) and that the plan affords "maximum opportunity for participation by private enterprise, consistent with the sounds needs of the municipality."

With respect to the first prong, "substandard or insanitary" has been defined as "a slum blighted, deteriorated, or deteriorating area, or an area which has a blighting influence on the surrounding area."

Even in light of the UDC, the Court noted that blight is an "elastic" term which does not call for a "one-size-fits-all definition," and that a determination of blight should be made on a case-by-case basis which considers many significant "factors and interrelationships." Citing prior case law, the Court listed some of these significant factors as including irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, crime rates, sanitation or lack thereof, fire hazards, traffic congestion, pollution and the general drain on the municipal resources presented by the area.

In examining the reports of AKRF, ESDC, Urbitran and Earth Tech, the Court found that the conclusions outlined in each report more than established that project site was a blighted area, the improvement of which constitutes a "land use improvement project" under the UDC.

## **Civic Project**

The UDC defines a Civic project as "a project or that portion of a multipurpose project designed and intended for the purpose of providing facilities for educational, cultural, recreational, community, municipal, public service, or other civic purposes." Further, the UDC empowers the ESDC to undertake "acquisition, construction, reconstruction, rehabilitation, or improvement" of an area if and when a need for a civic improvement exists thereon.

While Columbia is a private, not for profit educational entity which sought no contribution from the government for its project, the Court held that its improvement of the West Harlem area was indeed a Civic project because education is a crucial governmental and public interest that would be furthered by the new urban campus. The Court noted that nothing in the UDC statutory language limits educational projects to public educational institutions and therefore the First Department was incorrect to find that expansion of a private university could not be deemed a civic project.

Further, the Court found that the project would also generate civic improvements aside from those related to education, such as upgrades in the transit infrastructure, a financial commitment to West Harlem Piers, stimulating job growth and providing publicly accessible facilities and open space.

## **Due Process**

The Court rejected plaintiffs' argument that they had been denied Due Process of Law after the ESDC refused to produce five documents in compliance with the FOIL request and the decision rendered in the

Article 78 proceeding because, as the Court noted, ESDC had produced over 8,000 pages in documents and gave the plaintiffs ample opportunity to voice their questions and concerns in writing and orally at the two day project hearing. Further, the Court opined that FOIL violations do not amount to Due Process violations unless the plaintiffs could establish prejudice, which they could not.

The concurring opinion of Justice Smith agreed with the majority overall, but diverged in finding that there was no reason to consider the project as a civic one, being that it qualified as a land use development project.

© Morris Duffy Alonso & Faley (2010)