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April 28, 2010

VIA EMAIL: [asmith22@hvc.rr.com](mailto:asmith22@hvc.rr.com)  
AND REGULAR MAIL

Alex Smith, Esq.  
Assistant Corporation Counsel of the City of Middletown  
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***Re: New Elementary School Project***

Dear Alex:

We write in response to your letter of April 23, 2010 in which you asked the Enlarged City School District of Middletown ("School District") to provide justification for the Superintendent's comments at last week's Board of Education Meeting about the request by the City of Middletown ("City") for the District to pay for the replacement of the alleged "compromised" sewer line extending from the existing Chorley School to Elm Street.

Even after securing approval of its voters, an enlarged city school district may not advertise for bids or expend any funds to construct a new school building without plans and specifications being first approved by the Commissioner of Education of the State of New York ("Commissioner"). See, N.Y. Educ. Law, §§408[1]; 2512[4]. The Commissioner's approval of those plans and specifications may not be issued unless they "provide for heating, ventilation, lighting, *sanitation*, storm drainage and health, fire and accident protection adequate to maintain healthful, safe and comfortable conditions therein." See, N.Y. Educ. Law, §408[2]. No funds authorized by the voters may even be expended until the Commissioner certifies that the plans and specifications satisfy these conditions. Thus, the Commissioner alone must be satisfied that the School District will provide for suitable disposal of its sanitation on its site before approving the plans and specifications for construction. No other entity may exercise jurisdiction over the adequacy of the plans.

The City has been aware for nearly two years that the School District planned to replace the Chorley Elementary School with the construction of a new elementary school. During this period, the School District has made numerous presentations to the Common Council about the planned project. The Common Council has already approved one subdivision application in connection with this project. Not once, did the City ever inform the School District that it would be required to bear the sole cost for capital upgrades to its sewer collection system off school property. Now, as a condition for connecting the planned sewer improvements for the New Elementary School to its public sewer system, the City has demanded that the School District replace a sewer line that services numerous private homes and enterprises, including but not limited to the residents living in Tower Terrace Apartments and Clemson Park Condominium Complex. Such a condition seriously infringes and interferes with the Commissioner's lawful and exclusive jurisdiction over the planned school construction project.

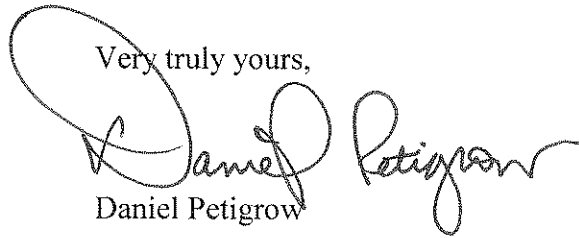
Also, if the District is required to fund replacement of the City's public sewer line extending far outside its property boundary, the District would be advancing its credit to benefit these private parties without any legal consideration being provided in return. Article VIII, §1 of the New York State Constitution prohibits a school district from giving or lending its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, in the absence of any statutory or contractual obligation. While a school district is legally authorized to construct and pay for facility improvements to safeguard the health, safety and welfare of the occupants on its own property, once approved by the Commissioner of Education (see, N.Y. Educ Law, §408; 8 N.Y.C.R.R. §155.2), there is no law or regulation permitting it to construct or replace improvements owned by other municipal entities, which are independently and legally responsible for upgrading and maintaining infrastructure that protects their own residents. Accordingly, requiring the School District to pay for the entire replacement of the public sewer line extending from its property to Elm Street, approximately 3/4 of a mile away, would violate Article VIII, §1 of the New York State Constitution.

Further, Article 389 of the City's Charter requires the Commissioner of Public Works and the Chief Fiscal Officer to "determine the total annual costs of operation, maintenance, debt service and capital replacement of the wastewater system which are necessary to maintain the capacity and performance, during the service life of the treatment works, for which such works were designed and constructed and to generate funds necessary for replacement." See, City Charter, §389-55. "Charges for the wastewater system attributable to extraneous flows (i.e., infiltration/inflow) shall be distributed *among all users of the wastewater system, based upon the flow volume of the users as determined by their water meter readings*(italics added)." Id., at §389-56[D].

If infiltration/inflow problems do indeed exist in this area, which require capital replacement of any portion of the City's sewer collection system, then at most, the School District expects to share in the costs with other users of the system, based on the flow volume as determined by water meter readings according to the City's Charter. However, the School District will not fund any replacement cost alone, as to impose such a requirement would be arbitrary and capricious, not to mention unlawful and unconstitutional.

Finally, we note that the City has been in possession of the School District's application and engineering information since late December of 2009. To our knowledge, the City has made no formal study of the School District's information or conducted any tests of the flow rates in the area where the District proposes to connect the New Elementary School wastewater collection and disposal system to the City's sewer system. We trust the City will promptly conduct and complete its review of the plans and specifications submitted by the School District and issue the required permit.

Very truly yours,

A handwritten signature in black ink, appearing to read "Daniel Petigrow". The signature is written in a cursive style with a large, looping initial "D".

Daniel Petigrow

DP/ejd

cc: Dr. Kenneth Eastwood (via email only)  
Elizabeth McKean (via email only)  
Tom Scott (via email only)  
Tim Bonaparte (via email only)