

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ORANGE

In the Matter of the Application of:

**THE ENLARGED CITY SCHOOL DISTRICT OF  
MIDDLETOWN,**

Petitioner,

vs.

**THE CITY OF MIDDLETOWN;**

**JOSEPH M. DeSTEFANO, in his capacity as MAYOR;**

**J. MIGUEL RODRIGUES, in his capacity as  
MIDDLETOWN COMMON COUNCIL PRESIDENT  
and member of the MIDDLETOWN COMMON  
COUNCIL;**

**JOSEPH G. MASI, THOMAS BURR, SCOTT A.  
SMITH, ASHOK SABNIS, RAYMOND DEPEW,  
BILL HIMARAS, JOEL SIERRA, and C. LEE  
GEROW, in their capacities as members of the  
MIDDLETOWN COMMON COUNCIL;**

**THE MIDDLETOWN COMMON COUNCIL;**

**THE MIDDLETOWN DEPARTMENT OF PUBLIC  
WORKS; and**

**JACOB TAWIL, in his capacity as MIDDLETOWN  
DEPARTMENT OF PUBLIC WORKS  
COMMISSIONER,**

Respondents.

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

**AFFIDAVIT OF DR.  
KENNETH EASTWOOD**

**2010 007804**  
Index No.

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SUPREME & COUNTY COU  
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STATE OF NEW YORK     )  
COUNTY OF ORANGE    ) ss.:

DR. KENNETH EASTWOOD, being duly sworn, deposes and says:

1. I am the Superintendent of the Enlarged City School District of Middletown (the "District"). I have held that position for six years.
2. I submit this affidavit in support of the District's Verified Petition pursuant to Article 78 of the CPLR.
3. In or around October 2008, the District conducted a facility needs assessment. A true and accurate copy of the resulting Facility Needs Assessment Summary is attached hereto as **Exhibit 1**. That assessment revealed a critical need for the District to increase the capacity of its elementary school facilities. (See Ex. 1).
4. Specifically, the assessment revealed that while the total number of enrolled students in grades Kindergarten through Five totaled 2,515 for the 2008/2009 school year, the total number of students in those same grades for the 2014/2015 school year was projected to increase to 4,083. (See Ex. 1).
5. Absent any changes to the capacity of the District's elementary school facilities, this increase in enrollment would result in a projected increase in the average Kindergarten through Second Grade class size from 18 students per class in the 2007/2008 school year to 25 students per class in the 2014/2015 school year. With respect to grades Three through Five, the District's projected increase in enrollment would increase the average class size from 25 students per class in 2007/2008 to 32 students per class in 2014/2015. (See Ex. 1).
6. These expected increases in average class size would render the District far in excess of the target class sizes, as approved by the New York State Education Department

("SED"), of 18 students per class for grades Kindergarten through Two and 25 students per class for grades Three through Twelve. (See Ex. 1).

7. Inherent in the concept of targeted class sizes is that educating the "whole child" – addressing their social, emotional and educational needs – cannot be meaningfully accomplished in an overcrowded environment.

8. In addition, the District's facility needs assessment revealed that one of the District's elementary buildings (the "Chorley Building") is in a critical state of physical decline, requiring substantial, continuing, and costly repairs. (See Ex. 1).

9. Given this assessment, it became – and remains – critical that the District expand and replace its existing facilities in order to meet New York State standards and provide the District's elementary students with a satisfactory education.

10. The necessity of constructing a new elementary school building was recognized in a resolution authorized by the District's Board of Education on or about October 30, 2008.

11. Accordingly, the District proposed to build a new elementary school building (the "Proposed Building") on a site adjacent to the Chorley Building and demolish the Chorley Building, at an aggregate maximum estimated cost of \$63,490,000.

12. In connection therewith, the District's Board of Education also resolved on or about October 30, 2008, to authorize the construction of the Proposed Building and the demolition of the Chorley Building and to authorize the expenditure of \$2,000,000 and the issuance of bonds not exceeding \$61,490,000.

13. Additionally, also by resolution on or about October 30, 2008, the District's Board of Education resolved to submit a proposition to the District's voters to approve the bonds.

14. On or about December 18, 2008, the District's bond resolution was approved by the voters of the District.

15. In connection with this proposal, and beginning as early as October 2008, the District made the City aware that the District planned to replace the Chorley School with the Proposed Building and regularly made presentations to the City Respondents, including the City, Mayor, and Common Council, regarding the District's proposal.

16. Because the Proposed Building will be located on property adjacent to the site of the Chorley Building, the District has, from the outset, planned to simply connect the Proposed Building to the pre-existing sewer pipeline that presently runs to the Chorley Building.

17. That portion of the pipeline is approximately three-quarters of a mile long, and presently services the Chorley Building as well as numerous private homes and enterprises, including several large apartment and condominium complexes extending well beyond the District's property. Again, this is the same portion of the pipeline that would service the District's Proposed Building.

18. From October 2008 through the end of 2009, the District's Proposed Building project made substantial progress and was not only unimpeded, but indeed supported, by the City. For example, in early 2009, the Common Council approved a subdivision to assist the District in gaining property and preparing for the eventual construction of the Proposed Building. A copy of the Common Council's resolution to this effect is attached hereto as **Exhibit 2**.

19. In addition, the City consented to the District's Board of Education acting as Lead Agency for the project and, in connection with the District's Environmental Assessment Form, took issue only with the District's assessment regarding traffic impacts. A copy of the Common Council's resolution consenting to the District acting as Lead Agency is attached

hereto as **Exhibit 3**, and a copy of the letter confirming the Common Council's consent is attached hereto as **Exhibit 4**.

20. Indeed, in the District's SEQR Environmental Assessment Form, a copy of which is attached hereto as **Exhibit 5**, the District explicitly stated with respect to sewage disposal at the Proposed Building that:

Sewage disposal is handled through an existing municipal sanitary system. The proposed building will replace the existing facility and since the current system handles sewage adequately, no problems are anticipated.

(See Ex. 5, §2.7).

21. In response to this SEQR Environmental Assessment Form, the City stated that its "only disagreement is with [the District's] assessment in Part C-12 regarding traffic impacts." (See Ex. 4). In contrast, no issues with respect to sewer connectivity were ever raised by any of the City Respondents.

### **The City's Sewer Replacement Project**

22. As of 2004, the City was in violation of New York State laws and regulations in connection with its sewage treatment system. As a means of addressing its violations, the City commissioned a Sewer System Evaluation Survey, a report of which was produced in January 2004. A copy of this report is attached hereto as **Exhibit 6**.

23. Nowhere in this voluminous report – which was dedicated entirely to issues involving the City's sewage system – was there any mention of a need to replace the portion of the City's sewer pipeline at issue herein. (See Ex. 6).

24. In connection with this report, on or about October 7, 2004, the City agreed with the New York State Department of Environmental Conservation (the "DEC"), to an Order on Consent in connection with which the City was required to undertake certain corrective actions

with respect to its sewage system, including, but not limited to, rehabilitating portions of the City's sewage collection system. A copy of this Order on Consent is attached hereto as **Exhibit 7**. Again, nowhere in the Order on Consent, or in the City's plan to rehabilitate the City's sewage collection system, is there any directive or even mention of replacing the portion of the City's sewer pipeline at issue herein. (See Ex. 7).

25. The City commenced this rehabilitation project and, on or about May 2, 2008, submitted a request to the DEC to modify the Order on Consent in accordance with the City's rehabilitation approach. A copy of this request is attached hereto as **Exhibit 8**. This request was accepted by the DEC, and the Order on Consent was modified in October 2008, a copy of which is attached hereto as **Exhibit 9**. As with the original Order on Consent, the modified Order on Consent was silent with respect to the portion of the City's sewer pipeline at issue herein. (See Ex. 9).

26. Beginning in approximately March 2010, however, the City Respondents, through Respondent DeStefano, suddenly began to contend that, at present, the particular sewer line at issue experiences "surcharges and sewage overflows through manholes and onto the public streets, private property, and streams during some rain events and when the ground is saturated." A copy of a letter from Respondent DeStefano to this effect is attached hereto as **Exhibit 10**.

27. In support of its new position, the City has produced no substantive analysis regarding the alleged need for a new pipeline.

28. An independent Engineer's Report prepared for the District has shown that the pipeline that runs to the Chorley Building, and that would run to the Proposed Building, would not be overtaxed by any additional sewage flow from the Proposed Building (as opposed to the

current sewage flow from the Chorley Building). A copy of this Engineer's Report is attached hereto as **Exhibit 11**.

29. The Engineer's Report also concluded that, even if the sewer pipeline were in need of replacement or repair, any such need would be the result of structural pipe failures, root intrusion, frequent solids deposition, or other maintenance issues unrelated to the particular uses of the District. (See Ex. 11).

**The City Respondents Demand That The District Pay To Replace Portions Of City Sewers**

30. As set forth above, from October 2008 through the end of 2009, the District's Proposed Building project proceeded smoothly and expeditiously without complaint objection by the City or any of the City Respondents. And, as of March 2010, the District was moving toward obtaining final approval from the State Education Department for the Proposed Building and commencing with construction-related activities.

31. Yet, although the City had been aware since at least October 2008 of the District's proposed construction of the Proposed Building and had, indeed, already approved certain permits in connection with the same, the City Respondents – for the first time – raised the prospect of denying the District a permit to allow the Proposed Building to connect to the City's water supply and sewage collection system unless the District agreed to reconstruct, repair, and/or replace – at the District's cost and expense – the existing sewer line running to the Chorley Building and Proposed Building site.

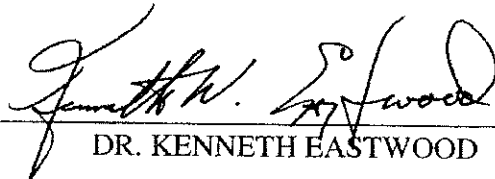
32. In connection with the City's new demand, Respondent DeStefano, who had recently been elected in November 2009, both in writing and orally at District meetings, expressly stated that the City would not issue the necessary permit for the District to connect the Proposed Building to the City's sewage collection system unless the District agreed to

reconstruct, repair, and/or replace the sewer line running to the Proposed Building at the District's cost and expense. Attached hereto as **Group Exhibit 12** is a series of correspondence involving Respondent DeStefano in connection with the City's demand.

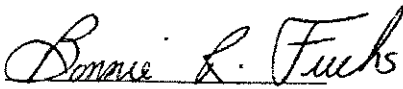
33. DeStefano repeated this position numerous times at District meetings of the Board of Education and in the attached letters to both the SED and the District Superintendent.

34. Above and beyond making the unfounded assertion that the City may compel the District to pay for replacement of sewer piping within the ownership and custody of the City as a precondition of connecting to the City's sewage collection system, DeStefano has gone so far as to claim that the District is required to connect to the City's sewage collection system, and therefore is required to pay for the same, even if the District determined that it would rather construct an on-site sewage disposal system. (See Ex. 12).

35. The City's course of conduct has put the District's project -- and the educational mission attendant therewith -- in serious jeopardy. In particular, the SED has informed the District that although the District has met all requirements necessary for the SED to approve the project and issue a construction permit, the SED will not allow the District to proceed with the Proposed Building unless and until the issue water supply and sewage collection is resolved. A copy of the SED's letter to this effect is attached hereto as **Exhibit 13**.

  
DR. KENNETH EASTWOOD

Sworn to before me this 16th  
day of July, 2010

  
Notary Public

