

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.

**MEMORANDUM OF LAW
IN SUPPORT OF ARTICLE
78 PETITION AND
COMPLAINT FOR
DECLARATORY
JUDGMENT**

Indexed **2010 007804**

ORANGE COUNTY
SUPREME & COUNTY COURT
GOSHEN, N.Y.
2010 JUL 19 PM 1:39

PRELIMINARY STATEMENT

For approximately two years, the Enlarged City School District of Middletown (the “District”), has undertaken a process to construct a new elementary school building that is desperately needed to accommodate a surge in elementary school enrollment within the District. Absent the construction of this new building, the increase in elementary school enrollment is expected, by the 2014-2015 school year, to create a situation of overcrowding that will render the District’s current elementary school facilities inadequate both as a matter of New York State standards and as a matter of fostering an environment in which District students can maximize their potential.

During this approximately two-year period, the District has worked hand in hand with both the New York State Education Department (“SED”) and the City of Middletown to develop plans and specifications for the proposed new building that have, as of the date hereof, met with the SED’s full approval. The City never raised any objections to the project, and the SED is, as of the date of this Memorandum of Law, otherwise ready to issue the District a permit to begin construction activities.

Earlier this year, however, in an effort to seize on the urgency with which the District must act in order to ensure completion of its proposed new elementary school and to obtain a windfall for both the City and certain private individuals and enterprises living near the site of the proposed building, the City suddenly made a new and unfounded demand of the District. Specifically, the City, through the City Respondents named herein, demanded that – as a precondition to the City’s consideration of any application by the District to connect its proposed building to the City’s sewage collection system – the District fund the replacement or

reconstruction of the pre-existing City sewer line that already services the District's existing elementary building and that would also service the District's proposed building.

The City's out-of-the-blue demand has no basis in law and is arbitrary and capricious, unlawful, and an abuse of discretion. The City has absolutely no basis or authority under State or local law to require the District to replace or reconstruct the pre-existing sewer line that services not only the District, but numerous private City residents as well. Indeed, the District is expressly prohibited under New York law from funding such reconstruction or replacement. Nevertheless, the City Respondents, in a transparent attempt to leverage the District's critical need for a new building into a windfall for the City, have determined that the City will not consider any District application for a sewer connection permit unless the District agrees to replace or reconstruct the pre-existing sewer line. As a result of the City Respondents' determination, the SED has informed the District that it will not issue a permit to begin construction until this issue is resolved.

For the reasons set forth in the District's Verified Petition and Complaint for Declaratory Judgment, in the accompanying affidavit of District Superintendent Kenneth Eastwood and attorney affirmation of Joseph S. Nacca, and in this Memorandum of Law, the District respectfully requests that this Court enter a judgment: (a) declaring that the City's refusal to consider any application by the District for a permit to connect to the City's water supply and sanitary sewage collection system unless the District agrees to fund the reconstruction or replacement of a pre-existing public sewer line under the ownership and custody of the City is unlawful, arbitrary and capricious, and an abuse of discretion; (b) declaring that the City may not require the District to pay for the reconstruction or replacement of a pre-existing public sewer line under the ownership and custody of the City as a precondition to considering any application

by the District for a permit to connect a new building to that sewer line; (c) ordering that the City Respondents comply with the City Charter in connection with any permit requested by the District; and (d) granting the District such other and further relief as the Court deems appropriate.

FACTUAL SUMMARY

The relevant facts are set forth in full in the Verified Petition and Complaint, the Eastwood Affidavit, and the Nacca Affirmation. They are set forth herein for the Court's convenience.

A. The Proposed Building

In or around October 2008, the District conducted a facility needs assessment, which revealed a critical need for the District to increase the capacity of its elementary school facilities. (See Eastwood Aff. ¶3, Ex. 1). 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 was projected to increase to 4,083 by the 2014-2015 school year. (See *id.*).

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 Eastwood Aff. ¶5, Ex. 1).

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, of 18 students

per class for grades Kindergarten through Two and 25 students per class for grades Three through Twelve. (See Eastwood Aff. ¶6, Ex. 1). 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. (See Eastwood Aff. ¶7).

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 Eastwood Aff. ¶8, Ex. 1).

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. (See Eastwood Aff. ¶9). 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. (See Eastwood Aff. ¶10).

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. (See Eastwood Aff. ¶11). 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. (See Eastwood Aff. ¶12).

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. (See Eastwood Aff. ¶13). On or about December 18, 2008, the District’s bond resolution was approved by the voters of the District. (See Eastwood Aff. ¶14).

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. (See Eastwood Aff. ¶15).

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. (See Eastwood Aff. ¶16). 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. (See Eastwood Aff. ¶17). Again, this is the same portion of the pipeline that would service the District's Proposed Building. (See Eastwood Aff. ¶17).

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. (See Eastwood Aff. ¶18, Ex. 2).

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. (See Eastwood Aff. ¶19, Exs. 3, 4).

Indeed, in the District's SEQR Environmental Assessment Form, 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 Eastwood Aff. ¶20, Ex. 5, §2.7).

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

B. The City’s Sewer Replacement Project

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. (See Eastwood Aff. ¶22, Ex.6). 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 Eastwood Aff. ¶22, Ex.6).

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. (See Eastwood Aff. at ¶24, Ex. 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 Eastwood Aff. at ¶24, Ex. 7).

The City commenced its 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. (See Eastwood Aff. ¶25, Ex. 8). This request was accepted by the DEC, and the Order on Consent was modified in October 2008. (See Eastwood Aff. ¶25, Ex. 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.

Beginning in approximately March 2010, however, as the District was moving toward final approval for the Proposed Building, the City changed its tune. In particular, 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." (See Eastwood Aff. ¶26, Ex. 10). Accordingly, the City now contends that this particular portion of pipeline is already in need of replacement.

The City's position could not be more transparent. The City is using the construction of the Proposed Building as a red herring to demand that the District fund the City's replacement of the sewer pipeline in question, even though the Proposed Building would be using the same sewer pipeline currently in use by the Chorley Building, and the same pipeline that the City now contends is already in need of repair, independent of the construction of the Proposed Building.

In support of its new position, the City has produced no substantive analysis regarding the alleged need for a new pipeline. (See Eastwood Aff. ¶27). Nor could it. Indeed, 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). (See Eastwood Aff. ¶28, Ex. 11). In other words, nothing about the differences between the Chorley Building and the Proposed Building would require replacement of the existing sewer line.

To the contrary, the Engineer's Report 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 Eastwood Aff. ¶29, Ex. 11). This conclusion is consistent with both the City's need to replace and rehabilitate other portions of its sewage collection and treatment system as well as with the City Respondents' new assertion that the pipeline running to the Chorley Building is already, at present, experiencing problems requiring the City's attention.

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

As set forth above, from October 2008 through the end of 2009, the District's Proposed Building project proceeded smoothly and expeditiously without complaint or objection by the City or any of the City Respondents. And, as of March 2010, the District was moving toward final approval from the SED for the Proposed Building and commencement with construction-related activities. (See Eastwood Aff. ¶30).

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, cooperated fully 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. (See Eastwood Aff. ¶31). Again, this is the same sewer line that services numerous private

residences and enterprises, and the same sewer line for which the City had never planned rehabilitation prior to the Spring of 2010.

In connection with the City's new and unfounded 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. (See Eastwood Aff. ¶32, Ex. 12).

DeStefano repeated this position numerous times at District meetings of the Board of Education and in letters to both the SED and the District Superintendent. (See Eastwood Aff. ¶33). Indeed, 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 Eastwood Aff. ¶34, Ex. 12).

In short, through their recent demands, the City Respondents have seized upon the critical necessity for the District to expand its facilities to accommodate the increasing number of elementary school students as leverage to force the District to pay for a sewer replacement or reconstruction that is – even if necessary – the City's responsibility by law. This course of conduct has put the District's project – and the educational mission attendant therewith – in serious jeopardy. (See Eastwood Aff. ¶35). That is because, pursuant to N.Y. Educ. Law §§408 and 2512(4), the Commissioner of Education of the State of New York (the "Commissioner"),

may not issue approval of the District's plans and specifications for the Proposed Building unless the Commissioner is satisfied that the District will provide for suitable disposal of sanitation.

Accordingly, 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. (See Eastwood Aff. ¶35, Ex. 13).

Thus, through their course of conduct and stated refusal to even consider an application by the District for a permit to connect to the City sewage collection system, the City Respondents have raised enough concern with the SED and Commissioner that the District cannot obtain an SED permit until this issue is resolved.

In short, the SED has communicated to the District that but for the City Respondents' stated refusal to consider a permit application for the District to connect to the City sewage collection system, the SED permit would be forthcoming.

Well aware of these circumstances, the City Respondents, by preemptively asserting that it will deny the District the necessary permit to connect to the City's water supply and sewage collection system unless the District agrees to fund the City's replacement and repair obligations, have attempted to parlay the urgency with which the District needs to expand its facilities into a windfall for both the City and the private residents who would benefit from the District's having to undertake an obligation that both: (a) is the City's sole and exclusive responsibility by law; and (b) the District is expressly forbidden by law from undertaking. As will now be shown, the District's determination is unlawful, arbitrary and capricious, and constitutes an abuse of discretion.

ARGUMENT

The City Respondents' opportunistic and, apparently, politically motivated course of conduct is not only factually disingenuous, but also precluded by the relevant and applicable statutory and legal framework. Accordingly, the City Respondents' determination that they will not consider a permit application by the District unless the District agrees to pay for the replacement or reconstruction of City-owned and City-controlled sewer pipelines has no statutory or other legal basis and is unlawful, arbitrary and capricious, and an abuse of discretion.

A. The City Charter Does Not Authorize The City's Demand

Municipal corporations, such as the City, are compelled to act in accordance with their respective charters. See, e.g., N.Y. Public Interest Research Group v. Dinkins, 83 N.Y.2d 377, 385-387 (1994) (holding that city must act in accordance with city charter); Deady v. Vill. of Lyons, 39 App. Div. 139 (4th Dep't 1899) (same).

Here, it is not disputed that the City is the legal owner and operator of the City sewer collection system. The City Charter expressly provides the manner in which the costs of capital improvements to the City's sewer system are to be funded. Specifically, Section 389-55 of the City Charter provides that the City's Commissioner of Public Works and Chief Fiscal Officer "shall 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 Nacca Aff., Ex. 1).

The City is then required under Section 389-56(B) of the City Charter to establish a uniform rate and billing system – based on the entirety of these "total annual costs" – to apply to all users of the system except those users determined by the Commissioner of Public Works to

have excessive strength or delivery flow characteristics that shall cause additional cost of treatment. As to those users, the Commissioner of Public Works and Chief Fiscal Officer shall develop rates for these users commensurate with the increased cost of treatment, pursuant to Section 389-56(C). (See Nacca Aff., Ex. 1). And, with respect to charges for the wastewater system attributable to extraneous flows, such charges shall, under Section 389-56(D), “be distributed among all users of the wastewater system, based upon the flow volume of the users as determined by their water meter readings.” (See Nacca Aff., Ex. 1).

Section 389-56(D), relating to extraneous flows, is particularly relevant here, where the City Respondents contend that the sewer pipeline in question is in need of repair because of “overflows” therein.

In short, the City Charter expressly provides that the costs of capital improvements to the City’s sewer system are to be included in the calculation of the City’s “total annual costs” and, accordingly, distributed among all users of the wastewater system. This framework makes perfect sense – where replacement of public sewer lines is necessary, the City – which owns the lines and is in custody of the same – makes the replacement, incorporates the total cost within its annual budget, and then apportions the cost proportionately to all users of the line in accordance with their usage.

By contrast, nothing in the City Charter authorizes the City to require a particular user of the system to bear the expense of constructing any portion of the sewer line, let alone require a user of the system to bear the expense of constructing a portion of the sewer line for the benefit of other private or municipal users of the same. To the contrary, as set forth above, the City Charter expressly requires that the charges of the sewer system, including costs associated with

capital replacement, are to be distributed among all users of the wastewater system through the usage-based rate and billing system established by the City Charter. (See Nacca Aff., Ex. 1).

Further, in setting forth the requirements that an applicant must meet to obtain a permit to connect to the City sewer system, nothing in the City Charter requires applicants to fund the cost of repairing or replacing a pre-existing sewer line at the time of the permit application. (See Nacca Aff., Ex. 1). Again, this makes perfect sense, given the system for apportioning the cost of capital improvements to the sewer line that is set forth in the City Charter.

Accordingly, the City Respondents' demand is both unauthorized and precluded by the City Charter. This alone is dispositive of this proceeding and renders the District entitled to the relief sought herein. But there's more.

B. The District Lacks Authority To Comply With The City's Demand

In addition to the City lacking any authority to require the District to fund the replacement of the sewer pipeline in question under the City Charter, the District itself lacks the authority to fund the replacement or reconstruction of the pipeline at issue. In the absence of such authority, the District may not as a matter of law fund the replacement of the City-owned, City-controlled sewer pipeline.

Courts in New York State have oft-repeated that “[i]t is historic legal principle that school districts have no inherent powers. Like other municipal corporations, they possess only those powers expressly delegated by statute or necessarily and reasonably implied therefrom.” Flamino v. Bd. of Educ. of the Cleveland Hill Union Free Sch. Dist., 97 Misc.2d 722, 724, 412 N.Y.S.2d 100 (Sup. Ct. 1979). See also Bd. of Educ. of Union Free Sch. Dist. No. 2 of the Town of Brookhaven v. Graves, 214 App. Div. 40, 43 (3d Dep’t 1925); Leone v. Hunter, 21 Misc.2d 750, 755, 191 N.Y.S.2d 334 (Sup. Ct. 1959).

The Commissioner of Education has reached this same conclusion. See, e.g., Appeal of Woodarek, 46 Ed. Dep't. Rep. 1 (2006); Appeal of McKenna, 42 Ed. Dep't. Rep. 54 (2002); Appeal of Rosenkranz, 37 Educ. Dep't. Rep. 330 (1998); Appeal of Bode, 33 Ed. Dep't. Rep. 260 (1993).

Here, the District lacks any statutory authority to fund the construction of the City-owned, City-controlled sewer pipeline, as the City has attempted to require in this case.

1. The Education Law Does Not Authorize The District To Fund The Sewer Pipeline

Nothing in the New York Education Law provides that a District has the separate power to provide sewage collection to individuals or entities other than the District itself. To the contrary, New York Education Law §2503, which sets forth the powers and duties of the District's Board of Education – other than those duties directed by the Commissioner – provides that the District's Board of Education:

shall have the care, custody, control, safekeeping and maintenance of all school property or other property used for educational, social or recreational work of the district, and shall prescribe rules and regulations for the preservation of such property. This subdivision shall not apply to property used for social or recreational programs of municipalities not established or maintained exclusively for educational purposes.

(N.Y. Ed. Law. §2503(6); emphasis added). Thus, the District has no authority under the Education Law to pay for the construction of a sewer pipeline that services private individuals and enterprises or is otherwise used for anything other than exclusively educational purposes.

2. The SED Will Not Authorize The District To Fund The Sewer Pipeline

Further still, the SED has taken the position, pursuant to Part 1201 of Title 19 of the Department of State Regulations, Section 1201.2(e), that it has no authority to direct the District to perform work on property over which the District does not have custody, including the City's pre-existing sewer pipeline that runs to the Proposed Building site and services both the District and numerous private individuals and enterprises. (See Eastwood Aff., Ex. 12). Specifically, Section 1201.2(e) states:

The State Education Department shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, school districts and boards of cooperative educational services.

(N.Y.C.R.R. Tit. 19, §1201.2(e)).

As the SED has correctly asserted, replacement of portions of sewer pipelines that are not located on District property and that service off-site private individuals and entities does not fall within the realm of "buildings, premises and equipment" in the custody of the District, nor does it constitute an activity related to such buildings, premises and equipment. To the contrary, construction of an off-site sewer pipeline that is under the ownership and custody of the City and that services private individuals and entities is – by its very definition – unrelated to the buildings, premises and equipment that is in the custody of the District.

This position, and the SED's reading of Section 1201.2(e), is consistent with N.Y. Educ. Law §2503, discussed above, which authorizes the Board of Education of a school district of a city with less than one hundred twenty five thousand inhabitants to have the "care, custody, control, safekeeping and maintenance of all school property or other property used for educational, social or recreational work of the district"

Thus, while the District – upon approval of the Commissioner – is authorized to construct and pay for facility improvements in connection with its own property, the District is prohibited from constructing or replacing improvements owned by other municipal entities from which other private and public individuals and entities receive the benefit. Yet, that is precisely what the City Respondents have attempted to require the District to do with respect to the sewer line at issue.

C. The District Is Expressly Prohibited From Complying With The City's Demand

Apart from having no statutory authority to replace or reconstruct the City's sewer pipeline, New York State law expressly prohibits the District from undertaking such a project. Specifically, 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.

That provision states, in pertinent part, that:

No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of, any private corporation or association; nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, except that two or more such units may join together pursuant to law in providing any municipal facility, service, activity or undertaking which each of such units has the power to provide separately.

(N.Y.S. Constitution, Art. VIII, §1). As discussed above, the District has no separate power to fund the replacement or reconstruction of the sewer pipeline in question. Further, there is no question that were the District to fund the replacement of a City-owned, City-controlled sewer line, such an expenditure, to the extent it extends far beyond the District's property and boundary line, would be to the exclusive benefit of the numerous private individuals and

enterprises who make use of that sewer pipeline. Without any consideration being provided in return, such funding would constitute an advancement of the District's credit to benefit these private individuals and entities.

In short, Respondents' determination that they will not consider a permit application from the District to connect the Proposed Building to the pre-existing sewer line running to the Proposed Building site unless the District agrees to fund the repair or replacement of that pre-existing sewer line is unlawful, arbitrary and capricious, and constitutes an abuse of discretion under both the City Charter and New York State law.

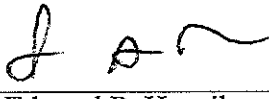
WHEREFORE, the District respectfully requests judgment that:

1. Declares that the City's refusal to consider any application by the District for a permit to connect to the City's water supply and sanitary sewage collection system unless the District agrees to fund the repair or replacement of a pre-existing public sewer line under the ownership and custody of the City is unlawful, arbitrary and capricious, and an abuse of discretion;
2. Declares that the City may not require the District to pay for the repair or replacement of a pre-existing public sewer line under the ownership and custody of the City as a precondition to considering any application by the District for a permit to connect a new building to that sewer line;
3. Orders that the City Respondents comply with the City Charter in connection with any permit requested by the District; and
4. Grants the District such other and further relief as the Court deems appropriate, including the costs and disbursements of this proceeding as well as attorneys' fees.

Dated: July 16, 2010

Respectfully submitted,

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