

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.

**NOTICE OF ARTICLE 78  
PETITION AND  
COMPLAINT FOR  
DECLARATORY  
JUDGMENT**

Index No. **2010 007804**

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

**PLEASE TAKE NOTICE** that upon the annexed Verified Article 78 Petition  
and Complaint for Declaratory Judgment of the Enlarged City School District of Middletown,

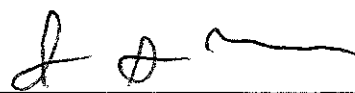
verified on the 16th day of July, 2010, an application will be made to a term and part of this Court, to be held at the Courthouse thereof, located at 285 Main Street, Goshen, New York 10924, on the 20th day of August, 2010, at 9:00 o'clock in the a.m. of that day, or as soon thereafter as counsel can be heard, for a judgment pursuant to CPLR Article 78 and Article 30: (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 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; (b) declaring 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; (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.

**PLEASE TAKE NOTICE**, that an answer and supporting affidavits, if any, shall be served at least five (5) days before the aforesaid date of hearing.

Petitioner designates Orange County as place of trial. Venue is based on Section 506(b) and Section 7804(b) of the CPLR.

Dated: July 16, 2010

BOND, SCHOENECK & KING, PLLC

By:   
Edward P. Hourihan, Jr.  
Joseph S. Nacca  
Attorneys for Petitioner  
345 Woodcliff Drive, Suite 208  
Fairport, New York 14450-4210  
Telephone: (585) 362-4700

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SUPREME COURT COUNTY OF ORANGE

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COMMISSIONER,**

Respondents.

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

**VERIFIED ARTICLE 78  
PETITION AND  
COMPLAINT FOR  
DECLARATORY  
JUDGMENT**

Index No. **2010 007804**

Petitioner, the Enlarged City School District of Middletown (the “District”), pursuant to Article 78 and Article 30 of the New York Civil Practice Law and Rules (“CPLR”), alleges as follows:

**NATURE OF ACTION**

1. This proceeding arises out of the City of Middletown’s (the “City”) attempt to hold hostage the District’s proposed construction of a new and critically necessary elementary school. Specifically, the City is making an unprecedented and unlawful demand on the District – requiring that, as a precondition for the City to consider an application by the District for the permit necessary to allow the District’s new school to connect to the City’s water supply and sanitary sewage collection system, the District bear the financial burden of replacing certain portions of the City’s sewer line.

2. This proceeding seeks a judgment pursuant to Article 78 and Article 30: (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 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; (b) declaring 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; (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.

## PARTIES

3. The District is a municipal corporation organized under the laws of the State of New York. The District is also a public city school district with less than 125,000 inhabitants under Article 51 of the New York Education Law. The District's principal place of business is located at 223 Wisner Avenue, Middletown, New York 10940.

4. On information and belief, the City is a municipal corporation organized under the laws of the State of New York, with its principal place of business located at 16 James Street, Middletown, New York 10940.

5. On information and belief, the Middletown Common Council is an administrative body of the City with a principal place of business located at 16 James Street, Middletown, New York 10940.

6. Joseph M. DeStefano is the Mayor of the City and, on information and belief, is a citizen of the State of New York residing in the City.

7. J. Miguel Rodrigues is the President of the Middletown Common Council and is also a member thereof. On information and belief, J. Miguel Rodrigues is a citizen of the State of New York and resides in the City.

8. Joseph G. Masi is a member of the Middletown Common Council and, on information and belief, is a citizen of the State of New York residing in the City.

9. Thomas Burr is a member of the Middletown Common Council and, on information and belief, is a citizen of the State of New York residing in the City.

10. Scott A. Smith is a member of the Middletown Common Council and, on information and belief, is a citizen of the State of New York residing in the City.

11. Ashok Sabnis is a member of the Middletown Common Council and, on information and belief, is a citizen of the State of New York residing in the City.

12. Raymond Depew is a member of the Middletown Common Council and, on information and belief, is a citizen of the State of New York residing in the City.

13. Bill Himaras is a member of the Middletown Common Council and, on information and belief, is a citizen of the State of New York residing in the City.

14. Joel Sierra is a member of the Middletown Common Council and, on information and belief, is a citizen of the State of New York residing in the City.

15. C. Lee Gerow is a member of the Middletown Common Council and, on information and belief, is a citizen of the State of New York residing in the City.

16. The Middletown Department of Public Works is a municipal agency with its principal place of business located at 16 James Street, Middletown, New York 10940.

17. Jacob Tawil is the Commissioner of the Middletown Department of Public Works and, on information and belief, is a citizen of the State of New York residing in the City.

18. Venue is appropriate in this Court under Section 506(b) and Section 7804(b) of the CPLR, as the determination made by the respondents herein (collectively, the “City Respondents”) that is the subject of this Petition was based on material events occurring within the County of Orange.

**FACTS**

**The Proposed Building**

19. In or around October 2008, the District conducted a facility needs assessment. (See Affidavit of District Superintendent Kenneth Eastwood (the “Eastwood Aff.”), at ¶3, Ex. 1).

That assessment revealed a critical need for the District to increase the capacity of its elementary school facilities. (See id.).

20. 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 Eastwood Aff. ¶4, Ex. 1).

21. 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).

22. 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).

23. 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).

24. 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).

25. 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).

26. 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).

27. 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).

28. 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).

29. 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).

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

31. 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).

32. 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).

33. 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).

34. 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).

35. 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).

36. 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).

**The City’s Sewer Replacement Project**

37. 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. ¶23, Ex. 6).

38. 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. ¶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. ¶24, Ex. 7).

39. 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. (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. (See Eastwood Aff. ¶25, Ex. 9).

40. 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, independent of the Proposed Building.

41. 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.

42. 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.

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

43. 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).

44. 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. (See Eastwood Aff. ¶31).

45. 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).

46. 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).

47. 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).

48. 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 sewer replacement or reconstruction that is 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).

49. 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.

50. 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 of water supply and sewage collection is resolved. (See Eastwood Aff. ¶35, Ex. 13).

51. Yet, the District is procedurally unable to formally apply to the City for the permit to connect the Proposed Building to the City's water supply and sewage collection system until the project receives final approval from the SED and the Commissioner. Nevertheless, 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.

52. 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.

53. Well aware of these circumstances, the City Respondents, by preemptively asserting that they 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 replacement of the sewer pipeline in question, has 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.

#### **The Relevant Statutory And Legal Framework**

54. 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.

55. It has not been 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. (See Attorney Affirmation of Joseph S. Nacca, (the "Nacca Aff."), at ¶5, Ex. 1). 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).

56. 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. (See Nacca Aff., Ex. 1). 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).

57. 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. (See Eastwood Aff., Ex. 10).

58. 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).

59. In short, 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, 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.

60. Further still, the SED has taken the position, pursuant to Part 1201 of Title 19 of the Department of State Regulations, Section 1201.2, that it has no authority to permit 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).

61. This position is consistent with §2503 of Article 51 of the New York Education Law, 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 . . .", which has also been cited by the SED in support of its position that the District is not authorized to maintain that portion of the sewage line that the City has demanded the District replace. (See Eastwood Aff., Ex. 12).

62. In addition to the City lacking any authority to require the District to fund the replacement of the sewer pipeline in question, 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.

63. 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.

64. The City 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.

65. Further, because the City Respondents have expressly stated their intention to deny the District a permit to connect the Proposed Building to the City's sewer system unless the District funds the replacement or repair of the pre-existing sewer pipeline servicing the Proposed Building site, and because this issue has resulted in the Commissioner being unwilling to grant final approval to the District's Proposed Building, there exists an actual and justiciable controversy between the District and the City Respondents.

66. The District does not have an adequate remedy at 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,

BOND, SCHOENECK & KING, PLLC

By: 

Edward P. Hourihan, Jr.  
Joseph S. Nacca

Attorneys for Petitioner  
345 Woodcliff Drive, Suite 208  
Fairport, New York 14450-4210  
Telephone: (585) 362-4700

**ATTORNEY VERIFICATION**

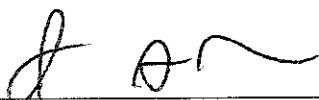
STATE OF NEW YORK     )  
COUNTY OF MONROE    ) ss.:

Joseph S. Nacca, Esq., being duly sworn, deposes and states that:

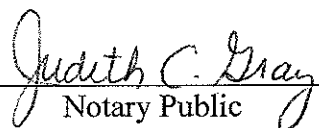
1. I am an attorney with the firm of Bond, Schoeneck & King, PLLC (“BSK”), attorneys for Petitioner, The Enlarged City School District of Middletown (the “District”) in this proceeding. Our office is located at 345 Woodcliff Drive, Suite 208, Fairport, New York 14450. I make this verification because the District is not located within Monroe County, which is the County where Bond, Schoeneck & King’s office is located.

2. I have read the foregoing Verified Article 78 Petition and Complaint for Declaratory Judgment and know the contents thereof. The Verified Article 78 Petition and Complaint for Declaratory Judgment is true to my knowledge except as to those matters alleged upon information and belief, and as to those matters, I believe them to be true.

3. The grounds of my belief as to all matters not stated upon my knowledge are: (1) review of documents and records in possession of the District; (2) conversations and communications with representatives of the District.

  
\_\_\_\_\_  
Joseph S. Nacca

Sworn to before me this  
16<sup>th</sup> day of July, 2010.

  
\_\_\_\_\_  
Notary Public

JUDITH C. GRAY  
Notary Public, State of New York  
Monroe County  
Commission Expires April 30, 2014

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ORANGE

In the Matter of the Application of:

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For a Judgment under Article 78 of the Civil Practice  
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**ATTORNEY  
AFFIRMATION OF  
JOSEPH S. NACCA**

Index No. \_\_\_\_\_

JOSEPH S. NACCA, under penalty of perjury, states as follows:

1. I am an attorney at law with the firm of Bond, Schoeneck & King, PLLC, attorneys for the Enlarged City School District of Middletown (the "District").

2. This affirmation is submitted in support of the District's Verified Article 78 Petition and Complaint for Declaratory Judgment.

3. This proceeding seeks a judgment pursuant to Article 78 and Article 30 of the CPLR: (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 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; (b) declaring 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; (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.

4. The relevant facts regarding the genesis of this proceeding are set forth in the accompanying Affidavit of District Superintendent Kenneth Eastwood.

5. Attached hereto as **Exhibit 1** is a copy of the relevant portions of the City Charter of the City of Middletown, which expressly provides the manner in which the costs of capital improvements to the City's sewer system are to be funded and demonstrates that the City has no authority to require the District to pay for the reconstruction or replacement of any portion

of the City's sewer line as a precondition for considering an application by the District for a permit to connect thereto.

6. The legal basis for the District's Verified Petition and Complaint for Declaratory Judgment is set forth in the accompanying Memorandum of Law. As set forth therein the District is entitled to the relief requested herein because, among other reasons: (a) the City Respondents' determination is not authorized under the City Charter; (b) the District lacks any statutory authority to perform the work being demanded by the City; (c) the State Education Department will not permit the District to perform the work being demanded of the City; and (d) New York State law expressly prohibits the City from performing the work being demanded by the City.

7. Accordingly, the City Respondents' determination that they will not consider a permit application from the District to connect the District's proposed building to the pre-existing sewer line running thereto 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.

8. Further, because the City Respondents have expressly stated their intention to deny the District a permit unless the District funds the replacement or repair of the pre-existing sewer pipeline servicing the proposed building, and because this issue has resulted in the District being unable to obtain final approval for its proposed building, there exists an actual and justiciable controversy between the District and the City Respondents.

9. The District does not have an adequate remedy at 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



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Joseph S. Nacca





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**ARTICLE I. Words and Terms Defined**

**§ 389-1. Definitions.**

A. Unless the context specifically indicates otherwise, the meaning of terms used in this chapter shall be as follows:

**ACT or THE ACT**

The Federal Water Pollution Control Act, also known as the Clean Water Act, as amended, 33 U.S.C. § 1251 et seq.

**[Added 2-25-1985]**

**ADMINISTRATOR**

The regional administrator of the United States Environmental Protection Agency, Region II.

**[Added 2-25-1985]**

**BOD (denoting "biochemical oxygen demand")**

The quantity of oxygen utilized in the biochemical oxidation of organic matter under standard laboratory procedure in five days at 20° C., expressed in parts per million by weight.

**BUILDING DRAIN**

That part of the lowest horizontal piping of a drainage system which receives the discharge from soil, waste and other pipes inside the walls, not including subsurface soil drains of the building, and conveys it to the building sewer, beginning five feet outside the inner face of the building wall.

**BUILDING SEWER**

The extension from the building drain to the public sewer or other place of disposal.

**CATEGORICAL PRETREATMENT STANDARDS**

The federal categorical pretreatment standards as enforced by the United States Environmental Protection Agency; any regulation containing pollutant discharge limits promulgated by the EPA in accordance with Section 307(b) and (c) of the Act (22 U.S.C. § 1347) which applies to a specific category of industrial users.

**[Added 1-23-1984; amended 2-25-1985]**

**COMBINED SEWER**

A sewer receiving both surface runoff and sewage.

**GARBAGE**

Solid wastes from the preparation, cooking and dispensing of food and from the handling, storage and sale of produce.

**INDUSTRIAL WASTES**

The liquid wastes from industrial processes, as distinct from sanitary sewage.

**INTERFERENCE**

An inhibition or disruption of the POTW, its treatment processes or operations or its sludge processes, use or disposal which is a cause, in whole or in part, of a violation of any requirement of the POTW's SPDES permit (including an increase in the magnitude or duration of a violation) or to the prevention of sewage sludge use or

disposal by the POTW in accordance with the following statutory provisions and regulations or permits issued thereunder, or more stringent state or local regulations: Section 405 of the Clean Water Act, the Solid Waste Disposal Act (SWDA), including Title II more commonly referred to as the "Resource Conservation and Recovery Act (RCRA)" and including state regulations contained in any state sludge management plan prepared pursuant to Subtitle D of the SWDA, the Clean Air Act and the Toxic Substances Control Act.

**[Added 2-25-1985; amended 5-13-1985]**

#### **NATURAL OUTLET**

Any outlet into a watercourse, pond, ditch, lake or other body of surface or ground water.

#### **NEW SOURCE**

Any source, the construction of which is commenced after the publication of proposed regulations prescribing a Section 307(c) (33 U.S.C. § 1317) categorical pretreatment standard which will be applicable to such source, if such standard is thereafter promulgated in accordance with that section.

**[Added 2-25-1985]**

#### **NYSDEC**

The New York State Department of Environmental Conservation.

**[Added 1-23-1984]**

#### **PERSON**

Any individual, firm, company, association, society, corporation or group.

#### **pH**

The logarithm of the reciprocal of the weight of hydrogen ions in grams per liter of solution.

#### **POTW TREATMENT PLANT**

That portion of the POTW designed to provide treatment to wastewater.

**[Added 2-25-1985]**

#### **PRETREATMENT or TREATMENT**

The reduction of the amount of pollutants, the elimination of pollutants or the alteration of the nature of pollutants or the alteration of the nature of pollutant properties in wastewater to a less harmful state prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW. The reduction or alteration can be obtained by a physical, chemical or biological process or process changes or by other means, except as prohibited by 40 CFR 403.6(d).

**[Added 2-25-1985]**

#### **PROPERLY SHREDDED GARBAGE**

The wastes from the preparation, cooking and dispensing of food that have been shredded to such degree that all particles will be carried freely under the flow conditions normally prevailing in public sewers, with no particle greater than 1/2 inch in any dimension.

#### **PUBLIC SEWER**

A sewer in which all owners of abutting properties have equal rights and which is controlled by public authority.

#### **SANITARY SEWER**

A sewer which carries sewage and to which storm-, surface and ground waters are not intentionally admitted.

#### **SEWAGE**

A combination of the water-carried wastes from residences, business buildings, institutions and industrial establishments, together with such ground-, storm- and surface waters as may be present.

#### **SEWAGE TREATMENT PLANT**

Any arrangement of devices and structures used for treating sewage.

#### **SEWAGE WORKS**

All facilities for collecting, pumping, treating and disposing of sewage.

#### **SEWER**

A pipe or conduit for carrying sewage.

#### **SIGNIFICANT INDUSTRIAL USER**

Any industrial user of the City's wastewater treatment system who is subject to national categorical pretreatment standards promulgated by USEPA; having substantial impact, either singly or in combination with other industries, on the operation of the treatment works; using, on an annual basis, more than 10,000 pounds or 1,000 gallons of raw material containing priority pollutants or substances of concern and discharging a

measurable quantity of these pollutants to the sewer system; or discharging more than 5% of the flow or load of conventional pollutants received by a City POTW treatment plant.

[Added 2-25-1985]

**SLUG DISCHARGE**

Any discharge of water or wastewater which, in concentrations of any given constituency or in quantity of flow, exceeds, for any period of duration, longer than 15 minutes more than five times the average twenty-four-hour concentration or flows during normal operations, and shall adversely affect the collection system and/or performance of the wastewater treatment works.

[Added 1-23-1984]

**STANDARD INDUSTRIAL CLASSIFICATION (SIC)**

A classification pursuant to the Standard Industrial Classification Manual issued by the Executive Office of the President, A Office of Management and Budget, 1972.

[Added 2-25-1985]

**STATE POLLUTANT DISCHARGE ELIMINATION SYSTEM OR SPDES PERMIT**

A permit issued pursuant to Section 402 of the Act (33 U.S.C. § 1342).

[Added 2-25-1985]

**STORM SEWER or STORM DRAIN**

A sewer which carries storm- and surface waters and drainage, but excludes sewage and polluted industrial wastes.

**SUPERINTENDENT**

The Commissioner of Public Works of the City of Middletown or his authorized deputy, agent or representative.

**SUSPENDED SOLIDS**

Solids that either float on the surface of or are in suspension in water, sewage or other liquids and which are removable by laboratory filtering.

**UNPOLLUTED WATERS**

Any waters which are void of pollutants and/or which have been determined by the NYSDEC as a class stream that is not polluted.

[Added 1-23-1984]

**USEPA**

The United States Environmental Protection Agency.

[Added 1-23-1984]

**WATERCOURSE**

A channel in which a flow of water occurs, either continuously or intermittently.

B. "Shall" is mandatory; "may" is permissive.

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**ARTICLE II. Use of Public Sewers Required**

**§ 389-2. Deposit of objectionable waste prohibited.**

It shall be unlawful for any person to place, deposit or permit to be deposited in an unsanitary manner upon public or private property within the City of Middletown, or in any area under the jurisdiction of said City, any human or animal excrement, garbage or other objectionable waste.

**§ 389-3. Discharge of polluted waters to natural outlet.**

It shall be unlawful to discharge to any natural outlet within the City of Middletown or in any area under the jurisdiction of said City any sanitary sewage, industrial wastes or other polluted waters, except where suitable treatment has been provided in accordance with subsequent provisions of this chapter.

**§ 389-4. Privy vaults, septic tanks, cesspools prohibited; exception.**

Except as hereinafter provided, it shall be unlawful to construct or maintain any privy, privy vault, septic tank, cesspool or other facility intended or used for the disposal of sewage.

**§ 389-5. Toilet facilities.**

**[Amended 10-13-1964]**

The owner of all houses, buildings or properties used for human occupancy, employment, recreation or other purpose, situated within the City of Middletown, and abutting on any street, alley or right-of-way in which there is now located or may in the future be located a public sanitary or storm sewer of the City of Middletown, is hereby required at his expense to install suitable toilet facilities therein and, further, to install suitable facilities to drain subsurface and surface water on the premises, and to connect such facilities directly with the proper public sewer or storm sewer in accordance with the provisions of this chapter, and under the supervision of the Commissioner of Public Works, within 30 days after date of official notice to do so, provided that said public sewer or storm sewer is within 100 feet of the property line.

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### **ARTICLE III. Private Sewage Disposal**

#### **§ 389-6. Where permitted.**

Where a public sanitary sewer is not available under the provisions of § 389-5, the building sewer shall be connected to a private sewage disposal system complying with the provisions of this article and Board of Health rule.

#### **§ 389-7. Permit required; application.**

Before commencement of construction of a private sewage disposal system, the owner shall first obtain a written permit signed by the Plumbing Inspector. The application for such permit shall be made on a form furnished by the City of Middletown, which the applicant shall supplement by any plans, specifications and other information as are deemed necessary by the City of Middletown.

#### **§ 389-8. Inspections during construction.**

A permit for a private sewage disposal system shall not become effective until the installation is completed to the satisfaction of the Plumbing Inspector. He shall be allowed to inspect the work at any stage of construction, and in any event, the applicant for the permit shall notify the Plumbing Inspector when the work is ready for final inspection, and before any underground portions are covered. The inspection shall be made within 48 hours of the receipt of notice by the Plumbing Inspector.

#### **§ 389-9. Types; capacities, location and layout.**

The type, capacities, location and layout of a private sewage disposal system shall comply with all recommendations of the Department of Health of the State of New York. No permit shall be issued for any private sewage disposal system employing subsurface soil absorption facilities where the area of the lot is less than 7,000 square feet. No septic tank or cesspool shall be permitted to discharge to any public sewer or natural outlet.

#### **§ 389-10. Direct connection with public sewer.**

At such time as a public sewer becomes available to a property served by a private sewage disposal system, as provided in § 389-5, a direct connection shall be made to the public sewer in compliance with this chapter, and any septic tanks, cesspools and similar private sewage disposal facilities shall be abandoned and filled with suitable material.

#### **§ 389-11. Maintenance of private system.**

The owner shall operate and maintain the private sewage disposal facilities in a sanitary manner at all times, at no expense to the City of Middletown.

#### **§ 389-12. Additional requirements not precluded.**

No statement contained in this article shall be construed to interfere with any additional requirements that may be imposed by the Health Officer.

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#### **ARTICLE IV. Building Sewers and Connections**

##### **§ 389-13. Permit required.**

No unauthorized person shall uncover, make any connections with or opening into, use, alter or disturb any public sewer or appurtenance thereof without first obtaining a written permit from the Superintendent.

##### **§ 389-14. Building sewer permits: classes; application; fee.**

**[Amended 12-27-2005; 1-7-2008]**

There shall be two classes of building sewer permits: for residential and commercial service, and for service to establishments producing industrial wastes. In either case, the owner or his agent shall make application on a special form furnished by the City of Middletown. The permit application shall be supplemented by any plans, specifications or other information considered pertinent in the judgment of the Superintendent. A permit and inspection fee of \$5 for a residential or commercial building sewer permit and \$15 for an industrial building sewer permit, shall be paid to the Treasurer at the time the application is filed.

##### **§ 389-15. Installation costs and expenses.**

All costs and expense incident to the installation and connection of the building sewer shall be borne by the owner. The owner shall indemnify the City from any loss or damage that may directly or indirectly be occasioned by the installation of the building sewer.

##### **§ 389-16. Separate sewer required for each building; exception.**

A separate and independent building sewer shall be provided for every building, except, where one building stands at the rear of another on an interior lot and no private sewer is available or can be constructed to the rear building through an adjoining alley, court, yard or driveway, the building sewer from the front building may be extended to the rear building and the whole considered as one building sewer.

##### **§ 389-17. Old building sewers used with new buildings.**

Old building sewers may be used in connection with new buildings only when they are found, on examination and test by the Superintendent, to meet all requirements of this chapter.

**§ 389-18. Materials.**

The building sewer shall be cast-iron soil pipe, ASTM specification (A74-42) or equal; vitrified clay sewer pipe, ASTM specification (C13-44T) or equal; approved asphalt pipe or other suitable material approved by the Superintendent. Joints shall be tight and waterproof. Any part of the building sewer that is located and within three feet of a water service pipe level or above shall be constructed of cast-iron soil pipe with leaded joints. Cast-iron pipe with leaded joints may be required by the Superintendent where the building sewer is exposed to damage by tree roots. If installed in filled or unstable ground, the building sewer shall be of cast-iron soil pipe, except that nonmetallic material may be accepted if laid on a suitable concrete bed or cradle as approved by the Superintendent.

**§ 389-19. Size and slope.**

The size and slope of the building sewer shall be subject to the approval of the Superintendent, but in no event shall the diameter be less than six inches. The slope of such four-inch pipe shall be not less than 1/4 inch per foot.

**§ 389-20. Elevation of connection; direction.**

Whenever possible, the building sewer shall be brought to the building at an elevation below the basement floor. No building sewer shall be laid parallel to or within three feet of any bearing wall which might thereby be weakened. The depth shall be sufficient to afford protection from frost. The building sewer shall be laid at uniform grade and in straight alignment insofar as possible. Changes in direction shall be made only with properly curved pipe and fittings.

**§ 389-21. Gravity flow preferred.**

In all buildings in which any building drain is too low to permit gravity flow to the public sewer, sanitary sewage carried by such drain shall be lifted by approved artificial means and discharged to the building sewer.

**§ 389-22. Excavations.**

All excavations required for the installation of a building sewer shall be open trench work unless otherwise approved by the Superintendent. Pipe laying and backfill shall be performed in accordance with ASTM specification (C12-19), except that no backfill shall be placed until the work has been inspected.

**§ 389-23. Joints and connections.**

**[Amended 5-24-1954]**

A. All joints and connections shall be made gastight and watertight. Cast-iron pipe joints shall be firmly packed with oakum or hemp and filled with molten lead, federal specification (QQ-L-156), not less than one inch deep. Lead shall be run in one pouring and caulked tight. No paint, varnish or other coatings shall be permitted on the jointing material until after the joint has been tested and approved.

B. All joints in vitrified clay pipe or between such pipe and metals shall be made with approved hot-poured jointing material.

C. Material for hot-poured joints shall not soften sufficiently to destroy the effectiveness of the joint when subjected to a temperature of 160° F., nor be soluble in any of the wastes carried by the drainage system. The joint shall first be caulked tight with jute, hemp or similar approved material.

D. Other jointing materials and methods may be used only by approval of the Superintendent.

**§ 389-24. Connection specifications.**

The connection of the building sewer into the public sewer shall be made at the Y-branch, if such branch is available at a suitable location. Where no properly located Y-branch is available, a neat hole may be cut into the public sewer to receive the building sewer, with entry in the downstream direction at an angle of about 45°. A forty-five-degree ell may be used to make such connection, with the spigot end cut so as not to extend past the inner surface of the public sewer. The invert of the building sewer at the point of connection shall be at the same or at a higher elevation than the invert of the public sewer. A smooth, neat joint shall be made and the connection made secure and watertight by encasement in concrete. Special fittings may be used for the connection only when approved by the Superintendent.

**§ 389-25. Inspection notice.**

The applicant for the building sewer permit shall notify the Superintendent when the building sewer is ready for inspection and connection to the public sewer. The connection shall be made under the supervision of the Superintendent or his representative.

**§ 389-26. Excavations: safety devices; restoration.**

All excavations for building sewer installation shall be adequately guarded with barricades and lights so as to protect the public from hazard. Streets, sidewalks, parkways and other public property disturbed in the course of the work shall be restored in a manner satisfactory to the City of Middletown and in accordance with the Street Excavation Ordinance. Editor's Note: See Ch. 416, Art. VIII, Openings and Excavations.

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#### **ARTICLE V. Use of the Public Sewers**

##### **§ 389-27. Prohibited discharge to sanitary sewers.**

No person shall discharge or cause to be discharged any stormwater, surface water, ground water, roof runoff, subsurface drainage, a cooling water or unpolluted industrial process waters to any sanitary sewer.

##### **§ 389-28. Disposition of unpolluted waters.**

**[Amended 2-25-1985]**

Stormwater and all other unpolluted drainage shall be discharged to such sewers as are specifically designated as combined sewers or storm sewers or to a natural outlet approved by the Superintendent. Industrial cooling water or unpolluted process waters may be discharged, upon approval of the Superintendent, to a storm sewer, combined sewer or natural outlet. Dischargers of cooling water to state waters must apply for a SPDES permit.

##### **§ 389-29. Enumeration of prohibited waters and wastes.**

Except as hereinafter provided, no person shall discharge or cause to be discharged any of the following described waters or wastes to any public sewer:

- A. Any liquid or vapor having a temperature higher than 150° F.
- B. Any water or waste which may contain more than 100 parts per million, by weight, of fat, oil or grease.
- C. Any gasoline, benzene, naphtha, fuel oil or other flammable or explosive liquid, solid or gas.
- D. Any garbage that has not been properly shredded.
- E. Any ashes, cinders, sand, mud, straw, shavings, metal, glass, rags, feathers, tar, plastics, wood, paunch manure or any other solid or viscous substance capable of causing obstruction to the flow in sewers or other interference with the proper operation of the sewage works.
- F. Any waters or wastes having a pH lower than 5.5 or higher than 9.0, or having any other corrosive property capable of causing damage or hazard to structures, equipment and personnel of the sewage works.
- G. Any waters or wastes containing toxic or poisonous substances, including oxygen demanding pollutants, released at a flow rate and/or pollutant concentration which would cause interference with any sewage treatment

process or constitute a hazard to humans or animals or create any hazard in the receiving waters of the sewage treatment plant.

**[Amended 2-25-1985; 5-13-1985]**

H. Any waters or wastes containing suspended solids of such character and quantity that unusual attention or expense is required to handle such materials at the sewage treatment plant.

I. Any noxious or malodorous gas or substance capable of creating a public nuisance.

J. Any wastewater which will result in a temperature exceeding 104° F. (40° C.) at the influent to the sewage treatment plant.

**[Added 1-23-1984]**

K. Any pollutant in excess of values specified in the categorical pretreatment standards.

**[Added 1-23-1984]**

**§ 389-30. Grease, oil and sand interceptors.**

A. Grease, oil and sand interceptors shall be provided when, in the opinion of the Superintendent they are necessary for the proper handling of liquid wastes containing grease in excessive amounts or any flammable wastes, sand and other harmful ingredients: except that such interceptors shall not be required for private living quarters or dwelling units. All interceptors shall be of a type and capacity approved by the Superintendent, and shall be located as to be readily and easily accessible for cleaning and inspection.

B. Grease and oil interceptors shall be constructed of impervious materials capable of withstanding abrupt and extreme changes in temperature. They shall be of substantial construction, watertight and equipped with easily removable covers which, when bolted in place, shall be gastight and watertight.

**§ 389-31. Maintenance of interceptors.**

Where installed, all grease, oil and sand interceptors shall be maintained by the owner, at his expense, in continuously efficient operation at all times.

**§ 389-32. Notice of slug discharge required.**

**[Added 1-23-1985]**

Notice must be given immediately to the Commissioner of Public Works of any slug discharge into the system.

**§ 389-33. Waters and wastes subject to approval; preliminary treatment facilities.**

A. Specific restrictions.

(1) The admission into the public sewers of any waters or wastes having the following characteristics shall be subject to the review and approval of the Superintendent:

(a) A five-day biochemical oxygen demand greater than 300 parts per million by weight.

(b) Containing more than 350 parts per million by weight of suspended solids.

(c) Containing any quantity of substances having the characteristics described in § 389-29B, D, H or I.

**[Amended 2-25-1985]**

(d) Having an average daily flow greater than 2% of the average daily sewage flow of the City.

(e) Any water or waste which may contain more than 100 parts per million, by weight of fat, oil or grease.

**[Added 1-23-1984]**

(f) Any garbage that has not been properly shredded.

**[Added 1-23-1984]**

(g) Any waters or wastes containing suspended solids of such character and quantity that unusual attention or expense is required to handle such materials at the sewage treatment plant.

**[Added 1-23-1984]**

(h) Any noxious or malodorous gas or substance capable of creating a public nuisance.

**[Added 1-23-1984]**

(2) Only the waters and wastes listed in § 389-29B, D, H and I may be discharged if reviewed and approved by the Superintendent, and these are the only water and wastes from § 389-29 that may be discharged if approved.

**[Added 2-25-1985; amended 5-13-1985]**

B. Where necessary, in the opinion of the Superintendent, the owner shall provide, at his expense, such preliminary treatment as may be necessary to:

- (1) Reduce the biochemical oxygen demand to 300 parts per million by weight;
- (2) Reduce objectionable characteristics or constituents to within the maximum limits provided for in § 389-29;  
or
- (3) Control the quantities and rates of discharge of such waters and wastes.

C. When preliminary treatment, flow-equalizing facilities or monitoring stations are provided for any waters or wastes, they shall be constructed and maintained continuously in satisfactory and effective operation by the owner at his expense. Where an industrial user has such treatment, equalization or monitoring facilities at the time these regulations are enacted, the Superintendent shall have the power to approve or disapprove of the adequacy of such facilities. Where construction of new or upgraded facilities for treatment, equalization or monitoring is required, plans and specifications prepared by a licensed professional engineer for such facilities shall be submitted to the Superintendent. No construction of such new or upgraded facilities shall commence until approval of the Superintendent is obtained in writing. Editor's Note: Original § 89-33, Maintenance of preliminary treatment facilities, which immediately followed this section, was repealed 2-25-1985.

**[Amended 2-26-1968; 2-25-1985]**

#### **§ 389-34. Control manholes.**

When required by the Superintendent, the owner of any property served by a building sewer carrying industrial wastes shall install a suitable control manhole in the building sewer to facilitate observation, sampling and measurement of the wastes. Such manhole, when required, shall be accessibly and safely located and shall be constructed in accordance with plans approved by the Superintendent. The manhole shall be installed by the owner at his expense and shall be maintained by him so as to be safe and accessible at all times.

#### **§ 389-35. Measurements, tests and analyses; accidental discharges.**

**[Amended 2-26-1968; 2-25-1985]**

A. All measurements, tests and analyses of the characteristics of waters and wastes required in any section of this chapter shall be carried out in accordance with the most recent edition of Standard Methods for the Examination of Water and Wastewater, and in accordance with regulations promulgated by the USEPA in 40 CFR 136, Guidelines Establishing Test Procedures for the Analysis of Pollutants. Such samples shall be taken at the approved monitoring stations described in § 389-33C, if such a station exists. If an approved monitoring station is not required, samples shall be taken from another manhole or other structure on the industrial sewer lateral before discharge to the public sewer. Unless specifically requested otherwise or unless specifically not allowed in federal regulations, samples shall be gathered as composite samples made up of individual samples taken not less than once per hour for a period of time equal to the duration of industrial waste discharge during daily operations.

**[Amended 5-13-1985]**

B. Each user shall provide for protection from accidental discharges of prohibited materials or of materials in volume or concentration exceeding limitations of this chapter or of an industrial wastewater permit. Detailed plans and procedures to provide for this protection shall be submitted to the Superintendent when so requested. Users shall immediately notify the Superintendent of the discharge of wastes in violation of this chapter or a permit resulting from breakdown of pretreatment equipment; accidents caused by human error or negligence or mechanical failure; or other causes, such as acts of nature, to allow the City to take countermeasures. The Superintendent shall be notified within five days of such occurrence by a detailed written statement describing the causes of the discharge and the measures being taken to prevent future occurrences.

C. In order that employees of industrial users be informed of City requirements, a notice shall be permanently posted on appropriate bulletin boards within the user's facility advising employees of City requirements and whom to call in case of an accidental discharge in violation of this chapter.

**§ 389-36. Special agreements not precluded.**

A. No statement contained in this article shall be construed as preventing any special agreement or arrangement between the City and any industrial concern whereby an industrial waste of unusual strength or character may be accepted by the City for treatment, subject to payment therefor by the industrial concern.

B. No special agreements shall circumvent federal categorical pretreatment standards.

**[Added 1-23-1984]**

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#### ARTICLE VI. General Provisions

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#### **ARTICLE VI. General Provisions**

##### **§ 389-37. Damage to sewage works; violators subject to arrest.**

No unauthorized person shall maliciously, willfully or negligently break, damage, destroy, uncover, deface or tamper with any structure, appurtenance or equipment which is a part of the municipal sewage works. Any person violating this provision shall be subject to immediate arrest under charge of disorderly conduct.

##### **§ 389-38. Powers and authority of inspectors.**

A. The Superintendent and other duly authorized employees of the City bearing proper credentials and identification shall be permitted to enter upon all properties for the purposes of inspection, observation, measurement, sampling and testing, in accordance with the provisions of this chapter.

B. Representatives of the NYSDEC and USEPA shall also be given permission to enter properties for the same purposes. All inspectors should be given the right to review and copy records.

**[Added 1-23-1984]**

##### **§ 389-39. Notice of violation; show cause hearing; penalties for offenses.**

**[Added 2-25-1985 Editor's Note: This ordinance also repealed original § 89-39, Notice of violations; compliance required. ]**

A. Notification of violation. Whenever the Superintendent finds that any user has violated or is violating this chapter, wastewater contribution permit or any prohibition or limitation of requirements contained herein, the Superintendent may serve upon such person a written notice stating the nature of the violation. Within 30 days of the date of the notice, a plan for the satisfactory correction thereof shall be submitted to the Superintendent by the user.

B. Show cause hearing.

(1) The Superintendent may order any user who causes or allows an authorized discharge to show cause before the City Council why the proposed enforcement action should not be taken. A notice shall be served on the user specifying the time and place of a hearing to be held by the City Council regarding the violation, the reasons why the action is to be taken, the proposed enforcement action and directing the user to show cause before the City Council why the proposed enforcement action should not be taken. The notice of the hearing shall be served personally or by registered or certified mail, return receipt requested, at least 10 days before the hearing. Service may be made on any agent or officer of a corporation.

(2) The City Council may itself conduct the hearing and take the evidence or may designate any of its members or any officer or employee of the Department of Public Works to:

(a) Issue in the name of the City Council notices of hearings requesting the attendance and testimony of witnesses and the production of evidence relevant to any matter involved in such hearings.

(b) Take the evidence.

(c) Transmit a report of the evidence and hearing, including transcripts and other evidence, together with recommendations to the City Council for action thereon.

(3) At any hearing held pursuant to this section, testimony taken must be under oath and recorded stenographically. The transcript, so recorded, will be made available to any member of the public or any party to the hearing upon payment of the usual charges thereof.

(4) After the City Council has reviewed the evidence, it may issue an order to the user responsible for the discharge directing that, following a specified time period, the sewer service be discontinued unless adequate treatment facilities, devices or other related appurtenances shall have been installed on existing treatment facilities, devices or other related appurtenances and are properly operated. Further orders and directives as are necessary and appropriate may be issued.

#### C. Penalties for offenses.

(1) Any person who violates any of the provisions of or who fails to perform any duty imposed by this chapter or any order or determination of the Superintendent promulgated under this chapter or the terms of any permit issued thereunder shall be liable to the City for a civil penalty not to exceed \$300 for each such violation, to be assessed after a hearing held in conformance with the procedures set forth in this chapter. Each violation shall be a separate and distinct violation, and in the case of continuing violation, each day's continuance thereof shall be deemed a separate and distinct violation. Such penalty may be recovered in an action brought by the Corporation Counsel at the request of the Superintendent in the name of the City in any court of competent jurisdiction. Such civil penalty may be released or compromised by the Superintendent before the matter has been referred to Corporation Counsel, and where such matter has been referred to the Corporation Counsel, any such penalty may be released or compromised and any action commenced to recover the same may be settled and discontinued by the Corporation Counsel with the consent of the Superintendent.

(2) In addition to the power to assess penalties as set forth in Subsection C(1) above, the Superintendent shall have the power, following a hearing held in conformance with the procedures set forth in Article VI of this chapter, to issue an order suspending, revoking or modifying the violator's permit and enjoining the violator from continuing the violation. Any such order of the Superintendent shall be enforceable in an action brought by the Corporation Council at the request of the Superintendent in the name of the City in any court of competent jurisdiction.

**[Amended 5-13-1985]**

#### **§ 389-40. Other remedies; emergencies.**

**[Added 2-25-1985 Editor's Note: This ordinance also repealed original § 89-40, Violations and penalties. ]**

A. The Corporation Counsel, on his own initiative or at the request of the Superintendent, shall have the right to seek equitable relief in the name of the City to restrain the violation of or to compel compliance with any order or determination issued thereunder by the Superintendent.

#### B. Emergencies.

(1) Notwithstanding any inconsistent provisions of law, whenever the Superintendent finds, after investigation, that any user is causing, engaging in or maintaining a condition or activity which, in his judgment, presents an imminent danger to the public health, safety or welfare or to the environment or is likely to result in irreversible or irreparable damage to the public sewer system or the environment, and it therefore appears to be prejudicial to the public interest to delay action until notice and an opportunity for a hearing can be provided, the Superintendent may, without prior hearing, order such user by notice, in writing wherever practicable or in such other form as practices are intended to be proscribed, to discontinue, abate or alleviate such condition or activity, and thereupon such person shall immediately discontinue, abate or alleviate such condition or activity; or where the giving of notice is impracticable, or in the event of a user's failure to comply voluntarily with an

emergency order, the Superintendent may take all appropriate action to abate the violating condition. As promptly as possible thereafter, not to exceed 15 days, the Superintendent shall provide the user an opportunity to be heard in accordance with the provisions of this chapter.

(2) The Superintendent, acting upon the belief that an emergency exists, shall be indemnified against any personal liability that may arise in the performance of his duties to protect the public health, safety or welfare or preserve the public sewer system.

**§ 389-41. Violator liable to City.**

Any person violating any of the provisions of this chapter shall become liable to the City for any expense, loss or damage occasioned the City by reason of such violation.

**§ 389-42. Repealer.**

**[Amended 5-24-1954]**

All ordinances or parts of ordinances in conflict herewith are hereby repealed, except that in the event of conflict with the provisions of the Plumbing Code of the City of Middletown, said Plumbing Code shall prevail. Editor's Note: See Ch. A500, Plumbers and Plumbing Standards.

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**ARTICLE VII. Out-of-City Users: Rates and Charges**

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**ARTICLE VII. Out-of-City Users: Rates and Charges**

**§ 389-43. Quarterly assessment.  
[Amended 11-23-1992]**

All nonresident property owners emptying sewage into the City sewage facilities, where connections with the City-owned sewer are outside the corporate limits of the City of Middletown, be and they shall pay the same rate as charged inside-the-City users and shall be billed at the same times and concurrently with the water billing.

**§ 389-44. Minimum charge.**

In the event a nonresident of the City of Middletown connects with the City sewage facilities outside the corporate limits of the City of Middletown and does not use City water, then and in that event said user shall pay quarterly to the City of Middletown on the first days of March, June, September and December a minimum charge of \$5 each quarter, in the case of residence use, and \$10 for business and industrial users.

**§ 389-45. Installation fees.  
[Amended 5-28-1962]**

All applicants for the use of City sewage facilities outside the corporate limits of the City of Middletown shall pay an installation fee of \$800, if for residence use, and \$1,000, if for business, industrial or other uses of a similar character.

**§ 389-46. Treasurer to bill users.  
[Amended 1-7-2008]**

The Treasurer be and is hereby authorized, empowered and directed to bill the users of City sewage facilities outside the corporate limits of said City in the amounts and in the manner hereinafter set forth.

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#### **ARTICLE VIII. Discharge Permits; Pretreatment Requirements** **[Added 2-25-1985]**

##### **§ 389-47. Wastewater discharge reports.**

As a means of determining compliance with these rules and regulations, with applicable SPDES permit conditions and with applicable state and federal laws, each industrial user shall be required to notify the Superintendent of any new or existing discharges to the POTW by submitting a completed industrial chemical survey form and industrial wastewater survey form to the Superintendent. The Superintendent may require any user discharging wastewater into the POTW to file wastewater discharge reports and to supplement such reports as the Superintendent deems necessary. All information required by the Superintendent shall be furnished by the user in complete cooperation with the Superintendent.

##### **§ 389-48. Notification of industrial users.**

The Superintendent shall, from time to time, notify each industrial user of applicable pretreatment standards and of any other applicable requirements under Sections 204(b) and 405 of the Clean Water Act and Subtitles C and D of RCRA.

##### **§ 389-49. Wastewater discharge permit required.**

A. No significant industrial user shall discharge wastewater to the POTW without having a valid wastewater discharge permit issued by the Superintendent. Significant industrial users shall comply fully with the terms and conditions of their permits in addition to the provisions of this chapter. Violation of a permit term or condition is deemed a violation of this chapter.

B. All significant industrial users proposing to connect to or to contribute to the POTW shall obtain a wastewater discharge permit before connecting to or contributing to the POTW. All existing significant industrial users connected to or contributing to the POTW shall obtain a wastewater discharge permit within 180 days after the effective date of this article.

##### **§ 389-50. Application for permit; terms and conditions.**

A. Permit application. Users required to obtain a wastewater discharge permit shall complete and file with the Superintendent an application in the form prescribed by the City as shown in Appendix A Editor's Note: Appendix A is on file in the office of the City Clerk and is available for inspection during normal business hours, and accompanied by a fee set forth by the City not to exceed \$200. Existing users shall apply for a wastewater discharge permit within 30 days after the effective date of this article, and proposed new users shall apply at least 90 days prior to connecting to or contributing to the POTW.



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#### **ARTICLE IX. Wastewater User Charges**

**[Added 10-24-1986 (Ch. 122, Art. II of the 1971 Code)]**

##### **§ 389-54. Purpose.**

The purpose of this chapter shall be to generate sufficient revenue to pay all costs for the City's complete wastewater system. The costs shall be distributed to all users of the wastewater system in proportion to their water usage, based upon water meter readings. Factors such as strength (BOD and SS) and delivery flow rate characteristics shall be considered and included as the basis for contribution, if the Commissioner of Public Works believes that it will cause additional cost for treatment.

##### **§ 389-55. Determining total costs.**

The Commissioner of Public Works and the 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. The total annual cost of the wastewater system shall include but need not be limited to labor, repairs, equipment replacement, maintenance, administration, necessary modifications, power, sampling, laboratory tests, a reasonable contingency fund, debt service and capital replacement.

##### **§ 389-56. Rates and billing.**

A. The Commissioner of Public Works and the Chief Fiscal Officer shall develop a proposed wastewater budget and recommend rates for wastewater usage to the Board of Estimate and Apportionment for review, amendment or adoption. The Board of Estimate and Apportionment will forward its recommendations to the Common Council for amendment or adoption of rates and a wastewater system budget.

B. The rates shall be determined by calculating the percentage of estimated total annual cost of the wastewater system to the estimated total annual cost of the water system. This percentage will be applied to the individual water bills to determine the wastewater charges. The billing will coincide with the water billing periods and be combined into one bill for water and wastewater. Delinquent wastewater accounts shall be treated the same as delinquent water accounts. Outside the City, wastewater charges shall remain a function of the individual water billing or estimated water billing. This rate and billing system shall apply to all users except those users determined by the Commissioner of Public Works to have excessive strength (BOD and/or SS) or delivery flow characteristics which shall cause additional cost of treatment.

C. In these cases, the Commissioner of Public Works and Chief Fiscal Officer shall develop rates for these users commensurate with the increased cost of treatment.

D. The 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.

**§ 389-57. Review of user's rates.**

The Commissioner of Public Works and Chief Fiscal Officer shall review the total annual cost of the wastewater system at least every two years and recommend revisions to the system, as necessary, to assure equity of the service charge system established herein and to assure that sufficient funds are obtained to adequately operate and maintain the wastewater system.

**§ 389-58. Notification of rates.**

Each user shall be notified, at least annually, in conjunction with a regular bill, of the rate and that portion of the user charges which are attributable to wastewater treatment services.

**§ 389-59. Prohibited wastes.**

The discharge of any waters containing toxic or poisonous solids, liquids or gases in sufficient quantity, either singly or by interaction with other wastes, to contaminate the sludge of any municipal systems or to injure or interfere with any sewage treatment process or to constitute a hazard in or have an adverse affect on the waters receiving any discharge from the treatment works is hereby prohibited. Chapter 389 of the City Code, Sewers, contains additional requirements covering the use of the City of Middletown's public sewers.

**§ 389-60. Toxic pollutants.**

Each user which discharges any toxic pollutant which causes an increase in the cost of managing the effluent or the sludge of the wastewater treatment works shall pay for such increased costs.

**§ 389-61. Inconsistent agreements.**

This system of service charges shall take precedence over any terms or conditions of agreements or contracts between the City and users (including industrial users, special districts, other municipalities or state and federal agencies or installations) which are inconsistent with 204(b)(1)(A) of the Clean Water Act (33 U.S.C. § 1251 et seq., as amended) or the 40 CFR, Part 35, rules and regulations.

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