

Joseph M. DeStefano  
Mayor



**City of Middletown**  
15 James Street, Middletown, New York 10940  
Established 1848

Tel 845-348-4100  
Fax 845-343-7539  
J.DeStefano@middletown-ny.com

May 17, 2010

Via facsimile to (518) 486-5918  
and First Class Mail

Mr. Curt Miller  
Associate Project Manager  
Office of Facilities Planning  
New York State Education Department  
1060 EBA, 89 Washington Avenue  
Albany, NY 12234

Re: Proposed new school, Enlarged City School District of Middletown

Dear Mr. Miller:

As the Mayor of the City of Middletown, New York, I am writing to you to express my concerns about a pending project by the Enlarged City School District of Middletown ("School District") to build a new school in the City to replace the existing Chorley School.

We have been asked by the School District to issue a permit to allow the new school to connect to the City's water supply and to the City's sanitary sewage collection system. Only within the past few months have we received drawings from the School District with any kind of details to preliminarily analyze their plans to bring water service to and sewer service from the new school. We have serious concerns about the proposed water and sewer services for a number of reasons and wanted to bring them to your attention to put you on notice so that you will not issue any permit to the School District to start construction until these matters are resolved.

The City has adequate capacity in both its water treatment and sewage treatment plants to handle the additional requirements of the new school. We have been told that the new school, based on 1,200 students, will need an average of approximately 20,000 gallons per day of both water and sewer. That does not account for peak usage periods, and it doesn't account for the fact that the School District has stated that over 1,325 students and faculty will be at the school. While we have adequate plant capacity, we are greatly concerned about the existing sewer line running from the school to a given point of connection at Elm Street. If the School District were

Mr. Curt Miller  
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to connect the new school to the sewage pipeline, that would create hazardous conditions along the line and on properties through which the line runs.

At present, the sewer line 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. If the new school were to hook into that line without undertaking any improvements to or replacement of that line, the overflows and discharges of raw sewage onto the ground and into some of the City's waterways would dramatically increase and pose significant dangers to the children and residents of the City along that line.

The School District currently uses approximately 60,000 gallons per month of water at the Chorley School, and most of that ends up being discharged into our sewer system. If we use the School District's calculations of the average daily need for water (not peak demand) and their estimate of 1,200 students (not 1,325, which includes faculty) for the proposed new school, that amounts to an average monthly total of 400,000 gallons of sewage, which is over six times the present demand on our line. This large increase would significantly overburden the existing sewer line during rain events and cause an increase in flow and overflow problems, and would likely trigger an action by the New York State Department of Environmental Conservation against the City and, possibly, the School District.

We cannot allow that to happen. We have asked the School District to reconstruct, repair and/or replace the sewer line to accommodate the excessive burden the new school would place on the existing sewer line. We have asked that the cost be included as a project cost, and we have even stated that we would be willing to share in a portion of the cost and the work. To date, the School District has refused to agree to our request. Rather, the School District has engaged in public posturing and finger pointing in an attempt to avoid their obligation to mitigate the overburdening of our sewer line. That is unacceptable.

Aside from the sewer issues, we have concerns about the water hookup. The plans we have received do not indicate whether there are any backflow prevention devices to protect our water supply system from possible contaminants entering our system. As the purveyor of the City's water supply, we must make sure that our water maintains the highest standards of purity and potability. What we have received so far does not satisfy us that our system's integrity will be preserved.

It is not acceptable to expect the City of Middletown taxpayers, who represent only approximately fifty percent of the School District's taxpayers, to be burdened with one hundred percent of the cost of correcting the sewer problem because of the addition of the additional sewage from the new school.

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On behalf of the City of Middletown and its residents, I am asking you to take immediate action to prevent the School District from continuing with its construction plans for a new school until and unless our concerns described above are dealt with satisfactorily. If you do not take that action and, instead, choose to issue a permit to the School District to construct the new school without addressing our concerns, we are prepared to commence litigation and potentially seek injunctive relief so that our residents are protected.

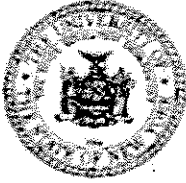
Please be guided accordingly.

Very truly yours,



Joseph M. Desterano, Mayor

cc: Carl Thurnau, P.E., Coordinator, Office of Facilities Planning  
(via facsimile to (518) 486-5918 and first class mail)  
Jacob S. Tawil, P.E., Commissioner of Public Works, City of Middletown  
Richard J. Guertin, Corporation Counsel, City of Middletown  
Alex Smith, Assistant Corporation Counsel, City of Middletown



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

Office of Facilities Planning, Room 1060 Education Building Annex  
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Fax (518) 488-5918  
E-mail: [www.emsc.nysed.gov/facplan/](http://www.emsc.nysed.gov/facplan/)

May 18, 2010

The Honorable Joseph M. Destefano  
Mayor of Middletown  
16 James Street  
Middletown, New York 10940

Dear Mayor Destefano:

Thank you for your faxed letter of May 17, 2010. I have taken the liberty of sharing your letter with Superintendent Eastwood since the district will clearly need to be involved in the resolution of these issues. I have also reviewed correspondence from the District's counsel to your Assistant Corporation Counsel regarding this dispute.

Regardless of the root cause of the concerns of the City of Middletown, the action your letter requests is illegal under education law. School districts have no authority in law to spend State or local capital construction monies on construction work off of school property. Therefore the district cannot legally replace the sewer line under the school project as you request.

Furthermore, the Department cannot authorize the district to contract for work off of school property as that is beyond the limit of our code enforcement jurisdiction, and because to do so would constitute an illegal gift of public monies. In this case, both private residents and the City of Middletown would improperly benefit from educational dollars through the upgraded sewer line.

I am happy to hear that the City has adequate capacity in both the water and sewage systems and I am happy to hear that the City is willing to share in the cost to upgrade the sewer line. The appropriate course of action would seem to be for the City, as the legal owner and operator of the systems, to undertake all necessary and appropriate improvements to *your* infrastructure in order to properly serve *your* constituency. The cost for such improvements must be shared by all beneficiaries of the improvements, including the school district. The Department will then share in the district portion of the costs attributable to the usage by the district.

Your correspondence describes deficiencies in your existing sanitary sewer system. It is your responsibility to correct those deficiencies in order to operate your system under the terms of your state pollution discharge elimination system permit in a safe and environmentally responsible manner. It is inappropriate to attempt to shift those necessary costs onto the school district. You correctly point out that failure to fix the system would likely result in enforcement action by the DEC, but that action would be limited to the City as the operator of the system.

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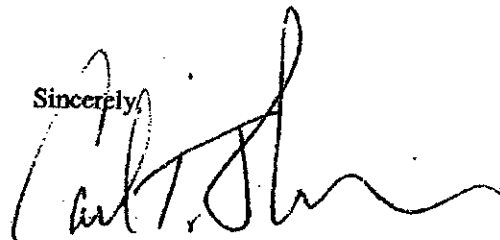
STANDARD FACILITIES BOARD

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Regarding the water supply to the building, please be advised that my engineers will require appropriate backflow prevention devices be installed prior to permitting. I am sure the district will share appropriate information once the design has been completed. As the utility supplier, I assume you would simply prevent water service to the facility until such time as your ministerial concerns have been satisfied for connection to your public water supply.

As you may understand, the State Education Department is the sole code enforcement and permitting authority for work undertaken by the Enlarged City School District of Middletown. Building permits will be issued when code compliant designs have been reviewed and approved. We are happy to continue to work toward a resolution of this issue, but the district cannot contract for the replacement of the sewer line. The way forward is clear. The City must cause the sewage line to be corrected at its own expense as the operator of the system, and the cost of the upgrade must be appropriately distributed to all those who benefit from it.

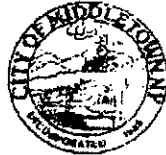
Sincerely,



Carl T. Thurnau, PE  
Director of Facilities

Cc: Curt Miller  
Dr. Kenneth Eastwood, ECSDM Superintendent  
Jacob Tawil, PE, Commissioner of Public Works  
Richard Guertin Corporation Counsel  
Alex Smith, Assistant Corporation Counsel

Joseph M. DeStefano  
Mayor



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May 18, 2010

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Carl T. Thurnau, P.E.  
Director of Facilities  
Office of Facilities Planning  
New York State Education Department  
1060 EBA, 89 Washington Avenue  
Albany, NY 12234

Re: Proposed new school, Enlarged City School District of Middletown

Dear Mr. Thurnau:

I have received your letter of May 18, 2010. You raise many issues with which we disagree, but there are some that need immediate attention.

You state that our requested action "is illegal under education law," there is "no authority in law to spend State or local capital construction monies on construction work off of [sic] school property" and the district cannot contract for off-premises work because that is "beyond the limit of our code enforcement jurisdiction, and because to do so would constitute an illegal gift of public monies." Where is your authority? You cite no statutes, case law or regulations to support your assertions. Indeed, I have heard the same kinds of statements from Dr. Eastwood at public meetings, without any support. Please, enlighten me.

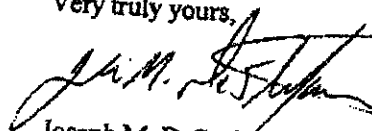
Furthermore, by what authority do you direct us to "cause the sewage line to be corrected ... as the operator of the system?" As you correctly note, the City is the "utility supplier" and the "legal owner and operator of the systems," and we will carry out our responsibilities not just ministerially, but substantively. Not only can we prevent water service to the facility, as you pointed out, but we can, and will, prevent sewage service from the facility until our concerns are addressed.

Carl T. Thurnau, P.E.  
Director of Facilities  
Office of Facilities Planning  
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Finally, thank you for acknowledging that the design work has not been completed. When the plans are completed, please have them forwarded to the Department of Public Works for a thorough review.

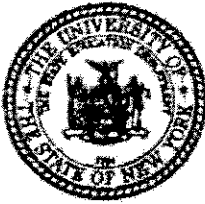
I look forward to your prompt response.

Very truly yours,



Joseph M. DeStefano, Mayor

cc: Mr. Curt Miller, Associate Project Manager, Office of Facilities Planning  
(via facsimile to (518) 486-5918 and first class mail)  
Jacob S. Tawil, P.E., Commissioner of Public Works, City of Middletown  
Richard J. Guertin, Corporation Counsel, City of Middletown  
Alex Smith, Assistant Corporation Counsel, City of Middletown



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May 20, 2010

The Honorable Joseph M. Destefano  
Mayor of Middletown  
16 James Street  
Middletown, New York 10940

Dear Mayor Destefano,

Thank you for your faxed letter of May 18, 2010. I have again taken the liberty of sharing your letter with Superintendent Eastwood since the district is the applicant with whose project you take issue.

I fully understand your role as a utility supplier and recognize that you do not have to provide water to, or receive sewage from the district until your concerns are addressed. You are correct in that I have no authority to force you to do anything. I am simply pointing out that the district may not legally address your existing system deficiencies for you by directly providing construction funds.

To respond to your request for legal citations, please be advised as follows:

The authority of the State Education Department with regard to public school code compliance is as follows: Part 1201 of Title 19 of the Department of State Regulations, 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 district and boards of cooperative educational services."

We therefore have no authority to permit schools to perform work on property they have no custody of.

Regarding the ability of school districts to spend capital dollars off of school premises please be advised that school districts are only allowed to perform functions which are expressly allowed under statute. Education law categorizes city school districts in accordance with the size of the city population.

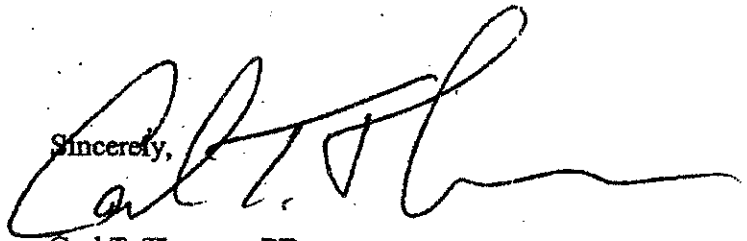
Article 51 of Education law entitled "City School Districts of Cities with less than One Hundred Twenty Five Thousand Inhabitants" is relevant. Section 2503 of Article 51 is entitled "powers and duties of Board of Education", and paragraph six states as follows: "Subject to the provisions of this Chapter, the Board of Education: ....(6) Shall have the care, custody, control,

safekeeping and main tenance 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.”

The Enlarged City School District of Middletown is not expressly authorized to maintain a private sewage line because it is not under their custody, and it is not school property. By whatever means the line is replaced, the district will not be involved in contracting for its replacement.

If this situation cannot be resolved to all parties' satisfaction, the department will work with the district and it's consultants to permit an on-site sewage disposal system. Such a system can be expected to cost considerably more for many of your community taxpayers.

Sincerely,



Carl T. Thurnau, PE  
Director of Facilities

Cc: Curt Miller  
Dr. Kenneth Eastwood, ECSDM Superintendent  
Jacob Tawil, PE, Commissioner of Public Works  
Richard Guertin, Corporation Counsel  
Alex Smith, Assistant Corporation Counsel

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**City of Middletown**  
16 James Street, Middletown, New York 10940  
Established 1894

June 1, 2010

Via facsimile to (518) 486-5918  
and First Class Mail

Carl T. Thurnau, P.E.  
Director of Facilities  
Office of Facilities Planning  
New York State Education Department  
1060 EBA, 89 Washington Avenue  
Albany, NY 12234

Re: Proposed new school, Enlarged City School District of Middletown

Dear Mr. Thurnau:

I have received your letter dated May 20, 2010. While you have provided your interpretation of what the law allegedly allows or does not allow a school district to do regarding construction of a school and use of a city's sewer line, you only cite a portion of the law without telling the whole story. I will point out below where you err and why I believe the City and the Enlarged City School District of Middletown ("the School District") can and, in fact, must enter into an agreement regarding the sewer pipeline.

In your May 20<sup>th</sup> letter, you cited Section 1201.2(e) of Title 19 of the New York Code of Rules and Regulations. I agree that the sewer line is not "in the custody of ... [the] school district." However, you omit an important part of that section, which states that the State Education Department ("SED") "shall be accountable for administration and enforcement of the uniform Code with respect to buildings, premises and equipment ... or activities related thereto" (emphasis supplied). Certainly, use of a sewer line to discharge sewage from the new school is an "activit[y] related thereto" for which the SED could be accountable. Nothing in Section 1201.2(e) states that the SED cannot be accountable for off-site work related to the construction or operation of a school, and you have drawn your conclusion out of thin air with no supporting documentation.

If, in fact, the SED is not accountable for such off-site work, then the supervising

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authority, by default, must be the City, and the City has already informed you of its position with respect to the sewer line. Subsection (f) of Section 1201.2 of Title 19 validates that. According to Section 1201.2 (f), "[t]o the maximum extent practicable, a governmental entity acting under this section shall consult with those other governmental entities providing services, under authority of other laws, to those areas where the authority conferred by this section is exercised." If the School District is supposed to consult "[t]o the maximum extent practicable" with another governmental entity having responsibilities for providing services, why was my microphone shut off after four minutes when I attempted to speak at a recent meeting of the Board of Education regarding the new school?

You also cite Section 2503 (6) of the Education Law for the proposition that the School District cannot maintain a "private sewage line" because it is not school property and is not under the School District's control. Of course that line is not school property. That line will be overtaxed, however, by the discharge of over six times more sewage (using the School District's own figures, which does not even account for peak flows) from the new school, and the School District cannot evade its responsibility for the excess sewage discharge. Furthermore, in citing Section 2503 (6), you conveniently ignore the law's own dictates that the School District has an obligation to maintain and take care of "other property used for educational, social or recreational work of the district." Are you saying that use of the sewer line to carry away over six times more sewage than from the old school is not the use of "other property?"

Once again, you cite a law without telling the whole story. If you continued reading Section 2503 of the Education Law, you could not help but notice Section 2503 (16). That portion of the law states that a Board of Education "[s]hall have power to contract with the city ... for the use of agencies, employees and facilities of the city, paying to the city its agreed proportion of the compensation or costs ..." (emphasis supplied). Apparently, the Legislature contemplated cooperation between a city school district and the city in which it is situated, including the sharing of costs.

I must also point out that the concept of intermunicipal cooperation is codified elsewhere in New York law. Section 119-o (1) of the General Municipal Law states that "municipal corporations [which definition includes school districts] ... shall have the power to enter into ... agreements ... for the provision of a ... joint water, sewage or drainage project." Section 119-o (2) goes further and states that such an agreement may contain provisions relating to the allocation and financing of capital and operating costs. While you have stated that "the district will not be involved in contracting for [the] replacement" of the sewer line, it is apparent that state law, contrary to your claim, not only allows for the payment of such costs but appears to encourage cost-sharing between and among municipal entities. See General Municipal Law Section 119-m and New York State Constitution, Article 8, Sections 1 and 2-a.

Carl T. Thurnau, P.E.  
Director of Facilities  
Office of Facilities Planning  
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Despite legislative support for municipal cost-sharing, you end your letter with a threat that if we cannot resolve this matter, "the department will work with the district and it's consultants to permit an on-site sewage disposal system" which would "be expected to cost considerably more for many of your community taxpayers." Are you seriously suggesting that SED, rather than attempt to arrive at a reasonable resolution of a problem that will be caused by the new school, would rather impose a solution at a higher cost to the taxpayers? Is the State that stubborn that it would rather spend more money than to try to fix a problem that we know will occur with the new school? In light of the State's money woes, that, to me, is preposterous.

An on-site sewage disposal system, in theory, would be a neat way for the State to avoid the issues I've raised. But it would also fly in the face of regulations and laws. While Title 8, Section 155.1 (b) (4) (iii) of the New York Code of Rules and Regulations does state that "[s]anitary sewers shall be connected to a municipal sewage system or an approved onsite disposal system," you ignore the fact that any such on-site system would have to discharge into, at best, a local intermittent stream. I cannot imagine that the New York State DEC would allow that, since to do so would pose a health hazard not only to residents in the area, but to the school children.

The first choice under Section 155.1 (b) (4) (iii) is to connect into the "municipal sewage system." That is also required by the City's Code. Section 389-4 of the Code of the City of Middletown states that toilet facilities must connect "directly with the proper public sewer ... in accordance with the provisions of this chapter ... provided that said public sewer ... is within 100 feet of the property line." There is no question that the public sewer is located "within 100 feet of the property line" for the new school, which then requires connection into the City's sewage system.

Authority for the requirement that toilet facilities connect to the City's public sewer system is found in Section 107 (g) of the Charter of the City of Middletown. Section 107 (g) states the following:

The said Common Council shall have exclusive control of all the storm and sanitary sewers in said city, and it shall not be lawful for any person to interfere with, enter or connect with any of the storm and sanitary sewers in said city without having first obtained permission so to do from the Commissioner of Public Works and all such connections shall be made under the supervision of the Commissioner of Public Works and the said Common Council is hereby empowered to compel any and all owners or occupants of lands on the line of any such storm and sanitary sewers, to enter and connect the drains from such lands into and with such storm and sanitary sewers, whenever the said Common Council shall deem it necessary for the public good, or as a sanitary

Carl T. Thurnau, P.E.  
Director of Facilities  
Office of Facilities Planning  
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measure, so to do; and the said Common Council is hereby authorized and empowered to enforce the observance of the provisions of this section, by ordinances imposing suitable penalties for the violation thereof.

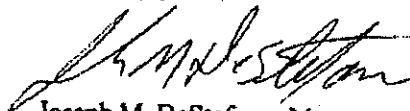
Section 107 (g) was adopted as Local Law #1 of 1964.

Finally, you should be aware, if you are not already aware, that the School District previously worked with the City to install off-site improvements for the benefit of the School District. When the Monhagen Middle School and the Maple Hill Elementary School were constructed in the 1990s, there were no water or sewer lines servicing that property. The School District contracted with the City to construct new water and sewer lines, which were built specifically for the new schools, on property not owned by the School District. Those lines for years were used only by the schools, and the School District paid the City the equivalent of over \$440,000.00 for the construction of those lines. Even today, the School District is anticipating improvements on property not owned by the School District in connection with the new school, since the plans submitted to the City show that the School District will install curbs and sidewalks on property not owned by the School District.

We could write letters back and forth and only exacerbate the situation. Or, we could approach this reasonably and reach a resolution that will enable the school to be built while accounting for the increased burden on the City's sewer line. I have stated publicly and privately that I am willing to meet with the responsible parties to determine if we can resolve this matter in a way that benefits everyone, including the children who will be attending the new school and the taxpayers of both the School District and the City of Middletown.

I await your response.

Very truly yours,



Joseph M. DeStefano, Mayor

cc: Mr. Curt Miller, Associate Project Manager, Office of Facilities Planning  
(via facsimile to (518) 486-5918 and first class mail)  
Jacob S. Tawil, P.E., Commissioner of Public Works, City of Middletown  
Richard J. Guertin, Corporation Counsel, City of Middletown  
Alex Smith, Assistant Corporation Counsel, City of Middletown  
William Geiger, President, and all members, Board of Education  
Dr. Kenneth Eastwood, Superintendent of Schools