

ALEX SMITH, ESQ.
Assistant Corporation Counsel of the City of Middletown
Middletown City Hall
16 James Street
Middletown, New York 10940
(845) 346-4140
(845) 346-4146 (fax)
asmith22@hvc.rr.com

September 9, 2010

Hon. Lewis Lubell
Justice of the Supreme Court
Orange County Government Center
Goshen, New York 10924

Re: *Enlarged City School District of Middletown v City of Middletown, et al*
Index # 10-7804

Dear Justice Lubell:

Please accept this letter as the City's Sur-Reply, with the consent of my adversary, who now has until September 16, 2010 to serve a Sur-Sur Reply limited also to a 3-page letter. With the Court's approval, counsel are jointly requesting that the return date of the Petition be extended from September 10, 2010 to September 17, 2010.

In his Affidavit, Charles Szuberla, Executive Director of School Operations and Management Services for the NYS Department of Education, states that a school district can contribute to the construction costs of an off-site municipal improvement that benefits that district. Until now, the School District has vociferously claimed it had no statutory or constitutional authority to make such a contribution, and that the City of Middletown was limited by its code to collect only user fees – as opposed to a contribution to construction cost -- from the District. Much of the District's legal argument now stands contradicted by the State Education Department.

The City has consistently argued that there is a difference between the collection of user fees and a contribution to the capital costs of construction. This distinction is borne out in a prior agreement in 1995 between the School District and the City (attached as Exhibit 1 to Dr. Eastwood's Reply Affidavit) for the construction of a new school in which the District was held responsible with other users for user fees (paragraph 1 of the 1995 agreement), but was also mandated to contribute nearly 80% of the construction

Enlarged City School District v City of Middletown

costs of the water and sewer lines. It cannot be emphasized enough that the water line to that new school was intentionally and significantly “oversized” (beyond the size required to just serve the school) so that the line could also distribute water to large areas of the City and surrounding Towns, i.e., users other than the District.¹ The District’s Reply papers evade this essential fact in order to avoid the duty to similarly contribute to the new Chorley sewer line which will likewise service District and non-District users. This evasion is reflected in the Thurnau Affidavit in paragraph 22 where the SED engineer discusses the 1995 agreement, but mentions only the sewer line, avoids reference to the water line, and then claims the District was “the sole user of the sewer line”. Contrary to Mr. Thurnau’s misleading statements, the District has *not* been the “sole” user of the off-site water line – the capital cost of which was borne largely, and fairly, by the District.

The 1995 agreement also contradicts the District argument on pages 21-23 of its Reply Memorandum that the District has no implied power to fund the replacement of the Chorley sewer line because it is not completely on school property. In making this argument, the District simply ignores the Affidavit of Phillip Clark, a licensed Professional Engineer in New York and CEO of a large engineering firm that has been involved in projects where New York school districts have contributed to the costs of off-site municipal improvements. The District also ignores the fact that its plans for the new Chorley school involve the construction of off-site sidewalks, an improvement that is not specifically provided for by State statute. Like the construction of a needed sewer line (or water line in the 1995 agreement), the construction of off-site sidewalks falls comfortably within the implied powers of a New York school district, and represent “off site infrastructure improvements” needed for the District’s facility (in this case the Chorley school) to properly function. Similarly, Executive Director Szuberla makes clear that many school districts opt to construct on-site sewage treatment facilities, despite the lack of a State statute specifically authorizing this construction. In sum, a school district has the implied authority to construct anything reasonably necessary for the operation and maintenance of a new school.

Since it is now clear that the District has the statutory and constitutional authority to contribute to the capital costs of construction of the new sewer line, and that the City has the right to require a contribution in addition to the normal (and later) user fees, the only legal issues left in this litigation are whether this action is ripe for judicial review and whether the Petition/Complaint should be dismissed on the unclean hands theory. If the Petition/Complaint survives these defenses, then the only remaining factual issue –

¹ See, Respondents’ Memorandum of Law, pp 25-26; Chumard Affidavit, ¶ 10.

Alex Smith, Esq.

Page 3

September 9, 2010

Enlarged City School District v City of Middletown

though not initially argued by the District – is how much of a contribution is fair.

The engineers have submitted their differing calculations, and perhaps a hearing would be appropriate to determine the amount of the District's contribution to the new sewer line.² At such a hearing, Szuberla or Thurnau could provide the Court with the statutory or regulatory authority for the calculations approved in their Affidavits, because such authority is conspicuously missing from the District's papers. Nor is any adequate explanation given why the proportionality calculations for the Chorley school are so radically different from the 1995 calculations. Neither Szuberla nor Thurnau dispute the City's assertion that but for the enlarged new Chorley school the existing sewer line would not have to be replaced; however, neither SED official explains why that reality is not factored into the proportionality calculations. Requiring City taxpayers (who comprise only about one-half of the School District's tax base) to fund 97.4% of the construction cost of the new sewer line, *when but for the new school the existing line would not presently need to be replaced*, is not "proportionality" in any fair sense of that word.

Thank you for your consideration.

Respectfully yours,

Alex Smith

AS; dl

cc:

Bond, Schoeneck & King, PLLC
350 Linden Oaks, Suite 310
Rochester, New York 14625
Attn: Joseph Nacca, Esq.

² A hearing could also provide an explanation of why the District's engineer made calculations for only 800 feet of sewer line (to Cantrell Avenue), while the SED's calculation involves 1,850 feet of line (to Liberty Street), when the City's primary concern includes the remaining 1,450 feet of line (to Elm Street).