2200 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402
TELEPHONE (612) 977-8400
FACSIMILE (612) 977-8650

BRIGGS AND MORGAN

PROFESSIONAL ASSOCIATION

WRITER'S DIRECT DIAL
(612) 977-8497
WRITER'S E-MAIL
jperry@briggs.com

August 9, 2005

<u>VIA HAND DELIVERY & EMAIL (Letter only)</u>

Edna C. Brazaitis
Friends of the Riverfront
4A Grove Street
Nicollet Island, MN 55401

Re: DeLaSalle Football Stadium Project

Dear Edna:

You, on behalf of the Friends of the Riverfront (Friends), asked us to review and comment on a July 29, 2005 letter from Eric Galatz, counsel to DeLaSalle. DeLaSalle's letter heavy-handedly represents to the Minneapolis Park and Recreation Board (Park Board) that pursuant to the 1983 Agreement it is "<u>obligated</u> . . . to provide DeLaSalle shared use of [Park Board] land on Nicollet Island in exchange for use of DeLaSalle facilities" — namely, its new football stadium. (Emphasis added). DeLaSalle is wrong.

We have identified at least six reasons why Park Board is <u>not</u> "obligate[d]" by the 1983 Agreement to either give DeLaSalle parkland for a football stadium or approve the proposed Reciprocal Use Agreement between Park Board and DeLaSalle (Reciprocal Agreement). These six reasons are as follows:

1. Park Board's alleged obligation in the 1983 Agreement § 2.1(01) (Ex. 3) to provide parkland to DeLaSalle for a "regulation size" football field does <u>not</u> include the vacation of the entire eastern portion of the historic Grove Street. In fact, such an explicit provision was ***struck from the prior unexecuted version*** of the 1983 Agreement (Ex. 4) § 1.2(01). Section 1.2(01) of the unexecuted agreement provided:

   > (01) The Board shall use its best efforts to <u>vacate Grove Street</u>, between Nicollet Street and East Island Avenue, within a reasonable time after it receives from all parties with any legal interest in the De La Salle Property the following:

> (a) A right of first refusal, in form and upon terms satisfactory to the Board, to purchase all of the De La Salle Property; and
>
> (b) An option, in form and upon terms satisfactory to the Board, to purchase all of the De La Salle Property if said Property is at any time used for any purpose other than as an institution of secondary education operated by the Christian Brothers, and upon such other terms and conditions as are required by the Board.

(Emphasis added). Both Park Board's obligation to "vacate Grove Street" and DeLaSalle's corresponding grant to Park Board of a "right of first refusal" were struck in the executed 1983 Agreement. Park Board is, moreover, obligated under Article 3 of the 1983 Agreement to "maintain" the roads. Ex. 3 Art. 3 ("[t]he Board shall maintain all such roads and roadways as part of the Public Parkway System").

DeLaSalle's July 29, 2005 letter to Park Board conspicuously and without explanation ignores both § 1.2(01) of the prior unexecuted agreement and Article 3 of the executed agreement. But the law does not permit such select editing of the record and the agreement.

2. Park Board's alleged obligation in the final, executed 1983 Agreement § 2.1(01) was to provide parkland to DeLaSalle for a "regulation size" football field. This obligation was satisfied when Minneapolis on May 25, 1984 granted to DeLaSalle at its request a 24-foot wide by 460-foot long (or 11,040 square foot) "encroachment permit" on to public land for its "regulation size" football field. Ex. 5 ("Petition from DeLaSalle High School Bond, Accept & Ins filed for permsn for encroachments to facilitate construction of new football field, chain link fence, etal"; "granted to the Diocese of St. Paul (DeLaSalle High School) its successors and assigns to encroach into and upon the S 24' of Grove St. extending Wly approx. 460' from the W curb line of E Island Av to facilitate their construction of a new football field") (emphasis added). DeLaSalle's July 29, 2005 letter to Park Board tellingly pretends that Park Board's May 25, 1984 grant of this significant encroachment permit for DeLaSalle's football field did not happen. The document belies such a pretension.

3. Pursuant to the 1983 Agreement § 4(01), Park Board cannot approve any part of this Project without first determining whether the Project is "consistent" with the 1996 Nicollet Island Master Plan (1996 Master Plan). Despite expressly providing for tennis courts, the 1996 Master Plan plainly makes no mention of the

construction of another football field on parkland or of vacating the eastern half of Grove Street. DeLaSalle cannot ignore the 1996 Master Plan because it participated in the process of creating the 1996 Master Plan and, in fact, also hosted most of the meetings to complete the plan.

4. Exclusive of any time bar limitations, DeLaSalle is not a party to the 1983 Agreement. DeLaSalle thus has no contractual rights to enforce against Park Board its alleged obligations under the 1983 Agreement.

5. Even if it had a contractual right to enforce Park Board's obligations under the 1983 Agreement, DeLaSalle's rights to enforce these alleged obligations against Park Board are time barred. Article 5(5.3) of the 1983 Agreement required Park Board to perform its "development" obligations "within 8 years of the date of this [1983] Agreement" (or by 1991). Ex. 3 § 5(01). Minnesota law provides for a six year statute of limitations to enforce provisions of a contract. The only way to extend the deadline for Park Board's performance is by "unavoidable delays." But none of the definitions of "unavoidable delays" occurred over the 22 years since the 1983 Agreement was approved. *Id.* § 6.3.

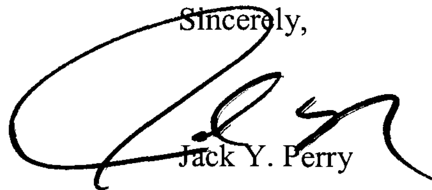
6. DeLaSalle's rights to enforce these alleged obligations against Park Board are otherwise barred by laches. Twenty-two years have passed since the 1983 Agreement was executed, 14 years have passed since the time for it to perform its alleged obligations passed, nine years have passed since the 1996 Master Plan (which omits any mention of a football stadium) was agreed to by all (including DeLaSalle), and several years have passed since Park Board built (largely for DeLaSalle) three tennis courts on Block 4 and Park Board and others paid for refurbishing Grove Street.

Many of these points were raised in the March 29, 2005 letter opinion from Mike Norton, special counsel to Park Board. "There are," in Mr. Norton's words, "a number of unresolved legal issues [Park Board] <u>should consider</u> which impact its obligations under the Agreement." Ex. 2 (emphasis added). Our list above certainly are among the issues to which Mr. Norton is, in our view, referring.

Any doubts about our assessment of the 1983 Agreement can be resolved by Park Board asking Mr. Norton to comment on DeLaSalle's letter. In so doing, Park Board should provide all of the information and data which Mr. Norton notes was not available to him.

Because of the aesthetic, historic and monetary value of the three acres of parkland at issue, Park Board Commissioners have a clear duty to act reasonably and prudently. In initialing hiring Mr. Norton, they have already recognized that such prudence requires a thorough appraisal of Park Board's legal rights and obligations under the 1983 Agreement. Our opinion and DeLaSalle's opinion on Park Board's "obligations" under the 1983 Agreement cannot both be correct. Park Board must, therefore, ask its "independent counsel," Mr. Norton, to render a full opinion on the issues raised. This is, indeed, precisely what Mr. Norton advised Park Board to do in the first place.

Sincerely,



Jack Y. Perry

JYP/kg
Attachments
cc: J. Cairns
V. Herring
1800860v2