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March 21, 2007

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Caponi Art Park
1205 Diffley Road
Eagan, MN 55123

Re: Status as a Type III Supporting Organization

Dear Sir/Madam:

We have been asked to determine whether your organization is a "fully integrated" Type III supporting organization. In order provide you with this determination, we have reviewed the following pertinent information provided by you:

1. IRS determination letter dated December 06, 2006 which provides that your organization is a "Type 3 supporting organization" under Section 509(a)(3);

2. Letter from Caponi Art Park dated March 14, 2005 responding to the IRS filing of IRS Form 1023, Schedule D;

3. IRS Form 1023, Schedule D Section 509(a)(3) Support Organizations, with attachments;

4. Letter from Caponi Art Park dated April 15, 2006 addressed to Mr. David Doeker of the IRS responding to IRS request for additional information in connection with Form 1023 previously filed, with attachments;

5. Caponi Art Park Land Purchase Documents, including Purchase Agreement, Promissory Note and Mortgage, Deed, Conservation Easements, and Appraisal of Property; and

6. Various additional documents detailing the history of the Caponi Art Park and the relationship with the City of Eagan.

<u>SUMMARY CONCLUSION</u>

Based upon the information provided, we have determined you are a fully integrated Type III support organization.

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FACTS

The Caponi Art Park (hereinafter "Art Park") was incorporated in 1992 and received exemption as a public charity by the Internal Revenue Service (hereinafter IRS).

In 2005, the Art Park requested reclassification as Type III support organization, to support the City of Eagan in establishing, creating, developing and operating a cultural center for the benefit of the City of Eagan.

By letter dated March 14, 2005, the Art Park requested reclassification as a support organization and in support of its request, the organizational documents were amended and restated to provide:

1. The corporation is organized and shall be operated for charitable purposes, specifically to establish, finance, create, develop, operate, and promote a cultural center for the benefit of the City of Eagan, a political subdivision of the State of Minnesota. See Articles of Incorporation of Caponi Art Park, Article II.

2. Upon dissolution of the corporation, the assets of the corporation shall be distributed to the City of Eagan, or any political subdivision or agency thereof for exclusively charitable purposes. See Articles of Incorporation of Caponi Art Park, Article XIX.

3. The Board of Directors shall include at least one director appointed by the City Council of the City of Eagan. See Bylaws of Caponi Art Park, Article III, paragraphs 3.2 and 3.5.

Also filed with its reclassification request was Schedule D to IRS Form 1023 Application for Recognition of Exempt Status. Schedule D indicates that the Art Park satisfies Test 3, "operated in connection with one or more publicly supported organizations." According to Schedule D, the Art Park meets the responsiveness test because:

- One or more of the director of the Art Park are appointed by the supported organization.

- One or more members of the governing body of the supported organization also serve as an officer, director or hold an important office.

- The officers and directors maintain a close and continuous working relationship with the officers, directors or trustees of the supported organization. This is documented by the operating and maintenance agreements which set forth the respective responsibilities of the City of Eagan and the Art Park.

- The supported organization has a significant voice in the investment policies, in the making and timing of grants, and in otherwise directing the use of the income and assets of the Park. Again, this is supported by the operating and maintenance agreements.

The Art Park also indicated that it meets the integral test required for a Type III support organization. As evidence of its satisfaction of the integral test requirement, the Art Park points to its operating a cultural center for the benefit of the City of Eagan, and that 100% of the funds of the Art Park are expended for this sole purpose.

By letter dated February 27, 2006, the IRS requested additional information in connection with the reclassification of the Art Park as a Type III support organization. By letter dated April 15, 2006, the Art Park responded to the IRS with an additional letter setting forth responses to each additional question, and included among many other documents, copies of the following:

1. Memorandum of Understanding dated December 10, 2004, between Mr. and Mrs. Caponi and the City of Eagan, regarding the use and development of the Caponi Art Park for the City and the County of Dakota, and for the public at large. This agreement set forth the purchase and sale of the property which is now considered the Caponi Art Park.

2. Caponi Art Park Agreement, dated March 15, 2005, setting forth the respective responsibilities of the City of Eagan and the Caponi Art Park including responsibility for oversight and land use, insurance and other Art Park operations.

3. Caponi Art Park Maintenance Agreement, dated March 15, 2005, setting forth responsibilities for maintaining the property and providing access to the Art Park per a previous agreement dated March 16, 1993.

4. Permanent Natural Area Conservation Easement between the City of Eagan and the County of Dakota, dated January 17, 2006, along with exhibits;

5. Purchase documents for sale of property from Anthony and Cheryl Caponi to the Caponi Art Park, including purchase agreement, promissory note and mortgage, and deed, all dated March 15, 2005;

6. Two Conservation Easements between the Caponi Art Park, City of Eagan and the County of Dakota, dated March 15,2005, pertaining to the property held by the Art Park;

7. Appraisal of Caponi Art Park.

By letter dated December 6, 2006, the IRS granted the Caponi Art Park public charity status as a Type III support organization.

The recent enactment of the Pension Protection Act of 2006 included provisions regulating granting to certain support organizations. In light of this, the Caponi Art Park is seeking documentation to establish that it is a "functionally integrated" Type III Supporting Organization. This requirement can be met by grantmakers relying on a reasoned written opinion of counsel of either the grantee or the grantmaker in making the determination that a support organization is a functionally integrated Type III supporting organization.

This letter is intended to serve as the "reasoned written opinion of counsel" as required by the Pension Protection Act of 2006.

ANALYSIS

A. Supporting Organizations Classified under I.R.C. § 509(a)

Section 509(a)(3) of the Internal Revenue Code (hereinafter "Code") provides that organizations that meet certain requirements are treated as a public charity without the public support requirements. I.R.C. § 509(a)(3). These organizations are not publicly supported but are responsive to the public because of their relationship with other public charities. These organizations must meet the following requirements:

1. Purpose Requirement: The organization must be organized and operated exclusively for the benefit of, to perform the function of, or to carry out the purposes of one or more charitable organizations. Treas. Reg. § 1.509(a)-4(a)(2).

2. Relationship Requirement: The organization must be operated, supervised or controlled by, or in connection with, one or more charitable organizations. *Id.* § 1.509(a)-4(a)(3). There are three relationships which may exist between the supporting organization and the public charity being supported. *Id.* § 1.509(a)-4(f)(2). These include :

    a. Type I Relationship. This type of relationship exists when the supporting organization is "operated, supervised or controlled by" the public charity it supported. *Id.* § 1.509(a)-4(f)(2)(i). Generally in this type of relationship, a majority of the officers, directors, or trustees of the supporting organization are appointed by the board, officers or membership of the public charity. *Id.* § 1.509(a)-4(g).

    b. Type II Relationship. This type of relationship is where the supporting organization is "supervised or controlled in connection with" the public charity it supports. *Id.* § 1.509(a)-4(f)(2)(ii). Satisfying this relationship means there is common supervision or control by the person supervising or controlling both the supporting organization and the publicly supported organization. *Id.* at § 1.509(a)-4(h).

c. Type III Relationship. This type of relationship provides the supporting organization be "operated in connection with" the publicly supported organization. *Id.* § 1.509(a)-4(f)(2)(iii). This type of relationship exists only if the supporting organization meets a responsiveness test and an integral part test. *Id.* § 1.509(a)-4(i).

i. Responsiveness Test. The supporting organization must be responsive to, and significantly involved in the operations of, the publicly supported organization. *Id.* § 1.509(a)-4(i)(2). This involves one or more members of the governing body of the supporting organization being elected by the governing body of the publicly supported organization; and the supported organization having a significant voice in the investment policies of the supporting organization, the timing and making of grants, and otherwise directing the use of income or assets of the supporting organization. *Id.*

ii. Integral Test. The integral part test is satisfied if the supporting organization maintains a significant involvement in the operations of one or more supported organizations and each supported organization is in turn dependent upon the supporting organization for the type of support which it provides. *Id.* § 1.509(a)-4(i)(3). This test requires that either (i) the activities engaged in by the supporting organization must be activities to perform the functions of, or carry out the purposes of, the supported organization, and but for the involvement of the supporting organization, the activities would normally be engaged in by the supported organizations themselves; or (ii) the supporting organization must make payments of at least 85% to or for the use of one or more of the supported organizations. *Id.* § § 1.509(a)-4(i)(3)(ii) – (iii).

As detailed above, the Caponi Art Park requested reclassification from a publicly supported organization under Code section 509(a)(1) to a supporting organization under Code section 509(a)(3). In support of its application, it provided the IRS with documentation setting forth that it satisfied the relationship test and integral test outlined above. Specifically, the relationship test was met because:

- One or more of the directors of the Art Park are appointed by the supported organization.
- One or more members of the governing body of the supported organization also serve as an officer or director, or hold an important office in the supporting organization.

- The officers and directors maintain a close and continuous working relationship with the officers, directors or trustees of the supported organization. This is documented by operating and maintenance agreements which set forth the respective responsibilities of the City of Eagan and the Art Park.

- The supported organization has a significant voice in the investment policies, in the making and timing of grants, and in otherwise directing the use of the income and assets of the Art Park. Again, this is supported by the operating and maintenance agreements.

Further, the integral test outlined above was also met by providing the IRS with sufficient information so as to determine that the activities engaged in by the Art Park are activities to perform the functions of, or carry out the purposes of, the City of Eagan, and but for the involvement of the Art Park, the activities would normally be engaged in by the City of Eagan.

The activities of the Art Park currently include operating a cultural center for the benefit of the general public and the City of Eagan, and while funds are not distributed directly to the City of Eagan, 100% of the funds of the Art Park are expended for the sole purpose of operating the cultural center.

The Art Park currently consists of four parcels of property, two of which are held by the City of Eagan and two by the Caponi Art Park. The ownership of the Art Park in this manner essentially assures an integrated relationship with the City of Eagan. To further support this, the relationship between the Art Park and the City of Eagan is interrelated in that the Art Park and City of Eagan both own portions of the Art Park, and;

- But for the relationship with the Art Park, the City of Eagan would be required to maintain and operate the Art Park and the property currently held by the City of Eagan; and

- Without a close ongoing relationship between the two organizations, the Art Park would fail to exist as it does.

Clearly, the City of Eagan has a vested interest in the activities of the Art Park.

B. <u>Pension Protection Act of 2006</u>

The Pension Protection Act of 2006 (PPA) was passed with an effective date of August 17, 2006. The PPA provides that distributions by nonoperating private foundations to the following support organizations are not qualifying distributions:

- Any Type III supporting organization defined in I.R.C. § 4943(f)(5)(A) that is not a functionally-integrated Type III support organization described in I.R.C. § 4943(f)(5)(B); and

- Any Type I or Type II supporting organization defined in I.R.C. § 4942(g)(4)(B) or a functionally integrated Type III organization, if a disqualified person of the private foundation directly or indirectly controls the organization or a supported organization of the organization, or the IRS determines that the distribution is inappropriate under regulations. I.R.C. § 4943(g)(4)(A).

In addition, under the PPA, payments by private foundations and donor advised funds to these organizations listed above are not covered by the supporting organization exception to the taxable expenditure rules of Code section 4945. *Id.* at § 4945(d)(4). Thus, payments that do not count as qualifying distributions are also taxable expenditures.

Specifically, the Pension Protection Act of 2006 added Code section 4943(f) which provides, in pertinent part:

* * *

> **(5) Type III supporting organization; functionally integrated type III supporting organization.**--For purposes of this subsection--
>
> **(A) Type III supporting organization.**--The term "type III supporting organization" means an organization which meets the requirements of subparagraphs (A) and (C) of section 509(a)(3) and which is operated in connection with one or more organizations described in paragraph (1) or (2) of section 509(a).
>
> **(B) Functionally integrated type III supporting organization.**--The term "functionally integrated type III supporting organization" means a type III supporting organization which is not required under regulations established by the Secretary to make payments to supported organizations (as defined under section 509(f)(3) due to the activities of the organization related to performing the functions of, or carrying out the purposes of, such supported organizations.

* * *

Following the PPA's passage, the IRS issued Notice 2006-109, providing interim guidance for determining the type of a supporting organization. According to this notice, a grantor, acting in good faith, may rely on a written representation from a proposed grantee together with certain specified documents in determining whether the grantee is a Type I, Type II, or functionally integrated Type III supporting organization. The good faith requirement is not satisfied if the collected specified documents are inconsistent with the written representation of the grantee. In each case, the grantor must verify that the grantee is listed in IRS Publication 78, Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code, or obtain a copy of the current IRS determination letter recognizing the grantee as exempt from federal income tax.

According to Notice 2006-109:

> To establish that a grantee is Type I or Type II supporting organization, a grantor, acting in good faith, may rely on a written representation signed by an officer, director or trustee of the grantee that the grantee is a Type I or Type II supporting organization, provided that:
>
> (i) the representation describes how the grantee's officers, directors, or trustees are selected, and references any provisions in governing documents that establish a Type I (operated, supervised or controlled by) or a Type II (supervised or controlled in connection with) relationship (as applicable) between the grantee and its supported organization(s); and
>
> (ii) the grantor collects and reviews copies of governing documents of the grantee (and, if relevant, of the supported organization(s)).
>
> As an alternative to relying on a written representation from a grantee and the specified documents as described above, a grantor may rely on a reasoned written opinion of counsel of either the grantor or the grantee concluding that the grantee is a Type I, Type II, or functionally integrated Type III supporting organization. Also, solely for purposes of a representation or opinion of counsel on which a grantor may rely, an organization will be considered a functionally integrated Type III supporting organization if it would meet the test set forth in Treas. Reg. § 1.509(a)-4(i)(3)(ii).

Treas. Reg. § 1.509(a)-4(i)(3)(ii) provides, in pertinent part:

> (ii) The activities engaged in for or on behalf of the publicly supported organizations are activities to perform the functions of, or to carry out the purposes of, such organizations, and, but for the involvement of the supporting organization, would normally be engaged in by the publicly supported organizations themselves. Treas. Reg. § 1.509(a)-4(i)(3)(ii)

In applying this criteria to the relationship between the Caponi Art Park and the City of Eagan, and as outlined above, there is a sufficiently integral relationship between the Park and the City of Eagan.

Based upon the materials provided, it appears that:

- The relationship between the Art Park and the City of Eagan is interrelated in that the Art Park and City of Eagan both own portions of the Art Park, and;
- But for the relationship with the Art Park, the City of Eagan would be required to maintain and operate the Art Park and the property currently held by the City of Eagan; and
- Without a close ongoing relationship between the two organizations, the Art Park would fail to exist as it does.

Further, the IRS issued its determination letter on the basis that the Art Park met the requirements of the "but for" test set forth in Treas. Reg. § 1.509(a)-4(i)(3)(ii).

In light of the above, it is our opinion so long as the Caponi Art Park conducts itself in a manner consistent with its application for status as a supporting organization under Code section 509(a)(3), and complies with the responsibilities and roles as set forth in the Operating Agreement dated March 15, 2005, Maintenance Agreement dated March 15, 2005, and other agreements and arrangements it has entered into with the City of Eagan and the County of Dakota, it meets the requirements of a fully integrated Type III support organization.

Very truly yours,

BRIGGS AND MORGAN, P.A.

Shehla Tauscher

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SPT/se

cc: Gregory A. Kvam

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