

Commentary on New York State Senator Kenneth P. LaValle's Report on the Polytechnic-NYU Affiliation¹

June 8, 2008

In his Report, issued in May, Senator LaValle finds that the overwhelming majority (thirteen) of the allegations raised by the Polytechnic Alumni Association regarding the merger were without merit. While Senator LaValle expressed concerns about three aspects of the merger process, he did not find these to be cause for the merger not to proceed. The University believes that when all the facts and circumstances are considered, it is clear that the Board of Trustees acted in good faith and in a manner reasonably believed to be in the best interests of Polytechnic, and with independent and informed judgment.

Here, briefly, are the University's responses to these three points:

(1) Engaging the Full Board.

While the Senator raises a concern that the full Board was not alerted to the initial merger discussions from the very beginning, the Board leadership were aware of the merger overtures from the very beginning. The Board leaders directed that these initial conversations remain informal and private to avoid the toll taken at Polytechnic during the 2004-2005 merger discussions, distracting it from the implementation of its Strategic Plan, *Securing the Future*; dividing the Board; and causing some Trustees to resign from the Board or not renew their terms. The Chairman was resolute in his view that solutions were needed for each of the objections to the earlier merger proposal before a second merger overture was brought to the full Board.

By August, 2007, the Presidents, with Board leadership input, had drafted a non-binding framework, called the Memorandum of Core Commitments, that satisfied the Chairman's concerns and on August 3, 2007, the Polytechnic University Executive Committee unanimously authorized the President to proceed to negotiate a non-binding Memorandum of Understanding (MOU) outlining the general terms and elements of a proposed merger. Immediately following the close of this meeting, all members of the Polytechnic Board, along with the full Polytechnic community, were informed of the new merger discussions and the Board began the process of review and deliberation which culminated in the approval of the merger more than seven months later, on March 6, 2008.

(2) Trustee Participation.

While Senator LaValle raises a concern that some Trustees who were not in favor of the proposed merger were excluded from deliberations, all of Polytechnic's Trustees were kept fully informed and provided with an opportunity for discussion at every stage of the process.

¹ This short commentary is a summary explanation and not a detailed rebuttal of the Senator's Report.

Between August 3 and October 10, 2007, all of the Trustees of Polytechnic had access to, and were invited to participate in, numerous meetings, phone calls, discussions, and document exchanges regarding the proposed merger and the related negotiations and drafting of Memorandum of Understanding. Similarly, once the Board voted on October 10, 2007, to approve the non-binding MOU and authorized the negotiation of a definitive legal agreement for the merger (the “Affiliation and Proposed Consolidation Agreement”), all the Trustees of Polytechnic had access to, and participated in, numerous meetings, phone calls, discussions, and documents and other informational exchanges regarding the proposed merger and the negotiations and terms of the Affiliation and Proposed Consolidation Agreement.

All Polytechnic Trustees, including those Polytechnic Trustees who ultimately voted against the merger agreement, were provided with: (a) advance notice to meetings, (b) full and complete disclosure of information concerning the proposed transaction, and (c) the ability to voice their concerns and exercise their independent judgment in voting on the proposed transaction. The Polytechnic negotiating team relied on Trustee comments and advice in negotiating and drafting the terms of the Affiliation and Proposed Consolidation Agreement.

(3) Real Estate Appraisal.

While Senator LaValle raises a concern that the Board, in 2008, should have obtained an appraisal of Polytechnic’s real estate, the decision to rely upon an appraisal of Polytechnic’s real estate which was obtained in 2005 was a reasonable and informed one, well within the business judgment of the Board members.

First, the merger agreement provides that Polytechnic remains the owner of its real estate after the Affiliation and, were there to be a sale of any of Polytechnic’s real estate during the Affiliation, the proceeds from such sale are to be used solely for Polytechnic’s benefit or its successor school at NYU after consolidation.

Second, the need or absence of need, for a formal updated assessment of Polytechnic’s real estate value was discussed at several Board meetings and the considered judgment of the Board of Trustees was that Polytechnic would not benefit from such an appraisal. For instance, the Board had access to detailed, expert analysis of the substantial cost of renovation of Polytechnic’s buildings and was aware that the Brooklyn real estate market was softening.

Finally, Polytechnic’s Board was fully aware that Polytechnic’s short-term and long-term financial distress went much deeper than the value of its real estate. From 1997 to 2004 (with the exception of one year, 1999), Polytechnic suffered substantial annual operating losses accumulating to nearly \$50M. While these losses were contained in 2004 through major expense reduction, Polytechnic’s financial condition has remained troubled since then, as evidenced by substantial cash flow shortfalls and the need for the Board of Trustees to authorize additional contributions of funds from the endowment.