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Expert Analysis

Considerations for Religious Institutions in Times of Crisis

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Churches, mosques, temples, synagogues, and other houses of worship, as well as their religious leaders and of course the members of their congregations, have been as devastated by the coronavirus and COVID-19 as other institutions and individuals and have suffered the same harms to their lives and their livelihoods as others have faced. Religious institutions, by virtue of their distinct nature and the essential role they play in their worshipers' day-to-day existence, also have felt the effects of the pandemic in their own unique ways, with their own kinds of stress and distress.

In-person religious services have been prohibited, milestones such as bar and bat mitzvahs and christenings have been postponed, radically altered, or livestreamed because they could not be celebrated in-person, parochial schools and other religious classes have been canceled or moved online, and employees have been furloughed or dismissed.

Religious institutions' financial resources have suffered. In many instances, receipts from dues or offerings at Sunday worship services have dropped—often precipitously. Summer camps have been or are being canceled, with a concomitant loss of revenue. Proceeds expected from catered events similarly have tailed off.

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Yet ministers and other remaining employees, creditors, landlords, and tax bills still must be paid.

Individual houses of worship and religious denominations are facing a troubling financial future, full of both invoices and increased litigation. This column describes key steps that they can take to become more financially secure and, as a result, to become better able to face future crises.

Corporate House Cleaning

Times of crisis such as COVID-19 highlight the critical importance of religious institutions having and maintaining proper governing documents.

As a first step, all houses of worship and denominations should make certain that their bylaws are up-to-date and that they include provisions that can prove critical when faced with a crisis.

Toward that end, bylaws should be clear as to the decision-making authority in times of crisis. To the extent legally permissible, bylaws should not require a traditional corporate or board of trustee meeting, or traditional notice for such meetings, for the institution to be able to take certain actions during a crisis, such as applying for a Paycheck Protection Program (PPP) loan or dismissing an employee. Instead, they might provide for using existing committees (such as the executive or finance committee) to make specific decisions, establishing a crisis committee that would include members of the institution's other committees, delegating authority to trustees to the

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maximum extent permitted by law, and obtaining congregational approval during a crisis by something other than an in-person meeting and vote.

The bylaws also should clearly explain how and to whom information will flow during a crisis. They should provide for and create a strong communications team and clearly spell out procedures to follow in crisis situations.

Bylaws also should specifically authorize electronic or remote meetings, such as the Zoom meetings that are being held during COVID-19. And they should specifically set forth guidelines for working remotely during times of crisis.

Many institutions still do not have crisis management policies; these should be drafted and adopted by every religious institution.

In addition, contracts with employees and vendors should be reviewed and, where necessary, revised to include a broad force majeure clause as well as other important contractual provisions, such as one relating to "impossibility of performance."

Once its bylaws, policies, and other corporate documents are revised and updated, a religious institution should ensure that its leadership and all employees fully understand and comply with the Religious Corporations Law, the Not-For-Profit Corporation Law, and its own governing rules. A well-practiced team functions far better in crisis situations than individuals who are unfamiliar with the rules and appropriate procedures.

Dissolutions, Foreclosures And Bankruptcy

COVID-19 has wreaked havoc on houses of worship throughout the state and the country. The decimation almost certainly will lead some to dissolve. When that occurs, numerous legal questions will have to be investigated and resolved.

For one thing, there may be a question as to the ownership of the building, as well as the ownership of other real or personal property associated with the institution. In particular, does property belong to the denomination or to the local church facing dissolution?

Determining ownership may require examining and interpreting formation documents that are decades old, and perhaps investigating whether any such documents even exist. There may be written rules for a particular denomination, such as a rule book, book of order, or manual, that will provide an answer. And the parties' relationship over the years, and whether and to what extent each has provided and received benefits from the relationship, can influence the conclusion.

The New York Court of Appeals has observed that a religious institution's "corporate activities" can be separated from its "ecclesiastical activities," as evidenced by various statutory provisions that specifically delegate certain corporate activities to an institution's trustees while leaving its ecclesiastical affairs to the members, who continue to exist as the religious association that preceded incorporation.

A religious institution facing a creditor's foreclosure action has numerous defenses that can lead to a resolution in its favor. In addition to traditional defenses and to a force majeure defense (if applicable), religious institutions have defenses that are unique to them. For instance, a loan to a religious institution is valid only if it was properly authorized, such as by the institution's trustees or congregation after proper notice, and may be challengeable if the required authorization had not been obtained.

Moreover, loans and liens may be invalid without the approval of the New York State Attorney General or a court. See Barry Black and Jonathan Robert Nelson, "Congregations Transferring Real Estate: When Is Court Approval Needed?," NYLJ (March 1, 2018). Indeed, a debt incurred by a church may be unenforceable if its denomination did not approve of it being incurred.

A further step that houses of worship may decide to take is to file for relief under the federal bankruptcy law. Clearly, this is not an action to be taken without great forethought. See "The Moral Appeal of Personal Bankruptcy," 20 Whittier L. Rev. 141, 167-68 ("The religious contours of Christianity, Islam, Judaism and Hinduism clearly foster in their believers a moral code that emphasizes the importance of debt-repayment, and hence, the avoidance of bankruptcy at all costs."). However, there can be substantial benefits to bankruptcy.

A bankruptcy filing need not occur only to stave off a foreclosure action; a religious institution suffering general financial distress may voluntarily enter bankruptcy. A bankruptcy action stays litigation, including foreclosure proceedings, and pre-trial discovery. This can help maintain the religious institution's cohesiveness and avoid a rift among its membership.

On the other hand, there may be drawbacks to entering bankruptcy. A bankruptcy filing may waive a house of worship's First Amendment protections, such as the ecclesiastical abstention doctrine, which was previously discussed in these pages, see Barry Black and Jonathan Robert Nel-

son, "When Can State Courts Decide Religious Disputes?," NYLJ (Nov. 20, 2017). A church also must consider what exposure, if any, the denomination might face as a result of its filing; for instance, can the corporate veil be pierced? Another issue is whether a payment to the denomination as part of a plan discharging a church in bankruptcy waives the denomination's right to recover further monies or property from the church.

Property Development

The most valuable asset of many religious institutions may be their place of worship or other real property, whether or not attached to their place of worship. Indeed, the COVID-19 pandemic is likely to exacerbate the stereotypical situation of religious institutions being "land rich, cash poor."

A religious institution can take a number of steps to alleviate that pressure, keeping in mind that any sale or lease of its real estate is likely to require approval of the New York State Attorney General, and in some cases one or more representatives of the denomination to which it belongs. These steps can be divided into two general categories: leases and shared space arrangements, and property redevelopment.

If a religious institution is in danger of losing its place of worship due to loss of income resulting from the pandemic, it might consider joining in the use of a single place of worship with a different religious institution. The host institution gains rental income to offset loss of income due to the pandemic, and the guest institution finds a new home, either temporary or permanent, for what is likely to be a significantly lower cost than owning and maintaining its own exclusive place of worship. This is likely to be more feasible and to yield benefits more quickly than a major redevelopment of the troubled religious institution's property.

Although this may be accomplished through a merger of two religious institutions in the same denomination, there also may be leases or shared use agreements of worship space where the religious institutions are of different religions (for example, Jewish and Christian) or are of different denominations of the same religion (for example, Seventh Day Adventist and mainline Protestant denominations) with worship schedules different enough that they may use the same space without undue overlap.

Another possibility is shared use of space by related institutions of the same denomination offering services in different languages, such as Spanish, French, Chinese, or American Sign Language (ASL).

Shared use of space would allow the religious institution leaving its space to sell it if continued ownership and redevelopment is not possible. Maintenance costs allocable to each congregation may be reduced by close to 50%.

Additionally, many religious institutions have unused land adjacent to worship space, or large space that can be reconfigured to allow continued worship in the same spiritual home but with additional income from a developer. Redevelopment, however, is a longer term solution that carries with it greater risks than a lease or shared space arrangement.

New York state and New York City provide tax incentives for low-income housing that permit religious institutions to both advance their mission to support the well-being of their local community, and at the same time to establish an endowment, to provide income on an ongoing basis, or even to pay debts incurred as a result of the pandemic. It is too early to predict the future of these tax incentives, or whether the economy will allow developers continued access to funds needed for such redevelopment.

Importantly, most property developments take years before the religious institutions receive any benefit, so it will be difficult to use this solution to solve what may be an immediate crisis that needs a solution in just a few weeks or months. This problem can be ameliorated by having a developer pay an upfront "bailout" payment to the religious institution. However, religious institutions should be wary of the leverage that their own circumstances may give the other party.

Conclusion

Under well established New York law, a religious institution is composed of two separate entities: A spiritual entity that existed as an unincorporated religious association before being incorporated, and a corporate entity. The New York Court of Appeals has observed that a religious institution's "corporate activities" can be separated from its "ecclesiastical activities," as evidenced by various statutory provisions that specifically delegate certain corporate activities to an institution's trustees while leaving its ecclesiastical affairs to the members, who continue to exist as the religious association that preceded incorporation. *Walker Memorial Baptist Church v. Saunders*, 285 N.Y. 462, 467-68 (1941). Changes to the corporate entity explored in this column do not equal the end of the spiritual body. Thus, even if it means dissolving and reorganizing in another form, selling property, or moving, the members of a house of worship should be comforted to know that their spiritual entity as a group of faithful can continue unimpeded by any crisis.