

PRESBYTERIAN CHURCH CORPORATIONS IN VIRGINIA

Considerations and Procedures

August 2005

CONTENTS

Executive Summary

Background Considerations

- Incorporation Directive in *Book of Order*
- Other Reasons to Incorporate
- Status of Church Incorporations in Virginia
- Pre-2005 Virginia Statutory Provisions
- Post-July 1, 2005 Virginia Statutory Provisions
- Regarding This Memorandum

Considerations in Forming Corporations

- Corporate Issues
- Polity Issues
- Operational Matters

Procedures to Incorporate

- Select the Right Forms
- Prepare Articles of Incorporation and Bylaws
- File Articles of Incorporation with State Corporation Commission
- Organizational Meeting of Initial Trustees
- Tax Matters
- Other Corporate Actions

Procedures to Convey Property to Corporation

- Authorizing the Trustees
- Prepare Deed of Conveyance
- Consents; Title Insurance

## EXECUTIVE SUMMARY

Churches in Virginia may now incorporate as a result of a Federal court decision in 2002. The former statutory scheme applicable to the ownership of property by churches (owned by trustees who act upon direction of their congregations and with the approval of the local court) was substantially modified by the 2005 Virginia General Assembly in a series of bills that will become effective July 1, 2005. This new legislation resolves most, if not all, of the former property ownership issues that were raised if a church did incorporate in Virginia as a result of the 2002 Federal court decision.

The *Constitution of the Presbyterian Church (U.S.A.)* requires particular churches to form corporations for the ownership of their properties where permitted by civil law. Such a corporation is to be a membership corporation (not a stock corporation), whose members are those members on the active roll of the particular church. Its directors (called trustees) are ordinarily the elders of the particular church who are on active service, although some churches may prefer to have a separate board of trustees to serve in this role or may prefer to have another method for electing the corporation's trustees.

To enable particular churches to form corporations with a minimum of effort and expense, model forms for articles of incorporation (to be filed with the state), bylaws (for internal operations), and an organizational consent for the initial trustees to sign (to complete the organization process) are provided on the Presbytery's web site. These forms should not be used without reviewing the entirety of this memorandum, which includes instructions for using the forms and certain choices that need to be considered. An attorney familiar with Virginia nonstock corporations and Presbyterian polity should be consulted, and should especially be involved on behalf of any church that desires to amend or alter any of the model forms. The attorney can advise the church regarding any changes in law or court decisions that impact information in this memorandum. The attorney will in all likelihood also be necessary to help transfer the church's property to the corporation. Please contact your Presbytery to inquire whether it has a list of attorneys available to assist and to whom it can refer you.

The entirety of this memorandum should be reviewed and considered prior to forming a corporation, as it contains useful (though perhaps uninteresting) information about the incorporation process, maintaining the corporation's status, indemnification matters, operational issues, and other matters. It also describes how to use the model forms that Presbytery has made available for this purpose. The memorandum also contains information about transferring the church's property from its current trustees to the corporation. Finally, it contains endnote references that would be important aids to the attorney engaged to assist the church in the process of forming its corporation and transferring its property to that corporation.

## **BACKGROUND CONSIDERATIONS**

The Presbyterian Church (U.S.A.) (referred to in this memorandum as the PC(USA)) is a body of Reformed Christians who have agreed to conduct their worship and other religious activities in conformity with the *Constitution of the Presbyterian Church (U.S.A.)* (referred to in this memorandum as the *Constitution*). The *Constitution* consists of the *Book of Confessions* (Part I) and the *Book of Order* (Part II).<sup>1</sup>

### **Incorporation Directive in the Book of Order**

The *Book of Order* directs each particular church to cause a corporation to be formed whenever permitted by civil law, with powers to hold, manage, encumber and transfer real and personal property for the particular church and to manage any permanent special funds for the furtherance of the purposes of the church, all subject to the authority of the session of the particular church and under the provisions of the *Constitution*.<sup>2</sup>

This directive does not contemplate the incorporation of the particular church, but rather the organization by the particular church of a separate corporation to perform limited civil law functions relating to the ownership and management of property. Similar provisions direct presbyteries to cause a corporation to be formed whenever permitted by civil law.<sup>3</sup>

Where a particular church does organize a corporation to own its properties, the particular church will not itself become incorporated but will continue to function unincorporated as it did before, with its session continuing to serve as its governing body. The corporation formed by the particular church will be a separate entity with a limited purpose, and will be governed by its members and directors or trustees (as discussed more fully below).

### **Other Reasons to Incorporate**

Where a particular church forms a corporation to own its real and personal properties, obligations and liabilities associated with those properties will be satisfied only from the assets of the corporation; other properties and assets of church members will not be exposed to risk.<sup>4</sup> Moreover, a corporation provides a continuity of ownership that is not present with individual trustees, who must periodically be changed as individuals come and go (and technically, requiring court approval for each change). Finally, under the 2005 legislation (noted below), court approval will no longer be required for subsequent transfers of land or the encumbering of property to secure debt where the property is owned by the corporation rather than by individual trustees.

### **Status of Church Incorporations in Virginia**

Virginia's constitution has a provision which prohibits the state from granting a charter of incorporation to any church or religious denomination.<sup>5</sup> This constitutional provision was held unconstitutional on April 3, 2002 by a federal district court in the case of *Falwell and Trustees of Thomas Road Baptist Church v. Miller*.<sup>6</sup> The court directed the State Corporation Commission to accept the articles of incorporation filed for Thomas Road Baptist Church and issue to it a

certificate of incorporation. This the State Corporation Commission did, and it has continued since then to issue certificates of incorporation to other churches in Virginia, notwithstanding the constitutional prohibition.<sup>7</sup>

### **Pre-July 1, 2005 Virginia Statutory Provisions**

Although the State Corporation Commission now accepts articles of incorporation filed by churches, all of the State's code provisions before July 1, 2005 that dealt with religious entities and their properties (with one exception noted below) did so from the standpoint of trustee ownership of church property as though the *Falwell* decision had not occurred. The primary provisions involved deal with whether trustees are required to hold property for churches (incorporated or not),<sup>8</sup> whether court approval is required for sales, transfers, gifts or encumbering church property,<sup>9</sup> and whether the real estate tax exemptions for church property will be available to corporations owning church lands.<sup>10</sup> Effective January 1, 2004, new legislation provided an exemption from recordation taxes for deeds to and from an incorporated church.<sup>11</sup>

### **Post-July 1, 2005 Virginia Statutory Provisions**

Effective July 1, 2005, most, if not all, of the former statutory issues surrounding corporations owning church properties have been resolved. Thus, the existing trustees of a particular church may transfer the title to that church's real and personal property to a corporation formed to own such property for the church, without obtaining court permission if the transfer is authorized in accordance with the church's polity.<sup>12</sup> No recordation tax will be due on a deed to or from such a corporation (although the normal Clerk's fee will still be assessed).<sup>13</sup>

Historically, the exemption from local real estate taxes for property used for religious purposes was determined by the State pursuant to a provision of the Virginia constitution that provided the Virginia General Assembly could exempt property used for religious, charitable and other similar purposes by classification or designation.<sup>14</sup> The legislature, in implementing the classification portion of this authority, provided (among other things) that buildings and land owned by churches were exempt, with the further provision that property owned by a trustee for a church would be considered as owned by the church for this purpose.<sup>15</sup> Effective January 1, 2003, and pursuant to an amendment made to the Virginia constitution, this authority to grant an exemption by classification or designation for property used for religious, charitable and other similar purposes was transferred from the State to the Virginia localities.<sup>16</sup> The transfer of the exemption responsibility did not affect continuing exemptions under the State scheme for any organization that had such an exemption on December 31, 2002.<sup>17</sup>

There may be a question whether exempt church property that is transferred on or after January 1, 2003 to a corporation (that did not exist on December 31, 2002) will continue to be exempt from local real property taxes, or whether a new application for exemption will have to be made by that corporation to the locality where the property is situated. The 2005 legislation added a provision to the State's exemption statute under the "religious and charitable purposes" clause, to include an exemption for buildings and land owned by a corporation for a church and to provide that property owned by a corporation for a church would be considered as owned by

the church for this purpose.<sup>18</sup> It is because this legislation was adopted after transfer of this exemption authority to the localities that the question may arise. However, the public policy behind exempting church property should not be dependent on how title to such property is held.

The Virginia constitution also provides in another section that property “owned and exclusively occupied or used” by churches for religious purposes is exempt from local real estate taxation.<sup>19</sup> This exemption section has not been affected by any of the foregoing constitutional or statutory amendments. However, it is not known whether property owned by a church corporation will qualify as property “owned and used” by a church.

Because of Virginia’s longstanding public policy of exempting church property from local real estate taxation, it is anticipated that the exemption will continue to be available for property transferred to church corporations. It would seem to be the better course of action to assume the exemption is available rather than inquiring of local city or county real estate tax assessors since the matter of incorporated churches and church corporations is so new to Virginia and it may take a while for regulations and procedures to evolve.

### **Regarding This Memorandum**

It is not the intention of this memorandum to provide legal, tax or accounting advice, and this memorandum hereby expressly disclaims providing any such advice. Each particular church contemplating forming a church corporation should retain the services of a qualified attorney who is familiar with both Virginia nonstock corporations and Presbyterian polity. Please contact your Presbytery to inquire whether it has a list of attorneys available to assist and to whom it can refer you.

The information in this memorandum is believed to be correct and accurate as of the date of the memorandum. As time passes, there may be new legislation that will impact the information in the memorandum or the forms themselves. There may also be new court decisions that will need to be considered. The attorney your church selects to help it with forming the church corporation and transferring the church property to that corporation will be in a position to advise about any subsequent legislation or court decisions that affect this memorandum and the forms.

### **CONSIDERATIONS IN FORMING CORPORATIONS**

There are several considerations in connection with the decision to organize a corporation in accordance with the *Book of Order* directive. The significant considerations are grouped together under three headings: corporate considerations, PC(USA) polity considerations, and operational considerations. The forms provided for particular churches to use in forming corporations comply with the requirements discussed below.

## **Corporate Issues to be Considered**

**Name of Corporation.** Under Virginia law, a nonstock corporation can adopt essentially whatever name it chooses, so long as the name does not imply a business and is distinguishable on the records of the State Corporation Commission from the name of any existing corporation.<sup>20</sup> Because there is a “First Presbyterian Church” or a “Westminster Presbyterian Church” (for examples) in many cities in Virginia, it is recommended that such churches consider adopting a corporate name that includes the city or locality in which they are located, such as “First Presbyterian Church of Richmond Corp.” Doing so would permit another church with a similar name to use its name in the same manner, such as “First Presbyterian Church of Charlottesville Corp.” If preferred, the style of the name in the foregoing example may be “First Presbyterian Church of Richmond Corporation” or “First Presbyterian Church of Richmond, Inc.”

**Directors or Trustees.** Where civil law often speaks of directors in connection with a corporation, the PC(USA) uses the term “trustees.”<sup>21</sup> In Virginia, a nonstock corporation may use any designation it prefers for the role of a director, including “trustee.”<sup>22</sup> This memorandum will primarily use the term “trustee” as the name for the corporation’s directors, as will the forms.

**Who Are the Members of the Corporation.** The *Book of Order* provides that only members on the active roll of a particular church will be the members of that church’s corporation.<sup>23</sup> It is significant to note that the minister of a particular church is not a member of the congregation, but rather is a member of the presbytery.<sup>24</sup> Since the minister is not a member of the congregation, the minister cannot be a member of the corporation and therefore will not be eligible to be elected a trustee (director).

**Who Are the Trustees (Directors) of the Corporation.** The *Book of Order* provides that the trustees (directors) of the corporation organized by a particular church would be the elders in active service on the session of that church, unless the corporation shall determine another method for electing its trustees.<sup>25</sup> The General Assembly Legal Resource Manual recommends that the session of a particular church comprise the trustees (directors) of that church’s corporation. If an alternate method of selecting trustees (directors) is desired, it must (1) include a nominating committee elected by the corporation, and (2) provide for terms of the trustees (directors) which are the same as those for elders.<sup>26</sup> Only members on the active roll of the particular church are eligible to be elected as trustees.<sup>27</sup> These variations in determining the trustees (the trustees being identical to the session or the trustees being persons different from the session members) will be reflected in the forms provided for church corporations.

**Who are the Officers of the Corporation.** The *Book of Order* does not have a provision relating to the officers of the corporation. Under Virginia law, a nonstock corporation is required to have only such officers as are stated in its bylaws, provided there is at least a chairman or a president or some other officer specifically authorized to act on behalf of the corporation.<sup>28</sup> The model bylaw form provides that the trustees (directors) shall elect from their number a president, a secretary and a treasurer, and may elect such other officers as may be necessary for the transaction of the affairs of the corporation. The same person may simultaneously hold more than one office except those of President and Secretary.<sup>29</sup> The forms provided in the General

Assembly Legal Resource Manual suggest that the clerk of session serve as the secretary of the corporation, and that the treasurer elected by the session serve as treasurer of the corporation.<sup>30</sup>

**Indemnification.** The corporation's articles of incorporation can contain a provision making mandatory the indemnification of officers, as well as trustees (directors), for actions taken by them in good faith and in the belief that such actions are in the best interests of the corporation. Such indemnification provisions can be extended to employees of the corporation, but it is not contemplated the corporation will have employees. (The indemnification by the corporation will not be applicable to employees of the church itself.) The corporation's articles of incorporation can also contain a provision relieving its trustees (directors) from liability to the corporation for acts taken in good faith and in the belief that they are in the best interests of the corporation. This relief provision is not available to corporate officers, and it does not apply to claims by third parties against such persons.

**Federal Tax Exemption.** Generally, such a corporation will automatically be exempt from Federal income taxation, as is the particular church. The PC(USA) has a group ruling issued by the Internal Revenue Service on January 31, 1964 and subsequently reaffirmed, which includes within the tax exempt group (among others) the particular churches and the presbyteries, as well as the first or primary corporation of any of them.<sup>31</sup> (Other incorporated bodies are not automatically included but may apply to the Office of General Assembly for inclusion upon compliance with that office's rules and procedures.) Corporations exempt from Federal income tax are also exempt from Virginia income taxation.<sup>32</sup>

### **Polity Issues to be Considered**

**Authority of the Session and Constitution.** The corporation's powers to receive, hold, encumber, manage and transfer property for the particular church, and its other related powers, are all subject to the authority of the session and the provisions of the *Constitution of the Presbyterian Church (U.S.A.)*.<sup>33</sup> It is important for the session of a particular church and its corporation to establish procedures that will insure close communication between the two groups, and to insure that the powers and duties of the corporation do not infringe upon the powers and duties of the session and the board of deacons.<sup>34</sup> Moreover, when the corporation decides to buy, sell or mortgage real property, it shall act only after the approval of the congregation in a duly constituted meeting,<sup>35</sup> and approval by the presbytery except for those churches that made the election noted in the following paragraph.<sup>36</sup>

**Certain Electing Churches Under G-8.0701.** For any particular church that (a) was not subject to a similar provision in its constitution immediately prior to reunion in 1983 and (b) properly elected the option provided in the *Book of Order*,<sup>37</sup> its property is to be held subject to the constitutional provisions applicable to that particular church immediately prior to the formation of the PC(USA).

For the former Presbyterian Church, US ("PCUS"), this would be the PCUS *Book of Church Order*, Chapter 6.<sup>38</sup> For the former United Presbyterian Church in the United States of America ("UPCUSA"), this would be the UPCUSA *Book of Order*, Chapter XLII.<sup>39</sup> This variation in the property provision is reflected in the forms provided for church corporations.

**Holding Property for PC(USA).** The *Book of Order* provides that all property held by or for a particular church (or by a presbytery or synod), regardless of where the title is lodged, is held in trust for the use and benefit of the PC(USA).<sup>40</sup> The General Assembly Legal Resource Manual recommends that conveyances of real property to the particular church's corporation contain a provision reciting that the property is to be held for worship and other purposes of ministry of the particular church, subject to the constitution of the PC(USA). The suggested language is set forth in the endnote, and it should be inserted in all deeds conveying property to the corporation.<sup>41</sup>

## **Operational Matters to be Considered**

**Church Staffs and Employees.** Church staffs and employees will remain staff and employees of the particular churches, not of the corporations. Thus, tax withholding, FICA, other employment obligations and tax return requirements of the church will remain as they exist prior to the organization of a corporation.<sup>42</sup> The same thing will be true for employment benefits such as health insurance, retirement benefits, and the like. If the corporation of a particular church were to hire employees, the duties of those employees will be limited to the purposes of the corporation. In addition, the corporation would have the same tax withholding, FICA, other employment obligations and tax return requirements as the particular church now has.

**Meetings of Members.** Each particular church now holds at least one annual meeting of its congregation, to elect officers, hear reports of the session and other organizations of the church, and to review the adequacy of the compensation for its pastor.<sup>43</sup> Of course, special meetings can be called at any time. In addition to the meeting of members of the particular church, an annual meeting of the members of the corporation will also have to be held.<sup>44</sup> It is recommended that the annual meeting of the corporation's members be held immediately following the annual meeting of the congregation. In addition, special meetings of members of the corporation can be called at any time.

**Meetings of Session and Trustees (Directors).** The session of the particular church will continue to meet as it does now, and conduct essentially the same business it now conducts. It can be anticipated that the trustees (directors) of the corporation will meet much less frequently (though at least annually), to transact whatever business is appropriate for the corporation to conduct.

**Liability.** Church staff, employees and church officers retain whatever liability risks they currently have for acts or omissions in the course of their duties as such. The forming of a corporation will not have any effect on their existing liability risks. However, Virginia law does provide some relief. For example, one provision provides that no member of any church will be liable in tort or contract for the actions of any officer or employee of such church solely because of membership in that church.<sup>45</sup> Another provision grants civil immunity (or limits liability to the amount of their compensation) to directors, trustees and officers of federally tax exempt organizations (which should include Presbyterian churches) for actions taken in their official capacities.<sup>46</sup>

**Insurance.** Since the corporation will acquire title to the property of the particular church, the corporation will have to obtain casualty and liability insurance on the property. As a

result of the 2005 Virginia General Assembly legislation (effective July 1, 2005), conveyance of title to the corporation results in assignment to the corporation of the interest in all insurance policies relating to the property.<sup>47</sup> In addition, the corporation may want to consider obtaining directors' and officers' liability insurance. The church, which continues to use the property, will no longer have to carry casualty insurance, but will want to retain its liability insurance. Churches deciding to form corporations should consult with their insurance agents about the amounts and types of insurance they and their corporations should have. The insurance agent for your particular church may recommend that the same insurance policies continue in effect, but that both the church and the corporation be listed as co-insureds on such policies.

**Registered Agent.** A corporation must have and maintain a registered office and a registered agent (who must be either an officer, a director, a member of the Virginia State Bar or an organization authorized to serve as registered agent, and whose business address is the same as the registered office address).<sup>48</sup> Failure to do so will result in the termination of the corporation's existence. Unlike other officers of the corporation who typically will rotate, the registered agent can serve as long as the corporation desires. It is advantageous to maintain the same registered agent, since each change in the registered agent requires filing the appropriate forms with the State Corporation Commission and payment of a modest fee.

**Initial and Annual Fees; Reports.** There are various fees and taxes involved with organizing a corporation and maintaining its corporate status. These include an initial franchise tax (currently, \$50) and a filing fee (currently, \$25) to be paid at the time the corporation is organized, and an annual franchise tax (currently, \$25) to be paid each year thereafter. Failure to pay these periodic fees will result in the termination of the corporation's existence.

Virginia corporations are also required to file an annual report with the State Corporation Commission on a form provided by the Commission. The report forms will be mailed each year to the corporation's registered agent, and must be filed by the date prescribed. Failure to file an annual report will result in the termination of the corporation's existence.

**Funds for the Corporation.** The corporation will require funds from the particular church to cover its obligations to pay taxes and fees, to purchase insurance, to maintain its property (unless the particular church retains this obligation), and to meet any other financial obligations. To be sure that its obligations can be covered, the corporation should prepare an annual budget (in addition to the budget prepared by the particular church for its needs). The source of funds to cover the corporation's budget should be an expense item in the church's annual budget. The aggregate costs of both the particular church and its corporation will be slightly higher than for the particular church before it forms a corporation, due in part to the annual fees for maintaining the corporation, possible additional insurance costs, and administrative costs for calling and holding corporation meetings in addition to church meetings (both for the session, the trustees (directors), members of the congregation and members of the corporation).

## PROCEDURES TO INCORPORATE

### Select the Right Forms

The Presbytery’s web site has four sets of forms relating to forming church corporations. The easiest way to understand the differences among the forms is to review the following chart. Essentially, most churches will choose between Form Sets “1” and “2,” depending on how the particular church wants to elect the trustees (directors) for its corporation—that is, whether such trustees will be identical to the active session members, or separately elected by the corporation’s members. Those churches which qualify for the special elective treatment under G-8.0701 regarding the holding of their property following reunion in 1983 will choose between Form Sets “3” and “4,” which provide the same two variations in how the trustees (directors) of the corporation are determined.

Forms	Session as Trustees	Separately Elected Trustees
Non-Electing Church	<u>Forms Set “1”</u> Form 1-A (articles) Form 1-B (bylaws) Form 1-C (consent)	<u>Forms Set “2”</u> Form 2-A (articles) Form 2-B (bylaws) Form 2-C (consent)
Church Election under G-8.0701	<u>Forms Set “3”</u> Form 3-A (articles) Form 3-B (bylaws) Form 3-C (consent)	<u>Forms Set “4”</u> Form 4-A (articles) Form 4-B (bylaws) Form 4-C (consent)

Each set of forms contains three forms: articles of incorporation, bylaws and an unanimous written consent. The correct use of each of these forms is described below. The forms within a given set are coordinated to work together. Thus, forms from one set must not be intermixed with forms from another set.

A particular church that believes it made the election under G-8.0701 must confirm that election with the records of its presbytery prior to using either Form Set “3” or Form Set “4.” If that election either was not timely made or was not reported to the presbytery, the church will not qualify for the benefit of the election and must use either Form Set “1” or Form Set “2.”

### Prepare Articles of Incorporation and Bylaws

Using the proper set of forms, insert the relevant information called for in the articles of incorporation, the bylaws and the consent. Be sure to delete the instructions inserted in each form (in all cases, instructions are in [*underlined italics type enclosed in brackets*]) as the requested information is filled in. Although some other changes could be made to any of these forms, it is recommended that no changes be made. The forms were reviewed by both the Office of Legal Services of the PC(USA) and the Clerk’s Office of the State Corporation Commission, and revisions were then made to reflect comments and suggestions received.<sup>49</sup> If changes are

nevertheless desired, it is further recommended that an attorney familiar with both Virginia nonstock corporations and Presbyterian polity, be engaged to assist with such changes.

In the articles, blanks that need to be completed are found in the heading of the form for the name of the corporation, in articles 1, 7, 10 and 12, and, at the end of the form, the date and the name of the incorporator. In article 10, the post office address for the registered office must be the physical location (not a post office box) where a process server can find the registered agent. Note that the registered office is to be the business address of the registered agent. See the further discussion under the heading, “Registered Agent,” at page 9.

In the bylaws, blanks that need to be completed are found in the heading of the form for the name of the corporation, and in sections 1.1, 1.8, 4.4 and 7.3.

### **File Articles of Incorporation with the State Corporation Commission**

The completed articles of incorporation need to be signed by the incorporator, who can be any person. Presumably, it should be a person authorized by the session of the particular church, which should have reviewed and approved the completed articles and bylaws. The signed articles of incorporation (but not the bylaws) must be filed with the Clerk’s Office of the State Corporation Commission, together with the appropriate filing fee and franchise tax. As of the date of this memorandum, the filing fee is \$25 and the initial franchise tax is \$50. Both amounts (totaling \$75) can be paid in one check made payable to the State Corporation Commission and mailed to:

Clerk’s Office  
State Corporation Commission  
1300 East Main Street  
Richmond, VA 23209

After the articles are reviewed and accepted as being in proper form and otherwise complying with state law, the State Corporation Commission will issue its certificate of incorporation for the corporation. The cover letter transmitting the articles and the check should identify the name and address of the person sending them, so that the Clerk’s Office will know where to send the certificate of incorporation and receipt for fees.

### **Organizational Meeting of Initial Trustees**

After issuance by the State Corporation Commission of a certificate of incorporation, the incorporator should call an organizational meeting of the corporation’s trustees (directors) to complete the organizational activities of the corporation. This typically will include the adoption of a few more or less standard corporate resolutions:

- To adopt bylaws;
- To authorize opening bank accounts; and
- To elect officers (there must be at least those officers—such as a president and secretary—who are authorized to execute documents and maintain corporate records.<sup>50</sup> The

minister, though not a member of the corporation, may hold office under Virginia law but the Legal Resource Manual of the PC(USA) recommends against this practice.<sup>51</sup>

In lieu of an actual meeting, or even where there is an actual meeting, of the initial trustees, their corporate actions may be recorded by unanimous written consent. In each set of forms, there is an appropriate written consent form. Using the proper set of forms, insert the relevant information called for in the unanimous written consent form. Be sure to delete the instructions inserted in the form (in all cases, instructions are in [*underlined italics type enclosed in brackets*]) as the requested information is filled in. Before any changes are made to this form, it is recommended that an attorney familiar with both Virginia nonstock corporations and Presbyterian polity be engaged to assist with such changes.

In the consent, blanks that need to be completed are found in the heading for the name of the corporation, and in the resolutions setting the number of trustees (directors), listing elected officers, authorizing the opening of bank accounts, accepting the conveyance of the church's property, and providing the names and dates of signing the consent by the initial trustees (directors).

In connection with opening bank accounts, each bank has its own form of corporate resolution that it will want the corporation to adopt. The bank will also require a corporate officer to certify that such a resolution was, in fact, adopted by the trustees (directors). The form of consent facilitates this by incorporating the resolution by reference to an attached certificate form that the bank will provide. Be sure that the certificate form is completed and that a copy of the certificate is attached to the consent.

If one or more of the initial trustees (directors) cannot sign such a consent for whatever reason, the written consent cannot be used. In this case, there must be an actual meeting, with the action taken being recorded in minutes for that meeting. Such actions should mirror the actions provided in the written consent.

### **Tax Matters**

The corporation will be required to obtain its own Federal taxpayer identification number; it cannot use the taxpayer identification number of the particular church for which it will own the property. The number can be obtained by completing Internal Revenue Service Form SS-4, Application for Employer Identification Number. Complete all relevant entries on the form. For type of entity, select "Church or church-controlled entity" and in the "Group Exemption Number" blank enter the number 1617 (the general exemption number listed on the Group Ruling granted to the Presbyterian Church (U.S.A.)). By late Summer or Fall of 2005, the General Assembly Legal Office ((888-728-7228, extension 5377) plans to send to each Virginia church a new letter confirming that it and any corporation it may form is and will be included in the Group Tax Exemption Ruling issued to the PC(USA).<sup>52</sup>

The Group Ruling exempts covered entities from the Form 990 annual filing requirement imposed on other nonprofit organizations (unless the corporation has unrelated business income for any year, in which event Form 990T must be filed and taxes paid). The Federal exemption does not automatically establish exemption from state and local taxes, but in Virginia there is

such an exemption for so-called Section 501(c)(3) organizations such as the corporation contemplated here.<sup>53</sup>

It is assumed in this memorandum that the corporation will not have employees. If in fact it does have employees, it will need to comply with various rules and regulations governing employers, including rules relating to tax withholding for both Federal and Virginia, and meeting social security or FICA obligations.

### **Other Corporate Actions**

Upon completion of the organizational meeting, the corporation can open a bank account into which it can deposit any funds it receives, and from which it can pay any expenses it incurs. Ideally, the bank's corporate account resolutions and certificate forms would have been obtained in advance, and attached to the unanimous written consent as the banking resolutions called for by that consent. The corporation can also apply for any insurance coverages it needs to obtain, and take any other actions that may be appropriate in connection with the conveyance to it of the property of the particular church.

Where the corporation's trustees (directors) are different from the session, it is important (i) to establish procedures whereby regular communications occur between the two bodies;<sup>54</sup> (ii) designate specific functions to be performed by the trustees (directors) of the corporation; and (iii) recognize that the corporation and its trustees (directors) perform their work subject to the authority of the session.<sup>55</sup>

### **PROCEDURES TO CONVEY PROPERTY TO CORPORATION**

After formation of the corporation, the property of the particular church, currently held by its present trustees, will have to be conveyed to the new corporation. This will require proper authorization for those trustees to make the conveyance, preparation of a deed, and recordation of the deed in the appropriate clerk's office.

### **Authorizing the Trustees**

The trustees who currently hold title to a particular church's property must be authorized pursuant to *Book of Order* requirements in order to convey that church's property to the corporation. This requires the authorization of the particular church's session, approval of the particular church's congregation,<sup>56</sup> and except for former PCUS churches that made the G-8.0701 election, approval by the Presbytery.<sup>57</sup>

As a result of the 2005 Virginia General Assembly legislation (effective July 1, 2005), the trustees who currently hold title to a particular church's real property will not have to obtain permission under the civil law by order of the circuit court in whose jurisdiction the property is located in order to transfer the property to the church's corporation, so long as the transfer is in accordance with the church's polity.<sup>58</sup>

## **Prepare and Record a Deed of Conveyance**

The current trustees will have to prepare (or engage an attorney to prepare) a deed of conveyance, to transfer the particular church's real property to the corporation. The deed may be a quit claim deed, but it should be certain to include the entirety of the real property. The deed should contain a recital that the property is held for benefit of the particular church's worship and ministry, subject to the constitution of the PC(USA). The recommended form of recital follows:<sup>59</sup>

The premises herein conveyed shall be used, kept, maintained and held in trust by the grantee for Divine Worship and other purposes of its ministry as a particular church belonging to the Presbytery of [*Insert Name of Presbytery*] (or its legal successors), subject to the provisions of the *Constitution of the Presbyterian Church (U.S.A.)*.

The deed will have to contain a satisfactory legal real property description, not a street address or tax map parcel number. More than likely, the description used in the deed to the trustees will be satisfactory unless there have been subsequent acquisitions of additional property, boundary line adjustments, easements, street condemnation proceedings or sales of portions of the original property. In a few cases, it may be advisable to obtain a current survey of the property for use in preparing the deed.

When the deed has been executed by the current trustees, whose signatures will have to be acknowledged before a notary public, the deed will need to be recorded in the clerk's office of the circuit court for the city or county in which the property is situated. The clerk of court will assess a recordation fee (based on the deed's page count). Once the deed is prepared, it can be shown to the clerk who will calculate the fee, which then can be paid by check. Because of the provision enacted at the 2005 Virginia General Assembly,<sup>60</sup> the clerk should not charge any recordation taxes. However, since this is a new provision, the current trustees should be alert to so advise the clerk where necessary.

For all deed and conveyance matters, the advice and services of an attorney should be obtained.

## **Consents; Title Insurance**

If the property is subject to an encumbrance by deed of trust or other lien, the conveyance to the new corporation will necessarily be made subject to that encumbrance or lien. In this regard, it is important to confirm that a conveyance of the property will not trigger a default under the encumbrance or lien, or otherwise accelerate the secured debt. If it might, the consent of the lien holder should be obtained before the conveyance is made in order to prevent a default from occurring.<sup>61</sup>

If the current trustees are beneficiaries of a title insurance policy covering the property, it is advisable for the corporation to obtain an update to that title policy from the title insurance company along with a change in beneficiary from the trustees to the corporation.<sup>62</sup> The title insurance company will charge a premium for the update and change in beneficiary, but it should be less expensive than would be the premium for a new policy.

---

<sup>1</sup> The PC(USA) is governed by representative governing bodies composed of presbyters, both elders and ministers of Word and Sacrament and known as sessions, presbyteries, synods and the General Assembly. Each of these governing bodies has its own particular responsibilities and powers. Governing bodies of the PC(USA) are distinct from the government of the state and have no civil jurisdiction or power to impose civil penalties, but have only ecclesiastical jurisdiction for the purpose of serving Jesus Christ. See *Book of Order*, G-9.0101 and following. The corollary principle is that civil governments do not assert ecclesiastical jurisdiction. Thus, neither the PC(USA) nor its governing bodies should be thought of as civil jural entities with legal capacities and attributes; their fundamental ecclesiastical nature, relationships, duties and responsibilities are established by the PC(USA) Constitution.

<sup>2</sup> *Book of Order*, G-7.0401.

<sup>3</sup> *Book of Order*, G-8.0202.

<sup>4</sup> Note that the limitation of liability to assets of the corporation applies only to the liabilities of the corporation. Any liabilities or responsibilities of church employees, officers or members will remain unchanged.

<sup>5</sup> Va. Const. Art. IV, § 14(20).

<sup>6</sup> 203 F.Supp. 2d 624 (W.D. Va. 2002).

<sup>7</sup> An article published in the May 2004 Newsletter of the Virginia State Bar Real Property Section reports that its author was advised by the State Corporation Commission that at the present time an internal memorandum advises its charter examiners to accept articles of incorporation filed by religious organizations, based on the *Falwell* court decision. No other guidance or regulations have been promulgated as of the date of this memorandum.

<sup>8</sup> Va. Code Ann § 57-8 prior to the amendments made by the 2005 Virginia General Assembly legislation.

<sup>9</sup> Va. Code Ann. § 57-15 prior to the amendments made by the 2005 Virginia General Assembly legislation.

<sup>10</sup> Va. Code Ann. § 58.1-3606 prior to its amendment by the 2005 Virginia General Assembly legislation.

<sup>11</sup> Acts of Assembly, Ch. 492 (2004), amending Va. Code Ann. §§ 58.1-811 and 58.1-3606.

<sup>12</sup> Acts of Assembly, ch. 772 (2005), amending Va. Code Ann. § 57-15.B. If no petition seeking to set such a transfer aside is filed within one year of the recordation of any deed transferring title to the real estate, it shall be conclusively presumed that the transfer was made in accordance with the church's polity.

<sup>13</sup> Acts of Assembly, ch. 928 (2005), amending Va. Code Ann. § 58.1-811.

<sup>14</sup> Va. Constitution Art. X, § 6(a)(6).

<sup>15</sup> Va. Code Ann. §§ 58.1-3606.A.2, 58.1-3617.

<sup>16</sup> This change results from an amendment made in 2002 to Va. Constitution Art. X, § 6(a)(6). See Va. Code Ann. § 58.1-3651.

<sup>17</sup> See opinion of Attorney General to The Honorable William J. Howell, Speaker of the House of Delegates, 03-049 (8/5/03)..

<sup>18</sup> Acts of Assembly, ch. 928 (2005), amending Va. Code Ann. §§ 58.1-3606, 58.1-3617.

---

<sup>19</sup> Va. Constitution Art. X, § 6(a)(2), which is a different section from Va. Constitution Art. X, § 6(a)(6) referred to in endnote 16. The § 6(a)(2) provision remains effective, without change.

<sup>20</sup> Va. Code Ann. § 13.1-829.

<sup>21</sup> See, for example, G-7.0401.

<sup>22</sup> Va. Code Ann. § 13.1-803.

<sup>23</sup> *Book of Order*, G-7.0401. There does not seem to be any contemplation in the *Book of Order* that a corporation formed by a higher governing body would have members.

<sup>24</sup> See *Book of Order*, G-7.0308.

<sup>25</sup> *Book of Order*, G-7.0401.

<sup>26</sup> *Book of Order*, G-7.0401. A similar provision is applicable to higher governing bodies. The members of the council of the higher governing body are to comprise the corporation's trustees (directors) unless the higher governing body determines an alternate method. *Book of Order*, G-8.0202.

<sup>27</sup> *Book of Order*, G-7.0401. See also the General Assembly Legal Resource Manual.

<sup>28</sup> Va. Code Ann. §§ 13.1-872.A., 13.1-804.F.

<sup>29</sup> The restriction on the same person not simultaneously holding the offices of president and secretary is not found in Virginia law. See § 13.1-872. It is found in the sample bylaw form set forth in the General Assembly Legal Resource Manual, and is used in the model bylaw forms.

<sup>30</sup> See Article VI, Section 1, of the sample corporate bylaws in the chapter entitled, "Incorporation and Boards of Trustees."

<sup>31</sup> Under the ruling, a covered entity is not required to file any type of report with the Internal Revenue Service concerning its tax exempt status. Additional information, including a letter certifying its status as a covered entity within the Group Ruling, can be obtained through the Office of Legal Services, General Assembly Council, Presbyterian Church (U.S.A.), Louisville, Kentucky. Call Senior Legal Assistant (currently Brenda Smithers) at (888) 728-7228, extension 5377, to obtain a federal tax exemption letter for your particular church and its corporation.

<sup>32</sup> Va. Code Ann. § 58.1-441. See also Va. Administrative Code, 23 VAC 10-120-90.

<sup>33</sup> G-7.040; G-10.0102.

<sup>34</sup> G-7.0401. See also G-10.0102.

<sup>35</sup> G-7.0304.

<sup>36</sup> G-8.0500. See G-8.0701 for an exception for those churches that made the election provided in this section of the *Book of Order*. See further endnote 37.

<sup>37</sup> *Book of Order*, G-8.0701. The twin requirements for this exception to be applicable to a particular church are that the particular church (a) voted to be exempt from the provisions of Chapter VIII of the *Book of Order* within a period of 8 years following the establishment of the PC(USA), and (b) thereafter notified its presbytery of such vote.

---

<sup>38</sup> Section 6-3 of the *Book of Church Order* for the PCUS as of 1983 (year of reunion) provides that “all property held by or for a particular church, whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of the particular church or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church in the United States.” Although the “in trust” language was added by amendment to the *Book of Church Order* in 1982 shortly before the vote on reunion, the principle expressed in that language had been recognized by both civil and ecclesiastical courts for a long time. It appears that the primary result for a particular PCUS church that made the election under G-08.0701 is an exemption from sections G-8.0501 (presbytery approval for selling or encumbering church property) and G-8.0502 (presbytery approval for leasing church property), for which there was no comparable provision in the PCUS *Book of Church Order*.

<sup>39</sup> Section 72.02 of the *Book of Order* for the UPCUSA as of 1983 (year of reunion) provides that “all property held by or for a particular church, a presbytery, synod, the General Assembly, or The United Presbyterian Church in the United States of America, whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of the particular church or of a more inclusive judicatory or retained for the production of income, is held in trust nevertheless for the use and benefit of The United Presbyterian Church in the United States of America.” It appears that the primary result for a particular UPCUSA church that made the election under G-8.0701 is an exemption from section G-8.0601 (property of church in schism), for which there was no comparable provision in the UPCUSA *Book of Order*.

<sup>40</sup> See G-8.0201.

<sup>41</sup> “The premises herein conveyed shall be used, kept, maintained and held in trust by the grantee for Divine Worship and other purposes of its ministry as a particular church belonging to the Presbytery of [Insert Name of Presbytery] (or its legal successors), subject to the provisions of the Constitution of the Presbyterian Church (U.S.A.)” See the General Assembly Legal Resource Manual chapter on Incorporation and Boards of Trustees, Fiduciary Duties of Trustees, *Church Property*.

<sup>42</sup> Under Va. Code Ann. § 60.1-213.B.1, the term “employment” does not apply to services performed “in the employ of (i) a church or convention or association of churches, or (ii) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.” Thus, employment by employees of a church, religious order or religious organization is not subject to Virginia unemployment tax. See Virginia Employment Commission (VEC) Employer Handbook, pp. 5-6 (2004).

<sup>43</sup> *Book of Order*, G-7.0302.

<sup>44</sup> Va. Code Ann. § 13.1-838.

<sup>45</sup> Va. Code Ann. § 8.01-220.1:3. This provision does not prevent a member of a church from being liable for his or her own actions.

<sup>46</sup> Va. Code Ann. § 8.01-220.1:1. This provision does not extend to willful misconduct or a knowing violation of the criminal law.

<sup>47</sup> Acts of Assembly, ch. 772 (2005), adding new Va. Code Ann. § 57-15.D.

<sup>48</sup> Va. Code Ann. § 13.1-833.

<sup>49</sup> The comments that were received were general in nature. Revisions were made to the forms which were intended to reflect these comments. However, the forms were not re-submitted to either the Office of Legal Services of the PC(USA) or the Clerk’s Office of the State Corporation Commission for additional review and/or comment.

<sup>50</sup> Va. Code Ann. § 13.1-872.

---

<sup>51</sup> Acknowledging that some states' corporation laws permit nonmembers to serve as officers of the corporation (thereby permitting the minister, who is not a member of the corporation, to be an officer), the General Assembly Legal Resource Manual provides that "the preferred method is that the minister not serve in such a capacity." In such event, the corporation's president, not the minister, would preside at corporation meetings.

<sup>52</sup> If the corporation is not the only corporation organized by a particular church, it may not automatically qualify for inclusion in the Group Ruling. In such a case, contact the Office of Legal Services, Senior Legal Assistant, at (888) 728-7228, ext. 5377.

<sup>53</sup> Va. Code Ann. § 58.1-401; Va. Tax Administrative Code 23 VAC 10-120-90. The instructions for the Virginia corporate income tax return Form 500 state that a nonprofit corporation exempt from income tax under § 501(c) of the Internal Revenue Code is not required to file a Virginia income tax return unless it has unrelated business income.

<sup>54</sup> See *Book of Order*, G-9.0407, G-10.0102.

<sup>55</sup> *Book of Order*, G-7.0402.

<sup>56</sup> *Book of Order*, G-7.0402.

<sup>57</sup> *Book of Order*, G-8.0500.

<sup>58</sup> Va. Code Ann. § 57-15.

<sup>59</sup> See the General Assembly Legal Resource Manual chapter on Incorporation and Boards of Trustees, Fiduciary Duties of Trustees, *Church Property*.

<sup>60</sup> See endnote 13 and the text accompanying that note.

<sup>61</sup> The Acts of Assembly, ch. 772 (2005), added to the Va. Code Ann. New § 57-15.C., which provides that no such transfer of property (from current trustees to a church corporation) will operate as a transfer for purposes of a provision in a note or deed of trust which purports to accelerate an indebtedness upon a transfer of title. Whether this provision, effective July 1, 2005, will be applicable to notes and deeds of trust existing at that date may be a question that will ultimately have to be decided by a court.

<sup>62</sup> The Acts of Assembly, ch. 772 (2005), added to the Va. Code Ann. New § 57-15.D., which provides a transfer of real or personal property pursuant to § 57-15.A. or B. (which includes transfers from current trustees to a corporation organized by the church to hold property) shall be deemed to assign to such corporation the beneficial interest in every policy of insurance of every kind relating to the property transferred. Presumably, this would include title insurance. Whether this provision, effective July 1, 2005, will be applicable to title insurance policies (and other kinds of insurance) existing at that date may be a question that ultimately will have to be decided by a court.