



## Questions About Buildings and Property

Members of the congregation are frequently faced with legal questions when they are required to consider issues related to the structure or use of their building:

- [What must our congregation consider before leasing or renting our building?](#)
- [Should our congregation have a written use agreement for occasional use of the property?](#)
- [Why is it important to establish separate incorporation when another organization used our building?](#)
- [What does our congregation need to know about zoning and land use?](#)
- [What should our congregation consider before leasing our property for a cellular tower?](#)



## What must our congregation consider before leasing our building?

**"Some other unrelated organization wants to rent space in our congregation's building to hold their meetings, to operate an after school program, or for some other purpose. If we lease space to them, what are the legal problems?"**

The following is a very brief discussion identifying important issues that a congregation should consider. The congregation should consult with a lawyer or other advisor, since the following discussion is not intended as legal advice in particular situations.

**Federal Income Tax** - The leasing of property owned by a church will NOT result in the loss of the church's exempt status for federal income tax purposes. However, the congregation may be subject to federal income tax on some or all of the net rental income if the church has outstanding indebtedness. If the congregation is debt free, none of the net rental income will be subject to tax. Even where the congregation has some indebtedness, there are several exceptions that avoid the imposition of tax. This question of federal income taxation is discussed in more detail in another explanation, [Taxation of a Congregation's Rental Income](#).

**State Income Tax** - Many states mirror the federal tax treatment. If the congregation is located in a state that does not follow the federal definitions for exempt entities and taxable income, it will be doubly important to check with a tax professional who is knowledgeable about income taxation by the particular state.

**Local Real Estate Tax** - Exemption from real estate taxes is governed by state law and varies from state to state. What is exempt in one state may be taxable in another state. Furthermore, exemption from real estate tax may vary from county to county within the same state. In some states, what the local tax accessor / collector says or thinks the state law is, controls. Therefore, check with the local taxing authorities or a local tax professional to find out whether the congregation will lose its real estate tax exemption if it leases property.

**Zoning** - If local zoning laws are violated, the owner of the property, as well as the lessee of the property may be liable. Therefore, check out the local zoning and property-use laws to make sure that the use which the lessee will make of the congregation's property will not be in violation.

**Insurance** - Check with the congregation's insurance company/agent to make sure that leasing of the congregation's property will not invalidate any of the congregation's coverage or increase potential liability. Also consider requiring the lessee to have the congregation named as a co-insured on insurance obtained by the lessee. Advice from your insurance agent/consultant is very important.

**Written Lease** - A written lease is necessary. The real issue is how short and simple or how long and detailed the lease should be. A practical rule of thumb is that the length of the lease ought to be proportional to the length of time required to

terminate the lease. The longer the cancellation period or the period before termination, the more necessary it is to provide for different contingencies that could arise. Where the lease can be terminated on 10 to 15 days notice, it might be a short, one or two page document. But, if the lease is for ten years and there is no provision for cancellation, the lease may have to be fifty pages or longer. Consult your local attorney.

## **Should our congregation have a written use agreement for occasional use of the property?**

Congregations as part of their ministry often allow nonprofit organizations use of their premises for weekly meetings. Some examples are 12-step groups and volunteer youth activities such as scouting. It is important to have a written agreement which sets forth the relationship and obligations of the third party use of the congregation's property.

These use agreements are not a lease or full blown rental agreement. Use agreements are not appropriate for a regular tenant who leases the building several days a week or for a lease to a for-profit organization. If a third party is leasing the church education building for a five-day-a-week day care, there needs to be a longer lease prepared by legal counsel.

A Sample Use Agreement provides specific understandings of use, requires that the user have insurance and agrees to indemnify the congregation for claims or damages.

SEE RESOURCE: [Sample Third Party Use Agreement](#)

## Separate Incorporation: Important issues to consider

While the following discussion deals with schools in particular, it is also applicable to other functions such as day care centers, latchkey programs, food pantries, thrift stores, etc. that may or may not be separately incorporated.

- **Legal liability.** The separate incorporation of the school, provided that it is thereafter operated as an entity distinct from the congregation (i.e., has its own board of directors, its own financial books and records, and in general, operates as a truly separate corporation) will result in the school not being liable for the debts or other obligations of the congregation, and the congregation not being liable for the debts or other obligations of the school. When the school and congregation are operated as one common entity then, of course, each may be liable for the debts and liabilities of the other. Accordingly, while separate incorporation does not necessarily ensure the non-liability for the debts and obligations of the other (because in those instances where, notwithstanding separate incorporation, the two entities continue to be operated as though they were one), separate incorporation at least ensures the opportunity to argue non-liability for the debts and obligations of the other.
- **Insurance.** Procuring proper and complete insurance is a significant issue. It is necessary that, if the school and congregation are operated as separate entities, clear disclosure of this fact is made to the insurance company, and that each of them be named as co-insured on any policy issued to the other.
- **Control.** The school that is not separately incorporated is subject to the direct control of the congregation. When separately incorporated, the school is subject to the control of its own board of directors. Control of the separately incorporated school by the congregation is indirect in that the congregation elects the board of directors of the school, and retains power to approve changes in the governing documents of the school. The congregation, however, is no longer responsible for the day-to-day control issues that the congregation is responsible for where both congregation and school are operated within the same corporation.
- **501(c)(3) status.** The Evangelical Lutheran Church in America (ELCA) churchwide organization has been afforded group exemption privileges by the Internal Revenue Service (IRS). Accordingly, entities that are "controlled or supervised" by the churchwide organization are eligible for inclusion in the group exemption. Obviously, neither the congregation nor the school is controlled by the churchwide organization. However, because congregations are in the ELCA denomination, they meet the criteria for recognition. In addition, the IRS permits the inclusion of schools, that include kindergarten and above grades, as meeting the criteria of inclusion as part of the Congregation and Synodical Mission unit of the churchwide organization.
- **State regulation.** In many states, schools are subject to a varying degree of regulation by state authorities, whether separately incorporated or not. This frequently requires supplying information for the entire corporate entity that includes the school. Accordingly, separate incorporation of the school may

render it more practical and feasible to comply with state regulatory requirements, since this may limit the detail of information about the congregation that may thereby have to be disclosed to the state authorities.

- **Discontinuation of operations.** It is possible that either the congregation or the school could experience financial difficulties which make desirable the discontinuation of one, but not both, of the functions. Where the two functions are conducted in the same entity, the discontinuation of one operation almost inevitably affects the continued operation of the other. However, where the two functions are separately incorporated, it is far easier to discontinue the operations of one of the entities without adverse financial repercussion on the operations carried on in the other entity. It is important to make sure that the governing documents clearly state that if a school or other entity should end operations, the remaining assets would go to the congregation or, if no longer in existence, to an appropriate ELCA ministry.
- **Number of employees.** Certain federal (and perhaps state) statutes are applicable to employers with more than a specified number of employees. For example, the employment provisions of the Americans with Disabilities Act are effective as of July 26, 1992, with respect to private employers with 25 or more employees. On and after July 26, 1994, the same provisions are applicable to private employers with 15 or more employees. (A congregation and its related school are private employers for this purpose.) Where the school is not separately incorporated, the number of employees of the congregation and the school may exceed the threshold number. Separate incorporation of the congregation and school may result in either the congregation or the school, or perhaps both, having less than the threshold number of employees and therefore not being subject to the legislation.
- **Monitoring separate financial records.** If separately incorporated, separate financial books, records and statements must be maintained. Without separate incorporation such separate financial books, records and statements may be separately maintained as a best practice.
- **Securing governmental or other third party grants.** Many governmental agencies and some charitable foundations have policies that preclude making financial grants to congregations as a religious organization. Without separate incorporation such policies may preclude grants for a congregational program that is not separately incorporated. Separate incorporation offers a far greater possibility, but not a guarantee, of being eligible to receive grants.
- **Leases and other agreements.** It is important to have a clearly written understanding of how a school or other entity may be using property, sharing personnel or other resources of the congregation. This is a best practice for unincorporated entities that are controlled by the congregation, but it is required if there is a separate incorporation.

*This is a list of important issues for a congregation and related entities. It may not be a complete list of all important considerations, depending on the specific facts and needs of the congregations. Congregations should obtain legal and tax advice when making these decisions.*

**What does our congregation need to know about zoning and land use?**

**What legal protections exist if our church wants to expand the sanctuary or remodel the exterior of the building and is having problems with local government zoning and land marking commissions?**

What legal protections exist if our church wants to expand the sanctuary or remodel the exterior of the building and is having problems with local government zoning and land marking commissions?

[The Religious Land Use and Institutionalized Persons Act of 2000 \(RLUIPA\)](#) is a federal law that is intended to protect religious organizations rights for the use of their real property. It is designed to protect religious assemblies and institutions from zoning and historic landmark laws that substantially interfere with their religious free exercise.

**Does RLUIPA immunize churches and other religious properties from land-use regulations?**

NO. All land-use regulations apply to religious buildings until a claimant makes a showing that a land-use regulation imposes a substantial burden on a sincerely held religious belief or activity.

Claimants will need to follow local land-use regulations and procedures until they are faced with a government decision that discriminates or places a substantial burden on their religious practice. They then can try to show that the Act has been violated. Even then, many zoning and building regulations regarding structural integrity and construction requirements, fire and flood safety, sanitation regulations, and similar health and safety requirements may well be found supported by a compelling governmental interest.

An additional discussion of the [Religious Land Use and Institutionalized Persons Act 2000 is available here.](#)

**What should our congregation consider before leasing our property for a cellular tower?**

**Are there issues for the congregation if we allow our steeple to be used for a cellular phone tower?**



When reviewing an offer to put a cellular tower and/or wireless equipment on church property, the congregation should consider many different factors.

The United Methodist Church has provided useful analysis of the [issues related to cellular towers](#).

Please refer to the sample cellular tower lease in the resource section to guide you.

**As stated in the materials, you should always consult with your attorney before entering into such an agreement.**

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