

College/University Board of Regents Questions (18-2889)

A college/university board of regents of Synod has asked numerous questions concerning the closing of a Concordia System college or university. The CCM has consolidated these questions in order to provide a road map of how Synod's bylaws designate that a Concordia University may be closed. This road map includes the roles of the board of directors of the Concordia University System, the individual Concordia University's board of regents, Synod's Board of Directors, the Council of Presidents, and Synod itself. The last area of inquiry concerns the paper trail that each agency must provide for the closing process to be valid.

The following are relevant Constitutional Articles and Bylaws, and a definition:

Article IV Powers

The Synod in convention is empowered to and has formed corporate entities which shall have legal powers:

1. To purchase, hold, administer, and sell property of every description in the interest of the Synod;
 2. To accept, hold, administer, and, if deemed advisable, dispose of legacies, donations, commercial papers, and legal documents of every description in the interest of its work.
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Article XI Rights and Duties of Officers

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E. Composition and Duties of the Board of Directors

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2. The Board of Directors is the legal representative and custodian of all the property of The Lutheran Church—Missouri Synod, directly or by its delegation of such authority to an agency of the Synod. It shall exercise supervision over all property and business affairs of The Lutheran Church—Missouri Synod except in those areas where it has delegated such authority to an agency of the Synod or where the voting members of the Synod through the adoption of bylaws or by other convention action have assigned specific areas of responsibility to separate corporate or trust entities, and as to those the Board of Directors shall have general oversight responsibility as set forth in the Bylaws. For the purposes of this article, The Lutheran Church—Missouri Synod includes both the Synod formed by this Constitution and the Missouri corporation formed by the Synod.
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- 1.2.1 The following definitions are for use in understanding the terms as used in the Bylaws of The Lutheran Church—Missouri Synod:

(a) **Agency:** An instrumentality other than a congregation or corporate Synod, whether or not separately incorporated, which the Synod in convention or its Board of Directors has caused or authorized to be formed to further the Synod's Objectives (Constitution Art. III).

(1) Agencies include each board, commission, council, seminary, university, college, district, Concordia Plan Services, and each synodwide corporate entity.

(2) The term "agency of the Synod" does not describe or imply the existence of principal and agency arrangements as defined under civil law.

...

(q) **Property of the Synod:** All assets, real or personal, tangible or intangible, whether situated in the United States or elsewhere, titled or held in the name of corporate Synod, its nominee, or an agency of the Synod. "Property of the Synod" does not include any assets held by member congregations, the Lutheran Church Extension Fund—Missouri Synod, or by an agency of the Synod in a fiduciary capacity (including, for purposes of example, the funds managed for the Concordia Plans by Concordia Plan Services and certain funds held by The Lutheran Church—Missouri Synod Foundation).

- 1.5.3.5 All agencies of the Synod shall develop policies and procedures for making available official minutes of their meetings. All mission boards and commissions shall develop policies and procedures to make available upon request and at a reasonable price a verbatim copy of the official minutes of their

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meetings except for executive sessions. Any member of the Synod may request a copy of any official minutes of mission boards or commissions by submitting a written or electronic (via email) request to the Secretary of the Synod, who shall provide such minutes according to the policy of the Board of Directors.

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3.3.4 The Board of Directors of the Synod is the legal representative of the Synod and the custodian of all the property of the Synod. It shall be accountable to the Synod in convention for the discharge of its duties.

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3.3.4.7 The Board of Directors shall serve as the custodian of all the property of the Synod as defined in Bylaw 1.2.1 (q). Except as otherwise provided in these Bylaws, it shall have the authority and responsibility with respect to the property of the Synod as is generally vested in and imposed upon a board of directors of a corporation.

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(b) It may, however, delegate to any agency of the Synod powers and duties with respect to property of the Synod for which such agency of the Synod has direct supervisory responsibility.

(c) Such delegation shall be in writing and shall be subject to change at any time by the Synod's Board of Directors provided that reasonable deliberations, as determined by the Board of Directors, take place with such agency prior to the change.

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3.10.6.4 The board of regents of each institution shall become familiar with and develop an understanding of pertinent policies, standards, and guidelines of the Synod and the Board of Directors of Concordia University System.

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(h) It shall take the leadership in assuring the preservation and improvement of the assets of the institution and see to the acquisition, management, use, and disposal of the properties and equipment of the institution within the guidelines set by the Board of Directors of The Lutheran Church—Missouri Synod.

(i) It shall operate and manage the institution as the agent of the Synod, in which ownership is primarily vested and which exercises its ownership through the Board of Directors as custodian of the Synod's property, the Board of Directors of Concordia University System, and the respective board of regents as the local governing body. Included in the operation and management are such responsibilities as these:

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(5) Serving as the governing body corporate of the institution vested with all powers which its members may exercise in law either as directors, trustees, or members of the body corporate, unless in conflict with the laws of the domicile of the institution or its Articles of Incorporation. In such event the board of regents shall have power to perform such acts as may be required by law to effect the corporate existence of the institution.

(6) Establishing and placing a priority on the capital needs of the institution and determining the plans for the maintenance and renovation of the buildings and property and purchase of needed equipment, but having no power by itself to close the institution or to sell all or any part of the property which constitutes the main campus.

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3.6.6.1 The Board of Directors of the Concordia University System has authority with respect to the Synod's colleges and universities....

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3.6.6.5 In keeping with the objectives and the Constitution, Bylaws, and resolutions of the Synod, the Board of Directors of Concordia University System shall

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(h) have authority, after receiving the consent of the Board of Directors of the Synod by its two-thirds vote and also the consent of either the Council of Presidents by its two-thirds vote or the

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appropriate board of regents by its two-thirds vote, to consolidate, relocate, separate, or divest a college or university.

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Divest. Equivalent to divest (q.v.) **Devest.** To deprive or dispossess of a title or right (*e.g.* an estate). *Black's Law Dictionary, Fifth Edition (1979)*

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Question 1: How are the assets of a University liquidated?

Opinion: Synod's Constitution places the authority of all of Synod's property with the Synod's Board of Directors (BOD) except "in those areas where it [the BOD] has delegated such authority to an agency of the Synod or where the voting members of the Synod through the adoption of bylaws or by other convention action have assigned specific areas of responsibility to separate corporate or trust entities, and as to those the Board of Directors shall have general oversight responsibility as set forth in the Bylaws" (Const. Art. XI E 2).

This BOD authority concerning Synod's property is repeated in Bylaws 3.3.4 and 3.3.4.7. The property of Synod is defined in Bylaw: 1.2.1(q) and includes all property of an agency of Synod. A Concordia University is an agency of Synod, making all the property of the Concordia University property of the Synod. Board of Directors Policies 5.4.1.2f. have addressed, in general, the delegation of property authority to college and university boards of regents, which delegation remains subject to the Bylaw requirement (3.10.6.4[i][6]) that a board of regents has "no power *by itself* to close the institution or to sell all or any part of the property which constitutes the main campus."

A board of regents may validly liquidate the property of a college or university under either of two circumstances. It may do so:

- (1) as part of a divestiture directed by Concordia University System under Bylaw 3.6.6.5 (h); or it may do so
- (2) having requested and obtained appropriate approvals (Bylaw 3.10.6.4 [i][6]), as when forced to exercise its fiduciary duties in a condition of financial emergency.

As the *by itself* of Bylaw 3.10.6.4[i][6] implies, the execution of a closure or "liquidation" of a college or university (whether initiated by Concordia University System under Bylaw 3.6.6.5 [h] or by the board of regents itself, on account of operating conditions) does rest with the board of regents, as the governing body corporate of the institution (Bylaw 3.10.6.4 [i][5]), but requires the consent of those with oversight authority, namely, the boards of directors of the Synod and of Concordia University System.

Bylaws do not stipulate limits as to how much of the institution's property may be divested in such a circumstance. There being no limit placed by the Bylaws the CCM can only conclude that the quantity of property and the kind of property that is the subject of the divestiture is the same property to which the above-noted authorities assented.

Question 2: (Another avenue of questions asked what paper trail must be established by Synod's Board of Directors. The questions focus on what can be done in private (executive session) by the BOD and what must be public, and what would constitute a proper form of "consent" allowing a board of regents to act "not on its own.")

Opinion: Synod's Constitution and bylaws are silent concerning this question. As such, the commission can only conclude that Missouri state law, if there is any state law on point, possibly may govern the answer to this question. The CCM states *possibly* because the Establishment clause of our Federal Constitution as well as the Missouri State Constitution may come into play. What the CCM can say is that the Constitution and Bylaws do not require the BOD to release every facet of its work (or these specific facets) in its public minutes.

While the fact that that BOD as an officer of the Synod (Const. Art. X A) is "in everything pertaining to [its] rights and the performance of [its] duties [is] responsible to the Synod (Const. Art. XI A 1)" implies

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that the conduct of its responsibilities (Const. Art. XI E 2) must be reviewable by the convention, this does not imply that the BOD cannot take, when necessary, confidential business actions. The BOD has both a fiduciary duty and a bylaw obligation to avoid “creating potential liability” (Bylaw 1.5.1.3). The BOD is the entity with fiduciary responsibility for the property and business of corporate Synod and must be the entity to determine what is suitable for release to public minutes. Issues surrounding the potential or actual closure of a college or university could understandably be very sensitive, and have the potential, if disclosed prematurely or unnecessarily, to cause significant harm to the business operations of the school, the Concordia University System, and the Synod. The BOD has policies relating to executive session (BOD Policy Manual section 2.4.8) providing for its holding confidential such material, and neither these policies nor their application to material relating to school closure are inconsistent with the Constitution or Bylaws of the Synod.

Bylaw 1.5.3.5 states “[a]ll agencies of the Synod shall develop policies and procedures for making available official minutes of their meetings...” Agencies by their very nature manage property that belongs essentially to the Synod, on behalf of Synod’s constituent congregations, and their actions with regard to that property are to be reported for examination by the Board of Directors and by the Synod as a whole. Corporate Synod and its Board of Directors are not “an agency of the Synod,” Bylaw 1.2.1 (a), and therefore not subject to Bylaw 1.5.3.5.

As a corollary, there are no magic words to signify “consent” to the divesting of property. The CCM would expect “consent” to be worded in language easily understood by whoever must be assured that proper “consent” has been given, such as Concordia University System, Synod’s Board of Directors, or the board of regents of the school.

Question 3: A third line of questions regarded filling vacancies on a board of regents and length of service. These are summarized as follows: In the event that vacancies occur on a board of regents (Bylaw 3.10.6.3), what remedy does a board of regents have if the appointing body fails or neglects to fill the vacancies?

Opinion: The Bylaws of the Synod do not address a remedy for failure to fill a university/college board of regents vacancy. An agency concerned that relevant bylaws are not being carried out as to filling vacancies should contact the appointing body or the President of the Synod under Bylaw 3.3.1.2 (c).

Question 4: According to the Constitution and Bylaws of the Synod, when, and under what circumstances, is a board of regents of a “closed” institution considered dissolved or dismissed?

Opinion: The Bylaws do not go into detail on the topic of the discharge of the members of a board of regents for a closed university/college. The question is one typically dealt with in state nonprofit corporate law.

Commission on Constitutional Matters

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