

Supreme Court No. A10-859

STATE OF MINNESOTA
IN SUPREME COURT

Crossroads Church of Prior Lake MN,

Relator,

vs.

County of Dakota,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

Issue I. Did the Tax Court correctly determine that Relator did not meet the requirements of Minn. Stat. § 272.02, subd. 38(b), thereby holding that the subject property was not exempt from property taxes in 2008?

The Tax Court held: Yes.

Apposite Authorities: *State v. American Fundamentalist Church (In re Delinquent Real Property Taxes)*, 530 N.W.2d 200 (Minn. 1995); *Jackson v. Mortgage Electronic Registration Systems Inc. (MERS)*, 770 N.W.2d 487 (Minn. 2009).

Issue II. Did the Tax Court's analysis violate Relator's Constitutional freedom of contract rights when it concluded that Relator had not acquired the property under an enforceable contract prior to July 1, 2008?

The Tax Court held: This issue was not raised by Relator before the Tax Court in the record below and Respondent asserts that it should not now be addressed. However, Respondent has produced arguments showing that no such freedom of contract rights were violated.

Apposite Authorities: *Powers v. State*, 731 N.W.2d 499 (Minn. 2007); *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406 (Minn. 1994); *In re Schmidt*, 443 N.W.2d 824, 830 (Minn. 1989); *Thayer v. American Fin. Advisors, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982).

Issue III. Does Minn. Stat. § 272.02, subd. 38(b) violate the Minnesota Constitution when it places churches and government entities in the same class for taxation purposes?

The Tax Court held: This issue was not raised by Relator before the Tax Court in the record below and Respondent asserts that it should not now be addressed. However, Respondent has produced arguments showing that this statute does not violate the Minnesota Constitution.

Apposite Authorities: *Ideal Life Church of Lake Elmo v. County of Washington*, 304 N.W.2d 308 (Minn. 1981); *State v. Second Church of Christ, Scientist*, 185 Minn. 242, 240 N.W. 532 (1932)

Issue IV. Does Minn. Stat. § 278.03, subd. 1(3) violate the Establishment Clause by requiring a church to establish financial hardship beyond sworn affidavit testimony of a church official?

The Tax Court held: This issue was not raised by Relator in the record below regarding its motion for waiver of taxes and Respondent asserts that it should not now be addressed. Moreover, this issue became moot once summary judgment was granted in favor of Respondent, and would remain moot even if summary judgment is reversed. Further, the Tax Court did not require Relator to produce specific evidence showing hardship.

Apposite Authorities: *Powers v. State*, 731 N.W.2d 499 (Minn. 2007); *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406 (Minn. 1994); *In re Schmidt*, 443 N.W.2d 824, 830 (Minn. 1989); *Thayer v. American Fin. Advisors, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982).

STATEMENT OF THE CASE

The issue argued before the Minnesota Tax Court was whether, pursuant to Minn. Stat. § 272.02, Subd. 38(b) (2008), Relator “acquired” the subject property in Burnsville prior to July 1, 2008, such that the property was entitled to a property tax exemption for assessment year 2008 for property taxes payable in 2009. A taxable entity owned the subject property until September 2008, at which time legal title was conveyed to Relator Crossroads Church. (App.17-18)¹ The parties brought cross-motions for summary judgment. Respondent’s exhibits were submitted as attachments to the Second Affidavit of Joel Miller (App.1-9), the Third Affidavit of Joel Miller (App.10-13) and the Second Affidavit of Suzanne W. Schrader (App.62-65). The Tax Court performed an in-depth analysis of the meaning of the term

¹ References to Respondent’s Appendix attached hereto will be by citing to “App.” followed by the relevant page number.

“acquired” in making its decision below. By a decision dated April 13, 2010, the Tax Court issued a final Order denying Relator’s motion for summary judgment and granting Respondent’s motion for summary judgment, determining that the real property purchased by Relator in Burnsville (“subject property”) was not entitled to a property tax exemption in 2008 under Minn. Stat. § 272.02, subd. 38(b). (App.74-92)

Relator filed an appeal of the Tax Court’s Order in the Minnesota Supreme Court. Respondent subsequently brought a motion to dismiss or for denial of oral argument, as Relator had not timely filed its brief. These motions were denied. Relator then brought a motion for extension of time so that it could request transcripts. This motion was denied. Consequently, transcripts are not part of the record on appeal in this case.

STATEMENT OF FACTS

Relator Crossroads Church of Prior Lake MN, Relator has claimed it is entitled to a property tax exemption for assessment year 2008, the year in which it purchased certain property in Burnsville, Minnesota (“subject property”). On January 2, 2008, the subject property was owned by a taxable entity and was classified as commercial. (App.14) Relator purchased the property on September 8, 2008, for \$4,500,000, as documented in the Certificate of Real Estate Value (CRV) (App.20-21). The CRV was signed by two representatives of Relator, including Craig Johnson, a Lead Pastor at Relator’s church. (App.50)

The application for property tax exemption submitted by Relator on December 30, 2008 further indicates that Relator “acquired” the subject property in September 2008. (App.22-23) The application was signed by a representative of Relator, Marc Ericson. (App.59) Relator’s mortgage on the subject property is in the amount of \$3,000,000.00 and is dated September 8, 2008. (App.15-16) The Warranty Deed for the subject property was signed on September 8, 2008, and filed with Dakota County on September 11, 2008. (App.17-18) A copy of a building permit issued to Relator on September 19, 2008, contains the comment “remodel for future church” at an estimated cost of \$175,000. (App.19) The purchase agreement for the subject property shows a date of March 6, 2008 that was originally typed in the date blank, but that date was crossed-out and it was redated on the date the agreement was signed. The agreement was not signed by the parties to the sale until August 28, 2008. (App.24-27). The contingency addendum to the purchase agreement indicates 5 criteria that the agreement was contingent upon. (App.27)

The earnest money check provided by Relator was dated April 10, 2008, but it was not deposited until August 25, 2008. (App.28). This check was not made out to the seller of the subject property, but to EFH Realty Advisors, Inc., an entity run by Mr. Gene Happe, that purchased Relator’s Prior Lake property (App.29-30) and that also acted as broker of the sale of the subject property. (App.11, ¶5) The Affidavit of Greg Dahling, an architect, indicates that he was hired by EFH Company, an entity that he believed represented *Relator*, to

prepare a site plan and concept floor plan of the subject property to be submitted to the City of Burnsville. (App.53) The Burnsville Planning Commission minutes state that Mr. Happe represented Relator Crossroads Church at its meeting on May 17, 2008. (App. 41) Gene Happe was also the owner of the property that sold to Heise & Heise, the former owner of the subject property. (App.11, ¶4)

The Certificate of Real Estate Value for the sale of Relator's former church building in Prior Lake indicates a sale date of September 8, 2008. (App.29-30) The property was sold on that date by Relator, an exempt entity, to EFH Realty Advisors, Inc., a taxable entity. A Scott County parcel sheet indicates that the Prior Lake property remained classified as exempt for 2008 taxes payable in 2009. (App.31-32) Relator's purchase of the subject property in Burnsville was contingent on the simultaneous closing of the sale of Relator's Prior Lake property. (App.27, ¶5)

On May 19, 2008, the Burnsville Economic Development Authority ("EDA) met to consider whether to grant or deny an amendment to the Contract for Redevelopment between itself and Heise & Heise ("Heise"), the owner of the subject property on that date, to allow Crossroads Church to purchase the building owned by Heise and to continue the payment in lieu of taxes agreement with the City of Burnsville. (App.33) The EDA voted to deny such amendment, thereby preventing the approved use of the subject property by Crossroads Church, and requiring the applicant to pursue different avenues to gain approval for church use. On May 27, 2008, the Burnsville Planning Commission met to

consider the application for a comprehensive plan amendment and planned unit development amendment to allow Crossroads Church to operate at the subject property in Burnsville. (App.34-45) The Planning Commission consists of 5-6 adult residents of Burnsville who are appointed to this board, and make recommendations to the City on issues related to land use and development in Burnsville. (App.4, ¶11.b) It was noted that the original application for the amendment was dated March 7, 2008, and that the applicant (Heise) granted an extension to the 60-day deadline until July 3, 2008 for the application to be ruled on by the City. (App.34) The Planning Commission voted 3-2 on May 27, 2008 to approve of Heise's application to sell his property to Relator for use as a church (App.45), but the application still needed to be approved by the City Council, and city staff was in opposition to this project. (App.39)

On June 17, 2008, the Burnsville City Council met to consider the Heise application for a Comprehensive Plan Amendment and Planned Unit Development to allow Crossroads Church to purchase and operate the subject property as a church. (App.46-47) It was noted that staff recommended denial of the application. The City Council requested further documentation and did not rule on this issue at that meeting. On July 8, 2008, the Burnsville City Council voted 3-2 to approve Heise's application to allow the subject property to be used as a church. (App. 48-49) This is the first date that the subject property could legally be used as a church. Heise and Heise, LLC, was still the legal owner of the subject property on this date. (App.17)

In the Affidavit of Pastor Craig Johnson, (App.50-52), at paragraph 17, the Senior Pastor at Crossroads Church states that Relator had been provided with a key to the subject property on April 21, 2008. Paragraph 21 of the affidavit states that "between the dates that the key was handed over and the formal signing of the purchase agreement [August 28, 2008], we continuously and actively sought financing for the project," but he does not state when financing was approved. Obtaining financing was one of the contingencies in the purchase agreement. (App.27) The (second) Affidavit of Pastor Craig Johnson (App.60) claims that it was a hardship for the church to pay the first half of property taxes due in 2009 and that the church had not been able to "set aside money specifically designated to pay" property taxes. Tax records in Dakota County show that Relator made a timely payment of its first half of property taxes in 2009, and no penalties were charged. (App.61).

The purchase agreement (App.24-27), escrow settlement statement (App.54-55), and Closing Acknowledgment (App.56-58) all indicate that all expenses (including utilities and taxes) were prorated to the date of closing, September 8, 2008, and Relator only paid such expenses after the closing date. The Affidavit of Mark Ericson (App.59) indicates that although he filled out the application for exemption and indicated that the church "acquired" the property in September 2008, he wanted to clarify that he believed the church "acquired possession" on a different date, although he does not say when that date was. He does not state that the application had an error and that Relator "acquired"

the property other than in September 2008. He only states that he believes “possession” was “acquired” on a different date.

The parties researched legislative history to discover the meaning of the word “acquired” in Minn. Stat. § 272.02, subd. 38(b). Relevant research showed that the date of “July 1” in this statute had previously been “August 1” but was changed in 1991. (App.66-67) The Department of Revenue stated this change was to comply with the July 1 deadline to finalize assessments. (App. 68-69) There was also special legislation in 1992 to exempt a particular church from this statute’s requirements. (App.70-72) The sale of that church property provides insight into interpreting the meaning of “acquired.”

The Tax Court ruled by its decision on April 13, 2010 to grant Respondent’s motion for summary judgment, and to deny Relator’s motion for summary judgment, thereby finding that Relator’s property did not meet the requirements for exemption in 2008 under Minn. Stat. § 272.02, subd. 38(b), because it had not “acquired” the subject property by July 1, 2008. (App.74-92)

Standard of Review: The principal issue in this appeal is whether the Tax Court properly interpreted and applied Minn. Stat. § 272.02, subd. 38(b,) correctly. This Court must review tax court decisions pursuant to Minn. Stat. § 271.10 (2009) to determine if they are supported by the evidence and in

conformity with the law, and to determine if errors of law were committed.² In Minnesota, property is presumed taxable unless it is specifically exempt by law.³ As a general matter, because “all property is presumed taxable and exemption from property tax liability is an exception to this general rule, exemptions are to be strictly construed and parties seeking exemptions bear the burden of proof.”⁴ Respondent asserts, as set forth below, that a strict construction of Minn. Stat. § 272.02, subd. 38(b), requires the term “acquired” to be interpreted as the acquisition of title to the property, rather than Relator’s vague definition as to “gain by any means.” Respondent asserts that the Tax Court’s decision was correct as described below, and should be affirmed by this Court.

ARGUMENT

I. **The Tax Court correctly determined that Relator did not meet the requirements of Minn. Stat. § 272.02, subd. 38(b), thereby holding that the property was not exempt from property taxes in 2008.**

Minnesota Statutes § 272.02, subd. 38(b) (2008), states in pertinent part that: “property ... that is subject to tax on January 2 that is acquired before July 1 of the year is exempt for that assessment year if the property is to be used for an exempt purpose” *Id.* The Tax Court held that Relator’s property was not

² *Care Institute, Inc.-Roseville v. County of Ramsey*, 612 NW2d. 443, 445 (Minn. 2000), *citing* Minn. Stat. § 271.10, Subd. 1; *Community Mem'l Home at Osakis, Minn., Inc. v. County of Douglas*, 573 N.W.2d 83, 86 (Minn. 1997).

³ *Camping and Educ. Found. v. State*, 282 Minn. 245, 250, 164 N.W.2d 369, 372 (1967).

⁴ *Skyline Preservation Foundation v. County of Polk*, 621 N.W.2d 727, 731 (Minn. 2001), *citing* *Am. Ass'n of Cereal Chemists v. County of Dakota*, 454 N.W.2d

exempt from property taxes in 2008, for taxes payable in 2009, because Relator did not “acquire” the property prior to July 1, 2008, and pursuant to this statute, the property was taxable in 2008. The definition of “acquired” under this statute is the key area of dispute in this case.

A. Relator did not obtain legal title to the subject property prior to July 1, 2008.

Numerous documents in the record below show that Relator took legal title to the property in September 2008.⁵ Relator did not provide any evidence to show that the seller relinquished its legal title to the property prior to this date. Respondent asserts that September 8, 2008, was the date Relator “acquired” the subject property and that pursuant to Minn. Stat. § 272.02, subd. 38(b), the property remained taxable for 2008. Correspondingly, Relator’s former exempt property in Prior Lake sold to a *taxable* entity on September 8, 2008, but remained *exempt* for 2008 pursuant to Minn. Stat. 272.02, subd. 38. (App.11-12)

912, 914 (Minn. 1990); *Junior Achievement of Greater Minneapolis, Inc. v. State*, 271 Minn. 385, 387, 390, 135 N.W.2d 881, 883, 885 (1965) (*emphasis added*).

⁵ These documents include, but are not limited to the CRV for Relator’s purchase of the subject property (App.20-21), and Relator’s own application for exemption, which indicated that it “acquired” the property in September 2008. (App.22-23) Relator obtained a mortgage in the amount of \$3,000,000 on September 8, 2008. (App.15-16) The warranty deed (App.17-18) was signed on September 8, 2008. The escrow settlement statement (App.53-54) indicates that the closing took place on September 8, 2008, and that the Relator paid prorated property taxes of \$30,311.36 at the closing. The closing acknowledgment (App.55-57) indicates this same closing date, but also indicates, consistent with the Purchase Agreement (App.25, ¶7), that the seller of the subject property would pay property taxes and expenses up to the date of closing, and the Relator would pay such expenses after the date of closing.

B. An analysis of exemption case law shows that Relator did not “acquire” the subject property prior to July 1, 2008, because it did not own the property prior to that date.

The 1995 Minnesota Supreme Court case *State v. American Fundamentalist Church (In re Delinquent Real Property Taxes)* aptly summarized the tax exemption law as applied to churches as follows:

Church property qualifies for tax exemption under both Minn. Stat. § 272.02, subd. 1(5) (1989 & 1995 Supp.) and Minn. Const. art. 10, § 1. [footnote omitted]. Minn. Stat. § 272.02, subd. 1(5) reads as follows:

All property described in this section to the extent herein limited shall be exempt from taxation * * * all churches, church property, and houses of worship. Minnesota Constitution Article 10, Section 1 provides that:

Churches, church property, houses of worship, * * * shall be exempt from taxation except as provided in this section.

Both church buildings and church parsonages have been held exempt, *State v. Second Church of Christ, Scientist*, 185 Minn. 242, 240 N.W. 532 (1932). . . . However, property owned by a church but not used for church purposes is denied exempt status. *State v. Union Congregational Church*, 173 Minn. 40, 216 N.W. 326 (1927).

We determine whether a property is tax exempt under Minn. Stat. § 272.02, subd 1(5), using a two part test: does a church own the property, and is the property used for the purpose for which the tax exemption was created?⁶

In *State v. American Fundamentalist Church* quoted above, the Supreme Court clarified that a church must both “own” the church property and use it for church purposes for it to qualify for a property tax exemption. Reading this case

⁶ *State v. American Fundamentalist Church (In re Delinquent Real Property Taxes)*, 530 N.W.2d 200, 204 (Minn. 1995) (*emphasis added*). It should be noted that since this 1995 decision, Minn. Stat. § 272.02, subd 1 was amended such that the provision applicable to churches is now subdivision 6 as opposed to 1(5) as was the case in 1995.

side-by-side with the language of Minn. Stat. § 272.02, subd. 38b, set forth above, it is axiomatic that a condition of property tax exemption in 2008 was that the property must have been “owned” by the Relator prior to July 1, 2008, and that therefore “acquired” is equated with “owned” under that statute.

Relator has cited to various definitions of the word “acquired” in an effort to show that this term does not always mean to “own” property. However, Relator’s definitions do not specifically relate to the acquisition of real estate. On page 13 of its brief, Relator cites the case *Anchor v. Columbia Electric Co. et al.*, 61 Minn. 510, 63 N.W. 1109 (1895) to support its theory that “acquire” means “to gain by any means.” *Anchor* is not applicable to the present case for several reasons. First, *Anchor*, which was an 1895 case, did not require the Supreme Court to determine the form of ownership of real estate. In *Anchor* the issue was whether the defendant corporation was merely a manufacturing company, as was claimed by the defendant stockholder, or whether it was organized to be more than a manufacturing business. The Court found that the corporation’s articles of incorporation stated that the business had the authority to “acquire” the operations of electric plants. The Court cited to the Webster definition of “acquired” as “to gain by any means,” in determining that the company could speculate in ventures beyond manufacturing. The Court did not address whether “acquired” meant to take legal or equitable title of real estate; it simply was not relevant to that case. Therefore, *Anchor* is not relevant to the present case.

The case *Clarno v. Gamble-Robinson Co.*, 190 Minn. 256, 251 N.W. 268 (1933), cited on page 13 of Relator's brief, further does not support Relator's argument. *Clarno* did not apply to real estate, but to automobiles. The issue was whether the phrase "automobiles thereafter acquired" in the Appellant's insurance policy referred to automobiles that were temporarily used but not purchased. The Court reviewed the Webster definition of acquired ("to gain by any means") but then looked at the facts and determined that the insurance policy was not intended to cover a temporary possession of an automobile that was not purchased or leased. The Court in *Clarno* actually refused to find that "acquired" meant "to gain by any means" in that case. In the present case, because exemptions are to be strictly construed, Respondent asserts that as in *Clarno*, such a vague definition of "acquired" should not be applied in this case.

On page 13 of its brief, Relator makes a bold statement that the Minnesota legislature chose to use the "gain by any means" definition of "acquired" when it enacted Minn. Stat. § 272.02, subd. 38, but there is no evidence provided to support this statement.⁷ Simply because the Minnesota Supreme Court referred to this definition in the *Anchor* case in 1895 and in the *Clarno* case in 1933, this does not mean that legislature intended the same definition be applied in the statute it enacted years later. Further, even the *Clarno* court rejected the "gain by any means" definition in the holding of that case. Therefore, Relator has not

⁷ The legislative history of this statute does not indicate that this definition was contemplated by legislators. See section I.D, beginning on page 28 herein.

provided any credible support for applying the “gain by any means” definition of “acquired” to the present case.

On page 13 of its brief Relator claims it “acquired” the property because it “paid part of the purchase price, took possession of the property, and took control of the property [and] made significant improvements toward zoning changes in the months before the July 1, 2008 cutoff....” Respondent disputes all of the claims made in this sentence. First, Relator had not “paid part of the purchase price” prior to July 1, 2008. In fact none of the purchase price was paid to the seller until the date of closing.⁸ Second, Relator’s statements that it “took possession of the property” and “took control of the property” prior to July 1, 2008, further do not have merit for reasons described in section I.C.6, beginning on page 26 herein. Third, Relator’s statement that it “made significant improvements toward zoning changes in the property” prior to July 1, 2008, also has no merit and is irrelevant, because the zoning change for church use was not granted by the City of Burnsville until July 8, 2008. (App.49) It further was not guaranteed prior to July 1, 2008, that the Burnsville City Council would approve the zoning change, as the City of Burnsville staff had consistently recommended against granting such change (App.39, 46).⁹

⁸ (See section I.C.2. on pages 17-20 herein for a detailed analysis of Relator’s earnest money payment.)

⁹ See footnote 16 on page 25 herein for a detailed description of actions taken by the City of Burnsville.

There further is no evidence to show that Relator made any improvements whatsoever to the property prior to July 1, 2008. The Affidavit of Craig Johnson claims that Relator made certain improvements to the subject property between April 21, 2008, and August 28, 2008, (App.52, ¶23), but did not specify that any of these events took place prior to July 1, 2008. In fact the first building permit obtained by Relator was dated September 19, 2008, (App.19), and specified that the property was for “remodel for future church.” Respondent asserts that this characterization of a “future church” made by Relator in September 2008 provides further evidence that there was no church use prior to July 1, 2008.

C. Relator did not gain equitable title to the subject property prior to July 1, 2008.

Relator has based its arguments on a claim that it obtained *equitable title* prior to July 1, 2008, and has basically equated its situation with a contract for deed purchase wherein a buyer makes a down-payment to a seller and upon doing so, gains equitable title to the property. Respondent asserts that such an analysis does not apply to the present case for the following reasons:

1. Contract for deed case law does not apply to this case.

Respondent does not dispute the well-settled case law stating that the legal and equitable titles to a property are separated under a sale by contract for deed. *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 121 (Minn. 1981). However, the present case did not involve a sale by contract for deed, but rather involved a standard purchase agreement that was not signed until August 28,

2008, and that contained five contingencies, some of which were not met until the closing on September 8, 2008. (App.27) Despite this distinction, Relator has relied heavily on a comparison to contract for deed cases to support its erroneous argument that it gained “equitable title” to the property prior to July 1, 2008.¹⁰ A review of the cases cited by Relator shows that the phrase “executory contract for the sale of land” has been used by the Court to mean the same thing as a contract for deed purchase of land, and that therefore, Relator’s attempt to construe its purchase agreement as an “executory contract for the sale of land” is no more effective than to construe it as a contract for deed.¹¹

Contracts for deed are considered “sales” under Minnesota law at the point of execution and down payment. Minn. Stat. § 272.115. This statute further requires a Certificate of Real Estate Value (“CRV”) to be filed for sales of real estate, specifically including contracts for deed. Contracts for deed also must be recorded pursuant to this statute, meaning that the holder of an equitable interest under a contract for deed has record title to the property, as opposed to the present case, where Relator’s alleged equitable title was not recorded. This

¹⁰ Among the contract for deed cases cited by Relator are *In re S.R.A.*, 219 Minn. 493, 18 N.W.2d 442 (1945), *aff’d sub nom. S.R.A., Inc. v. State*, 327 U.S. 558, 66 S. Ct. 749, 90 L. Ed. 851 (1946); *Lenman v. Jones*, 222 U.S. 51, 32 S.Ct. 18, 20 (1911); *Village of Hibbing v. Commissioner of Taxation*, 217 Minn. 528, 14 N.W.2d 923 (1944); *Greenfield v. Olson*, 143 Minn. 275, 173 N.W. 416 (1919), and *Stearns v. Kennedy*, 94 Minn. 439, 103 N.W. 212 (1905).

¹¹ Relator further cites the Illinois cases *Lockner v. VanBebber*, 364 Ill. 636, 5 N.E.2d 460 (Ill. 1936) and *Young v. Sinsabaugh*, 342 Ill. 82, 173 N.E. 784 (1930), neither of which apply to the present case, as they both pertained to land passing

illustrates another reason why Relator's claim of equitable title is not comparable to equitable title obtained under a contract for deed. Clearly, a purchase agreement is not considered a "sale" under Minn. Stat. § 272.115 until the proposed sale has closed, at which time a CRV must be filed. Therefore, the present case did not involve a "sale" that was completed prior to July 1, 2008, and any attempted comparisons to contract for deed situations are not analogous to the present case. Respondent believes that Relator did not gain equitable title at any point prior to September 8, 2008, the date it acquired legal title.

2. Relator's earnest money check was not a "down payment" made to the seller in April 2008, because it was not paid to the seller from escrow until the closing on September 8, 2008.

As is documented in the escrow settlement statement (App.54) and the purchase agreement contingency addendum (App.27), the \$10,000.00 earnest money check provided by Relator in April 2008 was put into an escrow account, and was not actually paid to the seller of the subject property until the closing, on September 8, 2008. Despite this, Relator has erroneously claimed throughout its brief that it made a *down payment* to the *seller* in April 2008, and at that point, a binding contract was formed. Contrary to the numerous contract for deed cases cited by Relator, when the \$10,000.00 earnest money check was provided by Relator in April 2008: 1) there was no signed agreement; 2) the check was made

by will rather than by purchase agreement, and the issues relevant to this case were not present in those cases.

out to the broker EFH Realty Advisors, Inc., and not to the seller;¹² 3) the check amount was not withdrawn from Relator's account until August 25, 2008, when it was deposited into an escrow account (pursuant to the unsigned purchase agreement) and at that time the seller had no right or access to this money, and 4) the Escrow Settlement Statement indicates that the \$10,000 in earnest money was not actually transferred to the seller until the date of closing. (App.54) When Relator wrote the earnest money check in April 2008, it did so pursuant to a written purchase agreement form (yet unsigned) stating that the earnest money would be deposited within three days of the signing of the purchase agreement. (App.27) The Purchase Agreement was not signed until August 28, 2008. (App.27) Therefore, as of July 1, 2008, Relator knew that its check still had not been deposited, as the agreement was still unsigned.

Relator was also on notice when it wrote the earnest money check in April that the check was to be "deposited with Dakota County Abstract who will act as escrow agent." (App.27) The endorsement on the back of the check confirms that the check was deposited into an escrow account on August 25, 2008.

(App.28) The fact that the money was placed in escrow rather than paid directly

¹² Mr. Gene Happe, Principal of EFH Realty, played a role in all three sales that closed simultaneously on September 8, 2008. Those sales were: #1. Sale of Petitioner's former church property in Prior Lake, in which EFH Realty was the purchaser of the property;(App.10, ¶3 and App.29), #2. Sale of the subject property by Heise & Heise to Petitioner; in which Mr. Happe acted as broker for both parties to the sale, (App.11, ¶5, and App.41 and 52, which actually indicate that *Relator* was Mr. Happe's client), and #3. Sale of a new Burnsville property to

to the seller further confirms the incomplete nature of this transaction until the date legal title transferred. If the purchase agreement had never been signed, the check presumably would have been returned to the Relator. Even if the check had been paid to the seller prior to July 1, 2008, the purchase agreement could have been cancelled at any point up to and including September 8, 2008, if any of the contingencies to the sale had not been met, and at that point, the money would presumably have been returned to Relator.

Regarding the contract for deed case *In re S.R.A.*, 219 Minn. 493, 18 N.W.2d 442 (1945), *aff'd sub nom. S.R.A., Inc. v. State*, 327 U.S. 558, 66 S. Ct. 749, 90 L. Ed. 851 (1946), Relator states on page 16 of its brief that the S.R.A. Court held that “a mere partial payment of the purchase price is enough to establish equitable title.” However, for reasons already discussed, Relator’s earnest money check in the present case did not amount to a “partial payment” to the seller, as the seller did not get that money from escrow until the closing. In *S.R.A.*, the down payment was actually paid to the seller at the time the contract was made, as is typical with most contracts for deed. *S.R.A.* therefore does not apply to the present case.

Relator also cites to *Lenman v. Jones*, 222 U.S. 51, 32 S.Ct. 18, 20 (1911) on page 16 of its brief, quoting language that clearly applies to a contract for deed. A review of that case confirms that it pertained to an executed contract

Heise & Heise (former owner of subject property), in which Mr. Happe’s company was also the seller of that property. (App.11, ¶4).

where a down payment was made to the seller. There were no reported contingencies to the sale. Again, Respondent does not dispute that a purchaser of a contract for deed gains equitable title, but claims that situation is not applicable to the present case. Relator has also cited to the case of *Village of Hibbing v. Commissioner of Taxation*, 217 Minn. 528, 14 N.W.2d 923 (1944) in support of its theory that “equitable title of the purchaser determines taxation.” However, *Village of Hibbing*, similar to *S.R.A.* and *Lenman* discussed above, can be distinguished as it involved equitable title acquired by a vendee under a contract for deed and does not apply to the present case.

3. Case law defining the requirements of “equitable title” establishes that Relator did not gain equitable title prior to July 1, 2008.

The Minnesota Supreme Court recently stated the following with regard to equitable title:

In the context of real property interests, equitable title refers to “a beneficial interest in property” and “gives the holder the right to acquire formal legal title.” Black’s Law Dictionary 1523. Likewise, an equitable assignment of a real property interest is one which “although not legally valid, will be recognized and enforced in equity.” *Id.* at 128.

Jackson v. Mortg. Elec. Registration Sys., 770 N.W.2d 487, 497 (Minn. 2009).

Relator claims it had a right to specific enforcement of its oral contract in April 2008 when it provided the earnest money check. Respondent disputes this.

Clearly, if a party makes an offer and provides an earnest money check, but the agreement is not signed nor the check cashed, the intended purchaser may have made an offer, but the seller would not be obligated to accept it. The Court

certainly would not have ordered specific performance at that point, especially when considering that the purchase agreement had five contingencies that still had not been met. See section II.C.5. beginning on page 23 herein.

Relator has cited to *Goblirsch v. Heikes*, 547 N.W.2d 89 (Minn. App. 1996) in support of its theory that its earnest money check was “paid” when it was provided to the broker in April 2008. However, *Goblirsch* is distinguishable from the present case for two main reasons. First, *Goblirsch* pertained to the purchase of goods, specifically tractors. Second, the buyer of the tractors gave a check for full payment for the tractors to the seller, and then received the tractors in exchange for the check. When the seller failed to cash the check, the buyer allocated its money to other uses and put a stop payment on the check. The seller’s attempt to cash the check five years later was to no avail, and he brought a claim against the buyer. The Court did not accept the buyer’s claim that he had “paid” for the tractors when he gave the seller the check, noting that the sale was conditioned on the check ultimately being drawn from the buyers account. The Court required the buyer to pay for the tractors. *Goblirsch* at 93 (Minn. App. 1996) The present case was also unlike *Goblirsch* because Relator’s earnest money check of \$10,000.00 was less than one percent of the \$4,500,000.00 purchase price of the subject property (App.20), and therefore did not constitute the full purchase price for the property, as was the case in *Goblirsch*.

4. The Statute of Frauds required the purchase agreement in this case to be in writing for it to be enforceable prior to July 1, 2008.

The purchase agreement provided by Relator was not enforceable, if at all, until August 28, 2008, the date it was signed.¹³ Unsigned contracts for the transfer of real estate are not legally enforceable pursuant to the statute of frauds, as follows:

Minn. Stat. § 513.05 (2008) Leases; Contracts for the Sale of Lands.

Every contract for the leasing for a longer period than one year or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the lease or sale is to be made, or by the party's lawful agent thereunto authorized in writing; and no such contract, when made by an agent, shall be entitled to record unless the authority of such agent be also recorded.

Id. (emphasis added). Relator has acknowledged that the parties signed the Purchase Agreement on August 28, 2008. Prior to that date, Relator only alleged that “an agreement was reached” in early 2008 (App.50, ¶6), or that in early March 2008 “a Purchase Agreement was drawn up to reflect the negotiated terms of the sale” (App.50, ¶11). Although Relator claims the late signing of the purchase agreement was somehow attributed to another entity’s intent to make a §1031 exchange of two other properties this is irrelevant. The fact remains that pursuant to the Statute of Frauds, the earliest date that the purchase agreement could have been enforced was August 28, 2008, and either party could have rescinded their oral agreement prior to that date.

¹³ The Tax Court below did not reach the issue of Statute of Frauds, because it ruled against Relator on other grounds. However, because Relator is asking this court to reverse the decision below, Respondent is reasserting its Statute of Frauds argument.

Relator claims to have acquired the subject property through equitable conversion, but the case of *Tollefson Dev., Inc. v. McCarthy*, 668 N.W.2d 701, 704 (Minn. App. 2003) specifically determined, based on case law of the Minnesota Supreme Court, that under the doctrine of equitable conversion, equitable title does not vest unless a written contract is executed, as follows:

Under the doctrine of equitable conversion, once parties have executed a binding contract for the sale of real estate, as here, equitable title vests in the vendee and the vendor holds only legal title as security for payment of the balance of the purchase price. *Stiernagle v. County of Waseca*, 511 N.W.2d 4, 5 (Minn. 1994); *In re S.R.A.*, 219 Minn. 493, 505, 18 N.W.2d 442, 449 (1945), *aff'd sub nom. S.R.A., Inc. v. State*, 327 U.S. 558, 565, 66 S. Ct. 749, 754, 90 L. Ed. 851 (1946).

Tollefson Dev., Inc. v. McCarthy, 668 N.W.2d 701 at 704 (Minn. App. 2003) (*emphasis added*). Therefore, even if equitable ownership could possibly be attained under a standard purchase agreement, such title would not exist until the parties executed a binding contract, which in the present case was August 28, 2008. However, there were still unfulfilled contingencies on that date.

5. Even if an unsigned purchase agreement were sufficient evidence of a contract for sale of real estate, Relator did not gain equitable ownership prior to July 1, 2008, because the agreement was contingent on requirements that were not met until after July 1, 2008.

A contingency in a purchase agreement provides an avenue for potential cancellation of the purchase agreement, in the event the contingency is not met. There is no evidence in the record that any of the five contingencies to the sale of the subject property had been met prior to July 1, 2008. In *Tollefson Dev., Inc. v.*

McCarthy quoted in the section above, the Court found that a corporation's equitable ownership in property was incomplete, and stated as follows:

An equitable title, obtained pursuant to a purchase agreement with unfulfilled contingencies, constitutes an insufficient interest in real property to maintain a partition action. Because these unfulfilled contingencies exist, appellant's equitable interest falls short of the standard necessary to demand conveyance of legal title. . . . In light of the inherent uncertainty created by the unmet contingencies that could preclude enforcement of the purchase agreement between appellant and James McCarthy, even appellant's future entitlement to obtain legal title remains unresolved. We conclude that the inchoate, unvested, and contingent features of appellant's equitable interest in the property preclude a legally sufficient basis for partition.

Tollefson Dev. at 706) (*emphasis added*). Relator's purchase agreement was contingent on five conditions.¹⁴ There is no evidence that any of the contingencies had been met by June 30, 2008.¹⁵ Relator has attempted to distinguish *Tollefson Dev.* because it pertained to a partition action, yet Relator has failed to provide any reasons why the general statements about equitable title found in *Tollefson Dev.* would not apply to the present case.

¹⁴ Although the purchase agreement and contingency addendum were still unsigned as of July 1, 2008, Relator has stated on page 25 of its brief that other than certain dates that were specified, all other provisions of the written purchase agreement formed the basis for its oral contract to purchase the subject property.

¹⁵ The five contingencies required that: 1) Relator enter into a purchase agreement for the sale of its Prior Lake church property; 2) the City of Burnsville grant approval for the subject property to be used as a church; 3) Relator obtain financing to purchase the subject property; 4) the City of Prior Lake grant approval for use of Relator's former church for a commercial purpose, and 5) the sale of the subject property close simultaneously with the sale of Relator's Prior Lake property. (App.27)

One of the contingencies in Relator's alleged purchase agreement stated "City of Burnsville's approval of Seller's property for use as a church." (App.27, ¶2) The City did not grant approval for the property's use as a church until July 8, 2008, and prior to that date, Burnsville city staff consistently recommended against such zoning change¹⁶. The city council voted 3 to 2 to approve of the church use at its meeting on July 8, 2008. (App.49) Any use of the subject property as a church prior to that date would have therefore been contrary to law.

¹⁶ Pastor Johnson states in paragraph 22 of his first affidavit (App.51) that the Burnsville City Planning Commission "accepted the plans on May 27, 2008." However, the Planning Commission is comprised of citizens who are appointed to make recommendations to the City Council; the commission itself has no power to officially rule on the use of the subject property. (App.4, ¶11.b). It also should be clarified that all attempts to get city approval for church use of the property were made by Heise & Heise, who at that time owned the subject property (App.40), but who later sold it to Relator on September 8, 2008.

The records from the Planning Commission meeting on May 27, 2008, indicate that city staff opposed the application for church use because the use was not consistent with the City's goals and expectations, and it was not consistent with the I-3 zoning or other uses in the industrial district. (App.4, ¶11.b and App.35,39) Pastor Craig Johnson spoke at this meeting and indicated that the church was "looking to relocate from Prior Lake" (App.42) and that he wanted to make sure that when the church got into the building that it was "in accordance with the codes." (App.43) With regard to the church in Prior Lake, he stated that "presently in our building now, it is open seven days a week." (App.44) These statements all seem to contradict statements made by Relator' counsel implying that Relator was occupying the subject property as early as April 2008. It should also be noted that on May 19, 2008, the Burnsville Economic Development Authority, comprised of members of the city council, voted to deny an amendment to the Contract for Redevelopment between itself and Heise & Heise to allow Relator to purchase the property and continue the payment in lieu of taxes agreement with the city. See (App.33).

As of the June 17, 2008, city council meeting, the Burnsville city staff still recommended the denial of the request for use of the property as a church and the council requested that further documentation be submitted. See (App.46-47).

Relator's purchase of the subject property was also contingent on the sale of Relator's former church property in Prior Lake (App.27), which did not close until September 8, 2008, the same date as the closing of the subject property. (App.29) The details of this other sale were not even finalized until late August 2008. (App.52, ¶ 25) This means that if the sale of the former church had not closed, Relator's purchase of the subject property could have been cancelled on the day of the scheduled closing.

In its Tax Court memoranda, Relator cited to *S.R.A., supra*, in support of its theory that open contingencies in the purchase agreement should not divest Relator of an equitable interest. In anticipation that Relator may cite to this in its reply brief, it should be noted again that *S.R.A.* involved a contract for deed, and there were no "contingencies" in *S.R.A.* other than the purchaser's obligation to make periodic payments under the contract, and that Relator's purchase agreement was not an "executory contract for the sale of land," a term used synonymously with "contract for deed."

6. Relator did not take possession or control of the property prior to July 1, 2008.

Regardless of whether Relator was given a key prior to July 1, 2008, it is clear that the seller was still entitled to possession, as the purchase agreement, signed on August 28, 2008, indicated that possession would be delivered on the date of closing, (App.25, ¶7) as confirmed by seller's responsibility to pay the taxes and expenses of the property until the date of closing. (App.24, ¶2)

Regarding the definition of “possession” as it pertains to real estate, Minn. Stat. § 541.023 (2008), commonly known as the “Marketable Title Act,” protects claims of title that are recorded, and subdivision 6 provides exceptions for persons in possession of real estate from the requirement of filing notice of their interests. The Minnesota Supreme Court has interpreted “possession of real estate” under this subdivision as follows:

it [possession] must be present, actual, open, and exclusive and must be inconsistent with the title of the person who is protected by this section. It cannot be equivocal or ambiguous but must be of a character which would put a prudent person on inquiry.” (*citations omitted*).

Township of Sterling v. Griffin, 309 Minn. 230, 236, 244 N.W.2d 129, 133 (1976).

Clearly Relator did not have “exclusive” possession of the subject property prior to July 1, as described in *Township of Sterling*, because the legal owner of the property could have entered the property at any time and asked Relator to leave. Further, Relator’s occupancy was not inconsistent with the owner’s title, as the owner had merely given Relator a *license to enter* the property, without giving up its own right of possession.¹⁷ For these same reasons, Relator did not “take control” of the property prior to July 1, 2008, as it has alleged.

This Court has long held that a “mere license to enter upon real estate is revocable.” *Ingalls v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 39 Minn. 479, 40 N.W. 524 (1888). Respondent asserts that it is not uncommon for purchasers

¹⁷ The purchase agreement, (App.25) paragraph 7, stated that the seller retained possession until the closing.

to be given a key prior to closing for a variety of reasons such as to take measurements or to move some items into the property, especially when the seller has already vacated the property, but giving Relator a key did not mean that the closing was a certainty. (App.6, ¶12a.) Relator's access to the property was certainly conditioned on the seller's belief that Relator would pay the seller for the property at closing, and if Relator had failed to go through with the closing, its right of access would have been withdrawn. Therefore, Relator did not have "possession" of the subject property prior to July 1, 2008, as it has alleged.

D. The legislative history of § 272.02, subd. 38(b), supports the Tax Court's holding that Relator did not "acquire" the subject property prior to July 1, 2008.

1. To "acquire" implies record notice to the Assessor.

The legislative history research presented below by Respondent found that Minn. Stat. § 272.02, subd. 38(b), (formerly 4(b)) was amended in 1991 to change the deadline date from August 1 to July 1. The 1991 amendment to this subdivision is documented on App.67. A document prepared by the Minnesota Department of Revenue regarding this change, (App.68-69) explained the date change, stating that "the change is needed in order for the conversion date to conform with the July 1st deadline for finalizing all values (M.S. 274.175)."¹⁸ This explanation is helpful because it implies that if the property is "acquired" prior to

¹⁸ Minn. Stat. 274.175 requires values to be finalized by July 1, but provides an exception for properties added to (not removed from) the tax rolls under Minn. Stat. 272.02, Subd. 38.

July 1, the Assessor would have reason to know this and would be able to incorporate this into the assessments that are final as of July 1.

Respondent asserts that it is a logical assumption from the Department of Revenue's intent for this date change that there would be some type of record notice provided to the Assessor prior to July 1 documenting the change to exempt status. However, in the present case, no CRV would have been filed prior to July 1, as the sale had not yet been consummated.¹⁹ The Dakota County Assessor would have no knowledge of the unsigned purchase agreement or earnest money, but even if he did there would be no way that he could assume on July 1st that this sale would close in 2008, if at all. How could an Assessor be in a position to know or even investigate all unconsummated purchase agreements to determine the likelihood that they would be fulfilled? Even if he had done so, why would he have determined that on July 1, 2008, Relator's purchase agreement was of such certainty to constitute equitable title when the agreement was not signed, no money had been paid to the seller, and there were still remaining unfulfilled contingencies?

It is also important to recognize that Relator's arguments do not actually depend on the actual closing taking place during 2008, but are based on what was known by the parties on July 1, 2008. Using this standard, Respondent believes that the sale of the subject property was very uncertain on that date.

¹⁹ Contract for deed sales must be recorded and a CRV must be filed upon signing the contract per Minn. Stat. § 272.115 and Minn. Stat. § 507.235.

Relator had no type of interest that had been recorded, or that could have been recorded at that time. Therefore, Respondent asserts that the intent behind the 1991 legislative date change in this subdivision supports its belief that Relator did not “acquire” the subject property prior to July 1, 2008.

2. Special legislation enacted in 1992 shows that “acquire” means “purchase.”

In 1992, special legislation was obtained for a church in Hopkins that “acquired” property prior to August 1, 1991, pursuant to the original 1990 version of Minn. Stat. § 272.02, subd. 4(b) (now 38(b)). However, unbeknownst to the church, the deadline to acquire property in the statute had recently changed from August 1 to July 1, and the church therefore was “caught” and required to pay the property taxes assessed in 1991, (as it had purchased the property on July 19 (App.73)). Legislators apparently viewed this situation as an innocent mistake, and special legislation was obtained to grant this church relief by exempting it from the time limit to “acquire” property under the statute. (App.71-72)

As is outlined in the Second Affidavit of Suzanne W. Schrader, paragraph 5 (App.63-64), this legislation was discussed in a taped discussion of the Senate Tax Committee on March 27, 1992. The Senate Tax Committee discussion quoted in the Affidavit indicates that the July 1st deadline stated in this statute applies to the date the property is “purchased” and that the church in question “purchased” the property after July 1, but prior to August 1, 1991. The legislators thus viewed the term “acquired” as synonymous with “purchased.” Respondent

inquired with Hennepin County Assessor's Office regarding the identity of this church property, and obtained the CRV between The Living Waters Christian Church and D J & S Limited (owner of Medalist Sports Club). (App.64, ¶6, App.73) Although the CRV indicates that a purchase agreement was signed on April 24, 1991, it was not claimed that the property was "acquired" in April, (as Relator is claiming in this case.) This shows that the Senators involved in the above discussion believed that the July 1 deadline to "acquire" property under this subdivision applied to the date of "purchase," which was the date of July 19th, as evidenced by the CRV.

Clearly, if the parties to the Hennepin County transaction had perceived that that property had been acquired prior to July 1, 2001 due to the earlier date of the purchase agreement, there would have been no need to obtain the special legislation. This analysis again reiterates Respondent's arguments above, that to "acquire" property prior to July 1 under this statute, there must be notice of a "purchase" that is provided to the Assessor so that this change can impact the Assessor's values that must be finalized as of July 1.

3. Relator's reliance on Minn. Stat. § 272.68 is misplaced, as that statute does not apply to this case.

On page 10 of its brief, Relator cites to the House of Representative's research department in determining that Minn. Stat. § 272.68 should be analyzed in this case. However, there is no evidence indicating that the legislators themselves considered that statute when enacting Minn. Stat. § 272.02,

subd. 38(b). Minnesota Statutes § 272.68 addresses the payment of taxes on property acquired by the state. Respondent urges that situations where the government acquires property via eminent domain or tax forfeiture are very different from where a church is purchasing property, as government acquisitions typically have many hurdles and are often opposed by the “seller.” The Tax Court was not persuaded by Relator’s arguments concerning this statute.

However, even if this Court determines that an analysis of Minn. Stat. § 272.68 (2008) is called for, this statute states under subdivision 2 that the property “shall remain taxable until the acquiring authority is by law or by the terms of a purchase agreement entitled to take possession thereof.” *Id.* In the present case, there is no dispute that the written purchase agreement provided under Article 7 that the “Seller shall deliver possession of the property on the date of Closing.” (App.25, ¶7) Further, Minn. Stat. § 272.68, subd. 1, states that “For the purpose of this section, the date of acquisition shall be the date on which the acquiring authority shall be entitled under law to take possession.” Respondent asserts that the first date “under law” that Relator took possession of the subject property was the date of closing.

On page 11 of its brief, Relator cites to language in Minn. Stat. § 272.68, subd. 1, stating “acquires a fee interest in property... by any means.” However, Relator does not address the fact that the use of the term “fee interest” in this statute has a distinct meaning according to case law of the Minnesota Supreme Court. Relator then uses the phrase “equitable fee interest” in later portions of its

memorandum, but Respondent asserts that this term does not have a legal meaning, because an interest is either an “equitable interest” or a “fee interest,” but not both.²⁰ Respondent asserts that “fee interest” means to take title to a “fee simple estate.” When Minnesota Courts have referred to the “fee interest,” this has consistently meant the “fee simple interest,” which is comprised of the entire “bundle of rights.” *Contos v. Herbst*, 278 N.W.2d 732, 737 (Minn. 1979).²¹ This interest is greater than a mere equitable interest in property.

E. Relator’s arguments concerning its ability to waive provisions of its alleged oral contract to purchase the subject property illustrates the uncertainty of Relator’s contract on July 1, 2008.

²⁰ Doing a search of Minnesota case law for Relator’s term “equitable fee interest” produced no results, indicating that the Minnesota Courts do not recognize this term. The only authority cited by Relator in its memorandum below, but not in its Supreme Court brief, that used the similar term “equitable title in fee” was a Minnesota Attorney General from 1976, which not only predated the cases cited above by Respondent, but which dealt with a contract for deed, and therefore was not applicable to this case. Relator cited to several Attorney General opinions below, and a close inspection of those opinions revealed that they actually supported Respondent’s, rather than Relator’s case

²¹ The Tax Court has also determined that “for every parcel of real property there is a bundle of rights which in total constitute a fee simple in that parcel.” *Beckstrom v. County of Becker*, 1983 Minn. Tax LEXIS 32 (Minn. Tax Ct. Order dated Oct. 19, 1983), and has consistently held that the entire bundle of property rights comprising the fee simple interest is valued and taxed under the ad valorem real estate tax system. The Minnesota Supreme Court has further equated a “fee interest” with “fee simple” title. In the 1977 case of *Nasseff v. Schoenecker*, the Court found that the Appellant owned the property in “fee simple” and several times referred to his interest as a “fee interest.” *Nasseff v. Schoenecker*, 312 Minn. 485, 489, 492, 253 N.W.2d 374, 376, 377, 378 (Minn. 1977). This case also distinguished the “fee interest” of the person owning the property in fee simple, from the “equitable interest” of the parties that were leasing the property. *Id.* at 376, 253 N.W.2d at 489.

Relator claims it had the ability to waive certain provisions of its oral contract to purchase the subject property, while keeping the remaining provisions in force. The Tax Court did not agree, citing to *Starlite Limited Partnership v. Landry's Restaurants, Inc.* 780 N.W.2d 396 (Minn. App. 2010). Relator did not present credible evidence that certain terms of the purchase agreement were waived (time deadlines) but that other provisions were not waived. In addition, Article 13 (b) of the purchase agreement states that no waiver of terms in the agreement will be effective unless they are in writing and executed by the parties.

If it is assumed that Relator's own statements on page 25 of its brief were true, that as of July 1, 2008, "the only terms of the contract [purchase agreement] that were waived were the time deadlines," then Relator's arguments on appeal must fail because the Purchase Agreement and Contingency Addendum contain numerous provisions that contradict Relator's claims throughout its brief. Therefore, Relator's acknowledgement that such provisions formed the basis for its oral agreement actually supports Respondent's arguments herein.²²

²² Regarding the Purchase Agreement (App.24-27), Article 4 required the seller to pay the property's expenses up until the date of closing, which goes against Relator's claim that it possessed or had control of the property prior to the closing. Article 7 granted possession to the Relator on the date of closing. Article 13(b) contains a merger clause stating that there were no verbal agreements that would change the written purchase agreement. Article 12 incorporates the Contingency Addendum that contains five contingencies. This addendum (App.27) also states that the earnest money "shall be deposited within three days after receipt of a signed purchase agreement" and that it further "shall be deposited with Dakota County Abstract who will act as escrow agent, and therefore would not be paid to the seller until closing.."

II. The Tax Court's analysis did not violate Relator's Constitutional freedom of contract rights when it held that Relator did not acquire the subject property prior to July 1, 2008.

A. This issue was not raised in the Tax Court below and should not be considered by the Minnesota Supreme Court.

Relator has raised several constitutional arguments in this appeal, including this freedom of contract issue, which were not raised in the record below. Respondent urges this Court to decline review of these new issues. The Minnesota Supreme Court has previously declined to review issues that were raised for the first time on appeal. In *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406 (Minn. 1994), this Court stated as follows regarding an issue raised for the first time on appeal:

The court of appeals declined to consider this argument because it was not raised in the trial court. "A reviewing court must limit itself to a consideration of only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thayer v. American Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982). Because this issue was not presented to and considered by the trial court, we also decline to consider the lawyers' argument.

Rouse at 408. In the case of *In re Schmidt*, 443 N.W.2d 824, 830 (Minn. 1989), this Court declined to consider a constitutional issue raised for the first time on appeal, and stated as follows:

On appeal in this court, Schmidt likewise claims a violation of his state constitutional right to equal protection. That issue was not raised before the district court, except in passing during oral argument. The trial court, however, based its decision on appellant's due process and privacy claims and did not address any equal protection argument. * * * We are limited to those issues presented to and considered by the trial court. *Thayer v. American Fin.*

Advisors, Inc., 322 N.W.2d 599, 604 (Minn. 1982). Thus, appellant's equal protection claim is not before us, and we decline to address it.

In re Schmidt at 830. In *Powers v. State*, 731 N.W.2d 499 (Minn. 2007), this Court again determined that it would not consider a constitutional issue that was not raised in the record below and stated as follows:

Powers also argues, for the first time in his brief to this court, that the sentencing guidelines are unconstitutional because they were enacted by the Minnesota Sentencing Guidelines Commission, rather than by the legislature. We are "most reluctant" to address issues that were not raised at the district court, *State v. Sorenson*, 441 N.W.2d 455, 459 (Minn. 1989), and we choose not to do so here. [footnote omitted].

Powers at 502. Therefore, Respondent urges this Court to decline consideration of Relator's freedom of contract issue, as this was not raised in the record below.

B. The Tax Court's decision below did not violate any Constitutional Freedom of Contract protections.

If this Court agrees to consider Relator's constitutional freedom of contract issue, there clearly has not been a violation of this provision, as evidenced by the fact that Relator took legal title to the property in September 2008, long before this matter was before the Tax Court, and nothing in the Court's decision attempts to undo Relator's contractual purchase of the subject property. In fact, Relator's standing to bring its property tax appeal was derived from the fact that it was the owner of the subject property. Relator has cited to various cases, all which do not apply to the present case, because they all involved governmental laws and/or regulations that served to prevent businesses from entering into certain types of contracts. Therefore, Relator's argument has no merit.

III. Minn. Stat. § 272.02, subd. 38(b), does not violate the Minnesota Constitution when it places churches and government entities in the same class for taxation purposes.

A. This issue was not raised in the Tax Court below and should not be considered by the Minnesota Supreme Court.

For reasons set forth in Section II.A above, Respondent urges this Court to decline review of this issue raised now by Relator, as Relator did not make a constitutional challenge to this statute in the record below. Further, Relator's initial Statement of the Case did not clarify that Relator was challenging this statute as unconstitutional on its face, but only alleged that the Tax Court violated Relator's constitutional rights in the decision below. The record below shows that Relator raised a constitutional issue only on pages 13-14 of its memorandum opposing Respondent's summary judgment motion, where it cited to the Constitution and to one case that provided a general interpretation of the constitutional provision. Further, Relator raised this issue only in the context of the *hardship* requirement under its motion for waiver of taxes, which had already been denied by the Tax Court, and which was not relevant for the parties' summary judgment motions. Relator further did not raise this issue in its memoranda in support of its own motion for summary judgment. Respondent urges this Court to deny review of this constitutional issue.

B. Relator's claim that Minn. Stat. § 272.02, subd. 38(b), is unconstitutional as applied to churches is without merit.

If this Court agrees to consider Relator's constitutional challenge to Minn. Stat. § 272.02, subd. 38(b), Relator clearly has not met its burden of proving this

statute to be unconstitutional.²³ Relator's claim appears to be based on its apparent assumption that it should not matter at what point during the year it purchased the subject property, it should not have to pay property taxes, simply because it is a church. This type of argument has already been addressed several times by this Court. Even where a church occupies a property during the entire assessment year, it will not qualify for tax exempt status simply because the taxes would otherwise be paid by a "church." It does not violate Minn. Const. Art. 10 § 1 to require property to be both owned by a church and used for church purposes to be exempt from property taxes. *E.g.*, *State v. American Fundamentalist Church (In re Delinquent Real Property Taxes)*, 530 N.W.2d 200, 203-4 (Minn. 1995). These general requirements for exemption of church property are addressed in Section I.B, beginning on page 11 of this brief, and were stated by this Court with reference to the Constitution in *Ideal Life Church v. County of Washington*, 304 N.W.2d 308 (Minn. 1981) as follows:

Another settled principle may be found in *Christian Businessmen's Committee of Minneapolis, Inc. v. State*, 228 Minn. 549, 38 N.W.2d 803 (1949). In that case the court stated:

In order for any institution to qualify for tax exemption under Minn. Const. art. 9, § 1 -- and M.S.A. § 272.02 enacted pursuant thereto -- there must be a concurrence of *ownership*

²³ This Court has stated that "[w]e presume statutes to be constitutional and exercise the power to declare a statute unconstitutional with extreme caution and only when absolutely necessary." *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 421 (Minn. 2005). The party challenging a statute's constitutionality must establish that the statute is unconstitutional beyond a reasonable doubt. *Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 719 (Minn. 2007).

of the property by an institution of the type prescribed by the constitution and a use of the property for the purpose for which such institution was organized. *Id.* at 554, 38 N.W.2d at 808 (footnote omitted; emphasis in original).

Ideal Life Church at 312-313.²⁴ If property is used in part for exempt purposes and in part for non-exempt purposes, it can be apportioned and taxed pro rata according to its uses. See *Christian Bus. Men's*, 228 Minn. at 559. If property owned by a church is not used for church purposes, the exemption must be denied. *State v. Union Congregational Church*, 173 Minn. 40, 216 N.W. 326 (1927). The test for exemption is “whether the property is devoted to and reasonably necessary for accomplishment of church purposes.” *Victory Lutheran*, 373 N.W.2d at 280. These cases illustrate situations where a church may be required to pay property taxes, and this would not violate constitutional protections..²⁵

The Tax Court acknowledged in the decision below the general requirement under Minn. Const. Art. 10 § 1 that churches be exempt from taxation (App.82), but went on to analyze Minn. Stat. § 272.02, subd. 38(b) that requires exempt entities such as churches to “acquire” property prior to July 1 of

²⁴ See also *Victory Lutheran Church v. County of Hennepin*, 373 N.W.2d 279, 280 (Minn. 1985); *State v. Board of Foreign Missions of Augustana Synod*, 221 Minn. 536, 541, 22 N.W.2d 642, 645 (1946);

²⁵ To the extent that a church purchases a property from a taxable entity after July 1, the property tax issue presumably could be raised in the negotiations for the purchase price of the property. The entire dispute in this case appears to have arisen because Relator had not been aware of the requirements of Minn. Stat. §272.02, subd. 38(b) when it negotiated the purchase of the subject property.

a given year for the property to be declared exempt for the entire year.

Respondent asserts that because it has already been held constitutional to require churches to meet the two-prong requirement for exemption set forth in the cases cited above, that Minn. Stat. § 272.02, subd. 38(b), must also be constitutional as applied to churches, because this statute does not add any additional hurdles to exemption. In fact, this statute allows a church to purchase a taxable property as late in the year as July 1 for the property to be held exempt, while the standard assessment law considers the status of property on January 2 of each year. Minn. Stat § 273.01 (2009). Therefore, Minn. Stat. § 272.02, subd. 38(b), is neither unconstitutional on its face, nor did the Tax Court apply it to Relator in a way that violated Relator's Constitutional rights.

In the case of *State v. Second Church of Christ, Scientist*, the Minnesota Supreme Court held that if a church purchases property with the intent to operate a church in the near future, and steps are immediately taken to prepare for such use, the requirement that the property be used for church purposes could be met, even if the property wasn't used as a church on the deadline date in the statute. However, it is significant that the church in that case had already *purchased* the property, which distinguished it from the present case. *State v. Second Church of Christ, Scientist*, 185 Minn. 242, 245, 240 N.W. 532, 534 (Minn. 1932).

State v. Second Church of Christ also had an important similarity to the present case because it involved church property that was determined to be exempt in 1927 *with the exception of a certain portion of land that was not*

acquired until after May 1, 1927, which was the statutory assessment date at that time. The entire property was then held exempt in the following year, 1928. The church was required to pay property taxes on land that was acquired after the statutory cut-off date, even though it was exempt for the following year. Although the church did not appeal that issue, this case presents the same scenario as is in the present case, and illustrates that there are legitimate situations where even a church may be required to pay property taxes.

IV. Minn. Stat. § 278.03, subd. 1(3), does not violate the Establishment Clause by requiring a church to establish financial hardship beyond sworn affidavit testimony of a church official.

A. This issue was not raised in Relator's Motion for Waiver of Taxes in the Tax Court below and should not be considered by the Minnesota Supreme Court.

Both parties submitted memoranda regarding Relator's Motion for Waiver of Tax that is under appeal. Relator did not raise this Constitutional argument regarding the hardship requirement in its memoranda in support of its motion.²⁶ Relator scheduled this motion for hearing on October 14, 2009, only one day before Relator's property tax payment was due. The Tax Court Judge ruled from the bench and denied Relator's motion on October 14, 2009. The parties' cross-motions for summary judgment had already been scheduled for hearing on

²⁶ Relator brought an earlier motion for waiver of taxes in March, 2008, through a different attorney. That motion was denied. Although Relator has included the memoranda in support of its previous motion in its Appendix, that motion decision was not appealed.

November 10, 2009. The Judge stated that she would put her written decision concerning the motion for waiver of taxes in her summary judgment decision.²⁷

In Relator's memoranda in response to Respondent's summary judgment, dated November 2, 2009, Relator for the first time alleged on pages 13 and 14 that the "hardship" ruling in the decision already issued by the Tax Court on October 14, 2009, was unconstitutional in violation of the Establishment Clause. This objection was not timely, as the motion had already been ruled on 18 days before the objection was made. Therefore, for reasons stated in Section II.A on page 35 herein, Respondent urges this Court to deny review of this issue now raised by Relator. Further, Relator's initial Statement of the Case did not clarify that Relator was challenging this statute as unconstitutional on its face, but only alleged that the Tax Court violated Relator's constitutional rights in its decision.

B. This Court should decline to review this issue because it is now moot.

Respondent asserts that this hardship issue is moot, because even if this Court agrees with Relator on this issue, the outcome of Relator's waiver motion would not change, as that outcome was also based on Relator's failure to show that it would likely prevail on the exemption claim.²⁸ To determine whether

²⁷ The Tax Court decision below contains the decision on Relator's Motion for Waiver of Taxes on page App.81.

²⁸ Minn. Stat. §278.03, subd. 1, has three requirements for property taxes to be waived pending a property tax appeal. The petitioner must show "(1) that the proposed review is to be taken in good faith; (2) that there is probable cause to believe that the property may be held exempt from the tax levied . . . ; and (3) that it would work a hardship upon petitioner to pay the taxes due." *Id.*

Relator was likely to prevail on the exemption claim, the decision on the summary judgment motion, heard only one month after the motion for waiver of taxes, would come under review, and is under review in this appeal. Even if this Court reverses the summary judgment decision and finds in favor of Relator, the hardship argument is still moot, as the property taxes would then be refunded to Appellant, *irrespective of a showing of hardship*. Therefore, Respondent urges this Court to deny review of this issue concerning the hardship requirement of Minn. Stat. § 278.03, subd. 1(3).

C. Relator has made an unsupported assumption that it would have to produce its financial records to establish the hardship requirement under Minn. Stat. § 278.03, subd. 1(3), which in turn would violate the Establishment Clause of the First Amendment.

If this Court agrees to consider Relator's constitutional challenge to the hardship requirement under Minn. Stat. § 278.03, subd. 1(3) (2008), Relator's claim has no merit because the decision below did not specify that Relator was required to submit certain types of information. However Respondent believes such a requirement would not be unconstitutional, whether under Minn. Const. Art. 1 § 2 or Art. 1 § 16. To show hardship, Relator submitted an affidavit of its pastor claiming hardship and stating that Relator was unable to set aside money "specifically designated to pay the second half property taxes." (App.60, ¶17)

Respondent pointed out in its memorandum opposing Relator's motion that the pastor's statement did not indicate that Relator did not have the ability to pay such taxes. Respondent further submitted an affidavit showing that although

Relator had made the same claim of hardship in conjunction with its previous motion for waiver of taxes brought five months earlier in March 2008, when that previous motion was denied from the bench, Relator was able to pay the taxes on the following day with no late penalties. (App.61 and App.9, ¶15.c)

Respondent also presented evidence of Relator's own statements indicating that it purchased the subject property because its church was growing and it needed a larger church building, which indicated financial growth. (App.50, ¶4)

Despite this evidence produced by Respondent, Relator did not address the hardship argument at all in its Reply Memorandum in support of its motion.

Therefore, it is not accurate for Relator to now claim that the Tax Court denied the hardship argument because Relator did not submit evidence beyond an affidavit of a church official. Relator's affidavit was lacking and Relator didn't present any arguments at all to refute Respondent's evidence. Therefore, the decision was based on the affidavit of the pastor (that did not clearly allege hardship), and Respondent's evidence that refuted Relator's hardship arguments. Relator's arguments have not established that the hardship requirement of this statute is unconstitutional. See footnote 23 herein.

CONCLUSION

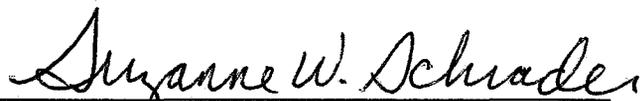
This Court has previously stated that "[b]ecause all property is presumed taxable and exemption from property tax liability is an exception to this general rule, exemptions are to be strictly construed and parties seeking exemptions bear the burden of proof. *Skyline Preservation Foundation v. County of Polk*, 621

NW2d. 727, 731 (Minn. 2001), *citing Am. Ass'n of Cereal Chemists v. County of Dakota*, 454 N.W.2d 912, 914 (Minn.1990). Relator asserts that this general rule applies to the present case and that Relator did not meet its burden of proving that it was entitled to a 2008 property tax exemption under Minn. Stat. § 272.02, subd. 38(b). Dakota County respectfully requests that this Court affirm the final judgment of the Tax Court that granted summary judgment to Respondent and denied summary judgment to Relator.

Dated: August 27, 2010.

Respectfully submitted,

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