

<p><b>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO</b> 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p><b>MOUNT SANITAS LLC,</b></p> <p>v.</p> <p>Respondent:</p> <p><b>BOULDER COUNTY BOARD OF COMMISSIONERS.</b></p>	<p><b>Docket No.: 46532</b></p>
<p><b>ORDER</b></p>	

**THIS MATTER** was heard by the Board of Assessment Appeals on August 16, 2007, Debra A. Baumbach, James R. Meurer, and Karen E. Hart presiding. Petitioner was represented by Robert Gunning, Esq. Respondent was represented by Michael A. Koertje, Esq. Petitioner is requesting an abatement/refund of taxes on the subject property for tax years 2003 and 2004.

**PROPERTY DESCRIPTION:**

Subject property is described as follows:

**2641 4<sup>th</sup> Street, Boulder, Colorado  
(Boulder County Schedule No. R085710)**

The subject property consists of several buildings located on a 5.5-acre site in Boulder, Colorado.

## **OVERVIEW:**

Seventh Day Adventist Association (“Seventh Day”) has used the subject property as the Boulder Junior Academy since the early 1950s. In March 2003, Seventh Day entered into negotiations to sell the subject property. According to Mr. Felix Flechas, a member of the Boulder Junior Academy Board of Directors, Seventh Day wanted to structure the sale of the subject property in such a way as to ensure they would have cash flow to construct a new school, as nonprofits have difficulty in securing construction loans. As part of the negotiations, they would continue to occupy the subject property until the new school was constructed. A warranty deed was signed on June 12, 2003 and placed into escrow. Draws for the new school construction began on September 26, 2003.

Seventh Day continued to use the subject property as the Boulder Junior Academy until February 2004. The subject property was then used for storage of school personal property not yet moved to the new school site, as a Spanish-speaking church meeting site, and for activities utilizing the basketball court and gym. On June 16, 2004, the terms of the contract to buy and sell the subject property were fulfilled, Seventh Day vacated the subject property, and Petitioner took possession. The warranty deed was recorded on March 8, 2005.

The value of the subject property is not in dispute. The only issue in this case is whether the subject property is entitled to exempt status for the period of June 12, 2003 through June 30, 2004.

## **FINDINGS OF FACT:**

On March 3, 2003, Seventh Day contracted with Gilbert Million and Stephen Tebo (“Buyers”) to buy and sell the subject property. Thereafter, Seventh Day and Buyers entered into four amendments to the contract. Hereinafter, the contract and its amendments will be collectively referred to as the “Contract.”

Pursuant to the terms of the Contract, Buyers agreed to purchase the subject property for \$5,500,000. Buyers also agreed to pay the \$5,500,000 in the following manner: (1) \$275,000 in earnest money, which would be applied to the purchase price of the property; (2) no later than April 25, 2003, Buyers agreed to set up a money market account in the name of Seventh Day in the amount of \$1,725,000; and (3) no later than June 16, 2003, Buyers agreed to issue an irrevocable letter of credit (“ILC”) for the benefit of Seventh Day with limitations on withdrawals, in the amount of \$3,500,000. According to the Contract, Buyers were required to pay the entire purchase price at or before the time of the transfer of the “deeds in escrow.”

The Contract places limitations on Seventh Day’s ability to draw on the \$3,500,000 ILC. The Contract permits Seventh Day to draw on the ILC “only for purposes and only in amounts and frequency it reasonably determines to be necessary for and directly related to its acquisition, construction, equipping and furnishing replacement property and facilities for the property and facilities being sold . . . .”

The Contract also provides that “delivery of the letter of credit and Seller’s [Seventh Day’s] draws thereon, shall not relieve Buyer of their obligations hereunder to pay the Purchase Price as the foregoing letter of credit is intended by the parties hereto simply as a means to ensure payment of the price for Seller’s [Seventh Day’s] benefit.”

With respect to the Seventh Day’s obligations, the Contract states:

Seller [Seventh Day] shall execute a good and sufficient General Warranty deed at Transfer Deeds into Escrow Date conveying the real estate and a Quit Claim Deed conveying the water rights and all mineral interests of Seller [Seventh Day] in and under the Property free and clear of all taxes except the general taxes for the year of Transfer Deeds into Escrow Date. Except as provided herein, title shall be conveyed free and clear of all liens, including any governmental liens for special improvements installed as of the date of Buyer’s signature hereon, whether assessed or not.

The Contract continues to state that:

Title shall be conveyed subject to: a.) those specific Exceptions described by reference to recorded documents as reflected in the Title Documents . . . , and b.) distribution utility easements, c.) those specifically described rights of third parties not shown by the public records of which Buyer has actual knowledge . . . , and d.) inclusion of the Property within a special taxing district, and e.) the benefits and burdens of any declaration and party wall agreements, if any, and f.) all applicable building and zoning restrictions and requirements and taxes for the year of Transfer Deeds into Escrow Date and thereafter, if any.

The Contract contains an “Escrow of Deeds” paragraph, which specifies that Seventh Day’s deeds and bill of sale will be held in escrow until such time as the balance of the purchase price is paid in full and received by Seventh Day. This provision also states that:

Upon written request by Buyer, Seller [Seventh Day] shall substitute new deeds and/or bill of sale that are the same as the prior deeds and/or bill of sale with a then current date, provided, however, such new deeds and/or bill of sale shall not expand the warranties of the seller under the original deed as to title or otherwise.

This provision also states that if Buyers default under the Contract, Seventh Day has the right to the return of its deed.

The Contract contains a Remedies paragraph, which provides that if Buyers are in default of the Contract, Seventh Day can obtain specific performance or damages. If Seventh Day is in default, Buyers can obtain specific performance or damages.

On June 12, 2003, Buyers entered into an assignment of contract, assigning their rights in the Contract to Petitioner. On this same date, Vectra Bank, Seventh Day, and Petitioner entered into a non-disturbance agreement. Pursuant to this agreement, Vector Bank agreed not to disturb Seventh Day's possession of the property until the ILC is fully drawn or December 31, 2004. This non-disturbance agreement was recorded on June 20, 2003.

On June 12, 2003, Seventh Day executed a warranty deed transferring the subject property to Petitioner. According to the deed, Seventh Day, for and in consideration of \$5,500,000.00, "the receipt and sufficiency of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the grantee, his heirs and assigns forever," the subject property. This deed was placed into escrow, but not recorded until March 8, 2005.

On June 12, 2003, Petitioner executed a deed of trust in favor of Vectra Bank in which Petitioner transferred and assigned to a trustee for the benefit of the lender all of Petitioner's rights in the subject property apparently as security for the \$3,500,000 ILC. On this same date, Seventh Day executed a deed of trust in favor of Vectra Bank using the subject property as security. The deed of trust from Petitioner was recorded on June 20, 2003, but the deed of trust from Seventh Day was not.

On June 12, 2003, Petitioner executed an assignment of rents in favor of Vectra Bank regarding the subject property. On this same date, Seventh Day executed a similar assignment of rents in favor of Vectra Bank. Both documents were recorded on June 20, 2003.

On June 12, 2003, Vectra Bank issued an irrevocable clean letter of credit in the amount of \$3,500,000 at the request of Petitioner. Pursuant to Vectra Bank's loan activity journal, it appears the ILC was not completely drawn down until sometime around June 15, 2004.

On September 5, 2003, Land Title issued a title insurance policy dated June 20, 2003. The title insurance policy states that the name of the insured is Petitioner, and that the interest being insured is rights of contract purchasers and that fee simple title to the subject property is vested in Seventh Day.

Respondent's witness, Mr. Samuel Forsyth, Advanced Appeals Deputy and former Chief Deputy Assessor for Boulder County, testified that in mid-2004 they received questions from the neighborhood regarding inquiries made about developing the property while in Seventh Day's ownership. They also knew about possible residential development proposals due to agendas from the City of Boulder.

The assessor's office became aware in late March 2005 that the property had sold, when the warranty deed and a quit claim deed were recorded. Seventh Day was a tax-exempt entity. The assessor's office performed due diligence because there was a large difference in deed date versus deed recording date. Respondent determined the date title transferred was June 12, 2003. The tax exemption was revoked and a Special Notice of Valuation was issued.

Respondent's witness, Mr. Stan Gueldenzopf, Manager of Exemptions with the Division of Property Taxation, testified that the subject property was previously exempt under the private

school/charitable statute. Seventh Day reported in their 2005 exemption filing with the Division of Property Taxation that the subject property was sold on June 12, 2003. Mr. Gueldenzopf testified that Seventh Day should have but did not report the sale on their 2004 exemption application. It is his position that the ownership of the property transferred on June 12, 2003, and that is when the exemption would have terminated.

According to the Assessor's Reference Library, "The date of the transfer is considered to be the date the title was conveyed, not the date the deed was filed with the clerk for recording." *2 Assessor's Reference Library: Administrative & Assessment Procedures* 3.36 (2003). Exemptions do not run with the land. Each new owner must be granted its own exemption. "Whenever property which has been exempt is sold or transferred, the exempt status is lost whether the Division granted the exemption or the exemption was due to ownership by a public entity." *Id.* Mr. Gueldenzopf testified that Petitioner, the current owner, does not meet Colorado Revised Statutes ("C.R.S.") section 39-3-107 to qualify for an exemption as a private school because for profit ownership would not qualify.

## **CONCLUSIONS:**

The only issue in this case is whether the subject property is entitled to exempt status for the period June 12, 2003 through June 30, 2004. Respondent contends that the subject property was no longer exempt effective the date the warranty deed was signed. Petitioner contends that the subject property should remain exempt until June 30, 2004 when the property ceased to be used by the Boulder Junior Academy. To resolve this issue, the Board must resolve the issue of whether title to the subject property transferred from Seventh Day to Petitioner as of June 12, 2003 or thereafter and subsequent to June 30, 2004.

The facts are undisputed that on June 12, 2003, Seventh Day executed a warranty deed in favor of Petitioner. The deed was placed in escrow and not recorded until March 8, 2005. The question is whether the deed, legally, was delivered by Seventh Day and accepted by Petitioner as of June 12, 2003.

Delivery is necessary to complete the execution of a deed so as to pass title. *Sims v. Sperry*, 835 P.2d 565, 568 (Colo. Ct. App. 1992). "Delivery requires proof that the grantor parted with possession and control or any power over the deed, for the benefit of the grantee, and that [the grantor] intended to do so presently and unconditionally." *Id.* The deed must also be accepted by the grantee. *Tuttle v. Burrows*, 852 P.2d 1314, 1316 (Colo. Ct. App. 1992). "A deed in escrow, conditioned upon satisfaction or completion of some specified event, consequently cannot be delivered or become operative until the condition has been performed, and no title or estate passes until rightful delivery is made." *Id.*

When a deed is recorded and acknowledged properly, this Board must presume that delivery of the deed occurred, relating back to the date of execution of the deed. *See* C.R.S. § 38-35-101(4). This presumption, however, is rebuttable. *Tuttle* at 1316, *Brown v. Board of County Commissioners of the County of Arapahoe*, 720 P.2d 579, 583 (Colo. Ct. App. 1985). “Once it is shown that a deed has been properly acknowledged and recorded, the burden shifts to the opponent to demonstrate non-delivery.” *Jacquez v. Jacquez*, 694 P.2d 1292, 1294 (Colo. Ct. App. 1984).

In this case, the warranty deed was recorded and properly acknowledged. As a result, this Board must presume that delivery occurred on June 12, 2003. Petitioner, therefore, has the burden to prove that Seventh Day did not intend to presently and unconditionally transfer the deed to Petitioner on June 12, 2003.

The Contract requires Seventh Day to execute a warranty deed “conveying the real estate.” While the Contract provides that the subject property be conveyed subject to exceptions such as utility easements, zoning restrictions, and requirements and rights of third parties not shown on title documents, none of these conditions evidence that Seventh Day did not intend to transfer the subject property presently and unconditionally, as of June 12, 2003.

Although the Contract contains an “Escrow of Deeds” paragraph, which specifies that the Seventh Day’s deed will be held in escrow until the balance of the purchase price is paid in full and received by Seventh Day, the Contract requires Buyers to pay the entire purchase price at or before the time of the transfer of the deed into escrow. The Contract provides that no later than June 16, 2003, Buyers pay the earnest money, set up the \$1,725,000 money market account, and have the \$3,500,000 letter of credit issued. Thus, arguably, payment was made at or very near the time the deed was executed.

However, arguably full payment was not made until Seventh Day fully drew down the \$3,500,000 ILC, which did not occur until after June 15, 2004. The Contract limited Seventh Day’s ability to utilize the \$3,500,000 ILC. These funds were only permitted to be drawn upon for the acquisition, equipment, and construction costs of a new facility.

The evidence also shows that both Petitioner and Seventh Day executed deeds of trust in favor of Vectra Bank, using the subject property as collateral. Similarly, both Petitioner and Seventh Day executed assignment of rents in favor of Vectra Bank regarding the subject property. The deed of trust executed by Seventh Day was not recorded but the assignment of rents executed by Seventh Day was recorded, while the deed of trust and assignment executed by Petitioner were both recorded on June 20, 2003. However, the Board notes that there were no rents generated at the property and therefore the issue of rent assignments is moot.

The title insurance document evidences that as of June 12, 2003, Petitioner did not believe the property was transferred. In contrast, the 2005 exempt property report filed with the Division of Property Taxation evidences that Seventh Day believed the subject property was transferred on June 12, 2003.

There are contradictory facts before the Board as to when ownership transferred to Petitioner. The Board is convinced that Seventh Day used the Contract as a means for financing a new school site and to retain occupancy of the subject property until the new school was completed. Seventh Day, for the aforementioned reasons, voluntarily chose to limit their receiving of the sale monies.

The Board finds that Petitioner did not meet its burden of proof to overcome the presumption of delivery set forth in C.R.S. section 38-35-101(4). The Board is most persuaded by the fact that Petitioner made available to Seventh Day, all of the purchase price in one form or another on the date the deed was signed. All parties were aware the warranty deed existed with a date of June 12, 2003. The Board finds that title to the subject property transferred to Petitioner on June 12, 2003.

As the Board has determined that the property transferred to Petitioner, a for-profit entity, on June 12, 2003, the temporary use of a portion of the subject property as a Spanish-speaking church meeting site does not qualify the subject property for exemption under the religious statutes which require the property to be “owned and used solely and exclusively for religious purposes and not for private gain or corporate profit.” C.R.S. § 39-3-106 (1).

Respondent presented sufficient probative evidence and testimony to prove that the revocation of tax-exempt status of the subject property effective June 12, 2003 was correct.

### **ORDER:**

The petition is denied.

### **APPEAL:**

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of C.R.S. section 24-4-106(11) (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation for assessment of the county wherein the property is located, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provision of C.R.S. section 24-4-106(11) (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, Respondent may petition the Court of Appeals for judicial review of such questions.

C.R.S. § 39-10-114.5(2) (2007).

**DATED and MAILED** this 25<sup>th</sup> day of January 2008.

**BOARD OF ASSESSMENT APPEALS**

*Debra A. Baumbach*

Debra A. Baumbach

*James R. Meurer*

James R. Meurer

*Karen E. Hart*

Karen E. Hart

This decision was put on the record

JAN 25 2008

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

*Heather Heinlein*

Heather Heinlein

