STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0790

Josh Boock,
Appellant,

vs.
Frohn Township,
Respondent.

Filed April 29, 2013
Affirmed
Kalitowski, Judge

Beltrami County District Court
File No. 04-CV-09-4843

Michael R. Ruffenach, Bemidji, Minnesota (for appellant)

Jason J. Kuboushek, Stephanie A. Angolkar, Iverson Reuvers, Bloomington, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Josh Boock challenges the district court's determination that Walnut Road, which is adjacent to his property, is a public road. Appellant argues that the district court erred in determining that (1) continued public use of Walnut Road established a common-law dedication and (2) Frohn Township (the township) established

the possession exception under the Marketable Title Act. Appellant also challenges the district court's failure to make a determination as to the road's width. We affirm.

D E C I S I O N

I.

"The question of public dedication is one of fact, and the trial court's determination on the matter will not be reversed unless it is clearly erroneous." *Ravenna Twp. v. Grunseth*, 314 N.W.2d 214, 217 (Minn. 1981). The evidence is reviewed in the light most favorable to the district court's findings. *Id.* "'[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.'" *Henly v. Chisago Cnty.*, 370 N.W.2d 920, 923 (Minn. App. 1985) (quoting Minn. R. Civ. P. 52.01).

Under common-law dedication, "a public road is established if (1) a landowner intends (either expressly or impliedly) to have his land appropriated and devoted to the public use, and (2) there is public acceptance of the land for that use." *Henly*, 370 N.W.2d at 923 (citing *Bengtson v. Vill. of Marine on St. Croix*, 310 Minn. 508, 509, 246 N.W.2d 582, 584 (1976) and *Flynn v. Beisel*, 257 Minn. 531, 540, 102 N.W.2d 284, 291 (1960)). "[D]edication is irrevocable after public acceptance unless the public consents to revocation." *Sackett v. Storm*, 480 N.W.2d 377, 380 (Minn. App. 1992) (citing *Keiter v. Berge*, 219 Minn. 374, 380, 18 N.W.2d 35, 38 (1945)), *review denied* (Minn. Mar. 26, 1992). "Thus, an owner's dedication binds his or her successors in interest." *Id.* (citing *Daugherty v. Sowers*, 243 Minn. 572, 575, 68 N.W.2d 866, 868-69 (1955)).

Appellant argues that the district court erred in determining that continued public use of Walnut Road established a common-law dedication. We disagree.

Appellant argues that the question of public dedication turns on whether the township maintained the road, relying on the requirements in Minn. Stat. § 160.05 (2012) and caselaw involving statutory dedications. But the district court concluded that a common-law dedication occurred and specifically declined to decide whether the elements of a statutory dedication were met. *See Wojahn v. Johnson*, 297 N.W.2d 298, 306 n.4 (Minn. 1980) ("Among the differences between statutory and common-law dedication, however, is that no specific time period of public use and maintenance is required for a common-law dedication. All that is required is that intent and acceptance coincide, and thus dedication may be made instantly."). Thus, the issue is whether the district court clearly erred in finding that the two requirements for a common-law dedication are met: (1) intent on behalf of the landowner for such use and (2) public acceptance of the land for that use. *Henly*, 370 N.W.2d at 923.

Intent

"An intent to dedicate need not be a conscious intent but may be inferred from the owner's unequivocal conduct." *Sackett*, 480 N.W.2d at 380 (citing *Anderson v. Birkeland*, 229 Minn. 77, 83, 38 N.W.2d 215, 219 (1949)). "Acquiescence, without objection, in the public use for a long time, is such conduct as proves and indicates to the public an intention to dedicate." *Klenk v. Town of Walnut Lake*, 51 Minn. 381, 385, 53 N.W. 703, 704 (1892).

The district court found that the "public's use of the disputed portion of Walnut Road from 1934 to the present has been present, actual, open and of such a kind as to put [appellant] and his predecessors-in-interest on notice of the use." The district court further found that there was no evidence that any of appellant's predecessors-in-interest ever tried to deny members of the public the right to use the road and reasoned that a failure to object proves an intention to dedicate. The district court also found that appellant's "predecessors-in-interest evinced both an express and implied intent to dedicate the entire length of Walnut Road, including the portion in dispute here, to public use."

The record supports the district court's findings that there were no prior objections to the use of the road. But appellant argues that the statute of frauds precludes the district court's finding that one of his predecessors-in-interest was among the 14 property owners who petitioned the township in 1934 to create Walnut Road. We disagree. Appellant waived this argument by failing to raise it below during the trial or in his motion for a new trial. Generally, we will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Accordingly, the district court's findings regarding intent are not clearly erroneous.

Acceptance

"Public acceptance may be shown by public use of the dedicated property, and this use may be established by a relatively small number of people." *Sackett*, 480 N.W.2d at 380 (citing *Flynn*, 257 Minn. at 541, 102 N.W.2d at 292). "The longer the time of public user the stronger is the presumption of dedication." *Anderson v. Birkeland*, 229 Minn.

77, 84, 38 N.W.2d 215, 220 (1949). Public use "'is the very highest kind of evidence' of public acceptance of a dedication." *Keiter*, 219 Minn. at 379-80, 18 N.W.2d at 38 (quoting *Morse v. Zeize*, 34 Minn. 35, 37, 24 N.W. 287, 288 (1885)). Acceptance may be inferred from the improvement or maintenance of the property, but it "is not essential to show that public funds were expended to improve or maintain the road." *Id.* at 379, 18 N.W.2d at 38.

The district court found that the public had accepted the disputed portion of Walnut Road by its use over the years, reasoning that the public used the road "heavily from 1934 to the mid-1960's, and then consistently albeit less frequently since then."

Regarding acceptance, appellant does not challenge the district court's findings about the public's use of the road, but argues that "[t]he real issue is whether the township has expended public money to maintain the road and maintain it to the standard of other public roads." The township contends that acceptance was proven through nearly eight decades of the public's use of the road and argues that appellant misplaces his reliance on a public-maintenance requirement. We agree.

Public maintenance is not required to establish acceptance. *See Keiter*, 219 Minn. at 379, 18 N.W.2d at 38 (stating that either public use or maintenance will suffice as acceptance). Here, multiple witnesses testified that the public used Walnut Road as a main access road from 1934 until the mid-1960s, when Beltrami County constructed County Road 4 just south of Walnut Road. After the construction of County Road 4, use of Walnut Road decreased but did not end. But a decrease in volume does not negate public acceptance, which may be established by a small number of people. *Sackett*, 480

N.W.2d at 380 (citing *Flynn*, 257 Minn. at 541, 102 N.W.2d at 292). Moreover, a long period of public use strengthens the presumption of a dedication. *Anderson*, 229 Minn. at 84, 38 N.W.2d at 220. Walnut Road has been used by the public since 1934. Accordingly, acceptance has been established and the district court's finding regarding acceptance was not clearly erroneous.

Because the district court's findings regarding intent and acceptance are supported by the record, we conclude that the district court's determination that Walnut Road was established as a public road through common-law dedication was not clearly erroneous.

II.

Appellant also argues that the district court erred in determining that the township did not abandon its right to the road by establishing the possession exception under the Marketable Title Act. The act provides that:

> As against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced by a person, partnership, corporation, other legal entity, state, or any political division thereof, to enforce any right, claim, interest, incumbrance, or lien founded upon any instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded in the office of the county recorder in the county in which the real estate affected is situated, a notice sworn to by the claimant or the claimant's agent or attorney setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance, or lien is mature or immature.

Minn. Stat. § 541.023, subd. 1 (2012). Under this act, "a township must comply with the requirement that it record properly its possessory interest in a public road within 40 years of the road's establishment or it will be presumed to have abandoned its right to the road." *Twp. of Villard v. Hoting*, 442 N.W.2d 826, 829 (Minn. App. 1989) (citing *Twp. of Sterling v. Griffin*, 309 Minn. 230, 234-35, 244 N.W.2d 129, 132-33 (1976)). The parties do not dispute that the township did not record the 1934 road order with the Beltrami County Recorder.

But one of the exceptions to the presumption of abandonment is a showing of possession. Minn. Stat. § 541.023, subd. 6 (2012). To establish possession of a road, a township bears the burden of proving its possession is "present, actual, open and exclusive." *Villard*, 442 N.W.2d at 829. Here, the district court found that the "public's use of the disputed portion of Walnut Road from 1934 to the present has been present, actual, open and of such a kind as to put [appellant] and his predecessors-in-interest on notice of the use." And although appellant argues that the township failed to comply with the Marketable Title Act, appellant fails to establish that the district court's finding that the possession exception was met is clearly erroneous.

Specifically, the district court found that the public repeatedly used Walnut Road and that the testimony of various witnesses was more credible than the assertion of appellant's father that he maintained a garden across the road that would have prevented its use. Moreover, the record is replete with evidence regarding continued use of the entire length of Walnut Road by automobiles, light trucks, four-wheelers, horses, snowmobilers, and pedestrians since its creation in 1934. Thus, the district court did not

err in concluding that the township established the possession exception to the Marketable Title Act.

III.

Finally, appellant argues that, assuming the district court correctly concluded the road is public, the district court failed to make a determination as to the road's width. But we conclude that this argument is waived because appellant did not raise it to the district court. *See Thiele*, 425 N.W.2d at 582 (stating that we will not consider matters not argued to and considered by the district court). Accordingly, we do not address the width of the road.

Affirmed.