This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0283

Dellwood Farm, LLC,
Appellant,

vs.

City of Grant,
Respondent.

Filed November 21, 2022
Reversed and remanded
Connolly, Judge

Washington County District Court
File No. 82-CV-20-1775

James A. Reichert, James A. Reichert, LLC, Minneapolis, Minnesota (for appellant)

Kevin S. Sandstrom, Keith A. Marnholtz, Nicholas J. Vivian, Eckberg Lammers, P.C., Stillwater, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

In this appeal, following the district court's denial of appellant's special-assessment appeal under Minn. Stat. § 429.081 (2020), appellant argues that the district court erred in applying the Marketable Title Act (MTA) to the circumstances presented in this case. Because the MTA does not apply here, we reverse and remand.

FACTS

Appellant Dellwood Farm, LLC (Dellwood) is the owner of real property (the property) located in respondent City of Grant (the city). The property fronts Justen Trail, which is used for access to the property as well as others within the Victoria Station platted development. As part of a 2020 street improvement project, the city rehabilitated city streets within the Victoria Station development and sent a proposed assessment and notice of a public hearing to property owners included in the proposed assessment. Because Justen Trail was one of the roads rehabilitated as part of the 2020 street improvement project, the property was included in the proposed assessment.

After the street improvement project was completed, a public hearing was held in April 2020, regarding the proposed assessments. Dellwood objected to the proposed assessment, relying on an easement instrument dated September 10, 1974. Pursuant to this instrument, Land O' Lakes, Inc., a predecessor in title to the property, granted an easement to the Township of Grant (the township), which is now the city. The instrument states that Land O' Lakes desired "to create a permanent easement for ingress and egress along a gravel road currently in existence on a portion of its property." The easement was recorded in the Office of Washington County Registrar of Deeds.

Justen Trail is the road described in the September 1974 easement instrument. Dellwood claimed that under paragraph three of the instrument, the city is liable for the costs of the improvements to Justen Trail. That paragraph states: "All costs of maintenance and repair of the aforedescribed road shall be borne by the party of the second part, it being

understood that the party of the first part has no obligation for maintenance and/or repair of said road."

Dellwood also relied on a second easement instrument dated August 14, 1987. Pursuant to this document, Calvin D. Garley and Betty M. Garley, predecessors in title to the property, conveyed an easement in the road in favor of the township in connection with the subdivision areas of the Victoria Station development. The second easement describes essentially the same road area described in the first easement, but the legal description is different as to part of the property. It contains no statement that the township is responsible for maintenance or repair of the road. The 1987 easement also fails to mention the 1974 easement. And like the 1974 easement, the 1987 easement was recorded in the Office of Washington County Registrar of Deeds.

Despite Dellwood's objection, the special assessment was approved against all affected properties, and Dellwood was assessed $22,447.44. Dellwood appealed the assessment under Minn. Stat. § 429.081, claiming that, under paragraph three of the 1974 easement instrument, it is not liable for the assessment. The city responded, alleging that by operation of the MTA, the 1974 easement is presumed to be abandoned.

In conjunction with their arguments, the parties submitted stipulated findings of fact. The parties stipulated to the existence of the easement instruments as well as the city's assessment process. The parties also stipulated that (1) Dellwood's deed of sale "provides a legal description of the property and makes no mention of any easements, and specifically does not mention the 1974 easement"; (2) neither the city, nor anyone else, filed any notice of claim regarding the 1974 easement in the almost 50 years since the easement was

recorded; and (3) the road has been plowed and maintained by the city continuously for at least six years.

The district court determined that the MTA is "intended to eliminate unnoticed easements that can clutter title," and "[n]either Dellwood nor its predecessor ever filed notice of the 1974 Easement that Dellwood now argues precludes Dellwood from having to pay an assessment for repairs to the road." The district court also determined that the city "still maintains an interest in the Road as the 1987 Easement is less than 40 years old and was recorded." The district court concluded that because neither "Dellwood nor its predecessor ever filed notice of the 1974 Easement under the requirements of the [MTA], the easement is presumed to be abandoned." Thus, the district court denied Dellwood's assessment appeal and ordered that the city is entitled to its special assessment of $22,447.44 against Dellwood.

Dellwood appealed. During oral arguments, a question arose as to whether the MTA applies to the circumstances presented here. The parties did not address this issue in their briefs. We then requested supplemental briefing, which the parties provided, to address whether the MTA is applicable here.[1]

DECISION

Dellwood challenges the district court's denial of its special-assessment appeal based on an application of the MTA. The interpretation of the MTA is a question of law,

[1] Counsel for the city did not appear at oral argument and later filed a notice of withdrawal. Shortly thereafter, the city's current attorneys filed a notice of appearance stating that they now represent the city.

which this court reviews de novo. *Piche v. Indep. Sch. Dist. No. 621*, 634 N.W.2d 193, 198 (Minn. App. 2001), *rev. denied* (Minn. Nov. 13, 2001).

The MTA is a mechanism for landowners to "relieve a title from the servitude of provisions contained in ancient records which fetter the marketability of real estate." *Wichelman v. Messner*, 83 N.W.2d 800, 812 (Minn. 1957) (quotation omitted); Minn. Stat. § 541.023 (2020). To achieve this purpose, the MTA provides that no interest can "be asserted against a claim of title based on a source of title unless the interest is preserved by filing a notice within 40 years of the creation of the interest." *State v. Hess*, 684 N.W.2d 414, 427 (Minn. 2004). "Easements are among the property interests that can be eliminated under the MTA." *Sampair v. Village of Birchwood*, 784 N.W.2d 65, 69 (Minn. 2010).

The MTA provides in relevant part,

> 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 . . . a notice . . . 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 . . . .

Minn. Stat. § 541.023, subd. 1. This provision "appl[ies] to every right, claim, interest, incumbrance, or lien founded by any instrument, event, or transaction that is at least 40 years old." *Id.*, subd. 2(a). To invoke the MTA, a party must have a "source of title" which has been "of record at least 40 years." *Hess*, 684 N.W.2d at 427 (quotation omitted).

The failure to record an interest in land within 40 years establishes a conclusive presumption that the interest has been abandoned. Minn. Stat. § 541.023, subds. 2, 5; *Hess*, 684 N.W.2d at 427. Once abandoned, any interest in land is "extinguish[ed]." *Hess*, 684 N.W.2d at 427. Subdivision 6, however, provides an exception to this general rule where there is actual "possession" of the property in question. Minn. Stat. § 541.023, subd. 6. Application of the possession exception "requires use sufficient to put a prudent person on notice of the asserted interest in the land, giving due regard to the nature of the easement at issue." *Sampair*, 784 N.W.2d at 70.

Dellwood argues that the MTA does not apply to the circumstances presented in this case. We agree. Generally, for the MTA to extinguish an interest in real property: (1) the party invoking the MTA must have a "claim of title based upon a source of title, which source has then been of record at least 40 years," and (2) the person against whom the MTA is invoked must be "conclusively presumed" to have abandoned all interest in the property. *Wichelman*, 83 N.W.2d at 807 (quotation omitted) (syllabus by the court). As explained by our supreme court:

> By operation of the MTA, when X holds property *in fee simple* that has been of record for over 40 years, and Y claims an interest in that property that is also at least 40 years old, then Y, or Y's predecessors in interest, must have filed the statutorily prescribed notice of Y's claim within 40 years of the creation of the interest Y now claims.

Sampair, 784 N.W.2d at 68 (emphasis added) (citing Minn. Stat. § 541.023; *Wichelman*, 83 N.W.2d at 811-13, 819-20).

Here, the city argued, and the district court agreed, that the 1974 easement was presumed to be abandoned under the MTA because "neither Dellwood nor its predecessor ever filed notice of the 1974 Easement under the requirements of the [MTA]." To be clear, the city is the party invoking the MTA for its benefit in this case. But under the first step of the two-step process to invoke the MTA, the city must establish a claim of title based upon a source of title in the subject property. *See Wichelman*, 83 N.W.2d at 807. "Source of title" means "any deed, judgment, decree, sheriff's certificate, or other instrument which transfers or confirms, or purports to transfer or confirm, a fee simple title to real estate." Minn. Stat. § 541.023, subd. 7. And the supreme court has clarified, "taking [the MTA] as a whole and construing the language used in it in light of the object and purpose which the legislature intended to accomplish, the term 'source of title' must refer to *Recorded fee simple ownership*, an estate under which [section] 500.02 may be 'defeasible or conditional.'" *Wichelman*, 83 N.W.2d at 816 (emphasis added).

The principle discussed in *Wichelman* was applied in *Town of Belle Prairie v. Kliber*, 448 N.W.2d 375 (Minn. App. 1989). In that case adjacent townships brought a declaratory judgment action seeking (1) a determination that a road lying on a common boundary line between the townships was a public road and (2) to enjoin landowners who own property adjacent to the road from blocking the road. *Kliber*, 448 N.W.2d at 377. The landowners claimed that under the MTA, the township had abandoned the public road. *Id.* at 379. Citing *Wichelman*, this court stated that "[o]nly those who possess a title which complies with the conditions of the [MTA] are entitled to invoke its aid." *Id.* at 378 (citing *Wichelman*, 83 N.W.2d at 816). The court then noted that the "term 'source of title' refers

to '*recorded fee simple ownership*, an estate which under [section] 500.02 may be 'defeasible or conditional.'" *Id.* (quoting *Wichelman*, 83 N.W.2d at 816). This court concluded that "[u]nder *Wichelman*, absent a showing of fee simple ownership, [the landowners] are not entitled to invoke the provisions of the MTA." *Id.* at 379 (stating that the court would not consider possession exception to abandonment because the landowners had no claim of title to invoke the MTA).

The decisions in *Wichelman* and *Kliber* demonstrate that only those who possess a title which complies with the conditions of the MTA are entitled to invoke its aid. *See Wichelman*, 83 N.W.2d at 816; *see also Kliber*, 448 N.W.2d at 379. Here, although the city was conveyed an easement interest in the road, there is nothing in the record indicating that fee simple title to the road was transferred to the city. *See Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789 (Minn. 1970) ("A right-of-way is an easement only and a conveyance thereof is not a conveyance of the land itself. Title to the land under such circumstances does not pass."). Instead, the easement instruments conveyed only an easement interest in the road, which is not a sufficient source of title to invoke the MTA.

The city concedes that it does not have fee simple title to the property. But the city contends that its "'source of title' . . . is common-law dedication of a public roadway." In other words, the city claims that it "holds a publicly dedicated roadway that is akin to a fee simple determinable with a possibility of reverter."

To support its position, the city relies on *Bengtson v. Village of Marine on St. Croix*, 246 N.W.2d 582 (Minn. 1976). In that case, the landowner constructed a road across his 80 acres of property, connecting a state highway to another landowner's property.

Bengtson, 246 N.W.2d at 583-84. After the landowner made improvements to his road, he brought suit against the village to recover the reasonable value of improvements the landowner had made to the road. *Id.* at 583. In addressing whether the road was a public or private road, the supreme court recognized that a public road may be established by common-law dedication. *Id.* at 584. The supreme court then stated that the "elements of a common-law dedication of a roadway are (1) the landowner's intent—express or implied—to have his land appropriated and devoted to a public use; and (2) an acceptance of that use by the public." *Id.* The supreme court determined that the "finding of the district court that the road is not a public road is reversed as clearly erroneous" because "[a]ll evidence indicated long and continuous use of the road by the public, and in the past the village has done maintenance work on it." *Id.* at 584-85. But the supreme court concluded that although the road is a public road on which "the public has an easement right to travel," it does not follow "that an abutting landowner may repair the road and force the village to reimburse him for his expenses." *Id.* at 585.

The city argues that a common-law dedication has occurred here because, "[s]imilar to *Bengtson*, . . . Dellwood's predecessor manifested the intent that the road would be devoted to a permanent public use" by entering into the 1974 easement, and the "public has consistently used the road." But this case is distinguishable from *Bengtson* because here, unlike in *Bengtson*, there was a specific easement to not only allow the city to use the road, but also to pay for the cost to maintain it. And by granting an easement to the city, fee simple title of the road remained with the property owner. *See Cohler*, 177 N.W.2d at 789. Moreover, the city cites no case, nor have we found any, in which common-law

dedication of a road is applicable where there is a specific easement agreement granting a municipality an easement over a landowner's property for public-road purposes. Therefore, the city cannot demonstrate that its source of title to the road is common-law dedication of a public roadway.

The city further contends that it "should be held to have the property interest necessary to allow it to invoke the MTA" because the MTA is "not a model of clarity" and because "[i]t is sound public policy to allow municipalities to rely on the MTA to clear the title of public roadways involving ancient interests that have not been renewed through the recording of notice under the MTA." But we do not consider public policy when the language of a statute is unambiguous. *See Firefighters Union Loc. 4725 v. City of Brainerd*, 934 N.W.2d 101, 109 (Minn. 2019); *see also LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000) (stating that this court "is limited in its function to correcting errors" and "cannot create public policy"), *rev. denied* (Minn. May 16, 2000). The MTA unambiguously requires that the party seeking to invoke the MTA for its own benefit establish a claim of title based upon a source of title in the subject property. Minn. Stat. § 541.023, subd. 1; *see Wichelman*, 83 N.W.2d at 807. The MTA also unambiguously states that a "source of title" means "any deed, judgment, decree, sheriff's certificate, or other instrument which transfers or confirms, or purports to transfer or confirm, a fee simple title to real estate." Minn. Stat. § 541.023, subd. 7. The city cannot establish a

"source of title" to the road sufficient to invoke the MTA. Therefore, the district court erroneously applied the MTA in deciding the issue before it.[2]

The city argues that even if this court determines that the MTA does not apply, a remand is unnecessary "because the 1974 Easement no longer has any force or effect as the [district] court . . . held it was modified and replaced by substitution via the 1987 . . . Easement." We are not persuaded.

An easement is defined as "an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists." *Cohler*, 177 N.W.2d at 789. An easement may be modified or relocated by agreement between the owners of the dominant and servient estates. *Schmidt v. Koecher*, 265 N.W. 347, 349 (Minn. 1936). "The parameters of an easement created by a grant depends entirely upon the construction of the terms of the grant." *Bergh & Mission Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997) (quotation omitted).

When an easement is created by an express grant, as it was in this case, its terms constitute a contract. *Lindberg v. Fasching*, 667 N.W.2d 481, 487 (Minn. App. 2003), *rev. denied* (Minn. Nov. 18, 2003). "When the language is clear and unambiguous, we enforce

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[2] The city argues that "[a]s a corollary to the MTA, the provisions of Minn. Stat. § 500.20 [(2020)] eliminated the restrictive covenant contained within the 1974 Easement." But this argument was not presented to nor considered by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally do not consider arguments raised for the first time on appeal). And the city's argument is outside the scope of the order for supplemental briefing, which was limited to questions related to the MTA. Therefore, we decline to consider the city's argument related to section 500.20.

the agreement of the parties as expressed in the language of the contract." *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). But where an easement is granted in general terms, "the uncertainty must be resolved by applying the general principles of law relating to the construction of ambiguous writings." *Farnes v. Lane*, 161 N.W.2d 297, 300 (Minn. 1968). In resolving ambiguous easement grants, district courts may consider extrinsic evidence "relating to the facts peculiar to the particular easement involved on the assumption that the grantor intended to permit a use of the easement which was reasonable under the circumstances and the grantee expected to enjoy the use to the fullest extent consistent with its purpose." *Id.*

Whether an ambiguity exists is a question of law, which this court reviews de novo. *Storms*, 883 N.W.2d at 776. "[I]f the terms of an instrument of conveyance are ambiguous, interpretation of the instrument is a question of fact." *Apitz v. Hopkins*, 863 N.W.2d 437, 439 (Minn. App. 2015).

The city argues that the facts of this case, as stipulated to by the parties, demonstrates that the 1987 easement modified the 1974 easement such that the city is no longer bound by the restriction about costs and assignment of costs related to the maintenance of the road. We disagree. The roads described in the 1974 easement and the 1987 easement, although similar, are not identical. Moreover, unlike the 1974 easement, the 1987 easement contains no language stating that the city should bear the cost of maintaining the road. And notably, the 1987 easement contains no language stating that the 1987 easement supersedes or replaces any prior easements. Although "silence alone does not necessarily create an ambiguity as a matter of law," *Facilities, Inc. v. Rogers-Usry*

Chevrolet, Inc., 908 So.2d 107, 115 (Miss. 2005), the circumstances presented here surrounding the two easements do create an ambiguity regarding the precise effect of the 1987 easement related to the cost of maintaining the road. Such an ambiguity is a fact question, which we cannot resolve. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that an appellate court does not find facts).

In conclusion, we hold that the MTA does not apply to this case. Therefore, we reverse and remand to the district court to resolve the ambiguity in determining the application of the two easements relating to who bears the cost of maintaining the road. On remand, the district court, in its discretion, may reopen the record in order to make this determination.

Reversed and remanded.