to reimbursement for the expense of the surgery itself. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[16]

CONCLUSION

Because Gammel's opinions, along with other evidence, provided sufficient competent evidence to support a finding that Pearson's knee replacement surgery was not the result of the work-related accident, the Workers' Compensation Court did not err in finding that Pearson's surgery was not compensable under § 48-120. In so holding, the compensation court was not acting contrary to the original award but was enforcing the award's plain language. Finding no error, we affirm the order of the review panel affirming the denial of compensation for Pearson's knee replacement surgery.

AFFIRMED.

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[16] *Selma Development v. Great Western Bank*, *ante* p. 37, 825 N.W.2d 215 (2013).

UNITED STATES COLD STORAGE, INC., A NEW JERSEY CORPORATION, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEE AND CROSS-APPELLANT, V. CITY OF LA VISTA, A NEBRASKA MUNICIPAL CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES, AND SANITARY AND IMPROVEMENT DISTRICT NO. 59 OF SARPY COUNTY, NEBRASKA, A NEBRASKA MUNICIPAL CORPORATION, APPELLANT.

831 N.W.2d 23

Filed March 29, 2013. No. S-12-267.

1. **Annexation: Ordinances: Equity: Appeal and Error.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity. On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.

3. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
4. **Municipal Corporations: Annexation.** A municipality may not annex property for revenue purposes only.
5. **Equity: Appeal and Error.** In an equity action, when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
6. **Legislature.** The Legislature is free to create and abolish rights so long as no vested right is disturbed.
7. **Constitutional Law: Words and Phrases.** The type of right that vests can be generally described as an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice. To be considered a vested right, the right must be fixed, settled, absolute, and not contingent upon anything.
8. **Constitutional Law: Property.** With respect to property, a right is considered to be vested if it involves an immediate fixed right of present or future enjoyment and an immediate right of present enjoyment, or a present fixed right of future enjoyment.
9. **Constitutional Law: Property: Legislature.** A vested right must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property. In essence, whether the Legislature acted beyond its power in affecting a right can only be determined after examining the nature of the alleged right and the character of the change in the law.
10. **Constitutional Law: Statutes: Intent: Presumptions.** A vested right can be created by statute. But it is presumed that a statutory scheme is not intended to create vested rights, and a party claiming otherwise must overcome that presumption.
11. **Constitutional Law: Taxation.** As a general rule, exemptions from taxation do not confer vested rights.
12. **Contracts: Statutes: Legislature: Intent: Presumptions.** Although a statute can be the source of a contractual right, a contract will be found to exist only if the statutory language evinces a clear and unmistakable indication that the Legislature intends to bind itself contractually. The general rule is that rights conferred by statute are presumed not to be contractual.
13. **Appeal and Error.** An appellate court may, at its option, notice plain error.
14. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Robert J. Huck and Scott D. Jochim, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellant.

Bryan S. Hatch, of Stinson, Morrison & Hecker, L.L.P., for appellee United States Cold Storage, Inc.

Gerald L. Friedrichsen and William M. Bradshaw, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellees City of La Vista et al.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

STEPHAN, J.

In this appeal, United States Cold Storage, Inc. (Cold Storage), and Sanitary and Improvement District No. 59 of Sarpy County (SID 59) contend that the district court for Sarpy County erred in rejecting their challenges to separate annexation ordinances enacted by the City of La Vista. We affirm the judgment of the district court.

I. BACKGROUND

Cold Storage is a New Jersey corporation that owns and operates a public refrigerator warehouse facility located in Sarpy County, Nebraska. The City of La Vista is a Nebraska municipal corporation of the first class located in Sarpy County. Doug Kindig is the mayor of La Vista, and Brenda Carlisle, Ron Sheehan, Alan Ronan, Mark Ellerbeck, Mike Crawford, Terrilyn Quick, Kelly Sell, and Anthony Gowan are members of the La Vista City Council. We shall refer to the city and its officers collectively as "La Vista."

In 1969, the owner of a contiguous 210-acre tract of land in Sarpy County petitioned the Sarpy County Board of Commissioners to designate the tract as an industrial area and the board complied.[1] Under § 13-1111, an industrial area is land "used or reserved for the location of industry." At the time of the designation, La Vista's zoning jurisdiction did not reach any part of the industrial area tract. By 1970, the industrial area had an assessed value of more than $100,000. Cold Storage acquired four lots in the industrial area in 1971 and has operated its business there since that time.

[1] See Neb. Rev. Stat. §§ 13-1111 to 13-1120 (Reissue 2012) (formerly Neb. Rev. Stat. §§ 19-2501 to 19-2508 (Cum. Supp. 1969)).

SID 59 was created in 1971 to provide utilities and services to the industrial area. The area of SID 59 is greater than, but includes, the entire industrial area.

On October 6, 2009, La Vista resolved to annex SID 59. On October 8, it sent written notices to the property owners within SID 59 of an October 22 city planning commission public hearing on the proposed annexation. On November 3, La Vista sent written notice to the property owners within SID 59 of a November 17 city council hearing also regarding the annexation of SID 59. On December 1, after conducting the public hearings, La Vista approved an ordinance (ordinance 1107) purporting to annex SID 59 in its entirety.

On December 16, 2009, Cold Storage filed a class action complaint challenging the validity of ordinance 1107 on behalf of itself and all landowners in SID 59. Named defendants were La Vista and SID 59. The complaint alleged that ordinance 1107 was invalid because (1) La Vista failed to comply with statutory notice requirements when adopting it, (2) the annexation was for revenue purposes only, and (3) state law prohibited the annexation of the industrial area within SID 59.

On January 18, 2011, while Cold Storage's challenge to the validity of ordinance 1107 was pending in district court, La Vista directed its planning commission to consider the annexation of only a portion of SID 59; specifically, that portion that did not include the industrial area. On April 19, after giving proper statutory notice of this proposed annexation, La Vista adopted an ordinance (ordinance 1142) purporting to annex the portion of SID 59 that did not include the industrial area.

On April 27, 2011, SID 59 filed a cross-claim in the original action filed by Cold Storage. The cross-claim named La Vista as defendant and challenged the validity of ordinance 1142. Specifically, the cross-claim asserted that La Vista was barred by Neb. Rev. Stat. § 31-765 (Reissue 2008) from attempting a partial annexation of SID 59 via ordinance 1142 while Cold Storage's challenge to the validity of La Vista's total annexation of SID 59 via ordinance 1107 was pending in the courts.

A bench trial on all claims was held in January 2012. On March 6, the district court entered orders finding in favor of

La Vista on all claims. Both Cold Storage and SID 59 filed timely notices of appeal, and we granted SID 59's petition to bypass the Court of Appeals. Because SID 59 filed the initial notice of appeal, Cold Storage is designated as an appellee asserting a cross-appeal pursuant to Neb. Ct. R. App. P. § 2-101(C) (rev. 2010).

II. ASSIGNMENTS OF ERROR

SID 59 assigns, restated and consolidated, that ordinance 1142 is invalid because § 31-765 prohibits a city from passing a partial annexation ordinance involving the same area already included within a prior total annexation ordinance when the validity of the prior ordinance has not been finally determined.

Cold Storage assigns that the district court, with respect to ordinance 1107, erred in (1) finding La Vista properly complied with the statutory notice provisions, (2) not finding Neb. Rev. Stat. § 19-5001(5) (Reissue 2012) unconstitutional, (3) finding La Vista could annex the industrial area without the consent of a majority in value of its property owners, (4) failing to find a 1991 amendment to § 13-1115 unconstitutional as special legislation, and (5) failing to find that La Vista annexed SID 59 for revenue purposes only.

III. STANDARD OF REVIEW

[1] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.[2] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[3]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[4]

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[2] *County of Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456 (2009); *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[3] *Id.*

[4] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012); *Engler v. State*, 283 Neb. 985, 814 N.W.2d 387 (2012).

IV. ANALYSIS

1. Ordinance 1107

In its cross-appeal, Cold Storage asserts five reasons why the district court erred in upholding the validity of ordinance 1107, by which La Vista sought to annex the entirety of SID 59. We shall address each in turn.

(a) Statutory Notice Requirements

Cold Storage contends that ordinance 1107 is invalid because La Vista failed to comply with the statutory notice requirements set forth in § 19-5001. These requirements were enacted in 2009.[5] The city's community development director testified that prior law did not require notice to landowners prior to the commencement of annexation proceedings and that this was her first attempt to comply with the new statutory requirements.

According to § 19-5001(1), "A city of the first or second class or village shall provide written notice of a proposed annexation to the owners of property within the area proposed for annexation . . . ." Section 19-5001(2) requires that notice be sent "by regular United States mail" postmarked "at least ten working days prior to the planning commission's public hearing" on the annexation and that a "certified letter" be sent to the clerk of any affected sanitary and improvement district. Section 19-5001(2) requires that such notice include "the telephone number of the pertinent city or village official and an electronic mail or Internet address if available." Section 19-5001(3) requires that a second notice be sent to the same parties "postmarked at least ten working days prior to the public hearing of the city council or village board on the annexation." This notice also must include the telephone number "and an electronic mail or Internet address if available."

It is undisputed that La Vista did not strictly comply with these notice requirements. It sent notices of the public hearing of the planning commission on October 8, 2009, which date was fewer than 10 working days prior to the hearing on October 22. It then sent notices of the city council meeting

[5] See 2009 Neb. Laws, L.B. 495.

on November 3, which date was fewer than 10 working days prior to the meeting on November 17. La Vista also sent the certified letter to an individual that was not the clerk of SID 59. In addition, the notices included the telephone number of the pertinent city official but did not also include an electronic mail or Internet address.

At trial, city officials explained that the notices were slightly late because they relied on an electronic calendar to determine the 10-day notice period and that the calendar used did not consider either the Columbus Day holiday on October 12 or the Veterans Day holiday on November 11. La Vista also presented evidence that the clerk of SID 59 had actual notice of the planning commission hearing and attended it. And the community development director testified that she misread the statute and thought it required a telephone number *or* an e-mail or Internet address.

La Vista contends that its failure to strictly comply with the requirements of § 19-5001(1) to (3) is forgiven by § 19-5001(5), which provides in part:

> Except for a willful or deliberate failure to cause notice to be given, no annexation decision made by a city of the first or second class or village to accept or reject a proposed annexation, either in whole or in part, shall be void, invalidated, or affected in any way because of any irregularity, defect, error, or failure on the part of the city or village or its employees to cause notice to be given as required by this section if a reasonable attempt to comply with this section was made.

The district court accepted this argument, finding the evidence showed that La Vista's actions were not deliberate or willful and that it made reasonable efforts to comply with the notice provisions.

Based upon our de novo review of the record, we agree. La Vista offered a reasonable explanation as to why the notices were not sent 10 working days prior to the hearings. It is also clear that the notices were sent 9 working days prior to the hearing, and thus everyone affected had reasonable notice. Although the clerk of SID 59 did not receive the proper written notice, he had actual notice of and attended the planning

commission hearing, and thus there was no prejudice to SID 59. In addition, the items that were omitted from the notices, including e-mail and Internet addresses, were relatively minor, in that a telephone number was provided and thus there was an expedient way to contact the relevant official. Although clearly La Vista made numerous errors with respect to the notices, nothing in the evidence supports any finding that it did so willfully or deliberately. The situation before us appears to be precisely the type of notice disparity meant to be resolved by § 19-5001(5). We therefore conclude that ordinance 1107 is not void for lack of notice to the affected property owners.

(b) Constitutionality of § 19-5001(5)

[3] In its brief on cross-appeal, Cold Storage argues that § 19-5001(5) is unconstitutional because it allows a city to annex an area without strictly complying with the annexation statutes. It argues that a municipal corporation has only that power provided by legislative enactment to extend its boundaries and that La Vista thus has to strictly comply with the notice statutes in order to exercise its annexation powers. We need not address this argument, as it was not presented to or decided by the district court. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[6]

(c) Annexation for Revenue Purposes

[4] Cold Storage argues that the district court erred in rejecting its claim that La Vista enacted ordinance 1107 solely for the purpose of obtaining revenue. A municipality may not annex property for revenue purposes only.[7] As the party attacking

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[6] *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011); *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008).

[7] *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved on other grounds, Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004); *S.I.D. No. 95 v. City of Omaha*, 221 Neb. 272, 376 N.W.2d 767 (1985). See, also, *United States v. City of Bellevue, Nebraska*, 334 F. Supp. 881 (D. Neb. 1971), *affirmed* 474 F.2d 473 (8th Cir. 1973).

ordinance 1107, Cold Storage had the burden of proving that La Vista acted pursuant to this impermissible purpose.[8]

Our cases recognize that the legal proscription against annexation for revenue purposes only does not mean that a municipality cannot consider potential revenues in deciding whether to proceed with an annexation. As we noted in *SID No. 57 v. City of Elkhorn*,[9] "[p]rudent annexation planning compels the City to consider any revenue to be engendered by annexation, in light of the liabilities to be incurred." In that case, we rejected a claim that the annexation was solely for revenue purposes, noting that the city would incur "substantial obligations" as a result of the annexation.[10] Similarly, in *S.I.D. No. 95 v. City of Omaha*,[11] we determined that the record did not support a claim that "the city's only objective in annexing the land . . . was to become the recipient of increased revenues, free of corresponding obligations," noting that because the sanitary and improvement district was fully developed, the city would assume all of its bonded indebtedness and the responsibility to provide "necessary improvements and services."

In this case, the record reflects that prior to enacting ordinance 1107, La Vista amended its comprehensive plan to include a new chapter entitled "Annexation Plan." The annexation plan sets forth general considerations for annexation of land within La Vista's extraterritorial jurisdiction and adopts specific annexation policies. Those policies include that La Vista will pursue an annexation program that "adds to the economic stability of the city, protects and enhances its quality of life, and protects its environmental resources." The annexation policies also include the promotion of "orderly growth and the provision of municipal services" and preservation of the city's "fiscal position." The annexation plan

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[8] See *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993).

[9] *SID No. 57 v. City of Elkhorn, supra* note 7, 248 Neb. at 489, 536 N.W.2d at 61.

[10] *Id.*

[11] *S.I.D. No. 95 v. City of Omaha, supra* note 7, 221 Neb. at 278-79, 376 N.W.2d at 772.

specifies an annexation study process which includes the preparation of "a plan with complete information on [La Vista's] intentions for extending city services to the land proposed for annexation."

Pursuant to this annexation plan and Neb. Rev. Stat. § 16-117(4) (Reissue 2012), the city's community development director prepared a staff report for the proposed annexation of SID 59 which was submitted to the city council on October 6, 2009. The report identified the street and sewer improvements La Vista would become responsible for in the event of annexation and estimated the maintenance expenses related to those improvements. The report also analyzed how police and fire services would be provided by La Vista to the area under consideration for annexation. It noted that with additional staff, police response time to the annexed areas would improve, and that fire service could be provided with current staff.

In a section titled "Annexation Suitability," the report noted: "[SID 59] is bordered by the City limits on several sides of its perimeter. Annexation would be a logical extension of the city." The city administrator testified that SID 59 was "a big SID" situated "sort of as an island in the city's area." She noted that this had resulted in some confusion about who was responsible for providing certain services such as law enforcement and snow removal. She also explained that annexation of SID 59 was a component of the orderly growth of the city, noting that a portion of SID 59 had been previously annexed and that the city was already providing some services to areas within SID 59.

The report included an analysis of the fiscal impact of annexation prepared by the city's finance director. She testified that upon annexation, the city would assume all debts and obligations of SID 59, including approximately $2.1 million in net bonded debt, and would incur the expense of providing public services to the annexed area. The finance director's analysis included a comparison of the revenue stream which the city would realize from annexation compared to the expense it would incur in the assumption of SID 59's indebtedness. This analysis was favorable to the city, in that it reduced its net

debt-to-valuation ratio which was beneficial to the city's ability to issue bonds.

[5] The district court concluded that Cold Storage had failed to meet its burden of proving that the annexation was solely for the purpose of obtaining revenue, noting that "[t]he evidence indicates that several factors other than revenue were considered and used by La Vista when it decided to proceed forward with the annexation of SID 59." Based upon our review of the evidence, we agree. Revenue was surely a factor, but other factors included the indebtedness which the city would assume by annexation; La Vista's objective of orderly growth; and the perception that annexation of SID 59's territory, which was already surrounded by the city, would improve the provision of services by eliminating jurisdictional issues. Cold Storage argues that the testimony of city officials was inconsistent and therefore should not be given weight. Although our review of this equity matter is de novo, when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[12] We conclude that the district court did not err in concluding that La Vista did not undertake the annexation of SID 59 solely for the purpose of obtaining revenue.

(d) Due Process

Cold Storage also argues that as the owner of property designated as an industrial area, its right to substantive due process would be violated by annexation pursuant to ordinance 1107.

(i) Applicable Statutes

The argument is premised on current and former Nebraska statutes[13] authorizing the creation of an "[i]ndustrial area," which is defined by Nebraska law as "a tract of land used or reserved for the location of industry."[14] Pursuant to § 13-1111,

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[12] See, *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011); *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

[13] See §§ 13-1111 to 13-1120 (Reissue 2012) and 13-1115 (Reissue 1987).

[14] § 13-1111.

> The owner or owners of any contiguous tract of real estate containing twenty acres or more, no part of which is within the boundaries of any incorporated city or village, except cities of the metropolitan or primary class, may file or cause to be filed with the county clerk of the county in which the greater portion of such real estate is situated if situated in more than one county, an application requesting the county board of such county to designate such contiguous tract as an industrial area.

Upon the filing of such an application, the county clerk "shall notify such municipal legislative bodies in whose area of zoning jurisdiction" the proposed industrial area is located and "request approval or disapproval" of the designation of the tract as an industrial area.[15] The approval "may be conditioned upon terms agreed to between the city and county," and if formal reply is not received within 30 days, "the county board shall construe such inaction as approval of such designation."[16]

Prior to 1991, § 13-1115 (Reissue 1987) provided that if a tract designated as an industrial area

> shall have an actual valuation of more than two hundred eighty-six thousand dollars, it shall not be subject to inclusion within the boundaries of any incorporated first- or second-class city or village unless so stipulated in the terms and conditions agreed upon between the county and the city or village in any agreement entered into pursuant to section 13-1112 or unless the owners of a majority in value of the property in such tract as shown upon the last preceding county assessment roll shall consent to such inclusion in writing or shall petition the city council or village board to annex such area.

But in 1991, § 13-1115 was amended to add a third circumstance which would permit annexation of an industrial area. The new language provided that an industrial area "regardless of actual valuation may be annexed if (1) it is located in a county with a population in excess of one hundred thousand persons and the city or village did not approve the original

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[15] § 13-1112.

[16] *Id.*

designation of such tract as an industrial area pursuant to section 13-1112."[17]

Both conditions of § 13-1115(1) are met in this case. The parties have stipulated that Sarpy County, in which the industrial area is located, had a population in excess of 100,000 in both 1990 and 2010. Section 13-1112 provides that municipal legislative bodies "in whose area of zoning jurisdiction an industrial tract is located" must be given an opportunity to approve or disapprove of the formation of an industrial area. Because the property was not within the city's zoning jurisdiction at the time that the industrial area was formed, La Vista could not and therefore did not approve of the formation within the meaning of §§ 13-1112 and 13-1115. Accordingly, we agree with the district court that § 13-1115(1) would permit the annexation contemplated by ordinance 1107 if that statute can be constitutionally applied in this case. We turn, now, to that question.

(ii) Vested Right

It is undisputed that under § 13-1115 as it was written prior to 1991, La Vista could not have annexed the industrial area within SID 59, because the area had an actual valuation of more than $286,000 and there was neither a stipulation pursuant to § 13-1112 nor consent of the owners of a majority in value of the property. But as we have noted, the 1991 amendment to § 13-1115 would permit annexation of the industrial area at issue here without either the stipulation or the consent of the property owners. Cold Storage contends that it had a vested right under pre-1991 law that its property could not be annexed without its consent and that therefore, application of the 1991 amendment to § 13-1115 to justify annexation of the industrial area would deprive it of substantive due process.

[6-10] The Legislature is free to create and abolish rights so long as no vested right is disturbed.[18] Thus, the question presented here is whether § 13-1115 as it was written prior

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[17] See 1991 Neb. Laws, L.B. 76, § 1.

[18] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006); *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989).

to the 1991 amendment created a constitutionally protected "vested right." The type of right that "vests" can be generally described as "an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice."[19] To be considered a vested right, the right must be "fixed, settled, absolute, and not contingent upon anything."[20] With respect to property, a right is considered to be "vested" if it involves "an immediate fixed right of present or future enjoyment and an immediate right of present enjoyment, or a present fixed right of future enjoyment."[21] A vested right "must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property."[22] In essence, whether the Legislature acted beyond its power in affecting a right can only be determined after examining the nature of the alleged right and the character of the change in the law.[23] A vested right can be created by statute.[24] But it is presumed that a statutory scheme is not intended to create vested rights, and a party claiming otherwise must overcome that presumption.[25]

Cold Storage argues that its claimed right to be free from annexation is analogous to a property owner's right not to have existing zoning ordinances changed in a manner that alters the permissible use of the property. We have held that a zoning ordinance cannot take away a vested property right.[26]

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[19] 16B Am. Jur. 2d *Constitutional Law* § 746 at 190 (2009).

[20] *Id*. at 191.

[21] *Id*.

[22] *Id*., § 748 at 193.

[23] See *id*., § 746.

[24] *Id*., § 747.

[25] *Id*. See, *Koster v. City of Davenport, Iowa*, 183 F.3d 762 (8th Cir. 1999); *Doe v. California Dept. of Justice*, 173 Cal. App. 4th 1095, 93 Cal. Rptr. 3d 736 (2009).

[26] *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949); *Cassel Realty Co. v. City of Omaha*, 144 Neb. 753, 14 N.W.2d 600 (1944); *Baker v. Somerville*, 138 Neb. 466, 293 N.W. 326 (1940).

Specifically, once a property owner has put property to a use authorized by existing zoning laws, the zoning laws cannot be changed to disallow that use.[27] But subjecting Cold Storage's property to annexation does not affect its use. As the district court noted, annexation would not change the permissible use of the property in question. Thus, we do not view the 1991 statutory amendment at issue here as analogous to a change in zoning laws.

The principal effect of annexation on Cold Storage is that its property would no longer be subject to taxation by SID 59, but would instead become subject to taxation by La Vista. Thus, the true nature of the vested right claimed by Cold Storage is the "benefit," specifically lower taxes, accruing from not being subject to taxation by La Vista. The question, then, is whether a right to what is in essence a partial statutory exemption from taxation is a vested right which cannot be subsequently taken away by the Legislature.

[11] As a general rule, exemptions from taxation do not confer vested rights.[28] We addressed the issue in *State, ex rel. Spelts, v. Rowe*.[29] There, at the time a landowner mortgaged his land, a 1911 statute valued his taxable interest in the land at $412.50. In 1919, the statute was amended so that his taxable interest became $16,250. He claimed that the amendment could not be applied to him, arguing in part that to do so would destroy a vested right. In rejecting this argument, this court reasoned that the power of taxation is a necessary attribute of sovereignty and that it was vested in the Legislature without limit. We further noted that in the 1911 statute, the Legislature did not contract or agree that the tax conditions would not change. We held:

> [W]here a part of the property within the state is not being taxed, in whole or in part, there is no pledge or agreement, expressed or implied, that the laws shall not be repealed or amended by a subsequent legislature to

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[27] See *id.*

[28] 16A C.J.S. *Constitutional Law* § 395 (2005).

[29] *State, ex rel. Spelts, v. Rowe*, 108 Neb. 232, 188 N.W. 107 (1922).

> meet the conditions which exempted the property from taxation and the placing of it on the tax list.[30]

We reasoned that the 1911 statute was "general in its effect, and was subject to repeal or amendment at legislative will."[31]

The Supreme Court of Iowa addressed an analogous case in *Shiner v. Jacobs et al., Township Trustees*.[32] An Iowa law provided that for every acre of forest trees planted on land, the landowner would receive a tax exemption of $100 for 10 years. After a landowner planted trees on his land, the law was amended to provide that the exemption could not exceed "'one-half of the valuation of the realty'" upon which it was claimed.[33] The landowner sued, arguing the amendment could not apply to him "because, when he accepted the terms of the original statute and complied with its requirements, his right to exemption from taxation to the extent of $100 per acre for ten years became complete."[34] The Supreme Court of Iowa rejected the argument, reasoning that the exemption was provided for in an act of general legislation that was applicable to all lands in the state. It found that the law was not in any manner a contract between the state and a landowner that availed himself of its provisions and reasoned it was "well settled" that "where an exemption from taxation is provided for by the general laws of the state, any subsequent legislature is not thereby deprived of the power to alter the law and remove the exemption."[35]

The U.S. Supreme Court has addressed a similar situation. In *Salt Company v. East Saginaw*,[36] a Michigan law passed in 1859 provided that all corporations formed for the purpose of boring for and manufacturing salt would be exempt from

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[30] *Id.* at 237, 188 N.W. at 109.

[31] *Id.*

[32] *Shiner v. Jacobs et al., Township Trustees*, 62 Iowa 392, 17 N.W. 613 (1883).

[33] *Id.* at 393, 17 N.W. at 613.

[34] *Id.*

[35] *Id.* at 393-94, 17 N.W. at 613.

[36] *Salt Company v. East Saginaw*, 80 U.S. 373, 374, 20 L. Ed. 611 (1871).

paying taxes on "'[a]ll property, real and personal'" "'for any purpose.'" The law also paid a "'bounty'" of 10 cents for each bushel of salt produced once 5,000 bushels were manufactured.[37] In 1861, the act was amended to limit the tax exemption to a period of 5 years and limited the total bounty possible to $5,000. A company that had organized and operated under the 1859 law sued, arguing the amendments could not be applied to it. The Supreme Court disagreed, reasoning the law was simply "a general law, regulative of the internal economy of the State" and, as such, subject to repeal and alteration at the whim of the legislature.[38]

We find nothing in the language of the pre-1991 version of § 13-1115 which would constitute a pledge by the Legislature that the circumstances under which property in an industrial area could be annexed would never be altered by an amendment to the statute. Accordingly, the former statute created no constitutionally protected vested right which would preclude application of the amended statute.

(iii) Impairment of Contract

[12] Cold Storage makes a related argument that the annexation would impair its contractual right arising from the pre-1991 version of § 13-1115. Although a statute can be the source of a contractual right, a contract will be found to exist only if the statutory language "evince[s] a clear and unmistakable indication that the legislature intends to bind itself contractually."[39] The general rule is that rights conferred by statute are presumed not to be contractual.[40]

For the same reason that we concluded the prior version of the statute created no vested right, we conclude it created no contractual right. We find nothing in the statutory language indicating intent on the part of the Legislature to be contractually bound with the landowners in a designated industrial

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[37] *Id.*

[38] *Id.*, 80 U.S. at 378.

[39] 16B Am. Jur. 2d, *supra* note 19, § 770 at 214.

[40] *Id.*

area, or any corresponding duty on the part of landowners in the industrial area that could be construed as the landowners' part of the contract with the state.

(iv) Retroactivity

We find no merit in Cold Storage's argument that § 13-1115 cannot be applied retroactively to authorize the annexation of its property. As noted, the Legislature had the authority to change the law in 1991 and that change applies to Cold Storage because it had no vested or contractual right prior to that change. Applying a change in the law that was made in 1991 to an annexation ordinance adopted in 2009 does not constitute a retroactive application. What Cold Storage characterizes as a retroactivity argument is subsumed within the question of whether application of § 13-1115 as amended would deprive Cold Storage of a vested or contractual right. For the reasons discussed above, we conclude that it would not.

(e) Special Legislation

On appeal, Cold Storage argues that to the extent the 1991 amendment to § 13-1115 can be read to authorize the annexation of its property without its consent, the statute is void as unconstitutional special legislation, in violation of article III, § 18, of the Nebraska Constitution. But this argument is not properly preserved for our review. In its complaint, Cold Storage did not challenge the 1991 amendment to § 13-1115 as unconstitutional special legislation. At trial, Cold Storage did not advise the court that it was challenging § 13-1115 as unconstitutional special legislation. And not surprisingly, the district court did not address any issue of special legislation in its order dismissing the complaint. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[41]

For completeness, we note that in its answer to the complaint, La Vista asserted that §§ 13-1111 to 13-1120, including § 13-1115, are special legislation. However, this claim appears

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[41] *Shepherd v. Chambers, supra* note 6; *Niemoller v. City of Papillion, supra* note 6.

to have been abandoned by the time of trial and, in any event, does not raise the specific constitutional issue which Cold Storage now asks us to decide. Accordingly, we conclude that Cold Storage, as the party which would have had the burden of proving the statute unconstitutional, did not present the question to the district court for disposition and has not preserved the issue for appeal.

[13,14] An appellate court may, at its option, notice plain error.[42] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[43] We find no such error in this case. Accordingly, we do not reach Cold Storage's special legislation claim.

(f) Summary

For the reasons discussed above, we find no merit in any of the assignments of error asserted by Cold Storage in its cross-appeal.

2. Ordinance 1142

The appeal of SID 59 is focused solely on ordinance 1142, by which La Vista sought to annex that portion of SID 59 that did not include the industrial area. SID 59 contends that ordinance 1142 is void because La Vista purported to adopt it while Cold Storage's challenge to ordinance 1107 was pending in the court.

The argument is premised on § 31-765, which must be read in context with other statutes relating to the annexation of sanitary and improvement districts. Neb. Rev. Stat. § 31-763 (Reissue 2008) details what is to occur "[w]henever any city or village annexes all the territory within the boundaries of any sanitary and improvement district . . . ." In that circumstance,

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[42] *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001).

[43] *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007); *Zwygart v. State*, 270 Neb. 41, 699 N.W.2d 362 (2005).

§ 31-763 provides that the sanitary and improvement district "shall merge" with the city or village. Section 31-765 then explains:

> The merger shall be effective thirty days after the effective date of the ordinance annexing the territory within the district; *Provided*, if the validity of the ordinance annexing the territory is challenged by a proceeding in a court of competent jurisdiction, the effective date of the merger shall be thirty days after the final determination of the validity of the ordinance. . . . [*T*]*he trustees or administrator of a sanitary and improvement district shall continue in possession and conduct the affairs of the district until the effective date of the merger, but shall not during such period levy any special assessments after the effective date of annexation*.

(Emphasis supplied.) Neb. Rev. Stat. § 31-766 (Reissue 2008) sets forth the procedures for dividing assets, liabilities, maintenance, and other obligations of the district and for changing the district's boundaries if "only a part of the territory within any sanitary and improvement district" "is annexed by a city or village."

SID 59 contends that in the circumstances of this case, where ordinance 1107 was pending in court, the italicized language of § 31-765 imposed an affirmative statutory limitation on La Vista's power to annex. La Vista contends that the language simply stays any proposed merger until a court can determine the validity of the challenged ordinance and does not in any way impose an additional statutory limitation on its power to annex.

The district court concluded La Vista was correct. And based on the plain language of § 31-765, read in light of that entire section and its placement in the statutes governing annexations of sanitary and improvement districts, we agree. It is quite clear that the purpose of the language in § 31-765 is simply to stay the effect of the proposed merger—here, the one effectuated by ordinance 1107—until a court can make a determination on the merits. Section 31-765 does not void ordinance 1142. Of course, because we have upheld the validity of ordinance 1107,

the validity and implementation of ordinance 1142 may be a moot point.

V. CONCLUSION

For the reasons discussed, we conclude that the district court did not err in upholding the validity of both ordinance 1107 and ordinance 1142 adopted by La Vista for the annexation of SID 59. We therefore affirm the judgments of the district court.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

VKGS, LLC, DOING BUSINESS AS VIDEO KING, A DELAWARE LIMITED LIABILITY COMPANY, APPELLANT, V. PLANET BINGO, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, AND MELANGE COMPUTER SERVICES, INC., A MICHIGAN CORPORATION, APPELLEES.

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1. **Judgments: Jurisdiction.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
4. **Judgments: Jurisdiction: Appeal and Error.** An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.
5. **Pleadings: Affidavits: Appeal and Error.** If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
6. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
7. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether