upon respondent's being on probation for a period of 2 years, including monitoring, following reinstatement, subject to the terms agreed to by respondent in the conditional admission and outlined above. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

KLAUS P. LINDNER, APPELLANT, V. DOUGLAS KINDIG, MAYOR OF THE CITY OF LA VISTA, ET AL., APPELLEES.

826 N.W.2d 868

Filed March 1, 2013. No. S-12-294.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
2. **Limitations of Actions.** Which statute of limitations applies is a question of law.
3. **Judgments: Appeal and Error.** An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.
4. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
5. **Constitutional Law: Appeal and Error.** Generally, a constitutional issue not passed upon by the trial court is not appropriate for consideration on appeal.
6. **Constitutional Law: Limitations of Actions.** A constitutional claim can become time barred just as any other claim can.
7. **Constitutional Law: Statutes: Proof.** A plaintiff can succeed in a facial challenge only by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.
8. **Limitations of Actions.** The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit.
9. ____. The time at which a cause of action accrues will differ depending on the facts of the case.

10. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.
11. **Limitations of Actions: Pleadings: Proof.** Where a complaint does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense, and, in that event, the defendant has the burden to prove that defense. If, however, the complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

K.C. Engdahl for appellant.

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

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

CASSEL, J.

INTRODUCTION

This appeal involves a declaratory judgment action challenging the constitutionality of a municipal ordinance creating an offstreet parking district adjoining a Cabela's store. The district court found that the action was barred by the general 4-year statute of limitations, because it was commenced more than 4 years after the ordinance was adopted. The primary question presented is when the statute began to run. Because we cannot tell from the face of the complaint when the taxpayer suffered harm and, thus, had the right to institute and maintain suit, we reverse, and remand for further proceedings.

BACKGROUND

On January 17, 2006, the City of La Vista, Nebraska (City), passed and approved ordinance No. 979. The ordinance provided for "the creation of vehicle offstreet parking

District No. 1 of the City" as authorized under Neb. Rev. Stat. § 19-3301 et seq. (Reissue 2012). According to the ordinance, the costs of the offstreet parking facilities—estimated by the city engineer to be $9 million—would be paid for from general taxes, special property taxes or assessments on property within the offstreet parking district, and/or general property taxes, with financing by issuance of the City's general obligation bonds.

On December 16, 2011, Klaus P. Lindner, a resident of the City, filed a complaint against the City and its mayor and city council members (collectively appellees). Lindner sought declaratory judgment and a declaration of the unconstitutionality of the ordinance.

Lindner alleged that the ordinance violated the Nebraska Constitution in two ways: first, by paying for the costs through a general property tax levy in violation of article VIII, § 6, and second, by granting a Cabela's store a special benefit in violation of article III, § 18. According to Lindner, appellees previously held a commercial enterprise responsible for payment of costs associated with installation of parking facilities that benefited the enterprise. But he alleged that under the ordinance, appellees had agreed to pay for and bear the entire cost of the parking facilities directly benefiting the Cabela's store. Lindner believed that the cost was paid with sales tax revenues drawn from municipal general funds. He also believed that no other business or individual doing business in the City had been provided with a similar special benefit. Lindner alleged that as a resident of the City, he was "aggrieved as a consequence of municipal revenues having been applied in an unconstitutional manner for the peculiar benefit of a private enterprise and in a manner which contravenes the constitutional prohibition on granting or establishment of special privileges and immunities."

Lindner therefore asked the district court to order and declare that "any and all agreements or practices as above detailed are null, void and unconstitutional" and to issue an order restraining and enjoining ongoing enforcement of or adherence to the ordinance. He also requested that appellees be

ordered to impose and levy any necessary special assessments upon the property which was specially benefited by the parking facilities.

Appellees filed a motion to dismiss the complaint under Neb. Ct. R. Pldg. § 6-1112(b)(6). They alleged that the claim was barred by the "applicable time periods" for challenging the ordinance.

The district court granted appellees' motion to dismiss and dismissed the complaint with prejudice. The court reasoned that the complaint was subject to the 4-year catchall statute of limitations set forth in Neb. Rev. Stat. § 25-212 (Cum. Supp. 2012). The court determined that the limitations period began to run on the date that the ordinance was passed and approved—January 17, 2006—giving Lindner until January 17, 2010, to bring the current action. Because Lindner did not file the complaint until December 16, 2011, the court concluded that the complaint was barred by the statute of limitations.

Lindner timely appealed, and we moved the case to our docket pursuant to statutory authority.[1]

ASSIGNMENTS OF ERROR

Lindner alleges that the district court erred in (1) concluding that his complaint failed to state a claim upon which relief could be granted, (2) dismissing his complaint with prejudice, and (3) determining that the complaint was barred by a 4-year statute of limitations. Lindner also asserts that it was error as a matter of law to determine that a 4-year statute of limitations can operate to bar claims of unconstitutionality directed to a municipal ordinance.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law

[1] See Neb. Rev. Stat. § 24-1106 (Reissue 2008).

and fact which may be drawn therefrom, but not the pleader's conclusions.[2]

[2,3] Which statute of limitations applies is a question of law.[3] An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.[4]

ANALYSIS

[4,5] The question of the ordinance's constitutionality is not properly before us for two reasons. First, Lindner's brief did not assign error in this regard. Although Lindner filed a notice of a constitutional question,[5] which asserted that "a question of state unconstitutionality of the complained of city ordinances will necessarily be presented," his brief did not specifically assign that an ordinance was unconstitutional. To be considered by this court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[6] Second, the district court did not reach the issue. Generally, a constitutional issue not passed upon by the trial court is not appropriate for consideration on appeal.[7] Here, the district court did not reach any constitutional issue, because it dismissed the complaint under § 6-1112(b)(6) for being filed outside the statute of limitations. Because Lindner failed to specifically assign that the challenged ordinance was unconstitutional and because the district court did not consider the issue, we decline to address the constitutionality of the ordinance.

Nonetheless, the constitutionality of the ordinance is at the center of Lindner's claim. We assume without deciding that the two constitutional provisions identified in Lindner's complaint—article VIII, § 6, and article III, § 18—apply to the

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[2] *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 282 Neb. 762, 810 N.W.2d 144 (2011).

[3] *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

[4] *Id.*

[5] See Neb. Ct. R. App. P. § 2-109(E) (rev. 2012).

[6] *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

[7] See *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007).

ordinance. However, in so doing, we express no opinion on the constitutionality of the ordinance or on its continued viability. Thus, we turn to the issue that is properly before us—whether Lindner's claim that the ordinance is unconstitutional is barred by a statute of limitations.

Lindner argues that a claim of unconstitutionality is not the type of claim which is subject to the bar of a statute of limitations. He argues that because a constitutionally infirm enactment is wholly void ab initio, "[e]ach day of unconstitutional subsistence is tantamount to a new and continuing wrong which may be challenged at any time . . . ."[8]

[6] But the U.S. Supreme Court has stated that a "constitutional claim can become time-barred just as any other claim can."[9] Statutes of limitations rest on a common understanding that wrongs for which the law grants a remedy are subject to a requirement that, in fairness, the party wronged must pursue the remedy in a timely fashion.[10] This understanding, in turn, addresses three concerns: first, for stale claims, where memories fade and witnesses and records may be missing; second, for repose—that after some period of time, claims should not continue unresolved; and third, that a plaintiff cannot sleep on his or her rights and then suddenly demand a remedy, without creating a greater wrong against the party charged and a wrong against the peace of the community.[11]

[7] At oral argument, Lindner clarified that his challenge to the constitutionality of the ordinance was a facial challenge. A plaintiff can succeed in a facial challenge only by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.[12] But the distinction between a facial as opposed to an "as-applied" challenge is not of great import for statute of

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[8] Brief for appellant at 8.

[9] *Block v. North Dakota*, 461 U.S. 273, 292, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983).

[10] See *Hair v. U.S.*, 350 F.3d 1253 (Fed. Cir. 2003).

[11] See *id.*

[12] See *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012).

limitations purposes. "[A] case alleging facial unconstitutionality is ripe not simply when the law is passed but, just like an as-applied challenge, when the government acts pursuant to that law and adversely affects the plaintiff's rights."[13] "There is simply no categorical rule that a law becomes insulated from facial challenge by the mere passage of time."[14]

[8,9] The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit.[15] "The time at which a cause of action accrues will differ depending on the facts of the case, but it will come whenever the plaintiff's rights are finally and clearly affected pursuant to the law that [he or] she believes is unconstitutional."[16]

Lindner's claim of harm ultimately depends upon the funding mechanism actually employed by appellees. According to the ordinance, the costs of the offstreet parking facilities would be paid for from general taxes, special property taxes or assessments on property within the offstreet parking district, and/or general property taxes, with financing by issuance of the City's general obligation bonds. In other words, the language of the ordinance was broad enough to allow for payment of the costs through a special assessment on Cabela's. And if that had occurred, Lindner's allegations of unconstitutionality would seem to disappear, because his complaint appears to concede that a special assessment would have been constitutional.

But instead, accepting as we must at this stage the truth of Lindner's allegations, appellees opted to pay for the costs of the offstreet parking district through a general property tax levy or sales tax revenues drawn from municipal general funds. It was this decision or its implementation that adversely affected Lindner's rights and allegedly gave rise to his right to institute suit.

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[13] Timothy Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. 51, 61 (2010). See *Gillmor v. Summit County*, 246 P.3d 102 (Utah 2010).

[14] Sandefur, *supra* note 13 at 61. Accord *Gillmor, supra* note 13.

[15] *Behrens v. Blunk*, 284 Neb. 454, 822 N.W.2d 344 (2012).

[16] Sandefur, *supra* note 13 at 61.

[10] However, from the face of Lindner's complaint, we cannot tell *when* appellees made the decision choosing the specific funding mechanism to be used or implemented that decision. At this stage, we must accept all of the factual allegations in the complaint as true and draw all reasonable inferences in Lindner's favor. To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.[17] It is certainly plausible that the decision to use general funding sources or the implementation of that decision was made within 4 years immediately before the filing of Lindner's complaint. The existing allegations are sufficient to raise a reasonable expectation that discovery will reveal the date at issue.[18]

[11] At this point, we need not—and indeed, we cannot—determine precisely when Lindner's claim accrued. The general rule is that where a complaint does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense, and, in that event, the defendant has the burden to prove that defense. If, however, the complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts.[19] Because the complaint does not allege when appellees decided to pay the costs from general sources or when it implemented the decision, the complaint does not disclose on its face that it is time barred. And in the absence of such allegations, we cannot determine with specificity when the claim accrued.

Although we agree with the district court that the 4-year catchall limitations period set forth in § 25-212 potentially applies, we disagree with the court's conclusion that the limitations period began to run when the ordinance was passed. Because we cannot determine when Lindner's cause of action

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[17] *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

[18] See *id.*

[19] See *Eisenhart v. Lobb*, 11 Neb. App. 124, 647 N.W.2d 96 (2002).

accrued in this case, we reverse the judgment and remand the cause for further proceedings.

CONCLUSION

We do not reach the constitutionality of the ordinance in this appeal. The harm to Lindner's rights allegedly occurred when appellees declined to pay for the offstreet parking facilities through special assessments and instead paid for the costs through a general property tax levy or sales tax revenues drawn from municipal general funds. Because we cannot tell from the face of Lindner's complaint when that decision was made or when it was implemented and, thus, when Lindner's cause of action accrued for purposes of the running of the statute of limitations, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.