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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0233**

First Baptist Church of St. Paul, et al.,
Appellants,

Church of St. Pascal Baylon, et al., Plaintiffs,

vs.

City of St. Paul,
Respondent.

**Filed December 16, 2019
Affirmed
Bratvold, Judge**

Ramsey County District Court
File No. 62-CV-16-6599

John G. Hoeschler, John G. Hoeschler, P.A., Eagan, Minnesota (for appellants)

Lyndsey M. Olson, St. Paul City Attorney, Megan D. Hafner, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Jesson, Judge; and Kirk,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellants are property owners who seek review of the district court's summary-judgment decision that dismissed, without prejudice, their challenge to a right-of-way special assessment imposed by respondent City of St. Paul (the city). The district court determined that appellants' challenge was untimely because it was filed in district court after the 40-day deadline. *See* Minn. Stat. § 429.081 (2018).

In their brief to this court, appellants do not seek review of the district court's determination that their challenge was untimely. Rather, appellants assert that the district court erred in dismissing their Fifth Amendment taking claim, which they contend is not subject to section 429.081's deadline. We conclude that appellants failed to assert a taking claim in their district court pleadings, and that the district court's summary-judgment decision did not address a taking claim. Because this court rarely reviews an issue that is neither raised in nor decided by the district court, we decline to review the taking issue asserted in this appeal and affirm.

FACTS

The city notified property owners of an October 5, 2016 public hearing on proposed right-of-way assessments. Each notice stated the assessment amount for the property owner's parcel and also stated that "[n]o appeal may be taken as to the amount of any adopted assessment unless a written objection signed by the affected property owner is

filed with the city clerk prior to the public hearing or presented in writing to the presiding officer at the public hearing.”

Appellants are 21 property owners who did not object to the proposed right-of-way assessment either before or at the October 5, 2016 hearing. More than 50 property owners objected (objecting property owners) to the proposed right-of-way assessments before the October 5, 2016 hearing.

On October 5, 2016, the city conducted the public hearing as scheduled and ratified the right-of-way assessments involving appellants’ properties. On November 2, 2016, the city council reviewed and ratified the assessments involving the objecting property owners.

On November 28, 2016, appellants and many of the objecting property owners jointly filed a notice of appeal in district court. The notice of appeal alleged that the right-of-way assessments should be set aside and returned to the city “for reassessment.”

In March 2018, the city moved to dismiss the notice of appeal or, in the alternative, sought summary judgment, arguing that the notice of appeal was untimely filed for two reasons. First, the city argued that appellants did not file a notice of appeal within the 40-day deadline set by Minn. Stat. § 429.081, and the district court therefore lacked subject-matter jurisdiction over their claim. Second, the city argued that, while the objecting property owners had filed timely written objections to their assessments, they had failed to properly submit the objections. As explained below, appellants and the objecting property owners opposed the city’s summary-judgment motion and moved to amend their notice of appeal. The district court stayed the motion to amend until after it heard the summary-judgment motion.

At the summary-judgment hearing, appellants' attorney stated, among other things, that the 21 property owners' notice of appeal was "technically late" under the relevant statute but argued that Minn. Stat. § 429.081 was unconstitutional on its face. In response to questions from the district court, appellants' attorney stated that he provided notice to the Minnesota Attorney General of his constitutional challenge on the day before the hearing.

In July 2018, the district court issued a written order granting in part and denying in part the city's motion. The written order stated three conclusions relevant to this appeal. First, the district court determined that the parties had submitted matters outside the pleadings and therefore the summary-judgment standard applied. Second, the district court considered the deadline established by Minn. Stat. § 429.081 and determined that appellants "do not dispute that they did not file their appeals in District Court within the 40 days as required by statute [30 + 10]." The district court determined that "it has no discretion to do anything but find it lacks subject matter jurisdiction." The district court reasoned, however, that a dismissal for lack of subject-matter jurisdiction is not "an adjudication on the merits" and therefore directed dismissal of appellants' claims "without prejudice." Third, the district court determined that appellants "failed to timely notify the attorney general of a constitutional challenge" to Minn. Stat. § 429.081. After finding "that giving notice to the [a]ttorney [g]eneral the day before a hearing is not sufficient time to allow the [a]ttorney [g]eneral to decide, let alone intervene in an action," the district court declined to address the constitutionality of section 429.081.

The district court's written order did *not* mention a Fifth Amendment taking claim. The district court denied summary judgment on the claims asserted by the objecting property owners after finding that "material fact questions" precluded summary judgment.

After other proceedings, the district court entered final judgment on claims asserted by the objecting property owners in November 2018. One month later, the district court granted a joint request from appellants and the city to enter final judgment on the July 2018 summary-judgment order. This appeal follows.

D E C I S I O N

A district court properly grants summary judgment when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. This court reviews a district court's summary-judgment decision *de novo* to "determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

The facts here are not in dispute, and the only issue is whether the district court properly dismissed appellants' challenge to the 2016 right-of-way assessment. "A special assessment is a tax, intended to offset the cost of local improvements such as sewer, water and streets, which is selectively imposed on the beneficiaries of such products." *Buettner v. City of St. Cloud*, 277 N.W.2d 199, 201 (Minn. 1979). In *First Baptist Church of St. Paul v. City of St. Paul*, the Minnesota Supreme Court reviewed the city's 2011

right-of-way assessment and its opinion is helpful background for appellants' claim. 884 N.W.2d 355, 356 (Minn. 2016).

First Baptist Church explained that the city uses the revenue collected from special assessments "to pay for a range of public right-of-way maintenance services." *Id.* at 356-57. The supreme court also described the right-of-way assessment "as authorized by the City's home rule charter and administrative code." *Id.* at 357. The assessment is "calculated by multiplying the property's assessable frontage on the right-of-way by a rate that varies based on the property's character and its location within the City." *Id.*¹

Property owners may appeal a city's special assessment within 40 days by (a) "serving a notice upon the mayor or clerk of the municipality" within 30 days "after the adoption of the assessment" and (b) filing the notice "with the court administrator of the district court within ten days after its service." Minn. Stat. § 429.081.² This statute

¹ Appellants assert that *First Baptist Church* held the city's right-of-way assessment program "was invalid." We disagree. In *First Baptist Church*, the supreme court held that the city's right-of-way assessments are a tax and are "subject to constitutional restrictions on the taxing power," including the Minnesota Constitution's requirements related to uniformity, special benefit, proportionality, and excess of actual cost. 884 N.W.2d at 365-66. The supreme court determined that appellants-property owners had raised a genuine issue of material fact about "the extent of special benefits to the Churches' properties attributable to the right-of-way services, and summary judgment is therefore inappropriate." *Id.* at 366. The supreme court therefore reversed summary judgment and remanded to the district court to make the factual determinations required to resolve the constitutional issues. *Id.* at 367.

² In *Curiskis v. City of Minneapolis*, this court interpreted section 429.081 as setting a 40-day deadline to file a notice of appeal in district court. 729 N.W.2d 655, 660 (Minn. App. 2007) ("[S]ervice upon the mayor or city clerk must occur within 30 days after the city's adoption of the assessment and upon the district court within 10 days after serving the mayor or city clerk. (Put another way, a total of 40 days).").

“provides the exclusive method of appeal from a special assessment levied pursuant to [chapter 429].” *Id.*; see also *McCullough & Sons, Inc. v. City of Vadnais Heights*, 905 N.W.2d 878, 882-84 (Minn. App. 2017) (reading section 429.081 along with section 429.061 and holding the unambiguous language provides that a property owner’s failure to sign a written objection and file it with the municipal clerk before the assessment hearing or with the presiding officer at the assessment hearing precludes the property owner from appealing the special assessment to district court).

Appellants do not dispute that they filed their notice of appeal on “November 29, 2016, which is 55 days after the assessment rolls were ratified by” the city and 15 days past the 40-day deadline established in section 429.081. Instead, appellants claim they asserted a “free standing” taking claim under the Fifth and Fourteenth Amendments to the United States Constitution and that the district court erred in dismissing their taking claim because it is not barred by the statutory filing deadline for assessment appeals. The city argues that appellants did not assert a taking claim in district court because they failed to allege it in their notice of appeal.

We begin our analysis by examining the pleadings. A notice of appeal that is filed in district court under section 429.081 to challenge a special assessment “initiates a civil action,” to which the Minnesota Rules of Civil Procedure apply. *Andrusick v. City of Apple Valley*, 258 N.W.2d 766, 768 (Minn. 1977). A pleading must provide sufficient notice of all claims. See Minn. R. Civ. P. 8.01 (“A pleading . . . shall contain a short and plain statement of the claim . . .”). “The primary function of notice pleading is to give the

adverse party fair notice of the theory on which the claim for relief is based.” *Goeb v. Tharaldson*, 615 N.W.2d 800, 818 (Minn. 2000) (quotation omitted).

Pleadings “are liberally construed to insure that the defending party is given adequate notice of the claim.” *L.K. v. Gregg*, 425 N.W.2d 813, 819 (Minn. 1988). Parties can amend pleadings by permission of the district court, and permission is freely granted “when justice so requires.” Minn. R. Civ. P. 15.01. But if a party does not amend a pleading, it “is bound by the pleadings unless the other issues are litigated by consent.” *Roberge v. Cambridge Co-op. Creamery Co.*, 67 N.W.2d 400, 403 (Minn. 1954). “[R]elief cannot be based on issues that are neither pleaded nor voluntarily litigated.” *Id.*

Here, appellants filed a notice of appeal in district court that alleged the city’s 2016 special assessment violated “Minnesota constitutional law” and asserted four counts: (1) the 2016 special assessment is “merely a general benefit to all properties, citizens and visitors and [does] not cause *any* special benefit to [appellants’] properties”; (2) the 2016 special assessment does “not meet the constitutional requirements for uniformity,” citing Article X of the Minnesota Constitution; (3) the 2016 special assessment fails “the legal test for proportionality because the lineal footage assessment method used ignores the vast amount of benefitted properties, tenants and owners located on the floors above and below the ground floor of high rise buildings”; and (4) the 2016 special assessment “unfairly favors residential properties with a lower than cost” charge “for the same services.”

The notice of appeal does *not* mention the Fifth or Fourteenth Amendments of the United States Constitution, it does *not* mention a taking claim, and it does *not* allege that the city took appellants’ property without just compensation.

After the city moved for summary judgment, appellants and the objecting property owners moved to amend their notice of appeal to add a taking claim, asserting that the right-of-way assessments “amount[] to a taking of [their] property” and “violate [their] rights under the Fourteenth Amendment.” But the district court neither granted nor denied appellants’ motion to amend. Instead, the district court stayed other issues and motions pending its decision on the city’s motion for summary judgment. The district court lifted the stay in May 2018, but the district court did not hear argument on the motion to amend the notice of appeal until after it heard the city’s summary-judgment motion and issued the July 2018 order dismissing appellants’ claims.³

In their memorandum opposing partial summary judgment, filed on the same day they moved to amend the notice of appeal, appellants argued for the first time that “[t]his is a takings case” and that federal law “preempts” the statutory deadline for filing a notice of appeal in district court. At the summary-judgment hearing, appellants’ attorney also argued that the district court should consider the taking claim because “constitutional rights in the 14th Amendment . . . preempt state law.” Appellants also asserted other constitutional challenges in their written response, including a claim that section 429.081 was facially unconstitutional.

The district court declined to consider the constitutionality of section 429.081 because appellants failed to provide prompt notice to the attorney general of a

³ The district court later denied leave to amend the notice of appeal for the objecting property owners, reasoning that the taking claim was not ripe until the court resolved the assessment appeal. The district court’s decision to deny leave to amend is not before us on appeal.

constitutional challenge to the statute. *See* Minn. R. Civ. P. 5A (providing that a party challenging the constitutionality of a state statute must “promptly” notify the Minnesota Attorney General to afford “an opportunity to intervene”). Appellants do not challenge the constitutionality of section 429.081 on appeal and instead contend that the district court erred because they asserted a separate taking claim that is not “inhibited by state notice of claim rules,” therefore, “no notice to the Minnesota Attorney General is required.” Appellants misconstrue the district court’s decision, which did not mention or discuss a taking claim.

After careful review of the relevant pleadings and motions, we conclude appellants failed to assert a taking claim in their district court pleadings. *See Roberge*, 67 N.W.2d at 403. While appellants sought to assert a taking claim in their proposed amended notice of appeal, they never obtained leave to amend. Because appellants did not assert a taking claim in their notice of appeal and never amended their notice of appeal to assert a taking claim, the city did not have “fair notice of the theory on which the claim for relief is based.” *Goeb*, 615 N.W.2d at 818. Appellants do not argue on appeal that the district court abused its discretion by staying the motion to amend or failing to decide the motion to amend. Thus we do not consider either the stay order or the district court’s failure to decide the motion to amend.

The district court declined to address *any* of appellants’ proposed constitutional claims in its summary-judgment decision and instead dismissed appellants’ asserted claims *without prejudice*. Because we generally decline to consider issues not raised in or decided by the district court, and we conclude that appellants did not assert a taking claim in their

pleadings, nor was this claim dismissed by the district court, we decline to consider appellants' taking claim in this appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts need not consider issues not raised to and decided by the district court).

Affirmed.