STATE OF MICHIGAN

COURT OF APPEALS

SCHOOLCRAFT EGG, INC., Plaintiff-Appellant,	UNPUBLISHED August 11, 2000
v	No. 216268 Kalamazoo Circuit Court
SCHOOLCRAFT TOWNSHIP, Defendant-Appellee.	LC No. 96-000094-CE

Before: Saad, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment of no cause of action from plaintiff's claim of violation of substantive due process and the trial court's prior orders granting summary disposition pursuant to MCR 2.116(C)(4) and (10) regarding plaintiff's claims of violation of equal protection and regulatory taking without just compensation in this zoning case. We reverse and remand for further proceedings.

I. FACTS AND PROCEEDINGS

Plaintiff is a producer, processor, and marketer of table eggs to wholesalers. It was incorporated in 1984 and began as a partnership with one chicken house on twenty acres of land in an agriculturally zoned district. Patrick Hunter is plaintiff's president and general manager. In the two years following 1984, plaintiff expanded considerably and added two chicken houses, thus having a total of 200,000 egg-laying chickens. There is no other egg production facility in Schoolcraft Township.

In 1987, members of defendant's planning commission were apparently concerned about plaintiff's expansion and began debating the passage of an intensive livestock ordinance. Plaintiff wished to add a pullet house and more chicken houses. On December 21, 1987, defendant passed a building permit moratorium for intensive livestock operations (ILO) that became effective on December 31, 1987. By December 1988, defendant passed Ordinance 1988-116. This ordinance made an ILO a special exception use in defendant's agricultural zones, meaning that those desiring to operate an ILO had to obtain a permit to do so. The ordinance applies to cattle, horses, goats, sheep, swine, turkeys, ducks, poultry, and "other livestock." The ordinance designates each chicken as .02 of an animal unit

and restricts each ILO to 2,500 animal units; therefore, each ILO is restricted to 125,000 chickens. The ordinance further provides for minimum acreage and setback requirements. Plaintiff's operation as a 200,000 chicken facility pre-dated the ordinance, and was thus a nonconforming use. However, plaintiff's desire to expand to 400,000 chickens with additional chicken houses was precluded by the ordinance. Further, future owners of the property will be required to comply with the ordinance unless they obtain a variance.

In 1992, plaintiff sought to add two more chicken houses; however, defendant's zoning board of appeals denied plaintiff's variance in December 1993 and denied plaintiff's request for a rehearing in January 1994. On January 11, 1996, plaintiff filed a five-count complaint alleging: (1) that the ordinance violates provisions of the Township Rural Zoning Act, MCL 125.271 *et seq.*; MSA 5.2963(1) *et seq*; (2) that the ordinance violates the Equal Protections Clauses of the federal and state constitutions because the classification of animal units and corresponding values was arbitrary, capricious, unreasonable, and unrelated to any legitimate governmental interest; (3) that the ordinance was an unconstitutional deprivation of the Due Process Clause because it deprived plaintiff of its property without due process of a law that is arbitrary, capricious, and unrelated to any legitimate governmental interest; and (4) the ordinance constitutes a regulatory taking without just compensation. Plaintiff claims that because of modern agricultural practices and economies of scale, egg production facilities cannot remain economically viable with less than 400,000 chickens.

Before trial, the trial court summarily dismissed counts I and II of the complaint, relating to the ordinance allegedly violating provisions of the Township Rural Zoning Act, and plaintiff does not challenge the trial court's dismissal of counts I and II. With regard to count III (violation of equal protection), the trial court also summarily dismissed this claim ruling that it was precluded by plaintiff's failure to exhaust its administrative remedies from the zoning board of appeals before initiating this judicial action. Plaintiff's count V, that the ordinance constitutes a regulatory taking without just compensation, was likewise dismissed before trial and the trial court specifically ruled that plaintiff failed to show that the property was unmarketable as zoned.

Plaintiff's count IV, alleging a violation of substantive due process, was not dismissed and the claim went before the trial court as the fact finder. Following a bench trial, the trial court found that, based on the testimony of defendant's officials, defendant's enactment of the ordinance was not arbitrary or capricious and that it was the result of a deliberative process "which may leave room for legitimate differences of opinions but that's not unconstitutional." Judgment was consequently entered in favor of defendant.

Plaintiff's appeal raises three issues. First, it claims that the trial court erred in dismissing the regulatory taking claim because the Supreme Court's decision in *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998), decided after the trial court granted summary disposition in favor of defendant, modified the law in plaintiff's favor. Second, plaintiff argues that the trial court's judgment in favor of defendant with regard to the due process claim was in error because the ordinance is facially invalid because it implements spot zoning and exclusionary zoning and that, regardless of the presumption of validity, the ordinance's restrictions on ILOs were arbitrary and capricious and not rationally related to any legitimate governmental interest. Lastly, plaintiff argues that

the trial court erred in dismissing the equal protection claim because this claim is a constitutional challenge to the validity of the ordinance and it was not necessary to exhaust administrative remedies before challenging the ordinance on this basis.

II. REGULATORY TAKING

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition with respect to the regulatory taking claim. The trial court granted summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue regarding any material fact and defendant entitled to judgment as a matter of law). The trial court found it significant that plaintiff was allowed to continue its operations and that the only preclusion was that plaintiff could not expand its otherwise nonconforming use. Specifically, the trial court ruled:

> There is no showing that plaintiff's property is unmarketable as zoned. While plaintiff has provided evidence that as an egg producing facility the property may not be viable, this is not however the functional equivalent of showing that the property is unmarketable as zoned. There is a distinct lack of evidence, save mere allegations and denials, to suggest that the land could not be used for other adaptable purposes within its zoned classification, or that no market for those purposes exist at all. Simply put, plaintiff may not prove a confiscation by showing a disparity in value between uses. . . . Plaintiff has not established that its property cannot be used for other adaptable purposes as it is currently zoned. Therefore, it can hardly be said that the consequent restrictions of the amended ordinance preclude plaintiffs['] land from *any* use to which it is reasonably adapted.

The trial court therefore held that the ordinance as applied to plaintiff's property does not amount to a regulatory taking without just compensation.

We review de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) test the factual support of a plaintiff's claim. *Spiek, supra*, p 337. The court is to consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted to determine whether a genuine issue of a material fact exists to warrant a trial. *Id.*

After the trial court granted summary disposition to defendant on this claim, our Supreme Court issued its opinion in *K & K Construction*. Plaintiff moved for reconsideration nearly five months after the Court decided *K & K Construction* and eight months after the trial court entered the order granting summary disposition to defendant. Plaintiff, in its motion for reconsideration, urged the trial court to reopen this issue on the ground that the decision in *K & K Construction* modified the law on regulatory taking in its favor. The trial court denied the motion on the ground of untimeliness, citing the fourteen-day time limit for motions for rehearing or reconsideration under MCR 2.119. Plaintiff now argues that the trial court improperly denied the motion as being untimely and that it should prevail on the merits of the claim.

We agree with plaintiff that the trial court should not have dismissed the motion for reconsideration on timeliness grounds. MCR 2.119(F) governs motions for rehearing or reconsideration and provides in relevant part:

> (1) Unless another rule provides a different procedure for reconsideration of a decision (see, e.g., MCR 2.604[A], 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion.

Plaintiff correctly argues that it was not bound by the fourteen-day deadline set forth in MCR 2.119(F)(1). Plaintiff relies on MCR 2.604(A), which provides that "an order or other form of decision adjudicating fewer than all the claims . . . does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and rights and liabilities of all the parties." Read in conjunction with the reference in MCR 2.119(F)(1) to MCR 2.604, this provision excuses the fourteen-day deadline for a motion for reconsideration or rehearing of orders entered before the final judgment. Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2.119.7, p 635. Plaintiff was therefore not bound by the fourteen-day rule of MCR 2.119(F)(1).

We next address the merits of plaintiff's claim and consider whether plaintiff presented sufficient evidence of its claim of a regulatory taking. Both the Fifth Amendment of the federal constitution and art 10, § 2 of the Michigan Constitution prohibit governmental taking of property without just compensation. A taking may occur where a governmental entity exercises its police power through regulation restricting the use of property. *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 68; 445 NW2d 61 (1989). "Zoning laws are a classic example of regulation that may amount to a 'taking,' if application 'goes too far' in impairing a property owner's use of [its] land." *Bevan v Brandon Twp*, 438 Mich 385, 390; 475 NW2d 37 (1991), citing *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922).

In *K & K Construction, supra*, pp 576-577, the Court stated:

> The United States Supreme Court has recognized that the government may effectively "take" a person's property by overburdening that property with regulations. As stated by Justice Holmes, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922). While all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land. *Keystone Bituminous Coal Ass'n v DeBenedictus*, 480 US 470, 485; 107 S Ct 1232; 94 L Ed 2d 472 (1987).
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> The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a

"categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

> In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property, *Lucas*, *supra* at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government . . . or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good. . . ."*Id.* at 1019 (emphasis in original). In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central*, 438 US 124.

We believe that plaintiff has submitted sufficient factual support for its claim of a regulatory taking, contrary to the trial court's ruling. The trial court did not address the first situation stated in *K & K Construction*, namely, where the regulation does not substantially advance a legitimate state interest. This is important because the teaching of *Nollan v California Coastal Comm*, 483 US 825, 837, 841; 107 S Ct 3141; 97 L Ed 2d 677 (1987), is that there must be a *substantial advancing* of a legitimate state interest. It is not enough for the governmental unit to simply state its proffered interest, here, the control of animal pollution; rather, defendant must show that the ordinance substantially advances its legitimate interest. Thus, a land-use restriction may constitute a taking if is not reasonably necessary to the effectuation of a substantial governmental purpose. *Id.*, p 834; *Penn Central*, *supra*, p 127.

The question whether the ordinance substantially advances defendant's legitimate interest in controlling animal pollution must be remanded to the trial court for further proceedings. Plaintiff has presented evidence that the numerical limit placed on chickens does not substantially advance defendant's legitimate interest in controlling animal pollution because there is deposition testimony of a salesperson from the Big Dutchman egg producer that there is no difference in manure odor from a 400,000 hen farm than there is from a 200,000 hen farm provided the manure is kept dry. Further, in 1992, the Department of Agriculture found that plaintiff had resolved the problem with manure run-off. We finally note that defendant has never set forth any scientific or statistical data regarding the selection of a 125,000 chicken maximum for a twenty-acre farm and how that number substantially advances its interest in controlling animal pollution.

Consequently, this claim must be remanded for trial because plaintiff has presented evidence sustaining its claim that defendant set forth "no proof whatsoever that placing a limit of 125,000 chickens on an egg producing facility has any reasonable relationship" to a legitimate governmental interest. We emphasize that this "essential nexus" between the ordinance requirements and defendant's

legitimate interest must be proved by defendant and it is not enough for defendant to simply put forth a legitimate interest without proving that the ordinance substantially advances that interest. *Nollan, supra,* pp 837, 841.

With regard to the second situation identified in *K & K Construction*, where the regulation denies an owner economically viable use of the land, we again find that plaintiff presented sufficient evidence to support this claim to avoid summary disposition. As explained by plaintiff, this case involves not a categorical taking, but a taking based on the balancing test established in *Penn Central*. Such a claim requires the court to engage in an ad hoc, factual inquiry, focusing on three factors: (1) the character of the government's action; (2) the economic effect of the regulation on the property; and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *K & K Construction, supra,* pp 587-588. "[T]he question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains." *Bevan, supra,* p 391, citing *Keystone, supra,* p 497. In determining whether a zoning regulation effects a taking, the property owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned. *Bevan, supra,* p 403. A mere diminution in property value resulting from the regulation does not amount to a taking. *Id.*, pp 402-403.

Plaintiff presented the deposition testimony of his agricultural expert, Lee Schrader, who testified that an egg production and marketing operation limited to 125,000 hens is not economically viable because they are not of a sufficient size to take advantage of the economies to scale. Additionally, Tim VandeBunte, an egg farmer in Holland, Michigan, testified that plaintiff was "too small" to remain economically viable. VandeBunte explained that the egg production industry in this country had "gotten larger and more consolidated" and that plaintiff was too small to stay competitive. VandeBunte also testified that a company with 200,000 hens without the capacity to expand was not salable.

Plaintiff's evidence presents more than a mere diminution in value because of the ordinance limitation on the number of chickens that it can have on its property. Patrick Hunter, plaintiff's president and general manager, testified that most chicken houses have at least 200,000 chickens, and that with a 125,000 chicken maximum, "nobody would build chicken houses in Schoolcraft Township period." Hunter stated that he needs more than 125,000 chickens to survive and have a salable product and that the total debt of the corporation was about $750,000 as of 1997. Interestingly, the appraisal relied upon by defendant in its motion for summary disposition, from 1994, indicated that the market value was $516,000.

Here, we find that plaintiff has presented evidence that the property is unmarketable as zoned, rather than suffering a mere diminution in value because of the ordinance restrictions. See, e.g., *Rogers v Allen Park,* 186 Mich App 33, 39; 463 NW2d 431 (1990). The trial court did not apply the proper test when it concluded that plaintiff had not established that its property could not be used for other adaptable purposes as currently zoned and that the ordinance precluded plaintiff's property from any use to which it is reasonably adapted. Rather, the trial court is to consider the character of defendant's action, the economic effect of the ordinance, and the extent of the ordinance's interference with

reasonable investment-backed expectations. *K & K Construction, supra,* pp 587-588; *Bevan, supra,* p 402.

Accordingly, we reverse the trial court's grant of summary disposition in favor of defendant with regard to plaintiff's regulatory taking claim and remand for a trial on this claim.

III. SUBSTANTIVE DUE PROCESS

As stated, the substantive due process claim was tried before the court, with the court ultimately ruling in favor of defendant. Plaintiff argues that the trial court erroneously began its due process analysis with the presumption that the ordinance is valid. Plaintiff contends that the ordinance is invalid because it implements "spot zoning" and "exclusionary zoning." Plaintiff also argues that, regardless of the presumption of validity, the evidence established that the ordinance's restrictions on ILOs were arbitrary and not rationally related to any legitimate governmental goals.

We review de novo a trial court's ruling on a constitutional challenge to a zoning ordinance. *Scots Ventures, Inc v Hayes Twp,* 212 Mich App 530, 532; 537 NW2d 610 (1995). The trial court's factual findings, however, are accorded considerable deference, *English v Augusta Twp,* 204 Mich App 33, 37; 514 NW2d 172 (1994), as factual findings are reviewed under the clearly erroneous standard, MCR 2.613(C).

As stated in *Bevan, supra,* p 391, a taking claim may be based on a denial of substantive due process where a plaintiff is deprived of property rights by irrational or arbitrary governmental action. "The basis of a substantive due process claims is that the zoning ordinance either fails to advance or is an unreasonable means of advancing a legitimate governmental interest." *Rogers supra,* p 38; see also *Hecht v Niles Twp,* 173 Mich App 453, 461; 434 NW2d 156 (1988); *Troy Campus v City of Troy,* 132 Mich App 441, 454; 349 NW2d 177 (1984). More specifically, in *Kropf v Sterling Heights,* 391 Mich 139, 158; 215 NW2d 179 (1974), our Supreme Court stated:

> In looking at this "reasonableness" requirement for a zoning ordinance, this Court will bear in mind that a challenge on due process grounds contains a two-fold argument; first, that there is no reasonable governmental interest being advanced by the present zoning classification itself, . . . or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question.

First, contrary to plaintiff's argument, the trial court correctly stated that it would presume the validity of the ordinance. *Bevan, supra,* p 398; *Gackler Land Co, Inc v Yankee Springs Twp,* 427 Mich 562, 571; 398 NW2d 393 (1986); *Kirk v Tyrone Twp,* 398 Mich 429, 439; 247 NW2d 848 (1976); *Kropf, supra,* p 62. However, an ordinance that totally excludes a use recognized by the constitution or other laws of the state, carries a strong taint of discrimination and a denial of equal protection of the law. *Id.,* p 156; *Countrywalk Condominiums, Inc v Orchard Lake Village,* 221 Mich App 19, 22; 561 NW2d 405 (1997). If the ordinance totally excludes a valid land use, it no longer carries a presumption of validity. *Id.,* p 24. A zoning ordinance may not totally exclude a lawful

land use where (1) there is a demonstrated need for the land use in the township or surrounding area, and (2) the land use is appropriate for the location. *English, supra,* pp 37-38.

We disagree with plaintiff's contention that the ordinance constitutes exclusionary zoning because plaintiff did not demonstrate a need for an egg production and marketing in Schoolcraft Township or the surrounding area. Further, the ordinance does not totally exclude ILOs; rather, it restricts their size and location. Plaintiff's contention that the ordinance makes it difficult for ILOs to operate profitably, thus excluding ILOs as a practical matter, does not fit the rule set forth in *English*. Consequently, the ordinance does not constitute exclusionary zoning.

Plaintiff also argues that the ordinance results in "spot zoning," thus nullifying the presumption of validity. In *Rogers, supra,* p 39, this Court explained that spot zoning involves a small zone of inconsistent use within a larger zone and that the courts will closely scrutinize any ordinance involving spot zoning. Plaintiff contends that the ordinance results in spot zoning because its operation was the only one that became a nonconforming use. This argument, however, does not fit the definition of spot zoning. The ordinance applies to all agriculturally zoned lands in Schoolcraft Township, not only to plaintiff's property. Here, the ordinance did not create a zone of inconsistent use, *id.*, but applies to all agriculturally zoned land. Therefore, there is no proof of spot zoning in this case.

The crux of plaintiff's argument is that the ordinance is unreasonable because there is no evidence to suggest that placing a maximum of 125,000 chickens for an ILO, as opposed to 20,000 or 500,000 chickens, promotes health, safety, or welfare, and that there is no evidence that spreading out the facilities is reasonably related to defendant's police power. We agree with plaintiff that the ordinance is unreasonable because there was no showing by defendant that the numerical limits placed on the livestock or the acreage limits are a reasonable means of advancing defendant's legitimate governmental interest.

We do not take issue with the assertion that controlling animal pollution is a legitimate governmental interest. However, the evidence at trial does not show that the ordinance constitutes a reasonable means of advancing that interest. First, there was no evidence that forcing ILOs to spread out, as opposed to concentrating, would actually reduce or control the amount of animal manure. More importantly, the numerical livestock limit is unreasonable in that it applies to all ILOs regardless of size. Thus, the limit of poultry (125,000) applies to all ILOs regardless of whether it is comprised of twenty acres or one hundred acres. Further, there was no evidence that the numerical limit itself advances defendant's interest. As noted by plaintiff, there was no evidence that placing a limit of 125,000 poultry at any ILO, as opposed to 20,000 or 500,000, advances defendant's interest. This is because the designation of .02 of an animal unit to each chicken is completely arbitrary.

In this regard, defendant's attorney, Craig Rolfe, testified at length about the deliberations concerning the numerical limits. Rolfe admitted that the committee never consulted any expert when it selected 125,000 as the maximum number of chickens for each ILO. Rolfe testified that the committee utilized the federal Clean Water Act, which actually provides for two different multipliers for poultry, .01 and .03, depending on the type of operation. Rolfe admitted that the committee chose the number .02 because it was "an average between the two already fudged numbers that the federal government

promulgated for poultry facilities for whatever those are worth." Rolfe also admitted that the committee considered, but rejected, a .01 multiplier for poultry because this would have allowed ILOs to keep 29,999 chickens without becoming subject to the ordinance. Because the committee felt that 30,000 was too high a threshold, it decided instead on a .02 multiplier for poultry, so that ILOs with 15,000 or more chickens would be subject to the ordinance.

Defendant's decision to utilize .02 as the designation for each chicken and its decision to limit each ILO, regardless of size, to 125,000 is unreasonable because there was no evidence that these numerical limits actually control animal pollution as opposed to any other numerical limits. In fact, we note at this point that there was no evidence at trial that plaintiff's operations were actually a pollution threat to the environment, other than the testimony of local citizens who testified that they believed that the poultry manure was polluting the environment, with one neighbor admitting that he had no direct evidence of wetland pollution. Moreover, the same numerical limit applies to all ILOs regardless of size, leaving potentially larger ILOs with the same number of livestock as on the smallest permissible ILO (twenty acres). See, e.g., *Charter Twp of Delta v Dinolfo*, 419 Mich 253, 351 NW2d 831 (1984) (the township's ordinance of limiting to two the number of unrelated persons who can occupy a residential dwelling together or with a biological family was unreasonable because it was not rationally related to the stated goals of the ordinance of preservation of traditional family values, maintenance of property values, and population and density control); *Scots Ventures, supra*, pp 533-534 (the township's ordinance mandating a ten-acre lot size minimum was unreasonable because it did not advance the goals of preservation of farmland and the area's rural character where there was evidence that such a lot size requirement was not sufficient to meet these goals and the township's comprehensive zoning plan recognized that a five-acre lot size would preserve the rural character of lands no longer in agricultural use); *Art Van Furniture, Inc v Kentwood*, 175 Mich App 343, 352-353; 437 NW2d 380 (1989) (the city's ordinance that regulated the size of wall signs on buildings to ten percent of the total area of the wall to which it was attached or a maximum of one hundred square feet was unreasonable because it produced a situation where the wall signs could either constitute 791 or 100 square feet on the building depending on the number of tenants in the building, thus inuring to the detriment of sole tenants as opposed to multiple tenants).

Accordingly, the trial court's decision in favor of defendant is reversed because there is no evidence that the ordinance is reasonably related to its stated goals of controlling animal pollution. We remand to the trial court for it to fashion an appropriate remedy pursuant to *Schwartz v Flint*, 426 Mich 295, 328-329; 395 NW2d 678 (1986). Thus, the trial court is to consider whether plaintiff proves by a preponderance of the evidence that its proposed use is reasonable, and, if so, issuing an injunction preventing defendant from interfering with that use. Further, defendant is "free to rezone consistent with the limiting conditions of plaintiff's proposed use, or not so limited, where plaintiff's use had not been declared unreasonable." *Id.*, p 329.

IV. EQUAL PROTECTION

Plaintiff lastly argues that the trial court erred in dismissing its equal protection claim under the "finality rule." The trial court dismissed counts I, II, and III of plaintiff's complaint, pursuant to MCR 2.116(C)(4) (lack of subject matter jurisdiction), ruling that these counts did not raise separate causes

of action. Rather, the trial court ruled that plaintiff's claims that the zoning board of appeals' decision did not comply with the constitution and laws of this state could have been raised in an appeal from the zoning board of appeals' decision. We review de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(4). *Thomas v United Parcel Service*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 209699, 209991, issued May 16, 2000), slip op, p 2.

In *Paragon Properties Co v Novi*, 452 Mich 568, 577; 550 NW2d 772 (1996), our Supreme Court, quoting *Williams Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 S Ct 3108; 87 L Ed 2d 126 (1985), stated:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.

Importantly, finality is not required for facial challenges to an ordinance because such challenges attack the very existence or enactment of an ordinance. *Paragon Properties*, *supra*, p 577. A facial challenge is one that alleges that the mere existence and threatened enforcement of an ordinance materially and adversely affects values and curtail opportunities of all property regulated in the market. *Id.*, p 576.

On the other hand, a challenge to the validity of a zoning ordinance as applied, whether analyzed under 42 USC as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality. *Id.* "An 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution." *Id.*

In *Countrywalk*, *supra*, p 22, this Court, in applying *Paragon Properties*, held that the plaintiff was making a facial challenge to the ordinance where the complaint alleged that the ordinance at issue violated the due process and equal protection clauses in that the ordinance was arbitrary and capricious, and that it failed to advance any legitimate governmental interest. Consequently, finality was not required for the court to have jurisdiction over the claims because the plaintiff was making a facial challenge to the ordinance.

Similarly, plaintiff in the present case is alleging a facial challenge to the ordinance. The gravamen of count III is that the ordinance creates a classification (an ILO) and a subclassification (animal units), the creation of which are arbitrary, capricious, unreasonable, and bear no reasonable relation to the advancement of a legitimate governmental interest. The finality rule does not apply to plaintiff's facial challenge of the ordinance on equal protection grounds. Further, defendant's argument that count III does not seek damages and that the finality rule pertains to a claim for damages is not correct. The Court in *Paragon Properties* did not set forth any requirement that a plaintiff must allege damages for the finality rule to apply. The only distinction drawn in *Paragon Properties* was whether the complaint alleged a facial challenge to the ordinance or was an "as applied" challenge. Simply stated, finality is not required where a plaintiff makes a facial challenge to an ordinance.

Accordingly, the trial court erred in applying the rule of finality to count III of plaintiff's complaint because plaintiff is facially attacking the ordinance. Moreover, we disagree with defendant's

further contention that the trial court's error is harmless because the trial court rejected plaintiff's substantive due process claim. This Court has recognized that equal protection analysis and substantive due process analysis substantially overlap. *Cryderman v Birmingham*, 171 Mich App 15, 25; 429 NW2d 625 (1988). The guarantee of equal protection requires that the classification in the application of a statute or ordinance be based on a real distinguishing characteristic and bear a reasonable relation to the object of the legislation. *Id.*, p 26. Because we are reversing the trial court's decision with regard to the substantive due process claim, and because the trial court did not consider the merits of the equal protection claim, we believe it would be inappropriate to dismiss the equal protection claim on a basis not raised below and not addressed by the trial court. See, e.g., *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) (issues raised for the first time on appeal are ordinarily not subject to review); *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999) (appellate review is generally limited to issues decided by the trial court).

Consequently, the equal protection claim is remanded to the trial court for further consideration. Defendant is, of course, free to argue below in the same manner on appeal that plaintiff has failed to prove that the ordinance classifications are arbitrary and cannot serve a legitimate governmental interest. See *Curto v Harper Woods*, 954 F2d 1237 (CA 6, 1992).

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Michael J. Talbot