STATE OF MICHIGAN

COURT OF APPEALS

HERITAGE SUSTAINABLE ENERGY, LLC, and HERITAGE WIND LEASING, LLC, Plaintiffs-Appellants,	UNPUBLISHED October 20, 2016
v	No. 331279 Schoolcraft Circuit Court
COUNTY OF SCHOOLCRAFT, Defendant-Appellee.	LC No. 2014-004861-CC

Before: MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order of the trial court granting defendant summary disposition under MCR 2.116(C)(4) (lack of subject matter jurisdiction) on plaintiffs' inverse condemnation action and dismissing as moot plaintiffs' motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). We disagree that the trial court lacked subject matter jurisdiction, but nevertheless we affirm.

Plaintiffs are the owners of various wind energy leases that they acquired from property owners in Schoolcraft County for the purpose of constructing wind turbine generators capable of providing electricity to the utility grid. At the time plaintiff acquired the leases, the Schoolcraft County Zoning Ordinance (SCZO) stated that windmills or wind generators were "not principle permitted uses in any zoning district, but may be permitted in any district upon approval of a variance by the Zoning Board of Appeals." Plaintiffs applied for and were granted a variance to install a 60 meter test tower to determine the feasibility of constructing a wind turbine at the various locations in their leases. On March 25, 2014, the Schoolcraft County Planning Commission approved amendments to § 508 the SCZO affecting wind turbines. The amendments stated in relevant parts:

> **SECTION 508: WIND ENERGY SYSTEMS (WES'S)**
>
> (A) Definitions - For purposes of this section, the following definitions shall apply:
>
> * * *

> UTILITY GRID WIND ENERGY SYSTEM means a land use designed and built to provide electricity to the electric utility grid by use of wind and includes accessory uses such as but not limited to an ANEMOMETER TOWER, electric substation, and related appurtenances.
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> * * *
>
> (D) Grid Wind Energy System(s)
>
> Utility Grid WESs applications and projects shall require a VARIANCE and may be permitted only if all of the following are met.

Following heading (D), the SCZO listed 25 different conditions, including a setback requirement stating that "[a]ll Utility Grid WESs shall be set back at least three thousand nine hundred sixty (3,960) feet from all lot lines, high water marks, public/private right of ways, easements, neighboring dwellings and businesses."

It is undisputed that none of the sites in plaintiffs' leases are capable of meeting the 25 conditions in the amended § 508(D). However, during the Planning Commission Meeting at which the amendments were adopted, Schoolcraft County Zoning Administrator Jake Rivard described the amendments as "guidelines" for the Zoning Board of Appeals and stated that it would be up to that body to deal with site specifics if all the requirements in the amended § 508(D) could not be met. Additionally, the amended SCZO contained the following provision:

> **Section 905: VARIANCES**
>
> Where owing to special conditions, a literal enforcement of the use provisions of this Ordinance would involve practical difficulties or cause unnecessary hardships within the meaning of this Ordinance, the Board shall have power upon appeal in specific cases to authorize such variation or modification as may be in harmony with the spirit of this Ordinance and so that public safety and welfare be secured and substantial justice done. No such variance or modification of the use provisions of this Ordinance shall be granted unless all of the following facts and conditions exist:

Eight different subheadings then follow § 905 describing various facts and conditions for consideration in granting a variance. The amended SCZO was approved by the Schoolcraft County Board of Commissioners on May 29, 2014.

On December 17, 2014, plaintiffs filed this action for inverse condemnation. They alleged that the amendments to the SCZO, specifically the amended § 508(D), prohibited them from constructing utility grid wind energy systems on their leases and, therefore, deprived them of all economically beneficial use of their property interests, their wind energy leases, contrary to the Takings Clause of the United States Constitution. On October 5, 2015, defendant filed a motion for summary disposition under MCR 2.116(C)(4) and (C)(8) (failure to state a claim), arguing that because plaintiffs had not first filed an application for a variance with the Zoning Board of Appeals under § 905 of the SCZO, plaintiffs' claim was not ripe for adjudication due to the rule of finality. Plaintiffs also moved for summary disposition under MCR 2.116(C)(10),

arguing that there was no factual dispute that the amended § 508(D) amounted to a regulatory taking. The trial court granted defendant's motion under MCR 2.116(C)(4), concluding that because plaintiffs had not first sought a variance from the Zoning Board of Appeals this action was not ripe for review under the rule of finality. The trial court dismissed plaintiffs' motion as moot. Plaintiffs now bring this appeal, arguing that the amended § 508(D) provided the Zoning Board of Appeals with no discretion to grant plaintiffs a variance, rendering any application for a variance an act in futility and excusing the finality requirement.

Jurisdictional questions arising under MCR 2.116(C)(4) are reviewed de novo. *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556; 655 NW2d 304 (2002). "Questions regarding ripeness are also reviewed de novo." *King v State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013).

Initially, we note that while we have reviewed disputes regarding ripeness of a zoning dispute under MCR 2.116(C)(4), see *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 156-157, 160-161; 683 NW2d 755 (2004), we question whether addressing ripeness issues under MCR 2.116(C)(4) is consistent with the Supreme Court's precedent on subject matter jurisdiction. Our Supreme Court has repeatedly held that subject matter jurisdiction "concerns a court's 'abstract *power* to try a case of the kind or character of the one pending' *and is not dependent on the particular facts of the case*." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001), quoting *Campbell v St John Hosp*, 434 Mich 608, 613-614; 455 NW2d 695 (1990) (internal quotation from *Campbell* omitted) (emphasis added by the *Travelers* Court). In *Travelers*, the Supreme Court stated that the doctrine of subject matter jurisdiction was a distinct and separate doctrine from that of primary jurisdiction and found that the circuit court had erred in considering a motion based on primary jurisdiction under MCR 2.116(C)(4) even though that error did not affect the trial court's substantive decision. *Id*., 465 Mich at 204, 205 n 18. The *Travelers* Court also stated that the doctrine of primary jurisdiction, which it distinguished from subject matter jurisdiction, *id*., was similar to the doctrines of standing, mootness, and ripeness. *Id.* at 196.

Similarly, the lead opinion in *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 370-372, 374 n 24; 716 NW2d 561 (2006) (Young, J., joined by Taylor, C.J., and Corrigan, J.), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371; 792 NW2d 686 (2010), concluded that justiciability doctrines such as ripeness concern "constitutional jurisdiction" that concern a court's authority to hear and decide a particular case and are doctrines distinct from that of subject matter jurisdiction. We conclude that issues such as ripeness and finality are more appropriately addressed under MCR 2.116(C)(8) because they concern whether a specific plaintiff in a specific case has a viable cause of action against a specific defendant, not whether the circuit court has subject matter jurisdiction over the class of cases that are of a kind or character of the one pending. However, as the Supreme Court recognized in *Travelers*, any error in regard to the specific sub-rule used to support and justify the motion is not dispositive provided the substantive analysis and decision are not affected. See *Travelers*, 465 Mich at 205 n 18.

An as applied challenge under the Takings Clause of the Fifth Amendment to a zoning ordinance "is subject to the rule of finality." *Paragon Props v City of Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996). This means that "where the possibility exists that a municipality may

have granted a variance -- or some other form of relief -- from the challenged provisions of the ordinance, the extent of the actual injury is unascertainable unless these alternative forms of potential relief are pursued to a final conclusion." *Conlin v Scio Twp*, 262 Mich App 379, 382; 686 NW2d 16 (2004). In *Paragon*, the Supreme Court held that the denial of a rezoning request was not a final decision "because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor therefore, is there information regarding the extent of the injury Paragon may have suffered as a result of the ordinance." *Paragon*, 452 Mich at 580.

In the present case, it is undisputed that plaintiffs have not sought a variance to build utility grid wind energy systems. The only variance that plaintiffs sought was the variance to build the test tower. Plaintiffs argue that in this case they did not need to submit an actual request for a variance and are excused from compliance with the rule of finality because under the amended § 508(D) of the SCZO, the Zoning Board of Appeals had no discretion to grant a variance unless the 25 requirements were met, rendering any variance request an act in futility that excused compliance with the finality requirement. In *Paragon*, the Supreme Court impliedly acknowledged that the finality requirement can be excused if seeking such a final determination would be futile. See 452 Mich at 581-583. Plaintiff's reliance on the futility exception is premised on its argument that the amended SCZO does not grant defendant's Board of Zoning Appeals any discretion to grant a variance for a utility grid wind energy system that does not meet the requirements of the amended § 508(D). Defendant counters that even if the 25 requirements under the amended § 508(D) are not met, the Board of Zoning Appeals can grant a variance under § 905. Therefore, we must turn our attention to interpreting the applicable zoning provisions.

Zoning ordinances are interpreted in the same manner as statutes. *Brandon Twp v Tippett*, 241 Mich App 417, 421-422; 616 NW2d 243 (2000). The "[f]irst and foremost" rule of statutory construction is to "give effect to the Legislature's intent." *Tryc v Michigan Vetermans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). This Court must begin by examining the language of the statute. See *American Federation of State Co and Muni Employees v City of Detroit*, 468 Mich 388, 399-400; 662 NW2d 695 (2003). We must apply clear and unambiguous language according to the plain meaning thereof, and we must avoid, insofar as possible, any construction that would negate or disregard any word or other part of the statute. *Id.* Here, the dispute is between the amended § 508(D), which states that utility grid wind energy systems "shall require a VARIANCE and may be permitted only if" all of the 25 sub-requirements are met, and § 905, which states that when "a literal enforcement of the use provisions of this Ordinance would involve practical difficulties or cause unnecessary hardships . . . the Board shall have power . . . to authorize such variation . . . so that public safety and welfare be secured and substantial justice done."

Plaintiffs contends that § 508(D)'s mandatory language "only if" would be rendered surplusage and nugatory if § 905 allowed for a variance to be granted when the 25 conditions in § 508(D) are not met. However, plaintiffs' argument fails to take into account that other use provisions in the SCZO may also use mandatory language. If plaintiffs' argument were to apply to those provisions as well, then § 905 would only be applicable to those use provisions that used permissive language. But the use provisions using permissive language would have no need for a provision like § 905 because a literal reading of a permissive provision would already grant the

SCZBA discretion. In fact, it is plaintiffs' proposed interpretation that would render § 905 surplusage and nugatory. Although the SCZO is not as artfully drafted as might be hoped, § 508(D) clearly states that unless the 25 sub-factors are all met, no variance can be granted, but § 905 essentially provides an exception to § 508(D) by stating that if a literal enforcement would create unnecessary hardship or practical difficulties, then a variance can be granted under § 905. It is possible for one statute or statutory provision to create an exception to the mandatory language used in another. For example, MCL 333.7403(2)(d) provides that a person who knowingly or intentionally possesses marihuana is guilty of a misdemeanor. However, MCL 333.26424(a) provides an exception for a qualifying patient under the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*. Similarly, in the present case, although § 508(D) of the SCZO uses mandatory language, that does not preclude § 905 from providing an exception to that mandatory language. The presence of the exception does not render the mandatory language surplusage or nugatory. Section 905 granted defendant's Board of Zoning Appeals the discretion to grant plaintiff a variance to build its utility grid wind energy systems, even if the 25 specific requirements under the amended § 508(D) were not met.[1]

Because § 905 provided the Zoning Board of Appeals with discretion to grant plaintiffs' a variance to construct a utility grid wind energy system even if the strict requirements of the amended § 508(D) were not met, it would not have been futile for plaintiffs to have sought such a variance. Because the possibility existed that a variance could have been granted but plaintiffs did not apply, their claim did not satisfy the rule of finality and was not ripe for review by the circuit court. The trial court did not err in granting defendant summary disposition on plaintiffs' inverse condemnation claim based on plaintiffs' failure to satisfy the rule of finality.

Plaintiffs also argue that the trial court failed to consider their own motion for summary disposition, which was based on MCR 2.116(C)(10), in determining whether a taking occurred. However, because we agree with the trial court that plaintiffs' claim is properly disposed of for lack of ripeness, we need not review plaintiffs' arguments on whether the amended § 508(D) effectuated a taking in this case. We agree with the trial court that granting defendant summary disposition renders plaintiff's motion moot.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Amy Ronayne Krause

[1] The parties discuss whether the Supreme Court's plurality opinion in *Hendee v Putnam Twp*, 486 Mich 556; 786 NW2d 521 (2010), requires a party to submit at least one meaningful application before asserting the futility doctrine as a defense to the rule of finality. However, because we find that defendant had discretion under its SCZO to grant plaintiffs a variance, we need not determine whether *Hendee* requires a party to submit at least one meaningful application even if such an application would be futile.