STATE OF MICHIGAN

COURT OF APPEALS

PAUL M. LUBIENSKI, GEORGE LUBIENSKI, ROSE MARIE LUBIENSKI, WALTER LUBIENSKI, MARY FLANAGAN, ROBERT FLANAGAN, OAKRIDGE ESTATES DEVELOPMENT, LLC, and ARBOR HEIGHTS, LLC,

Plaintiffs-Appellants,

v

SCIO TOWNSHIP and SCIO TOWNSHIP BOARD OF TRUSTEES,

Defendants-Appellees.

UNPUBLISHED
March 23, 2010

No. 288727
Washtenaw Circuit Court
LC No. 06-001098-CZ

PAUL M. LUBIENSKI, GEORGE LUBIENSKI, ROSE MARIE LUBIENSKI, WALTER LUBIENSKI, MARY FLANAGAN, ROBERT FLANAGAN, OAKRIDGE ESTATES DEVELOPMENT, LLC, and ARBOR HEIGHTS, LLC,

Plaintiffs-Appellants,

v

SCIO TOWNSHIP and SCIO TOWNSHIP BOARD OF TRUSTEES,

Defendants-Appellees.

No. 288769
Washtenaw Circuit Court
LC No. 06-001098-CZ

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal the trial court's September 26, 2008,[1] order finding that the denial of their request for a conditional use permit and site plan approval by defendants Scio Township and Scio Township Board of Trustees (referred to collectively as "the township") complied with the law, was supported by competent, material and substantial evidence on the record, and reflected a proper exercise of discretion. Plaintiffs also appeal the trial court's October 20, 2008, order denying their motion for reconsideration. We affirm.

I. Relevant Facts and Procedural History

Plaintiffs own adjoining pieces of property, totaling approximately 120 acres, in Scio Township. They seek to develop an "open space residential neighborhood" known as "Oakridge Estates," with 64 lots and a community wastewater treatment system, on the property. Plaintiffs allege that in 1997, they "divided the main parcel of the Property into six approximately 20-acre parcels," and that after the division, "there were 9 parcels." In 1999, they applied for and were granted approval by the township to divide a 25-acre parcel. They also received a variance to improve Daleview Drive, which is located on the property, as a private road. Plaintiffs continued discussions with the township regarding the proposed development and believed, based on representations by the township, that the density permitted on the property was 64 units.

On April 6, 2006, plaintiffs applied for a conditional use permit and site plan approval from the township. The site plan application indicated that there would be 64 units spread over the property and listed three separate property identification numbers: H-08-12-100-022, H-08-01-400-002, and H-08-12-200-039. In a letter dated April 27, 2006, the township's attorney, Michael Homier, advised plaintiffs' attorney that the density proposed by plaintiffs "grossly exceed[ed] that permitted by the [t]ownship's zoning ordinance." Homier stated that pursuant to the applicable formula in the ordinance, the maximum number of units permitted for the development was 31 units. According to plaintiffs, after several additional meetings with the township, the township planning commission recommended denial of their conditional use permit and site plan and the board of trustees followed the commission's recommendation. In regard to the density issue, the board's resolution stated: "The petition fails to conform to the density permitted by the Scio Township Zoning Ordinance as communicated to the Applicant [plaintiffs] by the Township Attorney's letter dated April 27, 2006 and concurring analysis of the Township's Planner, Carlisle Wortman, dated May 4, 2006, both of which are hereby incorporated by reference as support for denying the Petition." Plaintiffs sought review of the board's decision by the township's zoning board of appeals (ZBA), but the ZBA declined to review the decision based on lack of jurisdiction.

Thereafter, plaintiffs filed a four-count complaint against the township in the trial court. Count I of plaintiffs' complaint challenged the township's rejection of their request for a conditional use permit and site plan approval. In addition, plaintiffs sought superintending control (Count II). They also advanced a substantive due process challenge to the validity of the township's zoning ordinance (Count III), and a temporary takings challenge (Count IV).

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[1] While the trial court's register of actions states that the order was both signed and filed on September 29, the order itself indicates that it was signed on September 26.

The township moved to dismiss plaintiffs' complaint for lack of jurisdiction under MCR 2.116(C)(4) and (I)(1). The trial court issued a March 15, 2007, order stating that count I of the complaint was an appeal as of right of an administrative decision. The court dismissed count II of the complaint, stating that a writ of superintending control was unwarranted and must be dismissed under MCR 3.302(D)(2), and dismissed counts III and IV of the complaint because they were not ripe for review. Plaintiffs subsequently filed a motion to amend their complaint to add a claim for declaratory judgment, which the trial court denied. Following oral arguments on count I of plaintiffs' complaint, the court issued its September 26, 2008, opinion and order, finding that the township's decision complied with the law, was supported by competent, material and substantial evidence on the record, and reflected a proper exercise of discretion. Plaintiffs filed a motion for reconsideration, which the trial court denied in its October 20, 2008, order.

On November 6, 2008, plaintiffs filed an application for leave to appeal in this Court, seeking to appeal the trial court's September 26, 2008, order (Docket No. 288727). On the same day, plaintiffs filed a claim of appeal in this Court, appealing the trial court's October 20, 2008, order (Docket No. 288769). The township filed a motion to dismiss docket no. 288769, arguing that the trial court's October 20, 2008, order was an order entered on appeal from a decision of a tribunal and, pursuant to MCR 7.203(A)(1), such an order may not be appealed as of right. The township argued that the appeal must be dismissed for lack of jurisdiction. A panel of this Court denied the township's motion to dismiss, granted plaintiffs' application for leave to appeal, and consolidated plaintiffs' appeals. *Lubienski v Scio Twp*, unpublished order of the Court of Appeals, entered January 8, 2009 (Docket No. 288727); *Lubienski v Scio Twp*, unpublished order of the Court of Appeals, entered December 23, 2008 (Docket No. 288769).[2]

II. The Jurisdiction of the Trial Court

Plaintiffs first argue that count I of their complaint challenging the township's denial of their request for a conditional use permit and site plan approval invoked the original, rather than appellate, jurisdiction of the trial court and therefore that the court applied the wrong standard of review. We disagree.

Const 1963, art 6, § 28 states, in part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same

[2] Given this Court's orders, the township's arguments on appeal pertaining to this Court's alleged lack of jurisdiction are now moot.

> are supported by competent, material and substantial evidence on the whole record.

The Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*., vests townships with the authority to regulate land development and use. Various actions under the MZEA, including approval or rejection of conditional use permit requests and site plans, are essentially administrative in nature. See *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000) (stating that "[v]arious actions under the TZA, such as site-plan review and the approval of special use permit requests, are essentially administrative in nature").[3] The MZEA anticipates that final decisions are made by the ZBA, which may then be appealed to the circuit court. See MCL 125.3605 and 3606. MCL 125.3606(1) provides:

> Any party aggrieved by a decision of the [ZBA] may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
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> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the [ZBA].

The MZEA does not address situations such as this where the township board of trustees, not the ZBA, makes the final decision. This Court has held that if a township's zoning ordinance does not provide for an appeal from an administrative decision of the township's board to the ZBA, then the board's decision is final and subject to appellate review by the circuit court pursuant to Const 1963, art 6, § 28. See *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 198-200; 550 NW2d 867 (1996); see also *Krohn v Saginaw*, 175 Mich App 193, 195-196; 437 NW2d 260 (1988). Plaintiffs argue that *Livonia Hotel, LLC v Livonia*, 259 Mich App 116; 673 NW2d 763 (2003) controls here. But as the township points out, in that case, the plaintiffs' "complaint raised issues that 'had nothing to do with whether [the] appellant was entitled to special use approval.' Rather, [the] plaintiffs challenged the legal authority of the mayor to veto the city council's approval of a special use, asserted that it had a vested right to a restaurant licensed to serve alcoholic beverages, and 'challenged on constitutional grounds the validity of the zoning ordinance's treatment of restaurants in hotels.'" *Id*. at 124. Such issues fell within the original jurisdiction of the circuit court. *Id*. at 123-124. Whereas, in this case, count I of plaintiffs' complaint specifically dealt with the township's denial of their request for a

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[3] The TZA is the Township Zoning Act (TZA), MCL 125.271 *et seq*. It was repealed by 2006 PA 110, effective July 1, 2006, and replaced by the MZEA. The township issued its decision in this case on September 12, 2006 and applied the MZEA.

conditional use permit and site plan, invoking the appellate jurisdiction of the court. Accordingly, the trial court properly concluded that count I was a claim of appeal of an administrative decision, subject to review under Const 1963, art 6, § 28.

III. Ripeness

Plaintiffs next argue that the trial court improperly dismissed counts II, III, and IV of their complaint as not ripe for review. Again, we disagree.

First, as the township points out, the trial court did not dismiss count II on the basis that the count was not ripe. The court dismissed count II, plaintiffs' claim for superintending control, in light of its decision to treat count I as a claim of appeal. The court reasoned that pursuant to MCR 3.302(D)(2), a "writ of superintending control is not only not necessary but is not warranted given the Court's ruling." MCR 3.302(D)(2) provides: "When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed." Plaintiffs have not challenged the basis of the trial court's decision in regard to count II and we need not address it.

In count III of their complaint, plaintiffs asserted that the township's zoning ordinance, as applied to their property, had no reasonable relationship to public health, safety, and welfare, was arbitrary, discriminatory, and unreasonable, deprived them of the use and enjoyment of their property without due process, and unreasonably restricted the use of their property with no legitimate governmental purpose. In count IV, plaintiffs asserted that the zoning ordinance, as applied, constituted a temporary taking of their property without just compensation. The trial court held that because plaintiffs could have applied for rezoning but failed to do so, the administrative process was incomplete and plaintiffs' substantive due process and temporary takings claims were not ripe for review.

In dismissing counts III and IV, the trial court granted the township's motion for summary disposition pursuant to MCR 2.116(C)(4). Generally, we review "de novo a trial court's grant or denial of a motion for summary disposition. . . . Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust its administrative remedies." *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004) (quotation marks and citations omitted).

Our Supreme Court stated, in *Paragon Props Co v City of Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996), that an "'as applied'" challenge, as opposed to a facial challenge, to the validity of a zoning ordinance, "whether analyzed under 42 USC 1983 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." The Court further stated that the "'finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.'" *Id*. at 577 (citation omitted). "In other words, 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 alleged 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 Props*, 452 Mich at 572, the plaintiff claimed that its property had no economic potential for development as zoned, the zoning ordinance was unreasonable, confiscatory, and discriminatory as applied to the property, and the ordinance unconstitutionally deprived the plaintiff of its property in violation of the due process clauses of the Michigan and federal constitutions. The trial court held that the zoning ordinance as applied to the property effected an unconstitutional taking. *Id*. at 573. This Court reversed the trial court on the grounds that the plaintiff's constitutional claim was not ripe for review because the plaintiff had not sought a variance from the ZBA and had not brought a state inverse condemnation action. *Id*. The Supreme Court affirmed this Court's decision, stating that the city's denial of the plaintiff's "rezoning request is 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 [the plaintiff] may have suffered . . . ." *Id*. at 580. While the city's "denial of rezoning is certainly a decision, it is not a final decision . . . because had [the plaintiff] petitioned for a land use variance, [it] might have been eligible for alternative relief . . . ." *Id*.

Similarly, in *Conlin*, 262 Mich App at 381, the plaintiffs alleged that the township's zoning ordinance, particularly the density restrictions therein, were ultra vires and a violation of substantive due process, both on their face and as applied. The trial court found that the action was not ripe for review because the plaintiffs did not exhaust their administrative remedies. *Id*. at 382. This Court agreed with the trial court that the plaintiffs' "as applied" challenge was subject to the rule of finality and explained that although the plaintiffs had participated in an informal preapplication conference, it was undisputed that they had never submitted "a formal site plan . . . for preliminary or final approval[,] . . . applied for conditional land use approval of a Rural Open Space Development, or for a dimensional variance from the challenged density requirements[, or] . . . applied for rezoning of their land to a classification that would allow developments at the density they desired." *Id*. at 383. Accordingly, this Court held that "the trial court properly found that plaintiffs failed to exhaust their administrative remedies and, therefore, their 'as applied' challenge was not ripe for judicial review." *Id*.

As the township notes in its brief on appeal, this Court in *Braun*, 262 Mich App at 158-159, applied the rule of finality to takings claims. The *Braun* Court adopted the rule of finality in *Palazzolo v Rhode Island*, 533 US 606, 620-621; 121 S Ct 2448; 150 L Ed 2d 592 (2001):

> Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

The *Braun* Court further stated that "a determination of alternative uses of property as zoned is a condition precedent to a valid takings claim. In other words, the landowner must show that he sought alternative uses of the property as zoned and was denied, thus leaving the property owner with land having no economically productive or reasonably beneficial use." *Braun*, 262 Mich App at 159. We acknowledge that the rules articulated in *Braun* and its progeny, see, e.g.,

Frenchtown Charter Twp v City of Monroe, 275 Mich App 1, 7; 737 NW2d 328 (2007), are not directly applicable to this case. In those cases, the landowners claimed that the municipalities' denial of their requests for rezoning constituted unconstitutional takings. Thus, in order to establish that the municipality had issued a final decision as to the use of their properties, the landowners had to prove that they sought alternative uses *as currently zoned* and were denied.

We agree with the trial court that claims III and IV of plaintiffs' complaint were subject to the rule of finality and, because plaintiffs failed to exhaust all administrative remedies, their claims were not ripe for review. The township's denial of plaintiffs' request for a conditional use permit and site plan approval was a decision, but it was not a final decision as contemplated by *Paragon Props* and *Conlin*. Plaintiffs could have applied for rezoning but failed to do so. Absent a rezoning request, "there is no information regarding the potential uses of the property that might have been permitted," or "the extent of the injury [plaintiffs] may have suffered." *Paragon Props*, 452 Mich at 580. Had plaintiffs applied for rezoning to a classification that would allow the density they desired, they "might have been eligible for alternative relief from the provisions of the ordinance." *Id*.

In arguing that their claims are ripe for review, plaintiffs rely almost exclusively on *DF Land Dev, LLC v Ann Arbor Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2009 (Docket No. 287400). Initially, we note that unpublished opinions of this Court are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). Moreover, *DF Land Dev* is materially distinguishable from this case on its face. The *DF Land Dev* Court held that "*Braun* only applies to those claims that combine a takings claim with one or more 'as applied' constitutional challenges," and because the plaintiff had not raised a takings claim, the trial court erred in "relying on *Braun* and concluding that the [plaintiff's] 'as applied' claims were not ripe for judicial review." *DF Land Dev*, unpub op at 7. Plaintiffs fail to recognize that they did, in fact, raise a takings claim, making the holding in *DF Land Dev* inapplicable here.

In their reply brief, plaintiffs additionally argue that a rezoning request would have been futile and thus should not be required. Plaintiffs assert that the township reached a "definitive position" in this case and "won't change their mind," rezoning request or not. In discussing the futility exception to the finality rule, this Court has stated that where it is clear that further administrative proceedings would be futile and nothing more than a formality, resort to the administrative body is not mandated. *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358; 733 NW2d 107 (2007). However, "[f]utility will not be presumed," and a mere expectation that a body will decide or act in a certain way is insufficient to satisfy the futility exception. *Id*. at 358-359. Plaintiffs' bald assertion that the township "won't change [its] mind[]," is insufficient to satisfy the exception.

The trial court properly determined that plaintiffs failed to exhaust their administrative remedies and properly dismissed their substantive due process and takings challenges to the zoning ordinance as not ripe for review.

IV. Plaintiffs' Motion to Amend Their Complaint

Next, plaintiffs argue that the trial court improperly denied their motion to amend their complaint. We find that the trial court properly denied their motion.

We review a trial court's denial of a motion to amend a complaint for an abuse of discretion. *Dorman v Clinton Twp*, 269 Mich App 638, 654; 714 NW2d 350 (2006). MCR 2.118(A)(2) states that "[e]xcept as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires."

> Thus, a motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility. The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile.
>
> . . . An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction. [*PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (citations omitted).]

In this case, after the trial court issued its order stating that count I of plaintiffs' complaint would be treated as a claim of appeal and dismissing counts II, III, and IV, plaintiffs filed a motion to amend their complaint to add a claim for declaratory judgment. In their motion to amend, plaintiffs asserted: "The sole change proposed . . . is to add a new and different Count V which seeks a declaratory ruling from the Court regarding the proper application of Scio Township Ordinance 6.04(D). . . . Count V seeks a declaration from the Court regarding the density permitted [on plaintiffs' property]. . . . Any determinations made with regard to the pending appeal are unlikely to result in a determination of the proper application of Ordinance 6.04(D). A declaration is requested by the Amended Complaint to resolve the ambiguities in Ordinance 6.04(D) and avoid future litigation over the application of the ordinance. . . . The calculations made by both the [plaintiffs and the township] with regard to the ordinance demonstrate the varying nature of the interpretations provided under Ordinance 6.04(D). The interpretation of the ordinance can only be resolved with a declaration by the Court as to how the permitted density is calculated for [plaintiffs' property]."

The trial court denied plaintiffs' motion to amend because the amendment would be futile. Specifically, the trial court held that plaintiffs' request for a declaratory judgment as to the correct interpretation of the township's zoning ordinance was not properly before the court. The court determined that the ZBA was the proper body to interpret the ordinance and clarify any ambiguity therein, that plaintiffs had not raised the issue of ambiguity before the township or the ZBA, and that only after the ZBA had addressed the issue would it be ripe for the court's review.

We agree with the trial court's determination that permitting plaintiffs to amend their complaint would have been futile in that their proposed claim for declaratory judgment was not

properly before the court. MCL 125.3603(1), a subsection of the MZEA, provides that the ZBA shall hear and decide matters referred to the ZBA or upon which the ZBA "is required to pass under a zoning ordinance adopted under this act." Scio Township Ordinance 36-427,[4] which addresses the powers and duties of the ZBA, provides that the ZBA "shall hear and decide requests for interpretation of this chapter or the zoning map, taking into consideration the intent and purpose of this chapter and the waste plan." Ordinance 36-427(d)(1). In their motion to amend, plaintiffs asserted that the zoning ordinance at issue is ambiguous and must therefore be interpreted by the trial court. Plaintiffs failed to raise this issue before the township board or the ZBA–the body authorized by Ordinance 36-427(d)(1) to interpret the township's zoning ordinance. Plaintiffs concede in their reply brief on appeal that "the ZBA was the proper forum" for zoning ordinance interpretation, but claim that the trial court should have considered the issue because the ZBA denied their request for a hearing. But as the trial court alluded in denying plaintiffs' motion to amend, plaintiffs only requested that the ZBA review the township's denial of their conditional use permit and site plan. They did not request an interpretation of the township's zoning ordinance or claim that the ordinance was ambiguous. Given the timing of plaintiffs' motion to amend their complaint, which immediately followed the trial court's decision to treat count I as a claim of appeal and dismiss counts II, III, and IV, it appears that plaintiffs were attempting to invoke the original jurisdiction of the court, rather than its appellate jurisdiction, by adding the proposed count V to the complaint. The trial court could review the township's denial of plaintiffs' request for a conditional use permit and site plan approval under its appellate jurisdiction, but plaintiffs' claim that the zoning ordinance was ambiguous and required interpretation was not properly before the court.

The trial court properly exercised its discretion in denying plaintiffs' motion to amend their complaint.

V. Alleged Due Process Violation

Plaintiffs argue that they were denied due process of law by the ZBA's failure to grant them a hearing and review the township's decision, and, presumably, the trial court's failure to order a ZBA hearing after plaintiffs filed their motion for reconsideration. Plaintiffs' due process argument fails.

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[4] The township's website states that the township board adopted Ordinance 2009-04 on June 23, 2009. The website further states: "This ordinance codified all Scio Township Ordinances effective July 28, 2009 per MCL 41.186. All previous stand alone ordinances, including the Township Zoning Ordinance, are now included as regulations in the Scio Township Code. Some modifications, mostly required updates, were made to previous ordinances and included in the Code. If items from previous ordinances are not included in the Code document, they are no longer valid." Township of Scio, Ordinances, http://www.twp.scio.mi.us/ordinances (accessed January 11, 2010). The current version of the township's ordinances indicates that Ordinance 36-427 was formerly Ordinance 15.04. See http://library1.municode.com/default-test/home.htm?infobase=14234&doc_action=whatsnew (accessed January 11, 2010).

The township asserts that because plaintiffs failed to raise their due process argument before the ZBA or the trial court, this Court need not address the issue. See *Hall v Small*, 267 Mich App 330, 335; 705 NW2d 741 (2005) (stating that in general, issues raised for the first time on appeal are not subject to review). The township correctly asserts that plaintiffs did not raise this issue before the ZBA, in their complaint, or in response to the township's motion for summary disposition. Plaintiffs did, however, raise it in their motion for reconsideration. The trial court denied plaintiffs' motion without addressing their due process argument. An argument is not properly preserved for appeal when a party raises an issue for the first time in a motion for reconsideration; however, this Court may address the issue if it involves a question of law and the parties have presented all of the facts necessary for its resolution. *Farmers Ins Exch v Farm Bureau Gen Ins Co of Michigan*, 272 Mich App 106, 117-118; 724 NW2d 485 (2006). The issue preservation requirements are designed to prevent a party from harboring error as an appellate parachute by "sandbagging" the trial court after an unfavorable ruling is rendered. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005). Given plaintiffs' limited briefing of this issue on appeal, we need not address it.

Moreover, plaintiffs' due process argument fails. They assert in their brief on appeal that they "were denied any opportunity to speak or present any evidence before the ZBA, which is a denial of due process." In civil cases, the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *English v Blue Cross Blue Shield*, 263 Mich App 449, 459; 688 NW2d 523 (2004) (quotation marks and citations omitted). In denying plaintiffs' request for a hearing and review of the township's decision, the ZBA stated:

> We have been advised by . . . the Township Counsel that the [ZBA] cannot grant the relief that you have requested under the Township Zoning Ordinance and the [MZEA] as we do not have jurisdiction to hear this. So at this point we are just going to close this item and we are recommending that your fees be returned.

Plaintiffs assert that because the ZBA is charged with interpreting the township's zoning ordinance, see Ordinance 36-427(d)(1), it had jurisdiction to consider plaintiffs' application for review.[5] As discussed, however, plaintiffs did not request that the ZBA interpret the ordinance. Rather, plaintiffs requested that the ZBA review the township's denial of their conditional use permit and site plan. Plaintiffs have not pointed to any authority indicating that such review was within the ZBA's jurisdiction. In fact, in their application to the ZBA, plaintiffs stated that it was "unclear" in the township's zoning ordinance whether the ZBA had the authority to review a site plan and conditional use decision on appeal, and that they were "being forced to appeal to the ZBA, to preserve their rights." In their complaint, plaintiffs stated that the ZBA "does not have the authority to review site plan applications" or to "grant a variance to permit the Open Space Option requested." Even on appeal, plaintiffs point to nothing in the MZEA or the township's

[5] Plaintiffs additionally asserted in their brief on appeal that the ZBA improperly delegated its power to the township's attorney by allowing the attorney to interpret the township's zoning ordinance and make a decision on jurisdiction. But plaintiffs essentially abandon this issue in their reply brief on appeal.

zoning ordinance granting the ZBA the authority to review their application. A party may not leave it to this Court to search for authority in support of its position by giving "issues cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

VI. The Township Attorney's First Opinion Letter

Plaintiffs next argue that the trial court erred in denying their request to obtain and review the first letter drafted by the township's attorney regarding his opinion as to the density permitted on plaintiffs' property because the court had a duty to review the whole record and the letter was vital to plaintiffs' case. We disagree.

According to plaintiffs, the township's attorney issued an opinion letter regarding the density permitted on plaintiffs' property in September 2005. The township supervisor sent plaintiffs a letter dated September 9, 2005, stating: "Our Township Attorney has offered his opinion on density calculation in the letter you referred to. This information will be provided to our Planning Commission for their consideration." On the same day, the township supervisor left plaintiffs a voicemail message indicating that he believed the density permitted on their property was 64 units. Thereafter, plaintiffs sent the township a request under the Freedom of Information Act (FOIA) for a copy of the opinion letter. The township denied the request, indicating that the requested document was subject to the attorney-client privilege and was therefore "exempt from disclosure pursuant to Section 13(1)(g) of the FOIA." The township's letter further stated that plaintiffs had the right to submit a written appeal or to "seek judicial review . . . as stated in Section 10."

Plaintiffs argue on appeal that the trial court erred in failing to obtain and review, *in camera* if necessary, the township attorney's opinion letter. Plaintiffs did not appeal the township's denial of their FOIA request or seek judicial review of the denial. Nor did plaintiffs raise this issue in their complaint. Based on our review of the record, plaintiffs first raised this issue in their motion for reconsideration, stating that the trial court should review the opinion letter before issuing its final decision and provide a copy of the letter to plaintiffs "as the argument that it is protected by attorney-client privilege is moot." The trial court denied plaintiffs' motion and did not address this issue. As indicated, an argument is not properly preserved for appeal when a party raises an issue for the first time in a motion for reconsideration. *Farmers Ins Exch*, 272 Mich App at 117. In addition, because plaintiffs have provided this Court with limited briefing of this issue, we will only briefly address it. See *Peterson Novelties*, 259 Mich App at 14.

According to plaintiffs, the trial court should have obtained and reviewed the township attorney's opinion letter because the court was required to review the entire record and the opinion letter, which was vital to plaintiffs' case, was necessary to conduct a proper review of the township's decision. In so arguing, plaintiffs rely on MCL 125.3606, which provides, in part:

> (1) Any party aggrieved by a decision of the [ZBA] may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:

(a) Complies with the constitution and laws of the state.

(b) Is based upon proper procedure.

(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the [ZBA].

(2) If the court finds the record inadequate to make the review required by this section or finds that additional material evidence exists that with good reason was not presented, the court shall order further proceedings on conditions that the court considers proper. The [ZBA] may modify its findings and decision as a result of the new proceedings or may affirm the original decision. The supplementary record and decision shall be filed with the court. The court may affirm, reverse, or modify the decision.

Plaintiffs also cite *Schadewald v Brule*, 225 Mich App 26; 570 NW2d 788 (1997), in which this Court stated that the "function of the trial court when reviewing the [ZBA's] grant of a variance is to determine whether the decision was supported by competent, material, and substantial evidence on the whole record" under the now repealed MCL 125.293a(1). *Schadewald*, 225 Mich App at 34.

Arguably, the township is correct and the township attorney's opinion letter is subject to the attorney-client privilege and therefore exempt from disclosure under the FOIA. See *Leibel v Gen Motors Corp*, 250 Mich App 229, 238-239; 646 NW2d 179 (2002) (holding that a written memorandum drafted by an attorney for his client containing legal opinions and recommendations was protected by the attorney-client privilege). MCL 15.243(1)(g) provides that a "public body may exempt from disclosure as a public record" under the FOIA "[i]nformation or records subject to the attorney-client privilege." But even if the letter is not subject to the privilege, plaintiffs have not established that, absent the letter, the record was inadequate for the trial court to properly review the township's decision in this matter. Even if, as plaintiffs suggest, the opinion letter revealed an initial density calculation of 64 units by the township's attorney, the existing record was adequate for the trial court to review the township's ultimate decision as to the permissible density and determine whether the decision complied with the law, was based on proper procedure, was supported by competent, material, and substantial evidence on the record, and represented a reasonable exercise of discretion. See MCL 125.3606.

VII. The Density Calculation

Finally, plaintiffs argue that in affirming the township's denial of their conditional use permit and site plan, the trial court must have misread their application materials or misinterpreted and misapplied the township's zoning ordinance. Again, we disagree.

In considering plaintiffs' appeal of the township's decision, the trial court was charged with reviewing the record and determining whether the decision complied with the law and proper procedure, was supported by competent, material, and substantial evidence on the record, and represented a reasonable exercise of discretion. See MCL 125.3606(1); Const 1963, art 6, §

28. In reviewing the trial court's decision, we must determine "whether the . . . court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [township's] factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). This standard regarding the substantial evidence test is the same as the clearly erroneous standard. *Id*. A finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made. *Id*. at 234-235.

It is undisputed that plaintiffs' property is located in a general agricultural ("A-1") zoning district. Scio Township Ordinance 36-75, formerly Ordinance 4.08, Note 3, limits the density of developments in A-1 districts according to the following formula:

> 3. Single-family dwelling on lots a minimum 2 1/2 acres in size provided that the overall density permitted as of right upon a parcel existing as of March 31, 1997, shall be restricted to the following:
>
> a. For a parcel of ten acres or less, existing as of March 31, 1997 up to a total of four dwelling units.
>
> b. For a parcel of greater than ten acres, up to and including 120 acres, existing as of March 31, 1997 one additional dwelling for each whole ten acres in excess of the first ten acres, up to a maximum of 11 dwellings.
>
> c. For parcels of greater than 120 acres existing as of March 31, 1997 one additional dwelling for each whole 40 acres in excess of the first 120 acres.
>
> d. For a parcel of not less than 20 acres existing as of March 31, 1997 two additional dwellings may be permitted, if one of the following conditions apply:
>
> (i) Because of the establishment of one or more new roads, no new driveway accesses to an existing public road for any of the resulting parcels under subsections 3.a through c of this section or this subsection 3.d are created or required.
>
> (ii) One of the resulting parcels under subsections 3.a through c of this section and this subsection 3.d comprises not less than 60 percent of the area of the parent parcel or parent tract.

Plaintiffs applied for an open space development under Ordinance 36-130, formerly Ordinance 6.04, which begins with a base density calculated pursuant to Ordinance 36-75, and then adds "bonus density" if certain criteria are met. Ordinance 36-130(d)(1) provides:

> (d) Project density. Land found within the districts noted in subsection (b) of this section may be developed, at the option of the land owner, with the same number of dwelling units on a portion of land that, as determined by the township, could otherwise be developed, under existing ordinances, laws and rules, on the entire land area.

> (1) The following special density standards shall apply to land found within the A-1, General agriculture district. The number of dwelling units permitted under the open space preservation option on property zoned A-1 shall not exceed the overall density permitted as of right as set forth in section 36-75, note 3, of the schedule of regulations, plus additional density based upon the application of one of the following criteria, whichever results in the least number of additional dwelling units:
>
> a. Two dwelling units for the first ten acres plus one dwelling unit for each whole ten acres in excess of the first ten acres of the parcel; or
>
> b. Seven dwelling units, or ten dwelling units if one of the resulting lots or parcels comprises not less than 60 percent of the area of the parcel being developed.

Plaintiffs argue that the township's zoning ordinance permits a total of 64 units on their property, while the township and trial court concluded that the ordinance permits only 31 units. The discrepancy between the parties' calculations arises from their disagreement regarding the number of parcels plaintiffs possess, within the meaning of the term "parcel" in the zoning ordinance. Plaintiffs' site plan application indicated that there would be 64 units spread over their property and listed three separate property identification numbers: H-08-12-100-022, H-08-01-400-002, and H-08-12-200-039. Plaintiffs assert that prior to March 31, 1997, they divided the largest parcel, H-08-12-100-022, between several family members. According to plaintiffs, after the divisions, plaintiffs possessed nine parcels to be developed. However, there is no record evidence that plaintiffs obtained township approval for the divisions, and the record indicates that plaintiffs did not record the deed transfers with the county register of deeds until after 1997.

Ordinance 36-5, formerly Ordinance 2.02, defines the term "parcel" as "a piece or tract of land." At the time of plaintiffs' alleged division of their property, the township regulated land division through the 1993 Acreage Parcel Division Ordinance (APDO), repealed in 1997. Under the APDO, all divisions were subject to the township's prior review and approval. Section 100.2(2) of the APDO provided that "[a]ny real property division, which has not been first approved by the Township, will not be considered a valid division of such property under the terms of this Ordinance; and any parcel of real property, which has not received approval by the Township pursuant to the provisions of this Ordinance, will not be placed on the Township tax rolls as a separate and individual parcel of property." Section 306.0 provided that "[n]o acreage parcel may be divided in the Township except in accordance with the terms of this article." Section 201.0 defined "[a]creage parcel" as "[a]ny parcel of land in the Township which is not located in or part of a recorded plat," and "[d]ivision or divide" as "[t]o separate into parts or parcels by virtue of change of ownership, separation on the tax rolls, or any other means, any parcel of land."

Upon reviewing the township's zoning ordinance and the APDO, the township and trial court determined that plaintiffs possessed only three parcels as of March 31, 1997 because they failed to obtain prior township approval for their land divisions as required by the APDO. The township and trial court did not misread plaintiffs' application materials. Plaintiffs argue on appeal that the township and trial court improperly revised the definition of "parcel" in the zoning ordinance to mean "approved division" through application of the APDO. According to

plaintiffs, under the APDO, the only consequence of failing to obtain township approval for a land division was that the divided pieces of land were not placed on the township tax rolls, and that such failure did not preclude the pieces of land from qualifying as separate parcels for purposes of density calculation under the zoning ordinance. We disagree.

The APDO provided that any real property division that has not been first approved by the township "will not be considered a valid division of such property," section 100.2(2), and that no parcel in the township may be divided except in accordance with the ordinance, section 306.0. Moreover, plaintiffs have not pointed to any inconsistencies between the zoning ordinance and the APDO, or to any ambiguities in either ordinance. If statutory language is unambiguous, judicial construction is normally neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). The language must be enforced as written. *Fluor Enterprises, Inc v Revenue Div, Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). Furthermore, "statutes that relate to the same subject matter or share a common purpose are in *pari materia* and must be read together as one law . . . in order to effectuate the legislative purpose as found in harmonious statutes" and, if possible, construe and apply the statutes in a manner that avoids conflict. *In re Project Cost & Special Assessment*, 282 Mich App 142, 148; 762 NW2d 192 (2009) (citations omitted). See *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 568 n 15; 737 NW2d 476 (2007) (stating that the rules of statutory construction also apply to local ordinances). It was therefore appropriate for the township to look to the APDO to determine how many parcels plaintiffs possessed as of March 31, 1997 in order to conduct the necessary density calculations under the zoning ordinance.

Plaintiffs do not dispute that if, in fact, they possessed only three parcels as of March 31, 1997, the township's density calculations under the zoning ordinance were correct, and its decision was supported by competent, material, and substantial evidence on the record and represented a reasonable exercise of discretion.[6] Therefore, because the township and trial court properly determined that plaintiffs had only three parcels to be developed, we affirm the court's order upholding the township's denial of plaintiffs' conditional use permit and site plan.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello

[6] During plaintiffs' rebuttal at the oral argument in this case, plaintiffs' counsel questioned for the first time the township's density calculation results based on three parcels, but provided no basis for or analysis of his challenge.