

STATE OF MICHIGAN

IN THE SUPREME COURT

EXCLUSIVE CAPITAL PARTNERS, LLC, a
Michigan Limited Liability Company,

Supreme Court Case No. 168243

Plaintiff-Appellee,

Court of Appeals Case No. 366247

v.

Oakland County Circuit Court
Case No. 2022-193015-CZ

CITY OF ROYAL OAK, a Michigan Municipal
Corporation,

Defendant-Appellant,

and

Supreme Court Case No. 168023

QUALITY ROOTS, INC., a Michigan
Corporation,

Court of Appeals Case No. 366257

Plaintiff-Appellee,

Oakland County Circuit Court
Case No. 2022-192383-CZ

v.

CITY OF ROYAL OAK, a Michigan Municipal
Corporation,

Defendant-Appellant,

and

PGSH HOLDINGS, LLC, a Michigan Limited
Liability Company,

Intervening Defendant.

**AMICI CURIAE BRIEF OF THE MICHIGAN MUNICIPAL
LEAGUE AND THE GOVERNMENT LAW SECTION**

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STATEMENT OF QUESTIONS ADDRESSED BY AMICI CURIAE

Did the Court of Appeals improperly expand the Legislature’s definition of “public body” in the Open Meetings Act to include individuals?

The Trial Court said “yes.”

The Court of Appeals said “no.”

Defendant-Appellant says “yes.”

Plaintiffs-Appellees say “no.”

Amici Curiae Michigan Municipal League and Government Law Section say “yes.”

**STATEMENT OF INTEREST OF AMICUS CURIAE
THE MICHIGAN MUNICIPAL LEAGUE AND
THE GOVERNMENT LAW SECTION¹**

The Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. The MML's membership consists of over 500 cities, villages, and urban townships. The Michigan Municipal League Legal Defense Fund (the Fund) provides support and assistance to municipalities in litigation involving issues that impact not only the municipality involved, but also municipalities throughout the State. The Fund is governed by a 13-member Board of Directors, which consists of the president, vice-president, secretary-treasurer and directors of the Michigan Association of Municipal Attorneys, and the president and executive director of the MML.

The Government Law Section (GLS) is a voluntary membership section of the State Bar of Michigan (SBM), with over 100 member attorneys who represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the GLS is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures applicable to government law. The GLS provides information and education about issues of concern to its members and the public through meetings, seminars, the State Bar of Michigan website, public service programs, and publications. The GLS is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the GLS participates in cases that are significant to governmental entities throughout the

¹ Pursuant to MCR 7.312(H)(4), amici curiae The Michigan Municipal League and The Government Law Section state that neither appellant's counsel nor appellee's counsel authored this brief in whole or in part, or contributed money that was intended to fund the preparation or submission of the brief. Further, no person other than the amici curiae have contributed money intended to fund the preparation and submission of this brief.

State of Michigan and has filed numerous amicus briefs in state and federal courts. The GLS Council, its decision-making body, is comprised of 21 members. The position expressed in this amicus brief is that of the GLS only and is not the position of the State Bar of Michigan.

Amici Curiae have a longstanding interest in the correct interpretation of the Open Meetings Act and obtaining a clear and functional standard for compliance. The Court of Appeals' broad interpretation of the term "public body" in this case to include the city manager in his individual capacity expands compliance requirements well beyond the intent of the Legislature. The expansion of the definition of a "public body" to include an individual serving an executive or administrative function would increase the costs of government, result in significant delays in providing services and interrupt administrative actions intended to serve the community. Individuals acting in an administrative or executive role conducting day-to-day activities should reasonably expect to be free from the notice and public meeting constraints of the Open Meetings Act, which could bring regular operations to a halt. This issue is of utmost importance to MML, GLS, and their members. MML and GLS appreciate the opportunity to present this amici curiae brief for the Court's consideration.

INTRODUCTION

The legal arguments underlying this case represent a long line of cases originating out of the adoption and implementation of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951, *et seq.* The impact of the litigation brought by unsuccessful applicants seeking to open recreational marihuana establishments has had long-lasting effects on the daily operation of municipalities across the state far beyond that anticipated by MRTMA. While the primary challenges to ordinances enacted pursuant to MRTMA have involved language interpretation and execution of local ordinances, litigants have often raised Open Meetings Act (OMA) arguments in an attempt to negate unfavorable actions by municipalities attempting to navigate the muddy waters created by MRTMA.

What initially appeared to be benign rulings in the overall context of MRTMA litigation, has placed municipalities and their administrative officials in a precarious situation of running afoul of the OMA. Tasked with tending to the day-to-day operations of a municipality, individual executives and administrators require certainty that they may execute their daily duties without the constraints that the OMA places on public bodies charged with setting policy. The ruling by the Court of Appeals that an executive or administrative individual such a city manager can constitute a “public body” for purposes of the OMA upends the balance between the public’s right to be informed of policy decisions made by public bodies and the need for administrative officials to carry out those directives. For this reason, clarity from this Court and consideration of the arguments below are critical to sustaining the ability of municipalities across the state to operate without fear of unnecessary litigation that will impact their ability to serve their communities.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Amici Curiae refer this Court to the Statement of Facts contained in Defendant-Appellant City of Royal Oak’s Application for Leave to Appeal.

ARGUMENT

I. The Court of Appeals Erred in Holding that the City Manager as an Individual can Constitute a Public Body for Purposes of the Open Meetings Act.

With respect to the Open Meetings Act claim, the Court of Appeals found that “authority rested with the City Commission, ‘the public body,’” and “[i]t delegated authority to the city manager who was the de facto decisionmaker on awarding retail licenses.” *Exclusive Capital Partners, LLC v Royal Oak*, ___ Mich App ___, ___ NW2d ___ (2024) (Docket No. 366247), p 21. The Court stated that the ordinance gave the City, not the City Manager, the authority to decide among the applications, and the City Commission was required to approve the applicant’s permit for special land use and a site plan before the Clerk would issue a license. *Id.* at 23. The Court found that the City Commission adopted the City Manager’s recommendation without deliberation, so the City Manager made a de facto policy choice for the Commission, making him a governing body under the OMA. *Id.*

Beyond the impact to the parties in this case, the Court of Appeals ruling has far-reaching implications on the day-to-day operations of municipalities. Review is warranted because the impact of holding that an individual acting in an executive or administrative function can constitute a public body for purposes of the OMA disregards legislative intent, defies well-established concepts of statutory interpretation, and unreasonably burdens administrators of policies adopted by public bodies. While public policy favors open and transparent governance, *Vermilya v Delta College Bd of Trustees*, 325 Mich App 416, 419; 925 NW2d 897 (2018), the practical implications of applying notice and public meeting requirements to individual administrators weigh against the finding by the Court of Appeals, necessitating review and reversal by this Court.

A. For Purposes of the Open Meetings Act, the Legislature Defined Public Body to Constitute a Collective Entity, Not an Individual.

The Open Meetings Act, MCL 15.261 *et seq.*, requires that “[a]ll meetings of a public body must be open to the public and must be held in a place available to the general public.” MCL 15.263(1). In addition, “[a]ll decisions of a public body must be made at a meeting open to the public,” MCL 15.263(2), and “[a]ll deliberations of a public body constituting a quorum of its members must take place at a meeting open to the public . . .,” MCL 15.263(3). Thus, in determining whether the OMA applies, the threshold query is whether an entity is a “public body” as defined by the act. *Herald Company v Bay City*, 463 Mich 111, 129; 614 NW2d 873 (2000).

The OMA defines a “public body” as follows:

“Public body” means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 40 of the home rule city act, 1909 PA 279, MCL 117.40. [MCL 15.262(a)].

“The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written.” *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). In interpreting the language of a statute, courts must give effect to the intent of the Legislature. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). “In doing so, courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.” *Crooked Creek, LLC v Cass Co Treasurer*, 507 Mich 1, 9; 967 NW2d 577 (2021) (citation omitted). The legislative intent is to be derived from the specific language of the statute in as much as the Legislature “is presumed to have intended the meaning it has plainly expressed.” *Robertson v DaimlerChrysler*, 465 Mich 732, 748; 641 NW2d 567 (2002). A court may not speculate about

the Legislature’s intent beyond the words expressed but must enforce the law as written. *Turner v Auto Club Ins Ass’n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

“[P]rovisions of a statute must be construed in light of other provisions of the statute to carry out the intent of the Legislature.” *In re Messer Tr*, 457 Mich 371, 380; 579 NW2d 73 (1998) (citation omitted). “[T]o discern the Legislature’s intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole.” *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010), citing *Apsey v Mem Hosp*, 477 Mich 120, 132 n 8; 730 NW2d 695 (2007). “Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence.” *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) (citations omitted). “The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.” *Id.* A court may not read words into a statute that the Legislature did not employ. *Nickola v MIC Gen Ins Co*, 500 Mich 115, 123; 894 NW2d 552 (2017). As this Court explained in *Robertson*, “[o]ur judicial role precludes imposing different policy choices than those selected by the Legislature.” 465 Mich at 751, quoting *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001).

In the first part of the definition of “public body,” the statute elaborates that the phrase “state or local legislative or governing body” includes specific types of collective entities: “a board, commission, committee, subcommittee, authority, or council.” MCL 15.262(a). Absent from this list are any types of individuals, such as officers, directors, administrators, or government officials. In *Nickola*, 500 Mich at 125, n 25, this Court referred to Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 57-58, stating:

[T]he limitations of a text—what a text chooses *not* to do—are as much a part of its ‘purpose’ as its affirmative dispositions. These exceptions or limitations must

be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose. [(Emphasis in original).]

“This Court recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things.” *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997), holding mod by *Michigan Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Michigan*, 481 Mich 657 (2008). By expressly listing collective entities and excluding any types of individuals, the Legislature purposely elected to exempt individuals from the definition of “public body,” and therefore, the requirements of the OMA.

Further, the Legislature has included individuals in the definition of “public body” in other statutes where appropriate. For example, the Whistleblowers’ Protection Act defines “public body” to mean all of the following:

- (i) A state *officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.*
- (ii) An agency, board, commission, council, *member, or employee* of the legislative branch of state government.
- (iii) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, *or any member or employee thereof.*
- (iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, *or any member or employee of that body.*
- (v) A law enforcement agency *or any member or employee of a law enforcement agency.*
- (vi) The judiciary and *any member or employee of the judiciary.* [MCL 15.361(d) (emphasis added).]

The public securities validation statute defines “public body” as “the state of Michigan or any political subdivision thereof, including any county, township, city, village, school district, metropolitan district, port district, drainage district, public authority or other political entity, or any department, commission, agency or official of any of the foregoing.” MCL 600.2942(11)(a) (emphasis added). The Freedom of Information Act defines “public body” as any of the following:

- (i) A *state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.*
- (ii) An agency, board, commission, or council in the legislative branch of the state government.
- (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- (iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [MCL 15.232(h) (emphasis added).]

Thus, when the Legislature intends to include individuals, such as public officials, members, or employees in the definition of “public body,” it specifically does so. The notable absence of any type of individual from the definition of “public body” in the OMA makes it clear that the Legislature did not intend to subject individuals to the requirements of the OMA.

B. This Court Properly Interpreted the Language of the Statute in *Herald Company v Bay City*, Which has Provided a Clear, Workable Standard Regarding Application of the OMA.

In *Herald*, 463 Mich at 129, this Court interpreted the OMA’s definition of a “public body” to contain two requirements. “First, the entity at issue must be a ‘state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council.’” *Id.*, quoting MCL 15.262(a). “Second, the entity must be ‘empowered . . . to exercise

governmental or proprietary authority or perform a governmental or proprietary function,’ and that power must derive from ‘state constitution, statute, charter, ordinance, resolution, or rule. . . .’” *Id.*

With respect to the first requirement, the Court interpreted the language to mean that an individual cannot constitute a public body:

As used in the OMA, the term “public *body*” connotes a collective entity. The statutory terms used illustratively to define “public body”—“legislative body” and “governing body”—do not encompass individuals. A single individual is not commonly understood to be akin to a “board,” “commission,” “committee,” “subcommittee,” “authority,” or “council”—the bodies specifically listed in the act by the Legislature. We draw additional comfort in our construction of the OMA because the Legislature is certainly free to define, and has, in fact, defined elsewhere, the term “public body” in such a way as to encompass individuals. However, it would be awkward, to say the least, to apply the OMA to an individual. Perhaps the strongest common-sense basis for concluding that an individual was not contemplated by the Legislature as a “public body” is to consider how odd a concept it would be to require an individual to “deliberate” in an open meeting. MCL 15.263(3); MSA 4.1800(13)(3). Thus, we conclude that an individual executive acting in his executive capacity is not a public body for the purposes of the OMA. [*Id.* at 129-130 (emphasis in original, internal footnotes omitted).]

The Court noted that its analysis was bolstered by the dictionary definition of “body,” as “[a] group of individuals regarded as an entity’ and ‘[a] number of persons, concepts, or things regarded collectively; a group;” and “‘a group of persons or things’ and ‘a group of individuals organized for some purpose . . . (a legislative [body]).’” *Id.* at 130 n 10, quoting *The American Heritage Dictionary of the English Language*, (New College ed), p 147; *Webster’s New Collegiate Dictionary* (7th ed), p 94. The Court also noted that the Legislature knows how to define “public body” to include individuals, citing the definition of “public body” in the Freedom of Information Act, MCL 15.232(d). *Id.* at 130 n 11. The Court stated that an individual may be part of a public body, but when “the executive is performing functions exclusively vested in the solitary executive, as opposed to a legally mandated group, the executive is not a public body within the meaning of the OMA.” *Id.* at 130 n 12.

In *Herald*, 463 Mich at 115, the Bay City Charter provided that the Bay City Commission would appoint a fire chief on the recommendation of the city manager. The city manager formed a committee which assisted him in establishing criteria; soliciting, screening, and interviewing applicants; and advising him on selection. *Id.* The committee reviewed 34 applications, interviewed 7 applicants, and recommended 3 applicants for further consideration. *Id.* at 115-116. The city manager then interviewed the recommended applicants and recommended one applicant to the city commission, which held an open meeting and voted to appoint the recommended applicant as fire chief. *Id.* at 116. The plaintiff argued that the city manager and his committee violated the OMA by not conducting the interviews in open meetings. *Id.*

This Court found that the provision in the charter was not a delegation of the commission's authority and did not delegate its right to make the final determination to the city manager. *Herald*, 463 Mich at 132. Further, the authority given to the city manager was from the charter, not the commission. *Id.* The Court stated that even if it had delegated such authority, this would, at most, only satisfy the second requirement for a public body but not the first because the city manager was not a legislative or governing body. *Id.* at 132 n 15. This Court held that "the Legislature, by electing not to include individuals in the definition of public body in the OMA, has exempted the city manager from its requirements." *Id.* at 135. The Court further found that the committee formed by the city manager did not meet the definition of a public body because it did not derive its power from the "state constitution, statute, charter, ordinance, resolution, or rule." *Id.* at 136. This ruling recognized the practicalities of conducting day-to-day operations of municipalities and the need for city managers to occasionally consult with municipal employees without notice and a public hearing mandated by the OMA.

Michigan courts consistently followed this Court’s holding in *Herald* that individuals are not subject to the requirements of the OMA. For example, in *Craig v Detroit Public Schools Chief Executive Officer*, 265 Mich App 572, 573; 697 NW2d 529 (2005), abrogated in part on other grounds, *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125 (2014), the plaintiffs claimed that the chief executive officer (CEO) of the Detroit Public Schools violated the OMA in his coordination of meetings with curriculum leaders and coordinators whose contracts he declined to renew. Pursuant to statute, the CEO stepped into the shoes of the school board, which would have been obligated to follow the provisions of the OMA. *Id.* at 577-578. The Court held that under the definition of “public body” in the OMA and this Court’s interpretation in *Herald*, the CEO was not a “public body” because he was an individual acting within his official capacity, and he was not able or not required to carry out his functions at open meetings. *Id.* at 578-580.

In *Davis v Detroit Fin Review Team*, 296 Mich App 568, 574; 821 NW2d 896 (2012), the Court considered whether a financial review team (FRT) appointed by the Governor, and whether the State Treasurer, as a “one man committee” of the FRT, constituted a public body subject to the requirements of the OMA. Under the emergency financial manager act, the State Treasurer could conduct a preliminary review of a municipality’s financial problems, and upon a finding of probable financial distress, the Governor was to appoint an FRT. *Id.* at 575. The Court found that the reasoning in *Herald* applied to the State Treasurer:

It would be beyond “awkward” to envision that the State Treasurer, while acting, for example, in his executive capacity as the “state financial authority” of a local government and conducting a preliminary review to determine the existence of a local governmental financial problem, was at that moment subject to the Open Meetings Act as a “public body” when conducting a “meeting” in which he, and he alone, was “deliberating toward or rendering” a “decision” on a “public policy” matter that “effectuates or formulates public policy” on which “a vote by members of a public body is required. . . . [*Id.* at 587 (internal citations omitted).]

The Court held that the State Treasurer “when acting in his executive capacity with authority either generally derived from the Constitution or specifically derived from statute is not a public body subject to the Open Meetings Act.” *Id.* at 588. The Court also held that the FRT was not a public body because it was not a governing body where the authority and functions of the FRT did not empower it “to independently govern through decision-making that effectuates or formulates public policy;” and where it could only make recommendations but not act on them. *Id.* at 608.

In *Yellow Tail Ventures, Inc v Berkley*, 344 Mich App 689; 1 NW3d 860 (2022), the City of Berkley faced a challenge over whether it complied with the OMA in the context of an ordinance adopted pursuant to MRTMA. The city adopted an ordinance limiting the number of marijuana licenses to three and requiring the city manager to examine applications using a point-based system with 16 criteria established by the city council. *Id.* at 695. After this review, the city manager would make a recommendation for site plan approval to the planning commission and then to the city council for consideration at a public meeting. *Id.* at 697. The city manager had a group of subordinates assist with the scoring of the applications, and the trial court found that the scoring process violated the OMA because it did not take place in a public meeting. *Id.* at 698-699. The Court of Appeals reversed, finding that the ordinance itself did not create a scoring committee, but, rather, provided for the city manager to review the applications before sending them to the council for ultimate approval. *Id.* at 704. The Court stated that there was no impermissible delegation of authority because the city manager’s authority came from the ordinance, the review process did not involve the work of a public body because an individual is not included in the OMA’s definition of public body, and the city council made the ultimate decision in accordance with the OMA. *Id.* at 704-705.

A companion case to *Yellow Tail* was *Oak Flint LLC v Berkley*, unpublished opinion per curiam of the Court of Appeals, issued June 22, 2023 (Docket No. 362383).² The case arose out of the City of Berkley rescoring marijuana license applications following the trial court's ruling in *Yellow Tail* that the city violated the OMA, but before the ruling was reversed on appeal. In an effort to comply with the trial court's direction and move the licensing process forward while the *Yellow Tail* appeal was pending, a public meeting was held where the city manager sat in silence and rescored the license applications. The Court in *Oak Flint* noted that as a result of the rescoring, the plaintiff received the same score and no recommendation for a license. *Id.* at 2. In light of the rescoring, the trial court dismissed the plaintiff's claims, including the claim that the city's actions violated the OMA. The Court of Appeals ultimately upheld the trial court's holding for the same reasoning cited in *Yellow Tail* and further rejected the plaintiff's argument that the city council's act of "rubber stamping" the city manager's recommendations violated the OMA. *Id.* at 4-5. The Court stated that "plaintiff points to no authority under the OMA that public bodies must conduct a certain level of qualitative deliberation to pass muster. The OMA merely requires that when a public body makes a 'decision,' it does so during an open meeting." *Id.* at 5. While the ruling in *Oak Flint* was significantly impacted by the Court's ruling in *Yellow Tail* that there was no impermissible delegation of public policy authority to the city manager, the absurdity of designating a city manager as a public body and requiring a public meeting to score applications in silence is inescapable.

The circumstances in this case are similar to those in *Yellow Tail* and *Herald*. As set forth more fully in the City's brief on appeal, the MRTMA is not self-executing and did not itself give

² A copy of this unpublished opinion is attached as Exhibit A. This opinion is cited because it was a companion case to *Yellow Tail*, and it shows the practical effect of requiring an individual official to comply with the OMA – an incredible waste of time and taxpayer dollars.

the Commission or the City Manager the authority to decide which applicants would receive licenses. Rather, the MRTMA merely allows for the adoption of an ordinance to permit the licensing for marijuana. The Royal Oak City Charter created the City Commission as the legislative and governing body of the City with the power to enact ordinances. Royal Oak City Charter, Ch 3, §§ 1-2, Def.Apx.28. It is the ordinance that the Commission enacted that provides the authority to review, score, and rank applications as adopted by the legislative body of the City of Royal Oak. Royal Oak Ordinance, § 435-4.C, Def.Apx.1. That authority was given solely to the City Manager, not the City Commission, and when an “executive is performing functions exclusively vested in the solitary executive, as opposed to a legally mandated group, the executive is not a public body within the meaning of the OMA.” *Herald*, 463 Mich at 130 n 12. The ordinance gave the City Manager the power “to fully and effectively implement and administer the municipal license application process.” §435-2.E. He enlisted assistance from others for this process and provided his rankings to the City Commission, as he was required to do. The applicants then had to apply for special land use permits and approval of their site plans, which the Commission considered and decided in a public meeting in compliance with the OMA. The Commission did not delegate its authority to the City Manager, but, rather, each performed their respective functions under their own authority.

C. The Circumstances in *Booth* and *Pinebrook* are Distinguishable from Those of This Case and Should Not be Used to Improperly Expand the Statutory Definition of “Public Body.”

In reaching its conclusion, the Court of Appeals relied on the holdings in two cases – *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993), and *Pinebrook Warren, LLC v City of Warren*, ___ Mich ___; ___ NW2d ___ (2024) (Docket No. 164869). In *Booth*, 444 Mich at 215-216, after the university president announced his resignation, the Board of Regents appointed itself as the presidential selection committee, appointed a

chairman, and formed advisory committees to assist in the process of selecting a new president. The Board acknowledged that it used telephone calls and subquorum meetings to avoid the public quorum meetings that would have been required under the OMA. *Id.* at 216. The Court held that the Board was a public body, the selection of a president was an exercise of governmental authority, and any form of subcommittee that the Board empowered to exercise this governmental authority was also a “public body” under the OMA. *Id.* at 225. The Court also stated that delegating the task of choosing the president to a one-person committee, such as the chairman, would warrant the finding that the chairman was also a “public body.” *Id.* at 226. The Court found that regardless of how the Board categorized its actions, it “adopted a procedure that violated the OMA.” *Id.* at 228-229.

Michigan courts have consistently declined to extend the “one-person committee” holding in *Booth* beyond the circumstances of that case. For example, the Court in *Herald* distinguished *Booth* on the ground that the Board of Regents was clearly a public body under the OMA, the various subquorum groups had no independent authority to select a president, and the Board delegated its authority to them “for the express purpose of avoiding the requirements of the OMA.” *Herald*, 463 Mich at 134. In addition, because the city charter directly assigned the task of recommending a new fire chief to the city manager, there was no delegation of authority from the city commission. *Id.* at 135. Similarly, in *Yellow Tail*, 344 Mich at 704, the Court held that there was no delegation of decision-making duties to the city manager because the ordinance gave him the authority to review the applications. In *Davis*, 296 Mich App at 590, the Court stated that the Board of Regents in *Booth* was itself a public body, and if the FRT was not itself a public body, then the State Treasurer, as a “one man committee” of the FRT could not be a public body.

More recently, in *Pinebrook*, p 26, this Court noted the interpretations of *Booth* and stated:

More plainly put, if a public body delegates its authority to any other entity regardless of its size, that entity (or person) is still effectively a public body, even though an individual person does not generally fit the statutory definition of a “public body.” But where an individual executive is acting alone in their official work capacity pursuant to an independent grant of authority separate from the public body's authority, i.e., where their authority is not delegated by a public body to perform the functions of that same public body, an individual cannot be a “public body” under the OMA.

In *Pinebrook*, pp 14-15, the city of Warren’s marijuana ordinance created a review committee consisting of “the city attorney, or his designee, the director of the public service department, or his designee, and the members of the medical marihuana committee or alternates of the city council, as appointed by city council and alternates. . . .” to rate plans and applications based on specified factors. Three of the five members of the review committee were also on the city council. *Id.* at 15. The Court found that although the ordinance required the review committee to score applications and make recommendations, and required the city council to actually rank the applicants, the council instead adopted the work of the committee without discussion of the applicants. *Id.* at 31. Ultimately, the Court held that the review committee was subject to the OMA because it made decisions for the city council, putting it within the definition of a “governing body.” *Id.* at 31-32. The clear distinction from the present case is that the review committee in *Pinebrook* did not consist of an individual administrative executive.

Although *Pinebrook* did not involve the delegation of authority to an individual, the Court of Appeals in this case used the dicta regarding an individual person to expand the OMA requirements to apply not only to an individual, but also to an administrative executive executing authority contained in a city ordinance. The Court seized on the first sentence in the above quote that a person could effectively be a public body, but disregarded the second sentence that an individual executive acting alone in his official work capacity pursuant to an independent grant of authority is not a “public body” under the OMA. This is exactly the situation here. The

Commission did not have the authority to review, score, and rank applications. The City Manager had that authority in his official work capacity pursuant to the grant of authority in the ordinance to rank the applications using the criteria established by the city council.

Booth is also distinguishable where the chairman had no independent authority to perform the functions at issue. The Board of Regents simply delegated its tasks to subquorum groups of its own members and the chairman, admittedly for the purpose of evading the open meeting requirements of the statute. There is no evidence of such mal-intent here. The holding in *Booth* should be limited to its circumstances or perhaps reexamined for its refusal to consider the statutory language defining “public body” or the ordinary meaning of “committee.” See, e.g., *Merriam Webster Dictionary* (defining “committee” as “a *body of persons* delegated to consider, investigate, take action on, or report on some matter”), <<https://www.merriam-webster.com/dictionary/committee>> (accessed April 23, 2025) (emphasis added); *Cambridge Dictionary* (defining “committee” as “a *small group of people* chosen to represent a larger organization and either make decisions or collect information for it”), <<https://dictionary.cambridge.org/dictionary/english/committee>> (accessed April 23, 2025) (emphasis added). The *Booth* Court refused to consider the statutory language, labeling such argument as “form over substance.” *Booth*, 444 Mich at 226. However, the effects of that decision are significant.

D. Extending the Statutory Definition of “Public Body” to Individuals Would have the Practical Effect of Hindering Day-to-Day Activities and Ministerial Functions of Government Officials and Employees.

The Legislature purposely chose to limit the requirements of the OMA to collective entities. As shown in *Oak Flint*, as well as the examples set forth in the City’s brief on appeal, there are practical reasons not to require notice and a public hearing for all ministerial tasks

performed by government employees. This practicality is even more clear when considering the fact that the OMA requirements extend to a term as broad as “deliberation.”

While legislative bodies formulate public policy, individual administrators such as city managers are tasked with executing legislative directives. Many of those directives are set forth in local ordinances and confer authority on municipal employees to carry out the legislative body’s directives. Unlike public policy discussions which are suitable for public forums and public discussion, the day-to-day tasks an individual faces while running a municipality are not matters that can practically wait for consideration and decision-making at a public meeting.³ For example, municipal budgets are approved by legislative bodies while the execution of specifics necessarily requires ministerial decisions by administrators. Imagine if an administrator was required to give notice and hold a public hearing for the process of managing the budget. Every member of the public would have a different opinion on how public funds should be spent, and the payment of necessary expenses could be delayed, potentially resulting in penalty fees and increased costs. Furthermore, the city manager could find himself thinking, i.e., “deliberating,” about budget issues at any time. Is he required to turn on a camera wherever he is at that time?

A legislative body may approve the purchase of a vehicle, but administrators such as city managers must be allowed to coordinate with city personnel to make a recommendation on the type of vehicle necessary to carry out the legislative body’s policies. While this scenario may not outwardly implicate the delegation of authority concern raised by the Court of Appeals, the addition of facts could raise questions of whether the OMA necessitates a public hearing. In this

³ The notice and public forum requirements are not the only impediments to effective administration of day-to-day operations of a municipality. The OMA requires the taking of meeting minutes, the production of draft meeting minutes within eight business days, and approval of meeting minutes at the next meeting of the public body. MCL 15.269(1) and (3).

scenario, what if the recommendation of a vehicle type could arguably impact policy? The ultimate decision on the purchase would be up to the legislative body, but if the recommendation is adopted without “apparent deliberation,” did the city manager make a de facto policy choice subject to OMA requirements, and should the meetings with city personnel to discuss the vehicle purchase have been noticed and open to the public? The same argument could be made regarding a city manager’s decisions on enforcement of policies adopted by the legislative body. If the decision of a single administrator could arguably be considered a de facto public policy choice, that administrator could be subject to the OMA under the Court of Appeals ruling.

An important function of an administrator is to serve as a primary point of contact for the public, providing information, addressing concerns, and fostering communication between the government and its residents. Are determinations regarding which concerns and communications warrant presentation and consideration by the legislative body a de facto policy choice? If so, should all meetings with an administrative executive be subject to the OMA?

The additional impracticality of the Court of Appeals ruling is emphasized by the after-the-fact determination that the city manager constituted a public body for purposes of the OMA based on the action or inaction take by the city council. If one executive or administrator can constitute a public body under the OMA, the after-the-fact designation of that individual as a public body, as the result of the lack of deliberation by legislative body, could incapacitate a municipality. As the Court of Appeals held in *Oak Flint*, pp 4-5, public bodies are not subject to a certain level of “qualitative deliberation” to satisfy OMA requirements. Thus, an administrator such a city manager would not know whether his or her decisions require compliance with the OMA until after the legislative body makes it decision. Therefore, the level of deliberation by a public body responsible for making public policy would ultimately determine whether an individual

administrator violated the OMA. While the same could be said for committees, even committees of one as recognized by *Booth* are not charged with decision-making for day-to-day operations. Hence, the distinction and long history of opinions that have held that an individual, such as a city manager, cannot constitute a public body under the OMA.

In addition, due to the day-to-day decision-making nature of an administrator's job, the Court of Appeals holding in this case puts private information at risk of public disclosure by expanding the reach of the OMA. In this case, the Ordinance specifically states that "[i]nformation obtained from the applicant is exempt from public disclosure under state law." Royal Oak Ordinance, § 435-4.A; see also *Michigan Federation of Teachers & School Related Personnel*, AFT, AFL-CIO, 481 Mich 657, 680-682; 753 NW2d 28 (2008) (holding that home addresses and telephone numbers are information of a personal nature, the disclosure of which would constitute an unwarranted invasion of privacy). Applicants are entitled to rely on such a statement when they proceed to provide the personal or proprietary information required for an application which otherwise does not need to be exposed to public scrutiny.⁴ However, under the current ruling, the city manager is required to review such applications on camera in the open public, thus putting the protected information at risk of public disclosure. The alternative is to conceal personal information, which in this context would negate the entire purpose of compelling the city manager to hold a public meeting. See *Oak Flint* (where the city manager sat in silence reviewing and scoring license applications). While steps can always be taken to protect private information from disclosure in public settings, the Court of Appeals ruling expanding the definition of a public body

⁴ As an example, the Ordinance mandated that ten "competitive criteria" be considered as part of the review process which required applicants to provide personal information such as tax history, history of criminal convictions, whether they have ever been denied a commercial license, and bankruptcy history. See Royal Oak Ordinance, § 435-4(C)(4) (a)-(j).

to include an individual administrator greatly increases the likelihood that otherwise private information could be inadvertently disclosed to the public.

CONCLUSION AND RELIEF REQUESTED

For the above reasons, Amici Curiae the Michigan Municipal League and the Government Law Section request that this Court reverse the holding of the Court of Appeals that an individual can constitute a “public body” for purposes of the OMA.

Respectfully submitted,

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Dated: April 28, 2025

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Amici Curiae certifies pursuant to MCR 7.312(H) and MCR 7.212(B)(1) that this brief is printed in Times New Roman 12-point typeface utilizing Microsoft Word for Microsoft 365 and contains 6,344 words, including headings, footnotes, and quotations, but excluding the caption, tables, and signature.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Yvette E. Kotlarczyk, being first duly sworn deposes and says that on April 28, 2025, she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/ Yvette E. Kotlarczyk

Yvette E. Kotlarczyk

EXHIBIT A

STATE OF MICHIGAN
COURT OF APPEALS

OAK FLINT LLC,

Plaintiff-Appellant,

v

CITY OF BERKLEY,

Defendant-Appellee.

UNPUBLISHED

June 22, 2023

No. 362383

Oakland Circuit Court

LC No. 2022-192704-CZ

Before: MARKEY, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court’s order granting summary disposition under MCR 2.116(C)(4), (7), and (8) in favor of defendant. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2019, plaintiff, Oak Flint LLC, purchased property located at 27723 Woodward Avenue in defendant City of Berkley, Michigan (the “City”). Plaintiff also entered into an agreement to purchase an adjacent parcel located at 27701 Woodward Avenue. According to plaintiff, the purpose of the purchase of 27723 Woodward and the agreement for the adjacent lot was to facilitate the operation of “a medical marijuana provisioning center and an adult-use marijuana establishment” within the City.

Under the Berkley City Code of Ordinances (“City Code”), a prospective marijuana business was required to be licensed by the state and the City. Thus, after obtaining prequalification for a state-issued license, plaintiff submitted an application with the City for a City-issued marijuana business license. The City Code limited the total number of licenses issued to three.

Because there were more than three license applications, the City engaged in a process to select applicants “best suited” to operate a marijuana business in the City. Although plaintiff believed it should have been “highly recommended” for a license, plaintiff’s application was ultimately denied. One selection criterion highlighted prominently by plaintiff was the requirement that plaintiff’s proposed development did not displace an existing operational business

in the City. According to plaintiff, it intended to comply with this requirement because the seller of the property it had an agreement with was going to relocate the business elsewhere. This assertion was documented in an affidavit purportedly signed by the existing business owner but, inadvertently, the affidavit was not included with plaintiff's application materials. The omission of the affidavit by plaintiff was not identified by the City when the City issued a "completeness check form" sent to applicants. Thus, when Matthew Baumgarten, the city manager ("City Manager"), scored plaintiff's license application, he awarded 0 of 22 points for the criterion that plaintiff's proposed business would not displace an existing business.

According to plaintiff, the City Manager's scoring process violated the Open Meetings Act ("OMA"), MCL 15.261 *et seq.* In separate proceedings in the trial court initiated by plaintiff and other license applicants whose applications were denied, *Yellow Tail Ventures, Inc v Berkley*, lower court case no. 20-184751-CZ ("*Yellow Tail Ventures*"), the trial court agreed and concluded that the City violated the OMA when it scored the applications. The trial court invalidated the scores and ordered that the City rescore the applications during an open meeting. The City Manager held a meeting at Berkley City Hall to rescore the applications in compliance with the trial court's order. Plaintiff received the same score as in the previous round of scoring and was not recommended by the City Manager to receive a license.

Plaintiff appealed the City Manager's decision to a hearing officer, who upheld the decision to deny plaintiff's application. During a January 18, 2022, the City Manager submitted his recommendations on licenses for the City Council's consideration. The City Council accepted the City Manager and hearing officer's recommendations and made a final decision to deny plaintiff's application for a license. Plaintiff subsequently filed a five-count complaint, alleging violations of the OMA, the City Ordinance, and the Marihuana Regulation and Taxation of Marihuana Act ("MRTMA"), MCL 333.27951 *et seq.*, denial of due process, and asserted a claim of appeal to the trial court concerning the denial of its license application.

In lieu of an answer, the City moved for summary disposition, asserting plaintiff failed to state a claim for an OMA violation and was barred under res judicata and collateral estoppel from asserting statutory claims. The City also contended that the trial court lacked subject-matter jurisdiction to consider plaintiff's claim of appeal. The court agreed and granted the City's motion. This appeal followed.

II. OPEN MEETINGS ACT

Plaintiff first argues the trial court erred when it concluded that plaintiff failed to state a claim under the OMA. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maple Manor Rehab Ctr, LLC v Dept of Treasury*, 333 Mich App 154, 163; 958 NW2d 894 (2020). The trial court granted summary disposition in the City's favor as to the OMA claim under MCR 2.116(C)(8), which states that summary disposition is appropriate when "[t]he opposing party has failed to state a claim on which relief can be granted." "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no

factual development could possibly justify recovery.” *Maple Manor Rehab*, 333 Mich App at 162-163 (quotation marks and citation omitted). The plaintiff’s factual allegations in the complaint must be taken as true, and the trial court may only consider the pleadings when making a decision on the motion. *Ass’n of Home Help Care Agencies v Dep’t of Health and Human Servs*, 334 Mich App 674, 684 n 4; 965 NW2d 707 (2020).

This Court also reviews de novo questions of statutory interpretation. *Moore v Genesee Co*, 337 Mich App 723, 727; 976 NW2d 921 (2021). “If a statute is unambiguous, it must be applied as plainly written, and [the Court] may not read any unstated provisions into the statute.” *Id.* at 728.

B. ANALYSIS

Under the OMA, “[a]ll meetings of a public body shall be open to the public and shall be held in a place available to the general public.” MCL 15.263(1), as amended by 2018 PA 485.¹ A “meeting” under the OMA is defined, in relevant part, as “the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy” MCL 15.262(b). All “decisions” of a public body must be made at a meeting open to the public. MCL 15.263(2). A “decision,” in turn, is a “determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.” MCL 15.262(d). Lastly, and except for exceptions not relevant here, “[a]ll deliberations of a public body constituting a quorum of its members must take place at a meeting open to the public.” MCL 15.263(3).

This Court recently addressed the trial court’s decision in *Yellow Tail Ventures* that the initial scoring of the applications by the City Manager violated the OMA. In *Yellow Tail Ventures, Inc v Berkley*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket Nos. 357654, 357666, & 358242), slip op at 8-9, we concluded that the trial court erred when it held that the City violated the OMA when it formed a “scoring committee” to score the applications. This was so because “[e]ven though the City manager was aided by other officials and staff, there was no delegation of decision-making duties to these persons.” *Id.* at 8.

Quoting *Herald Co v Bay City*, 463 Mich 111; 614 NW2d 873 (2000), the Court distinguished the Michigan Supreme Court’s holding in *Booth Newspapers, Inc v University of Michigan Board of Regents*, 444 Mich 211; 507 NW2d 422 (1993), a case plaintiff relies upon:

“The important distinguishing feature of *Booth* was that the board was clearly a ‘public body’ that was subject to the OMA, and the various regents and subquorum groups had no independent authority to narrow the field, make a recommendation, or select a president. The board effectively sought to delegate its authority as a body subject to the OMA to various bodies of its own creation that it believed were

¹ Since the relevant time period of this case, MCL 15.263 has been amended several times. See 2020 PA 228; 2020 PA 254. None of the amendments are relevant to the issues in this case. Accordingly, we will refer to the current version of the statute in all subsequent citations.

not subject to the OMA, for the express purpose of avoiding the requirements of the OMA.

Thus, the decision in *Booth* precluded an attempt by a public body to evade the OMA (and thus circumvent legislative intent) by delegating its authority. In this case, the city manager was assigned the task of recommending a new fire chief directly by the city charter, and, therefore, he required no delegation of authority from the city commission in order to perform that function. Under these circumstances, the Legislature, by electing not to include individuals in the definition of public body in the OMA, has exempted the city manager from its requirements.” [*Yellow Tail Ventures, Inc*, ___ Mich App at ___; slip op at 9, quoting *Herald*, 463 Mich at 134-135.]

Thus, unlike in *Booth*, we held in *Yellow Tail Ventures, Inc* that “[t]here was no impermissible delegation of authority to the City manager” when he scored the applications because “the ordinance itself authorized the City manager to review the applications before sending them to the City council.” *Yellow Tail Ventures, Inc*, ___ Mich App at ___; slip op at 9, citing City Ordinance § 30-806(f)-(h).² Importantly, as noted by the Court, “[t]he ultimate decision on which applications were approved was made by the City council, all in accordance with the OMA.” *Yellow Tail Ventures, Inc*, ___ Mich App at ___; slip op at 9.

In addition to being binding precedent, MCR 7.215(C)(2), this Court’s holding in *Yellow Tail Ventures, Inc* is law of the case. *Farish v Dep’t of Talent and Economic Dev*, 336 Mich App 433, 449; 971 NW2d 1 (2021) (“The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that

² Those subsections of the City Code state:

(f) Within 90 days of receiving the last completed application, *the city manager shall recommend applications* for site plan approval to the planning commission. The city manager may only recommend a number of applications for consideration equal to or less than the number of remaining licenses available for issuance. All other applicants shall be sent a written notice of rejection setting forth specific reasons why the city manager did not recommend their application for city council approval.

(g) Upon receiving site plan approval from the planning commission, applicants shall move forward for final license *approval from the city council as recommended by the city manager*.

(h) Upon submittal of the *city manager’s recommended applications* to the city council, the city shall publish and provide public notice of the city council meeting when the city council will consider the license applications. Notice shall be given not less than 14 days prior to the city council meeting. All written feedback shall be presented to the city council. [City Code, § 30-806(f)-(h) (emphasis added).]

issue”) (quotation marks and citation omitted). In its complaint, plaintiff alleged that the City violated the OMA when the City Manager scored the applications during an open meeting at which, plaintiff alleged, the City Manager did not speak but sat quietly while scoring. Plaintiff further alleged that the City Council “rubber stamped” the City Manager’s recommendations without first openly deliberating on them. As in *Yellow Tail Ventures, Inc* and *Herald*, the City Manager did not violate the OMA when he scored the applications because he was not subject to the OMA nor was he acting under any delegation of authority from the City Council; rather, the City Manager was acting under his explicit duties set forth in the City Ordinance. See City Ordinance, § 30-806(f)-(h); see also *Pinebrook Warren, LLC v Warren*, ___ Mich App ___, ___ NW2d ___ (2022) (Docket Nos. 355989, 355994, 355995, 356005, 356011, 356017, 356023, 359269, & 359285), slip op at 18-19 (“A body that can only make recommendations is not a governing body for purposes of the OMA because its authority does not include the power to effectuate or formulate public policy.”).

Plaintiff’s assertion that the City Council’s act of “rubber stamping” the City Manager’s recommendations was a violation of the OMA is similarly without merit. There is no claim that the City’s Council’s January 18, 2022 meeting was not open to the public. And plaintiff points to no authority under the OMA that public bodies must conduct a certain level of qualitative deliberation to pass muster. The OMA merely requires that when a public body makes a “decision,” it does so during an open meeting. See MCL 15.263(2) (“All decisions of a public body must be made at a meeting open to the public.”).

Because the City Manager was not himself subject to the OMA, and because he acted subject to his statutory authority to score the applications and make recommendations to the City Council, the trial court did not err when it concluded that plaintiff failed to state a claim that the City violated the OMA.

III. RES JUDICATA

Next, plaintiff argues the trial court erred when it granted summary disposition in the City’s favor because neither res judicata nor collateral estoppel bar its claims. According to plaintiff, the fact that the City was required to rescore the applications created a new cause of action that it could not assert in *Yellow Tail Ventures*. Again, we disagree.

A. STANDARD OF REVIEW

The trial court granted summary disposition in the City’s favor under MCR 2.116(C)(7) regarding plaintiff’s claims concerning the MRTMA and City Ordinance. Under that court rule, summary disposition is proper “because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.” MCR 2.116(C)(7).

Under MCR 2.116(C)(7) (claim barred by prior judgment, i.e., res judicata), this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the

documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [*RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008) (citations omitted).]

B. ANALYSIS

“The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action.” *ER Drugs v Dep’t of Health and Human Servs*, 341 Mich App 133, 142; 988 NW2d 826 (2022) (quotation marks and citation omitted); see also MCR 2.203(A) (“In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action . . .”). The doctrine of res judicata

bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Dep’t of Environmental Quality v Sancrant*, 337 Mich App 696, 709; 976 NW2d 874 (2021) (quotation marks and citation omitted).]

There is no dispute between the parties that the first two elements are satisfied. The lower court's decision in *Yellow Tail Ventures* resulted in a final order, and plaintiff and the City were both parties to that action. Thus, the question in this case is whether the issues raised in plaintiff's complaint were or should have been raised in that case. See *Sancrant*, 337 Mich App at 709.

In Count II of plaintiff's complaint, plaintiff alleged that “[t]he procedure used by the City Manager and his resulting decision-making was not ‘a competitive process’ intended to select the ‘best suited’ applicant to operate in compliance with MRTMA” because the City Manager did not give plaintiff a full score for displacement of existing businesses and did not notify plaintiff that the affidavit was missing. The fact that the plaintiffs raised different claims in *Yellow Tail Ventures*—i.e., that the scoring criteria itself was inconsistent with the MRTMA—does not save plaintiff's claims. Res judicata bars not only claims that were actually litigated, but also claims that it could have but did not litigate. *Sancrant*, 337 Mich App at 709. The claims in Count II were known to plaintiff when it filed suit in *Yellow Tail Ventures*. At the time that complaint was filed, the City Manager had already (1) failed to notify plaintiff that the affidavit had not been included with the application; and (2) did not give plaintiff any points for displacement of existing businesses. Thus, plaintiff could have but did not raise those issues in *Yellow Tail Ventures* and res judicata bars their subsequent litigation.

The same is true for Count III of plaintiff's complaint. There, plaintiff alleged the City violated the City Ordinance by “failing to apply the scoring criteria in an objective and consistent manner, fail[ing] to obtain sufficient up to date information from applicants . . . , requiring Plaintiff

to submit secondary affidavits supporting the sworn facts in its Application and failing to notify Plaintiff of the omission of [the affidavit].” Like in Count II, these claims relate to issues known to plaintiff at the time *Yellow Tail Ventures* was filed in the trial court. Plaintiff received the same score from the City Manager in the first attempt at scoring as it did in the second. Thus, the same criteria were used, whether they were “objective and consistent” or not. And, in both rounds of scoring, the City allegedly did not obtain up to date information because it did not notify plaintiff the affidavit was missing. Accordingly, like Count II, plaintiff’s claims in Count III could have but were not asserted in *Yellow Tail Ventures*.³

Because the doctrine of res judicata barred plaintiff’s claims that the City violated the MRTMA and the City Ordinance when it scored plaintiff’s application, the trial court did not err when it granted summary disposition in the City’s favor.

IV. CLAIM OF APPEAL

Lastly, plaintiff contends the trial court erred when it dismissed plaintiff’s claim of appeal for lack of subject-matter jurisdiction. We disagree.

A. STANDARD OF REVIEW

“MCR 2.116(C)(4) permits a trial court to dismiss a complaint when the court lacks jurisdiction of the subject matter.” *Southfield v Shefa, LLC*, 340 Mich App 391, 406; 986 NW2d 607 (2022). “When viewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact.” *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008) (quotation marks and citation omitted).

B. ANALYSIS

Claims of appeal to the circuit court are governed by MCR 7.100, *et seq.* An aggrieved party has an appeal of right to the circuit court from

³ The City also argued in the trial court and this Court that collateral estoppel bars plaintiff’s claims. For collateral estoppel to apply, the City was required to show: “(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel.” *Sancrant*, 337 Mich App at 707 (quotation marks and citation omitted). We disagree that collateral estoppel would bar plaintiff’s claims. In *Yellow Tail Ventures*, the plaintiffs alleged that the City Ordinance’s scoring system violated the MRTMA. While this case also involves the City Ordinance and MRTMA, plaintiff’s claims are not related to whether the former violates the latter, but rather whether the City violated both schemes when it improperly scored plaintiff’s application. That issue of fact was not decided in *Yellow Tail Ventures* and, therefore, collateral estoppel does not apply. See *Sancrant*, 337 Mich App at 707.

(1) a final judgment or final order of a district or municipal court, except a judgment based on a plea of guilty or nolo contendere;

(2) a final order or decision of an agency governed by the Administrative Procedures Act, MCL 24.201 et seq.; and

(3) a final order or decision of an agency from which an appeal of right to the circuit court is provided by law. [MCR 7.103(A)(1)-(3).]

There is no dispute that plaintiff's claim of appeal does not concern a final judgment from a (1) district or municipal court, or (2) agency governed by the Administrative Procedures Act. Thus, the threshold question is whether plaintiff's claim of appeal was a final order "from which an appeal of right to the circuit court is provided by law." Under Const 1963, art 6, § 28, an aggrieved party may seek review from

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 [Emphasis added.]

Thus, if plaintiff's claim of appeal relates to a final order of an administrative officer or agency that is judicial or quasi-judicial, the trial court would have subject-matter jurisdiction to entertain it.

Plaintiff's reliance on Const 1963, art 6, § 28, is misplaced. The license application process was not adversarial in nature. In *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 86; 832 NW2d 288 (2013), this Court explained that not all government "actions are taken in a judicial or quasi-judicial capacity." Thus, "[t]o determine whether an administrative agency's determination is adjudicatory in nature, courts compare the agency's procedures to court procedures to determine whether they are similar." *Id.* "Quasi-judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents." In its simplest form, the City Ordinance required applicants to submit written narratives, materials, and fees to be considered for a license. The applications would be scored on the basis of those submissions and those scores would be submitted to the City Council for final decision. The City Council was not obligated to rely on those scores nor obligated to issue any licenses at all. There was nothing inherently quasi-judicial about the application process, such as the right to present or examine witnesses, submit exhibits, or conduct a hearing in front of a neutral party. Instead, applications were submitted and considered by the City Council in a public meeting. In fairness to plaintiff, the process below did involve an appeal of the City Manager's scores to a hearing officer, which arguably contained aspects of a quasi-judicial proceeding. But even if the appeal hearing was "quasi-judicial," the hearing officer had no authority to issue a final decision—i.e., approve or deny plaintiff's application—and plaintiff does not argue otherwise. That decision rested with the City Council, which, as explained above, did not act as a judicial or quasi-judicial agency. See *id.*

Because plaintiff's claim of appeal was not proper under MCR 7.103(A)(3) as it was not from "a final order or decision of an agency from which an appeal of right to the circuit court is

provided by law,” the circuit court lacked subject-matter jurisdiction to consider it. Thus, the trial court did not err when it granted the City’s motion for summary disposition.

Affirmed. The City, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Jane E. Markey

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly