RECEIVED by MSC 5/12/2025 9:51:04 PM

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
OAKLAND COUNTY CIRCUIT COURT JUDGE MARY ELLEN BRENNAN

EXCLUSIVE CAPITAL PARTNERS LLC,
a Michigan Limited Liability Company,

Plaintiff-Appellee,

v

CITY OF ROYAL OAK,
a Michigan Municipal Corporation,

Defendant-Appellant,

AND

QUALITY ROOTS, INC.,
a Michigan Corporation,

Plaintiff-Appellee,

v

CITY OF ROYAL OAK,
a Michigan Municipal Corporation,

Defendant-Appellant,

PGSH HOLDINGS, LLC,
a Michigan Limited Liability Company,

Intervening Defendant.

MSC No. 168243

COA No. 366247
(Consol. With Case No. 366257)

Circuit Court No. 2022-192383-CZ
HON. MARY ELLEN BRENNAN
Consolidated Trial Court Cases:
Case No. 2022-192288-CZ
Case No. 2022-192830-CZ
Case No. 2022-193015-CZ
Case No. 2022-294223-CZ
Case No. 2022-194753-CZ

MSC No. 168243

COA No. 366247
(Consol. With Case No. 366257)

Circuit Court No. 2022-192383-CZ
HON. MARY ELLEN BRENNAN
Consolidated Trial Court Cases:
Case No. 2022-192288-CZ
Case No. 2022-192830-CZ
Case No. 2022-193015-CZ
Case No. 2022-294223-CZ
Case No. 2022-194753-CZ

WILLIAMS, WILLIAMS, RATTNER & PLUNKETT, PC
By: Brian E. Etzel (P54905)
William C. DiSessa (P81906)
Attorneys for Plaintiff-Appellee Quality Roots, Inc.
380 North Old Woodward Avenue, Suite 300
Birmingham, MI 48009
(248) 642-0333
bee@wwrplaw.com
wcd@wwrplaw.com

ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, PC
By: Anne McClorey McLaughlin (P40455)
Attorneys for Defendant-Appellant City of Royal Oak
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100 / Fax: (248) 489-1726
amclaughlin@rsjalaw.com

RECEIVED by MSC 5/12/2025 9:51:04 PM

LEGAL CONSULTING, PLLC
By: Anthony J. Bologna (P72698)
Attorneys for Plaintiff-Appellee Exclusive Capital Partners LLC
26100 American Drive, Suite 500
Southfield, MI 48034
(248) 227-2278
ab@consultingpllc.com

CARSON FISCHER, PLC
By: Robert M. Carson (P11682)
David E. Schlackman (P58894)
Attorneys for Intervening Defendant PGSH Holdings, LLC
4111 Andover Road, West – Second Floor
Bloomfield Hills, MI 48302
(248) 644-4840
rcarson@carsonfischer.com
dschlackman@carsonfischer.com

PLAINTIFF-APPELLEE QUALITY ROOTS, INC'S RESPONSE TO BRIEF AMICUS CURIAE FILED BY MICHIGAN MUNICIPAL LEAGUE AND GOVERNMENT LAW SECTION OF THE STATE BAR OF MICHIGAN

RECEIVED by MSC 5/12/2025 9:51:04 PM

TABLE OF CONTENTS

TABLE OF CONTENTS iii
INDEX OF AUTHORITIES iv
I. INTRODUCTION 1
II. STATEMENT OF FACTS AND PROCEDURAL HISTORY 1
III. ANALYSIS 1
A. The Cout of Appeals Did Not Err When It Held that the City Violated the OMA 1
1. The Amici Curiae Ask This Court to Ignore and Overturn Its Own Recent Determinations Concerning the Application of the OMA to Individuals 2
2. The Amici Curiae's Reliance Upon This Court's Decision in *Herald* is Misplaced 3
3. Even If This Court is Persuaded that Individuals Categorically Cannot Constitute Public Bodies as Contemplated Under the OMA, the Relevant Decision-Making Body in This Case—the City Commission—Was Not an Individual 6
B. Difficulty in Compliance with the Law Is Not an Excuse to Evade Compliance 7
IV. CONCLUSION 10

RECEIVED by MSC 5/12/2025 9:51:04 PM

INDEX OF AUTHORITIES

Cases

Booth Newspapers, Inc v Univ of Mich Bd of Regents, 444 Mich 211; 507 NW2d 422 (1993) 2, 3
Bronner v Detroit, 507 Mich 158; 968 NW2d 310 (2021) 3
Goode v Dep't of Social Servs, 143 Mich App 756; 373 NW2d 210 (1985) 3
Greenslait v Taylor, 137 Mich App 536; 358 NW2d 30 (1984) 3
Herald Co v Bay City, 463 Mich 111; 614 NW2d 873 (2000) 3
In re Caldwell, 228 Mich App 116; 576 NW2d 724 (1998) 8
In re Pavlos-Hackney, 343 Mich App 642; 997 NW2d 511 (2022) 8
Pinebrook Warren, LLC v City of Warren, ___ Mich ___; ___ NW3d ___ (2024) (Docket Nos. 164869 through 164877) 2
Ryant v Cleveland Twp, 239 Mich App 430; 608 NW2d 101 (2000) 9
Spohn v Van Dyke Pub Sch, 296 Mich App 470; 822 NW2d 239 (2012) 8
Yellow Tail Ventures, Inc v City of Berkley, 344 Mich App 689; 1 NW3d 860 (2022) 5

Statutes

MCL 15.261 1
MCL 15.262(a) 2
MCL 15.262(d) 8
MCL 15.263(2) 8
MCL 15.263(3) 9
MCL 15.263(9) 9
MCL 710.51(6) 8

Other Authorities

Scalia & Garner, *Reading Law* (St. Paul: Thomson/West, 2012) 3

Municipal Ordinances8

Licensing Ordinance, § 435-4(C)(4)(a)-(j) 5, 6
Licensing Ordinance, § 435-4(D)(4) and (7) 5, 6

RECEIVED by MSC 5/12/2025 9:51:04 PM

BRIEF IN RESPONSE

I. INTRODUCTION

Amici Curiae the Michigan Municipal League and the Government Law Section of the State Bar of Michigan (the "Amici Curiae") have filed a Brief Amicus Curiae in support of the Defendant-Appellant City of Royal Oak's (the "City") Application for Leave to Appeal, arguing that this Court should, in an abrupt, about-face departure from recent appellate caselaw, decide that individuals may never constitute "public bodies" subject to the requirements of the Open Meetings Act ("OMA"), MCL 15.261 *et seq*. For the reasons articulated below and in Plaintiff-Appellee Quality Roots, Inc's ("Quality Roots") Answer to the City's Application for Leave to Appeal—as well as binding precedent set forth by this Court—the Amici Curiae's position must be rejected.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Quality Roots incorporates by reference the Statement of Facts and Procedural History included in its Answer to the City's Application for Leave to Appeal. However, Quality Roots further states that, after Quality Roots filed its Answer, Amici Curiae filed a Motion for leave to file a brief in support of the City's position. And on April 30, 2025, this Court entered an Order granting Amici Curiae's Motion.

This Brief follows and addresses the arguments presented by Amici Curiae.

III. ANALYSIS

A. The Cout of Appeals Did Not Err When It Held that the City Violated the OMA

The Amici Curiae focus their argument on the notion that an individual can never constitute a "public body" as contemplated under the OMA. For the reasons articulated below and in Quality Roots' Answer to the City's Application for Leave to Appeal (incorporated herein by reference), the Amici Curiae are mistaken.

RECEIVED by MSC 5/12/2025 9:51:04 PM

1. The Amici Curiae Ask This Court to Ignore and Overturn Its Own Recent Determinations Concerning the Application of the OMA to Individuals

The Amici Curiae's principal argument is that individuals cannot constitute public bodies subject to the terms of the OMA. For the reasons already expressed in the Court of Appeals' Opinion, in jurisprudence set forth by this Court, and in Quality Roots' briefing, the Amici Curiae's position is untenable.

The Amici Curiae first attempt to rely upon the negative-implication canon of statutory construction, often called "expressio unius est exclusio alterius," in support of their position. Specifically, they note that the definition of the term "public body" found in the OMA, MCL 15.262(a), offers a list of example bodies that constitute "public bodies"—i.e., boards, commissions, committees, subcommittees, authorities, or councils—but the list does not refer to any individuals. Thus, according to the Amici Curiae, the legislature's failure to expressly list any individual government officials within the definition of the term "public body" necessarily means that individuals cannot constitute public bodies.

Even so, the Amici Curiae fail to appreciate that this Court has previously considered the statutory definition of the term "public body" in the OMA multiple times; and on multiple occasions, the Court has determined that, in certain circumstances (such as those presented in this case), an individual may constitute a "public body." See *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 224-226; 507 NW2d 422 (1993) (directly citing the statutory definition of the term "public body" under the OMA, but nevertheless concluding that a "one-man committee" or "one-man task force" may constitute a public body); *Pinebrook Warren, LLC v City of Warren*, ___ Mich ___, ___; ___ NW3d ___ (2024) (Docket Nos. 164869 through 164877); slip op at 20-21, 32-33 (explicitly referencing the OMA's definition of the term "public body," but

RECEIVED by MSC 5/12/2025 9:51:04 PM

nevertheless recognizing that an individual can satisfy that definition). The Amici Curiae present absolutely no reason for this Court to overturn its previous determinations in this regard.

Moreover, the negative-implication canon generally means that "the express mention of one thing implies the exclusion of other similar things." *Greenslait v Taylor*, 137 Mich App 536, 538; 358 NW2d 30 (1984). However, that maxim ***only*** applies when the things specified " 'can reasonably be thought to be an expression of ***all*** that shares in the grant or prohibition involved.' " *Bronner v Detroit*, 507 Mich 158, 173; 968 NW2d 310 (2021), quoting Scalia & Garner, *Reading Law* (St. Paul: Thomson/West, 2012), p 107. And here, there can be no reasonable argument that the legislature meant to exempt individuals from the requirements of the OMA. To the contrary, both this Court and the Court of Appeals have previously recognized that such a determination would frustrate the purpose of the OMA to the point of rendering the Act a near nullity, as municipalities all over the state would routinely delegate decision-making authority on important matters of governmental policy to individuals in order to evade the need to comply with the OMA. See, e.g., *Goode v Dep't of Social Servs*, 143 Mich App 756, 759; 373 NW2d 210 (1985) ("We do not find the question of whether a multi-member panel or a single person presides to be dispositive. Such a distinction carries with it the potential for undermining the Open Meetings Act, as merely having a single person preside would exempt the public body from compliance with the act."); *Booth Newspapers, Inc*, 444 Mich at 226 (approvingly citing the Court of Appeals' reasoning in *Goode*).

The Amici Curiae's reliance upon the negative-implication canon fails where it would lead, quite unreasonably, to the nullification of OMA. See *Bronner*, 507 Mich at 173.

2. The Amici Curiae's Reliance Upon This Court's Decision in *Herald* is Misplaced

The Amici Curiae next argue that this Court's decision in *Herald Co v Bay City*, 463 Mich 111; 614 NW2d 873 (2000), necessitates a determination that individuals categorically cannot

RECEIVED by MSC 5/12/2025 9:51:04 PM

constitute public bodies as contemplated under the OMA. But this Court has already reconciled the holding in *Herald Co v Bay City* with other leading decisions (e.g., *Booth Newspapers, Inc*), which hold that individuals ***can*** constitute public bodies subject to the requirements of the OMA.

In *Pinebrook Warren, LLC*, this Court explained:

> In *Herald*, 463 Mich 111, we further addressed the OMA as it applied to city staff. This Court concluded that the OMA was inapplicable where the Bay City Charter required that a new fire chief be appointed by the Bay City Commission on the recommendation of the city manager . . . . Specifically, we held that the OMA did not apply to the city manager because the Legislature did not include individuals in the definition of "public body" in the OMA . . . . While *Booth* held that the individual regent was subject to the OMA, *Herald* came to the opposite conclusion . . . . *Booth* involved a public body (the Board of Regents) evading its OMA obligations by attempting to have an individual and subquorum committees composed of individual regents do the Board of Regents' job. *Herald*, in contrast, involved an individual executive who at all times had independent and individual authority under the city charter to recommend the fire chief candidate to the city commission. Unlike in *Booth*, the relevant public body in *Herald* (the city commission) did not delegate any authority to the city manager. Rather, the city manager's authority arose from the city charter . . . .
>
> 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. [*Pinebrook Warren, LLC*, ___ Mich at ___; slip op at 25-26.]

The distinction between the holding in *Booth Newspapers, Inc* (where the Court held that an individual can be bound by the requirements of the OMA), and *Herald Co* (where the Court declined to hold that the city manager of Bay City was so bound because of his status as an individual) is that, in the former case, a public body ***delegated*** its authority to an individual. In contrast, the result in *Herald Co* was reached because the city manager was acting in his individual

RECEIVED by MSC 5/12/2025 9:51:04 PM

capacity under the relevant city charter; ***not*** under any authority delegated by the city commission of Bay City.[1]

Thus, even if the disposition of this Appeal hinged entirely on whether the Royal Oak City Manager, an individual, can be a "public body" under the OMA (as explained below, it does ***not***), the Court's decision in *Herald Co* does not compel the Court to hold the OMA inapplicable in this case.

Here, the Court of Appeals rightly noted that the City Commission is a public body, which imbued the City Manager with " 'the power to fully and effectively implement and administer the Municipal License Application process.' " *Exclusive Capital Partners, LLC v City of Royal Oak*, ___ Mich App ___; ___ NW2d ___ (2024) (Docket Nos. 366247 and 366257); slip op at 23, quoting Licensing Ordinance, § 435-2(E). Under the terms of the Licensing Ordinance, the City Manager could only "implement and administer" the application process and rank applicants using the City's competitive criteria, but the final decision as to which applicants would be awarded a license was technically reserved to the City Commission. *Exclusive Capital Partners, LLC*, ___ Mich App at ___; slip op at 23, citing Licensing Ordinance, §§ 435-2(E), 435-4(C)(4)(a)-(j), 435-4(D)(4) and (7).

Nevertheless, ***in practice*** (putting aside the text of the Licensing Ordinance), the City Manager formed a workgroup composed of several city officers, which met in four closed-door

[1] For this same reason, the Amici Curiae's citations to other holdings that followed the *Herald Co* decision—for instance, the Court of Appeals' Opinion in *Yellow Tail Ventures, Inc v City of Berkley*, 344 Mich App 689, 704; 1 NW3d 860 (2022), where the Panel ***expressly*** acknowledged that "***[t]here was no impermissible delegation of authority to the City manager***" (emphasis added), and, for ***that reason***, the Berkley City Manager was not subject to the provisions of the OMA—are inapposite. These cases do not support the notion that an individual can never be subject to the OMA. They merely reaffirm that, unless there is a delegation of authority from a public body to that individual, the individual will generally not be considered a "public body" in his or her own right.

RECEIVED by MSC 5/12/2025 9:51:04 PM

sessions to assess applicants; and, as a result of those sessions, the City Manager recommended two applicants—Gatsby and Royal Treatment—for licensure. *Id*. While the Licensing Ordinance tasked the "City" with determining which applicants would be best suited to operate within the City, the City Commission merely adopted the City Manager's recommendation without any additional deliberation. *Id*. Indeed, the City Commission devoted no discussion to any applicants ***other than*** the two selected by the City Manager. *Id*.

> Consequently, the city manager effectively selected who would receive the two recreational marijuana licenses. ***Because the city manager made a de facto policy choice for the City Commission, the city manager met the definition of "governing body," and, thus, was subject to the OMA***. It follows that the meetings that the city manager had with his workgroup should have been noticed and made open to the public. [*Id*. (emphasis added).]

In effect, the City Commission, through the Licensing Ordinance, delegated its authority to select winning applicants to the City Manager, who did, in fact, exercise that authority in a manner that made him a "governing body"—and, therefore, a "public body"—as contemplated under the OMA. *Id*. at ___; slip op at 23-24.

3. Even If This Court is Persuaded that Individuals Categorically Cannot Constitute Public Bodies as Contemplated Under the OMA, the Relevant Decision-Making Body in This Case—the City Commission—Was Not an Individual

All else aside, the Amici Curiae's focus on the issue of whether an individual may constitute a public body is somewhat confusing. After all, as the Court of Appeals recognized, ***the City Manager did not make any governmental or policy-making determinations, alone***. Again, the plain text of the Licensing Ordinance leaves the final licensing determination to the City Commission. *Exclusive Capital Partners, LLC*, ___ Mich App at ___; slip op at 23, citing Licensing Ordinance, §§ 435-2(E), 435-4(C)(4)(a)-(j), 435-4(D)(4) and (7).

But under this Court's decision in *Pinebrook Warren, LLC*, ___ Mich at ___; slip op at 33, the Court must look ***beyond*** the "four corners" of an ordinance outlining decision-making authority

RECEIVED by MSC 5/12/2025 9:51:04 PM

and must also consider which entities, ***in actuality***, made policy decisions for the local government at issue. And here, as noted by the Court of Appeals, the City Manager's workgroup (the Review Committee) met in closed-door sessions to review and select winning applicants. *Exclusive Capital Partners, LLC*, ___ Mich App at ___; slip op at 23. Indeed, then City Manager Paul Brake testified that the final determination as to the winning applicants was a "consensus" reached by himself and the Review Committee, working in tandem to reach a "collective decision." (*Appellee's Appendix, Ex. A, 98, 100, 108, 183-184*). The City Commission then rubber-stamped the City Manager's (and Review Committee's) recommendation without any additional deliberation. *Id*. Indeed, the City Commission devoted no discussion to any applicants ***other than*** the two selected by the City Manager. *Id*.

Thus, whether the ultimate licensing determinations were made by the City Commission (as required under the Licensing Ordinance) or by the City Manager and his Review Committee, ***the decisions at issue were not made by an individual***.

B. Difficulty in Compliance with the Law Is Not an Excuse to Evade Compliance

The Amici Curiae's final contention is that, if this Court continues to acknowledge that individuals may constitute public bodies under the OMA, the day-to-day activities and ministerial functions of governmental officials and employees will be significantly hindered. However, as Quality Roots has explained in its Answer to the City's Application for Leave to Appeal, difficulty in compliance with the law is not an excuse to evade compliance.

As a preliminary matter, the Court of Appeals' holding in this case is rooted in this Court's ***1993*** Opinion in *Booth Newspapers, Inc*. The year is now 2025, and the municipal governments of this state have not devolved into anarchy.

But that aside, the Michigan Courts have repeatedly declined to carve out exceptions to the laws enacted by the legislature on the basis of inconvenience or personal convictions. See, e.g., *In*

RECEIVED by MSC 5/12/2025 9:51:04 PM

re Caldwell, 228 Mich App 116, 120-121; 576 NW2d 724 (1998) (declining to create an exception to the operation of MCL 710.51(6), which allows stepparents to adopt the child of a noncustodial parent who has failed or neglected to support or contact said child, even for parents who have been unable to support or contact their children due to incarceration); *In re Pavlos-Hackney*, 343 Mich App 642, 648-649; 997 NW2d 511 (2022) (holding that a person who is subjected to a facially unlawful order from a Court must still comply with the order until relieved of that obligation via subsequent order from an appellate Court); *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 488; 822 NW2d 239 (2012) ("[I]f [courts] were to equate lack of legal training regarding a statutory duty to disclose or absence of affirmative efforts to conceal the claim with excusable mistake or inadvertence, it would undermine the familiar maxim that, even for pro se litigants, ignorance of the law is no excuse.") (quotation marks omitted). And the Amici Curiae have provided no reason for this Court to create an exception to municipal obligations under the OMA for mere inconvenience.

Further, it must be noted that the Amici Curiae's concern that ministerial acts of individuals in local government will be subject to the terms of the OMA is misplaced. Under the OMA, "decisions" of public bodies must be made in meetings open to the public. MCL 15.263(2). But the OMA expressly states that a "decision 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) (emphasis added). A legislative body's purchase of a vehicle (to use the Amici Curiae's example) is unlikely to effectuate or formulate public policy, and so that

RECEIVED by MSC 5/12/2025 9:51:04 PM

manner of governmental decision-making would not be subject to the requirements of the OMA.[2] And beyond that, the Court of Appeals has recognized that "deliberating," for purposes of the OMA, is the act of carefully considering issues and options before making a decision or taking some action . . . [,] the act of exchanging views on something . . . [,] a discussion, as of a public question in an assembly, involving opposing viewpoints." *Ryant v Cleveland Twp*, 239 Mich App 430, 434; 608 NW2d 101 (2000) (citations and quotation marks omitted) (emphasis omitted). An individual can hardly "exchange views" with himself or herself. But even if an individual ***can*** "self-deliberate," the OMA only requires deliberations to occur at an open meeting when the deliberations are made by a quorum of the members of the relevant public body. See MCL 15.263(3). And the OMA specifically states that its provisions do not apply "to a meeting that is a social or chance gathering or conference not designed to avoid this act." MCL 15.263(9). Thus, because an individual can never avoid being in his or her own presence (and so a "quorum" of an individual body is always occurring by chance), the individual's private musings will never be subject to the OMA unless the individual at issue is attempting to use that status as a means to circumvent the requirements of the OMA.

The Amici Curiae have not articulated any reason why the Court of Appeals' Opinion in this case makes municipal governance any more difficult. And even if some difficulty in municipal

[2] The Amici Curiae also question whether individuals involved in the preparation of municipal budgets are subject to the OMA. But this is a somewhat strange example. Municipal budgets are subject to the Uniform Budgeting and Accounting Act, MCL 141.421 *et seq*., which ***requires*** such budgets to be approved via passage of a general appropriations act by a legislative body (necessarily a collective body, not an individual), which ***must occur at a public hearing***. See MCL 141.434(5). Any act by other municipal employees (aside from the members of the relevant legislative body) in furtherance of preparing a recommended budget would, at most, be making ***recommendations*** for final approval by the municipality's legislative body. Such recommendations, which do not cross the threshold into actual decision-making, do not inherently require compliance with the OMA. See *Booth Newspapers*, 444 Mich at 244.

RECEIVED by MSC 5/12/2025 9:51:04 PM

compliance would stem from the Court of Appeals' Opinion, it cannot result in a new, judicially created exception to the requirements of the statute.

IV. CONCLUSION

For the reasons outlined above, Plaintiff-Appellee Quality Roots, Inc. respectfully requests that this Court deny the City's Application for Leave to Appeal.

Respectfully submitted,

WILLIAMS, WILLIAMS, RATTNER, & PLUNKETT, P.C.

Dated: May 12, 2025

By: ***/s/ William C. DiSessa***
Brian E. Etzel (P54905)
William C. DiSessa (P81906)
Attorneys for Quality Roots, Inc.
bee@wwrplaw.com
wcd@wwrplaw.com

The word-processing system used to prepare this Brief has indicated that the portions that were drafted in compliance with MCR 7.212(C)(6) through (8) contain a total of 3,187 words.

/s/ *William C. DiSessa*
William C. DiSessa

PROOF OF SERVICE

I hereby certify that on May 12, 2025, I caused the appended document and this Proof of Service to be filed with the Clerk of the Michigan Supreme Court using the Court's e-file system, which will automatically send notification of such filing to all attorneys of record.

/s/ *William C. DiSessa*
William C. DiSessa

Dated: May 12, 2025