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STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

EXCLUSIVE CAPITAL PARTNERS,
a Michigan limited liability company,

Plaintiff-Appellee,

-vs-

CITY OF ROYAL OAK,
a Michigan Municipal Corporation,

Defendant-Appellant.

-and-

QUALITY ROOTS, INC.,
a Michigan Corporation,

Plaintiff-Appellee,

-vs-

CITY OF ROYAL OAK,
a Michigan Municipal Corporation,

Defendant-Appellant,

and

PGSH HOLDINGS, LLC,
a Michigan Limited Liability Company,

Intervening Defendant.

Supreme Court No. 168243
Court of Appeals No. 366247
Consolidated with No. 366257
Trial Court No. 2022-193015-CZ

Court of Appeals No. 366257
Consolidated with Case No. 366247
Trial Court No. 2022-192383-CZ

DEFENDANT-APPELLANT'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF COMPLIANCE

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In its Response, Plaintiff-Appellee, Quality Roots, Inc. (Plaintiff),[1] argued that the Court of Appeals did not err in this case because the city commission delegated its own authority to the city manager and, therefore, the city manager was a "public body" and subject to the Open Meetings Act. Plaintiff claimed that the city manager did not exercise independent authority, relying solely on the terms of the City Charter. Plaintiff's argument wholly disregarded the City's position and the role of the MRTMA in the entire scheme here, however, and the authority of the City to issue marijuana permits in the first place.

> The state may, and sometimes does, prescribe in what mode or manner a municipal corporation shall exercise its powers. It is generally within the legislative province to direct in what way, through what board of municipal officers or agents, or by what municipal officers the powers given shall be exercised.
>
> A municipality has broad discretion to determine the manner and means of exercising the powers delegated to it by state law. If the method for exercising a municipal power is not specifically prescribed, the mode or means by which a municipality may exercise powers granted by the legislature will not be strictly construed. 2A McQuillin's Municipal Corporations (3d ed), § 10:32, p "Method of execution of powers." (footnote omitted).

"Where a [municipal] corporation relies upon a grant of power from the legislature for authority to do any act, it is as much restricted to the mode prescribed by the statute for its exercise as to the thing allowed to be done." *Id*.

The MRTMA empowers municipalities to decide whether they want marijuana businesses in their communities to grow, process, and sell marijuana: "[A] municipality may completely prohibit or limit the number of marihuana establishments within its boundaries." MCL 333.27956(1). If a municipality opts in to the licensing process, it must adopt an ordinance. MCL 333.27956(2), (3) and (5); MCL 333.27959(3). But the MRTMA does not specify what the terms

[1] The City refers only to this Plaintiff-Appellee because Plaintiff-Appellee, Exclusive Capital Partners, LLC, did not file its own substantive brief in response. Exclusive filed a concurrence the day after Quality Roots filed its brief in response.

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of the ordinance should be or how the municipality is to exercise those powers. Therefore, the City of Royal Oak has broad discretion to determine the manner and means of exercising the powers delegated to it by state law. *McQuillin's, supra*; see also, 1963 Const, art 7, § 34 ("The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.")

These principles apply to the MRTMA's grant of authority to receive and decide applications according to the competitive process required by MCL 333.27959(4). The City is prohibited from issuing licenses for marijuana businesses (establishments) without an ordinance. But in furtherance of the principle described in McQuillin's above, when the MRTMA says that the City shall choose licensees by a competitive process, MCL 333.27959(4), it does not necessarily follow that "the City" means "the city commission."

Certainly, Plaintiff's argument follows the Court of Appeals' decision that the commission delegated its own authority to the city manager. But the Court of Appeals presumed, without analyzing the statutory and ordinance scheme, that the decision to award licenses belonged to the city commission in the first place. Under the statutory scheme, the MRTMA authorized the City to adopt an ordinance to permit and regulate marijuana businesses. Once the city commission adopted an ordinance, the ordinance authorized the Royal Oak licensing scheme and created independent authority in the city manager to implement the application process, rank the applications, and assign municipal license slots to allow the successful applicants to complete the process and ultimately obtain a license from the city clerk. The ordinance did not reserve any power in the city commission to overrule the city manager's rankings of applicants or assignment of municipal license slots to the two successful applicants. The city commission's power to adopt an ordinance is not synonymous with power to rank marijuana applications, where it never had that decision

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making authority before adopting the ordinance. And it still does not have that authority because it drafted and ratified an ordinance without that power.

Of course, Plaintiff and the Court of Appeals relied on this Court's decision in *Pinebrook Warren, LLC v City of Warren*, ___Mich___; ___NW3d___ (2024). But even this Court's exposition there of the requirements to meet a "public body" distinguished *Herald Co v Bay City,* 463 Mich 111; 614 NW2d 873 (2000). The Court's statements about individual executive officials there nonetheless were *dicta* because the Warren review committee was a committee that by definition was a "public body."

Plaintiff attempted to distinguish this case from *Yellow Tail Ventures, LLC v City of Berkley*, 344 Mich App 689; 1 NW3d 860 (2022), including the following quote: "The City ordinance's procedure that dictated that the City manager would review applications did not involve the work of a 'public body' for the purposes of the OMA because, as recognized in *Herald*, an individual person is not included in the definition of a public body for the purposes of the OMA." *Id*. at 704-705. This quote directly supports the City of Royal Oak here. The City's marijuana ordinance bestowed the power to "fully and effectively implement" the process on the city manager – which is exactly what he did. It did not involve the work of a "public body" because an individual person is not included in the definition of a public body under the OMA. Like the City of Berkley in *Yellow Tail*, " … the process by which the City manager scored the applications was not required to be conducted in a public hearing even though the manager enlisted the help of other City employees to accomplish the task." *Id*.

Plaintiff also baldly asserts that, "The Court of Appeals' analysis on the OMA issue did not break new ground on the subject." But the Court of Appeals ordered that its decision be for publication. The standards for publication are set forth in MCR 7.215(B):

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(B) Standards for Publication. A court opinion must be published if it:

(1) establishes a new rule of law;

(2) construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule;

(3) alters, modifies, or reverses an existing rule of law;

(4) reaffirms a principle of law or construction of a constitution, statute, regulation, ordinance, or court rule not applied in a reported decision since November 1, 1990;

(5) involves a legal issue of significant public interest;

(6) criticizes existing law;

(7) resolves a conflict among unpublished Court of Appeals opinions brought to the Court's attention; or

(8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.

The rules do not require the Court of Appeals to cite or explain under which subsection of the foregoing rule it deemed publication necessary. But in any event, the Court of Appeals most certainly blazed a new trail requiring OMA compliance by Royal Oak's city manager. That means that the city manager must post public notices of his meetings with City administrative staff, hold those meetings in a place accessible by the public, allow public comment at the meetings, adopt rules for the meetings, create a set of minutes of each meeting, make a draft set of minutes available within eight business days of the meeting, approve minutes of each meeting, and hold closed sessions only within the requirements and parameters of the OMA. The Court of Appeals specifically applied the OMA to the city manager because, it said, he was acting under authority conferred by an ordinance and that meant that the city commission delegated its own authority to him. The Court specifically expanded the definition of a "public body" to apply to the Royal Oak city manager when exercising his powers under the City's recreational marijuana establishment ordinance, and requiring OMA compliance.

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These are requirements never before imposed on Royal Oak's city manager, or any city manager, village manager, township supervisor or manager, or any other individual, municipal executive official. Moreover, the nature of the opinion as a reported decision imbues this decision with precedential effect under the doctrine of *stare decisis*, according to MCR 7.215(C)(2). By definition, the Court broke new ground.

Plaintiff also presumptuously construed the City's concerns about the practical effect of the Court of Appeals decision, including the substantial burdens on municipal governments, as a desire to evade compliance with the law. The City did not and does not seek to be absolved from compliance with the law. Rather, the City's argument seeks to limit the Court of Appeals' judicial expansion of the definition of a "public body" beyond the Legislature's express, unambiguous language in the statute. The Court of Appeals' decision directly contravened this Court's decision in *Herald Co v Bay City,* 463 Mich 111, 129; 614 NW2d 873 (2000), that specifically held that a "public body connotes a collective entity," meaning more than one person. The City does object to including the City's chief administrative officer, who is an individual executive official, in the definition of "public body" and what that decision portends for municipal operations. This objection stems from the apparent implications that the opinion will mean full OMA compliance by administrative officials who have never had to notice and call public meetings and all that goes with OMA compliance. Contrary to Plaintiff's argument, the City laid out what full OMA compliance means at pp 20-21 of its Application for Leave to Appeal. The requirements of the OMA are not only holding public meetings.

To reiterate, since its adoption in 1972, the OMA has never imposed requirements on municipal executive and administrative officials. Those officials and employees have never been subject to the OMA because they are not "legislative or governing bodies." OMA compliance means *all* OMA compliance, not simply allowing the public to attend internal meetings of

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municipal administrators. Those officials and employees do not hold meetings in public because they implement the policies made by the "legislative or governing body," who make those decisions at public meetings. To construe an individual executive official as a "body" is an unwarranted expansion of language used by the Legislature to define to which government officials the OMA applies. That expansion is appropriately left to the Legislature.

The City must point out the irony in Plaintiff's contention that the City's position would create a "new, judicial exception to the statute". The Court of Appeals opinion judicially expanded OMA requirements to an individual city manager, where no court had ever done so before. With a wave of its verbal magic wand, the Court of Appeals turned an individual executive official into a "public body" contrary to the express language of the OMA itself. This is a misconstruction that this Court must rectify.

WHEREFORE, Defendant-Appellant, CITY OF ROYAL OAK, respectfully requests that this Court grant its application for leave to appeal or, in the alternative, peremptorily reverse the Court of Appeals' opinion in this matter.

Respectfully submitted,

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I certify that the foregoing document was prepared using Microsoft Word word processing software in a proportional font, Times New Roman, 12 pt., a proportional font. The document consists of 2,205 countable words.

/s/ *Anne McClorey McLaughlin*