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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 SUPPLEMENTAL BRIEF FOR ORAL ARGUMENT ON THE APPLICATION

ORAL ARGUMENT REQUESTED

CERTIFICATE OF COMPLIANCE

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JURISDICTIONAL SUMMARY

Upon consideration of Defendant-Appellant's Application for Leave to Appeal, the Court issued an order on October 29, 2025, directing the Clerk to schedule oral argument. The Court further ordered the parties to file supplemental briefs in accordance with MCR 7.312(E) addressing the issue raised in the application, "whether the Royal Oak city manager was a 'public body' as defined by MCL 15.262(a), subject to the Open Meetings Act, MCL 15.261 *et seq*."

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QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT SHOULD REINSTATE THE TRIAL COURT'S PROPER GRANT OF SUMMARY DISPOSITION OF PLAINTIFF'S CLAIM THAT THE CITY OF ROYAL OAK VIOLATED THE OPEN MEETINGS ACT, WHERE THE CITY'S RECREATIONAL MARIJUANA ESTABLISHMENT LICENSING ORDINANCE CONFERRED THE TASKS OF IMPLEMENTING AND COMPLETING THE APPLICATION PROCESS AND RANKING THE APPLICATIONS UPON THE CITY MANAGER, WHO IS **NOT** A "PUBLIC BODY" SUBJECT TO THE OMA?

Plaintiffs-Appellees answer, "No."

Defendant-Appellant City answers, "Yes."

The trial court granted summary disposition and would answer, "Yes."

The Court of Appeals answered, "No."

This Court should answer, "Yes."

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INTRODUCTION AND SUMMARY OF ARGUMENT

A city manager, an individual, is not a public body for purposes of the Open Meetings Act, MCL 15.262(a). The Court of Appeals in this case erred by misreading or misconstruing the City's Recreational Marijuana Establishment (RME) ordinance to provide that the city commission was the final decisionmaker as to which applicants for RME licenses would receive a license under the RME ordinance. Instead, the city manager, not the city commission, was the final decisionmaker on the licensing issue. The city manager made *his* decision as the municipal official charged with making the decision under the ordinance. His preliminary "meetings" with his department heads and other administrative staff and officials did not constitute unnoticed, improper meetings of a work group that became a public body under the Open Meetings Act, as the Court of Appeals apparently held below, because the "decision" made under the RME ordinance was that of a single individual (the city manager) in which no public *body*, including the Royal Oak city commission, was involved.

The Court of Appeals below clearly conflated the decision that the city manager made under the RME ordinance with the roles of the Royal Oak city commission and planning commission in the overall marijuana use approval process—which were limited to meeting to review site plan and special land use approvals under the *zoning ordinance*, not to make decisions under the separate, and separately authorized, licensing decisions under the RME ordinance.

The city commission's adoption of the RME ordinance under the Michigan Regulation and Taxation of Marihuana Act (MRTMA), 2018 IL 1, MCL 333.27951, *et seq*., making the city manager the final decisionmaker of which applicants would receive marijuana retailer licenses was not improper or in any way precluded by the MRTMA, the statutory authority under which the RME ordinance was passed. The Royal Oak city commission was perfectly within its authority under the Michigan Constitution, the Home Rule City Act, and MRTMA to create an ordinance

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mechanism to be exercised not by a "public body" like the city commission, but rather by an individual, namely the City's chief administrative officer, the city manager.

To hold that a city manager is a "public body" in Michigan, where many communities operate in a council-manager form of government in which the legislative body is the policy-making body and the manager is the official in charge of executing or administering ordinances on a day-to-day basis, is simply untenable. A municipal government cannot function if every decision by a city manager exercising executive or administrative authority conferred upon him by ordinance requires full compliance with the Open Meetings Act—not just calling a meeting every time a manager wants to make a decision with the assistance of his or her department heads or even one other administrative official, but also noticing such a meeting, holding it in a place available to all members of the public, taking public comment, etc.

The Court of Appeals here simply misunderstood that Royal Oak administered two different ordinances in the context of the marijuana licensing and land use. The city manager properly carried out his function by determining which applicants would be awarded licenses under the RME ordinance's procedures. This Court has let the challenges to those processes die by denying the Plaintiffs' application for leave to appeal in Case No. 168023.

The city manager's decision under the *RME ordinance* process is conditional. The city commission also conducted its responsibility under the land use approval process prescribed by the City's *zoning ordinance*. It did so in an open meeting in compliance with the OMA *as it is obligated to do every time it acts, because it is a public body*. The city manager didn't make a "recommendation" to the city commission, and the city commission didn't affirm or deny his decision. They both appropriately conducted separate parts of the marijuana use approval process consistent with the nature of their respective positions under the governing ordinances. That the

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Court of Appeals either did not appreciate or credit that basic feature of the RME ordinance process or somehow found it to be improper requires this Court's intervention and ultimate reversal.

This Court should reverse the Court of Appeals' determination that the city manager in any way, shape, or form acted as a public body in this process and confirm that the trial court was correct in dismissing Plaintiffs' claims under the Open Meetings Act.

STATEMENT OF MATERIAL FACTS AND PROCEDURAL HISTORY

In 2018, Michigan voters adopted Proposal 1, the Michigan Regulation and Taxation of Marihuana Act (MRTMA), 2018 IL 1, MCL 333.27951, *et seq.* Nearly 70% of Royal Oak voters approved the new measure to legalize recreational (adult use) marijuana[1]. Adult-Use (Recreational) Marijuana Engagement and Outreach, https://www.romi.gov/1403/Adult-Use-Recreational-Marijuana (accessed November 24, 2025). After a period of opting out of permitting adult-use marijuana establishments, the Royal Oak city commission adopted a recreational marijuana establishment (RME) ordinance on July 27, 2020, codified at Royal Oak Code, Ch 435 "Marihuana," (as amended) (**Appx pp 1-23**), under the authority granted by MRTMA, MCL 333.27956(2) and (3). The ordinance authorizes all types of marijuana establishments[2] permitted by MRTMA, MCL 333.27959(2); Royal Oak Code, § 435-2.A(1)-(9) (**Appx p 5**), and requires an application process for licensing RME establishments. Relevant to this appeal, the ordinance authorizes a total of two retailer establishment licenses. Royal Oak Code, § 435-2.B(5), **Appx p 5**. The ordinance forbids operation of any RME establishment without a license issued by the City under the ordinance. Royal Oak Code, § 435-2.C, **Appx p 6**.

[1] The Michigan Appellate Opinion Manual establishes the spelling convention "marijuana" except when quoting or naming a statute using "Marihuana." Mich App Op Manual, Office of the Reporter of Decisions, (2014, as revised 2017), Appx 2, Word List, p 177.

[2] These are growers (Class A, B and C), processors, retailers, safety compliance facilities, secure transporters, marihuana microbusinesses, and co-located facilities.

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The RME ordinance, Royal Oak Code, § 435-2.E, provides that, "*The city manager* is granted the power to fully and effectively implement and administer the municipal license application process." **Appx p 6** (emphasis added) The ordinance provides for the *city manager* to open a "window" for receipt of applications for the several types of RME licenses. Royal Oak Code, § 435-4.C(1), **Appx p 10**. The ordinance further details the required contents of applications in Royal Oak Code, § 435-4.A(1)-(4), **Appx pp 7-9**. The ordinance further informs, "Applications must be complete and shall be considered on a competitive basis as required and set forth by MCLA 333.27959.4, as may be amended." Royal Oak Code, § 435-4.B, **Appx p 9**. When the window closes, if there are more applications received than available licenses, the ordinance directs the *city manager* to conduct a "competitive process intended to select the applicant(s) who are best suited to operate in compliance with the [MRTMA] within the City." Royal Oak Code, § 435-4.C(2), **Appx p 10**. This competitive process mirrors the statutory directive that "the municipality shall decide among competing applications by a competitive process intended to select applicants who are best suited to operate in compliance with this act within the municipality." MCL 333.27959(4). The *city manager* is to conduct this process by considering various criteria established by the ordinance. Royal Oak Code, § 435-4.C(4)(a)-(j), **Appx pp 10-11**.

Section 435-4.C(4) of the ordinance then advises that,

> The applicants and their applications will be ranked in the order of which is best suited to operate in compliance with the Act within the City *as determined by the city manager* or his or her designee. This ranking will be used to fill available municipal license slots[3], starting with the best-suited applicant and application, *until all available municipal license slots are filled*. **Appx p 10** (emphasis added.)

[3] A municipal license slot is, "An unissued permit available to be issued to an applicant." Royal Oak Code, § 435-1, Definitions, **Appx p 4**.

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In other words, the RME ordinance gives the decision as to whom to award an RME license to the city manager and the city manager alone. The city commission has no role in that licensure decision.

In accordance with the RME ordinance's direction to him as the decisionmaker, then-Royal Oak city manager Paul Brake opened a window from December 7, 2020 - February 1, 2021, for receipt of RME license applications. Royal Oak received 31 applications for two retailer establishment licenses, two applications for microbusinesses, one for a class A grower, and two class C grower applications. **Appx p 24**, Affidavit of Paul Brake, ¶ 8. Quality Roots (Quality) applied for two RME retailer licenses, while Exclusive Capital Partners (Exclusive) applied for one RME retailer license.

In conducting his review and evaluation of the retailer applications of plaintiffs and the other 28 applicants, Mr. Brake consulted with members of the city administration, principally his department heads, various administrators, and some senior staff members whose positions were relevant to certain aspects of the applications within the scope of their duties. *Id*., ¶ 9; **Appx pp 28-29**, Brake dep, pp 44:21-45:5. These included the assistant to the city manager, the director of community development, city planner, city engineer, deputy city manager/director of economic development, chief of police, city treasurer, and city attorney. **Appx p 24**, affidavit ¶ 10; **Appx pp 29-30**, deposition, pp 45-46.

Mr. Brake met with some of these staff members on four occasions in August 2021 to discuss specific applications at each gathering. **Appx pp 32, 34-37**, deposition pp 48:2-15; 54:5-57:2. The assistant to the city manager, Susan Barkman, developed a set of Marijuana Application Review Notes containing the competitive criteria from the RME ordinance, Royal Oak Code § 435-4.C(4)(a)-(j) (**Appx pp 10-11**). The Review Notes were available on a shared drive within the City's computer system and available only to the staff members to which each person could

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contribute according to their specific specialty. **Appx pp 38-40,** deposition pp 61:18-19; 61:24-62:5; 120:9-21.

After carefully reading all the applications and associated materials, comparing the applications to one another, and discussing them with administrative staff, Mr. Brake ranked the applications into three tiers. **Appx p 25,** affidavit ¶ 11**; Appx pp 27**, **33**, **41-44,** deposition pp 39:13-17; 53:11-12; 173:5-8; 263:3-5; 278:1-6; 378:1-2. Tier 1 comprised the two successful applicants who ranked the highest and to whom he, as the decisionmaker under the RME ordinance, awarded the two license slots. **Appx pp 27, 41, 43**, pp 39:13-39:17; 173:9-16; 278:1-6. Mr. Brake assigned the two retail license slots to Gatsby Cannabis that applied for a retail establishment co-located with a grower and a processor, and to Royal Treatment for a stand-alone retail establishment. **Appx p 25**, affidavit ¶ 12; **Appx pp 46-47**, Tier I letters to Gatsby and Royal Treatment.

Manager Brake ranked in Tier II those applicants and applications he described as on "standby," consisting of the next-highest-ranked applications that were well positioned to move forward if either of the two Tier I applicants did not successfully complete the process and obtain their approval separately required under the *zoning ordinance*, as further explained below. See **Appx p 25,** affidavit ¶ 13; **Appx pp 48-49**, December 15, 2021 "standby" letters issued to Quality and Exclusive; **Appx p 43**, deposition p 278:2-6. Mr. Brake issued denials to the Tier III applications after the initial review process as not meeting the minimum criteria for award of a municipal license slot.

Mr. Brake notified plaintiffs that their applications were not initially chosen in the competitive process for the retailer license slots in the zoning districts where they applied. **Appx pp 48-49**. Plaintiffs were among several applicants placed on a "standby" or waiting list, so that if an applicant failed to complete or pass the remainder of the process, including that required by the

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zoning ordinance, the next highest-ranked applicant(s) could fill the available license slot(s). **Appx p 26**, affidavit ¶ 15.

City Manager Brake thus did not deny plaintiffs' applications, but allowed plaintiffs to remain in consideration if one of the other license slots was unable to be filled. *Id.*; **Appx pp 48-49**. If the other recipients of a license slot completed the full process and were eventually licensed, then the city manager would issue a letter denying plaintiffs' applications. *Id.*; **Appx p 26**, ¶ 16. At the time the city manager sent the December 15 letters, the two license slot recipients had not yet applied for site plan and special land use review for hearing before the planning commission and the city commission as the next necessary steps for completion prior to issuance of an RME license. **Appx p 25**, affidavit ¶ 13.

Plaintiff Quality filed its Complaint in the Oakland County Circuit Court here on February 3, 2022, alleging (1) that the RME ordinance, and specifically the criteria for determination of applications for marijuana licensure set forth in the ordinance, violated MRTMA; (2) that the city violated MRTMA and the ordinance by giving at the time, a license slot to Gatsby Cannabis that is less than 1,000 feet from a K-12 school; (3) the city violated the due process clauses of the Michigan and U.S. Constitutions; and (4) violation of the Open Meetings Act, and seeking declaratory judgment, preliminary and permanent injunctive relief. **Appx pp 50-74.** Plaintiff Exclusive filed its complaint on March 10, 2022, largely alleging the same theories of liability and adding that the RME ordinance is void for vagueness and violates the dormant Commerce Clause. **Appx pp 103-123**.

When the city manager awarded the license slots to Gatsby and Royal Treatment, they were conditionally approved for licenses and were permitted to move on to the next step. Both applicants submitted their applications for site plan review and special land use permits under the City's zoning ordinance, Royal Oak Code, § 770-52.1, Special provisions for Marihuana Establishments,

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Appx p 889. Unlike the city manager's decision under the RME ordinance, these applications by law required a public hearing before the Royal Oak planning commission. Royal Oak Code, § 770-11.B(3), Special Land Uses, Permit procedures ("Prior to a decision by the Plan Commission, a public hearing shall be held in accordance with § 770-13, Public hearings.") **Appx p 884**. That hearing occurred on February 8, 2022. **Appx p 157**, agenda items D.2 and 3; **Appx pp 159-161**, minutes. The planning commission voted 3-2 to recommend denial by the city commission of Gatsby's special land use permit. **Appx p 160**. The planning commission voted 4-1 to recommend approval of Royal Treatment's special land use permit and site plan. *Id*., **pp 160-161**.

After service of its complaint on the city of Royal Oak, Quality filed a motion for preliminary injunction on February 22, 2022, seeking to prevent the city from continuing to implement the licensing process and issuing site plan approval, special land use permits, or conditional or final licenses. See **Appx p 173**, Register of Actions entry 02/22/2022. On February 28, 2022, PGSH Holdings, LLC, the applicant for the Gatsby Cannabis license, filed a motion to intervene, **Appx p 172**, entry of 02/28/22, which the trial court granted on March 7, 2022. *Id*., entry of 03/07/22. The trial court decided the motion for preliminary injunction without a hearing and denied the motion by order of March 9, 2022. **Appx pp 174-175**. The trial court held that plaintiff had not shown a substantial likelihood of success on the merits or that it would suffer irreparable harm without an injunction. *Id***.**

In lieu of an answer to Quality's complaint, the city of Royal Oak filed a motion for summary disposition on March 11, 2022. **Appx pp 176-196 (plus exhibits, pp 197-238)**. The city argued that plaintiff's claims were not ripe, as the city had not made a final decision in the marijuana licensing process and had not denied plaintiff a license. At that time, neither Gatsby nor Royal Treatment had completed the process to obtain their city licenses. The motion further sought summary disposition based on lack of a genuine issue of material fact of the Open Meetings Act

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claim, supported by the affidavit of City Manager Paul Brake. In all other respects, the city based its motion on MCR 2.116(C)(8) for failure to state a claim upon which relief can be granted. The city filed a similar dispositive motion on April 14, 2022, in lieu of an answer to the Exclusive complaint. **Appx pp 239-304**.

The applications of Gatsby Cannabis and Royal Treatment for site plan review and special land use permits under the provisions for Marihuana Establishments in the zoning ordinance, Royal Oak Code, § 770-52.1.B (**Appx 889**), proceeded to hearing before the city commission at its regular meeting of April 25, 2022. **Appx pp 312-315**, minutes. The city commission, fulfilling its role under the *zoning ordinance* as the decisionmaker as to site plan review and special land use applications for marijuana uses (not the marijuana licenses), voted to approve the site plans and special land use permits for both Gatsby and Royal Treatment. *Id*.

The separate zoning ordinance review having been completed, and the "condition" of the city manager's earlier license approval (by assigning license slots) having been satisfied by both applicants, the city clerk then issued formal licenses under the RME ordinance (not the zoning ordinance) to the two licensees the following day. **Appx pp 321-326.** Once the city issued licenses to Gatsby and Royal Treatment, the city manager issued formal denial letters to the other applicants initially placed on standby. See **Appx pp 327-346**, May 18, 2022, denial letters.[4]

[4] By this time, two other RME retailer license applicants also had filed suit, and the city moved to consolidate the four cases. The trial court ordered these cases with *Attitude Wellness, LLC v City of Royal Oak*, Case No. 2022-192288-CZ, and *BDE Warren, LLC v City of Royal Oak*, 2022-192830-CZ. The cases were consolidated under the oldest case number, that of Attitude Wellness. Two more marijuana retailer applicants eventually filed suit against the city, raising essentially the same claims and arguments as the first four: *Green Sq Holdings, LLC v City of Royal Oak,* Case No. 2022-194753-CZ, and *Green Theory, LLC v City of Royal Oak,* Case No. 2022-294223-CZ. The trial court consolidated those cases as well with the original four cases.

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Upon leave to amend granted by the trial court, plaintiff Quality filed an amended complaint on August 23, 2022. **Appx pp 347-408** (without exhibits). Likewise, Exclusive obtained leave to amend and filed both a first and second amended complaint. See **Appx pp 409-460**, second amended complaint (without exhibits).

In the meantime, the hearing on the city's original dispositive motions had been adjourned several times. The city responded to the respective amended pleadings of Quality and Exclusive with dispositive motions again under both MCR 2.116(C)(8) and (C)(10). With the approval of the trial court, the city's new motions incorporated the original motions for summary disposition and addressed only the new claims in the amended pleadings. **Appx pp 461-642**; **643-762**.

The city of Royal Oak filed motions for summary disposition in all six consolidated cases based upon the allegations in the specific pleadings in each case. The trial court heard and granted the dispositive motions in all six cases on December 14, 2022. As to the allegations under the Open Meetings Act, the trial court held that the OMA did not apply based upon this Court's decision of *Herald Co v Bay City*, 463 Mich 111; 614 NW2d 873 (2000). **Appx pp 779, 787**. The trial court further granted summary disposition of all other claims alleged in the pleadings, specifically that the city's RME ordinance does not violate MRTMA and the city manager did not violate MRTMA. The trial court also held that the ordinance was not void for vagueness and the city did not otherwise violate plaintiffs' rights to due process. *Id*. The trial court entered its orders granting summary disposition on December 21 and 22, 2022. **Appx pp 789-793**.

Plaintiffs filed motions for reconsideration on January 13, 2023. **Appx pp 113**, **795,** entries of 1/13/2023. The trial court issued an Opinion and Order in each case denying those motions on May 4, 2023. **Appx pp 802-808**. Plaintiffs filed their claims of appeal to the Court of Appeals on

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May 24, 2023. During the appeal, both Gatsby and Royal Treatment obtained their state licenses from the Cannabis Regulatory Agency (CRA) and have been open for business since May 2024.[5]

In a published decision issued December 4, 2024, the Court of Appeals affirmed summary disposition in favor of the City on all grounds raised by Plaintiffs except the claim under the Open Meetings Act. **Appx pp 809-833**, *Exclusive Capital Partners v City of Royal Oak*, ___Mich App___; ___NW2d___ (2024)(Docket Nos. 366247, 366257)(slip opinion). Finding that the City violated the OMA when the city manager met with his department heads and other officials to review the retail marijuana applications, the appellate court relied on this Court's holding in *Pinebrook Warren LLC v City of Warren*, ___Mich___; ___NW3d___ (2024) (Docket Nos. 164869-164877). The Court of Appeals held that in conducting the competitive process and deciding which applicants would receive the two licenses, the city manager was a "public body" subject to the OMA because he exercised decision-making authority that belonged to the city commission. **Appx p 831**, slip op at p 23.

The City and PGSH Holdings, LLC, filed a joint motion for reconsideration on December 23, 2024, taking issue both with the Court of Appeals' holding that the city commission had improperly "delegated" its own authority to the city manager in making the licensing decisions, and the court's dismissive treatment of the provisions of the Royal Oak city charter that contradict

[5] CRA current record details for Gatsby Cannabis: https://aca-prod.accela.com/MIMM/Cap/CapDetail.aspx?Module=Adult_Use&TabName=Adult_Use&capID1=REC24&capID2=00000&capID3=015CW&agencyCode=MIMM&IsToShowInspection= accessed November 24, 2025

CRA current record details for Royal Treatment: https://aca-prod.accela.com/MIMM/Cap/CapDetail.aspx?Module=Adult_Use&TabName=Adult_Use&capID1=REC24&capID2=00000&capID3=014ZL&agencyCode=MIMM&IsToShowInspection= accessed November 24, 2025

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the Court's conclusion. The Court of Appeals denied the motion in a peremptory order on January 27, 2025. **Appx p 834.**

On January 15, 2025, Quality filed an application with this Court, for leave to appeal the Court of Appeals' ruling upholding summary disposition on the other grounds raised by the city's dispositive motions. Docket No. 168023. Exclusive filed a concurrence in the application on January 16, 2025. The city filed its own application for leave to appeal with this Court in both cases on March 10, 2025, appealing the Court of Appeals' holding that the city manager was a "public body" and therefore subject to the OMA. Docket Nos. 168243, 168244.

On October 29, 2025, the Court entered an order denying Quality's application for leave to appeal in Docket No. 168023. The Court issued a concurrent order directing the clerk to schedule oral argument on the city's application for leave to appeal in Docket Nos. 168243 and 168244 and ordering the parties to file supplemental briefs in accordance with MCR 7.312(E), addressing the question of whether the Royal Oak city manager is a "public body" under the OMA.

STANDARD OF REVIEW

This case comes to the Court upon the trial court's grant of summary disposition to the city of Royal Oak under MCR 2.116(C)(8) and (10), involving matters of statutory construction. This Court in *Pinebrook*, *supra*, aptly summarized the standards of review for both issues:

> A trial court's decision on a motion for summary disposition is reviewed de novo. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Similarly, we review questions of statutory construction de novo. See *Herald*, 463 Mich at 117; 614 NW2d 873. When interpreting a statute, the language of the statute itself must be examined. See *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). "The Legislature is presumed to have intended the meaning it has plainly expressed ...." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007) (quotation marks and citation omitted). "If the statute is unambiguous it must be enforced as written." *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004). *Pinebrook,* slip op at p 21.

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Construction of the Royal Oak city charter and ordinances are also at issue here. The rules of statutory construction apply with equal force to the interpretations of home rule charters and ordinances. *City of Detroit v Walker,* 445 Mich 682, 690-691; 520 NW2d 135 (1994); *Bonner v City of Brighton***,** 495 Mich 209, 222; 848 NW2d 380 (2014).

ARGUMENT

THE COURT SHOULD REINSTATE THE TRIAL COURT'S PROPER GRANT OF SUMMARY DISPOSITION OF PLAINTIFFS' CLAIM THAT THE CITY OF ROYAL OAK VIOLATED THE OPEN MEETINGS ACT, WHERE THE CITY'S RECREATIONAL MARIJUANA ESTABLISHMENT LICENSING ORDINANCE CONFERRED THE TASKS OF IMPLEMENTING THE APPLICATION PROCESS, RANKING THE APPLICATIONS, AND FILLING THE AVAILABLE LICENSE SLOTS UPON THE CITY MANAGER, WHO IS NOT A "PUBLIC BODY" SUBJECT TO THE OMA.

The Royal Oak city manager was not a public body for purposes of the proceedings to issue a marijuana retailers license under the RME ordinance. As an individual, he cannot be a public body. Nor did he inadvertently create a public body by consulting with his department heads and other staff before making his decision of which applicants would be awarded a license. The city manager was properly given the decision-making authority by the RME ordinance.

The city commission, which *is* a public body, performed only the limited role in the marijuana land use approval process under its separate zoning authority pursuant to Royal Oak Code, § 770-52.1, which it validly exercised under the OMA at an open meeting on April 25, 2022.

The Court of Appeals clearly confused the two separate actions by separate decision makers under separate ordinances by finding that the city manager and his department heads and employees transformed from a group of employees doing their day jobs at the city into an *ad hoc* public body because they were discussing matters related to the decisions that the manager would make on the license applications. The practical consequences of that error by the Court of Appeals are staggering, and this Court should reverse and reinstate the trial court's ruling on this issue.

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A. An individual official, like a city manager, cannot be a public body, as this Court has made clear.

The OMA provides that all decisions and deliberations of a "public body" must be held at a meeting open to the public and held in a place available to the general public. MCL 15.263(1)-(3). "The threshold issue under the OMA is whether an entity is a 'public body.'" *Herald*, *supra*. 463 Mich at 129. The OMA expressly defines "public body":

> "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 4o of the home rule city act, 1909 PA 279, MCL 117.4o. MCL 15.262(a).

This definition is "straightforward, clear and unambiguous" and "must be enforced as written." *Rowland v Washtenaw Co Rd Comm'n, supra*, 477 Mich 197, 219; 731 NW2d 41 (2007). A city manager is not a "local legislative or governing body," and is not "a board, commission, committee, subcommittee, authority, or council." Therefore, a city manager plainly does not fall within the definition of a "public body" under the OMA. MCL 15.262(a).

This Court previously ruled that, "[u]nder the OMA, 'public *body*' connotes a collective entity." *Herald*, 463 Mich at 129 (emphasis original). The Court continued:

> 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.[6]

[6] The *Herald* Court expressly noted:

> Indeed, the Legislature knows how to include individuals within the definition of "public body" when it intends to, as it did when it defined "public body" for purposes of the FOIA:

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> 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). *Thus, we conclude that an individual executive acting in his executive capacity is not a public body for the purposes of the OMA*. *Herald,* 463 Mich at 129-130 (other footnotes omitted)(emphasis added).

In *Herald*, the Bay City manager made a hiring recommendation, per the city charter, for a new chief of the city's fire department. The city manager created a committee to advise him in that task and developed a recommendation for hiring to the city council. A local newspaper challenged the process under the OMA, claiming that the city manager was a public body, that the city manager and the city commission together formed a public body to whom the OMA applied, and that the committee's meetings had been in violation of the OMA. 463 Mich at 128. The Court of Appeals agreed with the plaintiff and reversed summary disposition in the city's favor. *Id*.

> "Public body" means 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 which is created by state or local authority or which is primarily funded by or through state or local authority.
>
> (v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [MCL 15.232(d)(emphasis added).]

Given this FOIA definition of "public body" that explicitly includes individuals, we cannot conclude, as does the dissent, that the Legislature intended to include single-member entities as public bodies within the meaning of the OMA, where the Legislature referenced only multimember entities. 463 Mich at 130, n 11.

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This Court "disagree[d] with the analysis suggested by plaintiff and the Court of Appeals." *Id*., at 129. It also distinguished other cases[7] cited by the plaintiff where the courts had held that committees created by statute or by other public bodies which themselves exercised governmental authority were public bodies and subject to the OMA. *Id*., at 133-135. The Court did not waver from its holding that an individual executive official is not a public body.

The RME ordinance, Royal Oak Code, § 435-2.E, provides that, "The City Manager is granted the power *to fully and effectively* implement and administer the municipal license application process." **Appx p 6** (emphasis added). That means the whole process, as § 435-4.C of the ordinance specifically confers the decision-making authority for the selection process to determine recipients of city licenses to the city manager. **Appx p 10**. Therefore, the city manager, as an individual executive acting in his executive capacity to fulfill the duty conferred on him by the ordinance, is not a "public body" subject to the OMA. In granting summary disposition to the City at the hearing of December 14, 2022, the trial court easily recognized the precedent established in *Herald* that the OMA "is inapplicable to the facts of the case at bar … pursuant to *Herald Co v City of Bay City*[.]" **Appx pp 779, 787.**

The day after the trial court granted the City's dispositive motions, the Court of Appeals issued its decision in *Yellow Tail Ventures, LLC v City of Berkley*, 344 Mich App 689; 1 NW3d 860 (2022). There, the Berkley marijuana ordinance bestowed on its city manager the task of evaluating applications and deciding the applicants that would be selected for retailer licenses. The Court of Appeals *reversed* the trial court's finding that the city manager violated the OMA by discussing the applications with other city officials. *Id*., 344 Mich App at 703-704. The Court noted that the ordinance did not create a "Scoring Committee." *Id*., at 704. Further, "[e]ven though the City

[7] *Menominee Co Taxpayers Alliance, Inc v Menominee Co Clerk,* 139 Mich App 814; 362 NW2d 871 (1984); *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211; 507 NW2d 422 (1993).

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manager was aided by other officials and staff, there was no delegation of decision-making duties to these persons." *Id*. "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.

The Berkley process approved by the Court of Appeals in *Yellow Tail* is the very process Royal Oak used here. The Royal Oak ordinance conferred the authority of implementing its terms to the city manager. It did not create a "review committee," as Plaintiffs have characterized. Although the Royal Oak ordinance does permit the city manager "or his designee" to rank the applications, Royal Oak Code, § 435-4.C(4), **Appx p 10**, Mr. Brake unequivocally testified that he and no one else ranked the applications. **Appx p 27.**

In reversing the trial court in this case, the Court of Appeals in this matter wholly disregarded the holding in *Yellow Tail Ventures* and its application here. Indeed, the court did not mention the *Yellow Tail Ventures* case in the context of the OMA claims at all. Instead, the court relied upon this Court's decision in *Pinebrook Warren LLC v City of Warren, supra*—a case that involves a completely different process where the legislative body (the Warren City Commission) retained the ultimate decision-making authority on the license issuance but used a different *group* of people to assist it in that decision. *Pinebrook* was about how to treat that advisory *group*. This Court held that:

> [I]n order to determine whether a public body has provided its authority to a different entity, thus subjecting that second entity to the OMA, we must examine both the language of the enabling action (in this case, an ordinance) and the actions actually taken by the new entity . . . . If the second entity makes public policy decisions that would otherwise have had to have been made by the original public body according to the law, then the second entity is also a public body covered by the OMA. [*Pinebrook, supra*, ___Mich at ___; slip op at 29 (citations omitted).]

See *Exclusive Capital Partners*, **Appx p 830,** slip op at 22.

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The Royal Oak RME ordinance does not involve a second body in a process that has the commission as a final decisionmaker. Royal Oak's process makes the city manager the final decisionmaker on the licenses, while limiting the commission's involvement to special use authority under the zoning provisions that apply to marijuana establishments in § 770-52.1.

B. The city manager, an individual, was the final decisionmaker under the RME ordinance, and the city commission's role was limited to acting under a separate ordinance, the City's zoning ordinance.

The Court of Appeals clearly did not appreciate that there were two ordinance processes in play here, the RME license review, ranking, and approval by the city manager, and zoning ordinance land use approvals by the city commission:

> On paper, the marijuana ordinance did not grant the city manager authority to make the final decision on awarding retail licenses. Rather, the ordinance indicated that the "City shall decide among Applications" which were best suited to operate in compliance with the MRTMA, see Royal Oak Ordinances, § 435-4(C)(2) (emphasis added). The city manager was only empowered to "implement and administer" the application process *and directed to rank the applicants* by applying the 10 competitive criteria, see Royal Oak Ordinances, § 435-2(E) and § 435-4(C)(4)(a)-(j). The successful applicants do not automatically receive a license after this process. Instead, an applicant obtains the license only after the City Commission approves the applicant's special-land-use permit and site plan, and, if other requirements are met, the City Clerk issues the license. See Royal Oak Ordinances, § 435-4(D)(4) and (7). That is according to the ordinance.
>
> In practice, however, the city manager's role was not limited to administering the applications process and scoring the applicants: whichever applicants made it through the city manager's process received licenses. The City received 31 applications for two retail licenses. To rank the applicants, the city manager formed a workgroup composed of several city officers. They met in four closed-door sessions to help the city manager assess the applicants. Ultimately, as a result of these meetings, the city manager ranked the applications in three categories, including a recommendation that the top two applicants be awarded a license.
>
> While the ordinance tasked the "City" with deciding which applicants would be best suited to operate within the City, and also with approving the applicants' special-land-use and site permits as a predicate to issuing licenses, see Royal Oak Ordinances, § 435-4(C)(2) and (D)(4)(f), *the City Commission adopted the city manager's recommendation without apparent deliberation*. The minutes of the City Commission meeting with respect the special-land-use permit and site plan of the two highest-ranked applicants as recommended by the city manager do not reflect

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> any discussion of other applicants. 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. **Appx pp 831**, slip op at p 23 (emphasis added).

It is clear from this portion of the opinion that the court flatly misconstrued the RME ordinance. The court incorrectly read the ordinance to say that the city manager was only to make a "recommendation" to the city commission of which applicants should receive the two licenses, and then the city commission would make a final decision whether the municipal license holders would receive a license. This conclusion is unequivocally incorrect.

The RME ordinance clearly states that the applications would be *ranked* by the city manager and those rankings would be used to *fill* the available municipal license slots—two slots for retailer licenses—until all slots are exhausted. Royal Oak Code, § 435-4.C(4), **Appx p 10.** Those license slot holders—*and only those license slot holders*—must then apply for site plan and special land use review to the planning commission, and then the city commission, under the zoning ordinance. The zoning ordinance is an entirely separate ordinance adopted by the city under the Michigan Zoning Enabling Act, MCL 125.3101, *et seq*.; the RME ordinance is adopted under MRTMA. Under the RME ordinance, the city manager-assigned license slot is conditional upon the license slot holder receiving zoning approval under the separate process. Only after the applicant gets that separate approval does it obtain its license from the city clerk. Royal Oak Code, § 435-4.D(4)(f), **Appx p 11**. So, the city manager did not make a "recommendation" of which applicants would receive licenses; he ranked the applications and *filled* the municipal license slots with the two highest ranked applications—he rendered that actual decision; he did not just recommend it. Once those two license slots were filled, the applicants took the next steps of applying for site plan and special land use review and approval by the city commission.

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In February 2022, the Royal Oak planning commission met in an open meeting and conducted a public hearing, then voted to make its recommendations to the city commission on the applications for site plan and special land use review submitted by Gatsby Cannabis and Royal Treatment, the holders of the two "municipal license slots" for marijuana retailers. Then, the city commission received the planning commission's recommendations *only as to the applications for zoning ordinance required site plan and special land use review—i.e., not the license awarded under the RME*. The city commission met in an open meeting and heard those land use applications for final decisions in April 2022.

Neither the planning commission nor the city commission received or discussed the applications of *any* applicants for marijuana establishment licenses under the RME, including Gatsby and Royal Treatment; the ordinance did not provide for *any* role of the city commission in the selection of RME licensees. This is the city commission did not "deliberate" about the city manager's licensing decision at its meeting—that decision was complete; the city commission's decision was a *different one*.

C. Making the city manager the final decision-maker and not a recommending agent was perfectly permissible, and the Court of Appeals' apparent understanding that the city commission had to make the decision is unsupported by the law.

How did the Court of Appeals "miss" that distinction in the process? Apparently, it misconstrued the MRTMA to *require* the city commission to be the final decisionmaker on the license applications, as opposed to the separate land use issues. But MRTMA contains no such requirement.

i. No law requires the city commission to be the decisionmaker.

Nothing in MRTMA's Section 9 requires the city commission to retain the final decision-making authority of marijuana license applications for itself:

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> If a municipality limits the number of marihuana establishments that may be licensed in the municipality pursuant to section 6 of this act and that limit prevents the department from issuing a state license to all applicants who meet the requirements of subsection 3 of this section, the municipality shall decide among competing applications by a competitive process intended to select applicants who are best suited to operate in compliance with this act within the municipality. MCL 333.27959.4.

Nothing in Section 6 requires it, either:

> 2. A municipality may adopt other ordinances that are not unreasonably impracticable and do not conflict with this act or with any rule promulgated pursuant to this act and that:
>
> (a) establish reasonable restrictions on public signs related to marihuana establishments;
>
> (b) regulate the time, place, and manner of operation of marihuana establishments and of the production, manufacture, sale, or display of marihuana accessories;
>
> (c) authorize the sale of marihuana for consumption in designated areas that are not accessible to persons under 21 years of age, or at special events in limited areas and for a limited time; and
>
> (d) designate a violation of the ordinance and provide for a penalty for that violation by a marihuana establishment, provided that such violation is a civil infraction and such penalty is a civil fine of not more than $500. MCL 333.27956.

The city acknowledges that *if* the state legislature had required the city commission to be the decisionmaker, that would be a different issue:

> 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 Municipal Corporations (3d ed), § 10:32, "Method of execution of powers." (Footnotes 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*.

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Here, the MRTMA empowers "municipalities" to decide whether they want marijuana businesses in their communities to grow, process, and sell marijuana, but does not specify what the terms 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, supra*; see also, 1963 Const, art 7, §§ 22[8] and 34[9].

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 establishments without an ordinance. But in furtherance of the principle described in McQuillin's treatise above, when the city's ordinance adopted pursuant to the authority of 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." Therefore, the Court of Appeals' conclusion that the city commission improperly "delegated" authority that belonged to the commission and only the commission is simply incorrect.

A review of the specific powers granted by the Royal Oak charter, adopted under the Home Rule City Act (HRCA), MCL 117.1, *et seq*., demonstrates why the Court of Appeals' conclusion in this respect is mistaken. The Royal Oak charter created the municipal corporation known as the

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[8] "Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section."

[9] "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor."

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City of Royal Oak, and defined its geographical boundaries. **Appx p 836**, Royal Oak Charter, Ch 1, §§ 1 and 2. It likewise sets forth the General Powers of "*the City*" in Charter, Ch 2, § 1, and that *the City*

> [m]ay exercise all powers which now or hereafter it would be competent for this Charter to enumerate as fully and completely as though said powers were specifically enumerated herein; and no enumeration of particular powers by this Charter shall be held as exclusive or in any wise a limitation on said City to legislate on other subjects; *and all such powers, whether expressed or implied, shall be exercised and enforced in the manner as shall be provided by ordinance, resolution, or the general laws of the State*. **Appx p 838**, p C:4 (emphasis added).

According to this section of the charter, then, all powers of *the City* are to be exercised in a manner provided by ordinance, resolution, or state law. *Id*.

Following the enumeration of the city's general powers, the Charter specifies that the city government is a "Commission-Manager" form of government and creates the commission consisting of a mayor and six commissioners. **Appx p 839**, Ch 3, § 1. The commission is the "legislative and governing body of the City possessing all the powers herein provided for, with power and authority *to pass such ordinances and adopt such resolutions* as they shall deem proper *in order to exercise any or all of these powers possessed by said City*." **Appx p 839**, Ch 3, § 2 (emphasis added). In other words, the city commission possesses its own powers as provided in the charter, and it may pass ordinances and resolutions to determine *how* the city's powers are otherwise to be exercised. Unless otherwise specified in the charter, as expressed above, *the City's powers are not self-executing*. The City can exercise its powers only "*as provided by ordinance, resolution or the general laws of the state.*" **Appx p 838**, Ch 2, § 1 (emphasis added). There is no presumption in the charter that all municipal powers are exercised by the city commission.[10] In

[10] For example, Royal Oak Charter, Ch 2, § 1 delineating the city's general powers expressly provides that the city, "may do any and all things needful, necessary, or proper to furnish, supply, control, and regulate water supply, sewage, sewage disposal, sanitation, and sanitary control within or without the boundaries of said City, *upon such terms and conditions as the Commission shall*

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furtherance of this principle, Charter Ch 14, § 14 provides, "The said (City) Commission may *by resolution or ordinance prescribe the method to more effectively carry out the foregoing provisions*." **Appx p 877** (emphasis added).

The power to license in the charter Ch 2, § 1 is granted to *the City*, which is defined in the HRCA as a body corporate. MCL 117.1 ("Each organized city shall be a body corporate.") The City Commission is "a body vested with legislative power," for whose creation and powers a charter must provide. MCL 117.3(a). The "body corporate" and the "body vested with legislative power" *are not synonymous*, as they are separately created and defined in the HRCA. The charter is the city's authority to act under the HRCA. "The charter of a city stands as its 'constitution.'" *Bivens v Grand Rapids*, 443 Mich 391, 400-401; 505 NW2d 239 (1993). The HRCA *requires the charter to provide for the adoption of ordinances to carry out the powers established under the HRCA* and the charter. MCL 117.3(k). ("Each city charter shall provide for … [a]dopting, continuing, amending, and repealing the city ordinances and for the publication of each ordinance before it becomes operative.") The power to adopt ordinances is contained in the Royal Oak Charter at Ch 3, § 2 and Ch 14, § 14. **Appx pp 839, 877**.

The power specifically to adopt a recreational marijuana establishment licensing ordinance, however, comes from the MRTMA, MCL 333.27956. The Court of Appeals misconstrued the city's argument in this respect when it stated, "We understand our Supreme Court's decision in *Pinebrook II* as implicitly rejecting the City's argument that the city commission did not delegate authority to the city manager because the MRTMA provided the city manager with an independent source of executive authority." **Appx p 823**, slip op, p 23. **However, the city did not argue that**

decide." (Emphasis added.) This is the only mention of the commission in that section. Further, Ch 2, § 2 provides that the city has certain powers related to railroad crossings, and that "the City Commission shall have authority under this section…[.]" Again, this is a specific power conferred to the commission by the charter itself.

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MRTMA was the source of the city manager's executive authority here. The MRTMA, coupled with the HRCA and the city charter, provided the authority *to adopt an ordinance* to permit possession, use, and sale (with a license) of marijuana. The city manager's authority comes from that ordinance—the RME ordinance—which *created* the power to license recreational marijuana establishments in Royal Oak, and to receive, review, and rank applications to fill the municipal license slots. The city commission never had the power to license marijuana establishments because from the outset the RME ordinance conferred that authority on the city manager. Therefore, the commission could not and did not "delegate" power it never had.

Like the powers created by the city charter, the MRTMA is not self-executing. To exercise any of the licensing powers under the MRTMA, a municipality must opt in by its legislative body's adoption of an ordinance. MCL 333.27956. In adopting an ordinance, *the city commission does not inherently possess the power to conduct the competitive process and issue RME retailer licenses*. To be sure, consistent with the authority to adopt ordinances to set the methods for carrying out the provisions of the charter, the commission **could have** given itself that power. *But it did not do so.* The city commission's initial authority under MRTMA is to adopt an ordinance. The ordinance, then, creates and grants the authority to license and to conduct the application process that results in the award of licenses.

ii. The RME ordinance clearly gave the decision of which applicants receive a license slot to the city manager, and not the city commission.

Applying the clear and straightforward language of the Royal Oak charter, the MRTMA, and the City's RME ordinance leads to the conclusion that the authority to review, evaluate and rank the RME license applicants and to assign license slots did not, as the Court of Appeals found, "[rest] with the City Commission, 'the public body.'" The ordinance expressly created and gave

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that authority directly to the city manager. Royal Oak Code, § 435-4.C(2) and (4).[11] In doing so it did not reserve any power in the city commission to overrule the city manager's rankings of applicants or assignment of those license slots to the successful applicants.

This system is entirely consistent with a Commission-Manager form of government. The city manager is the chief administrative officer of the City, Royal Oak Charter, Ch 3, § 16 (**Appx p 841**), and is the head of the city administration. Reviewing, evaluating, and ranking RME applications and assigning municipal license slots is inherently an administrative task, not a legislative one. It is the type of function that city managers do every day.

It thus makes perfect sense to leave the administrative tasks to the city manager. It would be quite a task for the seven-member city commission (six commissioners plus the mayor) to review in a public meeting the hundreds of pages of each of the 31 RME retailer applications, especially since the contents of the applications are not even public documents under the law. The MRTMA and the RME ordinance both make the contents of marijuana establishment license applications exempt from disclosure under the Michigan Freedom of Information Act. MCL 333.27959.7 ("Information obtained from an applicant related to licensure under this act is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246."); Royal Oak Code, § 435-4.A("Information obtained from the applicant is exempt from public disclosure under state law.") **Appx p 7**. It would be anomalous to require any city decisionmaker

[11] The Court of Appeals was apparently side-tracked by language in the ordinance that "*the City* shall decide among applications by a competitive process intended to select the applicant(s) who are best suited to operate in compliance with the [MRTMA] within the City." The Court of Appeals read that as distinguishing "the City" from "the city manager," concluding that use of the term "the City" means that the city commission shall decide among the applications who is best suited. But the ordinance merely lifted that language directly from MRTMA, MCL 333.27959.4 ("[T]he municipality shall decide among competing applications by a competitive process intended to select applicants who are best suited to operate in compliance with this act within the municipality"), replacing "municipality" with "the City."

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to discuss the applications in public when the information contained in the applications are exempt from public disclosure in the first place.

iii. The city commission (and planning commission) acted under the zoning ordinance.

The Court of Appeals clearly misunderstood that the city commission's role in the process was a limited role under the zoning ordinance, rather than the RME ordinance. *That* misunderstanding then colored the court's perception of the rest of the process and misled it to the erroneous conclusion that the licensing decision belonged to the commission. Once the city manager had filled the license slots, the planning commission and city commission only evaluated the license slot holders' site plans and special land use applications for conformity with the zoning ordinance, specifically, § 770-52.1. This is not novel or unusual for a new type of land use requiring a special land use permit.

The Court's statement that, "[T]he City Commission adopted the city manager's recommendation without apparent deliberation," is a wholly inaccurate statement of the proceedings. The city manager did not "recommend" the applicants to the city commission; he ranked the applicants and filled the two municipal license slots according to those rankings. The municipal license slot holders then obtained site plan and special use approval from the city commission under the zoning ordinance. The city commission did not "accept" or "reject" the city manager's decision of who was eligible to complete the process and obtain a license. By ordinance, that decision was up to the city manager and had already been made by the time the planning commission and city commission were called upon to exercise their authority under the *zoning* ordinance. Again, the RME ordinance creates no role for the city commission to rank or to decide which applicants receive a license based on their applications—that was done by the city manager.

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The commission reviewed and decided only applications for site plan and special land use approvals, not the retailer licensing applications.

Because the RME ordinance did not assign the licensing task to the city commission, this case is distinguishable from *Booth v Univ of Michigan Bd of Regents,* 444 Mich 211; 507 NW2d 422 (1993), where the U of M Board of Regents intentionally delegated its authority to a single regent to avoid the OMA. Nor is this case like *Pinebrook*, where the Warren city ordinance gave the authority to a review committee to make a recommendation to the city council, who had the final say in awarding licenses, but relied on the committee's actions entirely.

By focusing on *Pinebrook*, the Court of Appeals ended up disregarding this Court's decision in *Herald, supra*, on which the trial court correctly relied in finding that the Royal Oak city manager, a single municipal official, was not a "public body" for purposes of the OMA. The Court in *Pinebrook* expressly distinguished the facts in *Herald* because the city manager there (in *Herald*) exercised *his own* authority and did *not* exercise the authority of another public body:

> In other words, *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. *Pinebrook*, ___Mich___, slip op at p 26.

It is significant that *Herald* was decided after *Booth* and against that backdrop, which the Court recognized in the passage quoted above. The distinction made by this Court in *Pinebrook* applies equally here. The Royal Oak city manager exercised his own authority, not the city commission's authority delegated to him. This case is *Herald*, not *Booth* or *Pinebrook*.

The opinion of the court below also directly conflicts with its own decision in *Yellow Tail*, where it correctly construed the OMA as applying to a collective entity, a public body, and not to

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a city manager exercising his authority under a marijuana licensing ordinance, even when he meets with other administrative employees. Unlike individual members of a city legislative body, a municipal officer such as a city manager is empowered to bind a city. *Rasch v City of East Jordan*, 141 Mich App 336, 345; 367 NW2d 856 (1985). At the outset of its OMA analysis, the Court of Appeals merely announced its presumption, "Here, authority rested with the City Commission, 'the public body.'" **Appx p 829,** slip op, p 21. But the court never conducted any analysis or stated why it reached that conclusion, which is plainly incorrect as explained above.

D. The city manager consulting with his department heads and other staff members and administration—all people that work under his direction and supervision—did not transform the group into an *ad hoc* public body. The manager was the sole decision maker, and his employees gave him information he needed to make his decision. The practical consequences of leaving that discussion by the Court of Appeals in place are monumental; it would turn local government decision-making upside down.

It bears emphasizing that while the Court of Appeals missed on the OMA question, it found that the process of having the city manager conduct the review under the RME ordinance using the factors in the ordinance to rank applications and award licenses was not a violation of due process rights, and was otherwise valid and permissible. **Appx pp 820, 829**, slip op pp 12, 21. The OMA issue, then, turns entirely on whether the city manager himself was a public body, or whether, by combining with a group of his employees to discuss matters related to licenses, they together constituted a public body.

As set forth above, the city manager cannot be a body. It therefore appears that the Court of Appeals believed that the city manager's discussions with his employees triggered an OMA violation. This is impossible when the manager himself, not the city commission, is the decisionmaker. That conclusion is also impossible to square with how local government operates, how a city works under a council-manager form of government, and how the wide array of ordinances in any city are administered and executed.

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If, as the Court of Appeals held, "the City" in Royal Oak's ordinance necessarily means "the city commission," then this holding can be construed to mean that "the city" as used in the charter, an ordinance, or resolution in any context also means "the city commission." Then whenever any city official exercises powers or authority under an ordinance, they become a "public body" because the city commission, as the Court held, delegated its own authority to that official. This holding and construction contradict the interplay of the HRCA, the Royal Oak Charter, and city ordinances, and the realities of Royal Oak's system of government.

There is a fundamental reason why this Court decided the *Herald* case as it did. The idea that a gathering by the city manager of his/her department heads to help make a decision that is the manager's alone is somehow a potential OMA violation is simply not based in fact or reality. Such a result would create a hornet's nest not only for Royal Oak, but for municipal governments statewide. The Court of Appeals seemed to believe that OMA compliance for a city manager in the specific instance of discussing marijuana licensing applications simply means holding an open meeting with his staff and conducting their discussions in public. But exercising powers under municipal ordinances, marijuana-related or not, is the essence of daily municipal government. A city manager, department heads and administrative staff are charged with implementing the governing body's policies. They don't "meet" in a duly noticed public meeting to perform that day-to-day work, and they cannot. It is literally not possible to make these constant, day-in-day-out meetings comply with the OMA. Because if an official is a "public body" for *any* purpose under the OMA, then arguably that official is a public body for *every* purpose under the OMA.

The implication of the Court of Appeals decision that the manager's work group could simply comply with the "open meeting" part of the OMA is just untenable. Although deliberations and decision-making are the principal concerns of the OMA, the statute imposes numerous other requirements besides holding meetings in public. Applying the OMA to everyday operations in

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Royal Oak would mean that the city manager must post a public notice of a staff meeting. MCL 15.264. He would have to conduct the meeting in a location available to the public. MCL 15.263(1).

But there's even more. The OMA requires that each meeting set aside time for members of the public to comment under rules established by the "public body," MCL 15.263(5), and comments are not limited to the subject(s) of the meeting's agenda. The Act also requires that minutes be taken at every meeting, that the draft minutes of a meeting be made available to the public within eight business days, and that the minutes be approved at the next meeting of the public body. MCL 15.269(1) and (3).

But what if there is not another meeting between the city manager and his staff for the same specific purpose as the prior meeting? Then do they have to call a special meeting—and comply with the OMA requirements for doing so—to approve the minutes of the last meeting?

And if the city manager is a public body for *any* purpose when acting pursuant to an ordinance, presumably, then, when seeking legal advice from the city attorney, he cannot discuss a legal question ("deliberate") with the attorney unless he calls a public meeting. Must he request a written legal opinion of the city attorney, then notice and hold an open meeting in a place available to the general public, and then move (and vote) to enter a closed session under MCL 15.267 in order to discuss the written legal opinion with the city attorney under MCL 15.268(1)(h)? See *Mr Sunshine v Delta College Bd of Trustees*, 343 Mich App 597; 997 NW2d 755 (2022). There is far more to OMA compliance than just holding a public meeting, which it is not clear the Court of Appeals considered.

Perhaps for a medical marijuana review committee created by ordinance, as the city of Warren did in *Pinebrook*, OMA compliance would not be too onerous a task, for that review committee had one purpose and one purpose only: to review medical marijuana facility license

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applications and make a recommendation to the city council. To require that committee, whose sole task is to review those applications, to comply with the OMA is probably not overly burdensome—especially if the legislative body retained cases like full, final decision-making authority as in *Pinebrook* (or *Booth*).

But in reality, the functions and duties assigned by the charter and the city ordinances to the Royal Oak city manager, and to other departmental personnel who exercise responsibilities and authority under ordinances, comprise far more than the discrete task of reviewing marijuana applications. Under the Court of Appeals' ruling, the city manager would presumably have to observe OMA requirements *any* time he exercised his authority under the charter or an ordinance because, according to that court, he would be exercising the commission's power delegated to him. Theoretically, under this Court of Appeals' ruling, then, the city manager would be prohibited from something as simple as asking another staff member a question about the subject of the ordinance-conferred task without observing the requirements of the OMA, because as a "public body," he would be a quorum of the public body and prohibited from "deliberating" toward a decision outside a properly noticed, public meeting. MCL 15.263(3).

If allowed to stand, the Court of Appeals decision, read literally, could change the nature of administrative functions in municipal government and create unimaginable burdens never before imposed on municipal officers who are not elected officials and whose daily functions are not covered by the OMA. The Court of Appeals decision would impose requirements and limitations on executive and administrative officials of local government so onerous that their functions will grind to a virtual halt. OMA compliance has *never* previously been required of individual executive and administrative officials for good reason: *they are not defined in the OMA as public bodies*.

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Indeed, the Court of Appeals holding would apply to *any* administrative official—city clerk, director of public works, treasurer, finance director, police chief, fire chief, planning official, etc.—exercising authority under city ordinance. Every appointed municipal official then will become a public body if they exercise authority under a local ordinance, because the legislative body will be deemed to have "delegated" its own authority to that staff person. That cannot be what the Legislature intended by specifically defining public body as a collective entity of more than one person.

The change invented by the Court of Appeals runs afoul of its role in statutory interpretation. The Court did not apply the plain, unambiguous statutory language of the OMA. Rather, it expanded the definition of what a public body is under MCL 15.262(a), by applying it to an individual executive official. Changing or expanding a statutorily defined term is the province of the Legislature, not the courts. It was up to the court to apply the statutory definition as written. *Rowland*, 477 Mich at 219.

If the Court of Appeals decision stands and its logic is applied beyond the context of MRTMA, requiring compliance with OMA will add new layers and processes that will paralyze municipal governments and give new meaning to bureaucratic red tape. The decision thus reflects a fundamental and dangerous lack of understanding of both the way cities function and the additional, overwhelming burdens that the decision will foist on them.

From a practical perspective, compliance with this ruling will result in longer times for city governments to accomplish simple administrative functions, delayed services, interruption of administrative officials' other functions, greater responsibilities on administrative staff, some of which might require the hiring of additional staff or a choice between hiring more staff and reducing municipal services, and undoubtedly numerous other consequences not listed here. It is

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not a stretch to foresee that municipal administrative employees would constantly be in doubt whether they have to call a public meeting just to carry out their day-to-day responsibilities.

Ultimately, this decision could detrimentally affect efficiency and add to the already high cost of administering local government. Municipal budgets do not presently account for the costs that this type of compliance would impose. Then the taxpayers will wonder why if cities seek to raise taxes and fees or other forms of revenue to cover the additional administrative expenses caused by instituting processes that the judiciary—*not the legislature*—has imposed on them. Not to mention, this sweeping interpretation of the OMA will undoubtedly subject municipal governments to a slew of new lawsuits under the OMA, causing them to spend precious time and financial resources defending litigation rather than serving the public.

CONCLUSION

The trial court properly applied the definition of a "public body" and the *Herald* holding to this case in granting summary disposition of the claim under the Open Meetings Act. The Court of Appeals clearly erred when it reversed that ruling and applied the term to an individual city manager exercising his authority under the city's ordinance adopted pursuant to the MRTMA. This Court must correct that error and restore the appropriate scope of OMA compliance to public bodies and not individuals who are not within the statutory definition of that term.

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RELIEF REQUESTED

WHEREFORE, Defendant-Appellant, City of Royal Oak, respectfully requests that this Honorable Court REVERSE the holding of the Court of Appeals that the City of Royal Oak violated the Open Meetings Act in this case, and reinstate the trial court's order granting summary disposition to the City of Royal Oak.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that I prepared the foregoing Supplemental Brief on Oral Argument in Times New Roman 12-point proportional font using Microsoft Word word-processing software, The content of the application consists of 11,963 countable words, as counted by Microsoft Word.

/s/ *Anne McClorey McLaughlin*