STATE OF MICHIGAN
IN THE SUPREME COURT

HAPPY TRAILS GROUP, INC.; BLUE SPRUCE VENTURES, LLC; AUBREY VENTURES LLC; PURE ROOTS, LLC; PINEBROOK WARREN LLC; ALTERNATIVE RX, LLC; HCM WARREN, LLC; JAR CAPITAL OF WARREN, LLC; PURE GREEN WARREN, LLC; PURE WARREN, LLC; KAPP WALLED LAKE, LLC; MPM-R WARREN, LLC, DKB2, LLC,

Plaintiffs-Appellants,

and

EMERALD BUSINESS PARK PC, LLC; HRS RETAIL, LLC,

Plaintiffs,

v.

CITY OF WARREN; CECIL ST. PIERRE; RONALD PAPANDREA; STEVEN WARNER; RICHARD SABAUGH; ETHAN VINSON; CITY OF WARREN MEDICAL MARIHUANA REVIEW COMMITTEE,

Defendants-Appellees,

and

LE BATTLE CREEK INC.; WEISBERGER VENTURES II, LLC; VENDCO MICHIGAN, INC.; 989 VENTURES LLC; AE&K, LLC; BDECO I, INC.; BDECO II, LLC; DNVK 4, LLC; LEVEL UP GARDEN LLC; LIVWELL MICHIGAN, LLC; MDMS GROUP LLC; SOZO HEALTH, INC.; WARREN CAPITAL HOLDINGS, LLC; 8TH STREET WELLNESS PC, LLC; FRAZHO PROVISIONING, LLC; WEST FORT HOLDINGS, LLC,

Defendant Intervenors-Appellees.

Supreme Court Case No. 164869

Court of Appeals Case No. 359285

(Consolidated with Docket Nos. 355989, 355994, 355995, 356005, 356011, 356017, 356023, 359269)

Macomb Co. Cir. Ct. Case No. 2019-004059-CZ

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF PURSUANT TO COURT'S NOVEMBER 22, 2023 ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Pursuant to the Court's Order of November 22, 2023, this Supplemental Brief is limited to the following question:

1. Was the City of Warren's Medical Marihuana Review Committee a "public body" as defined by MCL 15.262(a), subject to the Open Meetings Act, MCL 15.261 *et seq*?

Appellants answer: "Yes"
Appellee City of Warren would answer: "No"
Appellee/Intervenors would answer: "No"
The Circuit Court answered: "Yes"
The Court of Appeals answered "No"
This Court should answer: "Yes."

INTRODUCTION

Appellants seek leave to appeal the August 25, 2022 two-to-one published opinion of the Michigan Court of Appeals, which reversed the finding of the Macomb County Circuit Court that the City of Warren's Medical Marihuana Review Committee was a public body subject to the Open Meetings Act ("OMA"), and that its meetings violated the OMA. By Order dated November 22, 2023 (the "Order"), the Court directed the clerk to schedule oral argument on Appellants' Application, and directed the parties to file supplemental briefs addressing whether the City of Warren's Medical Marihuana Review Committee was a "public body" as defined by MCL 15.262(a), subject to the OMA, MCL 15.261 *et seq.*

To recap, the Warren City Council created a Review Committee ("Committee") by ordinance ("Ordinance") to review applications for and evaluate potential businesses to be awarded marihuana licenses. The City Council appointed a sub-quorum of its own members to be the majority in control of the Committee (three of the five-member Committee members were members of City Council, and therefore were elected public officials). Then the Committee held at least 16 private meetings at which no minutes were taken; passed around lists of favored candidates; and issued scores used to award licenses without any public explanation or rationale for the scoring. Less than 24 hours later, the full City Council voted to adopt those scores with no deliberations or decision-making on the record; without hearing any public comment; and without undertaking the independent ranking required by the City's Ordinance or applying the additional criteria mandated by the Ordinance.

Applicants who did not receive licenses filed suit. Those applicants who were approved for licenses ("Intervenors") were allowed to intervene in the Circuit Court action. The trial court found that: 1) the Committee was subject to the OMA, and violated the OMA by meeting, deliberating, and choosing the list of candidates to be awarded licenses in secret meetings; and 2)

the Warren City Council also violated the OMA by rubber-stamping the decision of the Committee awarding licenses to the candidates selected by the Committee based on the scores that were tabulated in the Committee's closed-door meetings without public discussion. The trial court noted, among other things:

> Of significance to this court's decision is the wide discretion that was vested in the members of the review committee. Although the ordinance sets forth the duty of scoring the applicants as if it were a ministerial or mathematical function, the review committee members had de facto authority under the ordinance to subjectively rank applicants as each member saw fit, with no criteria whatsoever to limit their individual subjective preferences.
>
> ***
>
> For example, subsection "a" asks the members to rank applicants from 0 to 10 on "The integrity, moral character, personal business probity, financial ability and experience and responsibility or meant to operate or maintain a marihuana facility of the applicant." The ranking may be expressed as a number, but it is clear that this number is not based on hard data. It is simply a numerical way to express a totally subjective judgment.
>
> ***
>
> Subjectivity and the exercise of discretion and judgment are, of course, part of the political process. This court is not saying that discretionary subjective assessments are not allowed in making political decisions. Rather, this court is saying that this review committee was not engaged in a ministerial, non-political, fact-finding mission in which it was merely compiling data and presenting that data to city council. The review committee was exercising a critical governmental function in narrowing down the applicants to those it believed were the most worthy. Because that was the governmental function given them by the ordinance, the public had a right to be there and see the process as it happened.

Ex. C to Application, at pp. 3-5. As a result, the trial court invalidated the licenses awarded by City Council. The City and Intervenors appealed.

The Court of Appeals, in a 2-1 published opinion, reversed, with the majority (Judge Redford and Sawyer) finding that the Committee was not subject to the OMA. It held that the

trial court abused its discretion and ignored this Court's prior decisions which require a reviewing court to examine the function *actually performed* by the governmental body to determine if the actions taken are subject to the OMA, rather than simply evaluating the label attached to the Committee. The majority ignored the trial court's comprehensive review of the unfettered subjective decisions made by the City Council members on the Committee under the Ordinance.

The Court of Appeals' dissent (Judge Shapiro), found that the OMA did apply, noting that the Ordinance provides that the applications "shall be transmitted to the Review Committee *for approval*." Ex. B to Application, Dissent, at p. 15 (emphasis in original). The majority, focusing only on the word "recommendation" also used elsewhere in the Ordinance, disregarded this language while also ignoring what functions the Committee actually performed.[1]

The majority's position would significantly undermine the core protections embedded in the OMA. The majority erred in holding that the Committee was not a public body. If left undisturbed, this ruling will allow governmental bodies, clearly subject to the OMA, to create committees or subcommittees that can escape the requirements of the OMA, by simply declaring that the committee engaged in no decision-making. Neither the actions of the committee, nor the public body's reaction to those actions, will matter. A road map has been provided for public bodies to evade the OMA by having the decision-makers deliberate in secret and make a decision, and then the public body can simply rubber-stamp that decision. As the trial court observed in this case, a process that began in the dark, ended in the dark. Yet, engrained in this State's basic principles are the requirements that governmental bodies and their decision-making

[1] This Court need not accept the Court of Appeal's interpretation of the Ordinance, as it reviews *de novo* matters of statutory construction, including the interpretation of ordinances. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

processes be open and accessible to the public, and to allow public participation in such meetings. The OMA says just this – that the purpose and intent of OMA is to ensure transparency in governmental functions by governmental bodies and officials, and to promote and ensure public participation in the process. But the opposite of that is what happened here.

For the reasons given herein and in Appellants' Application, this Court should grant leave to appeal, reverse the Court of Appeals, and reinstate the Circuit Court Opinion.

ARGUMENT

I. THE COMMITTEE WAS SUBJECT TO THE OPEN MEETINGS ACT.

A. The Committee Was A Public Body.

As a starting point, the Court has declared the OMA was designed "to promote a new era in governmental accountability" and in order to achieve the OMA's important public purpose, the OMA must be interpreted broadly, while construing its exemptions strictly. *Booth Newspapers v University of Mich Bd of Regents*, 444 Mich 211, 222-223; 507 NW2d 422 (1993). In this case, the Court of Appeals took the opposite approach.

The OMA defines a public body broadly, and that definition includes the terms "committee" and "subcommittee":

As used in this act:

> (a) "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). A "committee" is generally defined as "[a] subordinate group to which a deliberative assembly or other organization refers business for consideration, investigation, oversight, or action." Black's Law Dictionary 290 (11th ed 2019). A "subcommittee" is generally defined as "[a] group within a committee to which the committee may refer business, standing in the same relation to its parent committee as the committee stands to the deliberative assembly." *Id.* In *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 610-611; 821 NW2d 896 (2012), the Court of Appeals also recognized that "an advisory committee of a public body that is created by the public body may itself constitute a derivative public body." 269 Mich App at 610-611.

Courts must consider two factors to determine if a committee or subcommittee is a public body and thus subject to the OMA. The first is whether the committee or subcommittee was a legislative or governing body. MCL 15.262(a); *see also Davis, supra*. The second is whether the entity was "empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or propriety authority or perform a governmental or proprietary function." *Id.* at 591, citing MCL 15.262(a). When these factors are applied here, it is clear that the Committee was subject to the OMA.

1. The Committee Was A Governing Body.

As noted in the majority opinion:

> A legislative body is a body that makes or enacts laws or otherwise brings something into or out of existence through the enactment of laws. A governing body is a body that makes or administers public policy, or otherwise regulates or controls a political subdivision.

(Ex A to Application, at p. 18, citing *Davis*.) As further explained in *Davis*, in order to be subject to the OMA, the body—regardless of what it is named—is not required to be the "supreme governing body" of the political subdivision, but must make or administer public

policy, or make decisions for that political subdivision. *Davis*, 296 Mich App at 597. And, as stated above, the OMA definition of a public body includes a "committee" or "subcommittee." MCL 15.262(a).

The facts in this case are similar to those in *Booth, supra*. In *Booth,* the University of Michigan sought to hire a new president. The Board of Regents appointed itself as a presidential selection committee. *Id.* at 215-16. The selection committee worked through advisory committees and sub-quorum meetings of groups of Regents, avoiding meetings of a quorum of the Board, as that would clearly require a public meeting under the OMA. *Id.* The selection committee compiled a list of 250 names, conducted meetings and telephone calls, and groups of Regents conducted private interviews, and then held closed meetings to discuss the candidates. The Regents employed several phases of "cuts" by narrowing the lists, rating the candidates and tallying the scores. *Id*. at 216-17. The Regents maintained that no voting took place at these closed committee meetings. Eventually, the selection committee narrowed the list of candidates to one, who it recommended based on information gathered during private meetings. The Regents only met as a full committee during the fourth and final phase, justifying the need for closed session because of candidates' request for confidentiality. *Id*. at 218. The full Board of Regents later met in a formal public session and voted to elect that one recommended candidate as the University president. *Id*. at 218-20.

An OMA challenge was made. The University argued that the decisions and recommendations of the selection committee did not constitute formal decisions, because they "merely reached a consensus regarding the action that they would take on the candidates that they preferred." *Id*. at 227. It also argued that the selection committee was not subject to the OMA because it did not take action by a "vote" as required under the OMA's definition of

"decision," and because no "formal" voting by the selection committee or its sub-quorum groups occurred. *Id*. at 227-228. This Court disagreed, holding that OMA "does not contain a voting requirement' or any form of 'formal voting requirement.' Consequently, arguments that the Presidential Selection Committee's actions were a consensus building process, rather than a mere vote or 'formal' vote, are irrelevant." *Id*. at 229.

This Court concluded that the decisions made by the selection committee through the processes described above, "achieved the same effect as if the entire board had met publicly, received candidate ballots, and 'formally' cast their votes." *Id*. The Court further noted that "[t]he only part of the decision-making process that occurred in public was the final step: Dr. Duderstadt's selection from a list of one," and the only part of the decision-making process that occurred in public was the vote, but that decision was really a "fait accompli." *Id*. at 229. The Court went on to state that, "[t]his Court's failure to recognize this fact would undermine the legislated intent to promote responsible and open government."[2] *Id.* With regard to the interviews conducted in private, the Court held that "there is no statutory exception permitting a subcommittee to conduct closed interviews." *Id*. at 231. *Accord, Cynar v Village of Dexter Council*, unpublished opinion of Court of Appeals, issued Nov 21, 1997 (Case No 198099) (Ex. J to Application), finding that "defendants" actions in closed session were not mere deliberations. Although defendants returned to open session to vote, they were by that point merely announcing publicly the decision at which they arrived during closed session. *Id*. at *7.

In contrast to *Booth* is *Herald Co v Bay City*, 463 Mich 111; 614 NW2d 873 (2000), where the Court found that the OMA did not apply to the City Manager's recommendation to

[2] The Court also reviewed the legislative history of the OMA, explaining that under the original OMA, deliberations would occur in private and then public officials would reconvene and vote on a matter in public. The OMA was revised precisely to eliminate that practice. *See* discussion at 444 Mich at 221-224. But that is exactly what occurred in this case.

City Council for a new Bay City fire chief. The Fire Chief retired, and under the City Charter, the City Commission was authorized to appoint a new Chief upon recommendation of the City Manager. The City Manager formed a committee to assist him in to investigate and recommend qualified candidates. The committee undertook its investigation through private meetings and the plaintiff alleged a violation of the OMA.

In determining that the OMA did not apply to that committee, and distinguishing *Booth*, this Court held that an *individual* who acted in an executive capacity was not a public body and thus not subject to the OMA. *Id.* at 130-31. In that the City Manager was not subject to the OMA, neither was the committee he formed to assist him in his selection. Critically, this Court observed the key distinction:

> Nor do we agree with the contention that the committee that was formed by the city manager was subject to the requirements of the OMA under the rationale in *Booth*. The city manager may have delegated some of his authority to the committee he created and, *were the city manager himself subject to the OMA, the committee he created might also have been subject to the OMA pursuant to Booth. Here, however, because the city manager was not subject to the OMA, Booth has no application.* Because the city manager's committee in this case was not 'empowered by state constitution, statute, charter, ordinance, resolution, or rule,' it was not a public body for purposes of the OMA, and the committee's actions did not violate that statute.

463 Mich at 135 (emphasis added). But in our case, because the Committee was formed by the City Council, which itself is subject to the OMA, and was controlled by elected City Councilpersons, its actions and decision-making could be subject to the OMA, and in fact, per *Booth*, *was* a public body subject to OMA based on the actions it actually took.

Specifically, the Committee was a five-member subcommittee of City Council, created by an Ordinance adopted by the City Council. The Ordinance did not require that any member of City Council serve on the Committee, just that the City Council choose three persons to serve

on the Committee. City Council, however, then appointed three of its own members (including the chair and vice-chair), *who were elected, public officials*, to serve on the five-member Committee. These three constituted a majority, allowing City Council, and thus, elected members of the public, to control the Committee. Indeed, City Council, by its own admission, believed the Committee to be a public body subject to the OMA, citing to the OMA on every meeting notice generated for the Committee. Specifically, each public notice issued by the City for the closed meetings of the Committee contained a published heading on the agenda that read: "**A MEETING OF THE MEDICAL MARIHUANA SUBCOMMITTEE OF THE CITY OF WARREN COUNCIL"** (bold in original) (Ex. D to Application).[3] Moreover, each notice indicated that the notice of closed session was being provided pursuant to "Section 4(a), (b),[4] and Section 5(1), (4),[5] and Section 9(2)[6] of Act 267 of Public Acts of Michigan, 1976" which is the OMA.[7] *Id*. However, the Committee held its meetings in secret and did not follow the instructions handed down by the OMA for conducting closed session. *See* MCL 15.268.

---

[3] The language in these meeting notices, issued by the City, belie the after-the-fact argument made by the City in this litigation that, "[t]he Review Committee is not a subcommittee of City Council." (City Court of Appeals Brief, p. 12.)

[4] Section 4 is MCL 15.264, which applies to posting notice of public meetings.

[5] Section 5 is MCL 15.265, which requires notice to be provided prior to a public meeting.

[6] Section 9 is MCL 15.269, which requires that minutes be taken at every open meeting, which did not take place here.

[7] The record is fraught with admissions by the City that it knew the Committee was subject to the OMA. In addition to the meeting notices acknowledging that the OMA applied to the Committee meetings, after the first lawsuit was filed in August 2019, the Committee attempted to "cure" its prior OMA violations by holding a public meeting on September 20, 2019. But one of the Committee members indicated that he did not "believe that this body can convene in a closed session." (*See* fn. 1 to Application; Ex. 8 to Appellants' Court of Appeals Brief). The Committee tried again to cure its prior OMA violations by holding another public meeting on October 7, 2019. *See* Ex. 10 to Appellant's Court of Appeals Brief. The Circuit Court held that the Review Committee's attempts to "cure" the violations were unavailing. (Ex. C to Application, at p. 8). The Court of Appeals, however, did not address this issue. (Court of Appeals majority opinion, at p. 23.)

Just as in *Booth*, the Committee—the majority of whom were elected public members of City Council, which is undisputedly a public body subject to the OMA—met in private meetings with applicants for medical marihuana licenses, conducted separate and private interviews with each applicant, and engaged in secret scoring of the applicants (whether this was done by group discussion, or separately by each member outside of a Committee meeting, is unknown as no record was kept of the Committee's actions and discussions). Many of the categories for which scores were rendered were completely subjective, such as the "integrity, moral character, and reputation … of the applicant"; "the applicant's business plan, considering the applicant's business experience within the past ten years"; "community involvement and/or proposed community involvement, including, but not limited to, charitable contributions and involvement"; and "holistic approach with medical use." Each category required a score on a scale from 1-10. Other categories were more straightforward, requiring basically a yes or no response, such as "whether the applicant has filed, or had filed against it, a proceeding for bankruptcy within the past 7 years." But even as to these more objective categories, as observed by the trial court, committee members could, and did, give a wide range of scores. (Ex. C to Application, at pp. 3-4.)

There were no public deliberations by the Committee, so there is no way of knowing how the scores and applicants were assessed. There were no public discussions of the merits of any application. And, as stated before, no minutes were kept of any of the secret meetings of the Committee.[8] (*See* Ex. E to Application.) The Committee never even submitted individual scoring sheets to the City Council, and never presented any information to the full Council to

[8] There is no doubt, however, that deliberations took place. Indeed, before the Committee submitted its final list to City Council, documents containing lists of preferred candidates from the Committee were leaked to the media. (*See* Ex. 6 to Appellants' Brief in the Court of Appeals).

explain the basis for its conclusory list of recommended candidates. The entire process was and remains a mystery, both to the successful and unsuccessful applicants, and to members of the general public, who had no clue as to how or why marihuana dispensaries were or were not approved.

The full City Council then voted on October 8, 2019, only one day after receipt of the Committee's list of recommended license candidates. It simply rubber-stamped the Committee's choices with no backup information provided. The resolution to approve the licenses was made and seconded by City Council members who served on the Committee. (*See* transcript of October 8 meeting, Ex. G to Application, at p. 2.) No Council member that sat on, or other member of the Committee, explained the Committee's "recommendations," discussed the list of candidates, or deliberated on the merits. Indeed, the majority of the relatively brief discussion was complaints from two members of City Council who were not on the Committee that they lacked access to the materials needed to do their job, namely, background information on why applicants were or were not recommended by the Committee to receive licenses. (Ex. G to Application, at pp. 6-7.) The resolution (made and seconded by Committee members) to simply adopt the list proffered by the Committee, not surprisingly, passed by a 5-2 vote.

In concluding that the Committee was not a public body, the Court of Appeals' majority reasoned that such a decision should be determined by looking at the four corners of the document creating the body. (Ex. A to Application, at p. 20.) According to the majority the actual exercise of authority by the Committee as described above is irrelevant. (*Id.*) As was the fact that the meeting notices issued by the City itself identified by Committee as a "subcommittee of City Council" subject to the OMA. The majority completely ignored the

critical fact that the City Council appointed its own members to serve on and control the Committee.[9] The Committee was clearly a governmental body in this regard.

2. The Committee Was Empowered By City Ordinance To Perform A Governmental Function—And Was The Ultimate Decision-Maker That Determined Who Was Awarded A License.

The second factor is whether the Committee was "empowered by … ordinance … to exercise governmental or proprietary authority or perform a governmental or proprietary function." MCL 15.262(a). The Court of Appeals' majority held that Appellants presented no evidence that City Council delegated its own authority to the Committee. (Ex. A to Application, at p. 20.)

This requirement was easily met here. It is undisputed that the Committee was created by the Ordinance, which was adopted by City Council, and its members were appointed by City Council. *See* Ordinance at §19.5-13(4) (Ex. A hereto). And the Committee performed the governmental function of determining who got a license. Appellants recognize that not every committee or subcommittee will be considered to be empowered to perform a governmental function for OMA purposes, but here, it was. *Davis* holds that courts should look at both the "authority" and "function" the body is empowered to exercise or perform. *Id*. at 601. The issue in *Davis* was whether the State Treasurer and the Detroit Financial Review Team ("Team"), acting under authority of the Emergency Financial Manager Act, were governing bodies subject

[9] The Ordinance language specifically provided that applications and plans "shall be transmitted to the Review Committee for approval." Ordinance at § 19.5-13(4)(a). The majority totally disregarded this language, rationalizing that it "is not determinative because the ordinance must be read as a whole." (Ex. A to Application, at p. 22.) In deciding to completely disregard specific language of the Ordinance contradictory to its conclusion, the majority ignored a central tenet of statutory construction—"When interpreting a statute, we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of statute surplusage or nugatory." *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018).

to the OMA. The Court of Appeals determined that neither were subject to the OMA. The Team was appointed by the Governor, who the Court noted was not a public body. *Id*. at 604.

Davis distinguished *Morrison v East Lansing* 255 Mich App 505; 660 NW2d 395 (2003), where the court found that an advisory committee appointed by the East Lansing City Council to advise on issues relating to a new community center project, was a public body subject to the OMA. *Davis* explained that the advisory committee in *Morrison* was created by City Council, a public body under the OMA, and that the City Council "*effectively authorized* the [building committee] to perform a governmental function." *Id*. (emphasis added.) The same could be said of the present case. And *Davis* distinguished *Booth* by observing that, "[t]he Governor's appointment pursuant to a statute creates a financial review team. Such a financial review team is thus not created by a public body to serve it in an adjunct advisory role." *Id*. *Davis* further distinguished *Booth*:

> This differs critically from the acts of individual or subquorum groups of regents in *Booth Newspapers.* In that case, the individual regents or subquorum groups were not merely making recommendations. Rather, *they were effectively exercising the authority* of the University of Michigan Board of Regents to narrow the field of candidates and ultimately choose the person to be the university president.

Id., at 604, emphasis added. In sum, *Davis* found the OMA did not apply because the function of the challenged governmental body was only investigative in nature.

The facts in *Davis* are completely distinguishable from this matter. The financial review team in Davis was not controlled by decision-makers. It had no power to implement anything. Here, like *Booth*, the Committee was controlled by the ultimate decision-maker, the City Council. The Committee here was indeed acting as a public, decision-making body. It decided who would and who would not be awarded a license. Critically, the ultimate decision-makers (members of City Council) constituted the majority of the Committee. In other words, the City

Council members who were on the Committee were able to discuss the applicants in private, rank them in private, come up with "recommendations," and then formally approve their own recommendations, with no public discussion whatsoever about why or how those decisions were reached.

There are two key factors that were ignored by the Court of Appeals' majority. The first is the relationship between the Committee making so-called "recommendations" and the ultimate decision-maker. While the City argues that City Council made the ultimate decisions on awarding licenses, that is not what actually transpired. Here, as in *Booth*, the Committee was populated with, and controlled by, members of the ultimate decision-maker. In *Booth*, the Regents denied that the subcommittees they used to undertake an investigation and winnowing down of applicants for University president had any decision-making authority but were instead only recommending committees. In rejecting this explanation, this Court examined in detail the actions actually taken by the subcommittees, including reducing the candidate list from sub-quorum groups of Regents, who conducted interviews, evaluations, and meetings outside of the public purview. *Id*. at 226-228. In other words, this Court looked then, as it should look now, to what the Committee actually did, rather than what it was formed to do.

Booth, *Herald*, *Morrison* and *Davis* all examined the underlying and actual functions and decision-making activity of the bodies at issue, particularly the relationship of those bodies to other bodies undeniably subject to the OMA. Here, the City Council delegated decision-making authority regarding a complex regulated matter to a Committee controlled by City Council members. The City tried to evade the OMA and *Booth* by never meeting with a quorum of City Council until the final meeting when a vote was taken. Had one additional member of City Council sat on the Committee, each meeting would have indisputably been a meeting of City

Council itself and plainly subject to the OMA. Instead, City Council appointed three of its own members to the Committee (including its most influential members—its chair and vice-chair) and controlled the Committee and undertook all of its meetings, discussions and deliberations in private. And yes, just as the Regents unsuccessfully argued in *Booth*, the full City Council, as the Board in *Booth*, could have rejected the decision of the Committee or approved a different licensee. The likelihood of that happening was slim to none.

The City Council held one meeting on the subject, 24 hours after receiving a list of scores from the Committee compiled after 9 months of secret meetings, and then approving that without allowing or hearing any public input, presentation on the merits by the Committee, or discussion or deliberations on the merits. Such a clear rubber-stamp approval of the Committee to evade OMA is plainly what *Booth* was intended to prevent.

If the test to determine whether OMA applies ignores the function that the body actually performs, as opposed to what it said on paper it was to perform,[10] it creates an easy end-run around the OMA with respect to controversial matters of public interest. That is clearly not what the OMA intended.

[10] As referenced on p. 12, n.9 *infra*, the Ordinance itself was arguably ambiguous with respect to the Committee's authority—the majority relied on Section 19.5-14 of the Ordinance, which provided that the Committee shall forward the scores and applications to City Council "with recommendations," while the dissent relied on Section 19.5-13(d)(1), which provided that applications and plans shall be transmitted to the Committee "for approval." Instead of trying to resolve the ambiguity by also focusing on how the decision-making was actually handled by the City, the majority chose to simply read words out of the Ordinance in their entirety.

B. <u>The Majority Ignored The Ordinance Requirement That City Council Deliberate On And Consider Additional Factors Before Approving Licenses.</u>

City Council's failure to follow its own Ordinance that required it to separately rank all 65 applicants is further proof that the Committee did not merely make "recommendations" and acted as a public body. Specifically, the Ordinance specified that if the number of applicants meeting the requirements exceeded the number of available licenses (as it did here), the full City Council (and not the Committee) was *required* to rank all of the applicants in order, considering both the factors that were to be considered by the Committee in Section 19.5-13, as well as additional factors (not considered by the Committee) to be considered by City Council as stated in Section 19.5-14(2):

> (2) *Council shall confirm compliance with all requirements and factors in the granting of Licenses. If the number of applicants meeting the requirements herein exceed the number of available licenses, the Council shall rank the applicants in order, considering the factors outlined above and consideration of the Plan proposed for the Provisioning Center; new construction and thereafter reconstruction of buildings shall be ranked equal than those applications proposing existing buildings.* The capitalization and improvements to real estate shall be ranked higher than proposed existing buildings. Ranking shall be based upon a 0 to 10 scale for each factor including zoning compliance with a 0 meaning does not comply and a 10 meaning exceeds compliance.

(Ex. C to Application, at pp. 15-16, emphasis added.)

It is undisputed that City Council did not rank or re-rank the list of applicants based on additional criteria outlined in its Ordinance. While the majority cited the above obligations of City Council as evidence that City Council, rather than the Committee, was the ultimate decision-maker, the majority utterly failed to address the ramifications of City Council not doing so. The majority failed to recognize that City Council's disregard of these obligations is simply further evidence that the Committee made the decisions in private, and the City Council simply rubber-stamped the result. Thus, the entire manner in which the City Council handled and treated

the "recommendations" (realistically – the decision) of the Committee is completely relevant as to whether the Committee was "effectively" exercising decision-making authority.

In addition to the flouting the requirements under the Ordinance, City Council also violated OMA by failing to allow public comment. Under MCL 15.263(5), City Council was required to allow time for public comment and to allow the public to address City Council on its decision to award licenses under the Marihuana Ordinance. This was not done. And yet, it is undisputed that City Council is subject to OMA regardless of the Committee's status. Not only did it disallow public comment, City Council conducted no deliberations on the record. Ex. G to Application, October 8, 2019 City Council Meeting Transcript.

The City's violation of its own Ordinance requirements and of OMA evidences the sheer and utter control the Committee had over selecting the list of 15 candidates to be awarded marihuana licenses – and evidencing that OMA clearly applied to the Committee.

CONCLUSION AND REQUEST FOR RELIEF

For the reasons given herein and in Appellants' Application for Leave to Appeal, Appellants respectfully request that this Court grant leave to appeal and, on appeal, reverse the Court of Appeals' Opinion and reinstate the Circuit Court's Opinion.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: /s/ *Alan M. Greene*
Alan M. Greene (P31984)
Jill M. Wheaton (P49921)
Christyn M. Scott (P67485)
Attorneys for Plaintiff-Appellant Happy Trails Group Inc. and Blue Spruce Ventures, LLC

FRANK & FRANK LAW

By: /s/ *Jonathon B. Frank*
Jonathan B. Frank (P42656)
Janette E. Frank (P42661)
Attorneys for Plaintiff-Appellant Aubrey Ventures LLC

O'REILLY RANCILIO P.C.

By: /s/ *Lawrence M. Scott*
Lawrence M. Scott (P30228)
Brian C. Grant (P71066)
Attorneys for Plaintiff-Appellant Pinebrook Warren LLC

JAFFE RAITT HEUER & WEISS, PC

By: /s/ *R. Christopher Cataldo*
R. Christopher Cataldo (P39353)
James W. Rose (P66473)
Attorneys for Plaintiff-Appellant Pure Roots, LLC

FLEMING YATOOMA & BOROWICZ PLC

By: /s/ *Frank M. DeLuca*
Frank M. DeLuca (P41604)
Gavin J. Fleming (P68366)
Attorneys for Plaintiff-Appellant Pure Green Warren, LLC, HCM Warren, LLC; JAR Capital of Warren, LLC, Pure Warren, LLC; Alternative RX, LLC

LAW OFFICE OF MIKE M. BAHOURA PLLC

By: /s/ *Mike Bahoura*
Mike Bahoura (P80205)
Attorneys for Plaintiff-Appellant Pure *Green Warren, LLC, HCM Warren, LLC; JAR Capital of Warren, LLC; Pure Warren, LLC; Alternative RX, LLC*

THE MIKE COX LAW FIRM, PLLC

By: /s/ *Michael A. Cox*
Michael A. Cox (P43039)
Attorneys for Plaintiff-Appellant Kapp Walled Lake, LLC

THOMAS LEGAL GROUP

By: /s/ *Joseph W. Thomas*
Joseph W. Thomas (P33226)
Attorneys for Plaintiff-Appellant DKB2, LLC

CRIVELLO LAW PLLC

By: /s/ *Grace Crivello*
Grace Crivello (P77774)
Co-Counsel for DKB2, LLC

WILLIAMS RATTNER & PLUNKETT, P.C.

By: /s/ *Brian E. Etzel*
Brian E. Etzel (P54905)
William C. Disessa (P81906)
Attorneys for Plaintiff-Appellant MPM-R Warren LLC

Dated: January 3, 2024

CERTIFICATE OF COMPLIANCE

I certify that the Plaintiffs-Appellants' Application for Leave to Appeal complies with the type-volume limitation set forth in MCR 7.212(G). This brief uses a 12-point proportional font (Times New Roman), and the word count, based on the word count of the word-processing system used to produce this document, for this brief is 5,631.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: /s/ *Alan M. Greene*
Alan M. Greene (P31984)
Jill M. Wheaton (P49921)
Christyn M. Scott (P67485)

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January 2024, I electronically filed the foregoing paper with the Clerk of the Court using the ECF System, which will send notification of such filing to all ECF participants.

DYKEMA GOSSETT PLLC

By: /s/ *Alan M. Greene*
Alan M. Greene (P31984)
Jill M. Wheaton (P49921)
Christyn M. Scott (P67485)
Attorneys for Plaintiff-Appellant Happy Trails Group Inc. and Blue Spruce Ventures, LLC