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STATE OF MICHIGAN

IN THE SUPREME COURT

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._____
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

APPLICATION FOR LEAVE TO APPEAL
OF DEFENDANT-APPELLANT CITY OF ROYAL OAK

CERTIFICATE OF COMPLIANCE

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JUDGMENT APPEALED

Defendant-Appellant, city of Royal Oak (the city), appeals the judgment of the Court of Appeals in its opinion issued December 4, 2024. The city and Intervening Defendant, PGSH Holdings, LLC, timely filed a joint motion for reconsideration on December 23, 2024. The Court of Appeals denied the motion by order of January 27, 2025.

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QUESTIONS 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 MARIJUANA LICENSING ORDINANCE CONFERRED THE TASK OF IMPLEMENTING THE APPLICATION PROCESS 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 answered, "No."

The Court of Appeals answered, "No."

This Court should answer, "Yes."

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STATEMENT OF MATERIAL FACTS AND PROCEDURAL HISTORY

In 2018, when Michigan voters adopted Proposal 1, the Michigan regulation and taxation of marihuana act (MRTMA), MCL 333.27951, *et seq*, nearly 70% of Royal Oak voters approved the new measure to legalize recreational marijuana. Adult-Use (Recreational) Marijuana Engagement and Outreach, https://www.romi.gov/1403/Adult-Use-Recreational-Marijuana (accessed March 7, 2025). After a period of opting out of permitting adult-use marijuana[1] establishments, the Royal Oak city commission adopted a recreational marijuana establishment (RME) ordinance on July 27, 2020, **Appx Ex 1,** Royal Oak Code, Ch 435 "Marihuana," under the authority granted by MRTMA, MCL 333.27956(2) and (3). The ordinance authorizes all types of marijuana establishments permitted by MRTMA, MCL 333.27959(2); Royal Oak Code, § 435-2.A(1)-(9)[2], and sets forth 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). The ordinance forbids operation of any RME establishment without a license issued by the city under the ordinance. Royal Oak Code, § 435-2.C.

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." 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). The ordinance further details the required contents of applications in Royal Oak Code, § 435-4.A(1)-(4). The ordinance further informs, "Applications must be complete and shall be considered on a

[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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competitive basis as required and set forth by MCLA 333.27959.4, as may be amended." Royal Oak Code, § 435-4.B. 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). 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).

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.

In accordance with the ordinance, 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 Ex 2**, 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 department heads and administrators whose positions were relevant to certain aspects of the

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

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applications within the scope of their duties. **Ex 2**, **¶ 9**; **Ex 3,** 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. *Id*., ¶ 10; **Ex 3**, dep, pp 45-46 . Mr. Brake met with various iterations of the group on four occasions in August 2021 to discuss certain applications at each session. **Ex 3**, 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) to which each person could contribute according to their specific specialty. **Exhibit 3**, pp 120-122.

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. **Ex 3**, dep, p 173:5-8. Tier 1 comprised the two successful applicants who ranked the highest and to whom he awarded the two license slots. **Ex 3**, pp 39:13-39:17; 53:11-12; 173:9-16; 263:3-5; 278:1-6; 378:1-2. 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 Ex 2**, Affidavit of Paul Brake, ¶ 12; **Exhibit 4**, 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 Ito move forward if either of the two tier I applicants did not successfully complete the process and obtain their city license. See **Exhibit 5**, December 15, 2021 "standby" letters issued to Quality and Exclusive; **Exhibit 3,** dep, 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.

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The city manager 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. **Ex 5**. 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, the next highest ranked applicant could fill the available license slot(s). **Ex 2**, ¶ 15. City manager Brake 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.*; **Ex 5.** If the other recipients of a license slot completed the process and were eventually licensed, then the city manager would issue a letter denying plaintiff's application. *Id.*; **Ex 2**, ¶ 16. At the time the city manager sent the December 15 letter, the city commission had not yet scheduled site plan review for any license slot recipient, one of the further necessary steps for completion prior to issuance of an RME license. **Ex 2**, ¶ 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, (4) violation of the Open Meetings Act, and seeking declaratory judgment, preliminary and permanent injunctive relief. **Ex 6.** 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. **Ex 7.**

After the city manager awarded the license slots to Gatsby and Royal Treatment, LLC, both applicants submitted applications for site plan review and special land use permits under the city's zoning ordinance that were scheduled for public hearing before the Royal Oak planning commission on February 8, 2022. **Ex 8**. The planning commission voted 3-2 to recommend denial

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by the city commission of Gatsby's special land use permit. **Ex 8**, p 4. The planning commission voted 4-1 to recommend approval of Royal Treatment's special land use permit and site plan. **Ex 8**, pp 4-5.

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 **Ex 9**, Quality 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, **Ex 9**, entry of 02/28/22, which the trial court granted on March 7, 2022. **Ex 9**, 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. **Ex 10**. 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. **Ex 11**. 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 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. **Ex 12**.

The applications of Gatsby Cannabis and Royal Treatment for site plan review and special land use permits proceeded to hearing before the city commission at its regular meeting of April

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25, 2022. **Ex 13**. The city commission voted to approve the site plans and special land use permits for both Gatsby and Royal Treatment. **Ex 13**, minutes pp 8-11. The city issued licenses to the two licensees the following day. **Ex 14.** Once the city issued licenses to Gatsby and Royal Treatment, the city manager issued formal denial letters to those applicants initially placed on standby. See **Ex 15**, May 18, 2022, denial letters to Quality and Exclusive.[4]

Upon leave to amend granted by the trial court, plaintiff Quality filed an amended complaint on August 23, 2022. **Ex 16.** Likewise, Exclusive obtained leave to amend and filed both a first and second amended complaint. See **Ex 17,** Exclusive's second amended complaint of 9/23/22.

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 motion for summary disposition and addressed only the new claims in the amended pleadings. **Exs 18 and 19.**

The city of Royal Oak had 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). **Exs 20 and 21**. The trial

[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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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. **Ex 20**, p 17; **Ex 21**, p 5. The court entered its orders granting summary disposition on December 21 and 22, 2022. **Ex 22.**

Plaintiffs filed motions for reconsideration on January 11, 2023. **Exs 9 and Ex 23,** entries of 01/11/2023. The trial court issued an Opinion and Order in each case denying those motions on May 4, 2023. **Exs 24 and 25**. Plaintiffs filed their claims of appeal to the Court of Appeals on May 24, 2023. During the appeal, both Gatsby and Royal Treatment obtained their state licenses and have been open for business since May 2024.

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 for the claim under the Open Meetings Act. **Exhibit 26**, *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. Slip op at pp 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 delegated its own authority to the city manager in making the licensing decisions, and the Court's

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dismissive treatment of the provisions of the Royal Oak city charter that contradict the Court's conclusion. The Court of Appeals denied the motion in a peremptory order on January 27, 2025. **Ex 27.**

STANDARD OF REVIEW

The city of Royal Oak brings this application for leave under the standards set forth in the authorities of MCR 7.305(B)(2), (3), and (5)(b). The issue raised by this application is the proper scope and application of the Open Meetings Act (OMA), an issue of significant public interest in a case against a municipal government, which is a political subdivision of the state. MCR 2.305(B)(2). The application also raises a legal principle of major significance to the state's jurisprudence, in that the implications affect local governments statewide. MCR 7.305(B)(3). Furthermore, the Court of Appeals decision conflicts with both another decision of Supreme Court, *Herald Co v Bay City*, 463 Mich 111; 614 NW2d 873 (2000), and of the Court of Appeals, *Yellow Tail Ventures, LLC v City of Berkley*, 344 Mich App 689; 1 NW3d 860 (2022). MCR 7.305(B)(5)(b).

This case comes to this Court upon the trial court's grant of summary disposition to the city under MCR 2.116(C)(8) and (10), and involving matters of statutory construction. This Court in *Pinebrook Warren*, *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 Warren*, slip op at p 21.

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Further, the city raises issues of construction of its city charter and ordinances. 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 PLAINTIFF'S CLAIM THAT THE CITY OF ROYAL OAK VIOLATED THE OPEN MEETINGS ACT, WHERE THE RME LICENSING ORDINANCE CONFERRED THE TASK OF IMPLEMENTING THE APPLICATION PROCESS UPON THE CITY MANAGER, WHO IS NOT A "PUBLIC BODY" SUBJECT TO THE OMA.

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*, 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).

"Public body" connotes a collective entity. *Herald, supra*. The Court there continued:

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> 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.[5] 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, supra*, 463 Mich at 129-130 (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. The manager took the others' advice and developed a recommendation for hiring to the city

---

[1] In footnote 11, 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:
>
> > "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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council. A local newspaper challenged this process under the OMA, claiming that the city manager was a public body and 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*.

This Court "disagreed with the analysis suggested by plaintiff and the Court of Appeals." *Id*., at 129. It also distinguished other cases[6] 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." (Emphasis added.) § 435-4.C of the ordinance confers the decision-making authority for the selection process to determine recipients of City licenses to the city manager. Therefore, the city manager, as an individual executive acting in his executive capacity, 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*[.]" **Ex 20**, p 17; **Ex 21**, p 6).

The next day, 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 the task of evaluating applications and deciding the applicants that would be selected for

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

Likewise, the Royal Oak ordinance conferred the authority of implementing its terms to the city manager. It did not create a "review committee." Although the Royal Oak ordinance does permit the city manager "or his designee" to rank the applications, Royal Oak Code, § 435-4(C)(4), Mr. Brake unequivocally testified that he and no one else ranked the applications. **Ex 3**, deposition p 39.

In reversing the trial court here, the Court of Appeals in this matter wholly disregarded the holding in *Yellow Tail Ventures* and its application in this case. 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*, specifically this Court's holding that,

> in 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. [*Id.* at ___; slip op at 29 (citations omitted).]

See *Exclusive Capital Partners*, slip op at 22.

The Court stated that,

> 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

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> 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 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. Slip op at p 23.

It is clear from this portion of the Court's opinion that it misconstrued the RME ordinance. The Court incorrectly asserted 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. However, the RME ordinance clearly states that the applications would be "ranked" by the city manager and those rankings would be used to *fill* the two available municipal license slots until all slots are exhausted. Royal Oak Code, § 435-4.C(4). 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, then the city commission, and if approved, then they may obtain their licenses from

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the city clerk. Royal Oak Code, § 435-4.D(4)(f). 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. Once those two license slots were filled, the applicants took the next steps of applying for site plan and special land use review. The city commission did not discuss the applications of any other applicant because no other applicant was before the commission, nor did the ordinance provide that any other application would be before the commission other than those holding a "municipal license slot."

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*., is necessary to demonstrate why the Court of Appeals incorrectly concluded that the city commission delegated its own authority to the city manager. The Royal Oak charter created the municipal corporation known as the City of Royal Oak, and defined its geographical boundaries. **Ex 28**, Royal Oak Charter, Ch 1, §§ 1 and 2. It likewise set 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*. **Ex 28**, p C:4 (emphasis added).

Following the enumeration of the city's general powers, the charter specifies that the city government is a "Commission-Manager" form of government and created the commission consisting of a mayor and six commissioners. **Ex 28**, 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*." **Ex 28**, Ch 3, § 2 (emphasis added). In other words, the city commission possesses its own powers as provided in the charter, and it

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may pass ordinances and resolutions to determine *how* the city's powers are to be exercised. Unless otherwise specified in the charter, as expressed above, *the City's powers are not self-executing*. The city can only exercise its powers "*as provided by ordinance, resolution or the general laws of the state.*" *Id*., Ch 2, § 1 (emphasis added). There is no presumption in the charter that powers are exercised by the city commission.[7] In 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*." **Ex 27** (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.

[7] 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 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, another specific power delegated to the commission by the charter itself.

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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." Slip op, p 23. However, the city did not argue that 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 the ordinance, which *created* the power to license recreational marijuana establishments and to receive, review, and rank applications to fill the municipal license slots. The city commission never had the power to license marijuana establishments; therefore, it could not have delegated power it never had. Moreover, there is no indication that any party in *Pinebrook* argued to this Court, or that the Court considered, the regulatory framework created by and the interplay among the MRTMA, the HRCA, city charter and city ordinance, as Royal Oak has done here.

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. *Id*. 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 may decide the structure of the RME ordinance and all the aspects of marijuana establishments. In creating the power to decide the application process and to issue city marijuana establishment retailer licenses, the city commission could have created that power in itself. *But it did not do so here.* The city commission's initial authority under MRTMA is to

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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.

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 did not, as the Court of Appeals found, "[rest] with the City Commission, 'the public body.'" The ordinance expressly created and gave that authority directly to the city manager. Royal Oak Code, § 435-4(C)(2) and (4). The Court held that since the ordinance says 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," and distinguished "the City" from "the City Manager", then use of the term, "the City" means that the city commission shall decide among the applications who is best suited. The Court failed to recognize that the ordinance merely lifted that language directly from MRTMA, MCL 333.27959(4) ("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"), replacing "municipality" with "the City". The ordinance did not assign to the city commission the task of deciding among competing applications who is best suited to operate an RME retailer in Royal Oak.

This is borne out by § 435-4.C(4), where the city manager is to rank the applications in the order of which is best suited operate in compliance with MRTMA within Royal Oak. The Court's statement that, "[T]he City Commission adopted the city manager's recommendation without apparent deliberation," is an 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. The city commission did not

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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. The ordinance creates no role for the city commission to rank or to decide which applicants receive a license based on their applications. The commission only reviews and decides applications for site plan and special land use approval.

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, and is the head of the 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. And while a city commission or council or governing body could do that task, under the Royal Oak Charter and MRTMA, the city commission had to adopt an ordinance in order to create the power allowed by MRTMA. The Royal Oak RME ordinance did not assign the licensing task to the commission. Therefore, the Royal Oak city commission did not delegate its own authority to the city manager, as the University of Michigan Board of Regents delegated its authority to a single regent in *Booth v Univ of Michigan Bd of Regents*, and the Warren city ordinance delegated the authority to a review committee to make a recommendation to the city council, who had the final say in awarding licenses in *Pinebrook*. None of those cases analyzed the relationship between the HRCA, a city charter, and a city ordinance in this context, which are important to understanding the powers granted to "the City."

By focusing on *Pinebrook*, the Court of Appeals also disregarded 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 Warren* expressly distinguished the facts in *Herald* because the city manager there exercised his own authority and did not exercise the authority of another public body:

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> In other words, *Booth* [*v Univ of Michigan Bd of Regents,* 444 Mich 211; 507 NW2d 422 (1993)] 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*, 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.

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.'" *Id*., slip op, p 21. But the Court never provided any analysis or stated why it reached that conclusion. Moreover, the Court did not distinguish *Yellow Tail* from *Pinebrook*, or explain why *Yellow Tail* does not apply here. The Court's opinion 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 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).

If, as 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 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

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the interplay of the HRCA, the Royal Oak Charter, and city ordinances, and the realities of Royal Oak's government.

Such a result would create a hornet's nest not only for Royal Oak, but for municipal governments statewide. If by adopting any ordinance and conferring authority on a municipal official or employee, a city governing or legislative body is presumed to delegate its own authority to that municipal official, then that other official necessarily becomes a "public body" required to comply with the Open Meetings Act, according to the Court of Appeals.

The Court of Appeals seemed to believe that OMA compliance for a city manager in this case simply means holding an open meeting with his staff and conducting their discussions in public. Exercising powers under municipal ordinances is the essence of daily municipal government. Applying this holding to daily municipal government in Royal Oak would mean that the city manager would have to post a public notice of a staff meeting, MCL 15.264, and conduct the meeting in a location available to the general public. MCL 15.263(1). But if an official is a "public body" for any purpose under the OMA, then that official is a public body for *every* purpose under the OMA. Although deliberations and decision-making are the principal concerns of the OMA, the statute imposes numerous other requirements besides holding public meetings.

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). It 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 of 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 requirements for such a meeting—in order to approve the minutes of the last meeting?

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If the city manager is a public body for any purpose, 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 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, would not be overly burdensome. But the function and duties of the Royal Oak city manager, and 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 Appeal's ruling, the city manager would have to observe OMA requirements any time he exercised his authority under an ordinance because, according to that Court, he would be exercising the commission's power delegated to him. So, he would be prohibited from something as simple as asking another staff member a question about the subject of the ordinance-conferred task because as a "public body," he would be a quorum, and is 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 here could conceivably change the nature of administrative functions in municipal government and create burdens never before imposed on

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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*. The Court of Appeals holding would apply to any administrative official – city clerk, director of public works, treasurer or finance director, police chief, zoning 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.

The change that the Court of Appeals has made in this case runs afoul of its role in statutory interpretation. The Court did not apply the plain, unambiguous words of the statute. 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*, at 219.

If this decision stands, 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 thereby reflects a lack of understanding of both the way cities function daily and the additional, overwhelming burdens that this 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

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reducing municipal services, and undoubtedly numerous other consequences not listed here. Ultimately, this decision will detrimentally affect efficiency and add to the already high cost of administering local government. Then the taxpayers will wonder why cities seek to raise taxes and fees 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 no doubt subject municipal governments to a slew of lawsuits with the OMA, spending precious resources on legal fees and costs rather than on serving the public.

CONCLUSION AND RELIEF REQUESTED

The trial court properly applied the definition of a "public body" and the *Herald* holding to this case in granting summary disposition. The Court of Appeals clearly erred and exceeded its function of statutory construction when it reversed that ruling and applied the term to an individual city manager. This Court must correct that error and restore the appropriate scope of OMA compliance imposed on public bodies and not individuals who are not within the statutory definition of that term.

WHEREFORE, Defendant-Appellant, City of Royal Oak, respectfully requests that this honorable Court GRANT its application for leave to appeal and REVERSE the holding of the Court of Appeals that the City of Royal Oak violated the Open Meetings Act in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that I prepared the foregoing Application for Leave to Appeal in Times New Roman 12-point proportional font using Microsoft Word word-processing software, The content of the application consists of 8,984 countable words, as counted by Microsoft Word.

/s/ *Anne McClorey McLaughlin*