STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PINEBROOK WARREN, LLC, a Michigan limited liability company, et al.,

Plaintiffs/Appellants,

vs.

The CITY OF WARREN, a Michigan Municipal corporation, et al,

Defendants/Appellees,

And

LE BATTLE CREEK INC., et al,

Intervenors/Appellees.

Supreme Court Docket No. 164869, 164870, 164871, 164872, 164873, 164874 164875, 164876, 164877,
Court of Appeals Docket No. 355989
Macomb cc: 2019-004059-CZ

INTERVENORS/APPELLEES,

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

SUPPLEMENTAL BRIEF

AND

PROOF OF SERVICE

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS CONTINUED

Pages

TABLE OF AUTHORITIES

CASES **Page**

TABLE OF AUTHORITIES CONTINUED

CASES **Page**

STATUTES

INDEX OF APPENDIX EXHIBITS

I. STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

I. WAS THE CITY OF WARREN'S MEDICAL MARIHUANNA REVIEW COMMITTEE A "PUBLIC BODY" AS DEFINED BY MCL 15.262(a) AND SUBJECT TO THE OPEN MEETINGS ACT, MCL 15.261 ET. SEQ.?

Intervenors /Appellees say:	**"No"**
Appellants say:	**"Yes"**
City of Warren/Appellee says:	**"No"**
Michigan Court of Appeals said:	**"No"**

II. INTRODUCTION

This Michigan Supreme Court has asked the parties for a statutory analysis on one (1) portion of the Open Meetings Act as applied to one (1) municipal ordinance.

This Michigan Supreme Court has supplied the parties with the rules to conduct that review along with the controlling body of law supporting those rules. When the governing rules of statutory construction are applied to the question presented by this Michigan Supreme Court, it is clear the Review Committee was not a "public body" under the Open Meetings Act.

Faced with this conundrum, the Plaintiffs invite this Michigan Supreme Court to depart from the rules and ignore the four corners of the language presented. This invitation is contrary to established law and should be rejected. Leave to appeal should be denied accordingly.

III. LEGAL ARGUMENTS

A. The Review Committee Was Not A "Public Body" As Defined By MCL 15.262(a) Subject To The Open Meetings Act.

On November 22, 2023, this Michigan Supreme Court issued an Order ("Order") directing the parties to file supplemental briefs addressing whether the City of Warren's Medical Marihuana Review Committee ("Review Committee") was a "public body" as defined by MCL 16.262(a) subject to the Open Meetings Act ("OMA"). The Order states, in relevant part, the following:

> **"The parties shall file supplemental briefs in accordance with MCR 7.312(E), 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 Open Meetings Act, MCL 15.261 et seq." (Appellees' Appendix Exhibit 1 -- Michigan Supreme Court Order,** Intervenors/Appellees' Appendix Pg. 11**) (Emphasis Added)**

The directives in the Order first require an examination of the statutory language set forth in MCL 15.262(a) pursuant to the rules of statutory construction already well established by this Michigan Supreme Court.

1. The OMA At MCL 15.262(a)

The OMA, at MCL 15.262(a), states that 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. The statutory definition of a "Public Body" is clear.

> "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." (**Appellees' Appendix Exhibit 2** -- MCL § 15.262, Intervenors/Appellees' Appendix Pg. 13) (Emphasis Added)

The applicable rules of statutory construction as pronounced by this Michigan Supreme Court apply to any review and analysis of this statutory language.

a. Rules of Statutory Construction

This Michigan Supreme Court has ruled that, when interpreting any statute, it must give effect to the Legislature's intent by focusing first on the plain language of a statute. Here, the language is clear and unambiguous.

> "**As with any statutory interpretation, we must give effect to the Legislature's intent by focusing first on the statute's [*23] plain language**. 22 When statutory language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." (**People** v. **Miller**, 498 Mich. 13, 22-23; 869 N.W.2d 204, 211 (2015).) (Emphasis Added)

This Michigan Supreme Court has ruled that Courts must give effect to every word, phrase, and clause in a statute and avoid any interpretation that would render any part of a statute surplusage or nugatory.

> "**Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory**. *Wickens, supra at* 60." (**Koontz** v. **Ameritech Servs.**, 466 Mich. 304, 312; 645 N.W.2d 34, 39 (2002).) (Emphasis Added)

This Michigan Supreme Court has ruled that undefined terms should be given their plain and ordinary meaning and that a court may, when necessary, consult dictionary definitions to determine the plain and ordinary meaning.

> "**Further, we give undefined statutory terms their plain and ordinary meanings**. *Donajkowski, supra* at 248-249; *Oakland Co Road Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich. 590, 604; 575 N.W.2d 751 (1998). **In those situations, we may consult dictionary definitions**. *Id."* (**Koontz** v. **Ameritech Servs.**, 466 Mich. 304, 312; 645 N.W.2d 34, 39 (2002).) (Emphasis Added)

This Michigan Supreme Court, in **Herald Co**. v. **City of Bay City**, 463 Mich. 111, 129; 614 NW2d 873, 882 (2000), examined MCL 15.262 and ruled that the definition of "public body" -- in the OMA -- encompasses two (2) primary requirements which must be met.

First, the entity at issue must be a state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council. (**Herald Co**. v. **City of Bay City**, 463 Mich. 111, 129; 614 NW2d 873, 882 (2000).)

Second, the entity must be "empowered" to exercise governmental or proprietary authority or perform a governmental or proprietary function, and that power "must derive" from state constitution, statute, charter, ordinance, resolution, or rule. The two (2) part test in **Herald** remains controlling.

> "**The definition of "public body" in the OMA contains two requirements**: **First, the entity at issue must be a "state or local legislative or governing body**, including a board, commission, committee, subcommittee, authority, or council." **Second, the entity must be "empowered . . . to exercise governmental or proprietary authority or perform a governmental or proprietary function," and that power must derive from "state constitution, statute, charter, ordinance, resolution, or rule** . . . ." (**Herald Co**. v. **City of Bay City**, 463 Mich. 111, 129, 614 N.W.2d 873, 882 (2000).) (Emphasis Added)

As used when defining a public body under the OMA at MCL 15.262, the terms "empowered" and "authority" are not defined in the statute. As a result, it is appropriate to consult a dictionary to establish the meaning and import of these terms as used in the relevant statute. (See: **Koontz** v. **Ameritech Servs.**, 466 Mich. 304, 312; 645 N.W.2d 34, 39, 2002).) In a prior ruling, this Michigan Supreme Court has already consulted a dictionary to define the term "Empower".

1. The Definition Of The Term Empower.

In **Liss** v. **Lewiston-Richards, Inc**., 478 Mich. 203, 212; 732 N.W.2d 514, 519 (2007), this Michigan Supreme Court consulted the Random House Dictionary to define the term "Empower". According to this Michigan Supreme Court, the term, "Empower" means to give official or legal power or authority.

> **"Empower" is defined as "1. to give official or legal power or authority to. 2. to endow with an ability; enable." Random House Webster's College Dictionary (1997)."** particular transaction, i.e., residential home building." (**Liss** v. **Lewiston-Richards, Inc**., 478 Mich. 203, 212; 732 N.W.2d 514, 519 (2007).) (Emphasis Added)

2. The Definition Of The Term Authority.

According to the Random House Webster's Dictionary, the term "authority" means the power to control, command or determine.

> **"authority, n. ., pl. -ties. 1. the power to control, command, or determine."** (**Appellees' Appendix Exhibit 3** -- Random House Webster's Dictionary Fourth Edition, Intervenors/Appellees' Appendix Pg. 15) (Emphasis Added)

Based upon the rules of statutory construction and the plain and ordinary meanings of "empower" and "authority", in order for the Review Committee to be a "Public Body" under MCL 16.262(a), the Marijuana Ordinance must provide to the Review Committee the official legal power to control, command or determine who gets a marijuana license. On its face, the Marijuana Ordinance did not provide this power to the Review Committee and the relevant review should end.

b. The Marijuana Ordinance States That The Review Committee Only Has The Power to "Recommend".

The Marijuana Ordinance, at Section 19.5-14, states that the Review Committee shall forward the scores and applications to the Warren City Council with "**recommendations**" and the issuance of any provisioning center license **"shall be approved by the City Council".** The Marijuana Ordinance states, in relevant part, the following:

> "Sec. 19.5-14. - Initial license approval.
>
> (a) **The review committee shall forward the scores and applications to the city council with recommendations. The issuance of any provisioning center license shall be approved by the city council**." (**Appellees' Appendix Exhibit 4** -- Sec. 19.5-14, Intervenors/Appellees' Appendix Pg. 17) (Emphasis Added)

The rules of ordinance construction already put in place by this Michigan Supreme Court apply to this language in the same scope and manner as the application to a state statute.

1. Rules of Ordinance Construction

In **Bonner** v. **City of Brighton**, 495 Mich. 209, 221-222; 848 N.W.2d 380, 388 (2014), this Michigan Supreme Court ruled that ordinances are treated as statutes for purposes of interpretation and review. This applies here.

> "**Further, because ordinances are treated as statutes for purposes of interpretation and review**, **we also [*222] review de novo the interpretation and application of a municipal ordinance**." (**Bonner** v. **City of Brighton**, 495 Mich. 209, 221-222; 848 N.W.2d 380, 388 (2014).) (Emphasis Added)

In **Bonner**, this Michigan Supreme Court further ruled that, since the rules governing statutory interpretation apply with equal force to a municipal ordinance, the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body.

> "**Since the rules governing statutory interpretation apply with equal force to a municipal ordinance**,23 **the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body**." (**Bonner** v. **City of Brighton**, 495 Mich. 209, 221-222; 848 N.W.2d 380, 388 (2014).) (Emphasis Added)

According to this Michigan Supreme Court, the most reliable evidence of the intent of a local legislative body is the language of the ordinance itself and, therefore, the words used in an ordinance must be given their plain and ordinary meanings.

> "**The most reliable evidence of that intent is the language of the ordinance itself** and, **therefore, the words used in an ordinance must be given their plain and ordinary meanings**." (**Bonner** v. **City of Brighton**, 495 Mich. 209, 221-222; 848 N.W.2d 380, 388 (2014).) (Emphasis Added)

Further, the Michigan Court of Appeals has ruled that an ordinance must be construed as a whole.

> "**An ordinance must be construed as a whole**, Winchester v WA Foote Mem Hosp, Inc, 153 Mich App 489, 501; 396 NW2d 456 (1986), affording words their plain and ordinary meanings, Great Lakes Society, 281 Mich App at 408. "If the language used by the legislative body is clear and unambiguous, the ordinance must be enforced as written." Morse, 317 Mich App at 548." (**McMillan** v. **Douglas**, 322 Mich. App. 354, 357, 913 N.W.2d 336, 338 (2017).) (Emphasis Added)

Likewise, this Michigan Supreme Court has ruled that when engaging in statutory construction, courts must construe the text as a whole.

> "**When engaging in statutory construction, courts must construe the text as a whole**. 23" (**McQueer** v. **Perfect Fence Co**., 502 Mich. 276, 289, 917 N.W.2d 584, 591 (2018).) (Emphasis Added)

Here, the Marijuana Ordinance, at Section 19.5-14, states that the Review Committee shall forward the scores and applications to the Warren City Council with "**recommendations**" and the issuance of any provisioning center license **"shall be approved by the City Council".**

> "Sec. 19.5-14. - Initial license approval.
>
> (a) **The review committee shall forward the scores and applications to the city council with recommendations. The issuance of any provisioning center license shall be approved by the city council**." (**Appellees' Appendix Exhibit 4** -- Sec. 19.5-14, Intervenors/Appellees' Appendix Pg. 17) (Emphasis Added)

The plain and ordinary meaning of the language set forth in the Marijuana Ordinance only provides the Review Committee with the power to make "recommendations" to the City Council. The Random House Webster's Dictionary defines the term "recommend" as meaning to present something as worthy of acceptance to "suggest". In other words, it is far from making a final determination.

> "**recommend , v.t. 1. to present as worthy of confidence, acceptance, or use. 2. To urge or suggest as appropriate or beneficial."** (**Appellees' Appendix Exhibit 5** – Random House Webster's Dictionary Fourth Edition, Intervenors/Appellees' Appendix Pg. 19) (Emphasis Added)

Thus, the Marijuana Ordinance only empowers the Review Committee to make suggestions. The decision making authority is with the City Council. The controlling language is clear.

c. The Marijuana Ordinance Clearly States That Only The City Council Is Authorized To Issue Licenses.

The language of the Marijuana Ordinance states that the issuance of any provisioning center license "shall be" approved by the City Council. (**Appellees' Appendix Exhibit 4** -- Ordinance Sec. 19.5-14, Intervenors/Appellees' Appendix Pg. 17) This Michigan Supreme Court has ruled that the use of the term "shall" denotes a mandatory and imperative directive.

> "**The use of "shall" in a statute generally "indicates a mandatory and imperative directive**." Burton v Reed City Hosp Corp, 471 Mich 745, 752; 691 NW2d 424 (2005) (citations omitted)." (**Mich. Educ. Ass'n** v. **Sec'y of State**, 489 Mich. 194, 218, 801 N.W.2d 35, 48 (2011).) (Emphasis Added)

As enacted, the Marijuana Ordinance empowers only the City Council with the authority to approve the issuance of a provisioning center license. There is no other interpretation of this language that is consistent with the applicable and controlling rules of construction as established and embraced by this Michigan Supreme Court.

The plain language of the Marijuana Ordinance did not provide the Review Committee with the power to control, command, or determine what entity gets a marijuana license. The plain language of the Marijuana Ordinance provided this power to the City Council under a "shall" standard. Thus, the Michigan Court of Appeals was correct when it ruled that the Marijuana Ordinance did not grant the Review Committee authority to approve applicants but, instead, required the City Council to retain and exercise the decision-making authority to approve applications and issue licenses.

> "Having done so, we conclude that the **Marijuana Ordinance did not grant the Review Committee authority to approve applicants but, instead, required the City Council to retain and exercise the decision-making authority to approve applications and issue licenses**. **The ordinance gave the Review Committee no authority to approve or disapprove of [***25] applications**." (**Appellees' Appendix Exhibit 6** -- **Pinebrook Warren, LLC** v. **City of Warren**, 343 Mich. App. 127, 150; 996 N.W.2d 754, 773-774 (2022), Intervenors/Appellees' Appendix Pg. 32) (Emphasis Added)

The Order directed the parties to file supplemental briefs addressing whether the Review Committee was a "public body" as defined by MCL 16.262(a) subject to the OMA. In order for the Review Committee to be a "Public Body", the Marijuana Ordinance must have empowered the Review Committee with the official legal power to control, command or determine who received a marijuana license. Here, the Review Committee was not empowered by the Marijuana Ordinance to control, command, or determine who received a marijuana license. In its simplest form, the question is whether the Marijuana Ordinance empowered the Review Committee with the right to make a decision regarding what entity would receive a license. The Review Committee had no power to make such a decision. The Review Committee was not a "public body" and was not subject to the OMA. There is no supported position to the contrary.

d. The Plaintiffs' Proposed Examination Fails To Look At The Actual Language Inserted Into the Marijuana Ordinance.

The Plaintiffs encourage this Michigan Supreme Court to avoid a focus on the authority provided by the four corners of the Marijuana Ordinance at issue.

> "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, it creates an easy end-run around the OMA with respect to controversial matters of public interest." **(Plaintiff's Supplemental Brief at p. 15)**

The Plaintiffs essentially reject the express language of the OMA and the decision in **Herald**, seeking to distract the analysis and propose what is essentially a breach of duty standard. The Plaintiff's proposed theory fails to focus on the actual language enacted and the limited power that was derived by the Review Committee from the Marijuana Ordinance. This encouraged position fails for two (2) reasons and should be summarily rejected.

First, the Plaintiff's encouraged examination is contrary to the language of the OMA and this Michigan Supreme Court's ruling in **Herald**. MCL 15.262(a) states that 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. Thus, the key focus is on what kind of authority the Marijuana Ordinance provides. This requires an analysis of the language set forth in the Marijuana Ordinance. In **Herald**, this Michigan Supreme Court ruled that the definition of "public body" in the OMA contains two (2) requirements. First, the entity at issue must be a state or local legislative or governing body and second the entity must be empowered to exercise governmental or proprietary authority and that power must "derive" from state constitution, statute, charter, ordinance, resolution, or rule.

> "**The definition of "public body" in the OMA contains two requirements**: **First, the entity at issue must be a "state or local legislative or governing body**, including a board, commission, committee, subcommittee, authority, or council." **Second, the entity must be "empowered . . . to exercise governmental or proprietary authority or perform a governmental or proprietary function," and that power must derive from "state constitution, statute, charter, ordinance, resolution, or rule** . . . ." (**Herald Co**. v. **City of Bay City**, 463 Mich. 111, 129, 614 N.W.2d 873, 882 (2000).) (Emphasis Added)

Herald requires a focus on the four corners of the Marijuana Ordinance to determine whether the Marijuana Ordinance -- through its language as enacted -- empowers the Review Committee with governmental authority. Pursuant to this Michigan Supreme Court's Opinion in **Herald**, any examination must focus on the power which can be "derived" form the Marijuana Ordinance itself. The Plaintiff's encouraged examination fails to look at the actual language enacted and is, therefore, contrary to the test set forth and adopted by this Michigan Supreme Court in **Herald**.

Second, the Plaintiffs encouraged examination should be rejected because the Review Committee did not exercise any actual decision making authority. The Record is clear that only the City Council could issue licenses and, in fact, only the City Council did issue licenses. Despite this, the Plaintiffs baldly assert that the City Council allegedly delegated decision-making authority to the Review Committee. The Plaintiff's argument is chock full of assertions with no support in the Record:

> "**Here, the City Council delegated decision-making authority** regarding a complex regulated matter to a Committee controlled by City Council members." (Plaintiffs' Supplemental Brief at p. 14) (Emphasis Added)

The Plaintiffs' statement to this Michigan Supreme Court is false and without support. There is simply no Record evidence that the City Council delegated its decision making authority to the Review Committee -- whether by resolution, memorandum or otherwise. The City Council, through the Marijuana Ordinance, only gave the Review Committee the power to make recommendations to the City Council. The Marijuana Ordinance, on its face, reserved the power to make the actual decisions solely to the City Council.

The Plaintiffs also assert, again with no support, that the Review Committee actually made the decisions regarding what entity would be awarded a license. This revised history is false, and the tactics of the Plaintiffs are transparent.

> "**The Committee here was indeed acting as a public, decision-making body. It decided who would and who would not be awarded a license**." (Plaintiffs' Supplemental Brief at p. 13) (Emphasis Added)

The Record is clear that the Review Committee did not make any decision. No document says otherwise. The Review Committee made a recommendation which was taken to the City Council where the City Council made the decision at a public meeting by way of a majority vote. Within its Opinion, the Michigan Court of Appeals properly stated that the City Council, in an open

meeting, voted on the applications and, in a 5-2, vote, the City Council selected the 15 successful applicants.

> "During the application process, [***26] pursuant to the ordinance, 65 license applicants submitted their materials to the City. Eventually, the Review Committee received the materials for 65 applicants, interviewed the applicants, reviewed the applications, and each Review Committee member individually assigned a score to each applicant for each of the 17 factors. **After this was completed, all 65 applications were forwarded to the City Council with the Review Committee's recommendations**. **Thereafter, the City Council, in an open meeting, voted on the applications. In a 5-2 vote, the City Council selected the 15 successful applicants**.4 **The Marijuana Ordinance gave the power to perform governmental or proprietary functions to the City Council alone**. **Because the Review Committee was not a local governing body that had been empowered by ordinance to exercise a governmental or proprietary function, it did not constitute a public body under the OMA**. See MCL 15.262(a). **The trial court erred by ruling that the Review Committee constituted a public body subject to the OMA**, which in turn led to its erroneous invalidation of the Review Committee's actions under MCL 15.270(2)." (**Appellees' Appendix Exhibit 6 -- Pinebrook Warren, LLC** v. **City of Warren**, 343 Mich. App. 127, 151-152; 996 N.W.2d 754, 774 (2022), Intervenors/Appellees' Appendix Pg. 33) (Emphasis Added)

The Plaintiffs are compelled to admit in their Supplemental Brief that the City Council held a meeting and approved of the recommendations. (See: Plaintiff's Supplemental Brief at p. 15) The point is simple. The Plaintiffs cannot avoid the fact that the actual approval of the licenses occurred at a City Council meeting by way of a controlling City Council vote. While the Plaintiffs try to call this approval a "rubber stamp", the Plaintiffs cannot avoid the controlling fact the City Council made the decision as required by the Marijuana Ordinance. Because the Review Committee was merely advisory and only capable of making recommendations concerning the exercise of governmental authority, the subcommittee was not subject to the OMA as a public body.

e. The Plaintiffs' Examination of Ordinance Section 19.5-13 Fails To Apply The Rules Of Statutory Construction.

Plaintiffs have pointed to some language in Ordinance Section 19.5-13 that indicates applications should be sent to the Review Committee "for approval". Ordinance Sec. 19.5-13 is entitled "Review process" and states that Applications and plans for provisioning centers shall be transmitted to the review committee for approval.

> **"Sec. 19.5-13. – Review process. . . .**
>
> **(1) Applications and plans for provisioning centers shall be transmitted to the review committee for approval. The city council may hire the service of an auditing firm if they deem necessary." (Appellees' Appendix Exhibit 7 -- Marijuana Ordinance Section 19.5-13,** Intervenors/Appellees' Appendix Pg. 44**) (Emphasis Added)**

Thereafter, Ordinance Sec. 19.5-14 is titled "Initial License approval" and states that the Review Committee "shall" forward the scores and applications to the City Council with recommendations.

> **"Sec. 19.5-14. – Initial License approval.**
>
> **(a) The review committee shall forward the scores and applications to the city council with recommendations. The issuance of any provisioning center license shall be approved by the city council." (Appellees' Appendix Exhibit 4 -- Marijuana Ordinance Section 19.5-14,** Intervenors/Appellees' Appendix Pg. 17**) (Emphasis Added)**

Thus, the issuance of any provisioning center license shall be approved by the City Council only.

These two ordinance sections work in harmony and, when read as a whole, show a process where the Review Committee reviews the applications and then makes recommendations to the City Council and the City Council approves of the licenses. The Michigan Court of Appeals in **Kalkman** cited to this Michigan Supreme Court's Opinion in **Bush** v **Shabahang** and ruled that the city's zoning ordinance, in that case, must be read as a whole and its provisions "**harmonized**".

> "**The general principles of statutory construction apply to the interpretation of zoning ordinances." Macenas v Village of Michiana, 433 Mich 380, 397 n 25; 446 NW2d 102 (1989). Thus, the City's Zoning Ordinance must be read as a whole and its provisions harmonized**. Bush v Shabahang, 484 Mich 156, 166-167; 772 NW2d 272 (2009)." (**Appellees' Appendix Exhibit 8** -- **Kalkman** v. **City of Douglas**, Unpublished Opinion Per Curiam of the Court of Appeals Decided [September 20, 2012] (Docket No. 306051), Intervenors/Appellees' Appendix Pg. 48) (Emphasis Added)

Here, when "harmonized" and read as a whole, these two ordinance sections show that the Review Committee only has the power to recommend and the City Council has the power to issue and approve of licenses.

f. The Three Members of The Review Committee That Were Also Members of City Council Did Not Control City Council's Vote as They Constituted Only 3 of 7 Votes.

Next, the Plaintiffs attempt to bootstrap their assertion that the City Council delegated its authority to the Review Committee by pointing out that three (3) City Council members were appointed to the Review Committee and suggesting they controlled the vote on the issuance of the licenses. This argument has no merit.

The three members of the City Council who sat on the Review Committee did not control the City Council vote on the issuance of licenses. In fact, just the opposite is true. These three members of the Review Committee constituted only a minority of City Council. Put differently, the majority of City Council members (4 out of 7) were not members of the Review Committee. Further, each member of City Council could accept or reject the Review Committee's recommendations and vote for any applicant of their choosing.[1]

The Record is clear each member of City Council had access to all 65 applications along with recordings of all 65 applicant interviews, which were held in City Council offices. (**Appellees' Appendix Exhibit 10**, Affidavit of Review Committee Member Cecil St. Pierre, ¶6-7, Intervenors/Appellees' Appendix Pg. 69) (**Appellees' Appendix Exhibit 11**, Affidavit of Review Committee Member Ethan Vinson, ¶19, Intervenors/Appellees' Appendix Pg. 80).[2] Finally, the Record indicates there were no votes or deliberations by the Review Committee because each member scored each application separately and/or privately. (**Appellees' Appendix Exhibit 10**, Affidavit of Review Committee Member Cecil St. Pierre, ¶10, Intervenors/Appellees' Appendix Pg. 70) (**Appellees' Appendix Exhibit 11**, Affidavit of Review Committee Member Ethan Vinson, ¶15, Intervenors/Appellees' Appendix Pg. 79)

In an attempt to muddy the waters, Plaintiffs make contradictory assertions. First, the Plaintiffs assert that the Review Committee was an elaborate ruse controlled by the three members who also sat on the City Council which resulted in a monolithic decision on 15 preferred applicants. Then, when discussing the purported subjective nature of some of the review criteria

---

[1] This point is underscored by the votes of one councilmember who voted not for the 15 recommended applications, but for an entirely separate slate of 15 other applicants. (**Appellees' Appendix Exhibit 9**, Transcript of October 8, 2019 City Council Meeting, pg. 18, Intervenors/Appellees' Appendix Pg. 61).

[2] This point is underscored by the statement of one councilmember who was not a member of the Review Committee who admitted that she had access to the interview recordings. (**Appellees' Appendix Exhibit 9,** Transcript of October 8, 2019 City Council Meeting, pg. 12, Intervenors/Appellees' Appendix Pg. 59).

set forth in the Marijuana Ordinance, the Plaintiffs point out that various Review Committee members gave a wide range of scores on even the most objective of criteria. (See: Plaintiff's Supplemental Brief at Page 10) However, this latter position only serves to establish that the actions of the Review Committee were not controlled by the members who also sat on City Council. Rather, each member of the Review Committee acted independently, without collective deliberation. The Plaintiffs stumble on their own arguments.

g. The Plaintiffs' Focus On Posted Notices Is Misplaced

Within their Supplemental Brief at page 9, the Plaintiffs mistakenly steer attention to certain posted notices regarding Review Committee meetings. MCL 15.262(a) does not reference or require an examination of any committee notices. Instead, MCL 15.262(a) requires an examination into whether an entity is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental authority. The manner in which the meeting notices are posted is not relevant to the issues now before this Michigan Supreme Court and Plaintiffs' diversion tactic is again transparent. The Record is clear that the Review Committee was advised by the city attorney that the meetings were not subject to the OMA. The determination of whether the Review Committee is public body should not be dependent on the incorrect assumptions of clerical staff typing and posting a meeting notice and the Plaintiffs belated interpretation of those notices.

h. This Michigan Supreme Court Did Not Direct Briefing On Whether There Was An OMA Violation.

The Order directing 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 16.262(a) subject to the Open Meetings Act was clear and concise as issued. The Plaintiffs Supplemental Brief, at page 17, argues that the City Council violated the OMA. This set of assertions by the Plaintiff are beyond the scope of the Order and should be stricken.

i. The Measurement of Time the City Council Took to Consider the Recommendations is not Determinative.

The Plaintiffs take a position that the City Council did not allocate enough time for its review of the Recommendation and this alone transforms the Review Committee into a public body. The OMA has no provision that governs how much time is allocated to any agenda item. An entire annual audit may take mere minutes to get a majority vote. An expense report from an

attended seminar may be debated for hours. The OMA has no time requirement that governs the amount of time a Legislative Body must review the recommendations of a committee. This type of subjective analysis should be avoided and the legislature obviously did not see it necessary to include such a provision.

j. The Facts Of Booth Are Distinguishable.

Plaintiffs erroneously seek to equate the facts of the instant case with those presented in **Booth Newspapers v. The University of Michigan Bd of Regents,** 444 Mich. 211; 507 NW2d 422 (1993)**.** However, the **Booth** case stems from an egregious set of facts not akin to the facts here. In **Booth**, the entire Board of Regents appointed itself as a selection committee. *Id.* at 215-216. The members of the selection committee intentionally held sub quorum meetings and telephone conferences in order to evade the OMA. *Id*. The selection committee made a series of cuts and presented only one candidate for consideration by the Board of Regents. *Id.* at 216-217 In contrast, the majority of City Council members in this case were not members of the Review Committee; there were no secret or sub quorum meetings taken with intent to evade the OMA.[3] All 65 applicants were ultimately presented for consideration. The City Council members were free to vote for the recommended applicants or any of the other 65 applicants. In fact, one City Council member voted for an entirely different slate of 15 applicants. (**Appellees' Appendix Exhibit 9**, Transcript of October 8, 2019 City Council Meeting, pg. 18, Intervenors/Appellees' Appendix Pg. 18).

IV. CONCLUSIONS AND RELIEF REQUESTED

This case involves the interpretation of one (1) ordinance and whether that ordinance empowered a committee with the authority to make ultimate decisions. The impact of this case on the State is limited and the Application for Leave should be denied accordingly.

Local legislative bodies throughout Michigan, including cities, townships and villages, routinely use committees to research and compile recommendations on a variety of issues for presentation back to the legislative body for review and possible action. All of these committees are prohibited from making final decisions that bind the local government. The Plaintiffs seek to erode this process by injecting a subjective set of reviews on the role of such committees and by examining such factors as "how long" the legislative body examines a recommendation before

[3] Indeed, Plaintiffs have trumpeted the fact that notices of the Review Committee meetings were actually published.

acting on it, how the meeting is posted and who sits on the committee. The Plaintiffs are forced to pivot from the statutory rules of construction to the presentation of viewpoints not set forth in the law or in any plain reading of the law. The Plaintiffs' tactics should be rejected.

WHEREFORE, the Intervenors/Appellees, LE Battle Creek Inc. BDECo I, Inc., DNVK 4, LLC, Warren Capital Holdings, LLC, Level Up Garden, LLC, 8th Street Wellness PC, LLC, Livwell Michigan, LLC, Sozo Health, Inc., Frazho Provisioning, LLC, MDMS Group, LLC, Weisberger Ventures II, LLC, Vendco Michigan, Inc., West Fort Holdings, LLC, 989 Ventures, LLC, and AE&K, LLC respectfully request that this Honorable Michigan Supreme Court enter an Order:

(I) Denying the Appellants' Application for Leave to Appeal to this Michigan Supreme Court; and

(II) Granting such further relief in favor of the Intervenors/Appellees as this Honorable Michigan Supreme Court deems just, equitable and appropriate under the circumstances presented.

BY: **/s/ Robert Charles Davis**

Dated: January 22, 2024

Robert Charles Davis (P40155)
Attorney for Intervenor/Appellee Sozo Health, Inc.
10 S. Main St., Ste. 401
Mt. Clemens, MI 48043
(586) 469-4300
rdavis@dbsattorneys.com

BY: **/s/ Thomas R. Waelchli**

Dated: January 22, 2024

Thomas R. Waelchli (P40468)
Attorney for Intervenor/Appellee
Livwell Michigan, LLC

BY: **/s/ Anthony J. Bologna**

Dated: January 22, 2024

Anthony J. Bologna (P72698)
Attorney for Intervenor/Appellee
BDECo I, Inc.

BY: **/s/ Anthony J. Bologna**

Dated: January 22, 2024

Anthony J. Bologna (P72698)
Attorney for Intervenor/Appellee
DNVK 4, LLC

BY: **/s/ Anthony J. Bologna**

Dated: January 22, 2024

Anthony J. Bologna (P72698)
Attorney for Intervenor/Appellee
Warren Capital Holdings, LLC

BY: **/s/ David R. Draper**

Dated: January 22, 2024

David R. Draper (P43750)
Attorney for Intervenor/Appellee
Level Up Garden, LLC

BY: **/s/ David R. Draper**

Dated: January 22, 2024

David R. Draper (P43750)
Attorney for Intervenor/Appellee
8th Street Wellness PC, LLC

BY: **/s/ David S. Senawi**

Dated: January 22, 2024

David Senawi (P71000)
Attorney for Intervenor/Appellee
Frazho Provisioning, LLC

BY: **/s/ Edward G. Lennon**

Dated: January 22, 2024

Edward G. Lennon (P42278)
Attorney for Intervenor/Appellee
MDMS Group, LLC

BY: **/s/ Aaron D. Geyer**

Dated: January 22, 2024

Aaron D. Geyer (P39889)
Christopher P. Aiello (P48091)
Attorney for Intervenor/Appellee
Weisberger Ventures II, LLC

BY: **/s/ Aaron D. Geyer**

Dated: January 22, 2024

Aaron D. Geyer (P39889)
Christopher P. Aiello (P48091)
Attorney for Intervenor/Appellee
Vendco Michigan, Inc.

BY: **/s/ Aaron D. Geyer**

Dated: January 22, 2024

Aaron D. Geyer (P39889)
Christopher P. Aiello (P48091)
Attorney for Intervenor/Appellee
LE Battle Creek, Inc.

BY: **/s/ Matthew Smith**

Dated: January 22, 2024

Matthew Smith (P72969)
Attorney for Intervenor/Appellee
West Fort Holdings, LLC

BY: **/s/ Jacqueline Langwith**

Dated: January 22, 2024

Jacqueline Langwith (P79600)
Attorney for Intervenor/Appellee
989 Ventures, LLC

BY: **/s/ Reese Serra**

Dated: January 22, 2024

Reese Serra (P74482)
Attorney for Intervenor/Appellee
AE&K, LLC

CERTIFICATION OF WORD COUNT

This brief uses a 12-point Times New Roman font and based on the word count as indicated in Microsoft Word, this brief contains 6,630 words.

BY: **/s/ Robert Charles Davis**

Dated: January 22, 2024

Robert Charles Davis (P40155)
Attorney for Intervenor/Appellee Sozo Health, Inc.
10 S. Main St., Ste. 401
Mt. Clemens, MI 48043
(586) 469-4300
rdavis@dbsattorneys.com

PROOF OF SERVICE

I served the **Intervenors/Appellees, LE Battle Creek Inc. BDECo I, Inc., DNVK 4, LLC, Warren Capital Holdings, LLC, Level Up Garden, LLC, 8th Street Wellness PC, LLC, Livwell Michigan, LLC, Sozo Health, Inc., Frazho Provisioning, LLC, MDMS Group, LLC, Weisberger Ventures II, LLC, Vendco Michigan, Inc., West Fort Holdings, LLC, 989 Ventures, LLC, and AE&K, LLC's Supplemental Brief** upon the attorneys of record and/or parties in this case on **January 22, 2024**. **I declare the foregoing statement to be true to the best of my information, knowledge and belief.**

☐ **U.S. Mail**	☐ Fax
☐ Hand Delivered	☐ Messenger
☐ Express Mail Private	**X Other: E-file**

/s/ William N. Listman
William N. Listman