STATE OF MICHIGAN
IN THE 41st CIRCUIT COURT FOR THE COUNTY OF MENOMINEE

NU GROUP, LLC, a Michigan limited liability company,

Plaintiff,

vs.

CITY OF MENOMINEE, a Michigan municipal corporation,

Defendant.

and

FIRST PROPERTY HOLDINGS, LLC, a Michigan limited liability company, and THE FIRE STATION, LLC, a Michigan limited liability company,

Intervening Defendants.

Case No. 21-17045-CZ

Hon. Mary B. Barglind

ATTITUDE WELLNESS, LLC, a Michigan limited liability company,

Plaintiff,

vs.

CITY OF MENOMINEE, a Michigan municipal corporation,

Defendant,

and

FIRST PROPERTY HOLDINGS, LLC, a Michigan limited liability company, and THE FIRE STATION, LLC, a Michigan limited liability company,

Intervening Defendants.

Case No. 21-17036-CZ

Hon. Mary B. Barglind

HIGHWIRE FARMS, LLC, a Michigan limited liability company,

Plaintiff,

Case No. 21-17053-CZ

Hon. Mary B. Barglind

---

vs.

CITY OF MENOMINEE, a Michigan municipal corporation; MENOMINEE CITY COUNCIL, a public body; JUDICIAL & LEGISLATIVE/ PERSONNEL & LABOR COMMITTEE, a public body; MARIHUANA RUBRIC SCORING COMMITTEE, a public body; FORMER CITY MANAGER TONY GRAFF; ACTING CITY MANAGER BRETT BOTBYL, FORMER CITY ENGINEER & PUBLIC WORKS DIRECTOR TRICIA ALWIN; FORMER ZONING ADMINISTRATOR DERRICK SCHULTZ; CITY CLERK, KATHY BROFKA; FIRE CHIEF, MARK PETERSON, and CITY ATTY. /LEGAL OFFICER MIKE CELELLO,

Defendants.

and

FIRST PROPERTY HOLDINGS, LLC, a Michigan limited liability company, and THE FIRE STATION, LLC, a Michigan limited liability company,

Intervening Defendants.

O.I. HOLDINGS, LLC a Michigan Limited Liability Company and HIGHER LOVE CORPORATION, INC., a Michigan Corporation,

Plaintiffs,

vs.

Case No. 21-17083-CZ

Hon. Mary B. Barglind

CITY OF MENOMINEE, JEAN STEGEMAN, HEATHER NELSON, JACQUELINE NUTTER, STEVE FIFAREK, WILLIAM PLEMEL, JOSH JONES, DENNIS KLITZKE, FRANK POHLMANN, DOUG ROBINSON, BRETT BOTBYL, TRICIA ALWIN, MARK PETERSON,

Defendants,

---

and

FIRST PROPERTY HOLDINGS, LLC, a Michigan limited liability company, and THE FIRE STATION, LLC, a Michigan limited liability company,

Intervening Defendants.

ROCKY NORTH, L.L.C. d/b/a GREEN PHARM U.P., a Michigan limited liability company,

Plaintiffs,

vs.

CITY OF MENOMINEE, a Michigan Municipal Corporation,

Defendant.

Case No. 21-170109-CZ

Hon. Mary B. Barglind

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PLAINTIFF O.I. HOLDINGS AND HIGHER LOVE CORP. INC'S MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL AND BRIEF IN SUPPORT

Plaintiffs O.I. Holdings LLC and Higher Love Corporation, Inc ("OI"), move the Court to stay the trial court proceedings pursuant to MCR 2.119 and MCR 7.209(E) pending the Court of Appeals' ruling on OI's application for leave to appeal, which OI filed on October 20, 2022. (**Exhibit 1**).

The Court is currently considering several dispositive motions filed by the defendants under MCR 2.116(C)(10), as well as motions filed by several of the plaintiffs seeking leave to amend their pleadings or to compel discovery. But any ruling on those motions would be premature and potentially unnecessary if the Court of Appeals grants OI's application for leave to appeal and reviews the Court's rulings with respect to the defendants' motions under MCR 2.116(C)(8). In fact, if the Court of Appeals reverses this Court's ruling with respect to either OI's equal protection claim or its Open Meetings Act claim, then any adjudication of the defendants' (C)(10) motions would likely be rendered moot or need to be redone from scratch.

To avoid unnecessary waste of this Court's resources in adjudicating motions that may be mooted if the Court of Appeals grants OI's application for leave to appeal, this Court should stay the proceedings in the trial court pending resolution of OI's application for leave to appeal.

Argument

MCR 2.614(D) provides that a motion for stay pending appeal is governed by MCR 7.108, 7.209, and 7.305(I). As applicable here, MCR 7.209(E)(2)(b) provides that the trial court may grant a stay "as justice requires . . ." *Id.* It is appropriate to stay the proceedings in the trial court in this case.

First, this Court is currently weighing numerous motions filed by the defendants under MCR 2.116(C)(10), as well as motions filed by several of the plaintiffs to amend their pleadings or compel discovery. If the Court of Appeals grants leave and reverses this Court's ruling on OI's Open Meetings Act claim on the merits, then the City's licensing process would be fatally defective, and there would be no need for this Court to reach any of the other claims asserted in this litigation. Likewise, if the Court of Appeals reverses this Court's ruling on OI's equal protection claim, then OI would be entitled to litigate that claim through discovery, and its resolution may well obviate any need for the Court to decide any of the other claims asserted in the case. Staying the proceedings in this Court pending resolution of the appeal would eliminate the potential that the Court may needlessly adjudicate the parties' pending motions, only to have the Court of Appeals grant leave to appeal and potentially render the Court's significant efforts a waste.

Second, this Court has already stayed the issuance of any commercial marijuana facility license in the City while the case is pending. Because the City is already stayed from issuing the licenses during the interim of this case, a stay during the pendency of the appeal would simply maintain the status quo. After the appeal has been decided, the parties can—if the appeal is successful—conclude discovery and motion practice with respect to any claims that are resuscitated on appeal.

Conclusion

The Court should stay the proceedings in the trial court pending resolution of OI's application for leave to appeal.

Respectfully Submitted,

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Dated: October 20, 2022

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EXHIBIT 1

STATE OF MICHIGAN

IN THE COURT OF APPEALS

ATTITUDE WELLNESS, LLC,

Plaintiff,

vs.

CITY OF MENOMINEE,

Defendant,

and

FIRST PROPERTY HOLDINGS, LLC, and THE FIRE STATION, LLC,

Intervening Defendants.

CoA No. _____

Menominee County Circuit Court
Case No. 21-17036-CZ

Hon. Mary B. Barglind

Plaintiffs-Appellants O.I. Holdings LLC's and Higher Love Corporation, Inc.'s Application for Leave to Appeal

**** Oral Argument Requested ****

NU GROUP, LLC,

Plaintiff,

vs.

CITY OF MENOMINEE,

Defendant.

and

FIRST PROPERTY HOLDINGS, LLC, and THE FIRE STATION, LLC,

Intervening Defendants.

Menominee County Circuit Court
Case No. 21-17045-CZ

Hon. Mary B. Barglind

HIGHWIRE FARMS, LLC,

Plaintiff,

vs.

CITY OF MENOMINEE, MENOMINEE CITY COUNCIL, JUDICIAL & LEGISLATIVE/ PERSONNEL & LABOR COMMITTEE, MARIHUANA RUBRIC SCORING COMMITTEE, FORMER CITY MANAGER TONY GRAFF, ACTING CITY MANAGER BRETT BOTBYL, FORMER CITY ENGINEER & PUBLIC WORKS DIRECTOR TRICIA ALWIN, FORMER ZONING ADMINISTRATOR DERRICK SCHULTZ,

Menominee County Circuit Court
Case No. 21-17053-CZ

Hon. Mary B. Barglind

CITY CLERK, KATHY BROFKA, FIRE CHIEF, MARK PETERSON, and CITY ATTORNEY/LEGAL OFFICER MIKE CELELLO,

Defendants.

and

FIRST PROPERTY HOLDINGS, LLC, and THE FIRE STATION, LLC,

Intervening Defendants.

O.I. HOLDINGS, LLC, and HIGHER LOVE CORPORATION, INC.,

Plaintiffs,

vs.

Menominee County Circuit Court
Case No. 21-17083-CZ

CITY OF MENOMINEE, JEAN STEGEMAN, HEATHER NELSON, JACQUELINE NUTTER, STEVE FIFAREK, WILLIAM PLEMEL, JOSH JONES, DENNIS KLITZKE, FRANK POHLMANN, DOUG ROBINSON, BRETT BOTBYL, TRICIA ALWIN, MARK PETERSON,

Hon. Mary B. Barglind

Defendants,

and

FIRST PROPERTY HOLDINGS, LLC, and THE FIRE STATION, LLC,

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ROCKY NORTH, L.L.C. d/b/a GREEN PHARM U.P.,

Plaintiffs,

vs.

Menominee County Circuit Court
Case No. 21-170109-CZ

CITY OF MENOMINEE,

Hon. Mary B. Barglind

Defendant.

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Plaintiffs-Appellants O.I. Holdings LLC's and Higher Love Corporation, Inc.'s Application for Leave to Appeal

**** Oral Argument Requested ****

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Introduction and Statement of Reasons for Granting Leave

The trial court made two significant errors when granting the City of Menominee's motions for summary disposition under MCR 2.116(C)(8).

First, the trial court dismissed the equal protection claim asserted by OI Holdings LLC and Higher Love Corporation, Inc. (collectively, "OI Holdings"), ruling that, "in order to establish an equal protection claim, a plaintiff must first demonstrate that a property or liberty interest has been taken away by the defendant's conduct." (App. 420a). That is incorrect. For purposes of the federal equal protection clause, "the [trial] court's identification of a property or liberty interest as a required element in an equal protection claim is erroneous because the text of the Fourteenth Amendment demonstrates that property and liberty interests are irrelevant to equal protection claims." *Thigpen v Bibb County*, 223 F3d 1231, 1236–37 (CA 11, 2000), *abrogated on other grounds as recognized by Bumpus v Watts*, 448 F App'x 3, 5 (CA 11, 2011) (attached at App. 476a). The equal protection clause is violated as long as there is irrational or invidious disparate treatment; there is no need for the plaintiff to allege or prove a deprivation of a liberty or property interest. See *Village of Willowbrook v Olech*, 528 US 562, 564 (2000). And "Michigan's equal protection provision [is] coextensive with the Equal Protection Clause of the federal constitution." *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000). The trial court improperly dismissed OI Holdings' equal protection claim for failing to allege an element that is not actually required.

Second, the trial court dismissed—again, under MCR 2.116(C)(8)—OI Holdings' claim under the Open Meetings Act, MCL § 15.261, reasoning that a certain subcommittee established by the City Council to review marijuana license applications (the "Selection Committee") was not a "public body" within the meaning of the Act. But the City Council is itself a "public body" under the Act, and this Court has recognized that "an advisory committee to a

public body *that is created by that public body* may itself constitute a derivative public body" that is required to comply with the Open Meetings Act. *Davis v City of Detroit Fin Rev Team*, 296 Mich App 568, 610; 821 NW2d 896 (2012). The City's Selection Committee is precisely that: an advisory committee to whom a public body delegated authority to recommend a narrowed list of candidates for licenses. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 216–17; 507 NW2d 422 (1993) (committee created to recommend narrowed list of candidates for university president); *Morrison v City of East Lansing*, 255 Mich App 505, 507; 660 NW2d 395 (2003) (advisory committee created to recommend contractors for municipal project), abrogated on other grounds as noted in *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 143 n.52; 860 NW2d 51 (2014). The trial court's ruling allows municipalities to avoid the Open Meetings Act by outsourcing their deliberations to advisory subcommittees and holding only the final, preordained vote in a public meeting. The Act was adopted precisely to prevent that result. See *Booth*, 444 Mich at 222.

Interlocutory review of these errors is appropriate. First, OI Holdings' lawsuit against the City was consolidated with four other lawsuits in the trial court, all of which present the same issues. It would be very inefficient to require the parties in all five lawsuits to litigate the remainder of their cases through to a final judgment, only to assert appeals that—if the trial court is reversed—will require the parties to begin again from the beginning on their equal protection and Open Meetings Act claims. It is far more efficient to correct the trial court's erroneous rulings now and permit the parties to litigate through the trial court as one package.

This is particularly true because the trial court has stayed the issuance of any commercial marijuana facility license in the City while the case is pending. (App. 416a). If OI Holdings cannot appeal until after the trial court enters final orders and the stay is lifted, then a

successful appeal may require the City to unwind licenses that were already issued. Granting leave to pursue an interlocutory appeal would therefore substantially further the parties' interest in finality with respect to the City's licensing decisions, because it would avoid the possibility that an appeal of the trial court's equal-protection and Open Meetings Act analysis would upend a final order under which marijuana licenses had been granted and relied upon by the parties. Moreover, there is no harm in staying the trial court proceedings during an interlocutory appeal, because the City is already stayed from issuing the licenses in the interim, anyway. A stay during the pendency of the appeal would simply maintain the status quo.

Finally, the proceedings in the trial court can easily be stayed while this Court considers the appeal. The City has already been temporarily restrained from issuing the licenses pending resolution in the trial court, and after the appeal has been decided, the parties can—if the appeal is successful—conclude discovery and motion practice with respect to any claims that are resuscitated on appeal.

OI Holdings respectfully requests that this Court grant leave to appeal.

Orders Appealed From and Relief Sought

Appellants O.I. Holdings LLC and Higher Love Corporation, Inc. (collectively, "OI Holdings") seek leave to appeal the circuit court's orders dated August 9, 2022, granting the City of Menominee's motions for summary disposition under MCR 2.116(C)(8), as well as the circuit court's order dated October 19, 2022, denying OI Holdings' motion for reconsideration. (App. 417a-421a, 422a-428a, 442a-445a). If granted leave to appeal, appellants request that this Court reverse the circuit court's orders.

Jurisdictional Statement

If this Court grants leave to appeal, it will have jurisdiction pursuant to MCR 7.203(B)(1). *See* MCR 7.205(E)(3).

Questions Presented

I. Under the federal equal protection clause, a plaintiff's equal protection rights are violated as long as there is invidious or irrational disparate treatment, regardless of whether the plaintiff is deprived of a liberty or property interest. Michigan's equal protection clause is coextensive with the federal equal protection clause.

Did the trial court err in holding that an equal protection claim fails as a matter of law unless the plaintiff alleges a deprivation of a liberty or property interest?

Plaintiff/Appellant OI Holdings answers: Yes.

Defendant/Appellee City of Menominee answers: No.

The circuit court answered: No.

II. The Open Meetings Act applies to subcommittees that are created by public bodies to narrow candidates from a larger pool, even where the subcommittee is merely advisory and provides recommendations to the public body rather than making the final decision itself.

Did the trial court err in holding that OI Holdings' Open Meetings Act claim fails as a matter of law, where OI Holdings alleged that the City's Selection Committee was created by the City Council to narrow marijuana-license applicants?

Plaintiff/Appellant OI Holdings answers: Yes.

Defendant/Appellee City of Menominee answers: No.

The circuit court answered: No.

Statement of Facts

The trial court's orders granted the City's motions for summary disposition under MCR 2.116(C)(8). The following facts are therefore taken from OI Holdings' complaint.

A. The City of Menominee establishes a process to winnow marijuana-license applicants under MRTMA.

The Michigan Regulation and Taxation of Marihuana Act ("MRTMA") generally provides that the possession and distribution of certain quantities of marijuana[1] is permissible under Michigan state law. MCL § 333.27955(1). MRTMA allows municipalities to either prohibit or limit the number of marijuana establishments within its boundaries. MCL § 333.27956(1). But if a municipality limits the number of marijuana establishments within its boundaries such that there are more applicants for a marijuana establishment license than there are licenses, then 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).

In October 2020, the City of Menominee adopted a Marihuana Establishments ordinance. (App. 31a-43a). Among other things, the ordinance purports to establish a "competitive process" to determine which applicants would be given the two available marijuana establishment licenses within City limits. (App. 35a).

First, all applications are forwarded to the Selection Committee for review and scoring. (App. 36a). The Selection Committee is comprised of three administrative officers of the City who are appointed to the committee by the City Manager, subject to the City Council's approval. (App. 33a). To score the applications, the Selection Committee uses rubrics that test,

[1] Consistent with this Court's convention, this brief uses the more common spelling "marijuana" rather than "marihuana" except where citing an ordinance or statute. See *People v Carruthers*, 301 Mich App 590 n1, 594; 837 NW2d 16 (2013).

among other factors, the economic benefits to the City of the applicants' respective proposals, such as job creation and the prospect of new construction or renovation of existing structures within the City. (App. 29a-30a). A notice at the top of the scoring rubric states, in relevant part, "The decision of the Selection Committee with respect to scoring shall be final and not subject to appeal or review. The City Council reserves the right to grant or deny licenses regardless of scoring rank." (App. 29a).

The ordinance provides that, after the applications were scored by the Selection Committee, "the results of the individual scores" would be forwarded to the City Council Subcommittee on Judicial & Legislative / Personnel & Labor (the "JLPL Subcommittee"), along with "a recommendation for the issuance of each marihuana establishment license." (App. 37a). The JLPL Subcommittee, in turn "shall make a recommendation for approval, denial, or approval with conditions, to the City Council." (App. 37a). The City Council "shall have the discretion to either approve or deny each individual license application" at the next regularly scheduled council meeting. (App. 37a).

B. The City fails to appropriately and equally implement its flawed process.

The process implemented by the City does not comply with MRTMA, not least because it is not designed to winnow license applicants to those who are "best suited to operate in compliance with [MRTMA] within the municipality." MCL § 333.27959(4). Instead, the application process is designed to implement other goals, including the City's interest in maximizing its own economic benefit. But even setting aside that flaw in the process, the City failed to appropriately and equally implement its chosen process.

As indicated in OI Holdings' complaint, 26 applicants applied for a license in the City under the ordinance. (App. 3a, 8a). OI Holdings was one of those applicants. (App. 6a).

Under the City's scoring process, the Selection Committee would review each application and award a score for each of the 34 different criteria under the scoring rubric. (App. 4a). An applicant could be awarded a set number of points for each criterion, for a total of 50 possible points. (App. 4a).

On May 17, 2021, the Selection Committee issued a memo to the JLPL Subcommittee containing the Selection Committee's scores of each of the applications. (App. 4a). On June 3, 2021, the City Manager issued a memo stating that the Selection Committee would hold a public meeting to discuss the scores. (App. 4a). That public meeting was not held until August 24, 2021. (App. 5a).

At the August 24 meeting, the Selection Committee announced that they were "scoring the applications." (App. 5a). Nevertheless, there was no independent analysis performed at the August 24 meeting; in fact, every member of the Selection Committee reached identical scores on August 24 that they had reached on May 17—for every score on every element for all 26 applicants. (App. 5a). At the August 24 meeting, moreover, there was very little or no discussion regarding the rationale for the scores. (App. 8a). Even where the committee members "discussed" a score, they did so tautologically, stating something like, "The applicant lost points for not renovating a new building because the applicant is not renovating a new building." (App. 5a).

Because it is so improbable that identical scores would occur by coincidence, the scores at which the Selection Committee arrived on August 24 appear to be the result of a prior, non-public agreement among the Selection Committee members. (App. 8a). In other words, the only plausible explanation for the Selection Committee to have landed—without substantive discussion—upon exactly the same scores that they had previously reached is that the committee held an impermissible, closed meeting at some point before August 24. (App. 8a).

Moreover, the Selection Committee did not apply the process equally to all applicants. OI Holdings submitted applications that met all criteria and should have been awarded all 50 of the possible points. (App. 6a). But the Selection Committee declined to award OI Holdings two points for "Experience in Highly Regulated Industry" even though OI Holdings' owner was formerly a manager in a hospital rehabilitation clinic because, according to the committee, "hospitals are not highly regulated." (App. 6a). The Selection Committee also assigned OI Holdings 0 out of 3 possible points for the criterion "Applicant proposes to use currently existing building or structure" and the criterion "Applicant commits to physical improvements to exterior of currently existing building and property (landscaping, etc.)." (App. 9a). But the Selection Committee's scoring ignored OI Holdings' proposal to completely renovate a building currently existing at 3120 Tenth Street in Menominee, including the façade and landscaping, at a total cost of approximately $1 million. (App. 9a). The Selection Committee had no rational basis to ignore the terms of OI Holdings' proposal, which unequivocally satisfied the criteria in the City's scoring rubric.

Even while the Selection Committee refused to treat OI Holdings in the same manner as other applicants who proposed to use currently existing buildings, the City also allowed a rival applicant to claim a "clerical error" after it submitted an application that did not propose a minimum wage that met the standard of the scoring rubric. (App. 6a). Instead of deducting points, the City permitted that applicant to propose a new minimum wage and ultimately scored the applicant as receiving full points for that criterion. (App. 6a). And the City allowed a different applicant to rely on a representation from a previous City Manager rather than upon the actual text of the scoring criteria, giving that applicant points for criteria that the applicant did not actually meet. (App. 9a).

C. OI Holdings files a complaint, alleging in relevant part an equal protection claim and an Open Meetings Act claim, and the City files motions for summary disposition under MCR 2.116(C)(8).

After the City denied OI Holdings' application for a license under the City's marijuana establishment ordinance, OI Holdings filed a complaint asserting five counts: (1) a claim under the Open Meetings Act, MCL § 15.261; (2) an equal protection claim under both the federal and Michigan constitutions; (3) a claim alleging that the City's process and its application of that process violated MRTMA; (4) a claim for declaratory relief; and (5) a claim for injunctive relief. (App. 7a-14a). Several other similarly situated applicants also filed lawsuits against the City with respect to the scoring process, and the cases were consolidated for decision.

On May 4, 2022, the City filed two amended motions for summary disposition under MCR 2.116(C)(8). The first of the City's motions argued that OI Holdings' equal protection claim should be dismissed for failure to state a claim. (App. 52a). The second motion argued that OI Holdings' Open Meetings Act claim should be dismissed for failure to state a claim. (App. 74a).

D. The trial court grants the City's motions and dismisses OI Holdings' equal protection and Open Meetings Act claims.

After a hearing on the City's (C)(8) motions, the trial court entered orders granting both of the City's motions. (App. 417a, 422a).

The trial court dismissed OI Holdings' equal protection claim solely on the basis of the following statement: "[I]n order to establish an equal protection claim, a plaintiff must first demonstrate that a property or liberty interest has been taken away by the defendant's conduct." (App. 420a). Because OI Holdings—as a license applicant—did not allege that it lost a property or liberty interest due to the City's conduct, the trial court held that OI Holdings failed to sufficiently allege an equal protection claim. (App. 420a).

With respect to OI Holdings' Open Meetings Act claim, the trial court reasoned that—based upon the pleadings[2] alone—OI Holdings' claim failed as a matter of law. (App. 427a-428a). According to the trial court, the Selection Committee was not required to comply with the Open Meetings Act because the Selection Committee could only make recommendations to the JLPL Committee and the City Council and did not itself have any power to act on its recommendations. (App. 427a). The trial court also rejected OI Holdings' argument that the Selection Committee was subject to the Open Meetings Act when the committee narrowed the applicants on behalf of the City Council, ruling that, "[f]rom the minutes of [the Council] meeting, it does not appear to have been a rubberstamped decision." (App. 428a). Those minutes were not attached to OI Holdings' complaint, nor was it proper for the trial court to make a finding of fact when ruling on a (C)(8) motion.

E. The trial court denies OI Holdings' motion for reconsideration, and OI Holdings files this application for leave.

OI Holdings timely filed a motion for reconsideration of both of the trial court's orders. (App. 429a). The trial court, however, denied the motion on October 19, 2020. (App. 442a-445a).

OI Holdings timely files this application for leave to appeal.

Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The trial court's interpretation of statutes and ordinances is also reviewed de novo. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

[2] The trial court's opinion also referenced facts that were alleged in some of the consolidated cases and did not constrain itself to the allegations contained in OI Holdings' complaint.

Argument

I. The trial court erroneously held that OI Holdings was required to allege a deprivation of a property or liberty interest in order to state an equal protection claim.

A. A plaintiff does not need to allege a deprivation of a property or liberty interest in order to state an equal protection claim.

The trial court dismissed OI Holdings' equal protection claim on the sole basis of the following statement in *Rudolph Steiner*:

> The Equal Protection Clause, Const. 1963, art. 1, § 2, provides in pertinent part that "No person shall be denied the equal protection of the laws." However, in order to establish an equal protection claim, a plaintiff must first demonstrate that a property or liberty interest has been taken away by the defendant's conduct. *Bender v City of St Ann*, 816 F Supp 1372, 1376 (ED Mo, 1993), aff'd 36 F3d 57 (CA 8, 1994). See also *Roloff v Sullivan*, 772 F Supp 1083, 1095 (ND Ind, 1991), aff'd 975 F2d 333 (CA 7, 1992).

Rudolph Steiner Sch of Ann Arbor v Ann Arbor Charter Twp, 237 Mich App 721, 740–41; 605 NW2d 18 (1999). The trial court's reliance on this statement in *Rudolph Steiner* was incorrect, for several reasons.

1. *Rudolph Steiner* does not apply to federal equal protection claims.

First, *Rudolph Steiner* is by its terms limited to claims asserted under the Michigan state constitution; it does not apply to claims asserted under the federal constitution. *Id.* OI Holdings' complaint asserted equal protection claims under both the federal and the Michigan state constitution. (App. 8a). At minimum, therefore, the trial court could not dismiss OI Holdings' claim under the federal equal protection clause on the basis of *Rudolph Steiner*.

2. Federal equal protection claims do not require a deprivation of a liberty or property interest.

Second, to the extent that *Rudolph Steiner* could be deemed as opining as to the scope of the federal equal protection clause, it does not control the analysis. State courts are not the final arbiters of federal-law questions. *Arizona v Evans*, 514 US 1, 8 (1995). And federal courts

have repeatedly explained that a federal equal protection claim does not need to allege a deprivation of a property or a liberty interest.

For example, in *Thigpen*, the trial court dismissed the plaintiffs' equal protection claims because the plaintiffs did not allege a deprivation of a property or a liberty interest. The Eleventh Circuit's rejection of that analysis is worth quoting at length:

> We address first the district court's conclusion that Plaintiffs' equal protection claims are incognizable because Plaintiffs had no property or liberty interest in the promotions they were denied. . . .
>
> **The district court's identification of a property or liberty interest as a required element in an equal protection claim is erroneous because the text of the Fourteenth Amendment demonstrates that property and liberty interests are irrelevant to equal protection claims.** Of the three clauses included in the second sentence of the Amendment's first section—the privileges and immunities clause, the due process clause, and the equal protection clause—only the due process clause alludes to "property" and "liberty." See U.S. Const. amend. XIV, § 1; cf. *Board of Regents v. Roth*, 408 U.S. 564, 569–78 (1972) (discussing generally the due process clause's safeguard of property and liberty interests). In contrast, **the applicability of the equal protection clause is not limited to only those instances in which property and liberty interests are implicated.** See U.S. Const. amend. XIV, § 1. **Rather, to properly plead an equal protection claim, a plaintiff need only allege that through state action, similarly situated persons have been treated disparately.** Cf. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

Thigpen, 223 F3d at 1236–37 (emphases added).

Other federal courts have explained the same principle. See, e.g., *EJS Properties, LLC v City of Toledo*, 698 F3d 845, 859 n.10 (CA 6, 2012) ("[*Village of Arlington Heights v Metro Hous Dev Corp*, 429 US 252 (1977)] does not discuss whether the real-estate developer had acquired a property interest, because an equal-protection claim does not require an injury to property."); *John Corp v City of Houston*, 214 F3d 573, 577 n.2 (CA 5, 2000) ("Unlike the Due Process Clause, the Equal Protection Clause does not require that the governmental action work a

deprivation of a constitutionally protected property or liberty interest."); *Johnson v Pfeiffer*, 821 F2d 1120, 1122 (CA 5, 1987) ("Although the fourteenth amendment assures due process only if the state deprives a person of life, liberty , or property, it assures equal protection against all kinds of invidious state action, even those discriminations that do not encroach on liberty or property."); *Minton v St Bernard Par Sch Bd*, 803 F2d 129, 132–33 (CA 5, 1986) ("The constitutional right to equal protection, however, is not predicated upon the existence of a property right. Due process safeguards only against the deprivation of life, liberty, or property, but every person is entitled to equal protection, even with regard to interests that do not constitute life, liberty, or property in the constitutional sense.").

For purposes of the federal equal protection clause, equal protection is violated as long as there is invidious or irrational disparate treatment, regardless of whether there is also a deprivation of a liberty or property interest. See *Village of Willowbrook v Olech*, 528 US 562, 564 (2000) (a plaintiff can establish a "class of one" claim by showing that he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"); *Ctr for Bio-Ethical Reform, Inc v Napolitano*, 648 F3d 365, 379 (CA 6, 2011) ("[T]he threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." (cleaned up)).

3. Michigan equal protection analysis is coextensive with federal equal protection analysis.

Third, the statements in *Rudolph Steiner* are inconsistent with authority from the Michigan Supreme Court. As explained in *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000), "Michigan's equal protection provision [is] coextensive with the Equal Protection Clause of the federal constitution." *Id.* at 258. See also *In re Request for Advisory Opinion Regarding*

Constitutionality of 2005 PA 71, 479 Mich 1, 11; 740 NW2d 444 (2007); *Harvey v State, Dep't of Mgmt & Budget*, 469 Mich 1, 11; 664 NW2d 767 (2003). And, as indicated, under the federal equal protection clause, there is no need to allege a deprivation of a liberty or a property interest. See *Village of Willowbrook*, 528 US at 564; *Thigpen*, 223 F3d at 1236–37. Instead, as *Crego* put it, "[t]he essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Crego*, 463 Mich at 258. See also *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 176; 667 NW2d 93 (2003) ("The essence of an equal protection claim is discrimination based on characteristics not justifying different treatment, and the essence of a substantive due process claim is the arbitrary deprivation of property or liberty interests." (internal citations omitted)).

4. The cases cited by *Rudolph Steiner* do not change the analysis.

The imprecision in the relevant statements found in *Rudolph Steiner* does not change either the controlling federal law or the controlling Michigan law. In fact, it appears that the imprecise statements contained in *Rudolph Steiner* stemmed from only two federal district court cases, *Bender v City of St Ann*, 816 F Supp 1372, 1376 (ED Mo, 1993), and *Roloff v Sullivan*, 772 F Supp 1083, 1095 (ND Ind, 1991). The first of those two cases—*Bender*—cited only to the second, *Roloff*. See *Bender*, 816 F Supp at 1376.

Roloff, in turn, cited four cases as support for its assertion that "[t]o establish a due process or equal protection claim under law, a party must first demonstrate that a property or liberty interest exists which has not been protected by the defendants' conduct." *Roloff*, 772 F Supp at 1095. But each of those four cases involved only a due process claim; none of them involved equal protection claims. See *Kentucky Dep't of Corr v Thompson*, 490 US 454, 460 (1989); *Bd of Regents of State Colleges v Roth*, 408 US 564, 569 (1972); *Woods v Thieret*, 903 F2d 1080, 1082 (CA 7, 1990); *Colon v Schneider*, 899 F2d 660, 666 (CA 7, 1990).

In short, neither of the two district court cases upon which *Rudolph Steiner* relies provides any federal law support for the notion that an equal protection claim must allege a deprivation of a liberty or property interest. And although both *Bender* and *Roloff* were affirmed on appeal, none of the parties in either of the cases raised any equal protection arguments on appeal. See *Bender v City of St Ann*, 36 F3d 57, 59 n.3 (CA 8, 1994); *Roloff v Sullivan*, 975 F2d 333, 334 n.1 (CA 7, 1992). The imprecise statements in *Rudolph Steiner* therefore have no support in federal law, either.

B. OI Holdings sufficiently stated an equal protection claim.

Under the appropriate test, OI Holdings' equal protection claim easily survives MCR 2.116(C)(8). To sufficiently allege an equal protection claim, "a plaintiff must allege either disparate treatment from similarly situated individuals and that the government actors had no rational basis for the difference, or that the challenged government action was motivated by animus or ill-will." *Paterek v Village of Armada*, 801 F3d 630, 650 (CA 6, 2015) (cleaned up). See also *Sheardown v Guastella*, 324 Mich App 251, 260; 920 NW2d 172 (2018).

In its complaint, OI Holdings alleged that it was treated worse than other similarly situated marijuana facility/establishment license applicants, that the City did not equally apply its ordinance and scoring rubric to each similarly situated applicant, and that the City had no rational basis for doing so. (App. 8a-10a). For example, OI Holdings alleged that the City allowed one of the successful applicants to revise its proposal regarding employee wages, alleging clerical error, without awarding the other marijuana license applicants the same ability. (App. 9a). The City also allowed the other successful applicant (the Fire Station LLC) to rely upon a representation by a previous City Manager rather than the language of the actual ordinance, unlike the other similarly situated applicants, who had to demonstrate compliance with the ordinance. (App. 9a). Moreover, the City arbitrarily and capriciously awarded OI Holdings 0 out of 3 points for failing to propose

renovations of an existing building, even though OI Holdings plainly proposed a $1,000,000 renovation of an existing building. (App. 9a-10a).

That is enough to withstand a (C)(8) motion.[3] Determining "whether individuals or entities are similarly situated is generally a question of fact for the jury[.]" *JDC Management LLC v Reich*, 644 F Supp 2d 905, 927 (WD Mich, 2009); see also *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 337; 675 NW2d 271 (2003) (holding that summary disposition on plaintiff's equal protection claim was improper because genuine issues of material fact remained). The trial court's order to the contrary should be reversed.

II. The trial court erred in holding that the application scoring process was not subject to the Open Meetings Act.

A. The trial court erroneously made findings of fact and relied on matters outside the pleadings even though it was ruling on a (C)(8) motion.

As an initial point, the trial court's dismissal of OI Holdings' Open Meetings Act claim improperly relied on matters outside OI Holdings' complaint, even though it was ruling on a motion under MCR 2.116(C)(8). For example, the trial court found that "[f]rom the minutes of [the City Council's] meeting, it does not appear to have been a rubberstamped decision." (App. 428a). This factual finding is inaccurate.[4] But the more relevant point is that the minutes of the Council's meeting were not attached to OI Holdings' complaint.

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[3] Moreover, although a (C)(8) motion does not implicate evidence that is extrinsic to the pleadings themselves, the discovery in which the parties engaged supported additional equal protection violations. For example, after OI Holdings pointed to portions of its application materials that demonstrated its entitlement to all 50 points, the City nevertheless refused to amend OI's score from 42 to 50. But when a different applicant (Attitude Wellness LLC) argued to the City that its electric car charging stations were "related to cannabis," the City rescored Attitude Wellness's application to a perfect 50. Evidently, the City selectively enforced its statement that "[t]he decision of the Selection Committee with respect to scoring shall be final and not subject to appeal or review," (App. 29a), applying it to some applicants, but not to others.

[4] The parties engaged in discovery pending the court's ruling on the (C)(8) motions, and multiple members of the Council testified that they simply voted either up or down on the Selection

Of course, a motion brought under MCR 2.116(C)(8) is decided on the pleadings alone; no other evidence may be considered. MCR 2.116 (G)(5); *Maiden*, 461 Mich at 119. And the court must accept as true all factual allegations contained in the complaint as well as any reasonable inferences that may be drawn from those allegations. *Singerman v Municipal Serv Bureau*, 455 Mich 135, 139; 565 NW2d 383 (1997).

As the trial court's improper reach beyond the pleadings demonstrates, the question of whether the City delegated authority to the Selection Committee (thereby making the committee subject to the Open Meetings Act) is a fact-bound question. That is why, for example, this Court's recent decision in *Pinebrook Warren* arose from a (C)(10) motion, not a (C)(8) motion. *Pinebrook Warren, LLC v City of Warren*, ___ Mich App ___, No. 355989; 2022 WL 3691938, at *3 (2022).

The trial court's order should be reversed for this reason alone, regardless of its reasoning on the merits.

B. The trial court erred in concluding that the City could avoid compliance with the Open Meetings Act by delegating its deliberative work to a sub-subcommittee.

The trial court's order is also wrong on the merits. The Open Meetings Act was specifically designed so that public bodies cannot hide their substantive deliberations from the public by outsourcing them to a subcommittee. But that is precisely what OI Holdings alleged in its complaint. On the basis of those allegations, the trial court's order was incorrect.

Committee's recommendation. One email sent among Council members even stated, "All, just a reminder, the idea was to keep council out of this, unless we found a mistake, something overlooked, or proven corruption affecting the decision of the special. The involvement of Council was supposed to be 'Hands Off Unless ...' That may not be exactly what the ordinance says, but that was what was suppose [sic] to say." None of this evidence, however, was reachable by the trial court in its decision on the City's (C)(8) motion.

1. The Open Meetings Act applies to subcommittees of public bodies.

The Open Meetings Act provides that "[a]ll decisions of a public body must be made at a meeting open to the public." MCL § 15.263(2). For purposes of the Act, a "decision" means "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." MCL § 15.262(b). And a "[p]ublic 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; . . ." MCL § 15.262(a).

The plain language of the statute confirms that the Selection Subcommittee is subject to the Act. After all, there is no doubt that the City Council is a "governing body" under the Act. MCL § 15.262(a). And the Selection Subcommittee is a "subcommittee" of that governing body "that is empowered by . . . ordinance . . . to perform a governmental or proprietary function." MCL § 15.262(a). As this Court has previously recognized, "an advisory committee to a public body *that is created by that public body* may itself constitute a derivative public body" that is required to comply with the Open Meetings Act. *Davis*, 296 Mich App at 610.

This reading of the statutory language is particularly appropriate in light of the reason for which the Open Meetings Act was enacted. As the Michigan Supreme Court has explained, the statutory regime that existed prior to the Act "required only that public entities conduct final votes on certain subjects at meetings open to the public" such that "all other decisions and deliberations by public bodies could lawfully be held in closed sessions." *Booth*, 444 Mich at 221. The problem with this scenario was that, "[s]ince final decisions of a public body [were] the only items that must be made public, nothing in Michigan law prevent[ed] members of any public

body, even including school boards, from discussing a proposal, adjourning to an executive session where members can agree privately on the action to be taken and then reconvene the 'public' meeting for the one or two minutes required to formally vote on their privately-arranged agreement." *Id.* at 222. The Open Meetings Act was enacted specifically to eliminate this problem. *Id.*

In light of this legislative purpose, Michigan courts have recognized the need to "interpret[ ] the statute broadly" in favor of transparency and openness. *Id.* at 223. That broad interpretation directs an outcome opposite to the one that the trial court reached here.

2. Public bodies may not outsource their deliberative work to a subcommittee, such that the decisional process is hidden from the public.

Cases like *Booth*, *Morrison*, and *Davis* illustrate that public bodies—like the City Council—cannot evade the Open Meetings Act by outsourcing their deliberative decisions to subcommittees.

In *Booth*, for example, the board of regents of the University of Michigan (a "public body" for purposes of the Act) directed one of its members to narrow the field of candidates for the vacant position of university president. *Booth*, 444 Mich at 216–17. Notably, however, the board did not delegate full authority to the one-man committee; instead, "any regent could review [the delegated individual's] list of seventy candidates and request the retention of a particular candidate, despite his decision to eliminate the candidate from consideration." *Id.* at 217. See also *id.* (noting that, after the one-man committee rated each candidate, he "discussed the results privately with each regent to insure that the list of thirty would be acceptable to the entire committee").

The *Booth* court rejected the notion that a public body could delegate its responsibility to an advisory subcommittee and thereby avoid the Open Meetings Act. *Id.* at 226–

28. It did not matter that "the process of reducing the candidate list resulted from recommendations" made by the subcommittees, nor did it matter that "the possibility existed that the board might reconsider [the subcommittees'] candidate evaluations and reexamine a previously rejected candidate." *Id.* at 227. Instead, the court found that the subcommittee's scoring and narrowing the pool of candidates was required to be conducted in an open meeting, as required by the Open Meetings Act. As the court explained, it was insufficient that "[t]he only part of the decision-making process that occurred in public was the final step: Dr. Duderstadt's selection from a list of one." *Id.* at 229.

The decision in *Morrison* stands for the same principle. There, the City Council of the City of East Lansing passed a resolution creating "an advisory committee to assist in the selection of architects, designers, and professional service organizations and to advise the council on programmatic needs and other issues to be decided in the planning process" for a particular community center project. *Morrison*, 255 Mich App at 507. Notably, the committee was purely advisory in nature; it could only make recommendations rather than final decisions: "Specifically, the HBC was expected to interview and recommend architects and construction managers; work with the community and the architect to develop a site plan, including parking location, and recommend the plan to the council; determine tenancy guidelines and criteria; and oversee design of the building's interior." *Id.* Consistent with its mandate, the committee "collected proposals from architects, narrowed the pool of candidates, interviewed several, and recommended one architect to the city council; the council then decided, at a public meeting, to hire that architect. Likewise, the [committee] utilized this same process with regard to a construction manager, and the council accepted the [committee's] recommendation at a public meeting." *Id.* at 509.

Despite the fact that the committee was merely advisory, could only issue recommendations, and lacked authority to make final decisions, this Court ruled that it was subject to the Open Meetings Act. *Id.* at 519–20. The Court found "the source of the committee's power" to be instructive. *Id.* at 519. The Court observed that "the city council, not the city manager, by resolution created the [committee] and appointed [committee] members," such that "[t]he city council effectively authorized the [committee] to perform a governmental function." *Id.* at 520.

Davis said the same thing. The central issue there was whether a financial review team that was appointed by the governor was a "governing body" under the Open Meetings Act. *Davis*, 296 Mich App at 593. After finding that the review team was not a "governing body" and that the Act did not apply, the Court emphasized that it could have reached a different result if the review team had been appointed by an entity that was a "governing body" within the meaning of the Act: "[T]he fact that the Governor—who is clearly not a public body—appoints the financial review team, takes this case out of the realm of cases like *Morrison v East Lansing*, in which this Court held that an advisory committee appointed by the city council was a public body subject to the Open Meetings Act." *Id.* at 609. The Court explained that *Morrison* remained good law: "We recognize that, under *Morrison*, an advisory committee to a public body *that is created by that public body* may itself constitute a derivative public body." *Id.* at 610. The only reason that the *Davis* court declined to apply *Morrison* is that, unlike the committee at issue in *Morrison*, the financial review team in *Davis* was "not created *by* a public body to serve in an advisory role to a public body" but was instead appointed by the governor. *Id.* Because the governor-appointed review team was "not created by a public body to serve it in an adjunct advisory role," it was not subject to the Open Meetings Act. *Id.* at 611.

Under *Booth*, *Morrison*, and *Davis*, the Open Meetings Act applies to subcommittees of public bodies even if those subcommittees are merely advisory, as long as the subcommittees are created by public bodies that are themselves subject to the Act. *Davis*, 296 Mich App at 610. This is true even if the committee's recommendations are later followed by a public meeting that formally anoints the committee's recommended outcome. *Booth*, 444 Mich at 229. Any other rule would allow a municipality to evade the Open Meetings Act by simply creating subcommittees (either by ordinance or resolution) and holding all deliberations behind closed doors, only to anoint the preordained result in a formal, open meeting afterwards. The Act was enacted precisely to prevent that possibility from occurring. *Booth*, 444 Mich at 222.

3. The decision in *Pinebrook Warren* does not support the trial court's ruling.

Booth and *Morrison* dictate the outcome here. The City Council created the Selection Committee and gave it a role in the marijuana licensing process by promulgating its Marihuana Establishment Ordinance. (App. 31a). The Selection Committee's role in narrowing the field of applicants and making a recommendation to City Council (through the JLPL Subcommittee) is indistinguishable from the role of the one-man committee in *Booth* and the advisory committee in *Morrison*. In each case, the subcommittee was authorized to make only a recommendation and did not have authority to make any final decision as to public policy. Yet, in each scenario, the subcommittee is subject to the Open Meetings Act.

This court's recent decision in *Pinebrook Warren* does not dictate a contrary result, for several reasons.

First, *Pinebrook Warren* recognized that, if a body "did not have the independent authority to act, but instead had to rely on the delegation of authority from the public body, then that body would also be deemed a public body." *Pinebrook Warren*, 2022 WL 3691938, at *5.

That is what happened here. As alleged in OI Holdings' complaint, the City Council promulgated the Marihuana Establishment ordinance, delegating its authority to narrow license applicants to the Selection Committee and to the JLPL Subcommittee, subject to the City Council's final approval—just like in *Morrison* and in *Booth*.

In *Pinebrook Warren*, by contrast, there was a failure of proof on the issue of delegation: the plaintiff "did not present any evidence that the City Council delegated its own authority to the Review Committee." *Pinebrook Warren*, 2022 WL 3691938, at *5. Instead, it appears that the City of Warren's Review Committee simply collected and scored applicants and then "forwarded all 65 applications together with their scores and recommendations to the City Council." *Pinebrook Warren*, 2022 WL 3691938, at *1. The Warren City Council itself "had to rank the applicants" and "in setting the rank, the City Council had to consider the factors stated under Warren Code, § 19.5-13(4)(b), in addition to factors related to the plan for the provisioning center." *Id.* at *1. Thus, unlike as alleged in OI Holdings' complaint, the plaintiffs in *Pinebrook Warren* failed to identify evidence sufficient to show that the review committee actually narrowed the field of applicants. Here, by contrast, OI Holdings' claim was dismissed at the (C)(8) stage without OI Holdings having the opportunity to prove that the Selection Committee narrowed the field of applicants in the same way that applicants were winnowed in *Booth* and *Morrison*. For purposes of MCR 2.116(C)(8), OI Holdings' complaint was sufficient to allege a claim under the Open Meetings Act, regardless of whether the plaintiffs in *Pinebrook Warren* were ultimately unable to satisfy their burden of proof.

Second, although the *Pinebrook Warren* court stated that "[a] body that can only make recommendations is not a governing body for purposes of the OMA because its authority does not include the power to effectuate or formulate public policy," *Pinebrook Warren*, 2022 WL

3691938, at *7, the court's holding cannot be interpreted as holding that no entity that makes a recommendation is ever subject to the Open Meetings Act. If that was the holding in *Pinebrook Warren*, it would conflict with both *Booth* and *Morrison*, both of which found that the Act applied to advisory subcommittees that merely made recommendations to a public body. It would also conflict with *Davis*, which expressly observed that, "under *Morrison*, an advisory committee to a public body *that is created by that public body* may itself constitute a derivative public body." *Davis*, 296 Mich App at 610. *Pinebrook Warren* cannot be interpreted as overruling prior published authority on that point. See MCR 7.215(J)(1).

Third, the decision in *Pinebrook Warren* does not stand for the proposition that a municipality can simply create a subcommittee by ordinance and thereby insulate the subcommittee from the Open Meetings Act. *Morrison*, for example, ruled that an advisory committee that was created by the City Council by resolution was subject to the Act. *Morrison*, 255 Mich App at 507. There is no relevant difference between creating an advisory committee by resolution and creating an advisory committee by ordinance. Either way, the advisory committee is created by the "public body" that is subject to the Open Meetings Act, such that the advisory committee is likewise subject to the Act. *Davis*, 296 Mich App at 610-11. Again, *Pinebrook Warren* cannot overrule *Morrison* on this point. See MCR 7.215(J)(1).

The common thread running through the controlling decisions is as follows: Where a committee is created by a "governing body" to make determinations in furtherance of its governmental function, that committee is itself subject to the Open Meetings Act, even if the committee does not wield final authority over public policy. See *Booth*, 444 Mich at 216; *Morrison*, 255 Mich App at 519. By contrast, where the committee is created by an entity that is not itself a governing body, the committee is not subject to the Act. See *Davis*, 296 Mich App at

609 (committee created by governor); *Herald County v City of Bay City*, 463 Mich 111, 135; 614 NW2d 873 (2000) (committee created by city manager). As *Herald County* explained, it is the genesis of the committee that makes all of the difference: "[W]ere the city manager himself subject to the OMA, the committee he created might also have been subject to the OMA pursuant to *Booth*. Here, however, because the city manager was not subject to the OMA, *Booth* has no application." *Herald County*, 463 Mich at 135. See also *Davis*, 296 Mich App at 610.

There are good practical reasons for this rule. It would frustrate the design of the Open Meetings Act to allow public bodies to delegate substantive analysis and deliberation to a subcommittee and then hold only the final—largely preordained—vote in public. *Booth*, 444 Mich at 222. That approach would allow municipalities to return to the pre-Open Meetings Act era of government, where only final votes were open to the public and the substantive deliberations—including narrowing of candidates for government contracts and licenses—are hidden from view. That interpretation of the Act has already been rejected by the Michigan Supreme Court. *Booth*, 444 Mich at 222.

Conclusion

This Court should grant appellants' application for leave and reverse the trial court's order.

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