

MUNICIPAL CORPORATIONS

During the survey period, the Nebraska Supreme Court decided a number of cases involving municipal corporations. *State ex rel. Schuler v. Dunbar*¹ is of particular significance because it deals with the construction and interpretation of the Nebraska open meetings law.²

In *Schuler*, the Nebraska Supreme Court addressed the issue of whether a board of county commissioners could validly amend its minutes *nunc pro tunc*,³ after the commencement of suit, to show the taking and recording of a roll call vote as required by the Nebraska open meetings law.⁴ The supreme court held the board's correction *nunc pro tunc* could not be used to satisfy the mandatory statutory directive, and that the open meetings law mandates that action taken in violation of this requirement shall be invalid.⁵

While invalidation may be an appropriate remedy for substantial violations which would defeat the purpose behind the public policy of open government, it is not appropriate in situations where the violations are technical. The *Schuler* decision reveals a need for the legislature to amend the present law to grant to courts discretion to apply appropriate sanctions, including invalidation, depending on the seriousness and nature of the violation.

STATE EX REL. SCHULER v. DUNBAR: THE NEBRASKA OPEN MEETINGS LAW

BACKGROUND

Legislative History

The present Nebraska open meetings law was enacted in 1975.⁶

1. 208 Neb. 69, 302 N.W.2d 674 (1981).

2. See generally NEB. REV. STAT. §§ 84-1408 to -1414 (Reissue 1976), as amended (Cum. Supp. 1980) (Reissue 1976 & Cum. Supp. 1980).

3. "Nunc pro tunc entry is an entry made now of something actually previously done to have effect of former date; office being not to supply omitted action, but to supply omission in record of action really had but omitted through inadvertance or mistake." BLACK'S LAW DICTIONARY 964 (5th ed. 1979).

4. 208 Neb. at 69-70, 302 N.W.2d at 676.

5. *Id.* at 77-79, 302 N.W.2d at 678-79.

6. The legislative history behind the enactment of the present law reveals that it was designed to correct weaknesses in the prior open meetings statute. *Government Committee Hearings on L.B. 325*, 84th Leg., 1st Sess. 2 (1975) (statement by Sen. Gary Anderson) [hereinafter cited as *Government Committee Hearings on L.B. 325*]; See Law of Oct. 23, 1967, ch. 614, 1967 Neb. Laws 2061 (codified as NEB. REV. STAT. §§ 84-1401 to -1405 (Reissue 1971) (Repealed 1975).

One of the goals of the legislation was to provide a clear definition of the terms "public body" and "meeting" in order to establish when the statutory provisions would apply.⁷ Another purpose of the law was to provide strict guidelines for when a public body could take action in closed session.⁸ However, the legislative history reveals little about the intent behind the sanctions of the law. The record does indicate that invalidation was considered the "primary penalty" for action taken in violation of the law.⁹ The use of invalidation, however, was only discussed during committee hearings with reference to action taken by a public body in an unlawful closed session.¹⁰

Open Meetings Law: The Problem of Enforcement

The right of the public to attend and participate in the meetings of governmental bodies was not recognized under the common law.¹¹ Therefore, the right of the public to attend such meetings must be statutory.¹² The trend toward allowing public access to certain meetings of state and local governmental bodies has swept the country, and all fifty states now have some type of open meetings law.¹³

One area which has generated a great deal of commentary and varied legislative response concerns the proper sanctions for violations of open meetings statutes.¹⁴ Many state laws provide a criminal penalty for violations, usually in the form of a fine and/or jail sentence.¹⁵ Some statutes authorize enforcement by the civil ac-

7. *Government Committee Hearings on L.B. 325*, *supra* note 6, at 2.

8. *Id.* at 3.

9. "The penalty for a violation of provisions of an open meeting law are, the primary penalty in my mind at least, is invalidation of the action taken by the board." *Id.* at 3. "The biggest thing in my mind is the fact that an act of a board can be invalidated if there's a violation." *Id.* at 16.

10. *Id.* at 11-12, 16.

11. H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* 179-80 (1953); 4 E. MCQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 13.07a (3d ed. rev. 1979) (hereinafter cited as E. MCQUILLAN).

12. 4 E. MCQUILLAN, *supra* note 3, at § 13.07a.

13. See Comment, *Invalidation as a Remedy for Open Meeting Law Violations*, 55 OR. L. REV. 519, 519 n.2 (1976). The author lists 47 states with open meetings statutes. Since that article was published, the three remaining states have enacted such legislation. They are: MISS. CODE ANN. §§ 25-41-1 to -15 (Supp. 1980); N.Y. [PUB. OFF.] LAW §§ 95 to 117 (McKinney Supp. 1980); R.I. GEN. LAWS §§ 42-46-1 to -10 (1977), as amended, (Supp. 1980).

14. See Wickham, *Let the Sun Shine In! Open Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. L. REV. 480, 487-89 (1973); Note, 49 TEX. L. REV. 764, 772-80 (1971); Comment, *Invalidation as a Remedy for Open Meeting Law Violations*, 55 OR. L. REV. at 525-33.

15. See, e.g., ILL. ANN. STAT. ch. 102, § 44 (Smith-Hurd Supp. 1981); OKLA. STAT.

tions of mandamus or injunction.¹⁶ Others provide that the courts, in their discretion, may void action taken in violation of the law if the court feels it is in the public interest to do so.¹⁷ Still others have chosen to deal with this problem by expressly providing that action taken in violation of the applicable open meetings law shall be invalid.¹⁸

The sanctions of the Nebraska open meetings law are found in section 84-1414 of the Nebraska Revised Statutes. The language of section 84-1414(1)¹⁹ indicates that invalidation by the district court of any formal action of a public body taken in violation of any of the provisions of the open meetings law is mandatory.²⁰ Section 84-1414(3) grants any state citizen the right to bring suit in district court to enforce the law, and apparently offers the plaintiff a choice of remedies.²¹ The language of that section indicates that the plaintiff may choose to seek relief in the form of an injunction,²² or declaratory judgment,²³ or the plaintiff may seek to have an action of a public body declared void.²⁴ In addition, section 84-1414(4) provides a criminal penalty for members of a public body who

ANN. tit. 25, § 314 (West Supp. 1980); TEX. REV. CIV. STAT. ANN. art. 6252-17(4) (1970), as amended, (Vernon Supp. 1980).

16. See, e.g., IOWA CODE ANN. § 28.A.6(3)(e) (West Cum. Supp. 1981); TEX. REV. CIV. STAT. ANN. art. 6252-17(3) (1970), as amended, (Vernon Supp. 1980).

17. See, e.g., DEL. CODE ANN. tit. 29, § 10005 (West 1979); MICH. STAT. ANN. § 4.1800(20) (1977); N.Y. [PUB. OFF.] LAW § 102(1) (McKinney Supp. 1980).

18. See, e.g., ALASKA STAT. § 44.62.310(f) (1980); ARIZ. REV. STAT. ANN. § 38-431.05 (West 1974 & Cum. Supp. 1980), as amended, (Cum. Supp. 1980); OKLA. STAT. ANN. tit. 25, § 313 (West Supp. 1980).

19. NEB. REV. STAT. § 84-1414(1) (Reissue 1976) states:

Any motion, resolution, rule, regulation, ordinance or formal action of a public body made or taken in violation of any of the provisions of sections 79-327, 84-1408 to 84-1413, and 85-104 shall be declared void by the district court. A suit to void any final action shall be commenced within one year of the action. *Id.* (emphasis added).

20. See *Thomas v. Sterhagen*, 178 Neb. 578, 581, 134 N.W.2d 237, 240 (1965) "The language 'shall have' would normally indicate a mandatory interpretation"; 1A SUTHERLAND, STATUTORY CONSTRUCTION § 25.04 (4th ed. 1972) "Unless the context indicates otherwise the use of the word 'shall' . . . indicates a mandatory intent."

21. NEB. REV. STAT. § 84-1414(3) (Reissue 1976) states:

Any citizen of this state may commence suit in the district court of the county in which the public body ordinarily meets or in which the plaintiff resides for the purpose of requiring compliance with or preventing violations of sections 79-327, 84-1408 to 84-1414, and 85-104, for the purpose of declaring an action of a public body void, or for the purpose of determining the applicability of sections 79-327, 84-1408 to 84-1414, and 85-104 to discussions or decisions of the public body.

Id.

22. *Id.* ("for the purpose of requiring compliance with or preventing violations").

23. *Id.* ("for the purpose of determining the applicability of").

24. *Id.* ("for the purpose of declaring an action of a public body void").

knowingly violate the act.²⁵

FACTS AND HOLDING

In *State ex rel. Schuler v. Dunbar*,²⁶ the Nebraska Supreme was asked to invalidate salary increases for various county officials granted by the Board of County Commissioners of Loup County, Nebraska, because of a failure of the original record to show a roll call vote as required by the Nebraska open meetings law.²⁷ On January 3, 1978, the board met and acted to set the salaries for various county officials for 1979.²⁸ The original minutes of this meeting failed to state that a roll call vote had been taken, or that the votes had been recorded.²⁹ The relator, a citizen and taxpayer of Loup County,³⁰ brought suit to have the salary increases declared void on the ground that section 84-1413(2) of the Nebraska Revised Statutes³¹ requires the taking and recording of a roll call vote on such action by a public body in open session.³² On January 15, 1979, some time after suit had been brought, the board attempted to correct the minutes of the January 3, 1978 meeting, *nunc pro tunc*,³³ to show that a roll call vote had been taken which unanimously approved the salary increases.³⁴ The district court found that the board had taken a roll call vote on the salary increases, and that the corrective action of January 15, 1979, had properly recorded the vote in the minutes of the January 3, 1978 meeting.³⁵

On appeal, the supreme court held the provisions of section 84-1413(2)³⁶ could not be satisfied by the board's attempted correction *nunc pro tunc*, and remanded the case for further action in accordance with its decision.³⁷ The court held that under the provisions

25. NEB. REV. STAT. § 84-1414(4) (Reissue 1976 & Cum. Supp. 1980), as amended, (Cum. Supp. 1980) states: "Any member of a public body knowingly violating any provision of sections 79-327, 84-1408 to 84-1414, and 85-104 shall be guilty of a Class V misdemeanor." *Id.* A Class V misdemeanor is punishable by fine, not to exceed 100 dollars. NEB. REV. STAT. § 28-106 (Reissue 1979).

26. 208 Neb. 69, 302 N.W.2d 674 (1981).

27. *Id.* at 69-70, 302 N.W.2d at 676.

28. *Id.* at 70, 302 N.W.2d at 676.

29. *Id.*

30. See note 21 and accompanying text *supra*.

31. NEB. REV. STAT. § 84-1413(2) (Reissue 1976 & Cum. Supp. 1980) as amended, states, in part: "Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted, or if the member was absent or not voting." *Id.*

32. 208 Neb. at 70, 302 N.W.2d at 676.

33. See note 3 *supra*.

34. 208 Neb. at 71, 302 N.W.2d at 676.

35. *Id.* at 70, 302 N.W.2d at 676.

36. See note 31 *supra*.

37. 208 Neb. at 77, 302 N.W.2d at 679.

of section 84-1413(2), not only is a roll call vote required, but the record must also state how each member voted.³⁸ They also noted that section 84-1414(1)³⁹ was clearly intended by the legislature to make compliance with these requirements mandatory.⁴⁰ Since the original minutes of the meeting did not show a roll call vote had been taken or recorded, and one of the commissioners present at that meeting did not testify, asserting his fifth amendment privilege, the court found the relator had "made a prima facie case showing that a mandatory requirement had not been complied with."⁴¹ The court also found the corrective action taken by the board was by itself insufficient to cure the defect.⁴² Noting that correction *nunc pro tunc* may be properly used to make the record speak the truth, the court held such action could not be used to "correct oversights or failures in the performance of mandatory acts."⁴³

In a dissenting opinion joined by Justices McCown and Brodkey, Chief Justice Krivosha stated that he felt the majority had misinterpreted both the open meetings law and the evidence in the case.⁴⁴ Justice Krivosha stated the language of section 84-1414(1)⁴⁵ indicated that the failure to *take* the roll call vote makes any decision void, and not merely the failure to *record* the vote.⁴⁶ Furthermore, the dissent stated nothing in the open meetings law precludes a public body from correcting its records to show what actually occurred, and the board's corrective action complied fully with the law's requirements.⁴⁷

ANALYSIS

Amendment Nunc Pro Tunc

A statutory requirement that the vote of each member of a public body be taken and recorded is generally held to be mandatory, and the record is insufficient if the vote is not recorded.⁴⁸ If, however, the record fails to show each members vote,

38. *Id.* at 73, 302 N.W.2d at 677.

39. See notes 19-20 and accompanying text *supra*.

40. 208 Neb. at 75, 302 N.W.2d at 678.

41. *Id.* at 74-75, 302 N.W.2d at 678.

42. *Id.* at 75, 302 N.W.2d at 678.

43. *Id.* at 74, 302 N.W.2d at 678.

44. *Id.* at 77, 302 N.W.2d at 680 (Krivosha, C.J., dissenting).

45. See notes 19-20 and accompanying text *supra*.

46. 208 Neb. at 79-80, 302 N.W.2d at 680-81 (Krivosha, C.J., dissenting).

47. *Id.* at 80-81, 302 N.W.2d at 681 (Krivosha, C.J., dissenting).

48. See 5 E. MCQUILLAN, *supra* note 3, at §§ 14.01, 14.04 (3d ed. 1969); 2 J. DILLON, MUNICIPAL CORPORATIONS § 540 (5th ed. 1911).

it can be corrected to show what actually took place.⁴⁹ Some jurisdictions allow amendment *nunc pro tunc* to record a vote not contained in the original minutes.⁵⁰ Generally, these amendments cannot be made unless based on evidence sufficient to establish that the proceedings in fact took place.⁵¹

In *Schuler*, the supreme court cited three previous Nebraska cases dealing with a statutory requirement that the "yeas and nays" of a public body must be called and recorded.⁵² These cases hold that compliance with a statutory requirement that a vote be called and recorded is mandatory and a prerequisite to valid action by the public body.⁵³ The supreme court cited *City of Valentine v. Valentine Motel, Inc.*⁵⁴ as developing the rationale for the holding in *Schuler*.⁵⁵

City of Valentine dealt with an attempt by the Valentine city council to amend its minutes *nunc pro tunc* to comply with the requirements of the state annexation statute.⁵⁶ The statute provided that upon passage of an annexation resolution, "the resolution, and the vote thereon, shall be spread upon the records of the council or board."⁵⁷ The original minutes did not show that a vote on the resolution had been called or recorded.⁵⁸ Six months later, after suit had been brought to challenge the validity of the resolution, the council adopted an amendment *nunc pro tunc* to show the taking and recording of the vote.⁵⁹

The supreme court held the amendment *nunc pro tunc* could not be used to show that such action was "spread upon the records" prior to the time it was actually recorded.⁶⁰ The court stated that to hold otherwise would defeat the purpose of the statutory requirement, and could "prejudice the possible intervening rights of property owners and citizens relying on the face of the

49. 5 E. MCQUILLAN, *supra* note 3, at § 14.10.

50. *See, e.g., City of Hallendale v. State ex rel. Sage Corp.*, 326 So. 2d 202, 203 (Fla. Dist. Ct. App. 1976); *City of Independence v. Hare*, 359 S.W.2d 33, 37 (Mo. Ct. App. 1962).

51. *See Ricketts v. Hiawatha Oil & Gas Co.*, 300 Ky. 548, —, 189 S.W.2d 858, 861 (1945); 5 E. MCQUILLAN, *supra* note 3, at § 14.11.

52. 208 Neb. at 74, 302 N.W.2d at 678.

53. *City of Valentine v. Valentine Motel, Inc.*, 176 Neb. 63, 70, 125 N.W.2d 98, 102-03 (1963); *Beverly Land Co. v. City of South Sioux City*, 117 Neb. 47, 51, 219 N.W. 385, 386 (1928); *Payne v. Ryan*, 79 Neb. 414, 415-16, 112 N.W.2d 599, 599-600 (1907).

54. 176 Neb. 63, 125 N.W.2d 98 (1963).

55. 208 Neb. at 76-77, 302 N.W.2d at 679.

56. 176 Neb. at 64, 125 N.W.2d at 100.

57. NEB. REV. STAT. § 17-407 (1943) (Repealed 1967).

58. 176 Neb. at 65, 125 N.W.2d at 100.

59. *Id.* at 65-66, 125 N.W.2d at 100.

60. *Id.* at 70, 125 N.W.2d at 102.

record."⁶¹

It may be important to note that in both the *City of Valentine* and *Schuler* cases, the public bodies attempted to amend their records after suit had been brought against them.⁶² Such action could justifiably make the court question whether they had acted in good faith. One answer to this problem would be to follow the course taken by the Missouri courts, which allow application for amendment to be made to the court in cases where litigation has arisen.⁶³

Substantive and Technical Violations

The Nebraska Supreme Court has decided few cases dealing with the present open meetings law, none of which deal with the precise issue confronted in *Schuler*.⁶⁴ One case is worth noting, however, because it reveals that the supreme court may not consider invalidation to be mandatory in all cases where there has been a violation of the open meetings law.

In *Pokorny v. City of Schuyler*,⁶⁵ two meetings were held in violation of the open meetings law. The supreme court considered whether this required action taken at the meetings, authorizing the purchase of land, be declared void.⁶⁶ The violations involved were a lack of sufficient notice prior to both meetings, and the holding of a closed session at the first meeting.⁶⁷ The supreme court stated that "the purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable."⁶⁸ The court found the violations "to be more technical than substantive,"⁶⁹ and reversed the trial court order permanently enjoining the council from carrying out the land purchase authorized at the meetings.⁷⁰ To sustain the permanent injunction would have prevented the city from ever acquiring the land, and the court stated that "this was not the intent or pur-

61. *Id.* at 70, 125 N.W.2d at 103.

62. 176 Neb. at 65-66, 125 N.W.2d at 100; 208 Neb. at 71, 302 N.W.2d at 676.

63. *See, e.g.*, *Frago v. City of Irondale*, 364 Mo. App. 508, —, 263 S.W.2d 356, 361 (1954); *Steiger v. City of Ste. Genevieve*, 235 Mo. App. 579, —, 141 S.W.2d 233, 237 (1940).

64. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979); *Witt v. School Dist. No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1978); *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976).

65. 202 Neb. 334, 275 N.W.2d 281 (1979).

66. *Id.* at 335, 275 N.W.2d at 282-83.

67. *Id.* at 338-39, 275 N.W.2d at 284.

68. *Id.* at 339, 275 N.W.2d at 284.

69. *Id.* at 339, 275 N.W.2d at 284.

70. *Id.* at 340-41, 275 N.W.2d at 285.

pose of the public meeting law."⁷¹ The court held that action approving the land purchase taken at a subsequent council meeting which complied with the open meetings law effectively cured any defects in the prior proceedings.⁷²

The supreme court's decision in *Pokorny* indicates that invalidation is not considered by the court to be mandatory for every violation of the open meetings law.⁷³ It also provides a means by which a public body which has previously violated the open meetings law can cure defects in prior proceedings.⁷⁴ Finally, the court's statement that the violations involved were "more technical than substantive" indicates the seriousness of the violation may influence whether or not invalidation is appropriate.⁷⁵

There was no allegation in *Schuler* that there had not been adequate public notice of the board's meeting, or that the meeting was not made open to the public. Therefore, the basic purpose behind the open meetings law, affording the public an opportunity to attend and participate in the conducting of public business, was substantially complied with.⁷⁶ In light of the court's decision in *Pokorny*, the violations involved in *Schuler* could also be viewed as being "more technical than substantive."⁷⁷

The dissent in *Schuler* argued that the court's invalidation served "to impose technical requirements upon part-time county commissioners beyond that which should be made and far in excess of anything the open meetings law was intended to require."⁷⁸ It also pointed out that the majority position would deny those persons who ran for public office, in reliance on the salary increases,

71. *Id.* at 341, 275 N.W.2d at 285.

72. *Id.*

73. See note 71 and accompanying text *supra*. See also *Shadbolt v. County of Cherry*, 185 Neb. 208, 174 N.W.2d 733 (1970). In *Shadbolt*, the Nebraska Supreme Court held that a lack of public notice of a special meeting of a county board to call an initiative petition was not sufficient to invalidate the election subsequently held. The case was brought under the prior state open meetings law, which also contained a mandatory invalidation provision. *Shadbolt* indicates that the supreme court may not consider invalidation proper for every violation of the open meetings law, in spite of the mandatory statutory language.

74. See note 72 and accompanying text *supra*.

75. See note 69 and accompanying text *supra*.

76. The district court found that the board had substantially complied with the requirement of the open meetings law. Brief of Appellees at 9, *State ex rel. Schuler v. Dunbar*, 208 Neb. 69, 302 N.W.2d 674 (1981).

77. See notes 69 and 75 and accompanying text *supra*. The appellees, noting that the relator had not alleged any prejudice or damage as a result of the board's action, argued that the relator sought invalidation for the application of the open meetings law in a "purely technical sense" only. Brief of appellees, *supra* note 76, at 10.

78. 208 Neb. at 80, 302 N.W.2d at 681 (Krivosha, C.J., dissenting).

the compensation they had expected to receive.⁷⁹ By viewing the invalidation remedy as mandatory, the court refused to consider a less drastic alternative sanction which might have led to a more just result.⁸⁰

CONCLUSION

The ultimate question which must be answered in light of the *Schuler* decision is whether invalidation was an appropriate remedy in this case.

It is clearly the legislative intent that "the formation of public policy is public business and may not be conducted in secret",⁸¹ and that "[e]very meeting of a public body shall be open to the public."⁸² The legislative history surrounding the use of invalidation as an enforcement measure is not conclusive as to whether it is to be mandatory for all violations of the open meetings act. It does seem to reveal, however, that it was designed primarily to deal with substantial violations which would frustrate the basic purpose behind the law, specifically, the conducting of public business in unlawful closed sessions.⁸³

The language of the statute indicates that invalidation is a mandatory remedy for any formal action by a public body taken in violation of any requirements of the law.⁸⁴ In previous cases, the Nebraska Supreme Court did not find the violations involved serious enough to invoke invalidation, thus indicating lower courts will use some discretion in applying this remedy, in spite of the apparently mandatory statutory language.⁸⁵

The legislature might consider following the approach of several states and adopt more flexible enforcement provisions which expressly allow the courts discretion to impose sanctions appropriate to the seriousness of the violation and the injury suffered by the public and plaintiff.⁸⁶

The use of invalidation as a mandatory remedy prompted one writer to comment:

If invalidation is to be useful, legislatures and courts must find ways to distinguish between violations which

79. *Id.* (Krivosha, C.J., dissenting).

80. The district court, in its decision, had admonished the board to comply with the statute in the future. Brief of Appellees, *supra* note 76, at 10.

81. NEB. REV. STAT. § 84-1408 (Reissue 1976).

82. *Id.*

83. See notes 9 and 10 and accompanying text *supra*.

84. See notes 19 and 20 and accompanying text *supra*.

85. See notes 65 to 73 and accompanying text *supra*.

86. See note 17 and accompanying text *supra*.

warrant invalidation and those which do not. To do so they must think of invalidation as a remedy for an injury to either an individual or the public, not as the necessary result of a jurisdictional failure. They must think of invalidation as a way to further the public policy of open government rather than the last proposition in a syllogism.⁸⁷

In *Schuler*, there was apparently substantial compliance with the basic purpose of the open meetings law. The application of a mandatory invalidation provision in a case such as this, where the violations were arguably "more technical than substantive,"⁸⁸ can lead to an undesirable and unnecessary result. In order to avoid such an inflexible and mechanistic use of invalidation in the future, the legislature should amend the present law to allow the courts discretion to apply appropriate sanctions, including but not limited to invalidation, according to the seriousness and nature of the violation.

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87. Comment, *Invalidation as a Remedy for Open Meeting Law Violations*, 55 OR. L. REV. 519, 529 (1976).

88. See notes 75 and 77 and accompanying text *supra*.