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ANNEXATION BATTLE IS OPPORTUNITY FOR GUIDANCE FROM SUPREME COURT

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On January 12, 2007, the Nebraska Supreme Court issued its long-anticipated opinion in *City of Elkhorn v. City of Omaha*, 272 Neb. 867, ___ N.W.2d ___ (2007) in which it declared that "Elkhorn [Nebraska] ceased to exist as a separate municipality on March 24, 2005, the date that Omaha's annexation ordinance became effective." The opinion establishes the winner and the loser in a high-stakes race for territorial expansion that would determine whether Omaha could continue to expand west, and whether Elkhorn would even survive as a municipality. Barring an unlikely successful appeal to the United States Supreme Court, what was once Elkhorn is now part of Omaha.

In the process of finding that Omaha's annexation ordinance became effective six days prior to Elkhorn's, thus ending Elkhorn's existence, the Supreme Court analyzed portions of the Nebraska Open Meetings Act, as well as annexation law in Nebraska. The result is some important guidance that impacts municipalities across the state.

"Reasonable Advance Publicized Notice" Does Not Necessarily Refer to Time

Elkhorn attempted to stave off annexation by Omaha by itself annexing a series of surrounding sanitary improvement districts in order to increase its population to meet the 10,000 residents threshold at which Elkhorn would be immune from unilateral annexation by Omaha. Elkhorn began by scheduling a special meeting on February 21, 2005 to consider its annexation plan. The next day, Omaha began preparing its own annexation ordinance. At 9:51 a.m. on February 22, the mayor of Omaha called a special meeting to be held that night at 10:00 p.m. to consider Omaha's annexation ordinance. Between 10:16 a.m. and 10:54 a.m., after notice of Omaha's special meeting had been given to all council members, an agenda of the meeting was sent to nineteen area media outlets, and public notice was posted on bulletin boards in the city's offices, in accordance with an Omaha public notice ordinance, and on the city's web site. The Omaha World-Herald published an afternoon story about the meeting. Over the next several days, Elkhorn and Omaha continued to race, holding a required series of meetings to consider their respective annexation ordinances.

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Elkhorn later challenged the validity of Omaha's February 22 meeting under the Open Meetings Act. Elkhorn argued that issuing an agenda less than twelve hours before the meeting violated the Act's requirement that "[e]xcept for items of an emergency nature, the agenda [of a meeting of a public body] shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting." Neb. Rev. Stat. § 84-1411(1). The Court, however, noted that the statute says "*altered*," and not "*created*," and to read such a limitation into the Act would be impermissible. The Court stated that the Legislature requires only that a public body's method of public notification of a meeting (1) "give reasonable advance publicized notice of the time and place of each meeting," and (2) be recorded in the public body's minutes. *City of Elkhorn*, 272 Neb. at 877. Omaha had passed an ordinance in 1975 providing for its method of notification for special meetings, which included posting notice on the city's bulletin boards. Passage of that ordinance was recorded in its minutes. The Court found that Omaha's notice complied with its ordinance, and thus moved on to the question of whether the notice was "reasonable."

The Court first clarified that ordinances requiring a particular minimum time for notice to council members of a special meeting is for the benefit of council members, not the public, and failing to follow such ordinance will not affect the validity of the meeting unless members of the council object. Second, the Court clarified that "reasonable advance publicized notice" does not necessarily refer to a required minimum amount of time prior to a meeting to give notice. The Court clarified its holding in *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979) in which it declared that notice given by Schuyler's city council at 10:00 p.m. of a meeting to be held at 10:30 a.m. the next morning, just over twelve hours prior to the meeting, "could hardly be considered to be reasonable advance publicized notice as required by [the Act]." *City of Elkhorn*, 272 Neb. at 879 (quoting *Pokorny*, 202 Neb. at 338). The Court noted it did not say it was the 12-hour notice before the meeting that made the notice insufficient in *Pokorny*. Rather, it was the fact that the notice was unlikely to "reach the public before the scheduled meeting" that caused the problem. Because Omaha's notice was given early on a business day, to several media outlets, it was superior to the notice in *Pokorny*, which was issued late at night when it was unlikely to reach the public. The Court stated that while it does not condone the giving of only 12 hours' notice of a public meeting, under these circumstances, the notice was valid.

Importantly, the Supreme Court has now clarified that reasonable notice is measured not so much by time, but rather by the likelihood that the notice given will reach the public. Municipalities should first ensure they have in place an ordinance outlining the method of notice for meetings of all types, and make sure passage of such ordinance is

recorded in the minutes. Municipalities facing a special meeting situation made urgent by limited time to give notice should, in order to meet the requirements of the Act, do whatever is necessary to genuinely inform the public of the upcoming meeting in addition to following the municipality's regular protocol for noticing meetings. In Omaha's situation, that meant faxing an agenda to several media outlets, in addition to posting notice on city bulletin boards. It is unclear how the Court might handle a situation where media outlets are scarce or newspapers of record are published less frequently than daily. Notice in *Pokorny* was posted overnight, and the Court in *City of Elkhorn* said the problem with that notice was its lack of ability to reach the public. Whether posting in the daytime would be sufficient remains to be seen. But according to the Court's ruling in *City of Elkhorn*, apparently posting according to a city's usual method of notice, along with attempts to genuinely inform the public, will suffice for "reasonable advance publicized notice" under the Act.

Court Declined to Adopt Prior Jurisdiction Rule

For now, the Supreme Court has declined to adopt the so-called "prior jurisdiction rule" in Nebraska. The rule, in effect in some states, says "when two public bodies claim jurisdiction over the same territory in annexation proceedings, the public body which takes the first valid step toward annexation has the superior claim." *City of Elkhorn*, 272 Neb. at 883. Elkhorn argued that because it began its annexation proceedings before Omaha, the prior jurisdiction rule should have allowed Elkhorn to complete those proceedings unimpeded by Omaha. But the Court noted the territory sought to be annexed by Elkhorn and Omaha was not identical, and so failed to see the applicability of the rule. For now, the Court has not adopted the rule in Nebraska, potentially allowing for similar annexation races in the future.

"Adjoining" Is the Same As "Contiguous" Or "Adjacent"

Elkhorn also argued Omaha's annexation of the city was invalid because Elkhorn and Omaha are not "adjoining." Neb. Rev. Stat. § 14-117 gives a city of the metropolitan class power to extend its corporate limits "over any *contiguous* or *adjacent*" land, and may, by extending its corporate limits, annex "any *adjoining* city of the first class having less than ten thousand population or any *adjoining* city of the second class or village." (Emphasis added). The Court noted cases in which it has held that a city may annex territory the boundary of which does not touch the corporate limits, if the city also annexes a substantial link of contiguous territory connecting the city to the territory. The Court held that the "adjoining" language of the statute does not require a city's boundaries to actually touch those of a city of the metropolitan class in order for the

metropolitan class city to be able to annex the city along with connecting territory.

The bulk of the Court's decision on this point may apply only to cities which might face annexation by Omaha in the future. However, the Court reaffirmed the ability of cities to annex territory that does not touch their corporate boundaries by simultaneously annexing a substantial link to the territory.

Guidance for the Future

Regardless of the popularity of the Court's decision in *City of Elkhorn* with some municipalities, the case does flesh out some ambiguous portions of the Open Meetings Act, and helps provide a template for action regarding compliance with the Act. The opinion also reaffirms what constitutes valid annexation by cities. Cities should incorporate the lessons of *City of Elkhorn* by (1) ensuring they have an ordinance in place defining the method of notice for meetings of all types, (2) giving proper notice for special meetings in accordance with that ordinance and by taking extra measures to ensure the public is notified, and (3) when annexing territory, making sure annexation of land not connected to the corporate boundaries includes annexation of a substantial link to that land.