PUBLIC OPINION V. CHAMBERSBURG AREA SCHOOL DISTRICT, C.P. Franklin County Branch, Equity Volume 8 Page 107.

Action in Equity - Demurrer maintaining that Plaintiff's Complaint, seeking a declaratory judgment that a vote taken to fill a vacancy on the Board of Directors of the Chambersburg Area School District constituted a violation of the Sunshine Act and the Public School Code of 1949, fails to state a cause of action under either of these provisions - Demurrer sustained

1. Even though Section 5-508 of the Public School Code of 1949 lists specific types of School Board votes which are to be recorded, this list is not mandatory but is merely directory.

2. The Sunshine Act (65 P.S. Section 275) is intended to provide for public scrutiny of the actions of public officials by providing that in all meetings of agencies, the vote of each member who actually votes on any resolution, rule, order, regulation, ordinance or the setting of official policy must be publicly cast.

3. When the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

4. The election of one to the Board of Directors of a School Board held at a public meeting is not a resolution, rule, order, regulation, ordinance or the setting of official policy and therefore is not subject to the requirements of the Sunshine Act.

5. As a general rule, a court is precluded from taking judicial notice of a fact not of record. However, a court can take judicial notice of a fact about which the plaintiff itself has written and published placing the facts of the case before the public.

6. Even if an initial vote would have constituted a violation of the Sunshine Act, a subsequent unanimous public vote by the voting body will remedy the violation.

7. A second vote which remedies a possible violation of the Sunshine Act moots the issue of whether the voting body did in fact violate the Sunshine Act.

8. Although an issue may be moot, if an issue is of sufficient public importance and is capable of repetition yet likely to evade review, the court may still decide the case on the merits.

9. A single, isolated incident rather than part of a repeated course of conduct taken to avoid public scrutiny will not trigger the exception to the moot rule.

J. McDowell Sharpe, Esquire, Attorney for Plaintiff
Jan G. Sulcove, Esquire, Attorney for Defendant

OPINION AND ORDER

Walker, J., March 29, 1994:

On December 29, 1993, eight directors of the Chambersburg Area School District (the "Board") met to fill a vacancy created by the death of Robert Drawbaugh. Candidate Penny M. Stoner received a majority of the votes cast on the second ballot. Although the balloting was conducted at a public meeting, it is not known which director voted for which candidate.

On January 6, 1994, the Franklin County newspaper ***Public Opinion*** filed a complaint in equity, seeking to enjoin the Board from seating Penny Stoner as a Board member. The complaint also requests a declaratory judgment that the December 29, 1993 vote was a violation of the Sunshine Act and the Public School Code of 1949. The complaint requests that the court invalidate the election.

The School District filed preliminary objections in the nature of a demurrer on January 12, 1994, maintaining that the complaint fails to state a cause of action under either the Sunshine Act or the Public School Code. Defendant's preliminary objections also assert the plaintiff's claims are premature until such time as Penny Stoner is sworn in, and that any alleged defects in the voting procedure can be cured before that time.

The Board held another public meeting on January 12, 1994, at which Penny Stoner was elected by the unanimous vote of the Board and sworn in. By opinion and order dated January 20, 1994, this court denied plaintiff's request for injunctive relief. The court concluded that plaintiff had not established that its right to injunctive relief was clear. The plaintiff had not shown that the initial vote was unlawful and that, in any event, the second vote mooted the issue.

DISCUSSION

A preliminary objection in the nature of a demurrer admits all well-pleaded, material and relevant facts as true, including all reasonable inferences that may be drawn from those facts, but not including the pleader's conclusions of law. ***Bash v. Bell Telephone Company,*** 411 Pa.Super. 347, 354, 601 A.2d 825, 828 (1992). The court is to determine whether or not the complaint pleads facts that are legally sufficient to permit the action to continue. ***Johnston v Lehman,*** 148 Pa.Commw. 98, 102, 609 A.2d 880, 882 (1992).

Initially, the court finds that the election of Penny Stoner did not violate section 5-508 of the Public School Code, which lists specific types of school board votes which are to be recorded. These provisions, if they include the election at issue here, are not mandatory but are merely directory. ***Mullin v. Dubois Area School District,*** 436 Pa. 211, 216, 259 A.2d 877, 880 (1969). The remainder of this court's discussion will concentrate on plaintiff's Sunshine Act claim.

Plaintiff argues that the Board's vote to fill the vacancy was unlawfully conducted by secret ballot. Plaintiff's argument relies heavily on the underlying purpose of the Sunshine Act:

> The General Assembly finds that the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formation and decision making of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society.

65 P.S. § 272(a).

The Sunshine Act provides in pertinent part:

> In all meetings of agencies, the vote of each member who actually votes on any resolution, rule, order, regulation, ordinance or the setting of official policy must be publicly cast and, in the case of roll call votes, recorded.

65 P.S. § 275. Plaintiff contends that the Board's actions of December 29, 1993 were in the nature of a resolution. "Resolution" is not defined in the Act, however, plaintiff relies on a broad, generic definition of that term. Plaintiff argues that any "formal expression of opinion, will or intent voted by an official body," such as the Board's initial vote, must be publicly cast or recorded so that members of that body may be held publicly accontable. ***Quoting Webster's Ninth New Collegiate Dictionary,*** p. 1044 (1983).

The court agrees with plaintiff that the Act is intended to provide for public scrutiny of the actions of public officials. The court emphasizes that even in light of its purpose, however, the Sunshine Act was not meant to be construed as broadly as plaintiff's interpretation. In analyzing terms of this same statute the Pennsylvania Supreme Court has stated:

> "When the words of a statute are clear and free from all ambiguity, the letter of it is not be disregarded under the pretext of pursuing its spirit."

Babic v. Pennsylvania Milk Marketing Board, 531 Pa. 391, 394, 613 A.2d 551, 553 (1992). Yet that is what the plaintiff urges this court to do.

The Legislature listed specific types of votes which must be publicly cast or recorded. Under plaintiff's expansive interpretation of the Sunshine Act, almost any action the Board could take would come within the purview of the Act. Requiring that virtually all decisions of public officers be subject to public scrutiny would have the effect of hampering the operation of those entities. The court is reluctant to adopt such an interpretation and therefore, cannot conclude that the December 29, 1993 election of Penny Stoner was unlawful. That initial vote was not a vote required to be publicly cast or recorded under section 275 because it was not a resolution, rule order, regulation,

ordinance, setting of official policy or roll call vote.

The court in *Morning Call v. Whitehall-Coplay School District,* 44 Lehigh 360 (1991) was presented with facts similar to those in the instant case. In *Morning Call*, the school board held a public meeting at which it received nominations for head baseball coach. The coach was elected, however, by secret paper ballot. The local newspaper filed its complaint seeking declaratory and injunctive relief, claiming that the election violated the Sunshine Act and the Public School Code of 1949. As in the instant case, the defendant filed preliminary objections in the nature of a demurrer. The school board held a second public meeting, at which the original successful candidate was unanimously elected in a recorded roll call vote. The court dismissed the complaint, concluding that the initial vote was not unlawful because it was a vote on a motion, not amoung the types of votes which must be publicly cast. The court further found that the school board's public re-vote mooted plaintiff's claim. *Id.* at 367-368.

The court emphasizes that the initial vote for Penny Stoner was conducted at a public meeting. The balloting was not cloaked in secrecy as plaintiff suggests. Significantly, if any violation did occur, and the court stresses that it does not find that the initial vote was unlawful, it was remedied on January 12, 1994, when the Board ratified its previous election of Penny Stoner by unanimous public vote. As this court concluded in its prior opinion on this matter, that unanimous, public re-vote mooted plaintiff's claim.

The Commonwealth Court reached a similar conclusion in several cases where alleged Sunshine Act violations were subsequently ratified in compliance with the Act. *See Lawrence County v. Brenner,* 135 Pa.Commw. 619, 582 A.2d 79 (1990) (if any Sunshine Act violation occurred when county commissioners decided in executive session to close nursing home, it was cured when the action was ratified at subsequent public meeting); *Bianco v. Robinson Township,* 125 Pa.Commw. 59, 556 A.2d 993 (1989) (promotions discussed at closed executive session of township commissioners proper when debated and ratified at subsequent public meeting); *Doverspike v. Black,* 126 Pa.Commw. 1, 535 A.2d 1217 (1989) (contract entered into by county commissioners in a closed door session, later validated by

public vote, satisfied requirements of Open Meeting Law). Indeed, the Commonwealth Court has stated that

> "short of fraud ... most any Sunshine Act infraction could have been cured by subsequent ratification at a public meeting."

Lawrence County at 629, 582 A.2d at 84.

The plaintiff urges this court not to take judicial notice of the fact of the second election. The court acknowledges that as a general rule, it is precluded from taking judicial notice of a fact not of record. *Muia v. Fazzini,* 416 Pa. 377, 378, 205 A.2d 856, 857 (1965). The court emphasizes that in this instance, however, it is taking judicial notice of a fact about which plaintiff itself has written and published. Plaintiff has placed the facts of this case before the public, arguing that it is acting in the public's behalf. Yet, the plaintiff also maintains that the complete factual picture should be unavailable for this court's consideration. Failure to consider the second vote would result in this case proceeding through the system when it clearly has no legal merit. For this reason, the court takes judicial notice of the January 12, 1994 vote at which Penny Stoner was unanimously elected to the Board and finds that complied with the Sunshine Act.

The plaintiff maintains that even if this court finds that its Sunshine Act claim is technically moot, it falls within the exception to mootness. Specifically, if an issue is of sufficient public importance and is capable of repetition yet likely to evade review, the court may still decide the case on the merits. *Consumers Education & Protective Association v. Nolan,* 470 Pa. 372, 382, 368 A.2d 675, 681 (1977). On the basis of *Nolan*, plaintiff urges the court to consider this case on the merits to determine whether or not the Sunshine Act violation was remedied. As previously stated, however, this court does not find that the Board's initial vote constituted a violation of the Sunshine Act. Moreover, the court is not convinced that *Nolan* is applicable to the facts in the instant case. As the court concluded in *Morning Call, Nolan* stands for the proposition that, in the context of the Sunshine Act, the mootness exception should be limited to cases involving legislative committees. *Morning Call* at 366.

The court emphasizes that it considers the Board's initial action to be a single, isolated incident rather than part of a repeated course of conduct taken to avoid public scrutiny. This court would readily examine any pattern of conduct which seeks to disregard the intent of the Sunshine Act. Indeed, the court notes that in this instance the Act accomplished its purpose. The plaintiff's request for injunctive relief induced the Board to take prompt steps to remedy the alleged violation and conduct this election in a throughly public manner in full compliance with the Act. Plaintiff does not challenge the January 12, 1994 vote.

CONCLUSION

For the reasons expressed in this opinion, defendant's preliminary objections are sustained. Plaintiff's complaint is dismissed for mootness and for failure to state a claim under either the Sunshine Act or the Public School Code of 1949.

ORDER OF COURT

March 29, 1994, the defendant's preliminary objections are sustained and plaintiff's complaint is dismissed.

The Journal Motto: