

# Nickel Tax Debate Continues in Webster County Circuit Court

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Dennis Beard

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WEBSTER COUNTY, KY (1/25/12) – Following the latest move by the Webster County Board of Education in January to “ratify” a motion supporting a previous action school officials said they made at the direction of the board during a special called meeting on Nov. 3, attorneys representing the Webster County Board of Education in its dispute with Webster County Clerk Valerie Franklin presented the board’s action as cause for rejection of Newell’s motion to have the case dismissed.

At issue is whether the Webster County Board of Education violated the Open Meetings Act when it conducted a closed session at its November meeting. The minutes from the meeting don’t reflect a vote by the board to take legal action, which prompted Webster County Attorney Clint Prow, who represents Newell on behalf of the county, to file a motion to have the court challenge dismissed. Webster County Attorney Amelia Zachary and Prow each presented their side of the issue to Fifth Judicial Circuit Court Judge Rene´ Williams at a hearing on the motion last month, and were directed to present follow-up briefs to the court before a ruling on the request is issued.

In the meantime, the Webster County Board of Education at its meeting on January 9 approved a motion to ratify a resolution in support of the legal action, with all five members of the school board voting unanimously in support of the action that night.

In a response filed on the board’s behalf, attorneys claimed that action validated any previous errors or omissions that may have occurred at the November meeting.

Citing KRS 61.805(3), the response states that “the board properly authorized the filing of the instant action as reflected in its minutes of Nov. 3.” It goes on to call the Nov. 3 directive a “collective decision,” and states, “No member of the board expressed a contrary intent” in regards to the directive reflected in the November minutes. However, at the Jan. 9 meeting, Board of Education members Steve Henry and Tim McCormick both stated publicly they were opposed to the initial lawsuit, but supported the ratified resolution since the case was already in the court system.

Attorneys also argued in their response that “the clarification of the board’s intent at its Jan. 9 meeting removes any doubt as to its intent at the Nov. 3 meeting” and that “the board’s action is not void... even if the court finds the board’s action on Nov. 3 was invalid.” The response cites KRS 61.848(5) to support its claim.

“Under KRS 61.848(5), an action of a public agency that does not substantially comply with the requirements of the Open Meetings Act is merely voidable, not void,” the response stated.

Newell and Prow in their answer to the response on Newell’s behalf rejected the “Nunc Pro Tunc” resolution and reiterated their request to have the case dismissed.

“The respondent (Newell) asserts that these recent actions of the petitioner (the school board) even while this issue is being briefed before this court do not change the result that this action should be dismissed,” Newell’s answer stated. “The petitioner incredulously asserts:

‘In essence, the clerk’s position that the board did not properly authorize the filing of the instant action exalts form over substance. The board’s intention is beyond doubt and it acted in an appropriate manner in reaching a consensus that this action should be filed and in directing its attorney to do so...’

“This is an example of the pot calling the kettle black,” the answer stated. “The petitioner filed this action challenging the respondent’s certification of the recall petition committee’s affidavit filed in the office of the respondent asserting very specific technical violations by the petition committee. Clearly, the petition committee’s intent was beyond all doubt that they desired a recall vote on the tax increase by the petitioner. Nonetheless, the petitioner filed this challenge even though the committee’s intent was clear. Therefore, who is actually ‘exalting form over substance?’”

Newell’s response goes on to call the ratified resolution a “shotgun approach” that “must fail.”

“As recited in prior pleadings, a local school board can only speak through its minutes. These minutes cannot be refuted or explained by resort to parole evidence,” the answer states, citing case law to support the claims. “The minutes can only be amended to correct inaccuracies and to reflect actual events of the meetings.

“The petitioner cannot amend the minutes of the Nov. 3, 2011, meeting... to explain or refute the action taken at the meeting. Clearly, the petitioner passed the above referred orders to attempt to circumvent this precedent. Therefore, the respondent asserts that the court should ignore all action taken by the petitioner at the January 9, 2012, meeting. These actions were simply an attempt to explain or refute their action at the November 3, 2011, meeting and not to simply correct inaccuracies in the record.

Newell’s answer, filed by Prow, goes on to address other points from the school board’s response, starting with the claim that board action wasn’t required, citing several court cases and Attorney General opinions.

Next, Newell's brief questions the claim that a collective decision could be argued given statements two of the board members made publicly about the lawsuit.

"Finally, it remains unclear what 'consensus' was actually reached at the November 3, 2011, meeting. According to the minutes of the January 9, 2012, meeting, school board members (Tim) McCormick and (Steve) Henry both indicated that they had opposed the decision to initiate the legal challenge at the November, 3, 2011, meeting," Newell's response stated. "Since the minutes do not reflect any recorded vote and such opposition to the measure has been acknowledged, it is impossible to now determine whether any consensus was actually reached at the November... meeting."

The document went on to allege that the claim of "collective decision was "obviously... yet another attempt by the petitioner to circumvent their failure to take proper action at the November... meeting. This argument would make meaningless the provisions of KRS 160.270, the Open Meetings Law, and perhaps other statutes affecting school boards as they could simply later ratify the actions taken by their attorney, superintendent, or any other persons acting on their behalf."

The document made a similar argument regarding the "Nunc Pro Tunc" resolution" and called the action a "misuse of orders."

"Kentucky courts have consistently followed this purpose by only allowing the use of nunc pro tunc orders to place in the record evidence of action that had actually been taken," the document states. "Such order cannot correct an error or supply the records with action that the court/agency failed to make."

The document concluded with a renewed call for the lawsuit to be dismissed. A hearing on the matter is scheduled for February.

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