



Office of the Attorney General
State of Connecticut

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January 31, 2017

Hon. Leonard A. Fasano
Senate Republican President Pro Tempore
Legislative Office Building
300 Capitol Avenue, Suite 3400
Hartford, CT 06106-1591

Dear Senator Fasano:

You have requested an opinion on the requirements of Conn. Gen. Stat. § 3-125a, which provides that the General Assembly may reject a settlement agreement by a "three-fifths vote of each house." Specifically, you inquire whether, in considering the proposed Revised Exit Plan for the *Juan F. v. Malloy* federal litigation, the supermajority requirement of § 3-125a is calculated on the basis of members present and voting. We conclude that the answer is "yes."

Section 3-125a provides:

Notwithstanding the provisions of subsection (h) of section 4-160, the Attorney General shall not enter into any agreement or stipulation in connection with a lawsuit to which the state is a party that contains any provision which requires an expenditure from the General Fund budget in an amount in excess of two million five hundred thousand dollars over the term of the agreement or stipulation, unless the General Assembly, by resolution, accepts the terms of such provision. ***The General Assembly may reject such provision by a three-fifths vote of each house.*** Such provision shall be deemed approved if the General Assembly fails to vote to approve or reject such provision within thirty days of the date of submittal pursuant to subsection (b) of this section.

Conn. Gen. Stat. § 3-125a(a) (emphasis added).

Both the Connecticut Constitution and various other statutes include supermajority voting requirements for legislative actions. These requirements generally are expressed in one of two ways: first, provisions that require a supermajority vote "of each house;" e.g., Conn. Const. art. Fourth, § 18 (gubernatorial incapacity, "two-thirds vote of each house"); Conn. Const. art. Fifth, § 2 (removal of judges, "on the address of two-thirds of each house"); Conn. Gen. Stat. § 5-278 (collective bargaining agreements and arbitration awards, rejected by "two-thirds vote of either house"); and second, provisions that require a supermajority vote of the "members" or "membership" of each house. E.g., Conn. Const. art. Third, § 6 (reapportionment, "vote of at least two-thirds of the membership of each house"); Conn. Const. art. Third, § 18 (spending cap, "vote of three-fifths of the members of each house"); Conn. Const. art. Fourth, § 15 (veto, "two-thirds vote of the members of each house"); Conn. Const. art. Twelfth (constitutional amendments, "vote of at least three-fourths of the total membership of each house," and "vote of at least a majority of the total membership of the house"); Conn. Const. art. Thirteenth, § 1 (constitutional conventions, "vote of at least two-thirds of the total membership of each house"); Conn. Gen. Stat. § 2-33a (statutory spending cap, "at least three-fifths of the members of each house"); Conn. Gen. Stat. § 3-20i (bond appropriations, "at least three-fifths of the members of each chamber"); Conn. Gen. Stat. § 9-211 (U.S. senator vacancy, "two-thirds of the membership of each chamber").¹ The provision in § 3-125a falls into the first category – "three-fifths vote of each house."

We have found no Connecticut case law that construes the supermajority requirement of § 3-125a or similar provisions. There is, however, legislative precedent. In 1994, the president of the senate was called on to rule whether the provision in Conn. Gen. Stat. § 5-278, relating to the approval or disapproval of union arbitration awards, required a two-thirds vote of the senators present and voting or two-thirds of the entire Senate membership. Similar to § 3-125a, § 5-278 uses the phrase "vote of either house." The president ruled that the proper calculation was based on the senators present and voting. *Rules and Precedents of the General Assembly of Connecticut*, No. 35-1.13 (rev. Jan. 4, 2017) (citing *Mason's Manual of Legislative Procedure* § 512(3)).²

¹ One constitutional provision does not fit neatly into these two main categories: Article Ninth, § 2 provides that, in impeachment proceedings tried in the Senate, a conviction requires "the concurrence of at least two-thirds of the members *present*." (emphasis added).

² The Senate and House rules provide that the rules of parliamentary procedure provided in *Mason's Manual of Legislative Procedure* will govern where not inconsistent with the adopted

This is consistent with the approach of other jurisdictions. In construing the two-thirds majority requirement to overcome a presidential veto in the federal Constitution, the U.S. Supreme Court held that, in the absence of some other qualifying language, a two-thirds vote of each house means "the two-thirds of a quorum of the body as empowered to perform other legislative duties." *Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 285 (1919). As the Court reaffirmed with regard to the supermajority requirement for constitutional amendments,

[t]he two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present – assuming the presence of a quorum – and not a vote of two-thirds of the entire membership, present and absent.

Rhode Island v. Palmer, 253 U.S. 350, 386 (1920). In both instances, the constitutional provision used the language "of that House" or "of both Houses." U.S. Const. art. I, § 7; art. V. Thus, when a supermajority requirement is imposed on legislative action that refers only to a vote of each or either house, the rule is that the vote is calculated on the basis of the members present and voting, not the entire membership of the body. *Warburton v. Thomas*, 616 A.2d 495, 501-02 (N.H. 1992); *Kay Jewelry Co. v. Board of Registration in Optometry*, 27 N.E.2d 1, 5 (Mass. 1940).

This rule is contrasted to supermajority provisions of other states where under their constitutions, unlike Connecticut's, the legislature may only act by a majority vote of all elected members, and not just a majority of a quorum. In those states, which the U.S. Supreme Court expressly distinguished, see *Missouri Pac. Ry.*, 248 U.S. at 285, courts have concluded that a supermajority provision is calculated on the basis of all elected members. See *State ex rel. Eastland v. Gould*, 17 N.W. 276, 277-78 (Minn. 1883). Similarly, in other states, supermajority provisions expressly refer to a vote of all members, and not, as the language of § 3-125a provides, to a vote of each house. E.g., *Opinion of the Justices*, 756 So.2d 23, 24 (Ala. 1999); *Duxbury v. Harding*, 490 N.W.2d 740, 744-45 (S.D. 1992); *Center Bank v. Dept. of Banking & Finance*, 313 N.W.2d 661, 663 (Neb. 1981).

rules of the Senate and House. Senate Rule 32 (2017); House Rule 22 (2017). *Mason's* provides that "[t]he requirement of a two-thirds vote, unless otherwise specified, means two-thirds of the legal votes cast, not two-thirds of the members present, or two-thirds of all the members." *Mason's Manual of Legislative Procedure* § 512(3).

We can discern no reason not to follow the view of the U.S. Supreme Court and other state courts that when the legislature uses the phrase "of each house," rather than a phrase such as "of the members of each house," it intends the supermajority calculation be based on members voting, not all members. Indeed, as discussed above, the General Assembly has in many instances chosen to use the latter language. *See Tine v. Zoning Bd. Of Appeals*, 308 Conn. 300, 308 (2013) (use of different sets of words reveals that legislature knows how to express different ideas). It thus can, when it chooses to, indicate its intention not to follow the general rule that members present and voting controls. *See Steiner, Inc. v. Town Plan & Zoning Comm'n*, 149 Conn. 74, 77 (1961) (construing statutory requirement that zoning commission act by "a vote of two-thirds of all members of the zoning commission" to be based on all members including vacancies, and not just members present).

Assuming that a court could conclude that the language of § 3-125a is nonetheless ambiguous when considered in the context of the related constitutional and statutory provisions, legislative precedent, and the case law of other jurisdictions, a review of the legislative history of § 3-125a offers no clear contrary guidance. Section 3-125a was enacted as part of the budget act in 1991, which also included the statutory spending cap (codified in Conn. Gen. Stat. § 2-33a), in the same special session that the legislature proposed the constitutional amendment for the spending cap. Public Act. 91-3, § 30, 165 (June 1991 Spec. Sess.); House Jt. Res. 205 (June 1991 Spec. Sess.). In the legislative debates in the House, Representative Tulisano discussed the rationale for the three-fifths supermajority requirement in what became § 3-125a. He noted that the spending cap uses a three-fifths vote for exceeding the spending limit imposed. 34 House Proc. 1327 (Aug. 21, 1991). Also, the statutory spending cap exempts expenditures for the implementation of court orders from the definition of general budgetary expenditures. Conn. Gen. Stat. § 2-33a. Representative Tulisano therefore expressed concern that consent decrees and court settlements could be used to skirt the limits imposed by the spending cap.³ For this reason, he stated

³ Representative Tulisano remarked:

The three-fourths rejection for [sic] provision is designed to reflect that which was just in the constitutional caps we established about a month ago. Sixty percent is the figure used to get outside of the constitutional cap. This follows that same figure, 60 percent, and the reason was when we were reviewing this legislation it also could be a way of getting around the constitutional cap because there is an exception in the constitutional [sic] cap for judicial judgments and if we start to get some control over there, then we could also get

that a three-fifths supermajority requirement was chosen for the review of consent orders to avoid that possibility. 34 House Proc. 1327. Nothing in his remarks addressed directly the issue of how to calculate the three-fifths vote requirement.

In light of this connection to the constitutional and statutory spending cap provisions referenced in the legislative history, an argument perhaps could be made that § 3-125a's supermajority requirement was implicitly intended to be based on all members. Both of the spending cap provisions use the phrase "three-fifths of the *members* of each house." Conn Const. art. Third, § 18; Conn. Gen. Stat. § 2-33a (emphasis added). This is not a reasonable implication. The language chosen in enacting § 3-125a was not the same as that in either the constitutional amendment or the statutory spending cap. The choice to use the phrase "three-fifths vote of each house" in § 3-125a, rather than "of the members of each house," particularly when these provisions were all enacted contemporaneously, must be presumed to be purposeful and to have different meanings despite the connection to the spending cap provisions for imposing a supermajority requirement. *See State v. Kevalis*, 313 Conn. 590, 603 (2014) ("Where a statute, with reference to one subject contains a given provision, the omission of such provision in a similar statute concerning a related subject . . . is significant to show that a different intention existed." (citations omitted)); *Marchesi v. Board of Selectmen*, 309 Conn. 608, 618 (2013) (same). Therefore, we do not find that the references to the constitutional and statutory spending cap provisions in the legislative history provide evidence of an intent to impose a supermajority vote of all members, rather than just those present and voting.

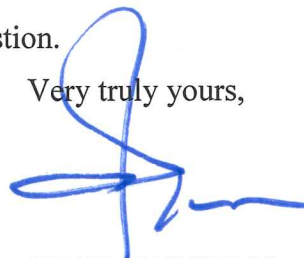
Accordingly, we conclude that a court presented with this issue would interpret the supermajority requirement of § 3-125a as requiring a three-fifths vote of members present and voting to reject.

caught in another bind. They could just go around us all the time to avoid the constitutional caps and it gets again, some playing – if we want to knock it out, use the same number for which we get out of the constitutional cap.

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We trust this is responsive to your question.

Very truly yours,

A handwritten signature in blue ink, consisting of a large, stylized 'G' followed by a horizontal line and a small flourish.

GEORGE JEPSEN
ATTORNEY GENERAL