

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 83-311
	:	
of	:	<u>OCTOBER 4, 1983</u>
	:	
JOHN K. VAN DE KAMP	:	
Attorney General	:	
	:	
RODNEY O. LILYQUIST	:	
Deputy Attorney General	:	
	:	

NEIL B. VAN WINKLE, COUNTY COUNSEL, COUNTY OF MONO, has requested an opinion on the following question:

May the board of supervisors of a general law county adopt an ordinance that mandates a four-fifths vote of the board to act regarding specified matters which otherwise would require only a majority vote for adoption?

CONCLUSION

The board of supervisors of a general law county may adopt an ordinance that mandates a four-fifths vote of the board to act regarding specified matters which otherwise would require only a majority vote for adoption; however, such an ordinance may itself be amended or repealed by a majority vote of the board.

ANALYSIS

The general parliamentary rule governing actions taken by a legislative body is that the body is empowered to act by a majority vote of those actually voting, where a majority of the existing membership is present. (See Civ. Code, § 12; Code Civ. Proc., § 15; *FTC v. Flotell Products* (1967) 389 U.S. 179, 183; *People v. Harrington* (1883) 63 Cal. 257, 259-260; *Dry Creek Valley Assn., Inc. v. Board of Supervisors* (1977) 67 Cal.App.3d 839, 843; *Ursino v. Superior Court* (1974) 39 Cal.App.3d 611, 620; *Martin v. Ballinger* (1938) 25 Cal.App.2d 435, 437; 62 Ops.Cal.Atty.Gen. 698, 698-700 (1979); 60 Ops.Cal.Atty.Gen. 76, 78 (1977); 58 Ops.Cal.Atty.Gen. 706, 706 (1975); 4 McQuillin, *Municipal Corporations* (rev. ed. 1979) § 13.31a, p. 552; Robert's Rules of Order (rev. 1970) § 43, p. 339.) For example, a legislative body of five members adopts a motion if three members are present, two votes in favor, and one votes against the proposal.

This general rule has been modified by the Legislature for the acts of a board of supervisors of a general law county. Government Code section 25005¹ states: "A majority of the members of the board constitute a quorum for the transaction of business. No act of the board shall be valid or binding unless a majority of all the members concur therein." Since a board has five members (§ 25000), three members must "concur" in order to act. (*Dry Creek Valley Assn., Inc. v. Board of Supervisors, supra*, 67 Cal.App.3d 839, 845; 60 Ops.Cal.Atty.Gen. 76, *supra*, 78; 58 Ops.Cal.Atty.Gen. 706, *supra*, 706-707.) A vote of two to one thus would be insufficient to bind the board.²

While the Legislature has established a general minimum of three concurring votes in section 25005, it has set a minimum of four affirmative votes for boards of supervisors in numerous specific situations. (See, e.g., § 29130; Health & Saf. Code, § 8950.3; Mil. & Vet. Code, § 1262.1; Sts. & Hy. Code, § 942.) Occasionally, the Legislature has established a unanimous five vote requirement. (See, e.g., § 26885.)

The question presented for analysis is whether a county board of supervisors may establish by ordinance its own four vote requirement regarding particular subjects not

¹ All references hereafter to the Government Code are by section number only.

² The general parliamentary rule is that abstentions are considered as "concurring" in the action taken by the majority of those who vote affirmatively or negatively. (See *Dry Creek Valley Assn. Inc. v. Board of Supervisors, supra*, 67 Cal.App.3d 839, 842-844; 62 Ops.Cal.Atty.Gen. 698, *supra*, 700; Robert's, *supra*, 43, p. 432; Mason's Legislative Manual (1975) 516, p. 363; Sturgis, *Standard Code of Parliamentary Procedure* (2d ed. 1966) p. 134.) Hence, where a board of supervisors is following this parliamentary rule, an act supported by two affirmative votes and one abstention or one affirmative vote and two abstentions would be valid under section 25005. (See *Dry Creek Valley Assn. Inc. v. Board of Supervisors, supra*, 67 Cal.App.3d 839, 844-846.)

already so required by the Legislature. We conclude that it may, although such an ordinance is itself subject to repeal or amendment by a mere majority vote.

A super majority vote requirement is sometimes considered necessary for "[a]cts regarded as of more than ordinary importance." (4 McQuillin, *supra*, § 13.13c, p. 555.) Both the federal (see, e.g., U.S. Const., art. II, § 2(2)) and state (see, e.g., Cal. Const., art. XVI, § 18) Constitutions contain super majority requirements for specified matters.

On the other hand, such a requirement "gives disproportionate power to the minority" (*Gordon v. Lance* (1971) 403 U.S. 1, 6) and is thus "fundamentally undemocratic" (*Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 205). As one leading commentator has stated:

"Some parliamentary writers have mistakenly assumed that the higher the vote required to take an action, the greater the protection of the members. Instead, the opposite is true. Whenever a vote of more than a majority is required to take an action, control is taken from the majority and given to a minority. For example, when a two-thirds vote is required, the majority need be only one-third plus one member to defeat the proposal. Thus, a minority is permitted to overrule the will, not only of the majority, but of almost two-thirds of the members. If a two-thirds vote is required to pass a proposal and sixty-five members vote for the proposal and thirty-five members vote against it, the thirty-five members make the decision. This is minority, not majority, rule." (*Sturgis, supra*, p. 130.)

Here, the authorizing legislation for a super majority vote requirement established by a board of supervisors is section 25003. It provides: "The board may make and enforce rules and regulations necessary for the government of the board, the preservation of order, and the transaction of business."

Section 25003 authorizes a board of supervisors to adopt rules regarding its voting procedures. (*Dry Creek Valley Assn. Inc. v. Board of Supervisors, supra*, 67 Cal.App.3d 839, 841-845 [Rule that "[i]n the event that one less than the necessary number of "aye" votes has been cast, then an "abstain" vote shall constitute concurrence" upheld].)

We believe that it is for a board of supervisors in the exercise of its discretion to determine whether a four-fifths voting requirement is "necessary" under section 25003.

(See *Gordon v. Lance, supra*, 403 U.S. 1, 7.)³ Being able to establish such a rule is a normal and ordinary procedural power held by a legislative body. (See Robert's, *supra*, § 43, pp. 339-340; Sturgis, *supra*, p. 130; Mason's, *supra*, § 22, pp. 42-43.)

In *Hopkins v. MacCulloch* (1939) 35 Cal.App.2d 442, a city council had adopted an ordinance (under general authority of a state law) that required unanimous consent of all members for a particular action to be taken. The court necessarily upheld the super majority requirement by ruling that the action at issue was invalid since one of the council members had been absent at the time of the vote. (*Id.*, at pp. 452-453.)⁴

Although we believe that a four-fifths voting rule may be adopted under section 25003, "it is the general rule that one legislature cannot enact irrevocable legislation or limit or restrict its own power or the power of its successors as to the repeal of statutes." (*United Milk Producers v. Cecil* (1941) 47 Cal.App.2d 758, 764.)

The applicable parliamentary principles regarding amendment or repeal of a legislative body's rules of procedure are:

"1. All legislative or governmental bodies have power to abolish, modify or waive their own rules of procedure.

"2. *A majority does not have power to make a rule which cannot be modified or repealed by a majority.* If a majority of an official public body has authority in the first instance to pass a rule, it has authority to annul or repeal the same rule. *Rules which can be adopted by a majority vote can be repealed or annulled by the same vote, even a rule which provides that no rule can be repealed or amended without a vote greater than a majority.*

"3. The power of a house of a legislature to determine its rules of proceedings is a continuous power. It can always be exercised by the house and is absolute and beyond the challenge of any other body or tribunal if the rule does not ignore constitutional restraints or violate fundamental rights.

³ Once the board acts by ordinance, its language will be "strictly construed" against a super majority requirement, with any ambiguities resolved in favor of a simple majority requirement. (See *Los Angeles Transportation Com. v. Richmond, supra*, 31 Cal.3d 197, 205.)

⁴ In the only other judicial decision that we have found relevant, the Supreme Court noted the question at issue but was not required to decide it. (*Rains v. County of Contra Costa* (1951) 37 Cal.2d 263, 264-266.)

"4. A legislative house cannot tie its own hands by establishing unchangeable rules. It may adopt and change procedure at any time and with no other notice than the rules may require.

"5. Rules of procedure passed by one legislature are not binding on a subsequent legislature operating within the same jurisdiction.

"6. No meeting of a legislative body can bind a subsequent one by irrevocable acts or rules of procedure. *The power to enact is the power to repeal. A by-law or rule requiring a two-thirds vote to alter or amend the acts of the body, may itself be altered, amended, or repealed by the same power that enacted it.*" (Mason's, *supra*, § 22, pp. 42-43; emphases added.)

As quoted in *United Milk Producers v. Cecil*, *supra*, 47 Cal.App.2d 758, 765:

"Every legislative body may modify or abolish the acts passed by itself or its predecessors. This power of repeal may be exercised at the same session at which the original act was passed; and even while a bill is in its progress and before it becomes a law. The legislature cannot bind a future legislature to a particular mode of repeal. It cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes." (Emphases added.)

Finally, we address the argument that the state has "preempted the field" in legislating super majority requirements for county supervisors. In essence, the issue is whether the Legislature has anywhere indicated "clearly that a paramount state concern will not tolerate further or additional local action" in the field of super majority voting requirements for boards of supervisors. (See Cal. Const., art. IX, § 7; § 37100; *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 807; *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 859-860; *In re Lane* (1962) 58 Cal.2d 99, 102.)

While it is true that the Legislature has set a four vote and five vote minimum requirement in various areas, we find no indication that the Legislature intended thereby to preclude a board of supervisors from setting its own super majority voting requirement. We discern no "paramount state concern" that would have the effect of preventing county supervisors from raising the three vote requirement to a minimum of four or five votes.

The fact that such a local super majority rule may be amended or repealed by a simple majority of the board substantially lessens any concern one may have that the rule is "fundamentally undemocratic." In effect, a majority of a board of supervisors may agree to be bound by a four vote minimum only until it decides otherwise.

In answer to the question presented, therefore, we conclude that the board of supervisors of a general law county may adopt an ordinance that mandates a four-fifths vote of the board to act regarding specified matters which otherwise would require a simple majority vote for adoption; however, such an ordinance may itself be amended or repealed by a majority of the board.
