

MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

May 10, 1984

Honorable Gerard P. Conley
President, Maine Senate
State House Station #3
Augusta, Maine 04333

Dear Senator Conley:

This is to confirm the oral advice rendered by my office to you on April 25, 1984 concerning the number of votes necessary for passage by the Maine Senate of Legislative Document 2340, "AN ACT To Authorize a General Fund Bond Issue in the Amount of \$15,735,000 to Plan, Construct and Equip Pollution Abatement Facilities and to Abate Clean Up and Mitigate Threats to Public Health and the Environment from Uncontrolled Hazardous Substance Sites." As my office indicated to you at that time, since this legislation concerns the authorization of a bond issue, and notwithstanding the presence of an emergency preamble on the bill, a vote of two-thirds of the members of the Senate present and voting, rather than two-thirds of the entire elected membership of the body, is all that is required for passage.*'

L.D. 2340 authorizes the Treasurer of the State to issue registered bonds in the name of the State for the purpose of mitigating threats to the Maine environment from uncontrolled

*' Acting pursuant to this advice, the Senate passed the legislation in question on April 25, 1984 by a vote of 21 to 8, with 4 Senators not voting. The bill is now P. & S.L. 1983, ch. 99.

hazardous substances and to fund the construction of pollution abatement facilities. As such, passage of the bill is governed by the provisions of Article IX, § 14 of the Maine Constitution which provides that "the Legislature may authorize the issuance of bonds on behalf of the State at such times and in such amounts and for such purposes as approved for such action" "whenever two-thirds of both Houses shall deem it necessary, . . ." (emphasis added). L.D. 2340, however, also contains a preamble in which the Legislature declared that the circumstances requiring the authorization of the bond issue constituted "an emergency within the meaning of the Constitution of Maine", thus raising the question as to whether the provisions of the Constitution governing enactment of emergency legislation applied to its passage. These provisions state that, "No Act or joint resolution of the Legislature . . . shall take effect until ninety days after the recess of the session of the Legislature in which it was passed, unless in case of emergency . . . the Legislature shall, by a vote of two-thirds of all the members elected to each House otherwise direct." (emphasis added). Me.Const. art. IV, pt. 3, § 16.

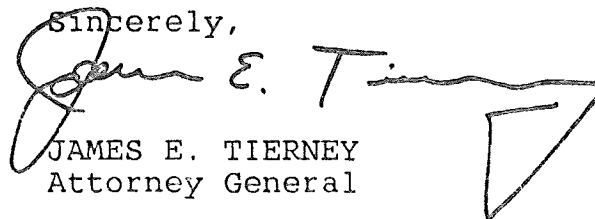
It is, first of all, clear that the number of votes necessary for passage of a bond issue, pursuant to Article IX, Section 14 of the Maine Constitution, is two-thirds of the members of each House present and voting, assuming the presence of a quorum. The phrase "two-thirds of both Houses," wherever it appears in the Maine, United States or other state Constitutions, has been consistently interpreted by the courts, the Legislature, the Congress and this Department to mean two-thirds of the members present and voting, rather than two-thirds of the entire elected membership of each House. See, e.g., the Opinion of Attorney General Joseph E. Brennan dated August 18, 1978 to Representative Louis Jalbert, interpreting the identical language of Article X, § 4 of the Maine Constitution, dealing with amendments to the Constitution. See also the Opinion of Attorney General James S. Erwin to Representative Jalbert, dated March 28, 1967, and the Opinion of Attorney General Richard J. Dubord to Speaker Dana W. Childs, dated February 12, 1965 (copies attached). It is also equally clear, however, that the phrase "two-thirds of all the members elected to each House," contained in the provision of the Maine Constitution relating to enactment of emergency legislation, means exactly what it says. Thus, the question is only whether the presence of an emergency preamble on bond authorization legislation alters the number of votes required for passage.

In the opinion of this Department, the presence of the emergency preamble does not have such an effect. As indicated by the quoted language of Article IX, Part 3, Section 16 of the Maine Constitution quoted above, the purpose of emergency legislation is to avoid the effect of that section delaying the effectiveness of legislation until ninety days after the recess of the session of the Legislature which passed it. The purpose of this provision, in turn, is to permit the electorate, through the operation of Article IV, Part 3, Section 17 of the Maine Constitution, to initiate a so-called "people's veto" of any piece of legislation to which it might object. Thus, the effect of enactment of emergency legislation by the Legislature is to cut off any possible public referendum on the bill.

In the case of a bond authorization, however, by the very terms of Article IX, Section 14, such legislation may become law only upon ratification "by a majority of the electors voting thereon at a general or special election." Thus, the bond authorization contained in L.D. 2340 will, in any event, have to be approved by the general electorate. That being the case, the presence of the emergency preamble on the bill, whose effect would be to negate what the Constitution already requires, must be regarded as surplusage. Consequently, the requirement of the Constitution that an absolute majority of each House approve legislation before the possibility of a public referendum is cut off does not apply.

I hope this answers your question. If you need further clarification, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "James E. Tierney". The signature is written in dark ink and is positioned above the typed name and title.

JAMES E. TIERNEY
Attorney General

JET/ec

cc: Governor Joseph E. Brennan
Speaker John L. Martin
Treasurer Samuel Shapiro
Secretary of State Rodney Quinn

JOHN E. F. RAY
ATTORNEY GENERAL



FRANK C. M. ...
JOHN B. ...
DONALD ...
DEPUTY ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

August 18, 1978

Honorable Louis Jalbert
39 Orestis Way
Lewiston, Maine 04240

Dear Representative Jalbert:

We are responding to your oral request for an opinion from this office on a question concerning legislative voting on proposed constitutional amendments. Amendments to the State Constitution are governed by Article X, Section 4, which reads in pertinent part:

"The Legislature, whenever two-thirds of both Houses shall deem it necessary, may propose amendments to this Constitution;
... "

Your question is whether the term "two-thirds of both Houses" means that the proposed amendment must be passed by two-thirds of all legislators elected to serve in the respective body or, alternatively, whether passage may be by two-thirds of the members of the body who are present and voting. Our answer is that if there is a quorum present in the Legislative body, the Constitution requires a two-thirds vote of the members present and not a vote of two-thirds of the entire membership present or absent.

Questions of this nature may be considered parliamentary questions which are appropriately answered by the presiding officer of the legislative body involved. However, in this case we believe the answer is so clear that we do not hesitate to provide that answer as an opinion of this office.

The provision of Article X, Section 4 of the Maine Constitution in question has not been the subject of a parliamentary ruling which we could find recorded or the subject of interpretation by the Maine Judiciary. However, Article V of the United States Constitution

with regard to amendments thereof is virtually identical to the provision in the Maine Constitution,^{1/} and has been subject to both parliamentary and judicial interpretation. In 1898 the Speaker of the United States House of Representatives, Thomas B. Reed of Maine, ruled in response to a point of order that the two-thirds requirement meant two-thirds of the Representatives present. In making his ruling, Speaker Reed states, among other things:

"The provision of the Constitution says 'two-thirds of both Houses.' What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object."
5 Hinds' Precedents of the House of Representatives, pp. 1009-1010.

Speaker Reed also noted with regard to this question that the first amendment to the United States Constitution proposed by the First Congress, which included as members many of those who had been directly involved in the constitutional convention, was passed upon a vote of 37 in favor out of a total elected membership of 65. Thus, the framers of the Constitution themselves apparently believed that the term meant two-thirds of those present rather than two-thirds of the entire elected membership. A ruling similar to that of Speaker Reed's had been made previously in the United States Senate in 1869. 5 Hinds' Precedents of the House of Representatives, p. 1010.^{2/}

1/ The parallel provision in the United States Constitution reads:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution. . . ."

2/ See also J Cooley's Constitutional Limitations, 8th ed. (1927), p. 70.

The provision of the United States Constitution with regard to amendments has also been the subject of interpretation by the United States Supreme Court. On both occasions that the Court has dealt specifically with this question, it has arrived at the same conclusion as that of Speaker Reed and has ruled that constitutional amendments proposed by two-thirds of the federal legislative bodies present had been constitutionally proposed. Missouri Pacific R. Co. v. Kansas, 248 U.S. 276 (1919); State of Rhode Island v. Palmer (The National Prohibition Cases), 253 U.S. 350 (1920).

We have searched for precedent in other states also. Generally speaking, there has been very little interpretation of constitutional provisions of this type, perhaps because many other states have much more specific wording - a specified portion of "all members elected to each House" (e.g. Kentucky, Virginia and Rhode Island). In one case, State v. State Board of Equalization, 230 P. 743 (Okla., 1924), the State Court did interpret terminology similar to that used in Maine as meaning two-thirds of all the Representatives elected. However, the wording of the Oklahoma provision is different from that of the provision in Maine since the context also referred to "a majority of all the members elected to each of the two Houses." The Court made it clear that they were basing their interpretation upon this context and that if the two-thirds provision stood by itself, as it does in Maine, their answer would have been different.

There are two other points which should be mentioned in support of our opinion. First, it is clear that if it had been intended to have the two-thirds of both Houses refer to the entire elected membership, the provision could have been phrased that way, as it is in Article IV, Part Third, Section 16. That provision, concerning the effective date of acts, provides an exception for emergency legislation passed ". . . by a vote of two-thirds of all the members elected to each House. . . ." Second, in examining questions which relate to parliamentary law, the past practices or usages of the legislative body do have precedential value. Mason, Manual of Legislative Procedure, 1975, § 39, pp. 53-55. Examples of the legislative procedure used for past amendments to the Maine Constitution clearly show that two-thirds of the members of a body

present at the time of the vote is sufficient to properly pass a constitutional proposal.^{3/}

On the basis of the foregoing, we believe that the answer to your question is quite clear. If we can assist you in any other way, please do not hesitate to call upon us.

Sincerely,

Joseph E. Brennan
JOSEPH E. BRENNAN
Attorney General

JEB:mfe

cc: President of the Senate
Speaker of the House

3/ Examples of past practices of the Maine Legislature indicating the acceptability of two-thirds of the membership present, include the following:

1. In 1834 the first amendment to the Constitution was passed in the House of Representatives on a vote of 117-52 and the membership of the House at that time was 186.

2. In 1837 the second amendment to the Constitution was passed by the House of Representatives by a vote of 97-14, and the membership at that time was 186.

3. In 1844 the Fifth Amendment to the Constitution was passed by the House of Representatives on a vote of 100-34, and the membership at that time was 151.

4. In 1868 the Eleventh Amendment to the Constitution was passed in the House of Representatives by a vote of 84-5, and there were 151 members. The journal entry for this vote reads in part:

"and the question being on finally passing the same [the constitutional amendment proposal], requiring a two-thirds vote. . ."

5. In 1879 the Senate, which then had a membership of 31, passed a constitutional amendment proposal on a vote of 15-2.

March 28, 1967

Honorable Louis Jalbert
House of Representatives
Augusta, Maine

Dear Louis: Re: Meaning of "Two-Thirds Vote"

You have asked me to clarify the law with respect to the meaning of a two-thirds vote required to override a Governor's veto. Attached to this letter you will find the letter of February 12, 1965, which Attorney General Dubord wrote to Speaker Dana Childs. This letter covers the question of two-thirds vote in the case of Constitutional amendments and emergency legislation. My answer to your inquiry is an extension of the opinion and logic used by Attorney General Dubord.

Accepting the premise that the word "House" means a quorum of its membership, I interpret the requirement of a two-thirds vote necessary to override the veto of a Governor to mean two-thirds of the members present and voting, assuming there is a quorum. It is my opinion that in the absence of clarifying language, the same standard is used for the overriding of a veto that is used for the passing of a Constitutional amendment.

As pointed out by Attorney General Dubord in his letter of February 12, 1965, the only place where the Constitution in terms requires "a vote of two-thirds of all the members elected to each house" is for emergency legislation. This requirement was apparently dictated by the fact that emergency legislation denies the people their right of referendum.

No such special consideration obtains in the matter of overriding a veto and the requirement only speaks in terms of the

Honorable Louis Jalbert

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March 28, 1967

"House." As stated above, we consider this to mean those present and voting (assuming a quorum). I refer again to the cases cited by Attorney General Dubord.

With the hope that this is useful to you, I am

Very truly yours,

James S. Erwin
Attorney General

JSE:H

February 12, 1965

Honorable Dana W. Childs
Speaker of the House
State House
Augusta, Maine

Dear Dana:

Re: Number of Votes Required by Article X, Section 4,
Constitution of Maine

FACTS:

Article X, Section 4, Constitution of Maine, provides that the legislature, whenever two-thirds of both houses shall deem it necessary, may propose amendments to the Constitution.

QUESTION:

Does the required number of votes mean two-thirds of the members of each house present and voting, providing there is a quorum of each house present?

ANSWER:

Yes.

OPINION:

The United States Supreme Court has held that the word "House", as used in the Constitution, means a quorum of its membership, and that the two-thirds vote in each house, which is required in proposing a constitutional 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.

Missouri Pacific Railway Co. v. Kansas, 248 U.S. 276

National Prohibition Cases, 253 U.S. 350

The Pocket Veto Case, 279 U.S. 655

State courts have universally applied this rule.

Opinion of Justices, (Ala.) 152 So. 902

Warnock v. Lafayette, 4 La. Am. 419

Zeiler v. Central Railway Co., (Md.) 35 A. 932

Kay Jewelry Co. v. Board, (Mass.) 27 N.E. 2d 1

Southworth v. Palmyra, etc., Railway, 2 Mich. 287

State v. Gould, (Minn.) 17 N.W. 276

Green v. Weller, 32 Miss. 650

State v. McBride, 4 Mo. 303

North Platte v. North Platte Water Works, (Neb.) 76 N.W. 906

English v. State, 7 Tex. App. 171

See: Mason's Legislative Manual, Sec. 512

Strengthening this conclusion is the provision in Article IV, Part 3rd, Section 16, Constitution of Maine, requiring "a vote of two-thirds of all the members elected to each house" for emergency legislation. The intent of the framers of the Constitution to apply different vote requirements in the two sections above cited becomes apparent when it is considered that the people have the right to vote upon a constitutional amendment; whereas, by enacting an emergency law, the legislature takes away the right of the people to vote upon it by referendum.

Very truly yours,

Richard J. Dubord
Attorney General