

COUNTY LAW §§ 150-a, 153, 153(1), 153(4), 153(8); GENERAL CONSTRUCTION LAW § 41; MUNICIPAL HOME RULE LAW ART. 3, §§ 2(5), 2(9), 2(12), 10(1), 10(1)(I), 10(1)(ii)(a)(3), 23(2)(f); NEW YORK STATE CONSTITUTION ART. IX, § 2(c), ART. IX, § 2(c)(3)

A county may adopt a local law requiring a super-majority to pass certain types of resolutions. Such a local law would be subject to mandatory referendum.

August 28, 2007

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Informal Opinion
No. 2007-5

Dear Mr. Westphal:

You have requested an opinion regarding whether the County may require that certain resolutions be adopted by a super-majority vote. You have advised that the County Legislature has in the past required approval by two-thirds of the Legislature for certain types of resolutions: resolutions authorizing certain expenditures when the County has adopted an austerity spending plan, resolutions authorizing filling positions of employment with the County when the County has restricted the hiring of County personnel, and resolutions authorizing the transfer or expenditure of money from the County's contingent fund. You have asked the general question of whether the County has the authority to impose such super-majority requirements for the enactment of resolutions of a particular type. As explained below, we are of the opinion that the County has the authority to impose such requirements by local law, but such a local law would then be subject to a mandatory referendum.¹

¹You have not asked, and we offer no opinion as to, whether the particular types of resolutions underlying your inquiry may be the subject of such a local law, or whether they are, for example, preempted by or inconsistent with relevant state law.

Analysis

Section 153 of the County Law governs the rules of procedure of a county board of supervisors.² Of particular relevance here, it provides that

[w]henever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board.

County Law § 153(4). You have asked whether the County may alter the voting strength necessary to pass certain types of resolutions.

One possible source of authority for the County to require a super-majority to pass certain types of resolutions is County Law § 153(8), which provides that, "[e]xcept as otherwise expressly provided, the board of supervisors of each county shall determine the rules of its own proceedings." County Law § 153(8). We believe, however, that this section does not provide the necessary authority. This section permits a legislative body to determine the number of votes required for intra-cameral matters such as selecting a vice-chairman, appointing council members to council committees, and adopting council rules. See Morris v. Cashmore, 253 A.D. 657 (1st Dep't), aff'd no opn., 278 N.Y. 730 (1938) (General Construction Law § 41, which requires public entities to act by a majority of the whole and not by majority of a quorum, does not restrict rule-making as to intra-cameral matters). But this provision does not authorize changing the number of votes required to adopt legislative acts.

In Op. Att'y Gen. (Inf.) No. 2001-6, we concluded, following Morris, that the authority of a body to establish general rules of procedure does not authorize changing voting requirements for matters other than intra-cameral matters. In that opinion, the issue was whether the city council could reduce the number of

²The powers and duties granted a county board of supervisors may be exercised by an elective county legislative body designated by another name. County Law § 150-a. You have advised that in Cayuga County, the legislative body is denominated the County Legislature.

votes required to pass a resolution; we concluded that its general housekeeping authority did not authorize the city to permit a number less than a majority of the whole council to adopt non-tax resolutions.

Similarly, here we are of the opinion that the authority to determine general rules of procedure does not authorize increasing the number of votes required to pass a resolution. As the Court of Appeals stated in Burroughs v. Brinkerhoff, 68 N.Y. 259 (1877):

The Revised Statutes declare that a majority of the supervisors of any county shall constitute a quorum for the transaction of business; and all questions which shall arise at their meetings shall be determined by the voice of a majority of the supervisors present. No rule of the board could alter this. It could be changed by law only.

68 N.Y.2d at 262-63.

We believe, however, that the County's home rule authority permits it to enact a local law that requires a super-majority to pass certain types of resolutions.³ The powers of a county legislature, except as otherwise expressly provided, may be exercised by either local law or resolution. County Law § 153(1). While both resolutions and local laws are legislative acts, the adoption of local laws requires compliance with procedures that passage of resolutions does not. See Reese v. Lombard, 47 A.D.2d 327, 330 (4th Dep't 1975) (a local law is a more formal legislative act than a resolution); see also generally Municipal Home Rule Law article 3 (procedure for adoption of local laws); cf. Memorandum of the Uniform County Law Commission, reprinted in Bill Jacket for ch. 691 (1950), at 9 ("The [County L]aw is designed that measures dealing with the permanent structure of county government must be passed by local law and temporary measures by resolution.").

³A local government's authority to increase the number of votes necessary to pass particular types of resolutions may be preempted by state law. See, e.g., Matter of Benderson Dev. Co., Inc. v. City of Utica, 5 Misc. 3d 467 (Sup. Ct. Oneida County 2004) (city code provision requiring three-fourths vote of the common council to pass a zoning amendment when the city planning board issued an adverse recommendation regarding the amendment was preempted by state law).

A county is authorized to adopt local laws relating to its property, affairs, or government that are not inconsistent with the provisions of the Constitution or with any general law. N.Y. Const. Art. IX, § 2(c); Municipal Home Rule Law § 10(1)(i). A county is also authorized to adopt local laws relating to the transaction of its business that are not inconsistent with the provisions of the Constitution or with any general law, except to the extent that the Legislature restricts the adoption of such a local law relating to other than the property, affairs, or government of the county. N.Y. Const. Art. IX, § 2(c)(3); Municipal Home Rule Law § 10(1)(ii)(a)(3).

We believe that these grants of home rule power authorize a local law requiring a super-majority vote of the County Legislature for certain types of resolutions – that such a local law relates to the County’s “property, affairs or government” or to the “transaction of its business.” In the past, we have concluded that a county may adopt a local law providing that a notice of a newly-adopted local law, an abstract of its provisions, and details as to the location of a copy of the text of the law must be published in a county’s official newspaper – that such a law falls within the “property, affairs or government” and is part of the transaction of the business of the county. Op. Att’y Gen. (Inf.) No. 92-1. We have also previously concluded that a county may adopt local law establishing a procedure for designating the county’s official newspaper – that such a law falls within the “property, affairs or government” and is part of the transaction of governmental business. Op. Att’y Gen. (Inf.) No. 86-13. Similarly, a local law requiring a super-majority for certain types of resolutions, we believe, directly relates to the manner in which the government of the County operates and by which it transacts its business. Cf. Op. St. Comptr. No. 93-20 (local law requiring that checks issued by a receiver of taxes be countersigned by another municipal officer falls within the “property, affairs or government” and is part of the transaction of business of a town).

A local law requiring a super-majority to adopt certain types of resolutions would not be inconsistent with County Law § 153(4).⁴ Section 153(4) provides the default voting rule for a

⁴We assume here for analytical purposes that County Law § 153(4) is a general, rather than a special, law. For home rule purposes, a general law is a state statute that in terms and in effect applies alike to, in relevant part, all counties or all counties other than those wholly included within a city. Municipal Home Rule Law § 2(5). In contrast, a special law is a

county board of supervisors "[w]henver in [the County Law] or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed," but the statute also expressly recognizes that other voting proportions may be prescribed.

While a local governing body may by local law require a super-majority for certain types of resolutions, it may not impose such a requirement on the enactment of local laws, as we expressly concluded in Op. Att'y Gen. (Inf.) No. 98-37. We so concluded because such a requirement would be inconsistent with the procedure set forth in the Municipal Home Rule Law for adopting local laws. Id. Resolutions are not, under the Municipal Home Rule Law, local laws. Municipal Home Rule Law § 2(9) ("local law" does not include "an ordinance, resolution or other similar act of the legislative body"). The provisions of the Municipal Home Rule Law prescribing the procedure for adopting local laws thus do not apply to enactments that are not local laws, such as city ordinances, Duci v. Roberts, 65 A.D.2d 56 (3d Dep't 1978) (provisions of Municipal Home Rule Law do not apply to amendment of city ordinance), or the resolutions that are at issue here.

Finally, although we believe that a county's home rule authority includes the authority to pass a local law requiring a super-majority to pass certain types of resolutions, we conclude that passage of any such law would be subject to a mandatory referendum. A local law that curtails the power of an elective officer is subject to mandatory referendum, except as otherwise provided or under authority of a state statute. Municipal Home Rule Law § 23(2)(f). A law curtails a power of an elective officer if it impairs a power conferred on the officer "as part of the framework of local government." Mayor of New York v. Council of New York, 2007 N.Y. LEXIS 1564, at **11 (N.Y. June 12, 2007). In contrast, a limitation on the activities that a local elective officer may take that is "merely a consequence of legislative policy making" and does not limit the elective officer's structural authority, does not require a referendum. Id. at **12.

state statute that in terms and in effect applies to one or more, but not all, counties or counties other than those wholly included within a city, id. § 2(12). When adopting local laws pursuant to its home rule authority, a county need only be consistent with general, not special, laws. Id. § 10(1).

A local law that requires more than the simple majority that would otherwise suffice to adopt a resolution would, in our opinion, curtail the voting power of the members of the County Legislature, who are elective officers, County Law § 150-a. Such a local law would have the effect of reducing the proportional impact of each legislator's vote, cf. Heeran v. Scully, 254 N.Y. 344 (1930) (local law adding two appointees of the mayor to a board previously consisting of three elective officers has effect of curtailing power of such elective officers and is subject to referendum), and thus would curtail each legislator's relative ability to cast the deciding vote. Therefore, such a local law is subject to mandatory referendum.

In summary, we conclude that the County may adopt a local law requiring that a super-majority be required to pass certain types of resolutions, and that such a local law would be subject to mandatory referendum.

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

KATHRYN SHEINGOLD
Assistant Solicitor General
In Charge of Opinions