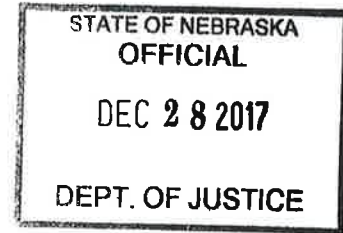




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No. 17-006



**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

**SUBJECT:** Interpretation of the "Supermajority" Voting Requirement in Neb. Rev. Stat. § 13-519(2) (Supp. 2017).

**REQUESTED BY:** Charlie Janssen  
State Auditor

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
L. Jay Bartel, Assistant Attorney General

### INTRODUCTION

Nebraska's political subdivisions are subject to certain limitations in adopting their budgets. Neb. Rev. Stat. §§ 13-518 to 13-522 (2012 and Supp. 2017). Specifically, "no governmental unit shall adopt a budget containing a total of budgeted restricted funds more than the last prior year's total of budgeted restricted funds" plus certain allowable increases. Neb. Rev. Stat. § 13-519(1)(a) (Supp. 2017). Governmental units may exceed the limitation "by up to an additional one percent upon the affirmative vote of at least seventy-five percent of the governing body." Neb. Rev. Stat. § 13-519(2) (Supp. 2017). You have asked our opinion on "whether the phrase 'seventy-five percent of the governing body'...refers to the specified percent of either the entire elected body or only those members present for the required vote." As the Auditor of Public Accounts must notify the State Treasurer if the budget documents of a governmental unit are not in compliance with the budget limits contained in §§ 13-518 to 13-522, you state that, "to fulfill that responsibility, it is essential for [the Auditor's] office to have a correct understanding of the statutory language at issue."

For the reasons stated below, we conclude that the additional one percent budget authority allowed under § 13-519(2) requires the affirmative vote of seventy-five percent of the members of the governing body constituting a quorum authorized to conduct business, and not seventy-five percent of the entire membership of the governing body.

## ANALYSIS

### I. Determining the “Governing Body” Subject to the Supermajority Vote Requirement.

Section 13-519(2) provides: “A governmental unit may exceed the limit provided in subdivision (1)(a) of this section for a fiscal year by up to an additional one percent upon the affirmative vote of at least seventy-five percent of the governing body.” “Governmental unit means every political subdivision which has authority to levy a property tax or authority to request levy authority under section 77-3443 except sanitary and improvement districts which have been in existence for five years or less and school districts.” Neb. Rev. Stat. § 13-518(4) (Supp. 2017). “Governing body has the same meaning as in section 13-503.” Neb. Rev. Stat. § 13-518(3) (Supp. 2017). Neb. Rev. Stat. § 13-503(1) (Cum. Supp. 2016) provides:

Governing body means the governing body of any county agricultural society, elected county fair board, joint airport authority formed under the Joint Airport Authorities Act, city or county airport authority, bridge commission created pursuant to section 39-868, cemetery district, city, village, municipal county, community college, community redevelopment authority, county, drainage or levee district, educational service unit, rural or suburban fire protection district, historical society, hospital district, irrigation district, learning community, natural resources district, nonprofit county historical association or society for which a tax is levied under subsection (1) of section 23-355.01, public building commission, railroad transportation safety district, reclamation district, road improvement district, rural water district, school district, sanitary and improvement district, township, offstreet parking district, transit authority, metropolitan utilities district, Educational Service Unit Coordinating Council, and political subdivision with the authority to have a property tax request, with the authority to levy a toll, or that receives state aid;....

The definition of “governing body” is circular, defining the term as the “governing body” of the various listed governmental units. “Statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary.” *PSB Credit Services, Inc. v. Rich*, 251 Neb. 474, 477, 558 N.W.2d 295, 297 (1997). “In ordinary speech, the ‘governing body’ of an institution, organization, or territory means the body which has the ultimate power to determine its policies and control its activities.” *Student Bar Ass’n Bd. of Govenors v. Byrd*, 293 N.C. 594, 602, 239 S.E.2d 415, 421 (S. Ct. 1977). The term “governing body,” in the context of operation of municipal or other local government, refers to the body that performs legislative functions. *Burch v. City of San Antonio*, 518 S.W.2d 540 (Tex. 1975); *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (Ga. 1955). For any specific listed entity or political subdivision having authority to have a

property tax request, levy a toll, or that receives state aid, the identity of the governing body will generally be determined by those statutes relating to the creation and exercise of powers by such entities. For example, the “governing body” of a county would be the county board. Neb. Rev. Stat. § 23-103 (2012) (“The powers of the county as a body corporate or politic, shall be exercised by a county board.”). For a metropolitan utilities district, the “governing body” is the board of directors. Neb. Rev. Stat. § 14-2102 (Cum. Supp. 2016) (“In each metropolitan utilities district service area, there shall be a board of directors consisting of seven members.”). The governing body of a public building commission would be the board of commissioners. Neb. Rev. Stat. § 13-1303 (2012) (“Each commission shall be governed by a board of commissioners of five members....”). For cities and villages, the “governing body” is the city council. See Neb. Rev. Stat. §§ 14-214 and 14-216 (2012) (Cities of the metropolitan class); Neb. Rev. Stat. §§ 15-201 and 15-401 (2012) (Cities of the primary class); Neb. Rev. Stat. § 16-401 (Cum. Supp. 2016) (Cities of the first class); and Neb. Rev. Stat. §§ 17-103 and 17-105 (Supp. 2017) (Cities of the second class and villages).<sup>1</sup>

## II. Computation of the Seventy-Five Percent Voting Requirement.

Section 13-519(2) allows a governmental unit to exceed the limitation in § 13-519(1)(a) “by up to an additional one percent upon the affirmative vote of at least seventy-five percent of the governing body.” Neb. Rev. Stat. § 13-519(2) (Supp. 2017). The issue is how is the 75 percent voting requirement to be computed – is it 75 percent of the entire membership of the body, or is it 75 percent of the number of members required for the body to transact business?

The general rule as to the number of votes required for action by a governmental body is stated as follows in the leading treatise on municipal law:

Where any particular act is required to be done by a specified vote, generally that requirement is met by a proportion of the vote of those constituting the quorum to do business....However, where the act must be done by a distinct proportion ‘of all the members elected,’ or ‘of all of the members of the council,’ it is manifest that the law should be construed by counting the whole membership of the body in question. 4 McQuillin, *Municipal Corporations* § 13.39 (2017) (footnotes omitted).

Where the vote of a specified percentage of a body is required, the following rule is recognized:

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<sup>1</sup> Apart from the issue of identifying what constitutes the “governing body” of a particular listed entity is the question of how to determine the number of votes required to satisfy the 75 percent vote requirement for particular entities. That issue is addressed in part II. of our analysis.

Acts regarded as of more than ordinary importance may require a two-thirds vote, or in some cases considered of greater public interest a three-fourths vote, of the local legislative body....However, power conferred upon a city council to be exercised 'by a vote of two-thirds of that body,' or by an 'affirmative vote of two-thirds of the members of the council,' has been construed to mean two-thirds of a legal quorum, and not two-thirds of the entire membership of the council. However, use of the phrase 'of the members' alone and without qualification in authorizing legislation does not give rise to a presumption that the requisite majority is to be determined upon the basis of a quorum, and the court will construe the legislative act as a whole in order to determine whether a majority of the entire council is required. 4 McQuillin, *Municipal Corporations* § 13.41 (2017) (footnotes omitted).

Courts from a number of jurisdictions have recognized the common law rule that "a majority of the membership of a board or commission constitutes a quorum for the transaction of business and a majority vote of the quorum is decisive...unless the legislature has provided a different rule by statute." *City of Hiawatha v. Regional Planning Com'n of Linn County*, 267 N.W.2d 31, 32 (Iowa 1978) [*"City of Hiawatha"*]. *Accord Harris v. Town of Wayland*, 16 Mass. App. Ct. 583, 453 N.E.2d 1062 (Mass. App. Ct. 1983); *DiGiacinto v. City of Allentown*, 486 Pa. 436, 406 A.2d 520 (Pa.1979). Unless the legislature has employed language requiring a vote by a specified number or percentage of "all the members," "the members of," or similar language expressing "an intention that decisions of the body be made by the designated proportion of the whole membership" of the governing body, "the requirement is met by that proportion of a quorum." *City of Hiawatha*, 267 N.W.2d at 32. *See also Mix v. City of New Orleans*, 126 So. 2d 1, 6 (La. Ct. App. 1960) ("[R]equirement of an affirmative vote of 'two-thirds of the members of the Council' means two-thirds of those members of the Council at a legally constituted meeting and not two-thirds of all the elected members of the Council."); *Manno v. City of Clifton*, 14 N.J. Super. 100, 102, 81 A.2d 368, 369 (N.J. Super. Ct. 1951) (Common law rule applied as "[t]he act contain[ed] no provision requiring a majority vote of all members for valid action.").

The Nebraska Supreme Court's decision in *City of North Platte v. North Platte Waterworks Co.*, 56 Neb. 403, 76 N.W. 906 (1898) [*"City of North Platte"*], is in accord with these general rules. In that case, the Court considered a challenge to the validity of an ordinance authorizing the construction of waterworks and supply of water through hydrants at a specified rental. By statute, ordinances of a general or permanent nature were required to be "fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rule." *Id.* at 409-10, 76 N.W. at 908-09. Only four of six council members were present and voted affirmatively to suspend the rule. While the ordinance was ultimately passed by majority vote of the entire council, the city argued the ordinance was invalid as the vote to suspend was not binding because the four votes represented only two-thirds of the council, not the three-fourths required by statute. *Id.* In analyzing the question, the Court noted a Maryland case holding a rule requiring two-

thirds of the “members of the branch” to suspend an ordinance reading requirement “mean[t] two-thirds of the members voting, not being less than a majority, and not two-thirds of all the members.” *Id.* at 412, 76 N.W. at 909 (quoting *Zeiler v. Railway Co.*, 84 Md. 304, \_\_\_, 35 A. 932, 934 (1896)). After noting authorities from other jurisdictions sustaining a similar rule, the Court stated:

From these cases it appears very clearly that, if we are to be governed by the opinion of other courts, we must hold that, at the meeting where four councilmen were in attendance, it was within their power by a unanimous vote to suspend the rule. There was required by the statute, to suspend the rule, three-fourths of the council; but, in the passage of an ordinance, the requirement of a concurrence of a majority of the whole number of members elected to the council was sufficient. Comp. St. c. 14, art. 1, § 76. It seems to us this particularity in prescribing that the majority in one instance must be of the whole number “of members elected to the council” indicates an intention on the part of the legislature that the general rule should govern provisions in the same chapter as to which no qualifying language was used. We therefore conclude that the rule was properly suspended by the vote by which, under the circumstances, it was attempted; and, there being presented no question other than those considered, the judgment of the district court is affirmed. 56 Neb. at 414-15, 76 N.W. at 910.

*Houser v. School Dist. of South Sioux City*, 189 Neb. 323, 202 N.W.2d 621 (1972) [*Houser*], involved application of a statute providing for the termination of a teacher’s contract by “a majority of the members of the board.” At a special meeting at which five of six board members were present, the board terminated the teacher’s contract by a three to two vote. The board argued the term “majority of the members of the board” meant a majority of a quorum, and not all members of the board. *Id.* at 326, 202 N.W.2d at 623. The Court found “no distinction between the phrasing ‘a majority of all members,’ and ‘majority of members,’” concluding “[t]he language used indicates to us the intention to require a majority of all members of the board, and not a majority of the quorum.” *Id.* at 328, 202 N.W.2d at 624. As only three of six board members voted to terminate, the Court reversed the district court’s finding that the termination was valid. *Id.*

In *State ex rel. Grosshans v. Gray*, 23 Neb. 365, 36 N.W. 577 (1888) [*Gray*], the Court considered the validity of a reorganization ordinance enacted by a city council comprised of four members. Two members voted in favor and two abstained. The mayor then cast a vote in favor. The relevant statutes provided that, to pass the ordinance, the “concurrence of a majority of the whole number of members elected to the council” was required. *Id.* at 369, 36 N.W. at 578. Based on these statutes, the Court concluded

There can be no doubt that to pass an ordinance for the reorganization of the city by increasing the number of wards, and of the membership of the council, it required the concurring vote of a majority of all of the councilmen

elected, and the vote of two members of a council consisting of four members was not sufficient. *Id.* at 369, 36 N.W. at 578-79.

*Nemaha Natural Resources Dist. v. Neeman*, 210 Neb. 442, 315 N.W.2d 619 (1982) [*“Neeman”*], involved the validity of action taken by the board of a soil conservation district. Three of five members of the board of supervisors were present at a meeting where two members voted in favor of a merger with other districts and the transfer of district assets. The other member abstained. The court found the “common law rule” that, absent a contrary statutory provision, “a majority of a quorum which constitutes a simple majority of the collective body may act for that body...,” did not apply, stating:

In the instant case, we determine that the phrase ‘the concurrence of a majority of the supervisors’ must be interpreted to mean a majority of all the supervisors of the Otoe conservation district board....Section 2-1519 defines a quorum as a majority of the supervisors, but specifically provides that ‘the concurrence of a majority of the supervisors shall be required for the determination of any matter within their duties.’

We determine that if only a simple majority of the quorum had been intended to control the action taken by the entire board of supervisors, there would be no need to insert the language ‘of the supervisors’ into the statute. We must conclude that the Legislature did so for the purpose of preventing the common-law rule from applying and to require that a majority of all the members of the board of supervisors vote on the matters before the district board. *Id.* at 452, 315 N.W.2d at 625.

Thus, in *City of North Platte*, the Court concluded that a statute requiring a vote of “three-fourths of the council” to suspend its rules applied to a majority of the council, and not all members, contrasting this language with a statute requiring “a concurrence of a majority of the whole number of members elected to the council” to pass an ordinance. In *Houser*, the phrase “a majority of the members of the board” was construed to mean a majority of “all” board members. In *Gray*, a statute requiring the “concurrence of a majority of the whole number of members elected to the council” was interpreted to require a majority of all council members. *Neeman*, in turn, determined that statutory language requiring the “concurrence of a majority of the supervisors” meant a majority of all supervisors.

Section 13-519(2) allows an additional one percent increase over the budget limitation imposed in § 13-519(1)(a) “upon the affirmative vote of at least seventy-five percent of the governing body.” This subsection does not state the 75 percent vote is based on “all of the members,” the “whole number of members,” or even the “members of” the governing body. Rather, it applies only to “the governing body.” In the absence of any statutory language indicating an intent that the 75 percent voting requirement applies to the entire membership of a governing body, we conclude that, in accord with

the general rule, the required percentage applies only to a quorum or majority of the governing body required to transact business.<sup>2</sup>

This conclusion is further supported by reference to the many statutes where the Legislature has employed language specifically requiring a vote of a specified percentage of all members of a governing body to take certain actions. *E.g.* Neb. Rev. Stat. § 16-721 (Cum. Supp. 2016) (Authorizing first class cities to transfer funds “by the affirmative vote of three-fourths of all the members of the city council.”); Neb. Rev. Stat. § 79-10,114 (2014) (Allowing school district property to be sold by school board only by vote “of at least two-thirds of all the members of the board.”); Neb. Rev. Stat. § 14-405 (2012) (Requiring “favorable vote of five-sevenths of all members of the city council” of a metropolitan class city when protest to change of boundaries is presented.); Neb. Rev. Stat. § 77-27,142(2)(a) (Cum. Supp. 2016) (Requiring municipality seeking to impose municipal sales and use tax greater than one and one-half percent to submit the question to the electorate “upon an affirmative vote by at least seventy-five percent of all of the members of the governing body of the incorporated municipality.”).

“The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.” *Stewart v. Dept. of Revenue*, 294 Neb. 1010, 1019, 885 N.W.2d 723, 730 (2016). “Additionally, the Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the

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<sup>2</sup> Determining the number of votes required to satisfy the “supermajority” voting requirement for certain covered entities may be impacted by other factors, such as local city charters and ordinances. For instance, Neb. Rev. Stat. § 15-401 (2012) provides that “[f]our members of the council shall constitute a quorum for the transaction of any business, and four affirmative votes shall be required to pass any measure or to transact any business unless it is otherwise provided by any charter of a city of the primary class.” Neb. Const. art. XI, § 2, authorizes a “city having a population of more than five thousand (5000) inhabitants [to] frame a charter for its own government, consistent with and subject to the constitution and laws of this state...” “[T]he purpose of the constitutional provision is to render cities independent of state legislation as to all subjects of strictly municipal concern.” *Axberg v. City of Lincoln*, 141 Neb. 55, 58, 2 N.W.2d 613, 614 (1942). “Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action taken under the home rule charter.” *Id.*, 2 N.W.2d at 615. The City of Lincoln, a primary class city, has enacted a charter which provides its city council consists of seven members, and states that “[f]our members of the council shall constitute a quorum for the transaction of any business, and four affirmative votes shall be required to pass any measure or to transact any business unless it is provided to the contrary in this charter.” Lincoln Charter Art. IV, §§ 8, 11. Thus, while three of four members of the city council would, in this case, represent 75 percent of a quorum, at least four affirmative votes are required to pass any measure, including the increase allowed under § 13-519(2).

language it employs to make effective the legislation." *Id.* The Legislature knows how to employ language expressing its intent to require a vote by a specified percentage of the entire membership of a governmental body to approve various actions, and did not use such language in § 13-519(2). We must presume the Legislature is aware of the different effect of the language used in § 13-519(2), requiring a vote of 75 percent "of the governing body" to approve the additional one percent budget authority, as opposed to the many times it has specified a vote by "all members," "the whole number," or "the members of" various governing bodies in setting voting requirements for actions taken by governing bodies in other contexts.

### CONCLUSION

Section 13-519(2) allows an additional one percent increase over the budget limitation imposed in § 13-519(1)(a) "upon the affirmative vote of at least seventy-five percent of the governing body." If the Legislature intended to require an affirmative vote of 75 percent of all members of the governing body, it would have employed language specifically stating the percentage requirement applies to a vote by "all members," the "whole number of members," or "the members of" the governing body, as it has done in numerous other statutes. Absent such language, we are compelled to conclude that the additional one percent budget authority allowed under § 13-519(2) requires the affirmative vote of 75 percent of the members of the governing body constituting a quorum authorized to conduct business, and not seventy-five percent of the entire membership of the governing body.

Very truly yours,

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