

Amendment 4: Hometown Democracy

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By Martha H. Chumbler **Practice Alert - Amendment 4: Hometown Democracy**

Q: What is Amendment 4?

A. Amendment 4, generally referred to as “Hometown Democracy,” is a proposed constitutional amendment that will appear on the ballot during the 2010 November elections. Amendment 4 would require that, before a local government can amend its comprehensive plan, the plan amendment must first be approved by the voters within that local jurisdiction.

Q: Would voter approval be required for all plan amendments?

A: Yes. While some types of plan amendments – including those involving certain small parcels (10 acres or less), urban infill or urban redevelopment – do not require review by the Department of Community Affairs (“DCA”), Amendment 4 includes no such exceptions from the requirement for voter approval.

Q: How would the referendum process be handled for small scale amendments?

A: Currently, a council or commission is required to hold only one hearing on a small scale amendment – the adoption hearing. However, Amendment 4 would require that an additional hearing be scheduled at which the governing body would first consider the plan amendment, followed by a referendum, and, finally, by the governing body’s adoption hearing.

Q: What about plan amendments that are mandated by current statutes, such as annual capital improvement element updates?

A: Unless the statutes are changed, those would require voter approval, as well.

Q: Would there have to be a special election for each plan amendment?

A: Not always. At least some plan amendments could be placed on the ballot along with other matters during a regularly scheduled election or a special election scheduled for other purposes. However, general elections are only required to occur once every other year. Some plan amendments, including those mandated by current statutes, will likely require a specially-scheduled election.

Q: Would each plan amendment have to be voted on separately?

A: It is unclear. However, there are both practical and legal reasons why a separate vote on each plan amendment is more likely. From a practical perspective, combining multiple plan amendments for a single vote places all of the amendments in jeopardy even though voter disapproval may only be directed at one provision. The referendum process – unlike government body adoption hearings, during which revisions can be discussed, public comment elicited, fully considered, and approved – does not allow the flexibility needed to correct minor problems. The combined amendments would all pass or all fail, regardless of the merit of any one of them standing alone.

Combining all of the amendments into a single ballot item could also subject the referendum to a legal challenge, since it would often be difficult, if not impossible, to prepare a ballot summary that complies with the statutory requirement that it describe the amendment's substance in 75 words or less. § 101.161, Fla. Stat.

Q: Who would pay for such specially-scheduled elections, as well as any added expense related to adding a plan amendment to the ballot for a regular election?

A: The local government bears the responsibility for all expenses relating to a local election. However, the local government could – and likely would – increase the fees for plan amendments initiated by private property owners and entities other than the local government itself in order to recoup these expenses.

Q: Is there a way for a local government to reduce the cost of a referendum on a plan amendment?

A: Amendment 4 includes no special mechanism for streamlining or decreasing the cost of the referenda that it would require. However, a local government could combine a plan amendment referendum with other matters being placed before the electorate. It could also utilize the mail-in election procedures already authorized under section 101.6102, Florida Statutes. However, mail-in elections are not inexpensive, involving both the cost of preparing and mailing the ballots and

significant labor costs.

Q: Where would the referendum fit in the schedule for adopting a plan amendment?

A: Amendment 4 would require that the referendum be held after the first consideration of the plan amendment by the governing body of the local government (i.e. its council or commission) but before the governing body actually votes to adopt it. The term “consideration” is not specifically defined in Amendment 4. Under the currently mandated statutory process for plan amendments, the transmittal hearing – at which the council or commission decides whether to transmit an amendment to DCA for initial review – would be the first consideration of an amendment. However, local government could certainly elect to schedule an earlier consideration hearing for the sole purpose of making a plan amendment ripe for a referendum. The referendum would have to occur sometime between this first consideration, whether at transmittal or some pre-transmittal hearing, and the adoption hearing.

Q: Are there practical considerations that would likely dictate the timing of the referendum during the period between first consideration and adoption?

A: Yes, there are several. First, because elections are expensive, local governments will undoubtedly attempt to schedule referenda on plan amendments to coincide with other elections. If there is an election already scheduled, local governments may be inclined to include the plan amendment in order to avoid the expense of a separate election.

If a local government adds a new “consideration” hearing on a plan amendment prior to the statutorily required transmittal hearing, it could then schedule the referendum before the local government’s commission or council has to decide whether to transmit the amendment to DCA. If a plan amendment fails at the referendum, the local government would avoid the expense and staff time required with the formal plan amendment process. However, such early submittal of a plan amendment to the electorate would clearly stifle opportunities for additional revisions to the plan amendment, with any changes made after approval by the electorate requiring yet another referendum.

Local governments may choose to schedule referenda on plan amendments for the period after DCA completes its review of the proposed amendment and provides the local government with its assessment of the amendment’s consistency with applicable statutes and rules. DCA’s assessment – referred to as the Objections, Recommendations, and Comments Report (“ORC Report”) – frequently identifies issues that, if not corrected through a revision of the proposed amendment at adoption, will result in a determination by DCA that the adopted amendment is not in compliance with state law. If a referendum were held on a proposed plan amendment in the form transmitted to DCA and the ORC Report later identifies needed revisions, the local government would have to

select from three bad choices: 1) hold a second referendum, seeking voter approval of the revised version; 2) adopt the amendment in its original form and risk a DCA finding of not in compliance; or 3) withdraw the amendment.

Q: Can a plan amendment that has been approved by the voters be found not in compliance by DCA?

A: Yes. Nothing in Amendment 4 changes the mechanisms for formally challenging the compliance of a plan amendment with applicable statutes and rules. If DCA found a plan amendment not in compliance, a formal administrative proceeding would automatically be initiated. However, DCA and the local government's ability to resolve the matter through remedial amendments would be hampered by the need to hold a referendum seeking voter approval of those amendments. The current statutes relating to such remedial amendments require that the local government's governing body first approve the compliance agreement specifying the needed amendments and subsequently adopt those amendments. However, these actions are often taken back-to-back, as part of a single agenda. Amendment 4 would require that the actions be separated by enough time to allow a referendum to occur after the governing body considers the compliance agreement, with the revisions specified, but before the revisions are actually adopted.

Q: Can a plan amendment that has been approved by the voters be challenged by a third party, whether or not that party is a local voter?

A: Yes. Again, nothing in Amendment 4 changes the mechanisms for formally challenging the compliance of a plan amendment with applicable statutes and rules. If, as a result of a third party challenge, the Administration Commission ultimately identifies revisions needed to bring the plan amendment into compliance, yet another referendum would be required before those revisions could be adopted by the local government.

The potential exists for any number of perplexing possibilities. For example, a plan amendment is approved by the voters and adopted by the local government but is challenged by a third party and ultimately found not in compliance by the Administration Commission, with the Administration Commission specifying repeal as the only acceptable remedial measure. That repeal would require amendment of the comprehensive plan and, therefore, would require another referendum. Since the possibility exists that the voters could disapprove or the repeal or other remedial measures specified by the Administration Commission, there exists the possibility that the local government would be constitutionally prohibited from complying with the Administration Commission's order.

Q: Is there a way to avoid the application of Amendment 4 to a plan amendment?

A: Amendment 4, if approved by the voters in November 2010, will become effective immediately

and would be applicable to all plan amendments that have not yet been adopted. Therefore, the only way to avoid its application to a plan amendment is for that amendment to be adopted prior to the 2010 election. Remedial amendments that are adopted subsequent to Amendment 4's effective date would require approval through a voter referendum, regardless of whether the amendment was originally adopted before that effective date.

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