

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA**

ENVIRONMENTAL RESEARCH &
EDUCATION FOUNDATION, INC.,

Plaintiff,

v.

CASE NO.: 11-2019-CA-004975-0001-XX

CITY OF NAPLES, FLORIDA,

Defendant.

_____ /

FIRST AMENDED COMPLAINT¹

Plaintiff, Environmental Research & Education Foundation, Inc. (“EREF”), sues Defendant, City of Naples (“City”), seeking declaratory and injunctive relief and alleging that City Ordinance 2019-14362 is unconstitutional, illegal, and invalid. In support of this action EREF states:

PRELIMINARY STATEMENT

1. Florida’s greenspaces, including lawns, landscapes, golf courses, and sports fields, help cool the environment, reduce carbon in the air, control erosion, and absorb pollutants from runoff that otherwise would flow into waterways.

2. The application of properly-formulated fertilizer by licensed and trained professionals and homeowners to Florida’s greenspaces during the summer growing season promotes the health and performance of those greenspaces.

¹ Pursuant to Florida Rule of Civil Procedure 1.190(a), Plaintiff amends its Complaint as a matter of course. The trial of this case is not set, no responsive pleading has been filed at the original Complaint, and the original Complaint was not served on any party.

3. City Ordinance 2019-14362, included as **Exhibit “A”**, prohibits within the City the application of fertilizer containing nitrogen, phosphorous, or both nitrogen and phosphorous during an application period that includes the time period between June 1 and September 30 of each calendar year. Ordinance 2019-14362 contains no exemption to this prohibition for licensed or trained professionals or homeowners.

4. City Ordinance 2019-14362 also requires nitrogen content in any fertilizer be a minimum of 50 percent slow release.

5. The City’s adoption of Ordinance 2019-14362, and thus the Ordinance, is contrary to Florida’s Constitution and other state law because the Legislature preempted the City’s power to regulate the nutrient content level and release rates of fertilizer at section 576.181, Florida Statutes.²

6. Moreover, the Legislature preempted and circumscribed the City’s power to regulate fertilizer application at section 403.9337, Florida Statutes. The City’s Ordinance is inconsistent with section 403.9337.

7. On November 5, 2019, EREF provided the City written notice that the Ordinance is expressly preempted by state law. To date the City has not given notice of its intent to repeal the Ordinance.

8. Subsection 57.112(2), Florida Statutes, provides that if an entity files a civil action against a local government challenging the adoption or enforcement of a local ordinance on the

² Ordinance 2019-14362 amended sections 52-182 through 52-187 of the Code of Ordinances, City of Naples (“City Code”). This Complaint alleges that Ordinance 2019-14362, as codified at subsections 52-184(a) and (d) of the City Code, is facially unconstitutional and invalid. Hereinafter this Complaint refers to Ordinance 2019-14362, as codified at subsections 52-184(a) and (d) of the City Code, as “the Ordinance” or “the City’s Ordinance.”

grounds that the local ordinance is expressly preempted by state law, the court shall assess and award reasonable attorney fees and costs and damages if the entity prevails.

JURISDICTION AND VENUE

9. This action seeks declaratory and injunctive relief and is brought pursuant to chapter 86, Florida Statutes. This Court has jurisdiction over this action pursuant to sections 86.011, 86.021, and 86.101, Florida Statutes.

10. Venue appropriately lies in the 20th Judicial Circuit pursuant to section 47.011, Florida Statutes, because the City of Naples is located within Collier County, Florida, and the Ordinance is enforceable within the City.

PARTIES

11. EREF is a not for profit corporation organized under chapter 617, Florida Statutes.

12. EREF funds environmental research and advocates on behalf of its members for healthy, properly-maintained greenspaces and urban landscapes.

13. EREF members include urban landscape professionals, golf course superintendents, lawn care service providers, sod producers, nursery growers, sports turf managers, club managers, commercial and residential property managers, and municipal and parks groundskeepers.

14. EREF members apply nitrogen and phosphorous-containing fertilizer to Florida's greenspaces during the summer growing season.

15. EREF members are located and conduct business throughout Florida and within the City of Naples.

16. EREF members suffer immediate and threatened injury and irreparable harm due to the Ordinance's prohibitions and enforcement penalties.

17. The City of Naples is an incorporated municipality existing under the laws of the State of Florida, and is located in Collier County, Florida. The City exercises its power to conduct municipal government pursuant to Article VIII, Section 2(b) of the Florida Constitution.

FACTUAL ALLEGATIONS

Framework for the Regulation of Fertilizer

Preemption

18. Article VIII, Section 2(b) of the Florida Constitution provides that municipalities may exercise any governmental, corporate, and propriety power for municipal purposes “except as otherwise provided by law.”

19. Subsection 166.021(3)(c), Florida Statutes, provides that a municipality may legislate concurrently with the State of Florida on any subject which the Florida Constitution or Legislature has not expressly preempted to state or county government.

20. Further, where concurrent state and municipal regulation is permitted because the state has not preemptively occupied a regulatory field, “a municipality’s concurrent regulation must not conflict with state law.” City of Palm Bay v. Wells Fargo Bank, N.A., 114 So. 3d 924, 928 (Fla. 2013) (quoting Thomas v. State, 614 So. 2d 468, 470 (Fla. 1993)).

21. The Legislature preempted and circumscribed municipal power to regulate fertilizer in chapters 576 and 403 of Florida Statutes.

Chapter 576

22. Chapter 576, Florida Statutes, pertains to the regulation of fertilizer and section 576.181, Florida Statutes, provides for the administration of the statute by the Florida Department of Agriculture and Consumer Services (“FDACS”).

23. Subsection 576.181(2), Florida Statutes, authorizes FDACS to “determine the composition and uses of fertilizer,” including to “prohibit the sale or use in fertilizer of any material proven to be detrimental to agriculture, public health, or the environment.”

24. Subsection 576.181(5)(a), Florida Statutes, provides FDACS “*exclusive authority* to regulate the sale, composition, packaging, labeling, wholesale and retail distribution, *and formulation, including nutrient content level and release rates,* of fertilizer.” (emphasis added).

25. Subsection 576.181(5)(a), Florida Statutes, further “*expressly preempts* such regulation of fertilizer to the state.” (emphasis added).

26. Subsection 576.011(12), Florida Statutes, defines “fertilizer” to mean any substance which: (a) contains one or more recognized plant nutrients and promotes plant growth, or (b) controls soil acidity or alkalinity, or (c) provides other soil enrichment, or (d) provides other corrective measures to the soil.

27. Nitrogen and phosphorous are recognized plant nutrients and promote plant growth.

Chapter 403 and the Model Ordinance

28. Chapter 403, Florida Statutes, pertains to pollution control and section 403.9337, Florida Statutes, provides for local government adoption of fertilizer use ordinances.

29. Section 403.9337, Florida Statutes, is titled “Model Ordinance for Florida-Friendly Fertilizer Use on Urban Landscapes” (the “Model Ordinance Statute”), which refers to the State’s Model Ordinance of the same name.

30. The Florida Department of Environmental Protection (“FDEP”) developed the Model Ordinance in conjunction with FDACS, the Consumer Fertilizer Task Force, and the University of Florida Institute of Food and Agricultural Sciences. § 403.9336, Fla. Stat.

31. The Legislature determined that implementation of the Model Ordinance “will assist in protecting the quality of Florida’s surface water and groundwater resources.” § 403.9336, Fla. Stat.

32. The Model Ordinance Statute encourages all local governments to adopt and enforce the Model Ordinance or an equivalent requirement as a mechanism for protecting local surface and groundwater quality, § 403.9337(1), Fla. Stat., and mandates adoption under specified circumstances, § 403.9337(2), Fla. Stat.

33. The Model Ordinance Statute provides requirements for both voluntarily-enacted and mandatory local government fertilizer use ordinances. §§ 403.9337(2)-(3), Fla. Stat.

34. Voluntarily-enacted fertilizer use ordinances adopted or amended after January 1, 2009, must *substantively conform* to the most recent version of the Model Ordinance. § 403.9337(3), Fla. Stat. The current version of the Model Ordinance is included as **Exhibit “B”**.

35. Similar to subsection 576.011(12), Florida Statutes, the Model Ordinance defines “fertilizer” to mean “any substance or mixture of substances that contains one or more recognized plant nutrients and promotes plant growth, or controls soil acidity or alkalinity, or provides other soil enrichment, or provides other corrective measures to the soil.”

36. Regarding the timing of fertilizer application, the Model Ordinance provides that no applicator “shall apply fertilizers containing nitrogen and/or phosphorous to turf and/or landscape plants during the Prohibited Application Period, or to saturated soils.”

37. The Model Ordinance defines “Prohibited Application Period” to mean “the time period during which a Flood Watch or Warning, or a Tropical Storm Watch or Warning, or a Hurricane Watch or Warning is in effect for any portion of (CITY/COUNTY), issued by the National Weather Service, or if heavy rain is likely.”

38. Regarding mandatory local government fertilizer use ordinances, the Model Ordinance Statute requires each county and municipal government located within the watershed of a water body or water segment that is listed as impaired by nutrients *pursuant to section 403.067, Florida Statutes*, to at a minimum adopt the Model Ordinance. § 403.9337(2), Fla. Stat.

39. Section 403.067, Florida Statutes, pertains to the assessment of water bodies for water quality impairments, the “listing” of impaired water bodies, and the establishment and implementation of “Total Maximum Daily Loads” or “TMDLs” for those impaired water bodies.

40. A TMDL is a scientifically-derived restoration target that represents the maximum amount of a specific pollutant that a water body or water segment can assimilate while maintaining its designated uses. § 403.067(6), Fla. Stat.

41. The Legislature determined that the scientifically-based TMDL program is “necessary to fairly and equitably allocate pollution loads to both nonpoint and point sources.” § 403.067(1), Fla. Stat.

42. The Legislature directed that FDEP be the lead agency in administering the TMDL program. § 403.067(1), Fla. Stat.

43. FDEP develops TMDLs in coordination with local governments. § 403.067(6)(a)1., Fla. Stat.

44. FDEP adopts TMDLs through rulemaking under chapter 120, Florida Statutes (“Administrative Procedure Act”). § 403.067(6)(c), Fla. Stat.

45. FDEP implements TMDLs through “Basin Management Action Plans” or “BMAPs,” which FDEP develops in coordination with local governments. § 403.067(7)(a)3., Fla. Stat.

46. A BMAP must equitably allocate pollutant reductions to point source and nonpoint sources. § 403.067(7)(a)2., Fla. Stat.

47. FDEP adopts BMAPs through secretarial order pursuant to the Administrative Procedure Act. § 403.067(7)(a)5., Fla. Stat.

48. The Legislature directed that the Model Ordinance Statute work in conjunction with section 403.067, Florida Statutes, which provides for TMDLs and BMAPs to restore impaired water bodies. See § 403.9337(2), Fla. Stat.

49. Where the Model Ordinance Statute mandates adoption of a local government fertilizer use ordinance (i.e., the local government is located within the watershed of a FDEP-listed, nutrient-impaired water body or water segment), a local government may adopt additional or more stringent standards than the Model Ordinance if two statutory criteria are met *prior* to adoption of the ordinance. § 403.9337(2), Fla. Stat.

50. The two preconditions specified at subsections 403.9337(2)(a) and (b), Florida Statutes, define the only circumstances under which a local government may lawfully enact a fertilizer use ordinance that does not substantively conform to the Model Ordinance. See § 403.9337(3), Fla. Stat.

51. First, the Model Ordinance Statute requires that the non-conforming local government fertilizer use ordinance be part of the comprehensive program to address nonpoint sources of nutrient pollution loading to the FDEP-listed, nutrient-impaired water body or water segment. § 403.9337(2)(a), Fla. Stat.

52. The comprehensive program to address nonpoint sources of nutrient pollution loading must be science-based and economically and technically feasible. § 403.9337(2)(a), Fla. Stat.

53. The BMAP is the comprehensive program to achieve the TMDL for the FDEP-listed, nutrient-impaired water body or water segment. § 403.067(7), Fla. Stat.

54. The local government also must have demonstrated as part of the comprehensive program that additional or more stringent standards than the Model Ordinance *are necessary* in order to adequately address urban fertilizer contributions to the nonpoint source nutrient loading to the FDEP-listed, nutrient-impaired water body or water segment. § 403.9337(2)(a), Fla. Stat.

55. Second, the Model Ordinance Statute requires that the local government have documented that it considered all relevant scientific information, including input from FDEP, FDACS, and the University of Florida Institute of Food and Agricultural Sciences, if provided, *on the need* for additional or more stringent provisions to address fertilizer use as a contributor to water quality degradation. § 403.9337(2)(b), Fla. Stat.

56. All documentation must become part of the public record before adoption of the additional or more stringent criteria. § 403.9337(2)(b), Fla. Stat.

57. The necessity of, and need for, additional or more stringent provisions or standards than the Model Ordinance are determined through the TMDL and BMAP processes provided for under section 403.067, Florida Statutes.

The City's Ordinance

58. On June 12, 2019, the City voluntarily enacted the Ordinance.

59. The Ordinance has since its enactment been, and now is, in full force and effect and is enforced by the City.

60. The City enforces the Ordinance pursuant to section 1-15 of the City Code.

61. Subsection 1-15(a) of the City Code provides that the penalty for violation of the Ordinance shall be a fine not exceeding \$500.00 or imprisonment for a term not exceeding 60 days or both such fine and imprisonment.

Requirement for voluntarily ordinances to substantively conform

62. Similar to the Model Ordinance, the City's Ordinance provides that no applicator "will apply fertilizers containing nitrogen, phosphorous, or both, during the prohibited application period or to saturated soils."

63. Similar to subsection 576.011(12), Florida Statutes, and identical to the Model Ordinance, the City's Ordinance defines "fertilizer" to mean "any substance that contains one or more recognized plant nutrients and promotes plant growth, or controls soil acidity or alkalinity, or provides other soil enrichment, or provides other corrective measures to the soil."

64. In contrast to the Model Ordinance, however, the City's Ordinance defines the "prohibited application period" as "the time period between June 1 through September 30 of each calendar year and any time period during which a Flood Watch or Warning, Tropical Storm Watch or Warning, or a Hurricane Watch or Warning is in effect for any portion of the city, as issued by the National Weather Service, and anytime there is a 60 percent chance of two inches or greater of rain in a 24-hour period."

65. In further contrast to the Model Ordinance, the City's Ordinance requires nitrogen content in any fertilizer be a minimum of 50 percent slow release.

66. As demonstrated in the preceding paragraphs, the City's Ordinance does not substantively conform to the Model Ordinance.

67. The City’s Ordinance provides prohibitions on the timing of fertilizer application and formulation of fertilizer that are additional or more stringent than those in the Model Ordinance.

Preconditions to deviate from Model Ordinance

68. The City prepared an “Agenda Memorandum,” included as **Exhibit “C”**, in support of its Council’s consideration of the Ordinance.

69. The Agenda Memorandum purports to document and satisfy the preconditions under which the City’s Ordinance includes additional or more stringent standards than the Model Ordinance.

70. The Agenda Memorandum asserts that “Naples Bay is designated as an impaired water body and recent sampling events indicate that Naples Bay does not meet nutrient criteria, as set by the Florida Department of Environmental Protection.”

71. The Agenda Memorandum further asserts that the “Gulf of Mexico has been plagued with red tide and toxic algae events, most notably evident in 2018 when local municipalities had to remove over 2,000 tons of dead sea life from southwest Florida beaches and shorelines.”

72. The Agenda Memorandum references “impairments to Naples Bay and the Gulf of Mexico” when describing the fiscal impacts of the Ordinance.

73. At the time the City enacted the Ordinance, Naples Bay was not listed as impaired by nutrients pursuant to section 403.067, Florida Statutes.

74. At the time the City enacted the Ordinance, the Gulf of Mexico was not listed as impaired by nutrients pursuant to section 403.067, Florida Statutes.

75. At the time the City enacted the Ordinance, there was no FDEP-established TMDL for nitrogen or phosphorous for Naples Bay.

76. At the time the City enacted the Ordinance, there was no FDEP-established TMDL for nitrogen or phosphorous for the Gulf of Mexico.

77. At the time the City enacted the Ordinance, there was no FDEP-established BMAP for Naples Bay.

78. At the time the City enacted the Ordinance, there was no FDEP-established BMAP for the Gulf of Mexico.

79. Neither the Ordinance nor the Agenda Memorandum adequately demonstrate or even indicate that the Ordinance is part of a comprehensive program to address nonpoint sources of nutrient pollution which is science-based, and economically and technically feasible.

80. Neither the Ordinance nor the Agenda Memorandum adequately demonstrate or even indicate that as part of a comprehensive program, additional or more stringent standards than the Model Ordinance are necessary to adequately address urban fertilizer contributions to nonpoint source nutrient loading to a water body.

81. Neither the Ordinance nor the Agenda Memorandum adequately document that the City adequately considered all relevant scientific information, including input from FDEP, FDACS, and the University of Florida Institute of Food and Agricultural Sciences, on the need for additional or more stringent provisions to address fertilizer use as a contributor to water quality degradation.

82. The City could not have demonstrated the legal-necessity of, or need for, additional or more stringent provisions or standards than the Model Ordinance where, at the time the City enacted the Ordinance, Naples Bay and the Gulf of Mexico were not listed by FDEP as impaired

by nutrients; where there was no FDEP-adopted TMDL to address nutrient loading to Naples Bay or the Gulf of Mexico; and where there was no FDEP-adopted BMAP to implement a TMDL for Naples Bay or the Gulf of Mexico.

Attorney Fees and Costs

83. Because the City has unlawfully adopted the Ordinance, EREF finds it necessary to engage the services of the undersigned attorney and firm to have this Court declare the Ordinance invalid. EREF will incur attorney fees and costs in prosecuting this civil action.

84. Subsection 57.112(2), Florida Statutes, provides that if an entity files a civil action against a local government challenging the adoption or enforcement of a local ordinance on the grounds that the local ordinance is expressly preempted by state law, the court shall assess and award reasonable attorney fees and costs and damages if the entity prevails.

EXPEDITED CONSIDERATION

85. Pursuant to section 86.111, Florida Statutes, EREF requests expedited consideration of this action for declaratory judgment.

CLAIMS FOR RELIEF

Count I

Preemption Under Section 576.181, Florida Statutes

86. This is a claim for declaratory and injunctive relief alleging that the Ordinance is invalid because of express preemption under section 576.181, Florida Statutes.

87. EREF repeats, realleges, and incorporates by reference each of the allegations of paragraphs 1 through 85 as if set forth in full herein.

88. EREF contends the Ordinance is invalid on its face and unenforceable because the Legislature preempted the City's power to regulate the formulation, including nutrient content and release rates, of fertilizer at section 576.181, Florida Statutes.

89. By restricting use of fertilizer containing nitrogen or phosphorous, the City's Ordinance unconstitutionally and illegally regulates the formulation of fertilizer.

90. By restricting use of fertilizer by nitrogen content release rate, the City's Ordinance unconstitutionally and illegally regulates the formulation of fertilizer.

91. The City disputes these contentions and will enforce the Ordinance against EREF members. An actual controversy has arisen and now exists between EREF members and the City relative to respective powers, privileges, and rights.

92. EREF members are in doubt as to their rights and duties under the Ordinance and seek to have this Court determine the validity of the Ordinance. A judicial declaration is necessary and appropriate at this time so EREF members can ascertain their rights and duties without first subjecting themselves to fines or imprisonment for violating the Ordinance.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor and that the Court:

- i. Declare that the Ordinance is unconstitutional and invalid because section 576.181, Florida Statutes, preempts the City's regulation of fertilizer nutrient content level and release rates;
- ii. Enjoin the City from enforcing the Ordinance;
- iii. Award Plaintiff reasonable attorney fees and costs pursuant to subsection 57.112(2), Florida Statutes; and,
- iv. Grant such other relief as the Court may deem just and proper.

Count II
Preemption Under Section 403.9337, Florida Statutes

93. This is a claim for declaratory and injunctive relief alleging that the Ordinance is invalid because of express preemption under section 403.9337, Florida Statutes.

94. EREF repeats, realleges, and incorporates by reference each of the allegations of paragraphs 1 through 85 as if set forth in full herein.

95. EREF contends the Ordinance is invalid on its face and unenforceable because the Legislature preempted the City's power to regulate the timing of fertilizer application, displacing the City's discretion to regulate and circumscribing local regulation as provided in section 403.9337, Florida Statutes.

96. By prohibiting application of fertilizer containing nitrogen or phosphorous between June 1 and September 30 of each calendar year, the Ordinance does not substantively conform to the Model Ordinance as required by subsection 403.9337(3), Florida Statutes.

97. By requiring nitrogen content in fertilizer to be a minimum of 50 percent slow release, the Ordinance does not substantively conform to the Model Ordinance as required by subsection 403.9337(3), Florida Statutes.

98. Moreover, because at the time the City enacted the Ordinance the City (1) was not located within the watershed of a FDEP-listed, nutrient-impaired water body or water segment; (2) had not demonstrated that the Ordinance is part of a comprehensive program to address nonpoint sources of nutrient pollution which is science-based, and economically and technically feasible; (3) had not demonstrated that as part of a comprehensive program, additional or more stringent standards than the Model Ordinance are necessary to adequately address urban fertilizer contributions to nonpoint source nutrient loading to a water body; and, (4) had not adequately documented that the City adequately considered all relevant scientific information, including input from FDEP, FDACS, and the University of Florida Institute of Food and Agricultural Sciences, on the need for additional or more stringent provisions to address fertilizer use as a contributor to

water quality degradation, the City's non-conforming ordinance unconstitutionally and illegally regulates the formulation and timing of fertilizer application.

99. The City disputes these contentions and will enforce the Ordinance against EREF members. An actual controversy has arisen and now exists between EREF members and the City relative to respective powers, privileges, and rights.

100. EREF members are in doubt as to their rights and duties under the Ordinance and seek to have this Court determine the validity of the Ordinance. A judicial declaration is necessary and appropriate at this time so EREF members can ascertain their rights and duties without first subjecting themselves to fines or imprisonment for violating the Ordinance.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor and that the Court:

- i. Declare that the Ordinance is unconstitutional and invalid because section 403.9337, Florida Statutes, preempts the City's regulation of timing of fertilizer application and nutrient release rates;
- ii. Enjoin the City from enforcing the Ordinance;
- iii. Award Plaintiff reasonable attorney fees and costs pursuant to subsection 57.112(2), Florida Statutes; and,
- iv. Grant such other relief as the Court may deem just and proper.

Count III
Conflict with Section 403.9337, Florida Statutes

101. This is a claim for declaratory and injunctive relief alleging that the Ordinance is invalid because the Ordinance conflicts with section 403.9337, Florida Statutes.

102. EREF repeats, realleges, and incorporates by reference each of the allegations of paragraphs 1 through 85 as if set forth in full herein.

103. EREF contends the Ordinance is invalid on its face and unenforceable because subsection 403.9337(3), Florida Statutes, mandates that the City's Ordinance substantively conform to the Model Ordinance.

104. By prohibiting application of fertilizer containing nitrogen or phosphorous between June 1 and September 30 of each calendar year the Ordinance does not substantively conform to the Model Ordinance.

105. By requiring nitrogen content in fertilizer to be a minimum of 50 percent slow release, the Ordinance does not substantively conform to the Model Ordinance.

106. Moreover, because at the time the City enacted the Ordinance the City (1) was not located within the watershed of a FDEP-listed, nutrient-impaired water body or water segment; (2) had not demonstrated that the Ordinance is part of a comprehensive program to address nonpoint sources of nutrient pollution which is science-based, and economically and technically feasible; (3) had not demonstrated that as part of a comprehensive program, additional or more stringent standards than the Model Ordinance are necessary to adequately address urban fertilizer contributions to nonpoint source nutrient loading to a water body; and, (4) had not adequately documented that the City adequately considered all relevant scientific information, including input from FDEP, FDACS, and the University of Florida Institute of Food and Agricultural Sciences, on the need for additional or more stringent provisions to address fertilizer use as a contributor to water quality degradation, the City's non-conforming ordinance unconstitutionally and illegally conflicts with section 403.9337, Florida Statutes.

107. The City disputes these contentions and will enforce the Ordinance against EREF members. An actual controversy has arisen and now exists between EREF members and the City relative to respective powers, privileges, and rights.

108. EREF members are in doubt as to their rights and duties under the Ordinance and seek to have this Court determine the validity of the Ordinance. A judicial declaration is necessary and appropriate at this time so EREF members can ascertain their rights and duties without first subjecting themselves to fines or imprisonment for violating the Ordinance.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor and that the Court:

- i. Declare that the Ordinance is unconstitutional and invalid because it conflicts with section 403.9337, Florida Statutes;
- ii. Enjoin the City from enforcing the Ordinance; and,
- iii. Grant such other relief as the Court may deem just and proper.

Respectfully submitted this 9th day of January, 2020.

MANSON BOLVES DONALDSON VARN, P.A.

/s/ Brian J. Accardo

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ORDINANCE 2019-14362

AN ORDINANCE RELATING TO FERTILIZER USE, AMENDING CHAPTER 52 – RESOURCE PROTECTION STANDARDS, ARTICLE VII – FERTILIZER USE AND MAINTENANCE OF URBAN LANDSCAPES, SECTIONS 52-182 THROUGH 52-187, CODE OF ORDINANCES; PROVIDING A SEVERABILITY CLAUSE, A REPEALER PROVISION, AND AN EFFECTIVE DATE.

WHEREAS, the City Council has considered the following documents, on file with the City Clerk’s Office, as evidence supporting the subject amendments: **Exhibit A:** Naples Bay Water Quality and Biological Analysis Project Final Report; **Exhibit B:** The Fate and Transport of Phosphorus in Turfgrass Ecosystems; **Exhibit C:** Maintaining quality turfgrass with minimal nitrogen leaching; **Exhibit D:** Effects of Sod Type, Irrigation, and Fertilization on Nitrate-Nitrogen and Orthophosphate-Phosphorus Leaching from Newly Established St. Augustine Grass Sod; **Exhibit E:** Analysis of nutrients and chlorophyll relative to the 2008 fertilizer ordinance in Lee County, Florida; **Exhibit F:** 2014 Watershed Summit: Our Vision in Action; and **Exhibit F:** Tampa Bay Residential Stormwater Evaluation Final Project Report;

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NAPLES, FLORIDA:

Section 1. That Sections 52-182 through 52-187 of the Code of Ordinances, City of Naples, is hereby amended to read as follows (with underlining indicating additions and ~~striketrough~~ indicating deletions):

Chapter 52 – RESOURCE PROTECTION STANDARDS

...

ARTICLE VII. - FERTILIZER USE AND MAINTENANCE OF URBAN LANDSCAPES

...

Sec. 52-182. - Definitions.

The following words, terms, and phrases when used in this article shall will have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning. Unless specifically defined below, words or phrases used in this article shall will be interpreted so as to give them the meaning they have in common usage and to give this article its most reasonable application:

Application or apply means the actual physical deposit of fertilizer to turf or landscape plants.

Applicator means any person who applies, in any manner, fertilizer to turf or landscape plants within the city as defined in this article.

Exhibit “A”

Commercial fertilizer applicator, except as provided in F.S. § 482.1562(9), means any person who applies fertilizer on turf or landscape plants within the city in exchange for money, goods, services, or other valuable consideration.

Fertilize, fertilizing, or fertilization means the act of applying fertilizer to a lawn (turf), specialized turf, or landscape plant.

Fertilizer means any substance that contains one or more recognized plant nutrients and promotes plant growth, or controls soil acidity or alkalinity, or provides other soil enrichment, or provides other corrective measures to the soil. Reclaimed water may contain some of the nutrients that are commonly found in fertilizers but is not considered fertilizer.

Guaranteed analysis means the percentage of plant nutrients or measures of neutralizing capability claimed to be present in a fertilizer.

~~*Heavy rain likely* — *heavy rain* means rainfall greater than or equal to 50 mm (two inches) in a 24-hour period; and *likely* means the precipitation probability as used by the National Weather Service is at least 60 percent.~~

Impervious surface means a constructed surface, such as a sidewalk, road, parking lot, or driveway, covered by impenetrable materials such as asphalt, concrete, brick, pavers, stone, or highly compacted soils.

Institutional fertilizer applicator means any person, other than a non-commercial or commercial applicator, unless such definitions also apply under the circumstances, who applies fertilizer for the purpose of maintaining turf or landscape plants. Institutional applicators ~~shall~~ will include, but shall not be limited to, owners and managers of public lands, schools, parks, religious institutions, utilities, industrial or business sites, and any residential properties maintained in condominium or common ownership.

Landscape plant means any native or exotic tree, shrub, or groundcover, excluding turf.

Leaching means the process by which soluble constituents are dissolved and filtered through the soil by a percolating fluid.

Low maintenance zone means an area a minimum of ten feet wide adjacent to waterbodies that is planted and managed in order to minimize the need for watering, mowing, fertilization, etc.

Non-commercial fertilizer applicator means any person other than a commercial fertilizer applicator or institutional applicator who applies fertilizer on turf or landscape plants in the city, such as an individual owner of a single-family residential unit.

Prohibited Application Period means the time period between June 1 through September 30 of each calendar year and any time period during which a Flood Watch or Warning, Tropical Storm Watch or Warning, or a Hurricane Watch or Warning is in effect for any portion of the city, as issued by the National Weather Service, and anytime there is a 60 percent chance of two inches or greater of rain in a 24-hour period.

Reclaimed water means water that has received at least secondary treatment and basic disinfection and is reused after flowing out of a domestic wastewater treatment facility, pursuant to F.A.C. ch. 62-610, as may be amended from time to time.

Saturated soil means a soil in which the voids are filled with water. Saturation does not require flow. For the purposes of this article, soils shall will be considered saturated if standing water is present or the pressure of a person standing on the soil causes the release of free water.

Slow release, controlled release, timed release, slowly available, or water insoluble nitrogen means nitrogen in a form that delays its availability for plant uptake and use after application, or that extends its availability to the plant longer than a reference rapid or quick release product. ~~"rapid-release nitrogen" product such as ammonium nitrate or urea, ammonium phosphate or potassium chloride.~~

Specialized turf manager means a landscape manager of non-agricultural land planted exclusively for golf course, park, or athletic field use.

Turf, sod, or lawn means a piece of grass-covered soil held together by the roots of the grass.

Waterbody or waterbodies means any visible, standing or open body of water. This shall will include, but not be limited to: municipal or private storm sewer systems, including inlets, conveyances and structures, ditches, swales, canals, creeks, rivers, streams, tidal waters, lakes, ponds, ponded water, standing water, marshes, swamps or any other body of permanent or temporary standing or visible water whether or not the waterbody is natural or man-made or contained by impervious surfaces on the bottom or sides and all wetlands and other surface waters as defined by Chapter 62-348 F.A.C. ch. 62-340.600, Florida Administrative Code (F.A.C.) as may be amended from time to time.

Wetlands means those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soils. [see Chapter F.A.C. ch. 62-340.200, F.A.C., as may be amended from time to time].

Sec. 52-183. - Applicability.

This article shall will be applicable to, and shall will regulate any and all, applicators of fertilizer within the city unless such applicator is specifically exempted by the terms of this article from the regulatory provisions of this article.

Sec. 52-184. – Fertilizer application and urban landscape maintenance. ~~Timing of fertilizer application; content and application rate; impervious surfaces; buffer zones; and mode of application.~~

(a) ~~*Timing of fertilizer application.* (1) No applicator shall will apply fertilizers containing nitrogen, phosphorus, or both, during the prohibited application period or to saturated soils, or if heavy rains are forecast in the next 24 hours.~~

(2) ~~No applicator shall apply fertilizers containing nitrogen or phosphorus to turf or landscape plants during a period of time when the National Weather Service has issued a flood watch or warning, or a tropical storm watch or warning, or a hurricane watch or warning for any portion of the city.~~

(b) ~~*Fertilizer-free zones.* No fertilizer shall will be applied within ten feet of any pond, stream, waterbody, lake, canal, retention area, drain or drainage ditch, wetland, or other waterbody, or within ten feet from the top of a seawall or lake bulkhead. Newly planted turf and landscape plants may be fertilized in this zone only for a 60-day~~

period beginning 30 days after planting, if needed, to allow the plants to become well-established. Caution shall be used to prevent direct deposition of nutrients into the water.

- (c) ~~Low maintenance zones.~~ A voluntary ten-foot, low maintenance, "no-mow" zone adjacent to waterbodies is strongly recommended, but not mandated, from any pond, stream, waterbody, lake, wetland or from the top of a seawall. A swale or berm system is recommended for installation at the landward edge of this low maintenance zone to capture and filter runoff. No mowed or cut vegetative material may be deposited or left remaining in this zone or deposited in the water. Care should be taken to prevent the over-spray of aquatic weed products in this zone.
- (d) Fertilizer content and application rate.
- (1) ~~Fertilizers applied to turf within the city shall be applied in accordance with requirements and directions provided by Rule 5E 1.003, F.A.C., as may be amended from time to time.~~
- (21) Nitrogen content in any fertilizer must be a minimum of 50 percent slow release. Fertilizer applied to turf or landscape plants within the city must contain no less than 50 percent slow release nitrogen per guaranteed analysis label; guaranteed analysis and label are defined in F.S. Ch. 576, as may be amended from time to time.
- (32) Fertilizer applied to landscaping plants, excluding turf, shall not be applied at a rate greater than one pound of nitrogen per 1,000 square feet per application. No more than three pounds of nitrogen per 1,000 square feet will be applied to Centipede turf grass per calendar year. No more than four pounds of nitrogen per 1,000 square feet shall will be applied to any other landscaped area, excluding turf, in any calendar year.
- (3) A guaranteed analysis may be required of alternative fertilizers such as manure or compost at the applicator's or property owner's expense.
- (4) Fertilizer containing nitrogen shall not be applied before seeding or sodding a site and shall not be applied for the first 30 days after seeding or sodding, except when hydro-seeding for temporary or permanent erosion control in an emergency, such as wildfire, or in accordance with the stormwater pollution prevention plan for that site.
- (5) ~~Fertilizers should be applied to turf or landscape plants at the lowest rate necessary without exceeding the maximum rate per application, as provided in this article, unless a soil or tissue deficiency has been verified by an approved test. Soil testing must be performed at a University of Florida/Institute of Food and Agricultural Services (UF/IFAS) Extension Soil Testing Laboratory, a state-certified or other laboratory pre-approved by the city manager.~~
- (65) Fertilizer containing phosphorus must not be applied to landscape plants or turf unless a soil or tissue deficiency has been verified by a test approved by the city manager. Phosphorus contained in city-distributed reclaimed water used for irrigation purposes is exempt from this provision. Soil or tissue testing must be performed at a University of Florida/Institute of Food and Agricultural Services (UF/IFAS) Extension Soil Testing Laboratory, or a state-certified or other laboratory pre-approved by the city manager. The applicator must carry proof of

approved soil or tissue test when applying fertilizer containing phosphorus. ~~Where a deficiency has been verified, P~~phosphorus fertilizer shall not be applied at application rates that exceed 0.25 lbs. P₂O₅/1,000 ft.² per application and not to exceed 0.50 lbs. P₂O₅/1,000 ft.² per year. ~~The use of no phosphorus fertilizer is strongly encouraged, as Florida soils typically contain sufficient phosphorus for a healthy native or man-made landscape.~~

(76) The use of water from a reclaimed wastewater system must be in accordance with this article and required best management practices. ~~;~~ If fertilizer containing nutrients in addition to other than that what is provided contained in the reclaimed water is to be applied, the cumulative nutrient loading shall not exceed those established in this article.

(e) Application practices.

(1) Spreader deflector shields are required when fertilizing via rotary (broadcast) spreaders. Deflectors must be positioned such that fertilizer granules are deflected away from all impervious surfaces, fertilizer-free zones, and waterbodies, ~~including wetlands.~~

(2) Fertilizer shall not be applied, spilled, or otherwise deposited on any impervious surfaces.

(3) Any fertilizer applied, spilled, or deposited, either intentionally or accidentally, on any impervious surface shall must be immediately and completely removed ~~to the greatest extent practicable.~~

(4) Fertilizer released on an impervious surface must be immediately contained and either legally applied to turf or any other legal site, or returned to the original or other appropriate container.

(5) In no case shall may fertilizer be washed, swept, or blown off impervious surfaces into stormwater drains, ditches, conveyances, or waterbodies.

(f) Management of grass clippings and vegetative matter. In no case shall may grass clippings, vegetative matter, and/or vegetative debris be washed, swept, or blown off into stormwater drains, ditches, conveyances, waterbodies, wetlands, sidewalks or roadways. Any material that is accidentally so deposited shall must be immediately and completely removed ~~to the maximum extent possible.~~ Grass clippings should be blown back onto lawn areas or removed.

Sec. 52-185. - Exemptions; golf course application.

(a) The timing of applications, fertilizer content, application rate provisions, and other provisions set forth above in section 52-184 shall not apply to:

(1) Bona fide farm operations as defined in the Florida Right to Farm Act, F.S. § 823.14;

(2) Other properties not subject to or covered under the Florida Right to Farm Act that have pastures used for grazing livestock; and

(3) Any lands used for bona fide scientific research, including, but not limited to, research on the effects of fertilizer use on urban stormwater, water quality, agronomics, or horticulture.

- (b) Application of fertilizers to golf courses, parks and athletic fields within the city shall must comply with Rule 5E-1.003, F.A.C., as may be amended from time to time. Application rates shall not exceed rates recommended in Solutions for Life (SL) 191: "Recommendations for N, P, K and Mg for Golf Course and Athletic Field Fertilization Based on Mehlich III Extractant", and shall must comply with the recommendations in the Florida Department of Environmental Protection document, "Best Management Practices for the Enhancement of Environmental Quality on Florida Golf Courses, 2012," as may be updated from time to time.

Sec. 52-186. -~~Urban landscape maintenance~~ Training and licensing requirements.

(a) *Training.*

- (1) All commercial and institutional fertilizer applicators within the city shall must abide by and successfully complete the ~~six-hour training program in the "Florida Friendly Best Management Practices for Protection of Water Resources by the Green Industries"~~ offered by the Florida Department of Environmental Protection through the University of Florida Extension "Florida-Friendly Landscaping™" program, or an approved equivalent.
- (2) Private, non-commercial fertilizer applicators are exempt from formal training and certificate requirements, but are encouraged to follow the ~~requirements of this article as well as the~~ recommendations of the University of Florida, Institute of Food and Agricultural Sciences (IFAS) Florida Yards and Neighborhoods program, except where this ordinance is more restrictive when applying fertilizers.

(b) *Licensing of commercial applicators.*

- (1) All commercial fertilizer applicators within the city shall must have and carry in their possession at all times when applying fertilizer, evidence of certification by the Florida Department of Agriculture and Consumer Services as a Commercial Fertilizer Applicator pursuant to Rule 5E-14.117(118), F.A.C. as may be amended from time to time.
- (2) All businesses applying fertilizer to turf ~~and/or~~ landscape plants (including, but not limited to residential lawns, golf courses, commercial properties, and multi-family and condominium properties) must ensure that at least one employee has a "Florida-Friendly Best Management Practices for Protection of Water Resources by the Green Industries" training certificate prior to the business owner obtaining a city business tax receipt. Owners of such businesses shall must provide proof of completion of the program to the city.

Sec. 52-187. - Enforcement and penalties.

The violation of any provision of this article shall will subject the violator to any enforcement procedure and to the penalties provided in section 1-15 of this Code. This article may be enforced against any person actually committing the infraction and any owner or person in control of the property upon which the violation occurs, or condition exists. Each day of violation shall ~~constitute~~ a separate offense.

Funds generated by penalties imposed under this section shall must be used by the city for the administration and enforcement of F.S. § 403.9337, as may be amended from

time to time, and the corresponding sections of the ordinance codified in this article, and to further water conservation and nonpoint pollution prevention activities.

Code Enforcement will annually report the number of warnings, violations, and citations issued as a result of enforcement of this Section.

Secs. 52-188 – 52-210. – Reserved.

Section 2. That if any word, phrase, clause, subsection or section of this ordinance is for any reason held unconstitutional, invalid, or ineffective, the same shall not affect the validity of any remaining portions of this ordinance. In such event, the pre-existing word, phrase, clause, subsection or section, shall be revived.

Section 3. That all sections or parts of sections of the Code of Ordinances, City of Naples, all ordinances or parts of ordinances, and all resolutions or parts of resolutions in conflict herewith, be and the same are hereby repealed to the extent of such conflict.

Section 4. That this ordinance shall take effect immediately upon adoption at second reading.

APPROVED AT FIRST READING AND PUBLIC HEARING THE 5TH DAY OF JUNE 2019.

ADOPTED AT SECOND READING AND PUBLIC HEARING IN OPEN AND REGULAR SESSION OF THE CITY COUNCIL OF THE CITY OF NAPLES, FLORIDA THIS 12TH DAY OF JUNE 2019.

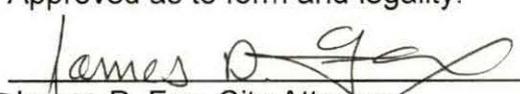
Attest:



 Patricia L. Rambosk, City Clerk


 Bill Barnett, Mayor

Approved as to form and legality:


 James D. Fox, City Attorney

Date filed with City Clerk: 6-20-19

Florida Department of Environmental Protection

MODEL ORDINANCE FOR FLORIDA-FRIENDLY FERTILIZER USE ON URBAN LANDSCAPES

[alternate title: **MODEL ORDINANCE FOR
FLORIDA-FRIENDLY USE OF FERTILIZER ON URBAN LANDSCAPES**]
2015

[Note: Title revision for clarity. There is no defined Florida-Friendly fertilizer product, as timing, chemistry, grade, amount, site-specific conditions and application practices all affect “Florida-friendliness”.]

INTRODUCTION

This attached Model Fertilizer Use Ordinance is another tool to reduce sources of nutrients coming from urban landscapes to reduce the impact of nutrients on Florida’s surface and ground waters. Limiting the amount of fertilizer applied to the landscape will reduce the risk of nutrient enrichment of surface and ground waters, but effective nutrient management requires more comprehensive control measures. Such a comprehensive approach is needed that may include, but is not limited to, land planning and low-impact development, site plan design, landscape design, irrigation system design and maintenance, fertilizer application, landscape maintenance, and waste disposal. To assist local governments in improving their existing land development regulations, several “model” ordinances have been developed. These include:

- “Low Impact Design” ordinances which seek to reduce the impact of urbanization on our natural resources by stressing “source controls” that either minimize the generation of stormwater or minimize the pollutants that can get into stormwater. For example, promoting development designs that minimizes clearing of natural vegetation and the compaction of urban soils. A Model Springs Protection Code was developed by DCA, DEP, and other stakeholders that includes specific Land Development Regulation recommendations that promote Low Impact Design. This Model Code is available as Chapter 5 in *Protecting Florida's Springs: An Implementation Guidebook*. It is available at <http://www.dca.state.fl.us/fdcp/DCP/springs/index.cfm>.
- “Landscape Ordinances” because design, construction, and maintenance are major determinants in the amount of fertilizer and irrigation that is needed to maintain healthy urban landscapes and minimize adverse impacts on water resources. A model Landscape Ordinance entitled “Guidelines for Model Ordinance Language for Protection of Water Quality and Quantity Using Florida-Friendly Lawns and Landscapes” was developed by a group of agencies, industries, and interest groups over a two year period and published in 2003. It was fundamentally an adaptation of earlier water conservation ordinances revised to include water quality protections for compliance with Total Maximum Daily Load (TMDL) or stormwater NPDES permit requirements. The language focused on continuing education of lawn care and landscape professionals, proper planning and supervision during development and construction, and the use of best management practices, including the Florida-

Friendly Landscape Program. This model ordinance has been renamed “Florida-Friendly Landscaping™ Model Guidelines for Ordinance Language for Protection of Water Quality and Quantity,” updated in 2008 and 2010 and may be downloaded from: <http://www.dep.state.fl.us/water/nonpoint/pubs.htm>.

- Finally, the 2004 Florida Legislature directed Florida’s water management districts to work with interested parties to develop landscape irrigation and Florida-Friendly design standards for new construction (section 373.228, F.S.). Local governments are to use the standards and guidelines when developing landscape irrigation and Florida-Friendly ordinances. The Committee on Landscape Irrigation and Florida-Friendly Design Standards convened and developed the standards. They are published in a booklet called **Landscape Irrigation and Florida-Friendly Design Standards (December 2006)**. The 2009 Legislature has directed that it be revised in 2011. The current version of this document can be downloaded from: http://www.dep.state.fl.us/water/waterpolicy/land_irr.htm

**MODEL ORDINANCE FOR
FLORIDA-FRIENDLY USE OF FERTILIZER ON URBAN LANDSCAPES
(FEBRUARY 2015)**

1. FINDINGS

As a result of impairment to (MUNICIPALITY / COUNTY)'S surface waters caused by excessive nutrients, or, as a result of increasing levels of nitrogen in the surface and/or ground water within the aquifers or springs within the boundaries of (municipality/county), the governing body of (municipality / county) has determined that the use of fertilizers on lands within (municipality / county) creates a risk to contributing to adverse effects on surface and/or ground water. Accordingly, the governing board of (municipality/county) finds that management measures [Guidance: optional "additional management measures than are otherwise"] contained in the most recent edition of the "*Florida-Friendly Best Management Practices for Protection of Water Resources by the Green Industries, 2008,*" may be required by this ordinance.

2. PURPOSE AND INTENT

This Ordinance regulates the proper use of fertilizers by any applicator; requires proper training of Commercial and Institutional Fertilizer Applicators; establishes training and licensing requirements; establishes a Prohibited Application Period; specifies allowable fertilizer application rates and methods, fertilizer-free zones, low maintenance zones, and exemptions. The Ordinance requires the use of Best Management Practices which provide specific management guidelines to minimize negative secondary and cumulative environmental effects associated with the misuse of fertilizers. These secondary and cumulative effects have been observed in and on (MUNICIPALITY / COUNTY)'s natural and constructed stormwater conveyances, rivers, creeks, canals, springs, lakes, estuaries and other water bodies. [Guidance: as appropriate] Collectively, these water bodies are an asset critical to the environmental, recreational, cultural and economic well-being of (MUNICIPALITY / COUNTY) residents and the health of the public. Overgrowth of algae and vegetation hinder the effectiveness of flood attenuation provided by natural and constructed stormwater conveyances. Regulation of nutrients, including both phosphorus and nitrogen contained in fertilizer, will help improve and maintain water and habitat quality.

3. DEFINITIONS

For this Article, the following terms shall have the meanings set forth in this section unless the context clearly indicates otherwise.

"Administrator" means the (MUNICIPALITY / COUNTY) Administrator, or an administrative official of (MUNICIPALITY / COUNTY) government designated by the City/County Administrator to administer and enforce the provisions of this Article.

"Application" or "Apply" means the actual physical deposit of fertilizer to turf or landscape plants.

“Applicator” means any Person who applies fertilizer on turf and/or landscape plants in (MUNICIPALITY / COUNTY).

“Board or Governing Board” means the Board of City/County Commissioners of (MUNICIPALITY / COUNTY), Florida.

“Best Management Practices” means turf and landscape practices or combination of practices based on research, field-testing, and expert review, determined to be the most effective and practicable on-location means, including economic and technological considerations, for improving water quality, conserving water supplies and protecting natural resources.

“Code Enforcement Officer, Official, or Inspector” means any designated employee or agent of (MUNICIPALITY / COUNTY) whose duty it is to enforce codes and ordinances enacted by (MUNICIPALITY / COUNTY).

“Commercial Fertilizer Applicator”, except as provided in 482.1562(9) F.S., means any person who applies fertilizer for payment or other consideration to property not owned by the person or firm applying the fertilizer or the employer of the applicator.

“Fertilize,” “Fertilizing,” or “Fertilization” means the act of applying fertilizer to turf, specialized turf, or landscape plants.

“Fertilizer” means any substance or mixture of substances that contains one or more recognized plant nutrients and promotes plant growth, or controls soil acidity or alkalinity, or provides other soil enrichment, or provides other corrective measures to the soil.

“Guaranteed Analysis” means the percentage of plant nutrients or measures of neutralizing capability claimed to be present in a fertilizer.

“Institutional Applicator” means any person, other than a private, non-commercial or a Commercial Applicator (unless such definitions also apply under the circumstances), that applies fertilizer for the purpose of maintaining turf and/or landscape plants. Institutional Applicators shall include, but shall not be limited to, owners, managers or employees of public lands, schools, parks, religious institutions, utilities, industrial or business sites and any residential properties maintained in condominium and/or common ownership.

“Landscape Plant” means any native or exotic tree, shrub, or groundcover (excluding turf).

“Low Maintenance Zone” means an area a minimum of ten (10) feet wide adjacent to water courses which is planted and managed in order to minimize the need for fertilization, watering, mowing, etc.

“Person” means any natural person, business, corporation, limited liability company, partnership, limited partnership, association, club, organization, and/or any group of people acting as an organized entity.

“Prohibited Application Period” means the time period during which a Flood Watch or Warning, or a Tropical Storm Watch or Warning, or a Hurricane Watch or Warning is in effect for any portion of (CITY/COUNTY), issued by the National Weather Service, or if heavy rain¹ is likely.

“(MUNICIPALITY / COUNTY) Approved Best Management Practices Training Program” means a training program approved per 403.9338 F.S., or any more stringent requirements set forth in this Article that includes the most current version of the Florida Department of Environmental Protection’s “*Florida-Friendly Best Management Practices for Protection of Water Resources by the Green Industries*, 2008,” as revised, and approved by the (MUNICIPALITY / COUNTY) Administrator.

"Saturated soil" means a soil in which the voids are filled with water. Saturation does not require flow. For the purposes of this ordinance, soils shall be considered saturated if standing water is present or the pressure of a person standing on the soil causes the release of free water. [Guidance: Some have questioned the enforceability of practical field definitions which should be considered before adoption.]

“Slow Release,” “Controlled Release,” “Timed Release,” “Slowly Available,” or “Water Insoluble Nitrogen” means nitrogen in a form which delays its availability for plant uptake and use after application, or which extends its availability to the plant longer than a reference rapid or quick release product.

“Turf,” “Sod,” or “Lawn” means a piece of grass-covered soil held together by the roots of the grass.

"Urban landscape" means pervious areas on residential, commercial, industrial, institutional, highway rights-of-way, or other nonagricultural lands that are planted with turf or horticultural plants. For the purposes of this section, agriculture has the same meaning as in s. 570.02.

4. APPLICABILITY

This Ordinance shall be applicable to and shall regulate any and all applicators of fertilizer and areas of application of fertilizer within the area of (MUNICIPALITY / COUNTY), unless such applicator is specifically exempted by the terms of this Ordinance from the regulatory provisions of this Ordinance. This Ordinance shall be prospective only, and shall not impair any existing contracts.

[Guidance: In 403.9336, the Legislature further finds that local conditions, including variations in the types and quality of water bodies, site-specific soils and geology, and urban or rural densities and characteristics, may necessitate the implementation of additional or more stringent fertilizer

¹ World Meteorological Organization definition of heavy rain: Rainfall greater than or equal to 50 mm (2 inches) in a 24 hour period. <http://severe.worldweather.org/rain/>, and forecast keyword “likely”, http://www.wrh.noaa.gov/sew/MediaGuide/TermsOutlooks_Watches_Warnings.pdf.

management practices at the local government level. Local government may adopt additional or more stringent provisions to the model ordinance as provided in 403.9337(2). However, the local government should consider the disadvantages of confusing jurisdictional differences and should clearly demonstrate they meet the required criteria:

(2) Each county and municipal government located within the watershed of a water body or water segment that is listed as impaired by nutrients pursuant to s. 403.067, shall, at a minimum, adopt the department's Model Ordinance for Florida-Friendly Fertilizer Use on Urban Landscapes. A local government may adopt additional or more stringent standards than the model ordinance if the following criteria are met:

- o (a) The local government has demonstrated, as part of a comprehensive program to address nonpoint sources of nutrient pollution which is science based, and economically and technically feasible, that additional or more stringent standards than the model ordinance are necessary in order to adequately address urban fertilizer contributions to nonpoint source nutrient loading to a water body.
- o (b) The local government documents that it has considered all relevant scientific information, including input from the department, the institute, the Department of Agriculture and Consumer Services, and the University of Florida Institute of Food and Agricultural Sciences, if provided, on the need for additional or more stringent provisions to address fertilizer use as a contributor to water quality degradation. All documentation must become part of the public record before adoption of the additional or more stringent criteria.]

[Guidance: Florida Statutes 125.568(3), 166.048(3), 373.185(3), 720.3075(4), and others provide that a local ordinance, deed restriction or covenant may not prohibit or be enforced so as to prohibit any property owner from implementing Florida-friendly landscaping on his or her land or create any requirement or limitation in conflict with any provision of part II of this chapter {373} or a water shortage order, other order, consumptive use permit, or rule adopted or issued pursuant to Chapter 373 part II.]

[Guidance: Florida Statutes 482.156 and 482.1562. Neither the Limited Commercial Landscape Maintenance Certification Program nor the Limited Certification for Urban Landscape Commercial Fertilizer Application allows landscape maintenance workers to make any kind of pesticide applications (including weed control and/or weed and feed products) to any turf areas.]

[Guidance: Florida Statutes 482.242, and 487.051 (2), F.S. Regulation of pest control businesses and applicators, and of pesticide use, is preempted to the Florida Department of Agriculture and Consumer Services (FDACS and suspected pesticide misuse should be reported to FDACS.

5. TIMING OF FERTILIZER APPLICATION

No applicator shall apply fertilizers containing nitrogen and/or phosphorus to turf and/or landscape plants during the Prohibited Application Period, or to saturated soils.

[Guidance: One of the most controversial issues associated with recent fertilizer ordinances enacted by local governments is the definition of the Prohibited Application Period. Some ordinances have prohibited the application of fertilizer, even slow release formulations, during the summer rainy season, typically June 1 to September 30. The reasoning is that rain occurs frequently, saturating the soil, leading to more runoff. Saturated soils are prone to runoff or leaching with little or no additional water, and pose a higher than normal risk until soil moisture capacity is restored. Fertilizer management is largely about keeping the nitrogen and/or phosphorus in the root zone where it can be used by plants. Periods of heavy rainfall contribute to leaching, which is washing nutrients out of the root zone, and to runoff, especially in areas with compacted or bare soils and significant slope. Vegetative ground cover is important to minimizing

erosion, filtering particulates, and incorporating or promoting the biological transformation of potential pollutants. Many variables influence the relationship between fertilizer rates, vegetation health and nutrient enrichment of surface and ground waters. Accordingly, sound science and carefully reasoned judgment are recommended in determining how to define the Prohibited Application Period.]

6. FERTILIZER FREE ZONES

Fertilizer shall not be applied within ten (10) feet of any pond, stream, watercourse, lake, canal, or wetland as defined by the Florida Department of Environmental Protection (Chapter 62-340, Florida Administrative Code) or from the top of a seawall, unless a deflector shield, drop spreader, or liquid applicator with a visible and sharply defined edge, is used, in which case a minimum of 3 feet shall be maintained. If more stringent (MUNICIPALITY / COUNTY) Code regulations apply, this provision does not relieve the requirement to adhere to the more stringent regulations. Newly planted turf and/or landscape plants may be fertilized in this Zone only for a sixty (60) day period beginning 30 days after planting if need to allow the plants to become well established. Caution shall be used to prevent direct deposition of nutrients into the water. [Guidance: This zone is a setback to prevent the applicator from inadvertently depositing fertilizer in the water while performing the application. It is not designed as a treatment buffer, and is to be adhered to as a fundamental environmental safety aspect of the applicator's job, regardless of the owner's desires. Some communities have existing residential setbacks of as little as 10 feet from water or seawall. Low maintenance zones, vegetated filter strips, and riparian buffers are strongly encouraged, but such activities are rightly a part of land use planning. Local governments are encouraged to implement these low-impact development practices where feasible.]

7. LOW MAINTENANCE ZONES

A voluntary ten (10) foot low maintenance zone is strongly recommended, but not mandated, from any pond, stream, water course, lake, wetland or from the top of a seawall. A swale/berm system is recommended for installation at the landward edge of this low maintenance zone to capture and filter runoff. If more stringent (MUNICIPALITY / COUNTY) Code regulations apply, this provision does not relieve the requirement to adhere to the more stringent regulations. No mowed or cut vegetative material may be deposited or left remaining in this zone or deposited in the water. Care should be taken to prevent the over-spray of aquatic weed products in this zone. [Guidance: Care must be taken to ensure erosion of the surface soil does not occur. Excessive erosion may be a greater pollution hazard than occasional proper applications of fertilizer.]

8. FERTILIZER CONTENT AND APPLICATION RATES

[Guidance: RULE 5E-1.003, F.A.C contains the following provisions for golf courses, parks and athletic fields. As such, no additional specific requirements are included for these types of urban turf. The appropriate Best Management Practices listed below must be followed on such sites for nutrient management activities:

These include not to exceed rates recommended in the document titled SL191 "*Recommendations for N, P, K and Mg for Golf Course and Athletic Field Fertilization Based on Mehlich I Extractant*", and to comply with the recommendations in "*BMP's for the Enhancement of Environmental Quality on Florida Golf Courses*", published by the Florida Department of Environmental Protection, dated 2012.

Note that this does not exempt applicators at these sites from the required basic Green Industry BMP training.

- (a) Fertilizers applied to turf within (MUNICIPALITY / COUNTY) shall be applied in accordance with requirements and directions provided by Rule 5E-1.003, Florida Administrative Code.
- (b) Fertilizer containing nitrogen shall not be applied before seeding or sodding a site, and shall not be applied for the first 30 days after seeding or sodding, except when hydro-seeding for temporary or permanent erosion control in an emergency situation (wildfire, etc.), or in accordance with the Stormwater Pollution Prevention Plan for that site.
- (c) Nitrogen or phosphorus fertilizer shall not be applied to turf or landscape plants except as provided in (a) above for turf, or in UF/IFAS recommendations for landscape plants, vegetable gardens, and fruit trees and shrubs, unless a soil or tissue deficiency has been verified by an approved test. [Guidance: Soil and tissue tests for phosphorus are normally done by UF/IFAS or another accredited laboratory. IFAS recommendations are available from the County Extension service or http://solutionsforyourlife.ufl.edu/lawn_and_garden/]

9. APPLICATION PRACTICES

- a. Spreader deflector shields are required when fertilizing via rotary (broadcast) spreaders. Deflectors must be positioned such that fertilizer granules are deflected away from all impervious surfaces, fertilizer-free zones and water bodies, including wetlands.
- b. Fertilizer shall not be applied, spilled, or otherwise deposited on any impervious surfaces.
- c. Any fertilizer applied, spilled, or deposited, either intentionally or accidentally, on any impervious surface shall be immediately and completely removed to the greatest extent practicable.
- d. Fertilizer released on an impervious surface must be immediately contained and either legally applied to turf or any other legal site, or returned to the original or other appropriate container.
- e. In no case shall fertilizer be washed, swept, or blown off impervious surfaces into stormwater drains, ditches, conveyances, or water bodies.

10. MANAGEMENT OF GRASS CLIPPINGS AND VEGETATIVE MATTER

In no case shall grass clippings, vegetative material, and/or vegetative debris be washed, swept, or blown off into stormwater drains, ditches, conveyances, water bodies, wetlands, or sidewalks or roadways. Any material that is accidentally so deposited shall be immediately removed to the maximum extent practicable.

11. EXEMPTIONS

The provisions set forth above in this Ordinance shall not apply to:

- (a) bona fide farm operations as defined in the Florida Right to Farm Act, Section 823.14 Florida Statutes;

(b) other properties not subject to or covered under the Florida Right to Farm Act that have pastures used for grazing livestock;

(c) any lands used for bona fide scientific research, including, but not limited to, research on the effects of fertilizer use on urban stormwater, water quality, agronomics, or horticulture.

[Guidance: Limited waivers for special cases such as botanical gardens, etc. should not be considered as less stringent for the purposes of the model as a minimum requirement.]

12. TRAINING

(a) All commercial and institutional applicators of fertilizer within the (un)incorporated area of (MUNICIPALITY / COUNTY), shall abide by and successfully complete the six-hour training program in the “*Florida Friendly Best Management Practices for Protection of Water Resources by the Green Industries*” offered by the Florida Department of Environmental Protection through the University of Florida Extension “*Florida-Friendly Landscaping™*” program, or an approved equivalent.

(b) Private, non-commercial applicators are encouraged to follow the recommendations of the University of Florida IFAS *Florida Yards and Neighborhoods* program when applying fertilizers.

[Guidance: A local government may establish a certification/education program for the institutional or private application of fertilizers indicating the completion of an education program for special local requirements not covered in the above programs. It is up to the local government to set a continuing education or renewal provision for these applicators. Persons with statewide FDACS commercial fertilizer certification cannot be required to submit to additional local testing after obtaining the FDACS certificate.]

13. LICENSING OF COMMERCIAL APPLICATORS

All commercial applicators of fertilizer within the (un)incorporated area of (MUNICIPALITY / COUNTY), shall have and carry in their possession at all times when applying fertilizer, evidence of certification by the Florida Department of Agriculture and Consumer Services as a Commercial Fertilizer Applicator per 5E-14.117(18) F.A.C.

All businesses applying fertilizer to turf and/or landscape plants (including but not limited to residential lawns, golf courses, commercial properties, and multi-family and condominium properties) must ensure that at least one employee has a “*Florida-Friendly Best Management Practices for Protection of Water Resources by the Green Industries*” training certificate prior to the business owner obtaining a Local Business Tax Certificate. Owners for any category of occupation which may apply any fertilizer to Turf and/or Landscape Plants shall provide proof of completion of the program to the (Municipality/ County) Tax Collector’s Office. [Guidance: This is an example of an administrative enforcement mechanism. It may be modified to use other local mechanisms as appropriate].

14. ENFORCEMENT

[Guidance: Local governments should consider making penalties consistent with their other fines and penalties.]

Funds generated by penalties imposed under this section shall be used by (Municipality/ County) for the administration and enforcement of section 403.9337, Florida Statutes, and the corresponding sections of this ordinance, and to further water conservation and nonpoint pollution prevention activities.



AGENDA MEMORANDUM *Streets & Stormwater Department*

Regular Meeting Date: June 5, 2019

To: City Council
From: Gregg R. Strakaluse, Director
Date: May 21, 2019

Legislative Quasi-Judicial

SUBJECT:

Public Hearing and Second Reading of an Ordinance amending Chapter 52, Article VII of the Code of Ordinances relating to fertilizer use and maintenance of urban landscapes.

SUMMARY:

City Council is requested to hold a Public Hearing and Second Reading of an Ordinance relating to fertilizer use and maintenance of urban landscapes; amending Chapter 52, Resource Protection Standards of the Code of Ordinances, amending Article VII Lawn and Landscape Maintenance in order to update and strengthen regulations for protection of stormwater and receiving water bodies; providing for conflict and severance. A First Reading was held at the June 5, 2019 Regular City Council meeting.

BACKGROUND:

A Public Hearing and First Reading was held at the June 5, 2019 Regular City Council meeting.

At the March 18, 2019 City Council Workshop, staff and technical professionals from the industry and the Conservancy of Southwest Florida presented information on the topic of fertilizer application. At the conclusion of the meeting, City Council directed staff to draft ordinance changes that included a summer fertilizer ban, limited annual nitrogen fertilizer application of 4-pounds per thousand square feet per year, and prohibiting phosphorus fertilizer application unless a soil/tissue test showed a deficiency. City Council further directed staff to bring the ordinance changes back to City Council within 90-calendar days to have changes take effect prior to the 2019 rainy season.

On May 15, 2019, City Council held a public hearing for the first reading of an Ordinance amending Chapter 52, Article VII of the Code of Ordinances relating to fertilizer use and maintenance of urban landscapes. The reading of that ordinance was based on two out of three agency comments and Chapter 403.9337 of the Florida Statutes requires the Florida Department of Environmental Protection (FDEP) input prior to adopting a more restrictive ordinance. Staff delivered the draft ordinance to FDEP on April 29, 2019 and staff received a response from FDEP on May 17, 2019. FDEP's response, which is included as Attachment

#1-FDEP Response, pointed out three areas of the City's ordinance amendment that appeared to be less restrictive than the State's model ordinance. They are:

1. **Section 52-184 – Fertilizer application and urban landscape maintenance (b):** Waterbody and wetland are defined differently in Florida Statute and the State's model ordinance reflects the difference and prohibits fertilizer application within 10-feet from either. The City must include wetlands in the 10-foot buffer provision, as well as the top of seawalls and bulkheads (which had been assumed to be adjacent to a waterbody). This change clarifies the more restrictive requirement and establishes consistency with the State's model ordinance.
2. **Section 52-184 - Fertilizer application and urban landscape maintenance (d) (2):** FDEP's model ordinance limits Centipede turf grass to three pounds of Nitrogen per 1,000 square feet per year. The City's amended ordinance now includes the more restrictive fertilizer use for Centipede turf grass.
3. **Section 52-186 – Training and licensing (a) (2):** While not enforceable, the State's model ordinance provides a statement of encouragement to private, non-commercial fertilizer applicators who are exempt from training and certification requirements to receive the formal training offered by FDEP in order to understand, and at a minimum, follow the recommendations provided by the University of Florida, Institute of Food and Agriculture Sciences Florida Yards and Neighborhoods program, except where more restrictive by the City's ordinance.

In considering FDEP's comments, Department staff and the City Attorney's office concluded that they were substantial enough to warrant another First Reading and, if approved, hold a Second Reading on June 12, 2019. This would provide the City with a strong and defensible ordinance modification and continue to achieve City Council's goal to implement ordinance changes at the outset of the 2019 rainy season.

REPEATED BACKGROUND FROM MAY 15, 2019:

On October 4, 2017 City Council approved ordinance modifications that, among other things, removed the wet season ban on fertilizer application. The wet season ban on fertilizer use was removed from the City's ordinance in favor of the State's regulations allowing limited fertilizer use year round. One rationale for the removal of the ban was a theory that landscape companies would exceed the regulated application rates just prior to the wet season and that the excess fertilizer would be carried off by the summer rains and deposited into receiving water bodies. However, the City's Code Enforcement Section has no documented record of warnings or violations issued to any landscape company for applying fertilizer in excess of the regulated quantities just prior to the previously enforced wet season restricted period.

The State's regulation that allows for limited fertilizer application in the wet season (and currently the City's regulation) acknowledges that fertilizer absorption is best during the summer growing season as opposed to the slower winter growing season. The State's regulation is based on studies conducted by the University of Florida Institute of Food and Agriculture (UF-IFAS) for the Florida Department of Environmental Protection (FDEP).

On February 5, 2019, the Collier County Board of Commissioners held a workshop on the issue of fertilizer need and use in preparation for a possible County ordinance change. City Council members and City staff were invited to participate in that workshop. Several scientists, industry professionals, and environmental organizations, and members of the public provided

Ethics above all else... Service to others before self... Quality in all that we do.

input to help guide the County towards an outcome that would best protect southwest Florida waters.

Naples Bay is designated as an impaired water body and recent sampling events indicate that Naples Bay does not meet nutrient criteria, as set by the Florida Department of Environmental Protection. The Gulf of Mexico has been plagued with red tide and toxic algae events, most notably evident in 2018 when local municipalities had to remove over 2,000 tons of dead sea life from southwest Florida beaches and shorelines {as reported by the honorable U.S. Representative Francis Rooney's office-April 18, 2019}. Water quality data collected by the City of Naples (from beach outfall removal design project) and Collier County Department of Health (from routine shoreline beach sampling) have indicated times of high bacteria levels causing swim warnings to be posted on Naples Beaches for the first time in many years.

Nutrient discharges can be both natural and man-made. Landscape fertilizers applied in excessive quantities are considered a man-made point source pollution issue. In 2015, the City commissioned a report that would provide a statistical analysis of over 7-years of data pertaining to water quality and biological habitat in Naples Bay. The report produced is entitled, *'Naples Bay Water Quality and Biological Analysis Report'*. Within the report, the following scientific conclusions were made.

"Because the majority of declining trends in wet season Total Nitrogen are shown for periods after 2008, the results may indicate that implementation of fertilizer ordinance in 2008 is a contributing factor for the decrease TN trend observed in Naples Bay."

"With the statistically significant decrease in wet season nitrogen and phosphorus at some long-term Bay stations coinciding with the implementation of the fertilizer ordinance, we cannot discount the importance of the ordinance as a potential contributing factor to the decrease."

Additionally, the following scientific studies lend support to a wet season ban for the City of Naples.

Soldat & Petrovic 2008

- 10.6% of an applied commercial lawn fertilizer was lost when followed immediately by an intense simulated rain event

Cisar & Snyder 1991

- Florida soils are well-drained coarse-textured sands that have little ability to retain either water or nutrients. The problem of N leaching is exacerbated by frequent intense rainfall.
- During periods of heavy rainfall, irrigation scheduling alone may not prevent nitrate-N losses from conventionally-applied water-soluble sources.

Erickson et al 2010

- During establishment of St. Augustine grass, both NO₃-N and PO₄-P nutrient leaching losses were strongly correlated with precipitation and drainage as evidenced by the significant trial effects and high leaching losses during the wetter trials.

Lasso de la Vega et al 2016

- Fertilizer ordinance may have had a positive effect on the reduction of nutrient concentrations in some storm water ponds, which may have contributed to the reduction of the relative abundance of planktonic algae.

Beever 2016

- Total phosphorus and total nitrogen had a statistically significant decrease between pre- and post-adoption of all local fertilizer ordinances in the Charlotte Harbor Estuary. Dr. Lisa Beever credits the reductions almost completely to the ordinances.

Listopda et al 2015

- In the Tampa Bay watershed, water quality differences were apparent among communities where stricter fertilizer ordinances were enacted.

SUMMARY OF CODE CHANGES

Below is a summary of the proposed changes to Chapter 52, Article VII of the City Code of Ordinances.

Section 52-182:

- Clarifies definitions and adds appropriate definitions.

Sec. 52-184:

- Shortens title, prohibits use during the Prohibited Application Period, prohibits fertilizer application within 10-feet of any waterbody, and establishes a voluntary 10-foot low maintenance zone adjacent to waterbodies.

Sec. 52-184 (a):

- Defines June 1 through September 30 as the Prohibited Application Period

Sec. 52-184 (b-c):

- Improves enforceability.

Sec. 52-184 (d): *(City Council directed.)*

- Adds limit of nitrogen to 4 lb/1,000sq ft/year
- Adds potential requirement for guaranteed analysis of alternative fertilizers
- Adds limit of zero phosphorus unless soil/tissue test determines deficiency

Sec. 52-184 (e)(3): *(Provides for clear enforcement.)*

- Clarifies that all spilled fertilizer are to be removed from impervious surfaces.

Sec. 52-184 (f): *(Provides for clear enforcement.)*

- Requires all grass clippings and other vegetative matter accidentally deposited on into stormwater drains, sidewalks, roads, etc. be immediately and completely removed.

Sec. 52-186: (*Consistent with the State's model ordinance.*)

- Shortens title
- Clarifies that private non-commercial fertilizer applicators are exempt from certification requirements.

Sec. 52-187: (*Staff recommendation.*)

- Includes a requirement for Code Enforcement to annually summarize and report warnings and violations issued as a result of enforcing this section.

The above information is intended to provide City Council with an overview of material changes to the ordinance. Staff will be prepared to answer specific questions.

FUNDING SOURCE:

Other than noticing requirements and staff time, there are no fiscal impacts to this item. Impairments to Naples Bay and the Gulf of Mexico are of critical concern to the fishing and tourism industries, as well as the real estate market.

RECOMMENDED ACTION:

Hold a Public Hearing and approve an Ordinance to take effect immediately on Second Reading relating to Fertilizer Use and Landscape Maintenance; amending Chapter 52, Resource Protection Standards, of the Code of Ordinances, Article VII Fertilizer Use and Maintenance of Urban Landscapes; providing for conflict and severance.