AN ORDINANCE AMENDING ARTICLE III, SUPPLEMENTARY DISTRICT REGULATIONS, SECTION 3.23, OF THE CITY OF CAPE CORAL LAND USE AND DEVELOPMENT REGULATIONS, BY AMENDING SECTION 3.23, BORROW PITS; REGULATION OF REMOVAL OR EXTRACTION OF DIRT, SOIL, SAND, ROCK, ETC., BY ESTABLISHING REGULATIONS FOR EXCAVATION, REMOVAL OR EXTRACTION FOR PURPOSES OF OIL OR GAS EXPLORATION OR PRODUCTION; PROVIDING FOR THE PROHIBITION OF WELL STIMULATION PROCEDURES; PROVIDING SEVERABILITY AND AN EFFECTIVE DATE.

WHEREAS, Florida Statutes §377.24(5) requires that prior to approval of an application for a permit to drill a gas or oil well, the governing authority of the municipality shall have first duty approved the application for such permit by resolution if the well is located within the corporate limits of any municipality; and

WHEREAS, the City of Cape Coral has used its zoning authority to address various forms of excavation and extraction activities; and

WHEREAS, well stimulation means a well intervention, exploration, operation, or maintenance procedure performed by injecting fluid into a rock formation in order to increase production at an oil or gas well. This includes but is not limited to, hydraulic fracturing, acidizing, and acid fracturing of oil or gas wells; and

WHEREAS, the City reviewed information from environmental and conservation resources regarding well stimulation and the impacts such procedures have on the health, safety, and welfare to the residents of the City; and

WHEREAS, there are mineral rights reserved under many parcels of land within the boundaries of the City of Cape Coral; and

WHEREAS, sound zoning principles as articulated in the determination of whether or not to consent to gas and oil exploration by City Council approval include (1) compatibility with existing or planned uses, (2) performance and locational standards, (3) consistency with the goals, objectives, policies and intent of the Comprehensive Plan, (4) whether the use will protect, conserve or preserve environmentally critical areas and natural resources, (5) whether the use will cause damage, hazard, nuisance or other detriment to persons or property; and (6) whether the use will be in compliance with all general zoning provisions and supplemental regulations pertaining to the use as set forth in the land development code; and

WHEREAS, Cape Coral City Council is cognizant of the Court's opinion in Wallach v. Town of Dryden, 23 N.Y.3d 728 (2014), holding that nothing obligates a town that "contains extractable minerals . . . to permit them to be mined somewhere within the municipality" or "to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole"; and

WHEREAS, in the Wallach case the Court found that the Town of Dryden engaged in a reasonable exercise of its zoning authority when it adopted local laws clarifying that hydro-fracking was not a permissible use in any of the Town's zoning districts; and

WHEREAS, well stimulation using fracking chemicals is an industrial activity with impacts typically associated with heavy industrial uses including storage of fracking chemicals (including carcinogens and trade secret formulations); and

WHEREAS, well stimulation using fracking chemicals is an industrial water usage generating waste, flowback, chemical and requiring storage, transportation, processing and disposal of chemical wastes; and

WHEREAS, well stimulation using fracking chemicals utilizes large tanker-trucks and heavy industrial equipment, machinery and requires transportation of fuel to power the heavy industrial machinery at the well site; and

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WHEREAS, heavy industrial activities associated with well stimulation using fracking chemicals occur twenty-four hours a day, seven days per week, include lighting and noise, and can result in fugitive gas emissions, including release of un-flared hazardous gases to the ambient air; and

WHEREAS, these heavy industrial activities involve storage, use, and disposal, of additional chemicals, some of which are listed as Immediately Dangerous to Life or Health (IDLHs) by the Center for Disease Control (CDC) including numerous chemicals contained in complex chemical formulations including trade secrets; and

WHEREAS, special equipment and training is needed to respond locally to oil well emergencies, spills and releases at oil and gas wells using fracking chemicals; and

WHEREAS, specialized emergency equipment and training is required to adequately respond to onsite emergency incidents and offsite collisions and vehicle accidents involving tanker trucks transporting dangerous chemicals, fuel, oil and waste to and from well sites, including the potential releases of toxic and dangerous gases (U.S. Dept of Health and Human Services Toxicological Profiles) as documented by MSDS sheets for complex trade secret chemical formulations; and

WHEREAS, the City has limited local emergency response training and equipment and response time capabilities to respond to oil well emergencies, spills and releases at oil and gas wells using fracking chemicals; and

WHEREAS, oil well stimulation using fracking chemicals is not a compatible use of land surrounding residential, commercial, government/institutional and agricultural designated lands, or wildlife habitat and existing urban, suburban, and agricultural landscapes in the City of Cape Coral; and

WHEREAS, impacts associated with oil well stimulations using fracking chemicals have been documented in studies including the Chemical and Biological Risk Assessment for Natural gas Extraction in New York, New York State Department of health 2014 Public Health Report of High-Volume Hydraulic Fracturing for Shale Gas Development (http://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf) and New York State Supplemental General Environmental Impact Statement (2015): (http://www.dec.ny.gov/energy/75370.html); and

WHEREAS, the Cape Coral City Council has determined to exercise its home rule powers and zoning authority to prohibit oil or gas well stimulation to prevent detrimental impacts to the community and to promote the interests of the community as a whole.

NOW, THEREFORE, THE CITY OF CAPE CORAL, FLORIDA, HEREBY ORDAINS THIS ORDINANCE AS FOLLOWS:

SECTION 1. The City of Cape Coral Land Use and Development Regulations, Article III, Section 3.23, Borrow Pits; regulation of removal or extraction of dirt, soil, sand, rock, etc.; procedures, is hereby amended as follows:

§ 3.23 Borrow pits; regulation of removal or extraction of dirt, soil, sand, rock, oil, gas, etc.; procedures.

.1 Removal or extraction of dirt, soil and sand.

A. All borrow pits from which dirt, sand or soil has been removed shall be completely enclosed by a fence or earth berm at least six feet in height.

B. Prior to any such removal or excavation, the following shall be submitted to the Department of Community Development: drainage plans, aerial photo of the site, a plan for development of the total site when the removal is completed, the estimated costs of restoring the site to a safe and developable condition, and a deposit of funds or other financial instruments payable to the City of Cape Coral is required equal to the estimated cost of restoring the site. The estimated cost for restoring the site shall include fence or berm removal, lake bank sloping and stabilization, site grading, seedings and/or mulching, drainage, and any other items that the Department, Commission, or Council deems appropriate to ensure that the site is restored to a safe and usable condition. The plans shall be reviewed by the Commission and written recommendation made to the Council prior to application for an excavation permit.
C. Determination of the size of buffer strip necessary shall be made by the Planning and Zoning Commission/Local Planning Agency subject to final approval of the City Council.

2. Removal or extraction of rock, gravel, shell, aggregate or marl.

A. All such excavations shall be sealed by fencing or grading or other device from general public access. All entrances to said excavation shall be fenced and locked during nonbusiness hours.

B. Prior to any such removal or excavation the following shall be submitted to the Department of Community Development: drainage plans, aerial photograph of the site, a plan for development of the total site when the removal is completed, the estimated costs of restoring the site to a safe and developable condition, and a deposit of funds or other financial instruments payable to the City of Cape Coral is required equal to the estimated cost of restoring the site. The estimated cost for restoring the site shall include fence or berm removal, lake, bank sloping and stabilization, site grading, seeding and/or mulching, drainage, and any other items that the Department, Commission or Council deems appropriate to ensure that the site is restored to a safe and usable condition. The plans shall be reviewed by the Commission and written recommendation made to the Council prior to application for an excavation permit.

C. Determination of the size of buffer strip necessary shall be made by the Planning and Zoning Commission/Local Planning Agency subject to final approval by the City Council.

D. No excavation or extraction may be made with explosives without express permission of the Council. Excavation or borrow pit permits involving explosives must be renewed every 90 days.

3. Excavations, removal, or extraction for purposes of oil or gas exploration or production.

A. All such excavations, removals, or extractions shall be sealed by fencing or grading or other device from general public access. All entrances to said sites shall be fenced and locked during nonbusiness hours.

B. Prior to any such excavation, removal, or extraction, the following shall be submitted to the Department of Community Development: drainage plans, aerial photograph of the site, a plan for development of the total site when the removal is completed, the estimated costs of restoring the site to a safe and developable condition, and a deposit of funds or other financial instruments payable to the City of Cape Coral is required equal to the estimated cost of restoring the site. The estimated cost for restoring the site shall include fence or berm removal, lake, bank sloping and stabilization, site grading, seeding and/or mulching, drainage, and any other items that the Department, Commission or Council deems appropriate to ensure that the site is restored to a safe and usable condition. The plans shall be reviewed by the Commission and written recommendation made to the Council prior to application for an excavation permit. No permit to drill a gas or oil well shall be issued unless City Council approves the application for such permit by resolution.

C. Determination of the size of buffer strip necessary shall be made by the Planning and Zoning Commission/Local Planning Agency subject to final approval by the City Council.

D. No excavation or extraction may be made with explosives without express permission of the Council. Excavation, including removal and extraction, or borrow pit, permits involving explosives must be renewed every 90 days.

E. No person or entity may engage in any oil and gas exploration or production that utilizes well stimulation within the corporate boundaries of the City of Cape Coral or, consistent with Florida Statutes §377.24(6), within the tidal waters of the state abutting or immediately adjacent to the corporate limits of the municipality, or within three miles of the City's corporate limits extending from the line of the mean high tide. As used in this section, the term "well stimulation" shall mean a well intervention, exploration, operation, or maintenance procedure performed by injecting fluid into a rock formation in order to increase production at an oil or gas well by improving the flow of hydrocarbons from the formation into the wellbore. Well stimulation does not include routine well cleaning that does not affect the integrity of the well or the formation.

A. Procedure.

A. The applicant shall meet with the Director and other city staff deemed appropriate by the Director prior to a public hearing with the Planning and Zoning Commission/Local Planning Agency to review staff concerns and to establish the basis for determining cost estimates as required.
B. All excavation or borrow pit requests shall be reviewed by the Planning and Zoning Commission/Local Planning Agency, City Manager, city staff and Health Department. After their review and recommendation, the City Council shall call for a public hearing on the application and shall determine whether or not said application shall be granted.

C. If the conceptual plan as presented by the applicant will require a zoning amendment for development, the applicant must prepare and submit a planned development project for the entire project prior to approval of the excavation.

D. If the excavation or borrow pit application is approved, the applicant may then apply for an excavation or borrow pit permit.

SECTION 2. Severability. In the event that any portion or Section of this ordinance is determined to be invalid, illegal or unconstitutional by a court of competent jurisdiction, such decision shall in no manner affect the remaining portions or Sections of this ordinance which shall remain in full force and effect.

SECTION 3. Effective Date. This ordinance shall become effective immediately after its adoption by the Cape Coral City Council.


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MARNI L. SAWICKI, MAYOR

VOTE OF MAYOR AND COUNCILMEMBERS:

SAWICKI _________ LEON _________
BURCH _________ ERBRICK _________
CARIOSCIA _________ WILLIAMS _________
STOUT _________ COSDEN _________

ATTESTED TO AND FILED IN MY OFFICE THIS _____ DAY OF ____________, 2016.

__________________________
REBECCA VAN DEUTEKOM
CITY CLERK

APPROVED AS TO FORM:

[Signature]
DOLORES D. MENENDEZ
CITY ATTORNEY
Owl/Fracking (well stimulation)
12/03/15
01/06/16