

ORDINANCE 20 - 19

AN ORDINANCE AMENDING THE CITY OF CAPE CORAL CODE OF ORDINANCES, CHAPTER 23, "PROTECTED SPECIES", ARTICLE II, "BURROWING OWL PROTECTION", BY RENAMING ARTICLE II TO READ "BURROWING OWL AND GOPHER TORTOISE PROTECTION" AND TO INCLUDE PROTECTIONS FOR GOPHER TORTOISES LOCATED IN THE CITY; PROVIDING SEVERABILITY AND AN EFFECTIVE DATE.

WHEREAS, pursuant to Article VIII, Section 2, Constitution of the state of Florida, and Chapter 166, Florida Statutes, the Cape Coral City Council ("Council") is authorized to adopt ordinances, except as otherwise provided by law; and

WHEREAS, the Florida Fish and Wildlife Conservation Commission has designated the gopher tortoise as a "Threatened Species" in the state of Florida; and

WHEREAS, the Council hereby finds that the protection of the gopher tortoise is an important public purpose; and

WHEREAS, the Council hereby finds that this ordinance is in the best interest of the public health, safety, and welfare.

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

SECTION 1. The City of Cape Coral Code of Ordinances, Chapter 23, Article II, is hereby amended to read as follows:

CHAPTER 23: - PROTECTED SPECIES

...

ARTICLE II: - BURROWING OWL AND GOPHER TORTOISE PROTECTION

§ 23-10 Purpose and intent.

The purpose of this article is to protect and preserve the burrowing owl (~~athene-cunicularia floridana~~ *Athene cunicularia floridana*) and the gopher tortoise (*Gopherus polyphemus*) by protecting, enhancing, and preserving the burrows of the burrowing owl and the gopher tortoise and its their immediate environs, while recognizing the rights of property owners to use their properties in a manner consistent with the rules, policies, and guidelines of the Florida Fish and Wildlife Conservation Commission and the City. The burrowing owl is and gopher tortoise are currently classified as State Threatened by the Florida Fish and Wildlife Conservation Commission (hereinafter "Commission"). With reasonable and proper management, the populations of the burrowing owl and gopher tortoise can be conserved and improved.

§ 23-11 Definitions.

For the purpose of this article, the following definitions shall apply unless the context clearly indicates or requires a different meaning:

Active burrow, for purposes of the burrowing owl, means a potentially occupied burrow that contains eggs or is used by flightless young. (Per Commission guidelines, the Commission typically does not issue permits to take active nests, except in situations involving health and human safety. Removing an active nest may also require a Federal permit from the U.S. Fish and Wildlife Service.) For purposes of the gopher tortoise, an active burrow shall mean a burrow that is in good repair, has the classic half-moon shaped entrance, and appears to be in use by a tortoise. For burrow surveys and density determinations, active burrows are combined with inactive burrows to create the potentially occupied burrow classification.

Applicant means the property owner, or the property owner's agent or authorized representative.

Burrow means a hole or tunnel dug by a small animal to use as a dwelling.

Development means any improvement or change of the land induced by human activities.

Inactive burrow, for purposes of the burrowing owl, means a potentially occupied burrow that does not contain eggs or flightless young. (Per Commission guidelines, inactive burrows provide important shelter for burrowing owls year-round, and impacts to potentially occupied burrows may cause a take, even when burrows are inactive.) For purposes of the gopher tortoise, an inactive burrow shall mean a burrow that is in good repair, but does not show recent tortoise use.

Potentially occupied burrow means a burrow with obvious indications of use and those with minimal or no obvious indications of use. Obvious indicators of use include burrowing owls or gopher tortoises present in or near the burrow entrance or evidence around the entrance, such as whitewash, feces, pellets, prey remains, or adornments.

Protection zone means the land area that surrounds a burrow. Protection zones will vary by species.

Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or an attempt to engage in any such conduct. The term “harm” in the definition of take means an act which actually kills or injures a burrowing owl or gopher tortoise. Such act may include significant habitat modification or degradation where it actually kills or injures burrowing owls or gopher tortoises by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. The term “harass” in the definition of take means an intentional or negligent act or omission which creates the likelihood of injury to a burrowing owl or gopher tortoise by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

§ 23-12 Development standards.

For development, the following, as applicable, shall serve as guidelines or standards for the protection of burrowing owls and gopher tortoises as prescribed by the goals, objectives, and policies of the conservation and coastal management element of the Cape Coral Comprehensive Plan:

- (a) Prior to submission of development applications, the following procedures are required:
 - 1. Applicants shall conduct a visual survey of the affected property for burrowing owl and gopher tortoise burrows. If a burrow is found on the subject property, or observed on an adjoining property where the protection zone extends into the subject property, the applicant shall contact the Commission for management guidelines. The applicant shall include the visual survey results with the development application and expressly indicate whether a take permit is being sought from the Commission.
 - 2. In addition to the visual survey required in subsection (a)1., development applications requiring PDP or site plan approval are required to submit an environmental survey of the development site. The environmental survey shall indicate whether there is the presence of burrowing owls, gopher tortoises, or burrows on site; whether the development proposal will impact owl or gopher tortoise burrows; and whether a take permit is being sought from the Commission.
- (b) All development applications will be reviewed against the City database for burrowing owls and gopher tortoises. If the City database or the surveys required by subsections (a)1. or (a)2. above indicate the presence of burrowing owls, gopher tortoises, or burrows, the applicant shall submit an affidavit identifying such presence and indicate whether a take permit is being sought from the Commission.

§ 23-13 Protection and permit procedures.

The requirements for taking or protecting the burrowing owl and gopher tortoise are as follows:

- (a) It shall be a violation of this article to take any burrowing owl or gopher tortoise, or any active or inactive burrowing owl or gopher tortoise burrow without proper state permits issued by the Commission.

- (b) Permits issued by the Commission shall be posted on site during all phases of the construction.
- (c) Except as otherwise authorized by state permit, Pprotection zone requirements shall include the following:
 - 1. For burrowing owls, Aa protection zone having at least a 10-foot buffer during the non-breeding season (July 11 - February 14), and at least a 33-foot buffer during the breeding season (February 15 – July 10), shall be maintained around the entrance of potentially occupied burrows during all phases of construction. A protection zone shall comply with Commission guidelines, as such guidelines may be amended.
 - 2. For gopher tortoises, a protection zone having at least a 25-foot buffer shall be maintained around the entrance of potentially occupied burrows during all phases of construction. A protection zone shall comply with Commission guidelines, as such guidelines may be amended.
 - 23. Contractors and property owners shall be responsible for maintaining the protection zone and informing all employees, workers, agents, and subcontractors to avoid the protection zone and to do nothing to affect the burrow(s) in such a manner as to make it collapse or to cause a take. Contractors and property owners shall be fully responsible for the actions of their employees, workers, agents, and subcontractors to ensure that all applicable laws, rules, and regulations protecting the burrowing owl and gopher tortoise are adhered to. Any take or violation of this article may subject the contractor and property owner to penalties as provided herein.
- (d) The City Building Official, code enforcement officers, law enforcement officers, or other City officials as may be designated by the City Council, may issue stop work orders for any development or construction that is not in compliance with the provisions of this article until any such violations have been inspected and complied with, and until any avoidance, minimization, or mitigation measures required by the Commission have been complied with or satisfied.
- (e) All Commission rules and guidelines relating to protection and taking procedures shall be followed at all times, even if not described in this article.

§ 23-14 Exempt activities within protection zones.

The following activities conducted within the protection zone of burrowing owl and gopher tortoise burrows shall not constitute a violation of this article, with the understanding that if any burrow does collapse or get damaged by the activity, it shall be immediately reported to the Commission and the City of Cape Coral to ensure proper rescue efforts may take place:

- (a) Burrow maintenance activities for the protection of owls and gopher tortoises, including the clipping of vegetation within the protection zone, staking and posting the protection zone with flagging tape and signage, and recording pertinent data.
- (b) Contractors and the property owner(s) may enter the protection zone for the limited purpose of removing debris with the full understanding that they can do nothing to disturb or harm the burrowing owl, gopher tortoise, or burrow in any manner. Contractors and lawn maintenance companies shall be fully responsible for the actions of their employees to ensure that all applicable laws, rules, and regulations protecting the burrowing owl and gopher tortoise are adhered to.
- (c) City employees, City agents and representatives, and the property owner(s) may enter the protection zone for the purpose of maintaining vegetation if using equipment that does not exert pressure on the ground to ensure the burrow does not collapse.
- (d) Scientific research or investigations approved by the Commission or the United States Fish and Wildlife Service. The City of Cape Coral shall be notified of all such research or investigations and provided with all study reports and publications produced.
- (e) Professional environmental consultants that are conducting surveys or monitoring of burrowing owls or gopher tortoises in conjunction with private or public construction.

- (f) Activities permitted by Commission rules, policies, and guidelines.

§ 23-15 Penalties.

- (a) Any person found violating any of the provisions of this article shall, upon conviction, be punished by a fine not to exceed \$500 or by imprisonment in the county jail for a period not to exceed 60 days, or by both fine and imprisonment. Such person shall also pay all costs and expenses incurred by the City in instituting such action. Each day a violation continues shall be considered a separate and distinct offense.
- (b) In addition to any other penalty provided by this article, any person who violates this article may be required to restore the protection zone to its condition prior to the violation. In the event restoration is not completed within a reasonable time after notice to the violator of the restoration requirement, then the City may perform the restoration and the cost of the restoration shall constitute a lien upon the subject property until paid in full. Any such restoration must be approved by the Commission.
- (c) In addition to any other penalty provided by this article, any violation of this article shall constitute a public nuisance and may be subject to restraint by injunction.
- (d) The City Manager, or the City Manager's designee, shall inform the Commission of any violations of this article by any person or entity within fourteen (14) days of such violation.

§ 23-16 Supplemental regulations.

This article is not intended to replace the Florida Endangered and Threatened Species Act or any other applicable federal, state, or local laws, rules, and regulations. Rather, this article is intended to supplement those laws, rules, and regulations to ensure the protection of the burrowing owl and the gopher tortoise.

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.

ADOPTED BY THE COUNCIL OF THE CITY OF CAPE CORAL AT ITS REGULAR SESSION THIS 10th DAY OF June, 2019.

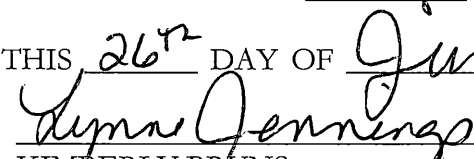

JOE COVIELLO, MAYOR

VOTE OF MAYOR AND COUNCILMEMBERS:

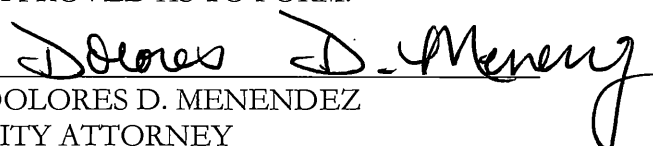
COVIELLO Aye
GUNTER Aye
CARIOSCIA Aye
STOUT Aye

NELSON Aye
STOKES Aye
WILLIAMS Aye
COSDEN Aye

ATTESTED TO AND FILED IN MY OFFICE THIS 26th DAY OF June, 2019.


KIMBERLY BRUNS
Acting CITY CLERK

APPROVED AS TO FORM:


DOLORES D. MENENDEZ
CITY ATTORNEY
Ord/GopherTortoises
4/30/19