

Additional/Revised Information

Agenda Item #	7
Meeting Date	July 8, 2013
Prepared By	Brian Kenner City Manager
Approved By	

Discussion Item	Discussion of Safe Grow Zone Ordinance
Background	<p>The Safe Grow Act of 2013 seeks to have the City Council enact a series of public education requirements and ultimately a ban on certain lawn pesticides on public and private property within the City. To that end, supporters submitted a draft ordinance for Council discussion at the work session on November 13, 2012.</p> <p>The City Council held a public forum on the proposal on March 18, 2013. Since that time, Councilmembers Grimes and Male have talked with people throughout the community supportive of or concerned by past drafts of the ordinance, including members of the Committee on the Environment. Councilmember Male has offered a refined version of the ordinance."</p> <p>The Safe Grow Act received public comment from residents and interested parties at the City Council meeting on July 1, 2013. Subsequent to this meeting three additional pieces of information have been gathered for consideration and are provided:</p> <ol style="list-style-type: none"> 1. Councilmember Male provided modifications to the original draft of the Safe Grow Act. These modifications were provided in response to the comments from the Council meeting. 2. The City Manager's office asked the City Attorney to respond to legal questions regarding: <ul style="list-style-type: none"> • City authority to regulate pesticides • City enforcement • Potential City liability for failure to enforce. 3. The Committee on the Environment responded to questions proposed by Councilmembers Grimes and Male and the City Attorney on the Safe Grow Act via an adopted e-vote. <p>The first reading of the proposed Ordinance is tentatively scheduled for Monday, July 15.</p>
Policy	<p>Section 401(a) of the City Charter:</p> <p><i>(a) The Council shall have the power to pass all such ordinances not contrary to the Constitution and laws of the State of Maryland or this Charter as it may deem necessary for the good government of the City; for the protection and preservation of the City's property, rights, and privileges; for the preservation of peace and good order; for securing persons and property from violence, danger, or destruction; and for the protection and promotion of the health, safety, comfort, convenience, welfare, and happiness of the residents of and visitors in the City.</i></p>
Fiscal Impact	<p>Original Ordinance: FY 14 - \$12,500; FY 15 - \$30,500; future years - \$25,000 per year</p> <p>Revised Ordinance: FY 14 - \$7,000; FY 15 - \$13,000; FY 16 - \$28,000; future years - \$25,000 per year</p>

Attachments	<ul style="list-style-type: none"> • Safe Grow Zone Proposed City Ordinance: The Safe Grow Zone Act of 2013 (as reformatted by the City Attorney's Office, draft dated June 7, 2013). • Proposed modifications from Councilmember Male on Safe Grow Zone Act of 2013 (draft dated July 5, 2013). • Legal memo from City Attorney in response to City Manager's request. • Committee on the Environment responses to questions from Councilmembers Male and Grimes and City Attorney.
Recommendation	Discuss the proposal and determine next steps.
Special Consideration	

(Draft 2013-06-07)

City of Takoma Park, Maryland

Proposed Text of the “Safe Grow Act of 2013”

Amending the *Takoma Park Code* Title 14. Health and Safety, to add restrictions on the use of pesticides on public and private property.

WHEREAS, Title 14, Health and Safety, protects the public health, safety, comfort, and general welfare of the residents and businesses of the City;

WHEREAS, Takoma Park’s Strategic Plan for FY2010-15, adopted May 18, 2009, articulates concern for clean water and safe neighborhoods and working environments and calls for “use of alternative, less environmentally damaging products”;

WHEREAS, in 2004, the City Council of Takoma Park proclaimed May 27 as Rachel Carson Day, a day in which residents are encouraged to consider the dangers from pesticides and to refrain from pesticide use, and the City has consistently, before and since, acted in society’s environmental and health best interests;

WHEREAS, The State of Maryland does not preempt municipal restriction of pesticide use, which indicates state recognition that localities are permitted and may wish to act beyond state law, and further, the State of Maryland itself goes beyond state law: A collaborative effort that includes the Maryland Departments of General Services and Natural Resources is transitioning the State House grounds to a “Bay-friendly, pesticide-free lawn and landscape care program” and instructs Marylanders, “Try Pesticide-free organic land care to protect the Bay and your family's health”;

WHEREAS, The EPA, the Committee on Environmental Health of the American Academy of Pediatrics, the National Academy of Sciences, and the 2010 President’s Cancer Panel have concluded that pesticide exposure is linked to reproductive disorders, birth defects, learning disabilities, neurological disease, endocrine disorders, and cancer;

WHEREAS, The EPA acknowledges, along with esteemed Mt. Sinai Children’s Environmental Health Center, that children, with their developing bodies and brains, are especially vulnerable to the harmful effects of lawn pesticides. Children’s behavior exposes them to far more contact with lawn pesticides than adults receive;

WHEREAS, The Journal of the National Cancer Institute finds that home and garden pesticide use can increase the risk of childhood leukemia by up to seven times. Dr. Philip Landrigan, the Director of Mt. Sinai Children’s Environmental Health Center states, “Case-control epidemiologic studies have found consistent, modest associations between pesticide exposures in utero and in early childhood and acute lymphocytic leukemia, childhood brain cancer, and childhood non-Hodgkin’s lymphoma. Rates of childhood leukemia are consistently elevated among children who grow up on farms, among children whose parents used pesticides in the home or garden, and among

children of pesticide applicators”;

WHEREAS, The EPA states pesticides are chemical irritants that can trigger asthma attacks in sufferers. One in ten children suffers from asthma, more in urban areas, where building managers routinely contract with lawn pesticide applicators;

WHEREAS, The National Institute of Environmental Health Sciences at NIH and the Harvard School of Public health have confirmed that exposure to pesticides raises the risk of Parkinson’s disease;

WHEREAS, Lawn pesticides have sub-lethal effects on animal life, including pets, aquatic organisms, and wildlife. A 2012 study by biologists at Harvard University concludes that pesticides are lethal to many pollinators and have been linked to Colony Collapse Disorder in honeybees;

WHEREAS, Friends of Sligo Creek asks people not to overuse pesticides and herbicides and also to “Encourage civic leaders to implement policies that reduce... toxic chemicals, and other impediments to water quality”;

WHEREAS, The Chesapeake Bay Foundation’s 2010 State of the Bay Report observes that non-point source pollution from residential and commercial lawn pesticides in surrounding towns pollute the watershed and ultimately Chesapeake Bay;

WHEREAS, Most provinces in Canada have banned the use of cosmetic lawn chemicals, and subsequent studies show a dramatic increase in stream health; Washington DC has enacted the Pesticide Education and Control Amendment Act of 2012; and Greenbelt, MD, strictly prohibits the use of synthetic chemical pesticides on all city-owned land with their Sustainable Land Care Policy of 2011;

WHEREAS, Non-toxic lawn care products are affordable and available to purchase in Takoma Park, and several local landscaping businesses offer pesticide-free lawn care.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TAKOMA PARK, MARYLAND:

SECTION 1. Title 14, Health and Safety, Chapter 14, is hereby amended to include the following:

Chapter 14.04.28

Restricted Lawn Care Pesticides

14.28.010 Declaration of policy

The application of certain pesticides, including the use of certain pesticides approved for use by the federal, state, or county governments, in manners and by persons allowed by those governments to apply them, nonetheless present an unacceptable risk of harm to public and animal health, the environment, and the region's watershed.

The City of Takoma Park prioritizes education of property owners and the businesses that serve them on the demonstrated and potential dangers posed by the use of certain pesticides for lawn care purposes, and on alternative, effective, safe means of promoting healthy lawns.

Education is important, but education alone is insufficient to protect the health of Takoma Park residents and visitors and the integrity of our environment and the region's watershed from the harm posed by the use of certain pesticides for the purposes of maintaining the cosmetic appearance of lawns. Certain pesticides are harmless to humans and non-pest species, and certain applications of potentially harmful pesticides may be justified by the need to eradicate invasive species and restore the environment. However, the desire to control purported pests such as clover, grubs, and black spot, to maintain a homogenous lawn does not merit the use of harmful pesticides.

This Chapter accordingly establishes public education requirements and phases in restrictions on the use of harmful pesticides for lawn care on public and private property within the City. It establishes an administrative framework for the implementation of educational steps, restrictions, and enforcement.

14.28.020 Definitions

As used in this Chapter,

"Infestation" means the presence of a pest in numbers or quantities large enough to be harmful.

"Lawn" means an area of grass or other vegetation of at least 50 square feet that is kept mowed.

"Pest" means any undesirable insect, animal, plant, fungi, bacteria, virus, or microorganism;

"Pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest, including insecticides, herbicides, and fungicides;

"Restricted pesticide" means a pesticide identified in the register of restricted pesticides in section 14.28.040 of this Chapter.

14.28.030 Outreach and Education

The City shall identify or prepare, and then periodically disseminate, materials designed to educate the community about the role of pesticides in our local environment, compliance with restrictions imposed by the Safe Grow Act, and earth-friendly practices and alternatives to the use of harmful pesticides.

Education may take the form of pamphlets and brochures, whether produced and distributed on paper or electronically, and classes and seminars, involving City staff, non-City governmental agencies, community and advocacy groups, and other resources.

The City Manager shall publish notice of this Chapter and a list of restricted pesticides and alternative, less environmentally damaging, products and cultural practices or methods of pest control and provide periodic notice regarding this Chapter to local lawn and garden retailers and contractors, and businesses, churches, schools, and other institutions located in the City, upon adoption of administrative regulations and subsequently every two years or more frequently.

14.28.040 Register of Restricted Pesticides

A. The City Manager shall create and issue, by October 1, 2013, and shall thereafter maintain and update, a Register of Restricted Pesticides, and any administrative regulations necessary for enforcement of this Chapter. The Register shall identify common commercial and industrial products containing restricted pesticides to facilitate compliance with this Chapter. However, persons applying pesticide products are responsible for determining whether the product contains a restricted pesticide, and the City's failure to identify a product in the register will not excuse a violation of this Chapter.

B. The initial register shall include the following pesticides:

Restricted Pesticides

2, 4-D

Bifenthrin

Dicamba

Dichlorprop-p Dimethylamine Salt

Diquat Dibromide

Fenoxycarb

Fluazifop-butyl

Glysophate

Imazethapyr

Imazipic

Imazipyr

C. The City Manager may add pesticides to the Register when it reasonably appears that the pesticide may be harmful to human or animal health when used for lawn care purposes.

14.28.050 Prohibited Applications

A. **Use by City Agents and Employees.** Except as provided in paragraphs 1 - 2 of this subsection, it shall be unlawful for any City agent or employee to use restricted pesticides for lawn care.

1. If the City Manager determines, after considering the pertinent criteria in Section 14.28.80, that the restricted use of a pesticide on public or private land is necessary to promote the public interest, the City Manager may authorize City agents and employees use restricted pesticides.

2. Before a City agent or employee may engage in the restricted use of a pesticide, the City Manager shall issue a public attestation stating the location(s) and timing of use, the substance(s) to be applied, the date(s) of application, and the unavailability of acceptable alternatives, for any use of restricted pesticides. The City Manager shall post the attestation on the City's web site and make the attestation available for public inspection at the Sam Abbott Citizens' Center. The City Manager immediately must a notice adjacent to the public right of way at the point(s) closest to the area(s) of the application of the pesticide. The Notice must remain posted until seven days after the completion of the application of the restricted pesticides.

B. **Use by Other Government Entities.** The City of Takoma Park shall inform governmental entities that own or control land within the City of its policy regarding restricted pesticides and encourage voluntary compliance with the pesticide use restrictions and notice requirements.

C. **Use on Private Property.**

1. Starting January 1, 2014, it shall be illegal to apply restricted pesticides for lawn care purposes on private property in the City, whether by the property owner or a tenant, service provider, or other agent.

2. **Notice of Restricted Use.** From the date of adoption of this ordinance until December 31, 2013, any party applying a restricted pesticide for lawn care purposes must post public notice, readable and visible from the public

right-of-way at the point closest to the area of application, stating the substance applied and the date of application. The notice shall include the address and approximate location of the pesticide application, date and estimated time of application, the type of pesticide being used and an appropriate telephone number for information regarding the pesticide's contents and potential health impacts.

14.28.060 Exceptions

This Chapter does not prohibit the use of restricted pesticides for the following purposes:

- A. **Noxious growths.** The control of plants identified in Section 12.08.040, Noxious Growths, of Takoma Park Code, including poison ivy (*Rhus radicans* or *Toxicodendron radicans*), poison oak (*Rhus toxicodendron* or *Toxicodendron quercifolium*), poison sumac (*Rhus vernix* or *Toxicodendron vernix*), ragweed (*Ambrosia artemisiifolia*), bamboo, kudzu-vine (*Pueraria lobata*), non-native honeysuckle, wisteria, and multi flora rose (*Rosa multiflora*). Notwithstanding the foregoing, the City encourages the use of cultural, physical, biological, and mechanical methods of pest control, instead of restricted pesticide use.
- B. **Noxious weeds.** The control of noxious weeds as defined in section 9-401 of the Agriculture Article of the Maryland Code, including thistles belonging to the asteraceae or compositae family, such as Canada, musk, nodding, plumeless, and bull thistle, johnsongrass (*sorghum halepense*) or hybrids that contain johnsongrass as a parent, and shatter cane and wild cane (*sorghum bicolor*). Notwithstanding the foregoing, the City encourages the use of cultural, physical, biological, and mechanical methods of pest control, instead of restricted pesticide use.
- C. **Invasive species.** The control of invasive species that may be detrimental to the environment, in accordance with a license issued by the City of Takoma Park or Montgomery County.
- D. **Mandatory applications.** Use of pesticides mandated by state or federal law.

14.28.070 Waiver.

Persons that have exhausted all reasonable alternatives to the use of restricted pesticides for lawn care may request a waiver allowing the use of one or more of the restricted pesticides under this Chapter.

- A. **Contents of Request.** A waiver request must include the following:
 - 1. A description of the nature and scope of the infestation sought to be controlled;

2. A description of the non restricted methods of pest control attempted, or a written statement from a pest control professional explaining why the use of non restricted methods would be unreasonable;
3. The restricted pesticide(s) sought to be to be applied; and
4. The proposed location(s), time(s), and date(s) of the proposed application of the restricted pesticides(s); and
5. An explanation of the proposed application schedule.

B. Supporting Documentation. Persons requesting a waiver may also submit documentary evidence in support of their application, including receipts and invoices relating to attempts to utilize non-restricted methods of pest control and photographs of the infestation.

C. Procedures.

1. Waiver requests must be filed at least 15 calendar days before the proposed restricted use of pesticides.
2. The City shall publish waiver requests on the City's web site and make the applications available for inspection at the Sam Abbott Citizens' Center.
3. Upon receipt of a waiver request, the City shall issue a notice form to the requestor, which the requestor must post adjacent to the public right of way at the point(s) closest to the area(s) of application for a period of five calendar days.
4. Persons shall have five calendar days from the date of posting of the notice form to submit to the City a statement of support for or opposition to the proposed restricted use and any documentary evidence in support of their statement.
5. The City Manager shall grant or deny a waiver request within 10 calendar days of the requestor's posting of the notice. Decisions granting a waiver shall specify the duration of the waiver, which shall be based upon the proper application schedule of the restricted pesticide(s).
6. **Notice of Decision.** The City Manager's decision on a waiver request shall be published on the City's web site and made available for public inspection at the Sam Abbott Citizens' Center. The City Manager will issue a copy of the decision to the requestor and any person filing a statement regarding the request.
7. **Notice of Waiver.**

a. If the City Manager grants a waiver, the City Manager shall issue a Notice of Pesticide Restriction Waiver to the requestor, post the Notice on the City's web site, and make the Notice available for public inspection at the Sam Abbott Citizens' Center.

b. The requestor immediately must post the Notice adjacent to the public right of way at the point(s) closest to the area(s) of application. The Notice must remain posted until seven days after the completion of the application of the restricted pesticides.

14.28.080 Criteria for waiver decisions.

In deciding whether to grant or deny a waiver request, the City Manager shall consider the following factors:

1. The extent of the infestation;
2. The impact of the infestation on the environment;
3. The risk of the infestation spreading on the requestor's property or to other properties;
4. The hardship to the requestor if the infestation is denied;
5. The environmental impact of the proposed restricted use;
6. The qualifications of the persons making statements in support of or opposition to the request; and
7. The extent of the efforts of the requestor's efforts to utilize non restricted methods of pest control.

14.28.090 Enforcement and penalties

A. Commencing July 1, 2015, each application of a restricted pesticide for lawn care purposes is a violation and shall be a Class B municipal infraction.

B. Commencing July 1, 2015, failure to post notice of an allowed application of a restricted pesticide is a violation and shall be a Class C municipal infraction.

(Draft 2013-07-05)

City of Takoma Park, Maryland

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WHEREAS, Title 14, Health and Safety, protects the public health, safety, comfort, and general welfare of the residents and businesses of the City;

WHEREAS, Takoma Park’s Strategic Plan for FY2010-15, adopted May 18, 2009, articulates concern for clean water and safe neighborhoods and working environments and calls for “use of alternative, less environmentally damaging products”;

WHEREAS, in 2004, the City Council of Takoma Park proclaimed May 27 as Rachel Carson Day, a day in which residents are encouraged to consider the dangers from pesticides and to refrain from pesticide use, and the City has consistently, before and since, acted in society’s environmental and health best interests;

WHEREAS, The State of Maryland does not preempt municipal restriction of pesticide use, which indicates state recognition that localities are permitted and may wish to act beyond state law, and further, the State of Maryland itself goes beyond state law: A collaborative effort that includes the Maryland Departments of General Services and Natural Resources is transitioning the State House grounds to a “Bay-friendly, pesticide-free lawn and landscape care program” and instructs Marylanders, “Try Pesticide-free organic land care to protect the Bay and your family's health”;

WHEREAS, The Precautionary Principle signed onto by the U.S Government as Principle 15 of the Rio Declaration (1992) and endorsed by the American Public Health Association holds, “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”;

WHEREAS, The EPA, the Committee on Environmental Health of the American Academy of Pediatrics, the National Academy of Sciences, and the 2010 President’s Cancer Panel have concluded that pesticide exposure is linked to reproductive disorders, birth defects, learning disabilities, neurological disease, endocrine disorders, and cancer;

WHEREAS, The EPA acknowledges, along with the esteemed Mt. Sinai Children’s Environmental Health Center, that children, with their developing bodies and brains, are especially vulnerable to the harmful effects of lawn pesticides. Children’s behavior exposes them to far more contact with lawn pesticides than adults receive;

WHEREAS, The Journal of the National Cancer Institute finds that home and garden pesticide use can increase the risk of childhood leukemia by up to seven times. Dr. Philip Landrigan, the Director of Mt. Sinai Children’s Environmental Health Center states,

“Case-control epidemiologic studies have found consistent, modest associations between pesticide exposures in utero and in early childhood and acute lymphocytic leukemia, childhood brain cancer, and childhood non-Hodgkin’s lymphoma. Rates of childhood leukemia are consistently elevated among children who grow up on farms, among children whose parents used pesticides in the home or garden, and among children of pesticide applicators”;

WHEREAS, The EPA states pesticides are chemical irritants that can trigger asthma attacks in sufferers. One in ten children suffers from asthma, more in urban areas, where building managers routinely contract with lawn pesticide applicators;

WHEREAS, The National Institute of Environmental Health Sciences at NIH and the Harvard School of Public health have confirmed that exposure to pesticides raises the risk of Parkinson’s disease;

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WHEREAS, Most provinces in Canada have banned the use of cosmetic lawn chemicals, and subsequent studies show a dramatic increase in stream health; Washington DC has enacted the Pesticide Education and Control Amendment Act of 2012; and Greenbelt, MD, strictly prohibits the use of synthetic chemical pesticides on all city-owned land with their Sustainable Land Care Policy of 2011;

WHEREAS, Non-toxic lawn care products are affordable and available to purchase in Takoma Park, and several local landscaping businesses offer pesticide-free lawn care.

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The City of Takoma Park prioritizes education of property owners and the businesses that serve them on the demonstrated and potential dangers posed by the use of certain pesticides for lawn care purposes, and on alternative, effective, safe means of promoting healthy lawns.

Education is important, but education alone is insufficient to protect the health of Takoma Park residents and visitors and the integrity of our environment and the region's watershed from the harm posed by the use of certain pesticides for the purposes of maintaining the cosmetic appearance of lawns. Certain pesticides are harmless to humans and non-pest species, and certain applications of potentially harmful pesticides may be justified by the need to eradicate invasive species and restore the environment. However, the desire to control purported pests such as clover, grubs, and black spot, to maintain a homogenous lawn does not merit the use of harmful pesticides.

This Chapter accordingly establishes public education requirements and phases in restrictions on the use of harmful pesticides for lawn care on public and private property within the City. It establishes an administrative framework for the implementation of educational steps, restrictions, and enforcement.

14.28.020 Definitions

As used in this Chapter,

"Commercial pesticide applicator" means any person that performs pesticide application for hire.

"Infestation" means the presence of a pest in numbers or quantities large enough to be harmful.

"Lawn" means an area of grass or other vegetation of at least 25 square feet that is kept mowed.

"Pest" means any undesirable insect, animal, plant, fungi, bacteria, virus, or microorganism;

"Pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest, including insecticides, herbicides, and fungicides;

“Restricted pesticide” means a pesticide identified in the register of restricted pesticides in section 14.28.040 of this Chapter.

14.28.030 Outreach and Education

A. The City shall identify or prepare, and then periodically disseminate, materials designed to educate the community about the role of pesticides in our local environment, compliance with restrictions imposed by the Safe Grow Act, and earth-friendly practices and alternatives to the use of harmful pesticides.

1. Education may take the form of pamphlets and brochures, whether produced and distributed on paper or electronically, and classes and seminars, involving City staff, non-City governmental agencies, community and advocacy groups, and other resources.

2. Materials shall include information about and links to the U.S. Environmental Protection Agency’s list of minimum risk pesticides.

B. The City Manager shall publish notice of this Chapter and a list of restricted pesticides and alternative, less environmentally damaging, products and cultural practices or methods of pest control and provide periodic notice regarding this Chapter to local lawn and garden retailers and contractors, and businesses, churches, schools, and other institutions located in the City, upon adoption of administrative regulations and subsequently every two years or more frequently.

14.28.040 Register of Restricted Pesticides

A. The City Manager shall create and issue, by October 1, 2013, and shall thereafter maintain and update, a Register of Restricted Pesticides, and any administrative regulations necessary for enforcement of this Chapter.

1. The Register shall identify common commercial and industrial products containing restricted pesticides to facilitate compliance with this Chapter.

2. Persons applying pesticide products are responsible for determining whether the product contains a restricted pesticide, and the City’s failure to identify a product in the Register will not excuse a violation of this Chapter.

B. The Register of Restricted Pesticides shall include the following pesticides:

1. 2, 4-D
2. 2,4-DD-p
3. Bifenthrin
4. Carbaryl
5. Diazinon
6. Dicamba

7. Dichlorprop-p
8. Dimethylamine Salt
9. Diquat
10. Fenoxycarb
11. Fluroxypry
12. Fluazifop-butyl
13. Glyphosate
14. Imazethapyr
15. Imazapic
16. Imazapyr
17. MCPA
18. MCPP
19. Pendimethalin
20. Trichlorpyr
21. Any lawn pesticide identified as a known or likely carcinogen by the U.S. Environmental Protection Agency
22. Any lawn pesticide identified as a Category 1 Endocrine Disruptor by the European Commission
23. 23. Any lawn pesticide identified by the Environmental Protection Agency as a Restricted Use Product (RUP)

14.28.050 Prohibited Applications

A. **Use by City Agents and Employees.** It shall be unlawful for any City agent or employee to use restricted pesticides for lawn care unless the City Manager determines, after considering the pertinent criteria in Section 14.28.070, that the restricted use of a pesticide on public or private land is necessary to promote the public interest, the City Manager may authorize City agents and employees to use restricted pesticides.

B. **Use by Other Government Entities.** The City of Takoma Park shall inform governmental entities that own or control land within the City of its policy regarding restricted pesticides and encourage voluntary compliance with the pesticide use restrictions and notice requirements.

C. **Use on Private Property.**

1. Commercial Pesticide Applicators.

a. Commencing January 1, 2014, it shall be illegal for a commercial pesticide applicator to apply restricted pesticides for lawn care purposes on private property in the City.

b. Commencing January 1, 2014, a commercial pesticide applicator applying a pesticide for lawn care purposes must post a written notice, readable and visible from the public right-of-way at the point closest to the area of

application, stating the address of the pesticide application, substance applied, amount applied, and the date of application, and shall include an affirmation that the pesticide product applied does not include a restricted pesticide. The notice shall remain in place for at least 2 days following application and shall include an appropriate telephone number for information regarding the pesticide's contents and potential health impacts.

c. Penalties.

i. From January 1, 2014, through June 30, 2014, the City shall issue a written warning to a commercial pesticide applicator that violates paragraphs (a) or (b) of this subsection.

ii. Commencing July 1, 2014, each prohibited application of a restricted pesticide for lawn care purposes is a violation and shall be a Class D municipal infraction for the initial offense and shall be a Class B municipal infraction for the second offense. The third and any subsequent offenses shall be repeat Class B offenses.

iii. Commencing July 1, 2014, failure to post and maintain the written notice required under paragraph (1)(b) of this subsection is a violation and shall be a Class G municipal infraction.

2. Property Owners and Tenants.

a. After July 1, 2014, the City shall distribute educational materials developed under section 14.28.030 to all single-family homes, duplexes, and townhouses in the City.

b. Commencing January 1, 2015, it shall be illegal for a property owner or tenant to apply restricted pesticides for lawn care purposes on private property in the City.

c. Commencing January 1, 2015, a property owner or tenant applying a pesticide for lawn care purposes must post written notice using a form provided by the City. The notice shall be readable and visible from the public right-of-way at the point closest to the area of application and state the address of the pesticide application, substance applied, and date of application, and include an affirmation that the pesticide product applied does not include a restricted pesticide. The property owner or tenant shall maintain the notice for at least 2 days following application.

d. Penalties.

i. From January 1, 2015, to June 30, 2015, the City shall issue a written warning to a property owner or tenant that violates the

pesticide application restrictions and posting requirements of paragraphs (2)(b) and (c) of this subsection.

ii. Commencing July 1, 2015, each prohibited application of a restricted pesticide for lawn care purposes is a violation and shall be a Class D municipal infraction for an initial offenses and shall be a Class B municipal infraction for the second offense. The third and any subsequent offenses shall be repeat Class B offenses.

iii. Commencing July 1, 2015, failure to post and maintain a written notice as required by paragraph (2)(c) of this subsection is a violation and shall be a Class G municipal infraction.

14.28.060 Exceptions

The City encourages the use of cultural, physical, biological, and mechanical methods of pest control, instead of restricted pesticide use, but this Chapter does not prohibit the use of restricted pesticides for the following purposes:

A. **Noxious growths.** The control of plants identified in Section 12.08.040, Noxious Growths, of the Takoma Park Code, including poison ivy (*Rhus radicans* or *Toxicodendron radicans*), poison oak (*Rhus toxicodendron* or *Toxicodendron quercifolium*), poison sumac (*Rhus vernix* or *Toxicodendron vernix*), ragweed (*Ambrosia artemisiifolia*), bamboo, kudzu-vine (*Pueraria lobata*), non-native honeysuckle, wisteria, and multi flora rose (*Rosa multiflora*).

B. **Noxious weeds.** The control of noxious weeds as defined in section 9-401 of the Agriculture Article of the Maryland Code, including thistles belonging to the asteraceae or compositae family, such as Canada, musk, nodding, plumeless, and bull thistle, johnsongrass (*sorghum halepense*) or hybrids that contain johnsongrass as a parent, and shatter cane and wild cane (*sorghum bicolor*).

C. **Invasive species.** The control of invasive species that may be detrimental to the environment, in accordance with a license issued by the City of Takoma Park or Montgomery County.

D. **Mandatory applications.** Use of pesticides mandated by state or federal law.

14.28.070 Waiver

Persons that have exhausted all reasonable alternatives to the use of restricted pesticides for lawn care may request a waiver from the City Manager allowing the use of one or more of the restricted pesticides under this Chapter.

- A. **Contents of Request.** A waiver request must include the following:
1. A description of the nature and scope of the infestation sought to be controlled;
 2. A description of the non restricted methods of pest control attempted, or a written statement from a pest control professional explaining why the use of non restricted methods would be unreasonable;
 3. The restricted pesticide(s) sought to be to be applied; and
 4. The proposed location(s), time(s), and date(s) of the proposed application of the restricted pesticides(s); and
 5. An explanation of the proposed application schedule.
- B. **Supporting Documentation.** Persons requesting a waiver may also submit documentary evidence in support of their application, including receipts and invoices relating to attempts to utilize non-restricted methods of pest control and photographs of the infestation.
- C. **Regulations.** The City Manager or his or her designee may promulgate regulations establishing waiver application procedures and criteria.

Susan Silber
Linda S. Perlman
Kenneth T. Sigman
Metody A. Tilev*
Kirstin Gulling, *Of Counsel*
* Also admitted in Virginia



SILBER, PERLMAN,
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the District of Columbia*

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MEMORANDUM

To: Takoma Park City Council

Cc: Brian Kenner, Suzanne Ludlow, Daryl Braithwaite

Via: Jessie Carpenter

From: Susan Silber, City Attorney, Kenneth Sigman, Asst. City Attorney

Subject: Legal analysis of the proposed Safe Grow Act

Date: May 20, 2013 (Supplemented July 5, 2013)

The purpose of this Memorandum is to advise the Council regarding the City's authority to regulate the use of pesticides, discuss the manner and cost of enforcing the ordinance, and discuss the potential liability of the City for injuries caused by restricted pesticides for failing to enforce the ordinance.

Background

The proposed legislation seeks to protect the health and safety of residents and the environment by restricting the use of pesticides that contain toxic chemicals. The proposal expressly restricts the use of specified toxic pesticides for lawn care purposes, and establishes a framework for the addition of other pesticides by regulation. The legislation also establishes exemptions from the general restrictions of the ordinance for situations where the use of restricted pesticides is necessary for the protection of the health and safety of residents or the environment, and allows for residents to apply for a waiver of the restrictions on a case-by-case basis, which the City may grant upon determining that the resident has exhausted all reasonable alternatives.

City Authority to Regulate Pesticides

The City, as a Maryland municipal corporation, has the authority to enact laws that promote the health safety and welfare of its residents. This authority is commonly referred to as police power. The courts have deemed laws that protect the environment to be exercises of police power. Generally, exercises of police power must be rationally related to a legitimate purpose to withstand constitutional scrutiny. In addition, municipal police power legislation must be consistent with federal and state law.

The federal government has enacted legislation and promulgated regulations that comprehensively regulate the manufacture, labeling, and application of pesticides. However, the Supreme Court has held that the federal pesticide regulations do not preclude local governments from enacting more restrictive pesticide regulations. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 611-12 (1991). The State of Maryland has

also enacted legislation regulating the registration and labeling of pesticides and the licensing and conduct of professional pesticide applicators. There is no case law of which we are aware that deems Maryland state pesticide laws to preempt local pesticide laws. Montgomery County regulates the retail sale of pesticides and requires the posting of signs following the application of pesticides. The County pesticide legislation has been in effect since the Supreme Court held that federal law does not preempt local pesticide regulation, and there has not been a challenge to the Montgomery County law based on state law preemption. In addition, the Maryland General Assembly did not pass a bill introduced in 1993 that would have restricted the right of local governments to regulate the application of pesticides. Therefore, we believe that state law does not preempt the City from enacting the Safe Grow Act.

The State of Maryland regulates the distribution and labeling of pesticides and the certification of pest control professionals. The Maryland Code does not expressly prohibit local governments from further regulating the use of pesticides, and there are no Maryland court decisions indicating that the State's regulation of pesticides precludes local governments from enacting pesticide regulations. Montgomery County has enacted legislation that requires the posting of notice after the application of pesticides, requires merchants to make information about pesticides available to customers, and regulates the storage and transportation of pesticides.¹ We are not aware of any legal challenges to Montgomery County's authority to regulate pesticides.

It is the opinion of the City Attorney that the City has the authority to enact the Safe Grow Act as proposed. The purpose of the Safe Grow Act is to protect the health of City residents and prevent the release of toxic chemicals into the environment. The General Assembly has expressly granted the City the authority to enact legislation to promote the health safety and welfare of its residents, which includes environmental legislation. There exists scientific evidence that many pesticides may be harmful to human health and the environment.² Because the proposal restricts the use of potentially harmful pesticides, it should withstand judicial scrutiny—it is rationally related to the legitimate purpose of protecting the health, safety, and welfare of City residents.

Enforcement

Because the City has the legal authority to enact the Safe Grow Act, the City also has the authority to enforce the Act. Promoting awareness of the restrictions in the Act and the potential health and environmental impact of the use of the restricted pesticides is the most efficient method of encouraging compliance with the Act. However, the municipal infraction process can be used to punish and deter violations of the Act. The City would probably have to rely on residents to report violations.

A proposed revision to the ordinance from Councilmember Male would require persons to post a sign on their property when applying any pesticide, which would allow the City to cite violators if the person failed to post, without the need to prove the violator used a restricted chemical, which often may require a chemical analysis of the lawn or soil where the potential violation occurred. The City would need either a warrant or the permission of the resident to collect a soil or lawn sample for testing. The City could also prove violations using

¹ Currently, Chapter 33B, Pesticides, of the Montgomery County Code applies in the City of Takoma Park. We see no reason to opt out of the County's regulation of the sale, storage, and transportation of pesticides if the City enacts the Safe Grow Act, but the City could opt out of the County's less stringent posting requirements to avoid duplicative regulation on that subject.

² This Office assumes that the specific pesticides identified in the proposal have been determined to be harmful to human health or the environment.

testimony or photographs if a code enforcement officer observes evidence of violations (e.g., the presence of containers of prohibited pesticides).

The proposed ordinance designates violations as civil offenses. The City must prove violations of all civil municipal infractions by clear and convincing evidence, which is the intermediary burden of proof, between the standard burden in civil actions, "preponderance of the evidence," which means more likely than not, and the state's burden in criminal cases, "beyond a reasonable doubt."

Whether the enforcement consists primarily of citing violations of the posting requirement or the use of restricted pesticides, the City probably will require additional staffing to respond to complaints, issue citations, and testify in court. The employee may need special education or training to be able to conduct chemical tests, or the City may have to procure private laboratory services. The City will also incur legal fees for advice provided to the enforcement officer and the prosecution of municipal infraction citations in court.

As noted above, the most efficient method of enforcement will be to educate the public about the dangers of chemical pesticides and the availability of alternatives to encourage voluntary compliance. The proposed ordinance mandates that the City conduct a public relations campaign and includes various phase-in periods intended to give the public an opportunity to learn the requirements of the law and adjust their lawn care practices before they could be subject to a citation.

Potential Liability for Failure to Enforce

The enactment of the Safe Grow Act will not expose the City to liability to persons injured by restricted pesticides if the City fails to prevent the use of restricted pesticides. Unless a statute indicates an intent to create a duty to specified persons, statutes are deemed to create a duty to the public generally, and individuals suffering damages do not have a cause of action against the government for injuries resulting from a failure to prevent violations. *Willow Tree Learning Ctr., Inc. v. Prince George's Cnty., Md.*, 85 Md. App. 508, 515-16 (1991). No iteration of the proposed ordinance that this office has reviewed indicates an intent to protect specific persons. Nonetheless, as part of the City's education campaign, we may wish to advise residents not to assume that the City has eradicated the use of restricted pesticides and to continue to take precautions to protect their children and pets from exposure.

**SAFE GROW ZONE ORDINANCE – RESPONSES TO QUESTIONS FROM
COUNCILMEMBERS GRIMES AND MALE**

Revision June 25, 2013 – 7:43 pm ET, Adopted via e-vote as of July 4, 2013

This is a summary of the Committee on Environment's responses to questions regarding the safe grow zone ordinance asked by Council members Grimes and Male and the City Attorney. These answers are based on a substantial amount of research, COE meetings and input from proponents and others.

1) What gaps are there between EPA & Maryland pesticide regulations and the protections envisioned by the Safe Grow Zone ordinance?

There are numerous scientific uncertainties in the risk assessments underlying many of the current regulations. These concern assumptions and data gaps in the human health (particularly children) and ecological (especially marine benthic invertebrates) risk assessments in addition to problems with circumstances that are unforeseen by regulators. These gaps are not specific to residential pesticide use. In fact, there are more data available for some pesticides than many other environmental hazards. EPA risk assessments are detailed and require that the pesticide risks are less than the benefits. Considering risk management, the SGZ ordinance would provide an additional margin of safety for public health and environmental protection over and above existing regulations.

2) Should the draft Safe Grow ordinance include pesticides other than those listed in the May 20, 2013 draft, and are there included pesticides that should be removed? Keep in mind that the application focus is lawns.

The COE suggests that a better and more positive approach would be to alternatively include a list of approved chemicals as safer alternatives for lawn use, drawn from EPA's minimum risk pesticides and bio-pesticides lists, and Ontario's Class 11 list. This would be a ban on all non-approved chemicals. Other municipalities have used this approach.

If the Council chooses to adopt a registry of specific pesticides, the current proposed list developed based on chemical usage patterns consists of 18 pesticides including those on the original list plus some additions. Including pesticides on chemical usage alone is problematic, without detailed individual scientific evaluation. There is no other community example of a list focused on lawns to draw from—the Ontario list is broader in scope. The City does not have the expertise to review each pesticide's risk assessment for inclusion or exclusion.

How should new pesticides be added to the list?

If the ordinance only includes a list of approved chemicals as the COE suggests, new safer alternatives would be added to the approved list if they meet EPA definition of minimum risk or bio-pesticide.

If the ordinance includes a registry of banned chemicals as it is currently written, any pesticide targeted for ornamental use that is not a minimum risk or bio-pesticide and found to be used for cosmetic lawn purposes in Takoma Park is a candidate for addition to the list.

3) Are there means of testing lawns for any of the listed pesticides that can be conducted by a trained non-scientist and provide results sufficiently accurate for municipal-enforcement purposes? If there are, which pesticides, and please provide a brief testing description.

Although sampling could be performed by City personnel, chemical analysis would need to be conducted at accredited contract laboratories. For a variety of reasons, testing is probably not a viable enforcement procedure. The COE strongly suggests an emphasis on education.

4) If the City of Takoma Park were to look to the work of governmental entities with pesticide bans or restrictions similar to Safe Grow's, to guide the inclusion/exclusion of pesticides in/from the city's registry, would that be a justifiable and acceptable approach?

A review of similar and related programs worldwide suggests that Ontario's program may be most relevant, although it is broader than lawn pesticides. Particularly important is the experience with both education and enforcement regarding its pesticide ban.

5) What pesticides are banned for residential-area lawn-care use, possibly with exceptions similar to those envisioned for Safe Grow, by the Provinces of Ontario and Quebec?

The proposed ordinance is less inclusive than most other programs in its focus on residential lawn care. For example, the Canadian regulations ban all cosmetic use (including on ornamental plants and trees and food gardens), not only lawns. The Ontario ban includes 108 pesticidal ingredients and hundreds of products. Connecticut bans all pesticides (cosmetic or not) for lawns in daycare centers and K-8 schools.

6) Does the invocation of the Precautionary Principle as a justification for Safe Grow impose a duty on the City of Takoma Park to take further protective steps in areas unrelated to Safe Grow? Should the precautionary principle be invoked as the policy basis for this ordinance?

The precautionary principle in the form adopted by the American Public Health Association could be a viable basis for this particular ordinance, but it does raise difficult questions of how broadly to apply this principle to other potential protective actions. Another, possibly more sound, basis is promotion of sustainability which is already a City goal and is closely linked with environmental health and the precautionary principle. The City does not need the precautionary principle to justify this action, though using it may help educate the public about pesticide risks.

7) Can we create a list that would ban carcinogens and/or endocrine disruptors?

Because of research gaps, such a list would potentially exclude many pesticides that haven't adequately been studied. In addition, this would exclude pesticides with other human health effects, health effects on companion animals or environmental impacts.

8) Is the COE aware of any circumstances where the benefits of utilizing restricted pesticides might outweigh the risks/harms caused by the pesticides not already covered by the exceptions?

Without a risk-benefit analysis, the COE is not able to address this. The precautionary principle assumes that the benefits outweigh the risks. The COE prefers an approach that promotes safer alternatives and practices that are available to attain the same goals as the restricted list pesticides.