

# **Deep Creek Watershed Compendium of Law**

**May, 2014**

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## HOT LINK INTERNET CITES IN THE COMPENDIUM

The web sites listed here are important links for researching the laws and regulations of the Deep Creek Watershed. You may link to these documents from this page or from certain footnotes.

Code of Public General Laws (Statutes) of Maryland:

<http://mgaleg.maryland.gov/webmga/frmStatutes.aspx?pid=statpage&tab=subject5>

Code of Maryland Regulations (COMAR Links):

<http://www.dsd.state.md.us/comar/>

Garrett County, Maryland Code of Ordinances:

[http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettco\\_md/garrettcounnymarylandcodeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:garrettco\\_md](http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettco_md/garrettcounnymarylandcodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:garrettco_md)

Deed of Conservation Easement between lakefront property owners at DCL and State of Md:

<http://www.dnr.state.md.us/publiclands/dceasement.asp>

Deep Creek Lake NRMA Guidelines for Special Permits and Conservation Easement Alterations:

[http://www.dnr.state.md.us/publiclands/pdfs/SPCE\\_guidelines2013.pdf](http://www.dnr.state.md.us/publiclands/pdfs/SPCE_guidelines2013.pdf)

Deep Creek NRMA Conservation Easement Alteration Application:

[http://www.dnr.state.md.us/publiclands/pdfs/conservation\\_easement\\_application2013.pdf](http://www.dnr.state.md.us/publiclands/pdfs/conservation_easement_application2013.pdf)

Deep Creek Lake NRMA Buffer Strip Use Permit Application:

[http://www.dnr.state.md.us/publiclands/pdfs/BSUP\\_application2013.pdf](http://www.dnr.state.md.us/publiclands/pdfs/BSUP_application2013.pdf)

Deep Creek Lake NRMA Special Permit Application:

[http://www.dnr.state.md.us/publiclands/pdfs/special\\_permit\\_application.pdf](http://www.dnr.state.md.us/publiclands/pdfs/special_permit_application.pdf)

Deep Creek Lake Recreation and Land Use Plan:

<http://www.dnr.state.md.us/publiclands/dcreport.asp>

Code of Federal Regulations (CFR):

<http://www.ecfr.gov/cgi-bin/text-idx?tpl=%2Findex.tpl>

US Coast Guard Navigation Rules International - In Land:

[http://www.uscg.mil/directives/cim/16000-16999/cim\\_16672\\_2d.pdf](http://www.uscg.mil/directives/cim/16000-16999/cim_16672_2d.pdf)

Guide to Hunting and Trapping in Maryland, 2013-2014:

[http://www.eregulations.com/31987630-979C-499A-887E-39AD3F9A4D16/FinalDownload/DownloadId-48A57A0F3A4FC524F180B7CB9F395C82/31987630-979C-499A-887E-39AD3F9A4D16/wp-content/uploads/2013/06/13MDHD\\_FINAL-LR.pdf](http://www.eregulations.com/31987630-979C-499A-887E-39AD3F9A4D16/FinalDownload/DownloadId-48A57A0F3A4FC524F180B7CB9F395C82/31987630-979C-499A-887E-39AD3F9A4D16/wp-content/uploads/2013/06/13MDHD_FINAL-LR.pdf)

#### HOT LINK INTERNET CITES IN THE COMPENDIUM (continued)

MDE 2007 Permit for Deep Creek Dam, Number GA1992S009(07):

[http://www.mde.state.md.us/programs/Water/Water\\_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf](http://www.mde.state.md.us/programs/Water/Water_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf).

PRB February 22, 2011 letter to MDE requesting changes:

[http://www.mde.state.md.us/programs/Water/Water\\_Supply/Documents/Deep%20Creek%20Lake/DCL%20PRB%20Lake%20Water%20Level%20Comments%20to%20MDE%20\(M0694618\).PDF](http://www.mde.state.md.us/programs/Water/Water_Supply/Documents/Deep%20Creek%20Lake/DCL%20PRB%20Lake%20Water%20Level%20Comments%20to%20MDE%20(M0694618).PDF)

Maryland Standards and Specifications for Soil Erosion and Sediment Control, December 2011

<http://www.mde.maryland.gov/programs/Water/StormwaterManagementProgram/SoilErosionandSedimentControl/Documents/2011%20MD%20Standard%20and%20Specifications%20for%20Soil%20Erosion%20and%20Sediment%20Control.pdf>.

Maryland Stormwater Design Manual, Volumes I & II (October 2000, Revised May 2009)

[http://www.mde.maryland.gov/programs/water/stormwatermanagementprogram/marylandstormwaterdesignmanual/pages/programs/waterprograms/sedimentandstormwater/stormwater\\_design/index.aspx](http://www.mde.maryland.gov/programs/water/stormwatermanagementprogram/marylandstormwaterdesignmanual/pages/programs/waterprograms/sedimentandstormwater/stormwater_design/index.aspx)

EPA Search Site

<http://www.epa.gov/enviro/facts/pcs-icis/search.html>

MDE Total Maximum Daily Load (TMDL) Site

<http://www.mde.state.md.us/programs/Water/TMDL/Pages/Programs/WaterPrograms/tmdl/index.aspx>

EPA: Maryland: Cherry Creek, Treating Acid Mine Drainage Improves Creek

[http://water.epa.gov/polwaste/nps/success319/md\\_cherry.cfm](http://water.epa.gov/polwaste/nps/success319/md_cherry.cfm)

Maryland Marcellus Shale Safe-Drilling Initiative Advisory Commission

<http://msa.maryland.gov/msa/mdmanual/26excom/html/23marcellus.html>

Maryland Chesapeake Bay Critical Area Protection Plan

<http://www.dnr.state.md.us/criticalarea>.

Deep Creek Watershed Zoning Map

[http://garrettcounty.org/resources/planning-land-development/pdf/zoning/DCL\\_zoning\\_LU.pdf](http://garrettcounty.org/resources/planning-land-development/pdf/zoning/DCL_zoning_LU.pdf)

Garrett County Comprehensive Plan Site

<http://garrettcounty.org/planning-land-development/comprehensive-planning>

Garrett County Subdivision Administration Site

Garrett County Subdivision Administration “Checklists & Forms.”

HOT LINK INTERNET CITES IN THE COMPENDIUM (continued)

Maryland Byways

<http://www.marylandroads.com/oed/MarylandScenicByways.pdf>

Garrett County Sensitive Areas Site (with maps)

[Sensitive Areas Map](#)

Garrett County Health Department – Sewage Disposal Systems

<http://garretthealth.org/departments/Environmental/sewage.htm>

Garrett Soil Conservation District Site

<http://garrettscd.org/>

Garrett County Stormwater Management Ordinance 2010

[http://garrettcounty.org/resources/permits-inspections/pdf/2010\\_Stormwater\\_Ordinance.pdf](http://garrettcounty.org/resources/permits-inspections/pdf/2010_Stormwater_Ordinance.pdf)

Maryland State Highway Administration: Guidelines for residential entrances to State Highways

[Guidelines for Residential Entrances to State Highways.](#)

US Fish and Wildlife Service: Environmental Conservation Online System

[U.S. FWS Endangered Species listing.](#)

Maryland DNR, Endangered Species Site

[Summary of Maryland Endangered Species.](#)

Maryland Department of Agriculture Board of Review Factsheet: Maryland Agricultural Land Preservation Foundation

[http://mda.maryland.gov/about\\_mda/Pages/md-land-preservation.aspx](http://mda.maryland.gov/about_mda/Pages/md-land-preservation.aspx)

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**Acknowledgments**

In 2013, the Deep Creek Lake Policy and Review Board unanimously endorsed the production of this Compendium so that those with an interest in the Deep Creek Watershed will have a single, readable document to which they can refer when they try to understand the governing law of the watershed. Secretary John Griffin of Maryland DNR wholeheartedly supported this Compendium and found funding to support the initial writing by Walton Shephard, now a lawyer practicing in WV. This Compendium was subsequently supported by Secretary Griffin’s successor, Joseph Gill, Esq.

Several experienced and skilled Maryland public servants took many hours reviewing the initial draft document to assure its accuracy. These included Jennifer Wazenski, Esq. and Matt Standeven, Esq. of the Maryland Attorney General’s office, John Nelson and Debbie Carpenter

of the Garrett County Planning office and the Garrett County Attorney, Gorman E. Getty III, Esq.

The Policy and Review Board greatly appreciates the dedicated work of all these persons.

The Deep Creek Lake Policy and Review Board  
May, 2014

## **I. Introduction**

### **A. History of Deep Creek Lake**

Deep Creek Lake (DCL) and its surrounding watershed (the Deep Creek Watershed) is one of the natural resource jewels of the State of Maryland. Surrounded by scenic mountains, it is the State's largest freshwater lake and the economic engine of Garrett County. The competing demands made on such a valuable asset are as unique as the lake's history, and the purpose of this compendium is to summarize how local, state, and federal law affects the myriad uses of the lake and its watershed.

The lake was formed in 1925 upon the construction of a hydroelectric dam by Pennsylvania Electric Company. "Penelec" was the long-time owner and manager of the lake and of the lands surrounding it. Over the years, Penelec sold much of that land, though it retained a "buffer strip" of property that circles the lake, even as the area around the lake developed into a recreational resort region through the mid-1900s.

Despite these private beginnings, control of the lake was gradually ceded to the state. The recreational and natural resource value of the lake grew to such an extent that, in 1980, though Penelec retained ownership, the State of Maryland took over the management of the lake and access to it, and instituted the beginnings of regulations that still guide the Maryland Department of Natural Resources (DNR) in their management of the lake and buffer strip. The dam has always been, and is today, operational, and after a period of federal oversight, the State was granted jurisdiction over the hydroelectric project in 1991. Today, the Maryland Department

of the Environment (MDE) oversees the dam operation and the level of water it may draw from the lake.

This growing level of State control was completed in 2000, when the State purchased from Penelec's holding company the lake bottom, the "buffer zone" around the lake, and other parcels around the lake. To fully manage the State's newly purchased natural resource asset, the General Assembly codified<sup>1</sup> DNR's management of the lake, which is further refined in the DNR's COMAR regulations.<sup>2</sup>

Those laws and regulations, and all other laws and regulations that might affect DCL and the Deep Creek Watershed (DCW), are the subject of this compendium.

## **B. How to Use this Guide**

### **1. State Law, COMAR, and County Ordinances**

Maryland law is typically divided into State code, which are the commonly referred to "laws" the General Assembly passes, and the subsequent COMAR "regulations," which are the underlying, often more specific rules that implement the code passed by the Assembly. In a sense, the General Assembly's code is the skeleton, while the COMAR regulations provide the "flesh on the bone" required for the laws to be fully effective. Regulations are often created by the government body that is charged with overseeing the code which the regulations refine. For example, State code authorizes the MDE to require permits for using water to operate a dam;<sup>3</sup>

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<sup>1</sup> Md. Code Ann., Nat. Res. § 5-215, *et seq.* To search for the actual written Maryland Code, see <http://mgaleg.maryland.gov/webmga/fmStatutes.aspx?pid=statpage&tab=subject5>, enter the Article, as in this case, "Natural Resources," and the Section, as in this case 5-215.

<sup>2</sup> COMAR 08.08.01, *et seq*

<sup>3</sup> Md. Code Ann., Envir. § 5-501, *et seq*

subsequent MDE COMAR regulations institute a more specific permit regime, with all its attendant rules, fees, exceptions, and so on.<sup>4</sup>

**a. *How to Read State Code***

State code is first divided into non-numbered categories (e.g. the Natural Resources Article, the Environmental Article, etc.), and then subarticles. Thus, for example, the state code that created DCL funding is the Natural Resources Article, Title 5 (“Forests and Parks”), Subtitle 2 (“Organization and Authority of Department Pertaining to Forests and Parks – in General”), Section 215 (“Deep Creek Lake Recreation Maintenance and Management Fund”). Title 5, Subtitle 2, Section 215 of the Natural Resources Article can be recognized by this format: Natural Resources Article, 5-215. Thus, state code and some other references in the Compendium can be recognized by two numbers separated by a dash (e.g. “2-421.”)

**b. *How to Read State Regulations (COMAR)***

State regulations<sup>5</sup> (“COMAR,” which stands for “Code of Maryland Regulations”) are also divided into categories, such as DNR Title (Title 8), which includes all regulations pertaining to and administered by DNR. However, they are divided into numbered titles, subtitles, and further subdivisions. For example, COMAR 08.08.05.01(D)(1) is the title (08), subtitle (.08), chapter (.05), regulation (.01), section (.D), and subsection (.1) which outlines the authority of the Lake Manager.<sup>6</sup> State regulations can be recognized by a format of two or more

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<sup>4</sup> COMAR 26.17.06.06.

<sup>5</sup> See generally <http://www.dsd.state.md.us/comar/>.

<sup>6</sup> COMAR 08.08.05.01(D)(1).

numbers separated by periods (e.g. “30.12.3”), which can often be further refined, depending on the specificity of the regulation, into something like 30.12.3.4(D)(2)(iii).

***c. How to Read County Regulations***

In addition to the regulations of DCL and the DNR-managed buffer strip, local regulations, in the form of the Garrett County Ordinance, are the primary body of law that regulates land use in the larger Deep Creek Watershed. In fact, most would agree that local ordinances have a far greater impact on the DCW, excepting the state-managed lake and buffer strip. These are, of course, ordinances passed at the local level, in response to local concerns, needs, and priorities that may or may not exist elsewhere in the State. Indeed, the DCW is singled out with its own zoning ordinance, which strictly delineates what land uses and structures are permitted or prohibited in each particular zoning district of the watershed. County regulations are typically identified by two three-digit codes, separated by a period (e.g. “236.521”).

***d. Federal Regulations***

Because of the considerable powers vested in the States (powers that are then often delegated to local governments, which are political subdivisions of the state), federal regulations impact local watersheds in only a few narrow categories, and then only indirectly through State laws. Those categories typically involve things that can cross state boundaries, notably water, but also other categories like endangered species or other wildlife. Even then, however, all federal law is delegated to the states for enactment and enforcement, including the federal Clean Water Act, which is almost wholly administered by State law in Maryland. Thus, there is no federal regulation section in this compendium, though several federal regulations are noted when they are administered through State laws.

## 2. How to Use Footnote References

Each of these laws, regulations, and ordinances, when described and summarized in this compendium, is cited by the use of a footnote, which is signified by a small number, such as the one at the end of this sentence.<sup>7</sup> Readers may use the information included in the text of the footnote to find and read the law or regulation itself, or to read some other form of background information that is provided.

On pages i- \_\_\_\_, before the Table of Contents and throughout the footnotes, thirty one separate hot links are included which, when ‘left clicked’ will directly bring the reader to a web site for the referred document. However, citations of County Ordinances can only be linked to a central page, found in this footnote,<sup>8</sup> and the reader must then click his or her way to the specific ordinance cited in the footnote, a relatively simple process.

If a footnote is preceded by the word “*see*,” the cited material does not directly state the rule of law as stated by the authors of this compendium, but can usually be inferred. “*See generally*” indicates that the authority cited in the footnote is best reviewed as a “general” overview of the relevant law or background material, and “*see, e.g.*” indicates that the cited material is but one of, at least, several examples. “*Id.*” in a footnote (which is an abbreviation of the Latin phrase for “in the same place”) simply means that the cited authority comes from the source cited in the previous footnote.

Some footnotes refer the reader to other sections of the Compendium in the form “*see infra (or supra)* Section III.B.8,” for example.

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<sup>7</sup> [Footnote].

<sup>8</sup> [http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettc0\\_md/garrettc0countymarylandcodeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:garrettc0\\_md](http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettc0_md/garrettc0countymarylandcodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:garrettc0_md)



### **3. Disclaimer and Suggestions for the Reader**

This compendium is intended for reference purposes only, as an unofficial guide for those interested in the DCW. As such, there is no representation or warranty as to this Compendium's accuracy, correctness, or completeness, nor is it an authoritative source of law or regulation. If any reader wishes to cite the law, he or she should cite the source documents of COMAR, State or federal law, local ordinances, or relevant case law.

This compendium does not contain, nor does it attempt to contain, every law or regulation that might possibly relate to the DCW. Instead, the compendium attempts to include the most salient law and regulation that might be of interest to, or potentially affect, most readers. Furthermore, many areas of the law and regulation, such as administrative, procedural, or relatively boilerplate "legalese" sections, are either referenced in passing or are not addressed by this compendium. Any person with a legal question or potential conflict should consult a qualified attorney.

When you read this Compendium on a given subject, before completing your search, be sure to search in other parts of the document for additional information on the same subject.

Since this is the first edition of this Compendium, which exceeds 100 pages, inevitably, the reader will come across errors or may realize that information has, inadvertently, been omitted. The authors would appreciate notice of these. Please send these to [dcarpenter@garrettcounty.org](mailto:dcarpenter@garrettcounty.org), so we can make corrections and additions. We hope to update this Compendium, yearly, and will show the date of update on the title page.

## II. State Law

### A. Natural Resources Law

#### 1. Lake Purchase and Buydown

The State purchased the DCL bottom and buffer strip (which had been retained by Penelec) in 2000, under the authority of the Department of Budget and Management (DBM) and the Board of Public Works.(PBW)<sup>9</sup> The State subsequently sold the buffer strip to private buyers. While not allowed to direct those monies for DCL purposes,<sup>10</sup> the State's contract of sale with Penelec required that any buffer strip parcels sold by the State be subject to a conservation easement.<sup>11</sup> It is this legal instrument<sup>12</sup> that prevents the buffer strip from being developed in a manner inconsistent with the recreation and conservation goals of the State.

#### 2. The Easement

When buying any part of the buffer strip, private buyers granted to the State a perpetual conservation easement that attaches several irrevocable conditions to ownership of the purchased buffer strip.<sup>13</sup> These allowed and disallowed uses of the buffer strip are outlined in the conservation easement "contract" between the State and the buyer.

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<sup>9</sup> Md. Code Ann., State Fin. & Proc. § 4-401, *et seq*

<sup>10</sup> Md. Code Ann., State Fin. & Proc. § 10-306

<sup>11</sup> Black's Law Dictionary defines a conservation easement as a "recorded, perpetual, nonpossessory interest in real property held by a government entity . . . that imposes restrictions or affirmative obligations on the property's owner or lessee to retain or protect natural, scenic, or open-space values of real property, ensure its availability for agricultural, forest, recreational, or open-space use, protect natural resources and habitat, maintain or enhance air or water quality.

<sup>12</sup> <http://www.dnr.state.md.us/publiclands/dceasement.asp>.

<sup>13</sup> *See generally id.*

The conservation easement and its restrictions “run with the land,” and are thus binding on all future owners of the buffer strip property subject to the easement.<sup>14</sup> The terms of the conservation easement may be altered for a limited range of reasons by submitting to DNR the “Conservation Easement Alteration Application,”<sup>15</sup> which is used for alterations in the following categories: landscaping, installation of lighting or electrical fixtures, stairs/walkways, non-permanent storage buildings/gazebo, non-permanent pavilion/shelter/deck, and “other.”<sup>16</sup>

The restrictions are as follows. Industrial and commercial activities are prohibited on the buffer strip, except for certain recreational access-related uses.<sup>17</sup> No building, structure, or walkway of any kind is permitted on the purchased buffer strip; however, wood, stone, or permeable walkways may be built for access between the lake and contiguous property.<sup>18</sup> Exceptions like these are overseen by DNR.

Subject to State approval, property owners may also construct recreational and commercial related utilities, as well as temporary structures, provided that the maximum footprint is 120 square feet.<sup>19</sup> Trees and shrubs may not be burned, cut, or removed; however, with DNR approval, dead or diseased vegetation, vegetation for erosion control, vegetation impeding reasonable lake access, and vegetation under a forest management plan may be altered

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<sup>14</sup> See *id.* at Article I.

<sup>15</sup> [http://www.dnr.state.md.us/publiclands/pdfs/conservation\\_easement\\_application2013.pdf](http://www.dnr.state.md.us/publiclands/pdfs/conservation_easement_application2013.pdf)

<sup>16</sup> *Supra* Note 12.

<sup>17</sup> *Id.* at I(A).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* and II(A) & (B).

or removed.<sup>20</sup> Dumping or storage of any materials on the buffer strip is prohibited,<sup>21</sup> as is excavation or mining;<sup>22</sup> However, temporary excavation is permitted, subject to State approval, for specific lake access or septic-related purposes.<sup>23</sup> Wetland disruption of any kind is prohibited.<sup>24</sup> Signs are also prohibited, except for temporary signs to advertise the rental or sale of the property.<sup>25</sup>

### **3. Deep Creek Lake Management and the Policy and Review Board**

The State granted DNR with the ability to fund the management and maintenance of the land, facilities, and services associated with DCL, by establishing the DCL Recreation and Management Fund.<sup>26</sup> The Fund was created by the State for maintaining and managing the land, facilities, and services related to the Lake.<sup>27</sup> The Fund is supplied by all boat launch fees at DCL State Park, all DCL permit fees, contracts, grants, and gifts to the DCL management program and any investment earnings from the Fund.<sup>28</sup> However, twenty-five percent of each quarter's Fund revenue is paid to the Board of County Commissioners of Garrett County,<sup>29</sup> and the Fund may also be used for DCL administrative costs.<sup>30</sup>

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<sup>20</sup> *Id.* at II(B).

<sup>21</sup> *Id.* at II(E).

<sup>22</sup> *Id.* at II(F).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at II(G).

<sup>25</sup> *Id.* at II(H).

<sup>26</sup> Md. Code Ann., Nat. Res. § 5-215.

<sup>27</sup> § 5-215(b)

<sup>28</sup> § 5-215(c)(1)

<sup>29</sup> § 5-215(c)(2).

<sup>30</sup> § 5-215(c)(4).

The Fund does not lapse,<sup>31</sup> and it may not be “raided” for the State’s General Fund.<sup>32</sup> Permit fees may be changed only by agreement between the DCL PRB and the DNR Secretary,<sup>33</sup> and must be preceded by a public notice and comment process in Garrett County.<sup>34</sup> In addition to fee proposals, the DCL PRB must consent to all proposed regulations by DNR, if the regulations pertain to implementing the DCL recreation and land use plan.<sup>35</sup>

DNR is granted broad authority to adopt regulations relating to DCL.<sup>36</sup> To guide the long-term planning of DCL, particularly as a natural resource, a recreational asset, and as a State asset to be sustainably conserved,<sup>37</sup> DNR and the DCL PRB was required by law to create a “DCL Recreation and Land Use Plan.”<sup>38</sup> The plan was to evaluate the lake and buffer area as a “recreational, water, natural, and scenic resource,” and as such must consider:

1. land use;
2. carrying capacity;
3. zoning;
4. visitor access;
5. recreation areas; and

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<sup>31</sup> § 5-215(c)(3)(i).

<sup>32</sup> Md. Code Ann., Nat. Res. § 5-215(c)(3)(ii).

<sup>33</sup> § 5-215(d).

<sup>34</sup> § 5-215(e).

<sup>35</sup> § 5-215.1(d)(2).

<sup>36</sup> § 5-215.1(d)(1).

<sup>37</sup> § 5-215.1(a)(2).

<sup>38</sup> § 5-215.1(b)(1).

6. commercial and private use.<sup>39</sup>

The plan must also “reflect” outdoor activities like fishing, boating, and hiking for public enjoyment.<sup>40</sup> The resulting plan<sup>41</sup> clearly meets these requirements and is a valuable tool for understanding the multitude of public purposes served by DCL and how to best sustain them.

The DCL PRB is broadly required to “review and advise the [DNR] Secretary on matters that relate to the DCL Recreation Maintenance and Management Fund and the DCL management program.”<sup>42</sup> The Board has several statutorily-required components, such as composition,<sup>43</sup> Board member terms,<sup>44</sup> and quorum.<sup>45</sup> The DCL Recreation and Land Use Plan provides for additional procedures of the PRB.<sup>46</sup> The Governor names the chairperson from among those persons she appoints.<sup>47</sup> The Board, whose members may not receive compensation other than expenses,<sup>48</sup> must hold meetings at least four times a year, all of which must be in Garrett County.<sup>49</sup> The Board may also, at its discretion, “review and make recommendations to the

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<sup>39</sup> § 5-215.1(b)(2).

<sup>40</sup> *Id.*

<sup>41</sup> <http://www.dnr.state.md.us/publiclands/dcreport.asp>

<sup>42</sup> § 5-216(g)(1).

<sup>43</sup> § 5-216(b)(1): Five members appointed by the Governor, two of whom must be Garrett County residents, one a representative of the MD Bass Federation and State resident, and two members at large; the State Senator of district 1, or her designee; the State Delegate of district 1A or her designee; a County Commissioner, chosen by the Board, or an alternative Commissioner serving as a designee; the president of the DCL property owner’s association or her designee; and the chairman of the Garrett County Chamber of Commerce or designee.

<sup>44</sup> § 5-216(b)(3): Terms are concurrent with the term of the Garrett County Commission, even if appointed after a term has begun.

<sup>45</sup> § 5-216(d): A simple majority is sufficient for quorum, though members of the Maryland General Assembly or designee must abstain from voting on proposed fees or regulations from the DNR.

<sup>46</sup> *See supra* note 41

<sup>47</sup> § 5-216(c).

<sup>48</sup> § 5-216(f).

<sup>49</sup> § 5-216(e).

[DNR] Secretary on budgetary matters that concern the management and maintenance of the lake and buffer area.”<sup>50</sup>

#### **4. Deep Creek Lake Law**

The management of DCL by DNR is most explicitly guided by the Code of Maryland Regulations (“COMAR”) in Title 08 (“Department of Natural Resources”),<sup>51</sup> Subtitle 08 (“Deep Creek Lake”).<sup>52</sup> It should be noted, however, that other subtitles of the DNR title (such as “Fishing”<sup>53</sup> and “Boating”<sup>54</sup>) apply to DCL as well, either explicitly, or by virtue of DCL being a state park (DCL State park is listed as both a “Waterfront Park” and a “Natural Resources Management Area” of the State park system listed in DNR regulations<sup>55</sup>).

While a host of other laws and regulations affect the larger DCW, DCL’s own subtitle in COMAR has the single greatest impact on property owners around the lake and buffer strip. Thus, the bulk of the DCL subtitle dictates how the DNR must regulate the buffer strip, through its various rules and permitting processes.

##### ***a. General Provisions***

The DCL subtitle begins by outlining “general provisions.”<sup>56</sup> This includes a statement, of a type often included as a “big picture” preface to many laws and regulations, of the “premises

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<sup>50</sup> § 5-216(g)(2).

<sup>51</sup> See COMAR Title 8, *et seq.*

<sup>52</sup> See COMAR 08.08,01, *et seq.*

<sup>53</sup> See COMAR 08.02,01, *et seq.*

<sup>54</sup> See COMAR 08.04,01, *et seq.*

<sup>55</sup> See COMAR 08.07.06.02(I)(3), & (M)(3).

<sup>56</sup> COMAR 08.08.01.01.

and purpose” of the DCL COMAR regulations.<sup>57</sup> This broad statement of legislative policy is valuable for understanding the underlying goals and motivations that animate these regulations. As such, the “premises and purpose” are expressed in large, overarching terms: the three primary purposes of the DCL regulations are to protect the “lake as a natural resource,” to preserve the lake’s “ecological balance,” and to further its “highest use as a recreational resource,” while explicitly noting that “overuse” of the lake is an “abuse” and would threaten its “well-being.”<sup>58</sup>

This explicit awareness of the potential for “overuse” guides much of the stated premises and purpose.<sup>59</sup> The regulations recognize, then, that a “balance” must be struck between both the “*level* of recreational use” and the “*quality*” of that recreational use.<sup>60</sup> Achieving that balance between usage and quality is the stated justification for providing “control of the level of usage” through regulation.<sup>61</sup>

Accordingly, the “introduction” of the regulations states that, because the State owns the lake, the land under the lake, and the buffer strip, use of those resources and that space by the public and by private property owners is a “privilege.”<sup>62</sup> As such, property ownership around the lake or use of the lake does not constitute any kind of “permanent or long-term property interest[.]” in the lake, lake bottom, or buffer strip.<sup>63</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> COMAR 08.08.01.01(A).

<sup>59</sup> *See id.*

<sup>60</sup> *Id.* (emphasis added)

<sup>61</sup> *Id.*

<sup>62</sup> COMAR 08.08.01.01(B).

<sup>63</sup> *Id.*



Lastly, the “introduction” acknowledges that other State regulations govern many aspects of lake uses, such as boating, fishing, and other uses of the lake and buffer strip. Thus, the DCL Subtitle “defines how the [DNR] will carry out this *additional* right and responsibility” of managing DCL beyond the DNR’s statewide duties outlined in other Subtitles.<sup>64</sup>

***b. Definitions***

The second chapter of the DCL regulations is the always-important “Definitions” section, which is often essential for pinpointing the precise “who, what, when, and where” of how the DCL Subtitle might apply. The definitions section is most likely useful as a cross-reference when reading and applying specific terms of the regulations later in the Subtitle. Nonetheless, the primary defined terms in the longer list are: “adjacent landowner,” “buffer strip,” “buffer strip use permit,” “commercial landowner,” “deeded access,” “development permit,” “general public,” “recreational permit,” “special permit,” and “usable buffer strip.”<sup>65</sup>

***c. Buffer Strip Uses***

The third chapter is entitled “Buffer Strip Uses,” and the first subchapter, “General Public Use of the Buffer Strip” outlines what any member of the “general public”<sup>66</sup> may and may not do. The enumerated permissible uses are walking along any portion of the buffer strip, using it for access to and from the lake in an emergency, and fishing with a valid fishing license.<sup>67</sup>

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<sup>64</sup> COMAR 08.08.01.01(C); (Emphasis added.)

<sup>65</sup> COMAR 08.08.01.02(B).

<sup>66</sup> COMAR 08.08.01.02(B)(10); defined as “those persons who do not hold a valid buffer strip use permit or who are not the tenants or guests of a person who holds a valid buffer strip use permit.”

<sup>67</sup> COMAR 08.08.03.01(B).

The general public is prohibited from putting in place any dock or other structure on or in the buffer strip/lake or from modifying the land and vegetation in any way and from camping, picnicking, swimming, or doing any other similar non-pedestrian activity, unless done in an area designated for those uses by the public.<sup>68</sup> The general public may not use or in any way interfere with any dock, equipment, or facility on the buffer strip placed there by a commercial or adjacent landowner.<sup>69</sup> The general public may not place garbage or any other kind of debris on the buffer strip or in the lake, nor may the general public tie a rope or cable around any tree or shrub on the buffer strip.<sup>70</sup>

“Adjacent Landowner Use of the Buffer Strip,” the second subchapter in the “Buffer Strip Uses” chapter, addresses their rights and duties. “Adjacent landowners”<sup>71</sup> must obtain a buffer strip use permit from the lake manager if the landowner wishes to use the buffer strip beyond those uses allowed to the general public.<sup>72</sup> Such additional rights to use the buffer strip are also extended to persons belonging to a group that has a validly permitted common dock facility.<sup>73</sup> Similarly, “commercial landowners”<sup>74</sup> must be regulated in the same manner as

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<sup>68</sup> COMAR 08.08.03.01(C).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> “‘Adjacent Landowner’ means a person, other than a commercial landowner, who: (a) Owns property immediately adjacent to the buffer strip; (b) Owns property immediately adjacent to a public right-of-way that is adjacent to the buffer strip; (c) Has deeded access to the buffer strip; or (d) Is eligible to apply for a buffer strip use permit pursuant to COMAR 08.08.05.02B(1)(b).” *See* COMAR 08.08.01.02B(1)

<sup>72</sup> COMAR 08.08.03.02.

<sup>73</sup> *Id.*

<sup>74</sup> “‘Commercial landowner’: (a) Means a person who owns or leases property immediately adjacent to the buffer strip or property immediately adjacent to a public right-of-way that is adjacent to the buffer strip and who legally pursues a trade, business, or other nonpersonal enterprise on that property; and (b) Does not include those persons eligible for a development permit.” *See* COMAR 08.08.01.02B(4).

adjacent landowners, are subject to the same provisions, and must have their buffer strip use permits specifically validated for “commercial use.”<sup>75</sup>

**d. Permits**

Because the purpose of the DCL regulations is to regulate the uses in the lake in such a way that upholds its highest use, Chapter 5, simply entitled “Permits,” constitutes the bulk of the DCL regulations. The “Permits” Chapter is divided into the following subchapters:

- 1). General Provisions;
- 2). Buffer Strip Use Permits;
- 3). Uses Permitted with a Buffer Strip Use Permit;
- 4). Uses Not Permitted within a Buffer Strip Use Permit;
- 5). Special Permits;
- 6). Development Permits;
- 7). Notice of Application for Development Permit or Commercial Validation; and
- 8). Nonconforming Use Permits.

The early “General Provisions”<sup>76</sup> subchapter of the “Permits” chapter outlines the scope and limits of DCL permits, the areas to which permits apply, the scope of authority of the lake manager, the order of the allocation of new slips, and permit duration.

The “Scope of Permits” subchapter grants guests and tenants of a permittee the same uses as the permittee.<sup>77</sup> However, unless otherwise authorized by a special, development, or

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<sup>75</sup> COMAR 08.08.03.03.

<sup>76</sup> COMAR\_08.08.05.01.

<sup>77</sup> COMAR 08.08.05.01(A)(3).

nonconforming use permit, permittees only have the same rights to use the buffer strip as those given to the general public.<sup>78</sup> The “Scope of Permits” section also protects the multi-use purposes of the lake by disallowing the sanctioning of any interference with any authorized public use of the buffer strip or lake, or with the hydroelectric operation.<sup>79</sup>

The “Area of Use” granted a permittee is determined by extending the permittee’s property lines to the water’s edge.<sup>80</sup> In more topographically complicated or curvilinear areas, such as coves, where property lines intersect less predictably, the lake manager must equitably divide the permitted use area among the permittees, “based on the amount of buffer strip frontage of each.”<sup>81</sup> The lake manager is also authorized to examine deeds or other instruments when necessary for determining the area of use for an adjacent landowner who claims buffer strip access through deeded access or who participates in a common dock facility.<sup>82</sup> In any event, the area of use must be specifically designated by the lake manager on the permit.<sup>83</sup>

The lake manager is granted discretionary authority to deny or to limit any permit, if she determines that such a denial or limitation is “necessary to protect public safety or welfare or to carry out” the premises and purposes outlined above.<sup>84</sup> While denying or limiting a permit is at the Lake Manager’s discretion, if she does do so, she must consider the following factors:

1. configuration of lake frontage;

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<sup>78</sup> COMAR\_08.08.05.01(A)(4).

<sup>79</sup> COMAR\_08.08.05.01(A)(2).

<sup>80</sup> COMAR\_08.08.05.01(C)(1).

<sup>81</sup> COMAR 08.08.05.01(C)(2).

<sup>82</sup> COMAR 08.08.05.01(C)(3).

<sup>83</sup> COMAR 08.08.05.01(C)(4).

<sup>84</sup> COMAR 08.08.05.01(D)(1)(a); *see also* 08.08.01.01.

2. fluctuation of the water line;
3. depth of water at the proposed site;
4. density of existing boat usage or other recreational uses;
5. number of pre-existing docks in the area;
6. potential navigation problems;
7. preservation of aquatic vegetation and wildlife; and
8. protection of the lake's ecological balance.<sup>85</sup>

Denial of a dock permit under this section<sup>86</sup> does not preclude the lake manager from considering and granting a permit for a common dock facility for adjoining landowners, provided all other eligibility requirements are met.<sup>87</sup>

The lake manager must, within 30 days of receiving a permit application, approve or disapprove the application and notify the applicant in writing which states the grounds for the decision.<sup>88</sup> The lake manager must keep all applications on file.<sup>89</sup> The manager must review, and grant or deny, by December 31 all permits for new slips received between September 2 of the preceding year and September 1 of the current year. Granted permits represent the allocation of new slip allocations for the following year.<sup>90</sup> Permits may be valid for no longer than one year, and expire on March 31 of each year unless otherwise specified.<sup>91</sup>

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<sup>85</sup> COMAR 08.08.05.01(D)(1)(a)

<sup>86</sup> COMAR 08.08.05.01.

<sup>87</sup> COMAR 08.08.05.01(D)(1)(b).

<sup>88</sup> COMAR 08.08.05.01(D)(2).

<sup>89</sup> *Id.*

<sup>90</sup> COMAR 08.08.05.01(E)(2).

<sup>91</sup> COMAR 08.08.05.01(F).

*e. Buffer Strip Use Permits*

The “Buffer Strip Use Permits” subchapter<sup>92</sup> outlines the application process,<sup>93</sup> eligibility,<sup>94</sup> fee,<sup>95</sup> and display<sup>96</sup> requirements, so adjacent and commercial landowners may use the lake and buffer strip beyond the uses granted the general public.<sup>97</sup> The application must be submitted on a form provided by DNR,<sup>98</sup> on which the landowner must provide all requested information and certify that the proposed use conforms to the zoning laws of the DCW.<sup>99</sup> In the event of joint ownership or deeded access that results in multiple eligible persons, only one person may apply for a permit. In such a case, that applicant must represent at least two-thirds of the eligible persons.<sup>100</sup>

*Non-discretionary Permits*

The lake manager has a non-discretionary duty<sup>101</sup> to issue buffer strip permits to the following persons:

1. a person with deeded access to DCL from a lot that meets zoning requirements for a residential dwelling;
2. a person seeking a permit pursuant to a development permit;

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<sup>92</sup> COMAR 08.08.05.02.

<sup>93</sup> COMAR 08.08.05.02(B).

<sup>94</sup> COMAR 08.08.05.02(C).

<sup>95</sup> COMAR 08.08.05.02(D).

<sup>96</sup> COMAR 08.08.05.02(E).

<sup>97</sup> COMAR 08.08.05.02(A).

<sup>98</sup> See [http://www.dnr.state.md.us/publiclands/pdfs/BSUP\\_application2013.pdf](http://www.dnr.state.md.us/publiclands/pdfs/BSUP_application2013.pdf).

<sup>99</sup> *Id*

<sup>100</sup> *Id*.

<sup>101</sup> COMAR 08.08.05.02(C)(1).

3. a person with less than 100 feet of frontage but who desires only recreational use, and not a dock or mooring;
4. a person who owns at least 100 feet of frontage on the buffer strip (or on an adjacent public right-of-way) if the property was subdivided and recorded after August 12, 1983, provided the property meets zoning requirements;
5. a person who has a recreation permit from Penelec,<sup>102</sup> a valid dock permit from DNR, and has continually maintained that dock, or who shows good cause why these criteria are not met;
6. an owner of adjacent land conveyed by Penelec after January 1, 1994, with frontage eligible for a permit before that date; and
7. a landowner of property eligible for a dock permit prior to August 12, 1983.

*Prohibited Permits*

Notwithstanding the non-discretionary permits above, the lake manager may not<sup>103</sup> issue a buffer strip use permit in the following cases:

1. for any applicant whose permit has been revoked in the past five years or is currently in violation of 08.08;
2. for property for which a required development permit has not been obtained;
3. for an applicant with less than 100 feet of frontage, unless a buffer strip use permit was issued before July 10, 1989.

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<sup>102</sup> COMAR 08.08.05.02(C)(1)(a).

<sup>103</sup> COMAR 08.08.05.02(C)(2).

If granted a permit, a permittee must pay the fee specified on the permit upon receipt of the permit, and the permit is only valid after the manager has received the fee.<sup>104</sup> Permit identification numbers must be displayed on docks, buoys, and other structures and must be visible from the lake and from land.<sup>105</sup>

*Uses Permitted with a Buffer Strip Permit*

A buffer strip permit entitles an adjacent landowner the following uses of the buffer strip:

1. nonprofit recreational use;
2. fishing; and
3. maintenance of grass vegetation.<sup>106</sup>

Permittees may install mooring buoys and boating and swimming structures,<sup>107</sup> so long as the permittee does not exceed the following limitations. The permittee may have only one dock, with slip space for no more than three boats; the permittee may not keep more than four boats on the lake, both docked and moored, of which only two may be power boats, and only three of which may be a combination of power boats and personal watercraft. If beached boats or vessels other than the four allowed on docks and moorings are kept, none may exceed 500 pounds.<sup>108</sup>

Any permitted dock or swimming structure must be nonpermanent and easily removable, float or have wheels, and have securely-fastened and non-harmful flotation devices. (If a drum is used as a dock flotation device, it must visibly float if it were to detach from the dock.) Docks

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<sup>104</sup> COMAR 08.08.05.02(D).

<sup>105</sup> COMAR 08.08.05.02(E).

<sup>106</sup> COMAR 08.08.05.03(A).

<sup>107</sup> COMAR 08.08.05.03(B).

<sup>108</sup> *Id.*



and swimming structures must be located within 100 feet of shore or within 1/3 distance to the opposite shore, whichever is less,<sup>109</sup> and be removed from the lake between November 31 and April 2.<sup>110</sup>

Mooring buoys must be white with a blue band, nonpermanent, marked by buoys sized between 500 and 4,000 cubic inches, marked with its permit number, and have no substantial metallic portion within 2 feet of the surface.<sup>111</sup> They must be located within 100 feet of shore or within 1/3 distance to the opposite shore, whichever is less,<sup>112</sup> and be removed from the lake between November 31 and April 2.<sup>113</sup>

*Uses Not Permitted Under a Buffer Strip Use Permit*

A buffer strip permittee may not:

1. interfere with the hydroelectric project or public works improvement or installation;
2. discharge sewage;
3. install or expand septic systems on the buffer strip;
4. remove or plant trees or shrubbery on the buffer strip without written consent from the lake manager;
5. erect fences or other obstructions on the buffer strip;

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<sup>109</sup> COMAR 08.08.05.03(F).

<sup>110</sup> COMAR 08.08.05.03(G).

<sup>111</sup> COMAR 08.08.05.03(E).

<sup>112</sup> COMAR 08.08.05.03(H).

<sup>113</sup> COMAR 08.08.05.03(G).

6. perform landscaping maintenance, other than mowing grass, on the buffer strip without a special permit;
7. interfere with authorized public use of the lake; or
8. create a hazard by stringing a rope or cable across the water.

***f. Special Permits***

“Special permits” allow for a buffer strip use permittee to go beyond the uses allowed under a standard buffer strip permit. Potential special permit uses include altering, modifying, or improving the buffer strip or lake.<sup>114</sup>

A special permit application<sup>115</sup> must include a detailed plan describing materials to be used, construction methods, timetables, and location.<sup>116</sup> A commercial landowner must obtain a special permit if she desires to install more than one dock with three slip spaces or moorings, or to use a boat launch ramp for commercial purposes.<sup>117</sup> Such applications must include a detailed plan, including the placement of docks, the number of slips, and the types of uses proposed.<sup>118</sup>

The lake manager may request additional information for any special permit application, which must be denied if the requested information is not provided.<sup>119</sup> The manager may also require a bond to cover the possible damage to the lake or buffer strip as a result of the use covered by a special permit; failure to submit a required bond must result in a permit denial.<sup>120</sup>

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<sup>114</sup> COMAR 08.08.05.05(A)(1)(a).

<sup>115</sup> See [http://www.dnr.state.md.us/publiclands/pdfs/special\\_permit\\_application.pdf](http://www.dnr.state.md.us/publiclands/pdfs/special_permit_application.pdf)

<sup>116</sup> COMAR 08.08.05.05(A)(2)(b).

<sup>117</sup> COMAR 08.08.05.05(A)(1)(b).

<sup>118</sup> COMAR 08.08.05.05(A)(2)(a).

<sup>119</sup> COMAR 08.08.05.05(A)(3).

<sup>120</sup> COMAR 08.08.05.05(A)(4).

The permittee will forfeit the bond if the permittee does not remove permitted structures or facilities within the time required by the manager, and the proceeds will be applied to removal, damage, and storage costs.<sup>121</sup>

The regulations grant the lake manager discretion in whether to grant a special permit for installing permanent structures, excavating or filling the buffer strip or lake, or removing vegetation.<sup>122</sup> The manager's discretion is to be applied<sup>123</sup> primarily by assessing whether the proposed activity meets the "Area of Use" standards set forth in the "General Provisions" section.<sup>124</sup> The manager must specify the uses and activities allowed under a granted special permit, and the permittee is liable for any damages due to departing from those specified limits.<sup>125</sup>

#### *Guidelines for Special Permits*

The issuance of special permits is guided by DNR's "Guidelines for Special Permits and Conservation Easements."<sup>126</sup> The "Guidelines" provide "general conditions," as well as specific restrictions and requirements for:

1. proposed structures;
2. stairs and walkways;
3. lighting and electrical improvements;
4. landscaping;

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<sup>121</sup> COMAR 08.08.07.05.

<sup>122</sup> COMAR 08.08.05.05(B)(1)(b).

<sup>123</sup> COMAR 08.08.05.05(B)(1)(a).

<sup>124</sup> COMAR 08.08.05.01(C).

<sup>125</sup> 08.08.05.05(B)(1)(b).

<sup>126</sup> See [http://www.dnr.state.md.us/publiclands/pdfs/SPCE\\_guidelines2013.pdf](http://www.dnr.state.md.us/publiclands/pdfs/SPCE_guidelines2013.pdf).

5. play areas, playgrounds, and swings or hammocks;
6. shoreline erosion control; and
7. other improvements such as fire rings.<sup>127</sup>

*Special Permits for Commercial Landowners*

Special permit applications by commercial landowners are subject to further potential restrictions, if the applicant requests a dock to accommodate more than three slips or the commercial use of a boat launch ramp.<sup>128</sup> The manager still has the discretionary authority to deny the permit if she finds such use would be inconsistent with the entirety of the DCL regulations.<sup>129</sup> Furthermore, the manager may not approve more than one slip space or mooring for every 50 feet of buffer strip frontage that is titled to the applicant, if the special permit application requests additional slips or moorings for:

1. the overnight storage of boats (not including rentals, marina employee boats, or boats “stored for service”); or
2. leasing boat slips to the public.<sup>130</sup>

However, in an exception, this restriction does not apply if a permit was issued before May 5, 1986 and the commercial use has not changed significantly.<sup>131</sup> In an exception to the exception, in the event commercial use of a permittee has changed significantly and special permit slips are reduced in total number by the manager, the manager is permitted to reassign those slips to the

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<sup>127</sup> *Id.*

<sup>128</sup> COMAR 08.08.05.05(B)(2).

<sup>129</sup> COMAR 08.08.05.05(B)(2)(a).

<sup>130</sup> COMAR 08.08.05.05(B)(2)(c)

<sup>131</sup> *Id.*

commercial permittee in a special permit, in excess of the one-slip-per-50 feet of frontage rule stated above.<sup>132</sup>

The manager may grant less than one slip or mooring per 50 feet of frontage to meet the broad public safety and welfare standards specified in 08.08.05.01(D).<sup>133</sup> This one-per-50 feet of frontage rule for slips and moorings does not apply if the use of them does not include overnight storage or involve ramping or dry storage for overnight storage.<sup>134</sup>

If a commercial landowner's special permit approves the use of a boat launch ramp, the manager must designate a specific number and type of launchings permitted, subject to change under the policies set forth in 08.08.01.01.<sup>135</sup>

***g. Development Permits***

“Development permits” are required for those who wish to develop property adjacent to the buffer strip that will result in future requests for at least one buffer strip use permit,<sup>136</sup> if the property and/or buffer strip are to be used in any of the following ways<sup>137</sup>:

1. constructing more than one residential unit with deeded access to the same buffer strip area;
2. constructing multiple family dwellings with buffer strip access;
3. installing or expanding a common dock facility; or

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<sup>132</sup> 08.08.05.05(B)(2)(c)(1).

<sup>133</sup> 08.08.05.05(B)(2)(d).

<sup>134</sup> COMAR 08.08.05.05(B)(2)(e).

<sup>135</sup> COMAR 08.08.05.05(B)(2)(f).

<sup>136</sup> COMAR 08.08.05.06.

<sup>137</sup> *Id.*

4. constructing or expanding a hotel, motel, condo, or convention center with buffer strip access.

The development permit application must include a plan and plat showing:

1. affected lake frontage and property to be developed;
2. the number of dwellings to be placed on the property;
3. the number of persons who will use the frontage; and
4. a detailed plan for use of the buffer strip.

The required detailed plan for use of the buffer strip must include:

1. dock placement;
2. the number of slips, and
3. any boat number or size restrictions.<sup>138</sup>

#### ***h. Development Permit Issuance***

The manager has discretion in issuing or denying a development permit: she must deny the permit if the proposed plan is inconsistent with these regulations, and such a denial applies by extension to subsequent buffer strip use permits requested for the developer, the developer's successors in title, and the developer's lessees.<sup>139</sup> The manager may require as a precondition of issuance of a development permit that covenants and contracts (legal instruments that help to guarantee plans for and conditions of future development that will occur) be executed by the

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<sup>138</sup> COMAR 08.08.05.06(B).

<sup>139</sup> COMAR 08.08.05.06(D)(1)(a).

<sup>140</sup> COMAR 08.08.05.06(C).

applicant.<sup>140</sup> Development permits are themselves a precondition to issuing subsequent buffer strip use permits.<sup>141</sup>

The manager must set a termination date for a development permit, which may be extended upon evidence of substantial progress. A developer can achieve substantial progress if there are financing commitments or subcontractor or material contracts that extend beyond the permit's existing termination date; installation of footers for more than 60 % of the project; or sales contracts for more than 5% of the development.<sup>142</sup>

The manager has discretion to approve or disapprove the specific proposal of dock and mooring locations. The manager is not permitted to approve more than one slip space or mooring buoy for every 50 feet of buffer strip frontage belonging to the original development permit applicant,<sup>143</sup> and may grant less than one per 50 feet at her discretion, under 08.08.05.01(C).<sup>144</sup>

Personal watercraft may be permitted at a common dock under a development permit, but only if:

1. the manager determines it is necessary under 08.08.05.01(C);<sup>145</sup> and
2. the number of allowed personal watercrafts permitted does not exceed 1/3 of the total slip allocations under that permit.<sup>146</sup>

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<sup>141</sup> COMAR 08.08.05.06(D)(1).

<sup>142</sup> COMAR 08.08.05.06(G).

<sup>143</sup> COMAR 08.08.05.06(D)(1)(d).

<sup>144</sup> COMAR 08.08.05.06(D)(1)(e).

<sup>145</sup> COMAR 08.08.05.06(D)(1)(f).

<sup>146</sup> COMAR 08.08.05.06(D)(1)(f)(ii).

*i. Prohibited Development Permits*

There are several instances in which the manager may not issue a development permit.<sup>147</sup>

The manager may not issue one if the development plan includes any of the following:

1. a planned common area with less than 200 feet of buffer strip frontage;<sup>148</sup>
2. the use of more than one portion of buffer strip which do not have a contiguous boundary line between the applicant and the State;<sup>149</sup>
3. the placement of a common dock facility apart from the common use area;
4. an intention to enter long term leases with a commercial facility in order to obtain more slips or ramping access for those without boat slips in the common area;<sup>150</sup>
5. separate docks for less than three boats as well as a common dock;<sup>151</sup>
6. the use of buffer strip already permitted to be used by a single residence, unless a minimum of 100 feet of separate buffer strip can be adequately designated;<sup>152</sup>
7. the creation of lots not in compliance with local zoning;<sup>153</sup> or
8. the use of a boat ramp for day use or storage of a number of boats that exceeds the slip and mooring allocation delineated in .01D,<sup>154</sup> when combined with the number of stored boats.

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<sup>147</sup> COMAR 08.08.05.06(D)(2).

<sup>148</sup> COMAR 08.08.05.06(D)(2)(a).

<sup>149</sup> COMAR 08.08.05.06(D)(2)(b).

<sup>150</sup> COMAR 08.08.05.06(D)(2)(d).

<sup>151</sup> COMAR 08.08.05.06(D)(2)(e).

<sup>152</sup> COMAR 08.08.05.06(D)(2)(f).

<sup>153</sup> COMAR 08.08.05.06(D)(2)(g).

<sup>154</sup> *See* COMAR 08.08.05.06(D)(2)(h).



In seeking a development permit, a developer may not publicly claim that he or she has already received or will receive approval for any number or type of buffer strip use or facility.<sup>155</sup>

**j. Recent Law Regarding Development Permits**

Under the Maryland Land Use Statute, development is defined as "an activity that materially affects the existing condition or use of any land or structure."<sup>156</sup> The only activity that is specifically excluded from the definition is normal agricultural activity.<sup>157</sup> The Maryland Code for Real Property does not provide a specific definition for general development, but as the Land Use Statute applies to real property, its definition of development would appear to be applicable.

Furthermore, in *F.D.R. Srouer P'ship v. Montgomery Cnty.*,<sup>158</sup> the Court of Appeals held that the definition of development in relation to a particular county provision was similar to the definition provided in the Maryland Land Use Statute. The county ordinance provided that development in relation to real property was defined as "the carrying out of any building activity or the making of any material change in the use of any structure or land which requires issuance of a building permit."<sup>159</sup>

Based on these two uses of the word "development" in reference to real property, the main requirement in order for something to be deemed a "development" might appear to be a material change in the condition of the land or existing structure. Under this definition of development, it might be argued that the plan to place several new docks on a parcel of land

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<sup>155</sup> COMAR 08.08.05.06(D)(3).

<sup>156</sup> Md. Code Ann., Land Use § 1-101(f)(1).

<sup>157</sup> Md. Code Ann., Land Use § 1-101(f)(2).

<sup>158</sup> 407 Md. 233, 964 A.2d 650 (2009)

<sup>159</sup> *Id.* at 236, 964 A. 2d. at 652.

owned by a marina would be considered a material change to the real property and therefore be seen as a development of that property.

However, the “development” referenced in the “Development Permit” is a narrower class of activities than those defined by the case law or the general Land Use statute: under the DCL regulations, a person must obtain a “development permit” if the “property or the buffer strip are to be used in any of [four] following ways...” The “development” that triggers the obligation to obtain a development permit at DCL can be (1) residential construction of more than one unit with deeded access to the same area of buffer strip; (2) multi family dwelling construction with access to the buffer strip; (3) installing or expanding a common dock facility (a common dock facility is one associated with a residential use.); or (4) constructing or adding onto a hotel, motel, condo or convention center.<sup>160</sup>

***k. Notice for Development permits and commercial validation***

The lake manager must provide public notice of any application for a development permit, as well as for a special permit requesting commercial use requiring installation of more than one dock with three slip spaces.<sup>161</sup> Specifically, upon receipt of the application, the manager must publish a notice and summary in a Garrett County newspaper for at least two consecutive weeks.<sup>162</sup> The manager must also alert bordering property owners, as well as each member of the

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<sup>160</sup> COMAR 08.08.05.06; *see supra* Section G.

<sup>161</sup> COMAR 08.08.05.07(A).

<sup>162</sup> COMAR 08.08.05.07(A)(1).

<sup>163</sup> COMAR 08.08.05.07(A)(2).

DCL Advisory and Review Committee, by sending copies of the application.<sup>163</sup> The manager must consider comments received regarding any application.<sup>164</sup>

***l. Non-Conforming Use Permits***

The DCL regulations allow for “grandfathering in” by permit property uses that are now otherwise disallowed (“non-conforming use”), provided such a permit was appropriately applied for before November 5, 1986.<sup>165</sup> Non-conforming use permits must be revoked if:

1. the non-conforming component is altered, expanded, or changed in character (beyond routine maintenance);<sup>166</sup>
2. the nonconforming component is unused for over one year;<sup>167</sup> or
3. the property covered by the permit is transferred or sold.<sup>168</sup>

***m. Permit revocation***

Any permit may be suspended or revoked if the manager finds the permittee violates these regulations or the terms of her permit.<sup>169</sup>

Permit suspension or revocation by the lake manager requires “due process” procedure.<sup>170</sup> Any such permit action must be in writing and delivered by mail,<sup>171</sup> with a 15-day “grace period”

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<sup>164</sup> COMAR 08.08.05.07(C).

<sup>165</sup> COMAR 08.08.05.08(A).

<sup>166</sup> COMAR 08.08.05.08(F).

<sup>167</sup> COMAR 08.08.06.02(E)(4)(b).

<sup>168</sup> COMAR 08.08.06.02(E)(4)(c).

<sup>169</sup> COMAR 08.08.06.01.

<sup>170</sup> COMAR 08.08.06.02(A)

<sup>171</sup> COMAR 08.08.06.02(B).

allowed for correcting the violation before suspension or revocation may occur.<sup>172</sup> If a permit is suspended or revoked for more than 15 days, the permittee must remove any dock, mooring buoy or structure within 15 days of notice.<sup>173</sup>

***n. Permit expiration***

While all permits expire annually (except for special permits validated for commercial use),<sup>174</sup> there are other conditions under which permits automatically expire.

Buffer strip use permits expire when the property is sold or transferred, though common dock facility privileges remain in effect for remaining property owners.<sup>175</sup>

Recreation permits expire upon sale or transfer of the property or when the permit is not renewed for more than one year.<sup>176</sup>

Special permits expire if commercial property converts to noncommercial use, or if the commercial operations change significantly enough to require substantial modifications to the permit.<sup>177</sup>

***o. Required removal of facilities***

There are specific regulations for removing structures or facilities if a permit is suspended or revoked. Any permanent structure must remain with the land,<sup>178</sup> unless the DNR

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<sup>172</sup> COMAR 08.08.06.02(C).

<sup>173</sup> COMAR 08.08.06.02(D)(4).

<sup>174</sup> COMAR 08.08.06.02(E).

<sup>175</sup> COMAR 08.08.06.02(E)(1).

<sup>176</sup> COMAR 08.08.06.02(E)(2).

<sup>177</sup> COMAR 08.08.06.02(E)(3).

<sup>178</sup> COMAR 08.08.07.01(A).

orders removal due to safety hazard,<sup>179</sup> interference with the hydroelectric project,<sup>180</sup> interference with public use of the buffer strip,<sup>181</sup> or for aesthetic reasons due to dilapidation.<sup>182</sup> Any temporary structure or facility must be removed at permittee's expense and the land restored to its natural condition.<sup>183</sup> Removal must be completed within 30 days of notice, after which the DNR may remove at permittee's expense.<sup>184</sup> Any safety hazard may be immediately removed at permittee's expense, who must be notified of such removal by certified mail.<sup>185</sup>

***p. Appeals***

Citizens are accorded a due process right to appeal decisions by the manager regarding permit applications or violations. To do so, a person must file a written appeal to the Secretary of the DNR within 31 days of the manager's final decision, or, if the manager fails to act, within 31 days from the last day the manager may act under 08.08.05.01(D).<sup>186</sup> The person is then entitled to an appeal hearing and final decision by the Secretary, as well as to subsequent judicial review, under already existing State law and regulations.<sup>187</sup>

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<sup>179</sup> COMAR 08.08.07.01(A)(1).

<sup>180</sup> COMAR 08.08.07.01(A)(2).

<sup>181</sup> COMAR 08.08.07.01(A)(3).

<sup>182</sup> COMAR 08.08.07.01(A)(4).

<sup>183</sup> COMAR 08.08.07.01(B).

<sup>184</sup> COMAR 08.08.07.03(A).

<sup>185</sup> COMAR 08.08.07.02.

<sup>186</sup> COMAR 08.08.08.01(A); *see* 08.08.05.01(D).

<sup>187</sup> COMAR 08.08.08.01(B) & (C); *see e.g.* State Govt Article §10-222.

## 5. Boating Regulations

With a few exceptions, the State's boating laws and regulations apply with equal force on DCL as they would elsewhere. The primary boating regulations are COMAR's DNR Title 08, Subtitle 04 and Subtitle 08. Subtitle 04 - "Boating," These primarily address boat ownership and registration, accident reporting, and mooring distances. Subtitle 18 - "Boating – Speed Limits and Operation of Vessels-" addresses speed and other operational issues. Within Subtitle 18 is Chapter 33, "Deep Creek Lake " which addresses DCL-specific operational and speed rules.<sup>188</sup>

### *a. Statewide Boating Regulations*

The statewide "Boating" Subtitle prohibits, with a few exceptions pursuant to federal law,<sup>189</sup> the use of any vessel that:

1. has not been issued a certificate of number,<sup>190</sup> which is visibly displayed on both sides of its forward half;<sup>191</sup>
2. does not have onboard a valid certificate of number or temporary certificate;<sup>192</sup> or
3. does not have a validation sticker in accord with S 8-712 Code of MD,<sup>193</sup> if the vessel is numbered by the State.<sup>194</sup>

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<sup>188</sup> See e.g. COMAR 08.18.33.01.

<sup>189</sup> See 33 CFR 173.13; see also 33 CFR 173.17. (To search the CFR, Code of Federal Regulations, go to <http://www.ecfr.gov/cgi-bin/text-idx?tpl=%2Findex.tpl> )

<sup>190</sup> COMAR 08.04.03.01(A)(1).

<sup>191</sup> COMAR 08.04.03.01(B).

<sup>192</sup> COMAR 08.04.03.02(A).

<sup>193</sup> COMAR 08.04.03.10(A).

<sup>194</sup> COMAR 08.04.03.10.

Additionally, any vessel titled under DNR laws<sup>195</sup> must have a hull identification number displayed on the vessel.<sup>196</sup>

Operators must submit a detailed<sup>197</sup> report if any of the following occurs while boating:

1. the injury of a person sufficient to require medical attention;<sup>198</sup>
2. the loss or damage to property, including to vessels, of \$200 or more;<sup>199</sup>
3. the death of any person;<sup>200</sup>
4. the disappearance of any person from onboard.<sup>201</sup>

“Marine gatherings,” an intentional congregation of at least 100 vessels that creates extra or unusual hazards,<sup>202</sup> require a special permit from the Natural Resources Police.<sup>203</sup>

Before departure, rented boats must be equipped with all lifesaving and safety equipment required by the State,<sup>204</sup> and no boat may be rented to a person born after July 1, 1972, unless she possesses a boating safety certificate.<sup>205</sup>

The rental of personal watercraft (“jet-skis”) is more restrictive, with rental operators required to:

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<sup>195</sup> COMAR 08.04.03.10(A); *see also* Md. Code Ann., Nat Res. § 8-712.

<sup>196</sup> COMAR 08.04.03.11(B).

<sup>197</sup> COMAR 08.04.07.01(C).

<sup>198</sup> COMAR 08.04.07.01(C)(3).

<sup>199</sup> COMAR 08.04.07.01(C)(4).

<sup>200</sup> COMAR 08.04.07.01(C)(1).

<sup>201</sup> COMAR 08.04.07.01(C)(2).

<sup>202</sup> COMAR 08.04.06.01(B)(2)(a).

<sup>203</sup> COMAR 08.04.06.02.

<sup>204</sup> COMAR 08.04.08.01(A).

<sup>205</sup> COMAR 08.04.08.01(C).

1. display COMAR's personal watercraft regulations;
2. advise customers to read them; and
3. certify on the rental contract that renters have indeed read them.<sup>206</sup>

Personal watercrafts may not be rented unless the renter is over 16 and has a boating safety certificate (if born after 7/1/72).<sup>207</sup> However, the rental operator may instead administer a test before renting in lieu of requiring the boating safety certificate.<sup>208</sup>

Moorings may not be placed in such a manner which interferes with the access through any bridge.<sup>209</sup>

***b. Additional General Statewide Boating Regulations***

There are additional general boating regulations that apply to all waters in a separate subtitle.<sup>210</sup> These regulations, however, would not apply to a tournament or other event, if approved by the DNR.<sup>211</sup>

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<sup>206</sup> COMAR 08.04.08.02(A).

<sup>207</sup> COMAR 08.04.08.02(B).

<sup>208</sup> COMAR 08.04.08.02(D).

<sup>209</sup> COMAR 08.04.13.02(B).

<sup>210</sup> 08.18.01, *et seq.*

<sup>211</sup> 08.18.01.02(A).

<sup>212</sup> *See generally* 33 U.S.C. § 2071, *et seq*



*The Rules of the Road*

The “Rules of the Road” for vessel operation are incorporated by reference to the Federal Inland Navigation Rules Act of 1980,<sup>212</sup> the Federal International Navigational Rules Act of 1977,<sup>213</sup> and the U.S. DOT “U.S. Coast Guard, Navigation Rules, International-Inland.”<sup>214</sup>

There is a general requirement not to operate at any “unsafe” speed when taking into account a variety of factors such as visibility, traffic, and wind velocity.<sup>215</sup> A person may not operate in any “reckless” or “negligent” manner,<sup>216</sup> or operate under the influence of any intoxicant.<sup>217</sup> If towing an individual, operators must stay at least 100 feet away from the shore, any structures in the water such as piers, and from other vessels when passing, and maintain a towline no more than 75 feet in length.<sup>218</sup> Wake surfing vessels, however, may not be operated within 200 feet of shorelines, marine structures, swimming platforms, other vessels, or individuals in the water.<sup>219</sup> Every vessel, including kayaks, sailboats, and the like, must be equipped with an approved lifesaving device for each person on board.<sup>220</sup>

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<sup>213</sup> *Id.*

<sup>214</sup> See generally [http://www.uscg.mil/directives/cim/16000-16999/cim\\_16672\\_2d.pdf](http://www.uscg.mil/directives/cim/16000-16999/cim_16672_2d.pdf)

<sup>215</sup> 08.18.01.04(B).

<sup>216</sup> 08.18.01.05(A)-(B).

<sup>217</sup> 08.18.01.07.

<sup>218</sup> 08.18.01.06(B).

<sup>219</sup> 08.18.01.09.

<sup>220</sup> 08.18.04.02.

### *Noise Limits*

DCL has specific noise level limits for vessels.<sup>221</sup> The maximum limit is 88dB(a), if the engine was manufactured after 1/1/93, or 90dB(a) if manufactured before. All vessels on DCL must also operate with a continuous muffler or noise suppression system, and may not bypass them in any way.<sup>222</sup>

### *Personal Watercraft*

Personal watercraft also have their own chapter in the boating regulations,<sup>223</sup> which outlines safety requirements, who may rent and operate them, and at what speed. Most operators must be at least 16 years old,<sup>224</sup> and if born after July 1, 1972, must carry a Boater Safety Education certificate.<sup>225</sup> Operators and passengers must wear an approved PFD,<sup>226</sup> and may not operate between sunset and sunrise<sup>227</sup> Jet-skis must have a three person capacity<sup>228</sup> and adhere to several specific safety design standards.<sup>229</sup>

On non-Atlantic waters, including DCL, personal watercraft may not be operated within 100 feet of shore, structure, other vessel (unless overtaking), or person in the water at a speed in excess of 6 knots.<sup>230</sup> An operator may not exceed idle speed in waters less than 18 inches deep.<sup>231</sup>

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<sup>221</sup> COMAR 08.18.03.03.

<sup>222</sup> COMAR 08.18.03.08.

<sup>223</sup> COMAR 08.18.02.

<sup>224</sup> COMAR 08.18.02.05(A).

<sup>225</sup> COMAR 08.18.02.05(C).

<sup>226</sup> COMAR 08.18.02.05(D).

<sup>227</sup> COMAR 08.18.02.05(E).

<sup>228</sup> COMAR 08.18.02.05(B)(1).

<sup>229</sup> COMAR 08.18.02(F)-(I).

<sup>230</sup> COMAR 08.18.02(K)-(L).

<sup>231</sup> COMAR 08.18.02(P).

There are a variety of “negligent” activities prohibited, including jumping wake within 100 feet of a vessel and weaving through traffic.<sup>232</sup> Regulations must be displayed to renters and verified as read in the rental contract.<sup>233</sup> A DNR regulation sticker must be visibly affixed to most jet-skis.<sup>234</sup>

### *Whitewater Rafting*

Whitewater rafting on the Youghiogheny River, designated as Class V (expert) by the DNR,<sup>235</sup> has specific safety requirements.<sup>236</sup> All individuals must use approved PFDs at all times.<sup>237</sup> Any person in charge of a commercial vessel must carry an approved first aid kit,<sup>238</sup> as well as grab loops or safety lines attached to the vessel.<sup>239</sup> Safety helmets are required of individuals using whitewater kayaks or covered canoes.<sup>240</sup> DNR must make safety information available to each registered whitewater outfitter and guide<sup>241</sup> and make available to the public a list of registered outfitters and guides.<sup>242</sup>

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<sup>232</sup> COMAR 08.18.02(M).

<sup>233</sup> COMAR 08.18.02(N).

<sup>234</sup> COMAR 08.18.02(O).

<sup>235</sup> COMAR 08.18.01.08(D)(3).

<sup>236</sup> COMAR 08.18.01.08(E).

<sup>237</sup> COMAR 08.18.01.08(E)(1).

<sup>238</sup> COMAR 08.18.01.08(E)(2).

<sup>239</sup> COMAR 08.18.01.08(E)(3).

<sup>240</sup> COMAR 08.18.01.08(E)(4).

<sup>241</sup> COMAR 08.18.01.08(F)(5).

<sup>242</sup> COMAR 08.18.01.08(F)(6).

*c. Boating on Deep Creek Lake*

Boating on DCL is afforded its own section in COMAR.<sup>243</sup> Due to the uniqueness of DCL, the chapter primarily addresses what kinds of vessels are permitted,<sup>244</sup> vessel speed limits, and skiing restrictions.<sup>245</sup>

The length restriction for vessels is 26 feet, unless it is a pontoon boat of no more than 30 feet, a boat with a molded platform of no more than 27 feet, or has a nonconforming use permit.<sup>246</sup> Vessels may not be operated if its engine(s) exceeds its recommended maximum horsepower or exceeds a total displacement of 550 cubic inches.<sup>247</sup>

No individual may:

1. use a houseboat;<sup>248</sup>
2. use a siren on a vessel;<sup>249</sup>
3. use a vessel with a sanitation device that can discharge any sewage into water;<sup>250</sup>
4. deposit waste of any kind into lake water;<sup>251</sup>
5. operate or be towed by a “parasailing” vessel;<sup>252</sup>

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<sup>243</sup> COMAR 08.18.33 (“Deep Creek Lake”).

<sup>244</sup> COMAR 08.18.33.03(A), (B), (D), & (F).

<sup>245</sup> COMAR 08.18.33.03.

<sup>246</sup> COMAR 08.18.33.02(A).

<sup>247</sup> COMAR 08.18.33.02(B).

<sup>248</sup> COMAR 08.18.33.02(D).

<sup>249</sup> COMAR 08.18.33.02(C).

<sup>250</sup> COMAR 08.18.33.02(F).

<sup>251</sup> COMAR 08.18.33.02(E).

<sup>252</sup> COMAR 08.18.33.02(I).

6. operate a vessel inshore from a public swimming area buoy;<sup>253</sup>
7. operate a personal watercraft or air-cushioned vessel from 11 AM to 4 PM Saturday-Monday on Memorial Day weekend or the Saturdays, Sundays, and holidays from July 1 through Labor Day;<sup>254</sup>
8. utilize an aircraft on the Lake without written permission from DNR [and Penelec];<sup>255</sup>
9. exceed minimum wake zone speed within 100 feet of shoreline, unless towing a skier immediately away from a dock or the shore;<sup>256</sup>
10. tow a skier, from 12 noon until sunset on each Saturday, Sunday, and each holiday, from North Glade Cove lying eastward of a line beginning at the Penelec monument designated Y-84 and extending to the Penelec monument designated N-351;<sup>257</sup> or
11. exceed minimum wake zone speeds in the following areas<sup>258</sup>:
  - a. the area of Meadow Mountain Run lying east of Meadow Mountain Bridge as it enters DCL State Park;
  - b. north of a line drawn from Penelec monument N-266 in an easterly direction to the southernmost point on a peninsula in McHenry Cove, then continuing on in an easterly direction to Penelec monument N-683;
  - c. that portion of Red Run Cove lying southwest of a line drawn between Penelec monuments SS-78 and N-181-1/2;

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<sup>253</sup> COMAR 08.18.33.02(G).

<sup>254</sup> COMAR 08.18.33.02(J).

<sup>255</sup> COMAR 08.18.33.04; *see also* COMAR 11.03.04(B)(3)(c). This regulation has not been amended since Penelec sold the lake to the state.

<sup>256</sup> COMAR 08.18.33.03(B)(1).

<sup>257</sup> COMAR 08.18.33.03(A).

<sup>258</sup> COMAR 08.18.33.03(B)(2)-(8).

- d. that portion of Thayerville Cove lying southwest of a line drawn from the easternmost point of the Arrowhead peninsula extending in a southeasterly direction to the Penelec monument designated Y-60;
- e. that portion of Hoop Pole Cove which lies southwest of a line drawn from Penelec monument N-518 to Penelec monument N-764;
- f. those portions of Pawn Run Cove which lie northwest of a line drawn from Penelec monument N-467 to the southeasternmost point of the Penn Cove Peninsula, and southwest of a line drawn from that same point on the peninsula to Penelec monument N-468; or
- g. from 11 a.m. to 4 p.m., each Saturday and Sunday, and each holiday from Memorial Day holiday weekend through Labor Day, that area of North Glade Cove which connects to Beckman's Cove, lying north of a line drawn from Penelec monument Y-82 to monument S-317c and south of a line drawn from Penelec monument N-330 to monument Y-80.

## 6. State Park Regulations

DCL, the buffer strip, and DCL State Park are all regulated under DNR state park regulations.<sup>259</sup> DCL is designated as both a “Waterfront Park”<sup>260</sup> as well as a “Natural Resources Management Area.” (NRMA)<sup>261</sup> NRMA’s are areas where “multiple-use management practices are employed for the maximum use of natural resources.”<sup>262</sup> In such an area, the development and management plans are the joint responsibility of the DNR’s Park Service, as well as other DNR agencies.<sup>263</sup> In this way, DCL is not only considered a park for recreational enjoyment, but a more vast asset that requires more extensive natural resource management.

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<sup>259</sup> COMAR 08.07.06.

<sup>260</sup> COMAR 08.07.06.02(I).

<sup>261</sup> COMAR 08.07.06.02(M).

<sup>262</sup> COMAR 08.07.06.02(C).

<sup>263</sup> *Id.*

DCL State Park is a designated hunting area,<sup>264</sup> though no firearms are permitted until a designated date each fall, and waterfowl hunting is prohibited.<sup>265</sup> Permanent stands, stationary blinds,<sup>266</sup> and baiting<sup>267</sup> are prohibited in all State Parks. No person may take more than two antlerless deer in DCL State Park, excluding Junior Hunt day.<sup>268</sup> Except for licensed hunting purposes or as otherwise excepted by the Park Service, weapons are not permitted in any State Park.<sup>269</sup> Fishing for finfish is permitted in DCL, and a permit is required for non-fish fishing.<sup>270</sup>

Swimming or wading is allowed unless posted otherwise.<sup>271</sup> A permit from the Park Service is required for each of the following in any State Park:

1. camping;<sup>272</sup>
2. commercial activities;<sup>273</sup>
3. fires in non-designated areas;<sup>274</sup>

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<sup>264</sup> COMAR 08.07.06.03; and Guide to Hunting and Trapping in MD, 2013-2014 at page 48. See [http://www.eregulations.com/31987630-979C-499A-887E-39AD3F9A4D16/FinalDownload/DownloadId-48A57A0F3A4FC524F180B7CB9F395C82/31987630-979C-499A-887E-39AD3F9A4D16/wp-content/uploads/2013/06/13MDHD\\_FINAL-LR.pdf](http://www.eregulations.com/31987630-979C-499A-887E-39AD3F9A4D16/FinalDownload/DownloadId-48A57A0F3A4FC524F180B7CB9F395C82/31987630-979C-499A-887E-39AD3F9A4D16/wp-content/uploads/2013/06/13MDHD_FINAL-LR.pdf)

<sup>265</sup> *Id.*

<sup>266</sup> COMAR 08.07.06(A)(5) and (B).

<sup>267</sup> COMAR 08.07.06(B).

<sup>268</sup> COMAR 08.03.03.07.

<sup>269</sup> COMAR 08.07.06.04.

<sup>270</sup> COMAR 08.07.06.05.

<sup>271</sup> COMAR 08.07.06.07.

<sup>272</sup> COMAR 08.07.06.08.

<sup>273</sup> COMAR 08.07.06.09.

<sup>274</sup> COMAR 08.07.06.10.

4. posting signs, notices, or literature;<sup>275</sup>
5. removing plants, rocks, or animals;<sup>276</sup>
6. grazing animals;<sup>277</sup>
7. digging for relics or treasures;<sup>278</sup>
8. possession of alcohol in designated shelters or other areas;<sup>279</sup>
9. possessing or using fireworks;<sup>280</sup> and
10. amplifying sound.<sup>281</sup>

There are several activities which are prohibited in State Parks, including depositing garbage or litter;<sup>282</sup> possessing a glass container in a swimming area or beach;<sup>283</sup> entering an area without paying a required fee;<sup>284</sup> not leashing a pet in an unrestricted area;<sup>285</sup> disorderly conduct;<sup>286</sup> and private encroachments, such as fences, woodpiles, and mowing or clearing.<sup>287</sup>

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<sup>275</sup> COMAR 08.07.06.11.

<sup>276</sup> COMAR 08.07.06.13.

<sup>277</sup> COMAR 08.07.06.16.

<sup>278</sup> COMAR 08.07.06.18.

<sup>279</sup> COMAR 08.07.06.19.

<sup>280</sup> COMAR 08.07.06.22.

<sup>281</sup> COMAR 08.07.06.26.

<sup>282</sup> COMAR 08.07.06.12.

<sup>283</sup> *Id.*

<sup>284</sup> COMAR 08.07.06.15.

<sup>285</sup> COMAR 08.07.06.17.

<sup>286</sup> COMAR 08.07.06.20.

<sup>287</sup> COMAR 08.07.06.24.



Violations of State Park regulations are misdemeanors, payable by a fine not to exceed \$500 for the first offense.<sup>288</sup>

The DCL NRMA is designated as an off-road vehicle (ORV) “trail” for snowmobiles, with stark restrictions.<sup>289</sup> Specifically, snowmobiles are the only ORVs allowed, which may be operated on the frozen lake surface only.<sup>290</sup> Access to the frozen lake is permitted only at a designated parking area at the State Park, or from a permitted buffer strip use site (with permission from the permittee).<sup>291</sup>

## **7. Fishing**

In order to manage fisheries in DCL, the DNR is authorized to close up to three tributaries of the lake at any one time, or prohibit fishing from one hour after sunset to 30 minutes before sunrise in order to police the area.<sup>292</sup> A person must generally be annually licensed to fish in any nontidal water (including DCL), unless the angler is a landowner or tenant (or family member of such person) bordering on that water.<sup>293</sup> No bows and arrows<sup>294</sup> or spear guns<sup>295</sup> may be used for fishing on DCL. Icefishing is permitted, provided the angler is licensed, the hole is no more than 10 inches across, and no more than 5 rods are used.<sup>296</sup> The introduction

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<sup>288</sup> Md. Code Ann., Nat. Res. § 5-1301.

<sup>289</sup> COMAR 08.01.03.11(A).

<sup>290</sup> COMAR 08.07.03.11(G).

<sup>291</sup> *Id.*

<sup>292</sup> Md. Code Ann. Nat Res § 4-625.

<sup>293</sup> § 4-604; COMAR 08.02.01.07.

<sup>294</sup> COMAR 08.02.11.04(B)(3).

<sup>295</sup> COMAR 08.02.11.04(E).

<sup>296</sup> COMAR 08.02.11.04(G).

of nonindigenous fish is prohibited,<sup>297</sup> as is removing the head or tail of any fish while at the fishing location.<sup>298</sup>

There are a variety of open seasons, and limits on creel, possession, and size for game and freshwater fish that apply statewide.<sup>299</sup> The only variation from statewide limits for DCL are as follows: there is a closed season for walleye from March 1-April 15;<sup>300</sup> there are trout limits addressed in the next paragraph;<sup>301</sup> there is a creel limit of 10 yellow perch,<sup>302</sup> and there is no minimum size restriction for yellow perch.<sup>303</sup>

Trout fishing on DCL is open year round, and there is no minimum size limit.<sup>304</sup> Put-and-take areas of fishing are closed from 10 PM to 5:30 AM., and daily creel and possession limits are both set at 5.<sup>305</sup> No gigs may be used.<sup>306</sup>

## **8. Wildlife**

The DCW is subject to all state wildlife laws and regulations. In relation to geese and other wildlife, DNR is authorized to reduce wildlife population if it has been determined that the

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<sup>297</sup> COMAR 08.02.11.04(I).

<sup>298</sup> COMAR 08.02.11.04(N).

<sup>299</sup> COMAR 08.02.11.C.

<sup>300</sup> COMAR 08.02.11.C(1)(a).

<sup>301</sup> COMAR 08.02.11.C(1)(b).

<sup>302</sup> COMAR 08.02.11.C(2)(s).

<sup>303</sup> COMAR 08.02.11.C(3)(s).

<sup>304</sup> COMAR 08.02.11.01(A).

<sup>305</sup> COMAR 08.02.11.01(B)(1)-(6).

<sup>306</sup> COMAR 08.02.11.04(A)(3).

<sup>307</sup> Md. Code Ann., Nat. Res. § 10-206.

population is “seriously injurious to agricultural or other interests of the affected area.”<sup>307</sup> DNR has discretion for the methods of reduction, but trapping is preferred if feasible.<sup>308</sup>

The Resident Canada Goose Depredation Control regulations<sup>309</sup> permit the taking of resident Canada geese, as permitted by federal law.<sup>310</sup> The preferred method is by egg oiling.

Almost all hunting requires a valid permit.<sup>311</sup> Additionally, any hunter must carry a photo identification in addition to a valid hunting license.<sup>312</sup> Electronic or recorded bird or wildlife calls are prohibited,<sup>313</sup> as is shooting from or across any public highway.<sup>314</sup> Guided hunting for economic gain is prohibited on land controlled by DNR, including DCL State Park.<sup>315</sup>

## **9. Tree removal or maintenance services**

State law has specific licensing requirements for anyone who offers or provides professional tree expert services.<sup>316</sup> The “Licensed Tree Expert” chapter incorporates by reference several required tree expert standards systems, including several American National Standards Institute (ANSI) standards for pruning practices, soil management, lightning protection systems, transplanting, and tree risk assessment.<sup>317</sup> A licensed tree expert’s

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<sup>308</sup> *Id.*

<sup>309</sup> COMAR 08.03.07.10.

<sup>310</sup> 50 CFR 21.50.

<sup>311</sup> Md. Code Ann., Nat. Res. § 10-301

<sup>312</sup> COMAR 08.03.10.13.

<sup>313</sup> COMAR 08.03.10.02.

<sup>314</sup> COMAR 08.03.10.05.

<sup>315</sup> COMAR 08.03.10.10.

<sup>316</sup> COMAR 08.07.07.01, *et seq.*

<sup>317</sup> COMAR 08.07.07.02.

responsibilities include employing ANSI standards,<sup>318</sup> entering into written contracts with specific, required terms,<sup>319</sup> and obtaining written permission from neighboring landowners before she may use their land to access her client’s property.<sup>320</sup> DNR has authority to suspend the license of a tree expert for violation of this chapter.<sup>321</sup>

## **B. Environmental Law**

### **1. Water Appropriation**

DCL was formed as a result of the construction of a dam by Penelec. The LLC entity that now operates the dam, Brookfield Power Piney and Deep Creek, is commonly referred to as “Brookfield.” Because the hydroelectric project is still operational and relies upon the sale of electricity, DCL itself is fundamentally influenced by the dam’s operations. While hydroelectric dams are typically regulated by the Federal Energy Regulatory Commission (FERC), in 1991 FERC transferred authority to the State, which now issues permits to Brookfield for its dam operations. The Maryland Department of the Environment (MDE) has authority for water appropriations, which require a permit.<sup>322</sup> Water appropriation permits also require a public notice and comment process.<sup>323</sup>

Brookfield’s “Water Appropriation and Use Permit,” granted by the Water Management Administration of the MDE, balances the use of DCL water to meet the “downstream” needs for

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<sup>318</sup> COMAR 08.07.07.03(B).

<sup>319</sup> COMAR 08.07.07.03(D).

<sup>320</sup> COMAR 08.07.07.01.

<sup>321</sup> COMAR 08.07.07.08.

<sup>322</sup> See Md. Code Ann., Envir. § 5-501, et. seq

<sup>323</sup> See Md. Code Ann., Envir. § 5-506, *see also* 5-204.

electricity generation, temperature enhancement for trout, whitewater enhancement for recreation enhancement, and minimum flows of the Youghiogheny River.<sup>324</sup> However, in addition to these considerations, protecting DCL itself as a natural and recreational resource is perhaps the highest priority of the permit specifications, through the “rule band” limitations.<sup>325</sup> Thus, downstream ecological and recreational needs, the “upstream” ecological and recreational needs of DCL, and the profitability needs for the hydroelectric project are all balanced in the permit conditions that follow below.

***a. Permit Introduction***

Brookfield’s MDE water appropriation permits have both general requirements under COMAR,<sup>326</sup> as well as specific conditions aimed at DCL water and recreation quality and downstream water quality. Water appropriation permits for the Brookfield dam are for 12 years,<sup>327</sup> and the current permit, GA1992S009 (08), expires on April 1, 2019.<sup>328</sup> The permit is officially reviewed by MDE every three years,<sup>329</sup> though the permit conditions may be revised or added to at any time under MDE’s broad authority to “properly protect, control and manage the water resources of the state.”<sup>330</sup> Indeed, this last condition was recently invoked at least partly in

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<sup>324</sup> See [http://www.mde.state.md.us/programs/Water/Water\\_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf](http://www.mde.state.md.us/programs/Water/Water_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf).

<sup>325</sup> See *id.*

<sup>326</sup> COMAR 26.17.06.06.

<sup>327</sup> COMAR 26.17.06.06(A)(1).

<sup>328</sup> See [http://www.mde.state.md.us/programs/Water/Water\\_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf](http://www.mde.state.md.us/programs/Water/Water_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf).

<sup>329</sup> See *id.*

<sup>330</sup> See *id.*

response to lower-than-average lake water levels.<sup>331</sup> Additionally, semi-annual reports from Brookfield are required by January 31 and July 31, which must show monthly totals of water released,<sup>332</sup> and a more comprehensive annual report to MDE accounting for the primary requirements of Brookfield is required by January 31.<sup>333</sup> Brookfield is limited to water withdrawals of a daily average of 94,000,000 gallons, on a yearly basis, and a maximum daily withdrawal of 420,000,000 gallons.<sup>334</sup> Water withdrawals must be measured by Brookfield each day, subject to inspection.<sup>335</sup>

***b. DCL Rule Band***

Brookfield is required to operate the dam in such a way that DCL water elevation levels stay within the “rule band.”<sup>336</sup> Lake water levels must be recorded daily, and be reported to MDE annually.<sup>337</sup> The rule band is a variable range of several feet (above mean sea level), depending upon the month, which at the highest end never exceeds 2461 feet in April through July, and at the lowest end never descends below 2455 feet in November through January.<sup>338</sup> Brookfield may release water as needed, if the water levels exceed the upper rule band. However, from May

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<sup>331</sup> See [http://www.mde.state.md.us/programs/Water/Water\\_Supply/Documents/Deep%20Creek%20Lake/DCL%20PRB%20Lake%20Water%20Level%20Comments%20to%20MDE%20\(M0694618\).PDF](http://www.mde.state.md.us/programs/Water/Water_Supply/Documents/Deep%20Creek%20Lake/DCL%20PRB%20Lake%20Water%20Level%20Comments%20to%20MDE%20(M0694618).PDF)

<sup>332</sup> See [http://www.mde.state.md.us/programs/Water/Water\\_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf](http://www.mde.state.md.us/programs/Water/Water_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *See id.*

<sup>337</sup> *See id.*

<sup>338</sup> See [http://www.mde.state.md.us/programs/Water/Water\\_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf](http://www.mde.state.md.us/programs/Water/Water_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf).

through October, the water level may exceed the upper rule band by 0.3 feet, though for no more than 21 days.<sup>339</sup>

The rule band does not apply in the following unusual or emergency situations: when the PJM regional electric grid requires maximum emergency generation, loading, or control; when there is a structural emergency at the dam; when an outage requires the shutdown of dam intake; when the dam or shoreline needs maintenance that requires lowering the water level below the rule band; or when excessive rainfall or runoff appears likely to spill over the dam.<sup>340</sup>

*c. Downstream Requirements*

In addition to DCL's rule band, there are a variety of downstream ecological requirements in the Youghiogheny River that must be met by Brookfield as well. These requirements are water temperature, flow rate, and dissolved oxygen minimum levels.

Brookfield must adhere to a MDE-approved plan that will result in June, July, and August water temperatures in the Youghiogheny (between the dam and Sang Run) below 25 degrees C.<sup>341</sup> Brookfield must continually monitor river temperatures, report them to MDE in an annual report, and notify MDE within 30 days of all temperature exceedances.<sup>342</sup>

There must be a minimum flow of 40 cfs below the dam's tailrace, at all times, with similar reporting requirements.<sup>343</sup> However, the minimum flow may be adjusted, with MDE

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<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *See id.*

<sup>342</sup> *Id.*

<sup>343</sup> *See id.*

permission, if lake levels are one foot or below the rule band.<sup>344</sup> Additionally, there must be a continuous flow of at least 9 cfs in the tailrace itself during the months of June, July, August, and September.

Downstream water must also meet minimum dissolved oxygen standards under State law,<sup>345</sup> which are 5 ppm daily, 6 ppm daily average. Brookfield must annually monitor and report levels during June 1 to October 1, and maintain a tailrace weir to meet required minimum levels.<sup>346</sup>

For whitewater recreation purposes on the Youghiogheny River, there are scheduled whitewater releases (WWR). Importantly, however, most releases are subject to the rule band requirements and the maximum temperature requirements.<sup>347</sup> Most releases, called “standard” WWRs, occur every Friday-Monday between April 15 and October 15, for a duration of 3 hours, starting at either 10 AM ET or 11 AM ET.<sup>348</sup>

“Special” WWR include, at a minimum, a six-hour release on the fourth Saturday in July, for the Team Friendsville Upper Yough Race (subject to the lake elevation being more than one foot below the lower rule band),<sup>349</sup> and three 3-hour releases on Tuesday, Wednesday, and Thursday, the week before the Gauley Festival in West Virginia.<sup>350</sup>

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<sup>344</sup> See [http://www.mde.state.md.us/programs/Water/Water\\_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf](http://www.mde.state.md.us/programs/Water/Water_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf)

<sup>345</sup> See COMAR 26.08.02.01, *et seq.*

<sup>346</sup> See [http://www.mde.state.md.us/programs/Water/Water\\_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf](http://www.mde.state.md.us/programs/Water/Water_Supply/Documents/Deep%20Creek%20Lake/dcl-p-07.pdf).

<sup>347</sup> See *id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*



Other Special WWRs may be requested, and all Special WWRs are contingent upon sufficient lake water levels.<sup>351</sup> During actual Special WWR days, Brookfield is exempted from meeting temperature requirements otherwise required under Condition 16.<sup>352</sup> In order to maintain appropriate whitewater-related flow, Brookfield must also follow several additional operating rules between April 15<sup>th</sup> and October 15<sup>th</sup>, depending on both the lake water level and the natural flows at the Friendsville USGS Gage.<sup>353</sup>

## **2. Soil Erosion and Sediment Control**

In order to prevent erosion and the harmful deposition of sediment in State waters,<sup>354</sup> State law requires approved grading and sediment control plans before any grading or building permits may be granted.<sup>355</sup> Such grading and building requirements must be included in the Garrett County ordinance,<sup>356</sup> which must also comply with the “2011 Maryland Standards and Specifications for Soil Erosion and Sediment Control.”<sup>357</sup> The approval of a plan is based on that guide’s criteria and upon the adequacy of the proposed measures.<sup>358</sup> Garrett County has

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<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> Md. Code Ann., Envir. § 4-101.

<sup>355</sup> § 4-103

<sup>356</sup> *Id.*; see Garrett County Ordinance Chapter 154; see also *infra* Section III.B.7.

<sup>357</sup> COMAR 26.17.01.04(A); see generally <http://www.mde.maryland.gov/programs/Water/StormwaterManagementProgram/SoilErosionandSedimentControl/Documents/2011%20MD%20Standard%20and%20Specifications%20for%20Soil%20Erosion%20and%20Sediment%20Control.pdf>.

<sup>358</sup> COMAR26.17.01.08(A).

enforcement authority of these State-required standards, pursuant to its capability of enforcing compliance.<sup>359</sup>

***a. Required Control Plans***

Before construction may commence, the County must first review and approve the sediment control plan,<sup>360</sup> and permittees must then implement the approved plan and conduct construction in accordance with it.<sup>361</sup> There are several specific requirements of a submission of a control plan, such as a map, soil types, and proposed grading and earth disturbances.<sup>362</sup> Subsequent changes to a sediment control plan require approval.<sup>363</sup> Penalties for violating these requirements, a misdemeanor, are fines up to \$10,000 or imprisonment up to one year, or both, as well as liability in a civil suit.<sup>364</sup>

***b. Exemptions***

These requirements do not apply to most agricultural activities or to construction of single-family dwellings that disturb an area of less than one-half acre and occur on lots of two acres or more.<sup>365</sup> Grading activities do not require a plan if they are for agricultural management or disturb less than 5,000 square feet of land area and less than 100 cubic yards of earth.<sup>366</sup>

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<sup>359</sup> *Id.*; *See also* Garrett County Code, Chapter 154.

<sup>360</sup> Md. Code Ann., Envir. § 4-105.

<sup>361</sup> *Id.*

<sup>362</sup> COMAR 26.17.01.07(B).

<sup>363</sup> *Id.*

<sup>364</sup> Md. Code Ann., Envir. § 4-116.

<sup>365</sup> § 4-102.

<sup>366</sup> COMAR 26.17.01.05(A).

### 3. Stormwater control

In order to reduce erosion, pollution, sedimentation, and flooding, state law regulates stormwater runoff<sup>367</sup> by, similarly to the sediment control plan process, requiring the submission and approval of a stormwater management plan before a grading or building permit may be issued for developments.<sup>368</sup> These requirements apply to any development or redevelopment of land. They do not apply to agricultural activities<sup>369</sup> or to developments that disturb less than 5,000 square feet of land, including additions to single family structures.<sup>370</sup> Penalties for violating these requirements, a misdemeanor, are fines up to \$10,000 or imprisonment up to one year, or both, as well as liability in a civil suit.<sup>371</sup>

Each county and municipality has ordinances<sup>372</sup> in support of this stormwater oversight, and provides the necessary approvals<sup>373</sup> through a comprehensive review and approval process.<sup>374</sup> The local ordinances must have minimum control requirements under law and the 2000 Maryland Stormwater Design Manual, Volumes I & II.<sup>375</sup> The control requirements

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<sup>367</sup> Md. Code Ann., Envir. § 4-201.

<sup>368</sup> § 4-204.

<sup>369</sup> COMAR 26.17.02.01(B).

<sup>370</sup> COMAR 26.17.02.05(B).

<sup>371</sup> Md. Code Ann., Envir. § 4-215.

<sup>372</sup> See Garrett County Stormwater Ordinance and see *infra* Section III.B.9, Stormwater Regulations

<sup>373</sup> Md. Code Ann., Envir. § 4-202.

<sup>374</sup> COMAR 26.17.02.04(B).

<sup>375</sup> COMAR 26.17.02.06(A); see generally [http://www.mde.maryland.gov/programs/water/stormwatermanagementprogram/marylandstormwaterdesignmanual/pages/programs/waterprograms/sedimentandstormwater/stormwater\\_design/index.aspx](http://www.mde.maryland.gov/programs/water/stormwatermanagementprogram/marylandstormwaterdesignmanual/pages/programs/waterprograms/sedimentandstormwater/stormwater_design/index.aspx)

mandate that stormwater management plans utilize “environmental site design” to the maximum extent practicable.<sup>376</sup>

The owner/developer must submit, according to the local ordinances, phased plans, including a concept plan, a site development plan, a final stormwater management plan, and construction drawings.<sup>377</sup> Advance notice must be given, prior to construction, and then regular inspections performed during construction.<sup>378</sup> The regulations require post-construction, maintenance to ensure proper functioning.<sup>379</sup>

#### **4. Sewage and Water Supply**

While there are a few exceptions,<sup>380</sup> a residence or commercial establishment that will require an on-site sewage disposal system<sup>381</sup> may not be built or altered without first obtaining a sewage disposal permit with MDE,<sup>382</sup> nor may a county issue a building permit.<sup>383</sup> Once permitted, a person must follow the terms of the permit when disposing of waste.<sup>384</sup> Water

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<sup>376</sup> *Id.*

<sup>377</sup> COMAR 26.17.02.09(E).

<sup>378</sup> COMAR 26.17.02.10.

<sup>379</sup> COMAR 26.17.02.11.

<sup>380</sup> COMAR 26.04.02.02(B)(1).

<sup>381</sup> Defined as a “sewage treatment unit, collection system, disposal area, and related appurtenances.” COMAR 26.04.02.01B(28).

<sup>382</sup> COMAR 26.04.02.02(D).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

supply, when not served by a community system, may be achieved only through COMAR-approved wells<sup>385</sup> or surface water systems.<sup>386</sup>

Applications for sewage permits must be on MDE forms, and must include a site plan.<sup>387</sup> A permit will not be issued unless the project conforms with the county water and sewer plan.<sup>388</sup> The system may not be used until inspected and approved.<sup>389</sup>

The septic system disposal area and two recovery areas for a lot may not be less than 10,000 square feet,<sup>390</sup> and the regulations include minimum distances between disposal systems, and their recovery areas, and certain features like steep slopes and drainage ways.<sup>391</sup> Systems and recovery areas must be at least 100 feet away from wells<sup>392</sup> and downhill from private water supplies.<sup>393</sup> Residential septic tanks have minimum size requirements according to the number of bedrooms,<sup>394</sup> while commercial system capacities are determined by a usage formula.<sup>395</sup>

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<sup>385</sup> COMAR 26.04.04.02(G); *also see* COMAR 26.04.04.01, *et seq.*

<sup>386</sup> *See* 26.04.01.01, *et seq.*

<sup>387</sup> COMAR 26.04.02.02(I).

<sup>388</sup> COMAR 26.04.02.02(J).

<sup>389</sup> COMAR 26.04.02.02(O)

<sup>390</sup> COMAR 26.04.02.04(C).

<sup>391</sup> COMAR 26.04.02.04(J).

<sup>392</sup> COMAR 26.04.02.05(B).

<sup>393</sup> COMAR 26.04.02.05(C).

<sup>394</sup> COMAR 26.04.02.05(E).

<sup>395</sup> COMAR 26.04.02.05(G).

<sup>396</sup> COMAR 26.04.02.05(I).

<sup>397</sup> COMAR 26.04.02.05(K).

<sup>398</sup> COMAR 26.04.02.05(O).

Minimum absorption areas,<sup>396</sup> deep trench system requirements,<sup>397</sup> percolation tests,<sup>398</sup> mound system requirements,<sup>399</sup> and similar requirements are also specified.<sup>400</sup>

Recently passed State law imposes additional requirements for on-site sewage systems in subdivisions, as they relate to 5-104 of the Land Use Article.<sup>401</sup> While there are exceptions for some subdivisions,<sup>402</sup> a local jurisdiction may not permit on-site sewage disposal systems for subdivisions unless 5-104 has been adopted by the local jurisdiction.<sup>403</sup> Additionally, residential subdivision plats may not be approved unless the area will be served by public sewer or if on-site sewer will be used in certain limited circumstances,<sup>404</sup> with a few exceptions.<sup>405</sup> Lastly, land platted for subdivision may not be sold or developed unless certain water and sewer information is provided to MDE,<sup>406</sup> and until any subsequent documentation or water and sewer requirements from the Department are met by the owner.<sup>407</sup> Other water-related restrictions are placed on minor subdivisions.<sup>408</sup>

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<sup>399</sup> COMAR 26.04.02.05(Q).

<sup>400</sup> *See generally* COMAR 26.04.02.05.

<sup>401</sup> Md. Code Ann., Envir. § 9-206; *see generally* Md. Code Ann. Land Use § 5-104; *Also see infra* Section III.B.3.h.

<sup>402</sup> Md. Code Ann., Envir. § 9-206(b)(2) & (c)(1).

<sup>403</sup> Md. Code Ann., Envir. § 9-206(b)(2) & (c)(1).

<sup>404</sup> § 9-206(g).

<sup>405</sup> § 9-206(h).

<sup>406</sup> § 9-206(j).

<sup>407</sup> Md. Code Ann., Envir. § 9-206(k).

<sup>408</sup> 9-206(h)

## 5. Nontidal wetlands permitting

Projects that impact any wetland require in advance a nontidal wetland permit, which have specific requirements before it may be issued.<sup>409</sup> While there are an extensive number of exemptions,<sup>410</sup> activities that require a nontidal wetland permit before commencing are:

1. removal or dredging of soil or other material;<sup>411</sup>
2. changing drainage, sedimentation, flooding and other characteristics;
3. disturbing water levels by drainage;
4. dumping or filling with material;
5. grading that would alter topography; or
6. destruction of plant life that would alter wetland character.<sup>412</sup>

Wetlands in the DCW typically occur near the confluence of small streams with DCL. Additionally, there are several areas in Garrett County listed as areas of “special State concern,”<sup>413</sup> which have more stringent environmental restrictions.<sup>414</sup> This includes “The Glades,” an important and unique wetland that is also the County’s largest, which is largely in the Cherry Creek watershed and contains naturally occurring peat bogs; and Hammel Glade, west of DCL.<sup>415</sup>

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<sup>409</sup> See COMAR 26.23.01.01, *et seq.*

<sup>410</sup> See COMAR 26.23.01.02; COMAR 26.23.01.01(b); COMAR 26.23.05.01(B); COMAR 26.23.05.02(B).

<sup>411</sup> If a waterway improvement district is desired for state supported dredging, as outlined in State law, a specific request must be submitted to DNR. See Md. Code Ann., Nat. Res. § 8-705; Md. Code Ann., Nat. Res. § 8-707(a)(3); and COMAR 08.04.11.01.

<sup>412</sup> COMAR 26.23.01.01(B)(74).

<sup>413</sup> See COMAR 26.23.06.01(K).

<sup>414</sup> See COMAR 26.23.06.03, *et. seq.*

<sup>415</sup> COMAR 26.23.06.01(K).

Applications have extensive requirements,<sup>416</sup> and a public notice and comment process is required for completed applications.<sup>417</sup> Specific criteria guides whether the MDE or authorized County authority<sup>418</sup> may issue the permit.<sup>419</sup>

## **6. Water Pollution Discharge Regime**

Pollution standards for all waters in the State are governed by the State’s Water Pollution Control subtitle.<sup>420</sup> Discharge of wastes or pollutants into State waters are often illegal without a permit.<sup>421</sup> If permitted, discharges require compliance with a National Pollution Discharge Elimination System permit (NPDES).<sup>422</sup> However, discharge of any kind of waste from a vessel into the waters of DCL is specifically prohibited by the State’s water pollution regulations.<sup>423</sup> There are a variety of “general” permits that each provide coverage for a broad array of activities,<sup>424</sup> including, for example, certain animal feeding operations (AFO) that require discharge permits.<sup>425</sup> A search for current and past NPDES permits can be accessed on the U.S. EPA website.<sup>426</sup>

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<sup>416</sup> COMAR 26.23.02.01.

<sup>417</sup> COMAR 26.23.02.02(G).

<sup>418</sup> COMAR 26.23.01.03.

<sup>419</sup> COMAR 26.23.02.04.

<sup>420</sup> *See* Md. Code Ann., Envir. § 9-101

<sup>421</sup> COMAR 26.08.03.01; *see also* Md. Code Ann., Envir §.Env Title, 9-3.

<sup>422</sup> COMAR 26.08.04.01; *see also* COMAR 26.08.03.01(C)(b) & (c).

<sup>423</sup> COMAR 26.08.03.01(A)(9).

<sup>424</sup> COMAR [26.08.04.09](#).

<sup>425</sup> COMAR 26.08.03.09.

<sup>426</sup> *See* <http://www.epa.gov/enviro/facts/pcs-icis/search.html>



The federal Clean Water Act is administered by the State, through its own water pollution laws and regulations which meet or exceed federal standards. While there are several components to the Clean Water Act statute, as embodied in State law, the primary requirements of the law consist of setting minimum water quality standards, and then ensuring those standards are met, often through NPDES permits.

First, the State must set water quality standards (WQS) for waterbodies according the particular functions they serve. If the WQS for a particular pollutant is not met in a specific waterbody, federal law requires that the amount of that pollutant be reduced until the waterbody is no longer “impaired” by the excessive levels of that pollutant.

That reduction is historically done through both the permitting process, in conjunction with assigning a Total Maximum Daily Load (TMDL) to that water. A TMDL<sup>427</sup> is essentially a “pollution diet” that determines how future sources of a pollutant will be allocated, in order to reduce the total amount of the pollutant in the impaired waterbody, by utilizing stringent permit limitations.

Under State law, as required by the federal Clean Water Act, DCL and its tributaries are designated as Use III-P waterbodies (“Non-tidal Cold Water” and “Public Water Supply”).<sup>428</sup> Under the water quality standards for those uses of water, there are three components of DCL and its watershed which are not in compliance, and are thus included on the “303(d) list,” named for the section of the Clean Water Act that requires the listing of such impaired waters.

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<sup>427</sup> See generally Maryland MDE TMDL FAQ. <http://www.mde.state.md.us/programs/Water/TMDL/Pages/Programs/WaterPrograms/tmdl/index.aspx>

<sup>428</sup> COMAR 26.08.02.02.

The first is DCL itself, as it has excessive levels of mercury in fish tissue, and has thus been assigned a TMDL.<sup>429</sup> As the TMDL report states, however, the primary source of mercury in DCL is from air-borne pollution from power plants,<sup>430</sup> rendering the reduction of mercury to permissible levels unlikely to be achieved at the State or local level.

Second, there is a biological impairment in DCL, primarily consisting of excessive nutrients (nitrogen and phosphorous) and bacteria.<sup>431</sup> MDE determined that the lake is not meeting the designated use for the “protection of aquatic life because of biological impairments.”<sup>432</sup>

The third State-identified impairment in the DCW is Cherry Creek, which has excessive levels of phosphorous, largely due to acid mine drainage.<sup>433</sup> However, the EPA recently cited Cherry Creek as a success story in the attempts to bring it into compliance.<sup>434</sup>

DCL used to be listed as impaired and out of compliance for phosphorous, based on eutrophication. While the lake was delisted in 2010,<sup>435</sup> the delisting report notes that there are still localized areas with eutrophication.<sup>436</sup> Low pH (likely caused by acid mine drainage) and

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<sup>429</sup> See [http://www.mde.state.md.us/programs/Water/TMDL/ApprovedFinalTMDLs/Pages/Programs/WaterPrograms/TMDL/approvedfinaltmdl/tmdl\\_deepcreeklake\\_hg\\_final.aspx](http://www.mde.state.md.us/programs/Water/TMDL/ApprovedFinalTMDLs/Pages/Programs/WaterPrograms/TMDL/approvedfinaltmdl/tmdl_deepcreeklake_hg_final.aspx)

<sup>430</sup> *Id.*

<sup>431</sup> MDE Impairment Listing: Watershed Report for Biological Impairment of the Deep Creek Lake Watershed [http://www.mde.state.md.us/programs/Water/TMDL/Documents/BSID\\_Reports/DeepCreek\\_BSID\\_Report\\_012412\\_revisedfinal.pdf](http://www.mde.state.md.us/programs/Water/TMDL/Documents/BSID_Reports/DeepCreek_BSID_Report_012412_revisedfinal.pdf).

<sup>432</sup> *Id.*

<sup>433</sup> See [http://www.mde.state.md.us/programs/Water/TMDL/ApprovedFinalTMDLs/Pages/Programs/WaterPrograms/TMDL/approvedfinaltmdl/tmdl\\_cherrycreek\\_final\\_ph.aspx](http://www.mde.state.md.us/programs/Water/TMDL/ApprovedFinalTMDLs/Pages/Programs/WaterPrograms/TMDL/approvedfinaltmdl/tmdl_cherrycreek_final_ph.aspx).

<sup>434</sup> See [http://water.epa.gov/polwaste/nps/success319/md\\_cherry.cfm](http://water.epa.gov/polwaste/nps/success319/md_cherry.cfm)

<sup>435</sup> See generally [http://www.mde.state.md.us/programs/Water/TMDL/ApprovedFinalTMDLs/Documents/www.mde.state.md.us/assets/document/WQA\\_Deep\\_Creek\\_Nut\\_07292011\\_final.pdf](http://www.mde.state.md.us/programs/Water/TMDL/ApprovedFinalTMDLs/Documents/www.mde.state.md.us/assets/document/WQA_Deep_Creek_Nut_07292011_final.pdf).

<sup>436</sup> *Id.* at 30.

stream morphology (the physical characteristics of the watershed geology) are listed as the likely causes.<sup>437</sup>

## BEACH WATER QUALITY

The MDE also regulates, by delegating responsibility to the Garrett County Health Department's Environmental Health Program, the health and usability of Maryland's beaches, which include DCL. Beach water quality is guided by the federal BEACH Act,<sup>438</sup> which, like the Clean Water Act, is another federal law implemented at the State level.

## 7. Marcellus Shale Drilling

Because the Marcellus shale formation underlies Garrett County, there is a pronounced interest in horizontal drilling to tap vast deposits of natural gas. This process involves hydraulic fracturing ("fracking"), which requires injection of large quantities of water and chemicals deep underground and the flowback of potentially harmful substances. Thus, the State is assessing the potential environmental costs in order to weigh them against the economic and energy resources gains to be gained, through the Governor's Marcellus Shale Safe-Drilling Initiative Advisory Commission.<sup>439</sup> No permits for Marcellus shale drilling will be issued until after the Commission's final report is released and assessed. The final report is due in August 2014.<sup>440</sup>

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<sup>437</sup> *Id.* at iv.

<sup>438</sup> Beaches Environmental Assessment and Coastal Health Act of 2000, Pub. L. No. 106-284, 114 Stat. 870 (2000).

<sup>439</sup> See generally <http://msa.maryland.gov/msa/mdmanual/26excom/html/23marcellus.html>

<sup>440</sup> *Id.*

## C. Agriculture Land

Garrett County comprises the Garrett Soil Conservation District,<sup>441</sup> whose supervisors may, through the regulation and rulemaking process, require:

1. specific standards of earthen-based engineering operations;
2. certain methods of cultivation; and
3. similar means for conserving soil resources and preventing erosion.<sup>442</sup>

### 1. Nutrient management plans

Many agricultural operations are required under soil conservation law to create nutrient management plans for their fertilizer use,<sup>443</sup> which take into account nitrogen and phosphorous levels in the soil and water.<sup>444</sup> A nutrient management plan is a method for ensuring fertilizers are not applied excessively or unnecessarily. This planning requirement does not apply to agricultural operations with less than \$2,500 in gross income or to livestock operations with less than eight animal units.<sup>445</sup> There are also educational requirements<sup>446</sup> and fertilizer application requirements<sup>447</sup> for many farming operations. Local government is not authorized to create laws or rules of any kind in regard to the application of fertilizers.<sup>448</sup>

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<sup>441</sup> Md. Code Ann., Agric. § 8-301

<sup>442</sup> § 8-307.

<sup>443</sup> § 8-801; *see also* COMAR 15.20.06.01, *et seq*;

<sup>444</sup> Md. Code Ann., Agric. § 8-802.

<sup>445</sup> § 8-803.1(b).

<sup>446</sup> § 8-803.3; *See also* COMAR 15.20.06.03.

<sup>447</sup> Md. Code Ann., Agric. § 8-803A.

<sup>448</sup> § 8-803.8.

## **2. Fertilizer Law**

Recently, Maryland agricultural law placed restrictions on how lawn fertilizer may be used and applied by lawn care professionals and homeowners.<sup>449</sup> Beginning in October of 2013, both lawn care professionals and homeowners will have to follow specific lawn fertilizer guidelines, including:

1. No application on impervious surfaces or frozen ground;
2. No applications within 15 feet of waterways; and no applications between December 1 (November 15 if a homeowner) and March 1; and
3. All fertilizer must be applied using University of Maryland recommendations.

## **III. County Ordinances and Regulations**

### **A. The Comprehensive Plan**

#### **1. Introduction to Local Land Use Planning and Regulation**

Because there is very little local land use authority or capacity residing in the federal government, and it is often impractical for states to oversee local land use decisions, local government is usually the source of the most impactful land use regulations. States typically delegate local planning and local regulation to counties and municipalities, and Maryland is no exception. Through a “comprehensive planning” process, designated local officials assess, in a public process, the long-term development prospects of a County or Municipality, taking into account the jurisdiction’s assets to be protected as well as potentially undesirable trends that should be avoided. Using that long-term assessment, which is embodied in the Comprehensive

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<sup>449</sup> See generally Md. Code Ann., Agric. § 8-801-8-803.9.

Plan, County and Town zoning ordinances are passed in order to enact that vision. County and town ordinances, then, are based on the vision and goals laid out in their respective Comprehensive Plan, and may not be contrary to the Plan.<sup>450</sup> With respect to the DCW, the Garrett County Comprehensive Plan is a very valuable tool for understanding the underlying County ordinances designed to support it.

Because the DCW does not drain into the Chesapeake Bay, it is not subject to the State's Chesapeake Bay Critical Area Protection Act.<sup>451</sup> However, because the Bay Act integrates much of the "best management practices" in regard to sediment, erosion, stormwater control, and nutrient runoff, anyone with an interest in long-term watershed planning in Maryland might wish to familiarize herself with the law's watershed-planning provisions.

## **2. The Garrett County Comprehensive Plan**

The Garrett County Comprehensive Plan, (Comp Plan),<sup>452</sup> last revised in 2008, is not itself law, but instead provides guidance for future development and a rationale for local ordinances. Thus it is an extremely useful document for understanding the larger trends that affect local regulation in Garrett County. Indeed, it refers to itself as the "policy guide" for Garrett County's growth and development, with a planning horizon of 2030, including a particular focus and entire chapter on the DCW.<sup>453</sup>

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<sup>450</sup> See Md. Code Ann., Land Use § 4-202.

<sup>451</sup> See generally The Critical Area Commission: <http://www.dnr.state.md.us/criticalarea>.

<sup>452</sup> See <http://garrettcountry.org/resources/planning-land-development/pdf/Comprehensive%20Planning/2008GarrettCountyAdoptedPlan-FULL.pdf>.

<sup>453</sup> *Id.*

By State law, the Comp Plan must address certain goals, including: concentrating development in certain areas, protecting sensitive areas, directing rural growth to existing population centers, and conserving resources.<sup>454</sup> The Maryland General Assembly recently enacted a Bill to change the cycle for review of Comprehensive Plans from every six years to ten years.<sup>455</sup>

***a. Land Use Categories***

Because of its unique and considerable natural resources, the DCW is the only watershed with zoning in Garrett County.<sup>456</sup> In order to better achieve watershed-wide planning and the ordinances used to achieve that planning, the zoned land is divided into 9 zoning districts, each of which has its own permitted and prohibited uses, structures, and associated regulations. In the DCW,<sup>457</sup> the primary categories are Rural Resource,<sup>458</sup> Agricultural Resource,<sup>459</sup> Lake Residential 1,<sup>460</sup> Lake Residential 2,<sup>461</sup> Town Residential,<sup>462</sup> Town Center,<sup>463</sup> General

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<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> *Id.* at Chapter 157.

<sup>457</sup> See Deep Creek Watershed Zoning Map at [http://garrettcountry.org/resources/planning-land-development/pdf/zoning/DCL\\_zoning\\_LU.pdf](http://garrettcountry.org/resources/planning-land-development/pdf/zoning/DCL_zoning_LU.pdf).

<sup>458</sup> See *supra*, note 452 at 3-12.

<sup>459</sup> See *supra*, note 452 at 3-13.

<sup>460</sup> See *supra*, note 452 at 3-16.

<sup>461</sup> *Id.*

<sup>462</sup> See *supra*, note 452 at 3-17.

<sup>463</sup> *Id.*

Commercial,<sup>464</sup> Commercial Resort 1,<sup>465</sup> and Commercial Resort 2.<sup>466</sup> Overlaid across many of these designated land use zones are also “Scenic Protection Areas.”<sup>467</sup> The DCL Recreation and Land Use Plan provides additional discussion of each of these land use zones.<sup>468</sup>

Each of these land use designations and their specific uses are discussed in the Comprehensive Plan. Based on that general designation, very specific allowed uses and prohibited uses are allocated to each land use in the subsequent County Zoning ordinance. (Note to reader: The Zoning Ordinance is frequently more detailed than the brief descriptions, below.)

#### *Rural Resource*

The zoning of Rural Resource (“RR”) districts aims to retain natural resources like timber for future use, while allowing for limited residential development.<sup>469</sup> These lands include DCL State Park, the Rock Lodge Trust property, and areas west of the dam.<sup>470</sup> Accordingly, in order to retain the natural resource value of the land, the Zoning Ordinance only allows subdivision with a minimum lot size of 3 acres (or of 1 acre in specific instances).<sup>471</sup>

#### *Agricultural Resource*

Agricultural Resource (“AR”) zoning districts are similar to RR in their natural resource protection goals, though in this case it is to protect agricultural land for future use, while also

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<sup>464</sup> *Id.*

<sup>465</sup> *See supra*, note 452 at 3-18.

<sup>466</sup> *Id.*

<sup>467</sup> *See supra*, note 452 at 4-23

<sup>468</sup> *See supra*, note 41 at 9-10.

<sup>469</sup> *See supra*, note 452 at 3-12, 3-14, and 4-15.

<sup>470</sup> *See supra*, note 452 at 4-15.

<sup>471</sup> *See* Garrett Code Article 3, § 157.023(B).



allowing for limited residential growth.<sup>472</sup> AR districts largely exist in the Cherry Creek and upper Glade Run watersheds, and in the southwestern portion of the watershed.<sup>473</sup> Thus, the Zoning Ordinance has the same relatively large minimum subdivision lot sizes as the Rural Resource district.<sup>474</sup>

#### *Lake Residential 1*

Lake Residential 1 (“LR1”) districts, the dominant land use zone around DCL itself, are intended to allow mixed use such as agriculture, recreational, and low-density housing with access to public sewer service.<sup>475</sup> The relatively low maximum residential density is envisioned in the Comp Plan as one dwelling unit per acre,<sup>476</sup> which is indeed the restriction in the subsequent Zoning Ordinance.<sup>477</sup> (Most of the surface of DCL is also zoned LR1.<sup>478</sup>)

#### *Lake Residential 2*

Lake Residential 2 (“LR2”) zones, like LR1, aim to allow mixed use such as agriculture, recreational, and low-density housing, but are areas that do not currently have access to public sewer service.<sup>479</sup> However, LR2 is even less dense than LR1, with one dwelling unit envisioned

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<sup>472</sup> See *supra*, note 452 at 3-12, 3-14, and 4-15.

<sup>473</sup> See *supra*, note 452 at 4-15.

<sup>474</sup> See § 157.023(A).

<sup>475</sup> See *supra*, note 452 at 3-16.

<sup>476</sup> *Id.*

<sup>477</sup> See Garrett Code, Article 3, § 157.023(C).

<sup>478</sup> See *supra*, note 452 at 4-15, fn. 1

<sup>479</sup> See *id.*

<sup>480</sup> See *supra*, note 452 at 3-17

per two acres.<sup>480</sup> The ordinance upholds that limit within areas not planned for public water or public sewer service.<sup>481</sup>

#### *Town Residential*

Town Residential (“TR”) zoning districts are intended to provide higher density development near town and village centers.<sup>482</sup> Accordingly, TR areas are oriented only on the peripheries of McHenry and Thayerville. TR residential densities are as high as 8 multi-family dwellings and about five single-family dwellings per acre, and minimum lot sizes are 10,000 square feet (and larger if served by on site sewer and water), and TR allows for mixed housing types.<sup>483</sup> The Zoning Ordinance sets the average residential density as 4 to 5 units per acre.<sup>484</sup>

#### *Town Center*

Town Center (“TC”) zones also allow for denser development: in addition to the higher density residential use found in TR areas, TC zones also allow for mixed uses like retail, service, and commercial.<sup>485</sup> The Ordinance accordingly provides for even denser residency than in TR districts, at 5 to 6 units per acre.<sup>486</sup>

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<sup>481</sup> See Garrett Code, Article 3, § 157.023(D); and see *infra* Section III.B.2.

<sup>482</sup> See *id.*

<sup>483</sup> *Id.*

<sup>484</sup> See Garrett Code Article 3, § 157.023(E).

<sup>485</sup> *Id.*

<sup>486</sup> See Garrett Code Article 3, § 157.023(F).

<sup>487</sup> *Id.*

### *General Commercial*

General Commercial (“GC”) allows for light industrial use, in addition to retail, service, and commercial development. As such, residential use is typically discouraged.<sup>487</sup> The two GC zones are along 119 in Thayerville.

### *Commercial Resorts, 1 & 2*

Lastly, Commercial Resort 1 (“CR1”) and Commercial Resort 2 (“CR2”) provide for specific commercial recreation uses like the Wisp Resort and the Garrett County Fairgrounds, and their associated commercial and residential uses. CR1 is aimed at visitor-oriented commercial development, and CR2 addresses low-density residential development as well as family-oriented land-based, commercial development.<sup>488</sup> Accordingly, the Zoning Ordinance allows no major residential development in CR1 districts, though it allows for a modest 1 unit per acre residential density in CR2 districts.<sup>489</sup>

## **B. County Ordinances**

### **1. Introduction**

Largely pursuant to the long-term planning goals of the Comprehensive Plan, the Garrett County Code (the “County Code”)<sup>490</sup> provides not only zoning regulations for the DCW, but extensive and specific regulatory guidance for a host of County-wide local land uses. Such wide-ranging regulations include how utility equipment like gas and power lines may be placed along

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<sup>488</sup> See *supra*, note 452 at 3-18.

<sup>489</sup> See 157.023(H).

<sup>490</sup> See Garrett County Code: [http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettco\\_md/garrettcounymarylandcodeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:garrettco\\_md](http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettco_md/garrettcounymarylandcodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:garrettco_md)

county roadways,<sup>491</sup> plumbing<sup>492</sup> and building codes,<sup>493</sup> and unsafe structure abatement.<sup>494</sup> And, of course, an entire chapter of the Comprehensive Plan is devoted to the extensive zoning regulations of the DCW.<sup>495</sup>

## **2. The Deep Creek Watershed Zoning Ordinance**

### *a. Introduction and Overview of Zoning Ordinance Contents*

Outside of the municipalities, the Deep Creek Watershed is the only area of Garrett County that is subject to comprehensive zoning ordinances. While the vast majority of the non-zoning related ordinances in the County Code apply uniformly county-wide, including in the DCW, the Deep Creek Watershed Zoning Ordinance applies only within that watershed.

The Zoning Ordinance is enforced through zoning permits. A zoning permit must be secured from the County Zoning Administrator for any structure or use of land, as well as for any change in use for any structure or land use.<sup>496</sup>

The Ordinance is comprised of several discrete Articles including the “General Provisions” Article containing much of the legalese that accompanies most ordinances,<sup>497</sup> as well as the all-important “Definitions.”<sup>498</sup>

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<sup>491</sup> See Chapter 54.

<sup>492</sup> See Chapter 150.01.

<sup>493</sup> See Chapter 150.02-.04.

<sup>494</sup> See Chapter 161.

<sup>495</sup> See Chapter 157.

<sup>496</sup> Article 10, § 157.146.

<sup>497</sup> Article 1, § 157.001-006.

<sup>498</sup> Article 2, § 157.007.

The “Zoning Districts and Use Regulations” Article is typically the most impactful part of a zoning ordinance, as it governs what uses are permitted or prohibited in any of the areas enumerated in the Comprehensive Plan (LR1, LR2, GC, etc.).<sup>499</sup>

The “Lot Area and Yard Regulations,” much like the county-wide Subdivision Ordinance, outline the various dimensions required of any given lot, as well as of the appurtenances thereto.<sup>500</sup>

The “General Regulations” Article, as the title suggests, regulates any of the various components of land use that aren’t captured in the other Articles, be it lighting requirements, traffic visibility at corners, commercial campground design, and so forth.<sup>501</sup>

The “Off-Road Parking and Loading” Article mandates how many parking spaces must be offered for each non-residential use of land,<sup>502</sup> while the “Sign Regulations” Article governs the size and other requirements for signs in the watershed.<sup>503</sup>

Uses that were “grandfathered in” upon passage of the Zoning Ordinance, but which would otherwise be disallowed (“nonconforming uses”), are governed by the “Nonconformities” Article.<sup>504</sup>

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<sup>499</sup> Article 3, § 157.036; *see* sections x and z.

<sup>500</sup> Article 5, § 157.040-053.

<sup>501</sup> Article 6, § 157.061-079.

<sup>502</sup> Article 7, § 157.090-093.

<sup>503</sup> Article 8, § 157.105-113.

<sup>504</sup> Article 9, § 157.125-131.

The DCW Zoning Ordinance specifically adopts the County-wide Sensitive Areas Ordinance to govern the use of steep slopes<sup>505</sup> and the development near stream buffers.<sup>506</sup>

The administrative requirements for zoning, including zoning permits and the powers of the Zoning Administrator, are covered in the “Administration” Article.<sup>507</sup> The appeals process for zoning decisions and the rules governing the Board of Appeals are outlined in the “Board of Appeals” Article.<sup>508</sup> Finally, the process for amending the Zoning Ordinance as well as for enforcing it and enacting penalties is covered in the “Amendments, Remedies, and Penalties” Article.<sup>509</sup>

***b. Zoning Districts and Use Regulations***

*Introduction*

The bulk of the straightforward and informative “Zoning Districts and Use Regulations” is comprised of a table that outlines whether a given land use is permitted or prohibited in each zoning district. Thus, no land or structure may be used except in a way permitted, as indicated in the “Table of Use Regulations.”<sup>510</sup> For example, while a “single family detached dwelling” is a “permitted” use in almost every zoning district (as indicated in the table by a “P,” which stands for “permitted by right”), it is not a permitted use in a General Commercial District or in a Commercial Resort 1 district (as indicated by an “N,” which stands for “not permitted”).<sup>511</sup>

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<sup>505</sup> Article 6, § 157.071.

<sup>506</sup> Article 6, § 157.072.

<sup>507</sup> Article 10, § 157.145-149.

<sup>508</sup> Article 11, § 157.160-173.

<sup>509</sup> Article 12, § 157.185-193.

<sup>510</sup> Article 3, § 157.022(A).

<sup>511</sup> Article 3, § 157.024(B)(1).

In addition to the binary “permitted by right” and “not permitted” categories of uses, there are also the categories of “permitted accessory uses” (indicated by an “A”) and “special exceptions” (indicated by an “SE”).

“Special exception” (SE) uses are uses that have been approved on a case-by-case basis by the Board of Zoning Appeals,<sup>512</sup> and which are subject to ongoing conditions and requirements.<sup>513</sup> For example, while a mobile home park is a permitted use (P) in a General Commercial district and a prohibited use (N) in the Commercial Resort 1 district, it may be allowed as a special exception (SE) use in all other districts.<sup>514</sup> Therefore, to operate a mobile home park in any district other than in a GC or CR1 district, one would need a special exception from the County.

A “permitted accessory use” is a use of land or property that is conducted on the same lot as the primary use, to which the accessory use is related and incidental to, and often found in connection with, that primary use.<sup>515</sup> Thus, for example, the “A” designation might apply to things like “on-premises advertising signs”<sup>516</sup> or to “agricultural wind energy devices,” which are only allowed as accessory uses in zoning districts that also allow agricultural use, which is the “primary use.”<sup>517</sup> “Accessory uses” are less common than “special exceptions.”

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<sup>512</sup> Such approval must have been granted pursuant to Article 6, § 157.160 *et seq.*

<sup>513</sup> Article 3, § 157.024.

<sup>514</sup> Article 3, § 157.024(B)(8).

<sup>515</sup> See Article 2(B): definition of “Accessory Use.”

<sup>516</sup> Article 3, § 157.024(E)(22)(b).

<sup>517</sup> § 157.024(G)(4)(i).

### *The Table of Use Regulations*

It would be impractical to summarize the already compact table that sets forth the various uses that are permitted, not permitted, or otherwise.<sup>518</sup> The table is divided into several categories of uses:

1. natural resources and agricultural uses;<sup>519</sup>
2. residential uses;<sup>520</sup>
3. public or private recreational uses;<sup>521</sup>
4. institutional, educational, and utility uses;<sup>522</sup>
5. retail and commercial services uses;<sup>523</sup>
6. manufacturing and industrial uses;<sup>524</sup> and
7. miscellaneous and accessory uses.<sup>525</sup>

The table is relatively simple to use and covers well over 100 potential uses of land and structures. To provide but one example of the information conveyed by the Table of Use Regulations, the “conversion of a dwelling or other building into 3 or more dwelling units” is a permitted by right use in the TR, TC, CR1, and CR2 zoning districts, is not permitted in the GC district, and may be permitted by special exception in the RR, AR, LR1, and LR2 districts.<sup>526</sup> A

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<sup>518</sup> See § 157.024.

<sup>519</sup> § 157.024(A).

<sup>520</sup> § 157.024(B).

<sup>521</sup> § 157.024(C).

<sup>522</sup> § 157.024(D).

<sup>523</sup> § 157.024(E).

<sup>524</sup> § 157.024(F).

<sup>525</sup> § 157.024(G).

<sup>526</sup> § 157.024(B)(11).



variety of other uses, and in which districts they may or may not be allowed, can be found in the Table.

***c. The Scenic Protection Overlay District***

Just as the unique qualities and value of the DCW guides the larger Zoning Ordinance, preserving the scenic value of the lake and its surrounding mountains is the purpose of the “Scenic Protection Overlay District.”<sup>527</sup> An “overlay” district can overlap several or even all other zoning districts, if the “scenic” land in question crosses the boundaries of other districts. As such, an overlay district’s requirements “supplement the requirements of the underlying zoning district[s] and apply to all land delineated as a scenic protection area.”<sup>528</sup> As the name implies, the scenic protection district seeks to “preserve views of the [scenery from the lake and shoreline of the surrounding mountains] and thereby protect the natural beauty of the area.”<sup>529</sup>

The overlay district accomplishes this scenic protection by applying to any land where any part of a structure could be silhouetted against the sky, when viewed from the lake or on the shoreline.<sup>530</sup> Thus, any development that is not visible from the lake or the shoreline is exempt from the requirements of the overlay district.<sup>531</sup>

The scenic protection district minimizes the effect of the visual impact of structures primarily through the requirement of tree retention and planting.<sup>532</sup> Structures subject to the

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<sup>527</sup> See Article 4, § 157.036.

<sup>528</sup> § 157.036(B)(1).

<sup>529</sup> § 157.036(A).

<sup>530</sup> § 157.036(B)(2).

<sup>531</sup> § 157.036(B)(3).

<sup>532</sup> § 157.036(C).

ordinance are required to have trees around them, to blend the new structure into the surrounding landscape (from the perspective of the lake and shoreline), thus retaining the lake’s “forested crests.”<sup>533</sup>

A vegetation plan is required for any zoning permit or subdivision approval in the overlay district, which shows the location, size, and species of trees to be retained, removed, and planted, as well as any proposed grading.<sup>534</sup> Minimum tree planting standards are applied if trees are removed, requiring at least one large deciduous canopy tree for every 15 feet of the building’s non-lake facing façades.<sup>535</sup> Planted trees must be native, and at least 8 feet tall at the time of planting.<sup>536</sup> A tree protection easement must also be granted to the County if tree planting or retention is required, thus, in the event trees are cut or die at any point in the future, the County is legally entitled to replanting.<sup>537</sup>

***d. Lot Area and Yard Regulations***

Similar to the subdivision regulations for the rest of Garrett County, the Lot Area and Yard Regulations Article<sup>538</sup> sets the overall lot size requirements for each zoning district, depending on the particular land use, as well as other spatial requirements, such as minimum setbacks and height restrictions.

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<sup>533</sup> § 157.036(C)(1).

<sup>534</sup> § 157.036(C)(2).

<sup>535</sup> § 157.036(C)(4).

<sup>536</sup> § 157.036(C)(6)-(7).

<sup>537</sup> § 157.036(C)(5).

<sup>538</sup> Article 5, § 157.040 *et seq.*

The lot size requirements are set forth much like the Table of Use Restrictions: minimum lot areas, minimum lot areas based on per dwelling unit (if applicable), minimum lot width, and minimum required yard sizes are specified in tables.<sup>539</sup> The tables are divided according to uses: residential, recreational, institutional and educational, retail and commercial service, manufacturing, and miscellaneous and other uses.<sup>540</sup>

Each table shows a spectrum of size requirements, depending upon:

- 1) the category of use (residential, recreational, etc.);
- 2) the more specific use within that category (single family home, miniature golf course, etc.); and
- 3) the particular zoning district (LR1, LR2, etc.) in which specific use takes place.<sup>541</sup>

In setting forth this wide variety of minimum lot sizes across several uses, the Zoning Ordinance attempts to match the particular uses and burdens of each land use with the priorities of the Comprehensive Plan and with other land use planning goals.

#### *Exceptions*

As is common in land use planning and with regulations generally, there are a host of exceptions to the lot sizes required by the “Table of Dimensional Requirements.”<sup>542</sup> Non-conforming lots that have been “grandfathered in” because they predated the County Ordinance may have smaller lot sizes than otherwise required;<sup>543</sup> however, they must still comply with

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<sup>539</sup> 157.041(B)-(G).

<sup>540</sup> *Id.*

<sup>541</sup> *See generally* Article 5, § 157.041(B)-(G).

<sup>542</sup> *See* § 157.042-045.

<sup>543</sup> § 157.042.

Health Department regulations and be served by centralized water and sewer systems.<sup>544</sup> If such non-conforming lots are not served by central water and sewer systems, then the lot size must be sufficient to meet state and local sewage disposal regulations.<sup>545</sup>

Lots adjoining public recreation land (including DCL) may have a width no less than 2/3 of the minimum width otherwise required for the same lot.

In determining the width of a front yard for any building, the required width may be reduced by the average depth of front yards existing on the adjoining lots provided; however, this exception is only available if there is a building on each of the adjoining lots and the existing buildings lie within 100 feet of the proposed new building and lie nearer the road line than the required front yard depth specified in the “Table of Dimensional Requirements.”<sup>546</sup> The same exception may be applied to rear lots. However, in no case may a structure be located closer than 5 feet from the front or rear property line.<sup>547</sup> Any yard adjoining a non-alley public road is deemed a front yard.<sup>548</sup>

The “Table of Dimensional Requirements” does not apply to other housing features, including:

1. Fences or any wall less than 6 feet above the natural grade;

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<sup>544</sup> *Id.*; see § 157.040(B).

<sup>545</sup> *Id.*

<sup>546</sup> § 157.044.

<sup>547</sup> *Id.*

<sup>548</sup> § 157.047.

2. Raised terraces, decks, porches, and the like that are no higher than 3 feet above the building's ground floor level, so long as the feature is no closer than 5 feet from the property line;
3. Steps and patios;
4. Projections such as bay windows, chimneys, and entrances less than 10 feet in length may extend into required yards up to four feet; and
5. Bear-proof containers that are at least 5 feet from side-lot lines.<sup>549</sup>

In the TC zoning district, dwelling units incorporated into a permitted principle non-residential use, on a lakefront lot, may have up to 3 accessory dwelling units without additional land area. However, the floor area of the additional units is subject to maximum floor area restrictions.<sup>550</sup>

#### *Height regulations*

No principle building or structure may exceed 35 feet or 3 stories in height. Special exceptions to this restriction may be granted to multi-family dwellings in the TC and CR2 zoning districts, and to hotels under 60 feet and 6 stories high in the TC, CR1, and CR2 zoning districts.<sup>551</sup> Height restrictions, however, do not apply to agricultural buildings, churches, chimneys, utility poles and towers, air conditioning equipment atop buildings, or similar utility-like equipment.<sup>552</sup>

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<sup>549</sup> § 157.045.

<sup>550</sup> § 157.050.

<sup>551</sup> § 157.048(A).

<sup>552</sup> § 157.048(C).

The height restrictions for domestic or agricultural wind energy devices are 50 feet for domestic wind turbines and 100 for agricultural turbines.<sup>553</sup>

Accessory structures may not exceed 20 feet in height or have a roof higher than 32 feet above the lowest level of ground abutting the structure.<sup>554</sup>

*Additional Setback Requirements*

Accessory structures (subordinate structures like a garage, greenhouse, barn, or playhouse<sup>555</sup>) that are separated from any other structure by at least 5 feet may occupy required rear and side yards, but may not be closer than 5 feet to the property line;<sup>556</sup> however, the same such accessory structures in lake front lots in the LR1 district must be at least 40 feet from the rear property line and 25 feet from the front property line.<sup>557</sup> In any lake front lot adjoining property bought from the State of Maryland, accessory structures of less than 120 square feet may not be closer than 5 feet to the State's land, and such structures also require a DNR permit.<sup>558</sup>

Marina retail boat showrooms have different minimum yard requirements specified in the "Table of Dimensional Requirements" for marinas: they must be setback at least 20 feet from the front line, 15 from the sides, and 25 from the rear.<sup>559</sup>

Domestic and agricultural wind devices must be:

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<sup>553</sup> § 157.048(D).

<sup>554</sup> § 157.048(B).

<sup>555</sup> Article 2, § 157.007(B).

<sup>556</sup> Article 5, § 157.046(A).

<sup>557</sup> § 157.046(B)(1).

<sup>558</sup> § 157.046(B)(2); *see* special permit

<sup>559</sup> § 157.050.

1. at least 1000 feet away from schools and sites on the National Register of Historic Places;
2. 200 (domestic) or 500 feet (agricultural) from other residential structures;
3. 100 (domestic) or 200 feet (agricultural) from any non-residential structure on another lot; and
4. at least 2 times the height of the device from any parcel boundary.

*Subdivisions in AR and RR Zoning Districts*

Because Agricultural Resource and Rural Resource zoning districts seek to protect the undeveloped character of those areas,<sup>560</sup> they have their own subdivision requirements.<sup>561</sup> Most lots have a 3 acre minimum size requirement and a 3 acre minimum average lot area per dwelling unit requirement, and a minimum lot width of 200 feet.<sup>562</sup>

However, there are exceptions for creating smaller lot sizes if:

1. the lot is being subdivided to transfer to a child or grandchild;<sup>563</sup>
2. the original lot is 20 acres or less and meets additional requirements;<sup>564</sup> or
3. the subdivision is done as a cluster subdivision and meets additional standards.<sup>565</sup>

If cluster subdivisions are undertaken in the RR or AR districts, there are increasing levels of incentives for creating open space.<sup>566</sup>

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<sup>560</sup> See *supra*, note 452 at 3-12, 3-14, and 4-15.

<sup>561</sup> Article 3, § 157.053.

<sup>562</sup> § 157.053(A).

<sup>563</sup> § 157.053(B)(1).

<sup>564</sup> § 157.053(B)(2).

<sup>565</sup> § 157.053(C); see *supra*, page 72, *Single Family Cluster Option*; also see generally *infra* Section III.B.3.

<sup>566</sup> See § 157.053(D)-(F).

*e. General Regulations*

The “General Regulations” Article<sup>567</sup> regulates much of the non-residential uses of land in the DCW, as well as a few more innovative forms of subdivision development.<sup>568</sup>

*Erosion Control*

If a grading permit is required from the County under The Sediment and Erosion Control Ordinance,<sup>569</sup> a zoning permit will be withheld until evidence of compliance with the grading permit is given. A grading permit is required in the DCW for:

1. any introduction of sediment into any waterway or drainageway;
2. the movement of more than 100 yards of earth: or
3. the disturbance of more than 5,000 square feet of surface area.<sup>570</sup>

*Special Setbacks for General Regulation Uses*

Any land use or building subject to regulation under the general regulation section<sup>571</sup> must be setback at least 200 feet from any subdivision. The land use or building must also be setback 200 feet from any lot with a residence, school, church, or human care institution, (unless it is on the same lot).<sup>572</sup>

*General Performance Standards*

No land use may cause a nuisance. Generally speaking, a nuisance is excessive, dangerous, or objectionable results of land use that can be felt across property lines.<sup>573</sup> In pursuit

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<sup>567</sup> Article 6, § 157.061-079.

<sup>568</sup> See, e.g., § 157.067 and 157.073.

<sup>569</sup> See Chapter 154, §154.01; see *infra* section III.B.7.

<sup>570</sup> § 157.061.

<sup>571</sup> § 157.061-079

<sup>572</sup> § 157.062.

<sup>573</sup> § 157.063.



of this minimum living standard of preventing nuisance, the Zoning Administrator is empowered to ensure that zoning applicants show in advance that the proposed land use will not constitute a nuisance.<sup>574</sup> The Zoning Ordinance also requires compliance with State standards for the regulation of noise and vibration,<sup>575</sup> air quality,<sup>576</sup> fire and explosion hazards,<sup>577</sup> water quality,<sup>578</sup> water and sewer service, and stormwater and sediment control.<sup>579</sup> *(NOTE: The State has not delegated authority for the County to regulate most environmental concerns. The County, however, requires, in the context of land use, that the applicant's "comply" with State standards.)*

#### *Extractive Industry Regulation*

The DCW Zoning Ordinance requires compliance with State standards for extractive uses.<sup>580</sup> However, the County also creates its own performance standards,<sup>581</sup> which apply in the event they are more stringent than State requirements.<sup>582</sup> The County's performance standards include setback requirements, topsoil requirements, slope and regrading requirements, and

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<sup>574</sup> § 157.063(A).

<sup>575</sup> § 157.063(C).

<sup>576</sup> § 157.063(D).

<sup>577</sup> § 157.063(F).

<sup>578</sup> § 157.063(G).

<sup>579</sup> § 157.063(E).

<sup>580</sup> § 157.064(A).

<sup>581</sup> § 157.064(C).

<sup>582</sup> § 157.064(A).

planting and revegetation requirements.<sup>583</sup> Zoning applications for extractive uses also have additional procedural and plan submission requirements.<sup>584</sup>

*Traffic Visibility Requirements at Corners*

Lot owners who abut the intersection of two roads must maintain a cleared triangular area on the corner that provides a safe level of visibility for road-users.<sup>585</sup> The triangle must be free of any visual obstruction between 2 and 7 feet high, and be formed by drawing a straight line from 25 feet from the corner on the edge of one road to 25 feet on the edge of the other road.<sup>586</sup>

*Mobile Home Park Standards*

Permitted mobile home parks have the following standards:<sup>587</sup>

1. each mobile home must be on at least a 5,400 square foot lot;
2. the maximum number of mobile homes is limited according to total available space;
3. the overall density may never exceed 5 mobile homes per acre;
4. mobile homes must:
  - a. be at least 100 feet away from roads and lot lines;
  - b. be at least 25 feet from adjoining mobile home park roads, parking areas, and common areas;
  - c. be 20 feet from each other;
  - d. be on concrete pads that are at least 50 by 25 feet, or be made stable by another approved support or anchor method;

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<sup>583</sup> § 157.064(C).

<sup>584</sup> § 157.064(B).

<sup>585</sup> § 157.065.

<sup>586</sup> *Id.*

<sup>587</sup> § 157.066.

- e. meet specific road standards and be paved according to County specifications;
- f. maintain a buffer strip of evergreen trees and shrubs 10 feet wide along all boundaries;
- g. provide a minimum of 10% usable open space; and
- h. have safe and all-season pedestrian walkways.

*Planned Residential Development*

An alternative to traditional subdivision development, that seeks to preserve environmental features and provide open space, is planned residential development (PRD).<sup>588</sup> Subject to many restrictions<sup>589</sup> and conditions,<sup>590</sup> PRDs may provide a flexible method of addressing many of the zoning restrictions imposed on subdivision and residential development found elsewhere in the Ordinance, including minimum lot sizes<sup>591</sup> and specified road designs.<sup>592</sup>

In exchange for this relative flexibility, common open space must be provided and original natural features must be maintained as much as possible.<sup>593</sup> PRDs, due to their non-conventional nature, are subject to their own rigorous approval and oversight procedures.<sup>594</sup>

*Single Family Cluster Option*

While the DCW Zoning Ordinance largely supplants the County-wide “Subdivision Design Requirements” Article,<sup>595</sup> the watershed ordinance does adopt the County standards for

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<sup>588</sup> See generally Article 6, § 157.067.

<sup>589</sup> See, e.g. § 157.067(B).

<sup>590</sup> See, e.g., § 157.067(C) and (L).

<sup>591</sup> § 157.067(F).

<sup>592</sup> § 157.067(H).

<sup>593</sup> § 157.067(C).

<sup>594</sup> § 157.067(M)(1)-(10).

<sup>595</sup> Chapter 159, Article 3, § 159.025(B); see generally Article 3.

the “single family cluster” option.<sup>596</sup> Similar in intent to a PRD, the cluster option reduces the minimum residential lot size requirements, in exchange for less environmentally and economically consumptive forms of development.<sup>597</sup>

Cluster developments in the DCW must meet size restrictions and open space preservation requirements, according to a table provided in the ordinance.<sup>598</sup> The cluster development must also serve a demonstrable valid “public purpose,” such as permanent preservation of valuable open space.<sup>599</sup> The open space must be able to be used for prescribed purposes and meet specific design standards.<sup>600</sup> The DCL ordinance also requires specific administrative procedures to obtain approval of a cluster development.<sup>601</sup>

#### *Commercial Campgrounds*

Commercial campgrounds of any kind must operate solely for transient or vacationing customers.<sup>602</sup> As such, campsites, which include RV parking spaces, may only be rented by the day or week, and no one person may remain in one for more than 60 days in any 6 month period.<sup>603</sup>

Campsite design standards are as follows:

1. the minimum width of RV campsites is 35 feet;

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<sup>596</sup> Article 6, § 157.073(B)(1); *see generally* 159.030.

<sup>597</sup> *See* § 159.030(A)(1).

<sup>598</sup> § 157.073(C).

<sup>599</sup> § 159.030(C).

<sup>600</sup> § 159.030(E).

<sup>601</sup> § 159.073(B)(2)-(4).

<sup>602</sup> § 157.068(A).

<sup>603</sup> § 157.068(B)(8).

2. the average campsite density may not exceed 10 per acre, with a maximum density of 15 for any one acre;
3. campsites must be 75 feet from any road right-of-way that abuts the campground and 100 feet from any other boundary line;
4. there must be 25 feet between every campsite and any road, common parking area or other common area within the campground;
5. road design must minimize congestion and hazards at entrances and exits; and
6. no campsite may have direct vehicular access onto a public road.

#### *Commercial Resorts*

Commercial resort facilities, like mobile home parks and campgrounds, have their own setback, minimum size requirements, and similar restrictions. Resort developments must meet the following requirements:<sup>604</sup>

1. resort sites must be at least 20 acres, with direct vehicular access to a state or county highway;
2. no building may be erected within 100 feet of any boundary line;
3. the resort must have an office and lobby;
4. the total ground floor area may not cover more than 35% of the resort site, and no eating area may cover more than 10% of the site;
5. there may be no more than one sleeping space for every 2,000 square feet of the site, and each sleeping area may not be less than 250 square feet, including bathroom and closet space;

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<sup>604</sup> § 157.069(A)-(B).

6. distances between buildings may not be less than 25 feet, or 15 feet if there is no driveway;
7. there must be at least one parking space per sleeping area that is no more than 300 feet away, per sleeping area;
8. there must be one parking space for one for every 100 square feet of eating area space and one for every 1.5 employees at peak periods; and
9. off-road parking areas must be paved and at least 50 feet away from property lines, and at least 30 feet away from sleeping areas if they serve an eating area.

*Development with Access to DCL and other Public Lands*

Residential property with either a “common use area” adjoining DCL or other public land, or with the right to use a point-of-entry to such land must comply with additional zoning requirements.<sup>605</sup> These regulations do not supplant DNR requirements, including buffer strip permits.<sup>606</sup> Every such development must have a “common use area” bounded by a right-of-way line or by a property line of the public land (the “common property line”).<sup>607</sup> That common use area must also be bounded by a right-of-way or property line generally parallel to and at least 25 feet away from the common property line.<sup>608</sup> Any access to the nearest road must be screened by approved materials, such as vegetation.<sup>609</sup>

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<sup>605</sup> § 157.070.

<sup>606</sup> § 157.070(E).

<sup>607</sup> § 157.070(A).

<sup>608</sup> *Id.*

<sup>609</sup> *Id.*

In the LR1 or LR2 zoning districts, the length of the common property line must be at least:

1. 100 feet if only one lot or dwelling may use the common use area;
2. 200 feet if there are 8 or fewer lots or dwellings that may use the common area; or
3. 300 feet if there are 20 or fewer lots or dwellings that may use the common area.

The common property line must be increased by 15 feet for every lot or dwelling over 20.<sup>610</sup>

In the TR and TC zoning districts, the common property line length must be at least 75 feet for 3 or fewer lots or dwelling units, or at least 150 feet for ten or fewer. The line must increase by 10 feet for every dwelling or lot above 10.<sup>611</sup>

#### *Office and Other Trailers*

Office trailers and other similar types of trailers may only be used for construction or for temporary real estate office purposes for the sale of a property. They may never be used housing units.<sup>612</sup>

#### *Group Homes*

Group homes, defined generally as dwellings for the purpose of providing special care,<sup>613</sup> may only house a maximum of 8 unrelated persons for whom care is being provided,<sup>614</sup> and a maximum of 3 caregivers may work there who do not live there.<sup>615</sup> At least one off-street parking

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<sup>610</sup> § 157.070(B).

<sup>611</sup> § 157.070(C).

<sup>612</sup> § 157.074.

<sup>613</sup> See Article 2, § 157.007(B), definition of “group home.”

<sup>614</sup> § 157.075(C).

<sup>615</sup> § 157.075(G).

space must be provided for each employee during peak periods.<sup>616</sup>No sign may identify the facility,<sup>617</sup> and the home must have a similar appearance to surrounding dwellings if in a residential zoning district.<sup>618</sup>

*Outdoor Lighting of Commercial or Industrial Uses*

Outdoor lighting of industrial and commercial sites must be diffused by a cover to eliminate direct visibility of the light from public roads or dwellings. Light pollution affecting other properties must be prevented by directing, shielding, and containing the light on the lot, and light may not shine into the eyes of motorists.<sup>619</sup>

*Design Standards in TC, TR, and GC Zoning Districts*

In order to maintain the visual quality in town center, town residential, and general commercial districts for the overall benefit of the entire area, any new non-residential buildings or sites in those zones must adhere to general design standards (which are not, however, intended to dictate any particular style, design, or material).<sup>620</sup> Buildings must be of high quality material that is compatible with the materials used in the surrounding architecture, with no more than 60% of any building façade comprised of metal siding, if visible from a public road.<sup>621</sup> If any sides of a building are visible from a road or public area, they must be built of the same quality, material, and style as the front of the building.<sup>622</sup> Roofs must resemble those in the area as much

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<sup>616</sup> § 157.075(D).

<sup>617</sup> § 157.075(I).

<sup>618</sup> § 157.075(H).

<sup>619</sup> § 157.076.

<sup>620</sup> § 157.078(A).

<sup>621</sup> § 157.078(C)(1).

<sup>622</sup> § 157.078(C)(2).



as possible, and flat roofs are generally not permitted.<sup>623</sup> Businesses on lakefront lots must maintain, if feasible, pedestrian access to the buffer strip and walkways or seating areas with views of the lake and adjacent to the buffer strip.<sup>624</sup> Commercial uses must be designed to provide safe and convenient pedestrian access between parking, sidewalks, and other non-residential buildings.<sup>625</sup>

#### *Transient Vacation Rental Units*

Vacation rental units in the Deep Creek watershed must also meet several requirements.<sup>626</sup> One off-street parking space must be provided for each bedroom, or for every 1.5 bedrooms if part of a larger complex that already has at least 20 parking spaces.<sup>627</sup> A bear-proof trash container must be provided, and be at least 5 feet from side lot lines if in a front or side yard,<sup>628</sup> and weekly trash collection must be provided.<sup>629</sup> All living facilities must be located in the primary structure, with accessory buildings limited to storage, game room, or similar secondary uses.<sup>630</sup> For a proposed large unit of 6 to 8 bedrooms, a relevant professional must first evaluate such unit's overall effect on and trend in the proposed neighborhood.<sup>631</sup>

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<sup>623</sup> § 157.078(C)(4).

<sup>624</sup> § 157.078(D).

<sup>625</sup> § 157.078(E).

<sup>626</sup> § 157.078.

<sup>627</sup> § 157.078(B).

<sup>628</sup> § 157.078(C).

<sup>629</sup> § 157.078(D).

<sup>630</sup> § 157.079(F).

<sup>631</sup> See Article 6, § 157.079(G).

### *Required Off-Road Parking Spaces*

Many building or land uses are required to have a certain number of off-road parking spaces.<sup>632</sup> All requirements are specified in an easy to use table, according to land use category.<sup>633</sup>

All spaces must be within 400 feet of the associated use.<sup>634</sup> Provisions exist where the use of parking spaces is shared across multiple uses, subject to the condition that such use does not significantly overlap and, thus, compete for the shared spaces.<sup>635</sup>

Parking lots and spaces must meet minimum dimension, design, and safety standards.<sup>636</sup> Permitted boat launch areas must provide a minimum of 20 spaces for vehicles with trailers attached.<sup>637</sup>

### *Loading Areas*

Any permitted use requiring truck loading and unloading space must provide sufficient area to ensure that no loading vehicle stands in or projects into any public road (during normal operations).<sup>638</sup>

### *Sign Regulations*

Signs are extensively regulated in the DCW.<sup>639</sup> Except for on-premises signs smaller than 2 square feet, temporary signs smaller than 6 feet, and government signs, most signs require a

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<sup>632</sup> Article 7, § 157.090.

<sup>633</sup> § 157.090(A)-(F).

<sup>634</sup> § 157.090(G).

<sup>635</sup> § 157.090(E).

<sup>636</sup> § 157.092.

<sup>637</sup> § 157.092(I).

<sup>638</sup> § 157.093(A).

<sup>639</sup> Article 8, § 157.105-113.

permit.<sup>640</sup> If attached to a building, no sign may exceed 3 feet above the roof or project out more than 14 inches.<sup>641</sup> If not attached to a building, a sign may not exceed 20 feet above the ground, though special exceptions may be granted, subject to certain restrictions.<sup>642</sup> Lighting of signs may not create light pollution onto a public road or residential area, and no flashing or rotating illumination is allowed.<sup>643</sup>

Signs larger than 18 square feet must be set back at least 10 feet from road rights-of-way if less than 10 feet in height, or have a 20 foot setback if higher than 10 feet; however, these setbacks do not apply to subdivision signs on private roads, or to on-premises signs in the TC and GC zones along state highways.<sup>644</sup> Special provisions apply to LED, LCD, and scrolling message signs.<sup>645</sup>

Signs permitted as accessory uses in the “Table of Use Regulations”<sup>646</sup> are required to be located on the same lot as the permitted use.<sup>647</sup> Signs may also be subject to restrictions depending upon the permitted use and the nature of the sign.<sup>648</sup>

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<sup>640</sup> § 157.107(A).

<sup>641</sup> § 157.109(A).

<sup>642</sup> § 157.109(B).

<sup>643</sup> § 157.109(D).

<sup>644</sup> § 157.109(E).

<sup>645</sup> § 157.109(F).

<sup>646</sup> Article 3, § 157.024; *see, e.g.*, 157.024(E)(22)(a).

<sup>647</sup> § 157.112(A).

<sup>648</sup> § 157.112(B)(1)-(7).

<sup>649</sup> § 157.024.

“Off-premises” signs, which direct a person to a property other than that on which the sign is placed, if permitted by the “Table of Use Regulations,”<sup>649</sup> have restrictions, depending on whether they are directional signs,<sup>650</sup> advertising signs,<sup>651</sup> or temporary signs.<sup>652</sup>

#### *Nonconforming Uses*

Article 9 of the DCW Zoning Ordinance addresses lots, structures, and uses that existed prior to the adoption of the Ordinance. The provisions of Article 9 regulate how nonconforming uses, lots, and structures are to be determined, how or if they may be extended or enlarged, how and if they may be restored when damaged, and determines how or if they may be changed or adjusted.

### **3. Subdivision Regulation**

The approval, siting, and design standards of County subdivisions is extensively regulated to ensure their “orderly and efficient integration” and to meet a host of other public welfare and public planning goals.<sup>653</sup> Indeed, more than 40 percent of the subdivisions built in Garrett County between 1986 and 1996 were in the DCL area.<sup>654</sup> The subdivision regulations apply to all County subdivisions, and to the roads and sewer and water mains associated with

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<sup>650</sup> § 157.113(B).

<sup>651</sup> § 157.113(C).

<sup>652</sup> § 157.113(D).

<sup>653</sup> See § 159.002, “Purposes.”

<sup>654</sup> See <http://www.dnr.state.md.us/publiclands/dcreport.asp#jaa>

<sup>655</sup> § 159.003 (A) & (B).

them.<sup>655</sup> The “Subdivision Design” standards do not apply in the DCL watershed, which has its own subdivision design standards.<sup>656</sup>

Recent legislation, entitled The Sustainable Growth and Agricultural Preservation Act of 2012, has imposed a dramatic impact on local subdivision regulations by severely limiting the number of new lots that may be developed with septic systems on parcels of land that are primarily devoted to agriculture or forest land cover. The new State law limits development to a maximum of seven new lots utilizing septic systems as a means of sewage disposal on all parcels located in TIER 4 areas as shown on the Tier Mapping adopted by the Board of County Commissioners on December 4, 2012. (See <http://garrettcounty.org/planning-land-development/comprehensive-planning> )

***a. Introduction***

The County Subdivision Ordinance provides for a broad category of requirements that apply in the Deep Creek watershed. The multi-stage plat submission process has a variety of requirements.<sup>657</sup> Minor subdivisions and lot line adjustments are afforded an Article,<sup>658</sup> as are plat recording requirements<sup>659</sup> and the infrastructure funding and development guarantees required of subdivision developers.<sup>660</sup> Design standards for roads, water supply, sidewalks, road

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<sup>656</sup> See generally *supra* § III, B, 3

<sup>657</sup> Chapter 159, Articles 4-6.

<sup>658</sup> Chapter 159, Article 7.

<sup>659</sup> Chapter 159, Article 9.

<sup>660</sup> Chapter 159, Article 8.

signs,<sup>661</sup> mobile homes and mobile home parks are subject to specific regulations.<sup>662</sup> There are exemptions to the requirements of the Subdivision Ordinance relating to large lots not intended for more than one dwelling, merged lots that will never be resold as individual lots, and lots with no buildings.<sup>663</sup>

***b. Major and Minor Subdivisions***

The regulations often distinguish between minor and major subdivisions. Minor subdivisions are generally lot line adjustments or subdivisions of no more than 5 new residential lots that do not require an extended or new road.<sup>664</sup> However, if six or more new lots are approved as minor subdivisions from the same parent tract within the previous three years, it is deemed to be a “major subdivision.”<sup>665</sup> Major subdivisions are any subdivision other than a minor subdivision.<sup>666</sup>

***c. Plat Requirements***

Detailed maps of proposed and approved major subdivisions (“plats”) are required to be submitted to the Subdivision Administrator,<sup>667</sup> in a multi-stage process: the sketch plat (which is

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<sup>661</sup> Chapter 159, Article 10.

<sup>662</sup> Chapter 159, Article 11.

<sup>663</sup> § 159.004.

<sup>664</sup> Chapter 159, Article 2, “Definitions.”

<sup>665</sup> *Id.*

<sup>666</sup> *Id.*

<sup>667</sup> See generally [Garrett County Subdivision Administration “Checklists & Forms.”](#)

optional),<sup>668</sup> the preliminary plat,<sup>669</sup> and the final plat.<sup>670</sup> Minor subdivisions require similar, although much simplified, procedural requirements.<sup>671</sup>

Preliminary plats are the relatively basic plats that display the design and layout of a proposed subdivision.<sup>672</sup> Copies must be distributed at least 21 days before a regular Planning Commission meeting, to the Commission and other entities such as the Health Department and the County Engineer.<sup>673</sup> The plat itself must meet several drafting requirements,<sup>674</sup> and it must include:

1. general, natural, and man-made features;<sup>675</sup>
2. the proposed layout;<sup>676</sup>
3. the utility plan;<sup>677</sup> and
4. the road plan profiles.<sup>678</sup>

This same information must also be submitted in the final plat.

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<sup>668</sup> Chapter 159, Article 4.

<sup>669</sup> Chapter 159, Article 5.

<sup>670</sup> Chapter 159, Article 6

<sup>671</sup> Chapter 159, Article 7.

<sup>672</sup> § 159.055.

<sup>673</sup> § 159.056(B).

<sup>674</sup> § 159.057(B).

<sup>675</sup> § 159.057(C)-(E).

<sup>676</sup> § 159.057(F).

<sup>677</sup> § 159.057(G).

<sup>678</sup> § 159.057(H).

The final plat, which must be submitted within 10 years of preliminary plat approval,<sup>679</sup> is far more extensive, as it specifies the exact dimensions of the lots and associated measurements like rights-of-way and easements.<sup>680</sup> The final plat must also demonstrate compliance with all local, state, and federal regulations.<sup>681</sup> In addition to having the same requirements as the preliminary plat,<sup>682</sup> the final plat must also show any revisions.<sup>683</sup> The extensive supporting documentation includes any deed restrictions or agreements, and evidence of approved stormwater management plans.<sup>684</sup> While not required with the final plat, before the subdivision may be recorded, utility agreements and proof of required permits must be submitted as well.<sup>685</sup>

Once final plats are approved, there are additional requirements for the recording of the approved final plat (the “record plat”) with the Clerk of Circuit Court.<sup>686</sup> The record plat itself has format requirements similar to those of the final plat.<sup>687</sup>

***d. Infrastructure Improvements Guarantees***

To ensure that necessary or promised utility improvements (such as water lines and roads) associated with proposed subdivisions are completed, the County requires developers to guarantee infrastructure improvements, generally in the form of a bond or letter of credit (a

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<sup>679</sup> § 159.056(F).

<sup>680</sup> § 159.069.

<sup>681</sup> *Id.*

<sup>682</sup> § 159.072(A)(5).

<sup>683</sup> § 159.072(C)(1).

<sup>684</sup> § 159.072(C).

<sup>685</sup> § 159.072(D).

<sup>686</sup> Article 9.

<sup>687</sup> *Id.*



“Bond”).<sup>688</sup> The Planning Commission is granted authority to condition plat approval on receipt of a bond that assures the developer will either install all required infrastructure improvements before any lot is sold, or guarantees the improvements will be made once lots are sold.<sup>689</sup> Such Bonds may also be staged, across successive phases of development.<sup>690</sup>

Bonds may also be required for public water or sewer systems to which the developer plans to connect.<sup>691</sup> Any Bond or other financial guarantee made by a developer must be secured as specified by the County.<sup>692</sup> Any such Bond can be released only after a required inspection and approval process.<sup>693</sup>

Remedies are provided in the event that guaranteed improvements are not installed or the developer goes bankrupt.<sup>694</sup> The Ordinance grants the County Commission power to enforce any Bond posted as an improvement guarantee.<sup>695</sup> These powers include seizing lots or escrow funds, and non-release of performance Bonds.<sup>696</sup>

***e. Design Standards and Required Improvements***

The Subdivision Ordinance sets minimum design standards for a subdivision approval<sup>697</sup> and provides the Planning Commission with authority, in its discretion, to increase the standard if

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<sup>688</sup> Article 8, “Improvements Guarantees.”

<sup>689</sup> § 159.090(B).

<sup>690</sup> § 159.090(C).

<sup>691</sup> § 159.090(H).

<sup>692</sup> § 159.090(I).

<sup>693</sup> § 159.091.

<sup>694</sup> § 159.092.

<sup>695</sup> § 159.092.

<sup>696</sup> § 159.092(1)(a).

<sup>697</sup> Article 10.

it deems it necessary for the public welfare.<sup>698</sup> Specific design standards are set for roads, driveways, sewage, water supply, utilities, sidewalks, trees, and rear lots abutting major roads.<sup>699</sup>

***f. Subdivision Road Planning***

All new subdivision lots have road design standards that assure safe and permanent access to public or approved private roads<sup>700</sup> and there are additional design, legal, and maintenance burdens if subdivisions are to be accessed from private roads.<sup>701</sup> Long-term road planning must be addressed in new subdivisions by including “stub roads” for potential future extension, as well as additional width for future utility rights-of-way.<sup>702</sup> The Planning Commission may require certain traffic layouts, if it deems doing so would improve traffic congestion and safety.<sup>703</sup>

Road intersections have specific design requirements: roads must intersect at right angles whenever possible, no more than two roads may intersect at one point, and proposed roads must be aligned with roads located across pre-existing roads when feasible.<sup>704</sup> All new subdivision roads must have final design features to provide drainage,<sup>705</sup> have minimum intersection sight distances, as well as required cul-de-sac or turnaround requirements.<sup>706</sup>

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<sup>698</sup> § 159.110(A).

<sup>699</sup> *See generally* § 159.111- §159.123.

<sup>700</sup> § 159.111(A).

<sup>701</sup> § 159.111(A)(3) & (B).

<sup>702</sup> § 159.111(C).

<sup>703</sup> § 159.111(E).

<sup>704</sup> § 159.111(D).

<sup>705</sup> § 159.111(H)

<sup>706</sup> § 159.111(I)-(J).

New roads intended to be turned over to the County or to the State must meet those receiving entities' road standards. If the road is intended to remain private it must, nonetheless, meet certain designs and technical requirements, as well.<sup>707</sup> These private road requirements include minimum rights-of-way widths, minimum cartway widths, road pavement construction standards, maximum road slopes, and minimum sight distances.<sup>708</sup>

The Planning Commission is authorized to require traffic impact studies at the recommendation of the Planning Director or County Engineer for large subdivisions or for smaller subdivisions that might have a particular traffic impact.<sup>709</sup> Any required study must be conducted by a professional,<sup>710</sup> and the applicant is responsible for any required improvements dictated by that study.<sup>711</sup>

***g. Subdivision Driveways***

Driveways must have a minimum width of 10 feet, and require a permit for access onto a State or County road. Slopes are generally limited to a maximum of 10% for the first 20 feet of driveway. Driveway entrances must be designed to maximize sight distances of oncoming traffic.<sup>712</sup>

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<sup>707</sup> § 159.111(F).

<sup>708</sup> § 159.111(G)(1)-(7).

<sup>709</sup> § 159.112(A).

<sup>710</sup> § 159.112(D).

<sup>711</sup> § 159.112(H).

<sup>712</sup> § 159.113.

***h. Subdivision Sewage***

County and State sewage requirements also apply to all sewage systems, whether central or on-site,<sup>713</sup> and located within a subdivision. The Sanitary District is given oversight of subdivision central sewage systems that connect to their sewage service area.<sup>714</sup>

***i. Subdivision Water Supply***

On-lot or central water must serve all subdivision lots, and must meet all County and State regulations.<sup>715</sup> The Planning Commission has the authority to require any subdivision to be connected to a central water supply system if it deems it feasible and desirable to do so, and any such extension must meet the criteria of the larger system.<sup>716</sup> Installation of fire hydrants may be mandated by the Planning Commission in a subdivision served by a public water system, to ensure a minimum 600 feet proximity to all buildings.<sup>717</sup>

***j. Subdivision Utilities and Easements***

All electric and telephone lines must be extended by the developer to each lot prior to that lot's sale, and all such extensions must meet the current standards of the utility.<sup>718</sup> Utility easements must be acquired according to the County's requirements, adhering to minimum separation distances, and be located along the sides of lots, when practical.<sup>719</sup>

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<sup>713</sup> § 159.115(A) & (C).

<sup>714</sup> § 159.115(B).

<sup>715</sup> § 159.116(A).

<sup>716</sup> § 159.116(B).

<sup>717</sup> § 159.116(D).

<sup>718</sup> § 159.117(A).

<sup>719</sup> § 159.117(B).

***k. Subdivision Sidewalks***

The Planning Commission or Director has the right to require sidewalks along road frontages abutting or within a subdivision.<sup>720</sup> Installation is the responsibility of the applicant, and must meet AASHTO design standards.<sup>721</sup>

***l. Subdivision Tree Guidelines***

While not strictly mandatory, the County Code encourages the maximum protection of trees during construction. The Subdivision Ordinance recommends measures that avoid damage of tree trunks, minimize tree cutting, avoid root compaction, and keep grade level around trees within 6 inches of its original state.<sup>722</sup>

***m. Subdivision Buffers in Rear Lots***

If the rear yard of a lot of less than two acres that directly abuts an arterial road or expressway, the rear yard must include a 10 foot wide planting strip along the back, with no access across it permitted. The strip must include evergreen plantings and shade trees, with any fencing placed on the inside of the plantings.<sup>723</sup>

***n. Subdivisions Along Scenic Byways***

Protecting the viewshed of the State's "Mountain Maryland Scenic Byway,"<sup>724</sup> which travels through the DCW, along portions of 219, 495, State Park Road, Glendale Road, Mayhew

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<sup>720</sup> § 159.118(A).

<sup>721</sup> § 159.118(B)-(C).

<sup>722</sup> § 159.120.

<sup>723</sup> § 159.121.

<sup>724</sup> See generally [Maryland Scenic Byways](#), at 19.

Inn Road, Swallow Falls Road, and Herrington Manor Road,<sup>725</sup> is the focus of the Subdivision Ordinance’s “Development Abutting Scenic Byways” section.<sup>726</sup> Subdivisions along scenic byways shall, ‘to the greatest extent possible’ locate lots near existing tree lines or forests, or behind natural topographic features.<sup>727</sup> Subdivisions must also limit the removal of existing hedgerows, walls, and trees next to roadways, and are required to plant trees to screen new development, unless to do so would block scenic views.<sup>728</sup> The county works with the developer to implement these practices when possible.

#### **4. Garrett County Sensitive Areas Ordinance**

While Garrett County does not have county-wide zoning, the Sensitive Areas Ordinance<sup>729</sup> has certain provisions that seek to engage in long-term land use planning<sup>730</sup> by protecting the environment<sup>731</sup> and preserving natural features that make Garrett County unique.<sup>732</sup> While the Ordinance may not necessarily affect every, or even most, land uses in the County, every subdivision and building permit application is subject to scrutiny under the Ordinance.<sup>733</sup> The County has adopted Generalized Sensitive Area Maps in compliance with the Ordinance and to assist in applying its requirements.<sup>734</sup>

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<sup>725</sup> *Id.* and § 159.123(A).

<sup>726</sup> § 159.123.

<sup>727</sup> § 159.123(B)(1).

<sup>728</sup> § 159.123(B)(2).

<sup>729</sup> Chapter 156, *see generally* [Sensitive Areas Map](#).

<sup>730</sup> *See* § 156.01(B)(1) & (5)

<sup>731</sup> *See* § 156.01(B)(2) & (4).

<sup>732</sup> *See* § 156.01(B)(3).

<sup>733</sup> § 156.02.

<sup>734</sup> § 156.10(E); *see* [Map 1](#) and [Map 2](#).

The primary realm of development to which the Ordinance applies are:

1. development on steep slopes;<sup>735</sup>
2. stream buffer areas;<sup>736</sup>
3. areas with known rare, endangered, or threatened species;<sup>737</sup>
4. source water protection areas;<sup>738</sup> and
5. land along roads.<sup>739</sup>

The Ordinance also incorporates regulations relating to floodplain management, sediment and erosion control, and wetlands.<sup>740</sup>

*a. Steep Slopes*

If a steep slope over 30% might be affected by grading or construction, a site plan must be submitted that designates the total area that will be graded.<sup>741</sup> New buildings and/or parking areas, with a few exceptions in steep slopes,<sup>742</sup> will be permitted only if requirements of the Ordinance are met, including professionally prepared grading plans.<sup>743</sup> Regrading land is not permitted to evade the Ordinance.<sup>744</sup>

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<sup>735</sup> § 156.04.

<sup>736</sup> § 156.05.

<sup>737</sup> § 156.06.

<sup>738</sup> § 156.09.

<sup>739</sup> § 156.12.

<sup>740</sup> § 156.07-08.

<sup>741</sup> § 156.04(A).

<sup>742</sup> § 156.04(C) & (D).

<sup>743</sup> § 156.04(B).

<sup>744</sup> § 156.04(F).

**b. *Stream Buffers***

A stream buffer generally extends to the area 25 feet from the top of the bank of the stream.<sup>745</sup> In the areas designated as “growth areas,”<sup>746</sup> no new building or paving or stone surface may be placed in a stream buffer.<sup>747</sup> In areas not designated as a growth area, the stream buffer is extended to 50 feet.<sup>748</sup> There are certain exceptions for the expansion of buildings<sup>749</sup> and for certain paved or stone surfaces.<sup>750</sup> To minimize grading within the stream buffer the Ordinance requires a professional grading plan.<sup>751</sup>

**c. *Rare, Endangered, and Threatened Species***

No subdivision plat or building permit may be approved if the development would adversely affect the known habitat of a federally-designated rare, threatened, or endangered species, until federal approval of such development and all related documents have been provided.<sup>752</sup> If the affected species is designated by the State of Maryland, the Department of Planning and Land Development will initiate a referral process between the applicant and the DNR.<sup>753</sup>

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<sup>745</sup> § 156.

<sup>746</sup> See [http://garrettcountry.org/resources/planning-land-development/pdf/Sensitive%20Areas/Sensitive\\_Areas1\\_002.pdf](http://garrettcountry.org/resources/planning-land-development/pdf/Sensitive%20Areas/Sensitive_Areas1_002.pdf).

<sup>747</sup> § 156.05(A), (B), & (D).

<sup>748</sup> § 156.05(A).

<sup>749</sup> § 156.05(C).

<sup>750</sup> § 156.05(D)(1)-(4).

<sup>751</sup> § 156.05(E).

<sup>752</sup> § 156.06(B).

<sup>753</sup> § 156.06(C).



**d. Source Water Protection Areas**

Building permits, zoning permits, site plans, or subdivision plats cannot be approved in County-designated source water protection areas (SWPA)<sup>754</sup> without first meeting certain requirements.<sup>755</sup> The maximum impervious surface area of any lot within a SWPA is 50%.<sup>756</sup> No hazardous substance storage tank may be located within 500 feet of the water supply system well.<sup>757</sup> If the property cannot accommodate the 500 foot restriction, a storage tank must be placed above ground with additional protections.<sup>758</sup>

Certain uses are prohibited within SWPAs, such as junk yards, livestock pens, and bulk storage or mixing of fertilizers or pesticides.<sup>759</sup> Pesticide use beyond normal household use must be applied in strict conformity with their labels and any relevant law.<sup>760</sup>

Subdivision plats must delineate the SWPA, situate open space in the SWPA if feasible, and ensure that every lot's eventual development can comply with the 50% impervious surface limit.<sup>761</sup>

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<sup>754</sup> See [http://garrettcountry.org/resources/planning-land-development/pdf/Sensitive%20Areas/Sensitive\\_Areas1\\_002.pdf](http://garrettcountry.org/resources/planning-land-development/pdf/Sensitive%20Areas/Sensitive_Areas1_002.pdf)

<sup>755</sup> § 156.09(C).

<sup>756</sup> § 156.09(C)(1).

<sup>757</sup> § 156.09(C)(2).

<sup>758</sup> § 156.09(C)(3).

<sup>759</sup> § 156.09(C)(4).

<sup>760</sup> § 156.09(D).

<sup>761</sup> § 156.09(F); see 156.09(C)(1).

*e. Building Prohibition Near Roads*

No new building in the County may be built or expanded within 20 feet of the right-of-way of a non-alley public road or within 20 feet of the cartway<sup>762</sup> of a non-alley private road.<sup>763</sup>

## **5. Sewage Regulations**

DCL Wastewater Treatment Plant, owned and operated by the Garrett County Sanitary District, Inc.,<sup>764</sup> serves most of the areas comprising the upper two-thirds of DCL, and plans to expand its service area to the bottom one-third of the lake by 2030.<sup>765</sup> This proposed expansion, if completed, would address marginal and failing septic systems in Turkey Neck, Sky Valley, Green Glade, and Hazelhurst.<sup>766</sup> The discharge from the treatment plant, into Deep Creek stream just west of the dam, is regulated under NPDES MD0054348.<sup>767</sup> The plant meets Biological Nutrient Removal (BNR) standards, which is often considered some of the best technology for reducing nutrient pollution discharges found in the treated water.<sup>768</sup>

On-site sewage needs within the watershed are met through sewage disposal systems, regulated under Subchapter 53 of the County Code and by State law<sup>769</sup> (which also addresses

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<sup>762</sup> Cartway is “the portion of a road designed for vehicle traffic and any areas intended for on road parking.” See § 159.016(A).

<sup>763</sup> § 156.12.

<sup>764</sup> See Section 5-1.

<sup>765</sup> 4-9-10.

<sup>766</sup> 5-19

<sup>767</sup> See [EPA NPDES permit database](#).

<sup>768</sup> 5-21

<sup>769</sup> § 53.01 *et seq.* [http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettc0\\_md/garrettc0countymarylandcodeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:garrettc0\\_md](http://www.amlegal.com/nxt/gateway.dll/Maryland/garrettc0_md/garrettc0countymarylandcodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:garrettc0_md)

disposal of sewage sludge<sup>770</sup>). The County requires a written “Sewage Disposal Permit” from the County Health Department’s Environmental Health Services<sup>771</sup> (*Despite the name, the Garrett County Health Department is, in fact, a State agency.*) before any construction may begin on any facility that will produce sewage,<sup>772</sup> or before any alteration may be made that will change the amount of sewage produced.<sup>773</sup> An application for the required permit must include complete plans and specifications for the disposal system.<sup>774</sup>

There are several requirements for subsurface disposal systems.<sup>775</sup> A single-family dwelling unit must have a disposal area of at least 60,000 square feet,<sup>776</sup> and other dwelling units have minimum requirements of 10,000 square feet for every 100 gallons of estimated sewage generated per day.<sup>777</sup> For future sewage disposal, a “reserve area” must be set aside of at least twice the area required for the proposed sewage system.<sup>778</sup> The “reserve area” may not be used or built upon in any way that would impede future sewage system installation.<sup>779</sup> The Environmental Health Services provide a variety of additional specifications, such as separation requirements and fee totals.<sup>780</sup>

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<sup>770</sup> § 52.01 *et seq.*52

<sup>771</sup> <http://garretthealth.org/departments/Environmental/sewage.htm>

<sup>772</sup> § 53.01(A)(1).

<sup>773</sup> § 53.01(A)(2).

<sup>774</sup> § 53.01(B).

<sup>775</sup> § 53.02

<sup>776</sup> § 53.02(A).

<sup>777</sup> § 53.02(B).

<sup>778</sup> § 53.02(C).

<sup>779</sup> § 53.02(C).

<sup>780</sup> *See infra* Note 804.

Larger sewage flows, those producing estimated flows of 10,000 gallons or more per day, require secondary treatment prior to discharge.<sup>781</sup> The level of secondary treatment required is based on meeting 5-day biochemical oxygen demand limits and total suspended solids limits.<sup>782</sup>

On-site disposal systems are prohibited on any property served by the public DCL community sewerage system.<sup>783</sup> No disposal area of any on-site system may be closer than 100 feet, measured horizontally, to the 2,462 foot high water elevation of DCL.<sup>784</sup> Also prohibited is the discharge of any sewage, or treated sewage effluent, into DCL or into any tributary to DCL.<sup>785</sup>

## **6. Drinking Water Regulations**

Most areas in the DCW obtain drinking water from private wells or springs,<sup>786</sup> which are regulated by the Maryland Department of the Environment (MDE) regulations.<sup>787</sup> (Springs, however, may not supply water to newly constructed homes.<sup>788</sup>) Well design regulations are designed to avoid pollution from septic systems by addressing parcel size and system design.<sup>789</sup>

The only public drinking water service in the watershed is the McHenry Water Service Area, owned and operated by the Garrett County Sanitary District, Inc. (the “District”).<sup>790</sup> The

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<sup>781</sup> § 53.03.

<sup>782</sup> § 53.03(A) & (B).

<sup>783</sup> § 53.01(A)(3).

<sup>784</sup> § 53.02(D).

<sup>785</sup> § 53.04(A).

<sup>786</sup> Comp Plan 5-1

<sup>787</sup> COMAR 26.04.04.

<sup>788</sup> COMAR 26.04.02.02(G)(2).

<sup>789</sup> COMAR 26.04.04.

<sup>790</sup> Comp Plan 5.2.1.

District is permitted to draw groundwater well water at 150,000 to 215,000 gallons per day under a MDE water appropriation permit.<sup>791</sup> The McHenry Water Service Area supplies water for properties on the west side of U.S. Route 219 in McHenry, along Marsh Hill Road, and for the Wisp Resort.<sup>792</sup> Water service areas are designated by the County, and the Comprehensive Plan recommends an additional water service district in Thayerville.<sup>793</sup> As of 2014 the Thayerville system has been completed.

In 2007, the Garrett County Source Water Protection Plan (SWPP) delineated a Source Water Protection Area for the public water system in McHenry and other areas of the County.<sup>794</sup>

## **7. Soil Erosion and Sediment Control**

Pursuant to State law,<sup>795</sup> a grading permit must be obtained from the County Commissioners before any grading or any earth moving that may result in any sedimentation in any drainageway, will move more than 100 cubic yards of earth, or will disturb more than 5,000 square feet of surface area.<sup>796</sup> There are exceptions for certain agricultural activities and single-family residences on lots of at least two acres.<sup>797</sup> The grading permit is a prerequisite for a building permit.<sup>798</sup>

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<sup>791</sup> *Id.*

<sup>792</sup> Comp Plan at 4-22.

<sup>793</sup> Comp Plan 4.7.1.

<sup>794</sup> Comp Plan at 5.2.7.

<sup>795</sup> See above section X.

<sup>796</sup> § 154.01.

<sup>797</sup> § 154.01(B).

<sup>798</sup> § 154.02.

While disturbance of a small area does not require a permit, larger developments have additional requirements, including that a plan be designed by a professional<sup>799</sup> and be approved by the Garrett Soil Conservation District.<sup>800</sup> The standards for erosion and sediment control are specified by the Garrett Soil Conservation District.<sup>801</sup>

## **8. Floodplain Regulation**

Floodplains receive extensive regulatory attention through the County's Floodplain Management Ordinance.<sup>802</sup> The floodplain includes the entire shoreline of Deep Creek Lake.<sup>803</sup> Because floodplains are typically low-lying areas subject to periodic flooding, the County has determined that it is important to manage floodwaters and groundwater and, therefore, development on and disturbance of the floodplain is limited by County regulation. Generally, on the 100-year floodplain:<sup>804</sup>

1. occupied areas of residential structures are prohibited<sup>805</sup> (with limited exceptions for non-occupied accessory structures totaling no more than 600 square feet),<sup>806</sup>
2. non-residential structures must be flood-proofed,<sup>807</sup> and

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<sup>799</sup> *Id.*

<sup>800</sup> § 154.05.

<sup>801</sup> *Id.*; see <http://garrettscd.org/>

<sup>802</sup> Article 151.

<sup>803</sup> Comp Plan at 4-23.

<sup>804</sup> An area with a one percent chance of being flooded in any particular year, or which will flood at least once every one-hundred years.

<sup>805</sup> § 151.056(A).

<sup>806</sup> § 151.024.

<sup>807</sup> § 151.056(B).

3. no more than 600 yards of fill material may be placed on the floodplain,<sup>808</sup> which is permitted only when no other alternative exists.<sup>809</sup>

Because of these floodplain restrictions, any development within the floodplain zone requires a permit.<sup>810</sup> New residences are prohibited in “floodways,”<sup>811</sup> and development may not occur in the floodplain where alternate sites exist.<sup>812</sup> The floodplain permitting process has several requirements, including certification that the lowest floor of a structure will be elevated to or above the flood protection level.<sup>813</sup>

The County has some latitude in granting permits within the floodplain. While the Ordinance provides that all buildings “should” be located outside of the floodplain,<sup>814</sup> there are provisions for variances.<sup>815</sup> In the event that any floodplain construction is permitted, there are specific requirements that must be met.<sup>816</sup> Elevated buildings that have enclosed lower areas must have water-equalizing vents and these areas may only be used as a garage, access, or storage area.<sup>817</sup> No existing structure within a floodplain may be substantially improved without elevating the lowest occupied level.<sup>818</sup> All structures must be anchored, and certain items below

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<sup>808</sup> § 151.057(A).

<sup>809</sup> § 151.092.

<sup>810</sup> § 151.003.

<sup>811</sup> § 151.070.

<sup>812</sup> § 151.055

<sup>813</sup> § 151.003 & § 151.020-024.

<sup>814</sup> § 151.085.

<sup>815</sup> § 151.100-102.

<sup>816</sup> § 151.085-092.

<sup>817</sup> § 151.086(A) & (B).

<sup>818</sup> § 151.072.

the “Flood Protection Level” must be anchored as well.<sup>819</sup> Electric, plumbing, gas, water supply, and sewage facilities have specific floodplain requirements.<sup>820</sup> New manufactured homes are prohibited on the floodplain, unless it is replacing an old one, is one foot above the elevation of a 100-year flood<sup>821</sup> and is anchored according to County regulation.<sup>822</sup>

Accessory structures, which are not generally permitted in the floodplain, have grade, design, and anchoring requirements.<sup>823</sup>

There are special requirements in the floodplain ordinance relating to subdivisions. For example, developers of subdivisions must demonstrate that the building site and sewage disposal of each lot is outside the 100-year floodplain.<sup>824</sup> In any floodplain area, lots may be subdivided only if new lots have buildable sites outside the 100-year floodplain.<sup>825</sup>

## **9. Stormwater Regulations**

As required by State law,<sup>826</sup> the County has extensive requirements and procedures for mitigating stormwater runoff and its adverse effects.<sup>827</sup>

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<sup>819</sup> § 151.088.

<sup>820</sup> § 151.089.

<sup>821</sup> § 151.072(B) & 151.087(A).

<sup>822</sup> § 151.087(B).

<sup>823</sup> § 151.090.

<sup>824</sup> § 151.022.

<sup>825</sup> § 151.058(A).

<sup>826</sup> See section X above.

<sup>827</sup> Chapter 155.



The Garrett County Stormwater Management Ordinance incorporates the 2000 Maryland Stormwater Design Manual, Volumes I & II, as amended and follows the Stormwater Management Act of 2007 as the official guide for stormwater runoff management. (the Design Manual).<sup>828</sup> The County also encourages innovative stormwater management techniques such as tree conservation areas, buffer strips, and rain gardens.<sup>829</sup>

As mandated by State law, no land may be developed or redeveloped (with a few exceptions<sup>830</sup>) without submitting<sup>831</sup> a stormwater management plan to the County Stormwater Management Office for approval.<sup>832</sup> The contents of the submission are tightly prescribed by the Design Manual<sup>833</sup> and the ordinance.<sup>834</sup> The management plan requires control standards, which emphasize Environmental Site Design before less advanced Best Management Practices may be used.<sup>835</sup> Grading and building permits may not be granted until the plan is approved or waived,<sup>836</sup> and a performance bond is posted.<sup>837</sup>

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<sup>828</sup> § 155.002 and [2000 Maryland Stormwater Design Manual](#).

<sup>829</sup> See [http://garrettcountry.org/resources/permits-inspections/pdf/2010\\_Stormwater\\_Ordinance.pdf](http://garrettcountry.org/resources/permits-inspections/pdf/2010_Stormwater_Ordinance.pdf)

<sup>830</sup> § 155.007.

<sup>831</sup> § 155.040.

<sup>832</sup> § 155.005 & 155.009; *see generally* [Garrett County Office of Stormwater Management](#).

<sup>833</sup> *See supra* reference 830,

<sup>834</sup> § 155.040(A) & 155.041.

<sup>835</sup> § 155.025 & 155.026.

<sup>836</sup> § 155.055.

<sup>837</sup> § 155.059.

## 10. County Roads

Garrett County maintains specifications for entrances and culverts built on public roads<sup>838</sup> requiring development to comply with the “Guidelines for Residential Entrances and Procedure for Commercial Subdivision, Industrial Access to County Roads.”<sup>839</sup>

Owners or occupiers of land adjacent to county roads may not leave any debris upon the adjacent road or road ditch or road drain, if the debris, including earth or spoil, has come from that person’s land.<sup>840</sup>

## 11. Endangered species

Endangered species laws are strict “roadblock” regulations that prohibit the killing of any species listed by the State or the Federal Government as being in danger of becoming extinct. The Federal<sup>841</sup> and State<sup>842</sup> Governments maintain separate lists and maps of the habitats of Rare, Threatened, and Endangered (RTE) species, including plants and animals.<sup>843</sup> Any development, construction, or land use that might harm any of these species is required to be preceded by a thorough consultation with, either the Maryland DNR, the U.S. FWS, or both.

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<sup>838</sup> Garrett Code, Chapter 90.

<sup>839</sup> § 90.02; *see generally* [Guidelines for Residential Entrances to State Highways](#).

<sup>840</sup> § 90.22.

<sup>841</sup> [U.S. FWS Endangered Species listing](#).

<sup>842</sup> COMAR 08.03.08.

<sup>843</sup> *See generally* [Summary of Maryland Endangered Species](#).

## 12. Vacation Rental Units Ordinance

Given the popularity of Deep Creek Lake and its environs as a tourist destination, the County subjects vacation rental units<sup>844</sup> to specific regulation.<sup>845</sup> Owners of rental units must register the property with the Licensing and Enforcement Officer,<sup>846</sup> and each unit must obtain a biennially renew and a rental license.<sup>847</sup> Approval of the Health Department must also be obtained and proper water samples taken.<sup>848</sup> The Licensing and Enforcement Officer as well as the Health Department are authorized to enter the unit for inspections.<sup>849</sup>

The units themselves must comply with the International Residential Building Code, and be equipped with egress from each bedroom, an emergency exit plan, must be equipped with a fire extinguisher in the kitchen, and smoke alarms in each bedroom and on each floor.<sup>850</sup> Pools and hot tubs must be maintained by a State-certified operator.<sup>851</sup> Subsequent biennial relicensing is subject to additional, ongoing requirements,<sup>852</sup> including:

1. prohibitions on commercial use of the rental unit;
2. parking requirements;
3. appropriate noise levels; and

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<sup>844</sup> Defined as a complete living facility under one roof with a maximum of 8 bedrooms, with a maximum occupancy of 2 persons per bedroom, plus 4 persons, and rented for 14 days or less to guests.

<sup>845</sup> Garrett Code, Chapter 160.

<sup>846</sup> § 160.03.

<sup>847</sup> § 160.02(D) & 160.05(A).

<sup>848</sup> § 160.04(A).

<sup>849</sup> § 160.03(C).

<sup>850</sup> § 160.04(C).

<sup>851</sup> § 160.04(A)(4).

<sup>852</sup> § 160.06.

4. bear proof trash enclosures.

### **13. Farm Use**

In order to protect the viability of land in the County as an agricultural resource, landowners may apply to protect their farmland by easement as an Agricultural Land Preservation District,<sup>853</sup> according to State law<sup>854</sup> and regulation.<sup>855</sup> If approved as a District, the land may be used for any farm use,<sup>856</sup> including the operation of farming equipment at any time.<sup>857</sup> Noise and odors associated with normal farming operations are permitted, as is the sale of farm products produced there.<sup>858</sup>

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<sup>853</sup> Chapter 153.

<sup>854</sup> *See generally*, Md. Code Annot., Ag 2-501 to 2-517

<sup>855</sup> COMAR 15.15.01. to 15.15.03 *and see* [http://mda.maryland.gov/about\\_mda/Pages/md-land-preservation.aspx](http://mda.maryland.gov/about_mda/Pages/md-land-preservation.aspx)

<sup>856</sup> § 153.05(A).

<sup>857</sup> § 153.05(B).

<sup>858</sup> § 153.05(C)-(D).