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LOT TO LOT SURFACE DRAINAGE

Who Is Responsible for Lot to Lot Surface Drainage?

Surface runoff can create concerns for property owners, particularly in an urban environment. Changes in surface drainage patterns on one property can contribute to problems that range from annoyance to actual property damage on another. It can be difficult for homeowners to know where to turn when a problem arises. The goal of this factsheet is to present information that may provide some answers.

The Law – A General Discussion of Maryland Law Related to Surface Runoff

Maryland applies a modified Civil Law Rule to the natural flow of surface water based upon the “reasonableness of use” doctrine. The reasonableness of use doctrine balances the benefits and harms caused by surface water flow to make sure that the lower landowner is not unreasonably denied the use of his or her property. Generally, under Maryland’s modified Civil Law Rule, landowners are entitled to have surface water flow naturally from the higher land over the lower land, and the lower landowner cannot prevent the escape of water from the higher land onto the lower land. But this right does not allow the higher landowner, or the owner’s design professional, to act with impunity and artificially increase materially the quantity or volume of water discharged on the lower land or concentrate the natural flow of water and damage the lower land as a result. Further, the higher landowner has no right to discharge water into an artificial channel or in a different manner than the usual and ordinary natural drainage course, or put water upon the lower land that would not have flowed there if the natural drainage conditions had not been disturbed. And, finally, the higher landowner has no right to cause dirt, debris, and pollutants to be discharged onto the lower land or otherwise create a health hazard on the lower land.

The goal of the Montgomery County Department of Permitting Services (DPS) sediment control permit review process is to control the adverse environmental impacts associated with land disturbances, which includes the minimization of soil erosion and prevention of off-site sedimentation. The permit review process does not include an assessment of Maryland’s modified Civil Law Rule or the reasonableness of use doctrine. That assessment is made by permittees and their design professionals. Disputes over the benefits and harms caused by surface water flow, and whether adjacent or nearby property owners have been unreasonably denied the use of their property, are private legal matters that are resolved by judges and juries in the court system. The issuance of a sediment control permit does not authorize or give the permittee or design professional permission to violate, cancel or set aside any provision of Maryland or County law, including Maryland’s modified Civil Law Rule, or any other generally accepted design criteria.

What is DPS' Role Related to Lot to Lot Surface Runoff Issues?

Montgomery County reviews construction plans for compliance with environmental runoff ***treatment*** criteria for reducing pollutants, stream erosion, and incidents of localized flooding, such as inundation of public road intersections. Our reviews are conducted under a delegation of authority from the Maryland Department of the Environment (MDE) and are based upon the Federal Clean Water Act. These compliance standards are environmental in nature and are not intended to augment or replace existing law governing issues of property rights resulting from lot to lot surface runoff. Although they are based upon minimum MDE requirements, Montgomery County stormwater environmental treatment requirements are in some areas stricter than those set forth by MDE. Stormwater management requirements are included as a part of the sediment control permit.

Because they are meant to address environmental treatment requirements and pertain to a relatively small rainfall event, ***Stormwater management practices are not intended to provide significant reduction of lot to lot surface runoff.*** As mentioned above, the issuance of a sediment control permit does not authorize or give the permittee or design professional permission to violate, cancel or set aside any provision of Maryland or County law, including Maryland's modified Civil Law Rule, or any other generally accepted design criteria.

Why Do Some Projects Include Stormwater Management Waivers?

Even though stormwater treatment requirements do not specifically address lot to lot runoff issues, in many instances the treatment being installed on the subject property can provide some level of runoff storage, even when a partial waiver of the stormwater treatment requirement is granted by DPS. This is because stormwater treatment requirements do not ignore existing impervious areas, such as homes and driveways, but pertain to all new construction. For example, if an existing residential lot with a house on it is currently 60% impervious, and there is a proposal to remove that house and construct a new one resulting in a lot that is 80% impervious, the stormwater treatment volume would be based on 80% impervious, not just on the 20% increase.

In some cases, it may not be possible for full stormwater treatment compliance to be met for a project. In such instances, a waiver of all or a portion of the requirement may be granted by DPS. Stormwater treatment compliance waivers are only granted when they are necessary and when there is a demonstrated need for them; they are not granted simply by request or as a matter of convenience to the applicant.

Reasons for being unable to meet full stormwater treatment requirements vary, but often are the result of limitations caused by the onsite soils, such as poorly draining clays, shallow rock, or the presence of groundwater. These limit the ability of water to filter into the ground, thus greatly limiting the ability for a project to meet the full treatment requirements. In fact, for this reason many existing homes built prior to the requirements for stormwater management could probably not be rebuilt on the same lot today without at least a partial waiver of the treatment requirement. Other limitations include things like the location of utilities and required setbacks from structures and basements.

When a full or partial waiver of stormwater treatment is granted by DPS, the applicant must pay a fee in lieu of treatment, in compliance with existing Executive Regulations. These fees are transferred to the Montgomery County Department of Environmental Protection and are used for environmental repair and enhancement projects.

DPS does not support stormwater waivers for projects that are going through the subdivision process to create additional properties. These projects are required to demonstrate, at the conceptual review stage, that development of the proposed newly created properties is likely to be able to comply with stormwater management treatment requirements.

What if I Have Concerns About Surface Runoff from My Neighbor's Property?

If there is an active sediment control permit on the neighboring property, you can contact DPS and we can provide you or anyone else with plans or other information from our permit file, and we can provide contact information for the owner and the preparing engineer so you can discuss the issues with them. In addition, the DPS inspector can work with the applicant to make voluntary revisions in the field that may alleviate or reduce the concern. If the changes require a formal revision to the sediment control plans, DPS can expedite that process. If you or the applicant decide to perform grading on your property to improve drainage conditions, DPS can expedite our required review process for that as well. When contacting us, please be prepared to give us the address of the property you have concerns about so we can easily locate our permit file.

If a construction project is not currently operating under an active sediment control permit, DPS can send an inspector to the location to determine if a permit is required. DPS will take appropriate enforcement action if it is determined that the activity is being conducted without a required sediment control permit.

If you are unable to resolve your drainage concern after talking to the neighboring property owner, you may need to seek legal advice. DPS will make our records available for your use in such cases, upon request.

NOTE: This factsheet is not a substitute for good legal advice. Each applicant and design professional should consult a lawyer if legal advice is needed.