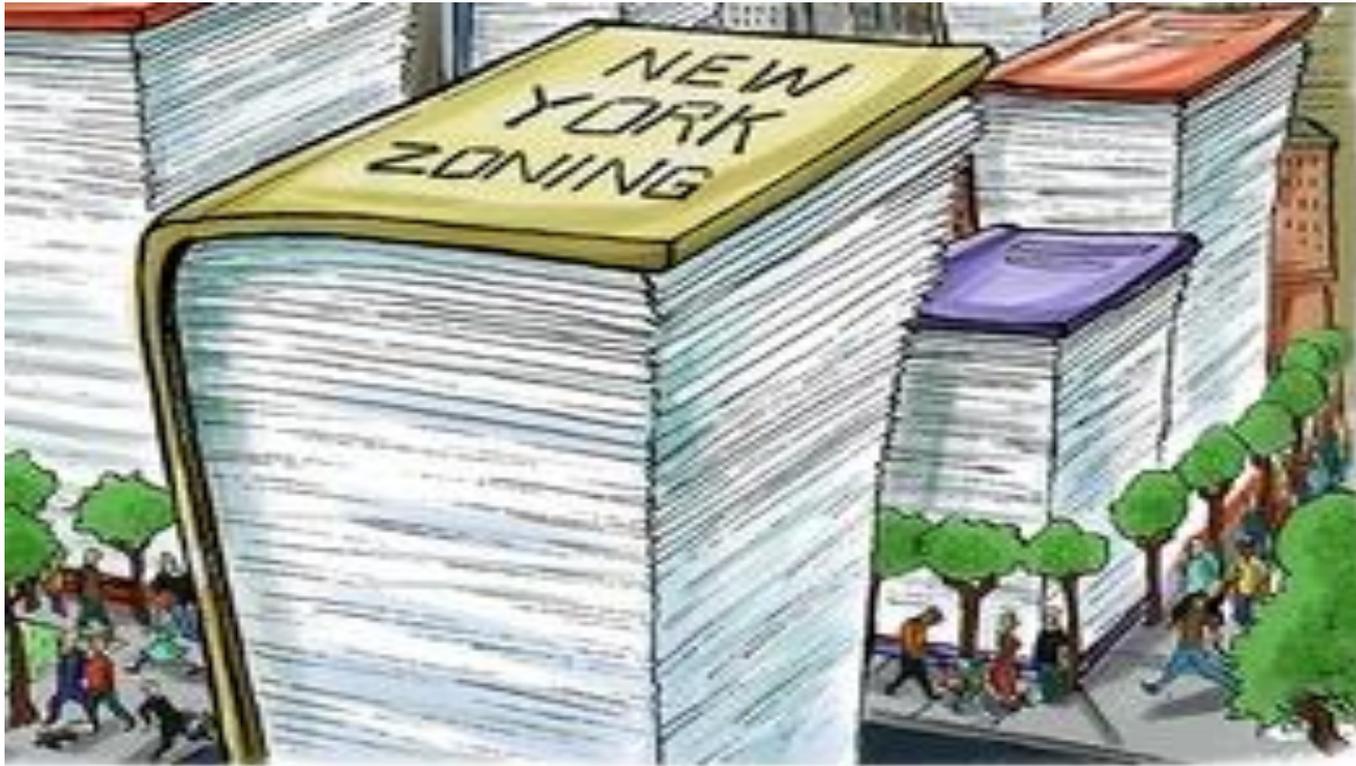


# Nonconformities

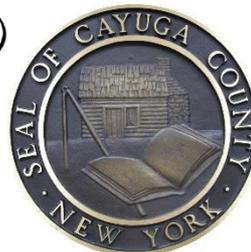
## Cayuga County Planning Board Training Series



Cayuga-Onondaga  
County BOCES  
Auburn, New York

March 18, 2015

Presented by:  
Kari Terwilliger, AICP; Planner  
John Zepko; Planner  
Nick Colas, AICP; Principal Analyst  
Cayuga County Dept. of Planning and Economic Development



# Topics That Will Be Covered

- ❑ What is a Nonconforming Use?
- ❑ Regulation & Termination
  - ***Reconstruction and Restoration***
  - ***Enlargement, Alteration or Extension***
  - ***Changing to Another Nonconforming Use***
  - ***Abandonment***
  - ***Amortization***
- ❑ Relevant Case Laws

# Nonconforming Uses

## Regulation & Termination



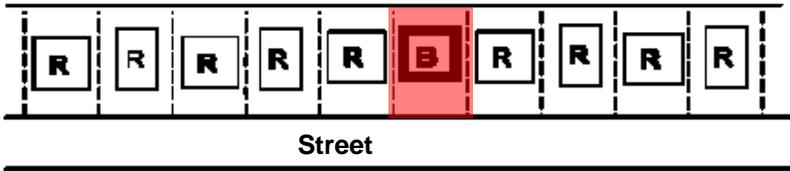
# What Is A Nonconforming Use?

## **Definition:**

An existing use of land or a structure that was allowed under the zoning regulations at the time the use was established but which, due to subsequent changes in those regulations, is no longer a permitted use.

# Types of Nonconformities

Properties Zoned Residential



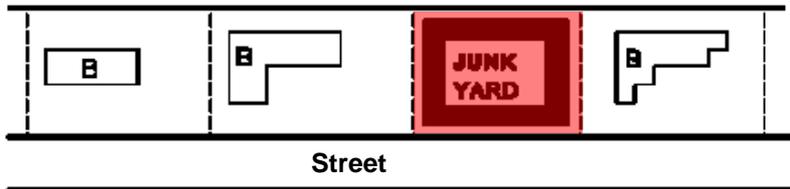
Nonconforming Use of Structure and Land

Zoned Residential- 80ft Lot Width Required



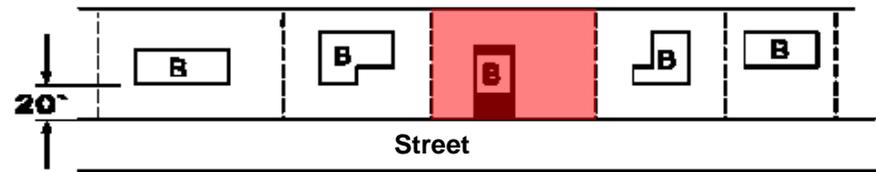
Nonconforming Lot

Properties Zoned for Businesses



Nonconforming Use of Land

Zoned Commercial- 20ft Setback Required



Nonconforming Structure

-  **B BUSINESS**
-  **R RESIDENTIAL**

# Nonconforming Signs



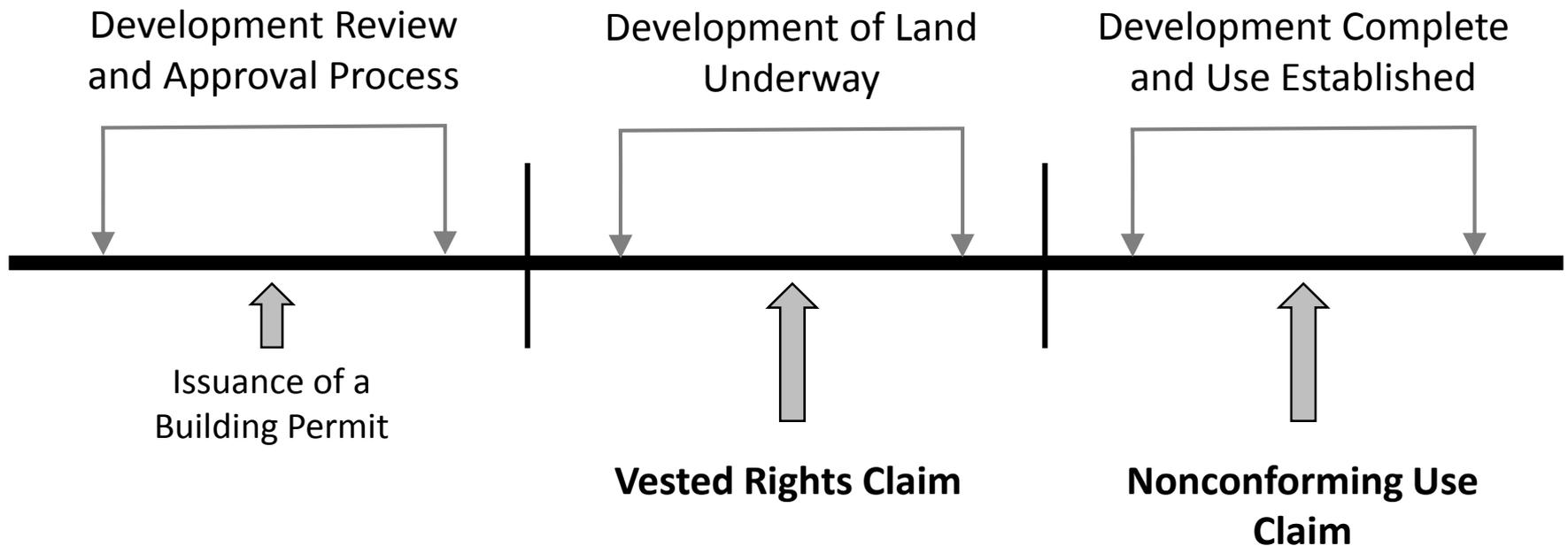
# Legal Right to Continue

## **Legally Existing Nonconforming Use Status:**

Protects the right to continue the existing use, even though it doesn't comply with current zoning regulations.

# Fundamental Fairness in the Regulatory Process

## Protection from New Zoning Regulations



# Nonconforming Use Claim

## Elements of Proof

### **Burden on Owner to Show:**

- The Use Was Lawfully Created
- The Use Was a Permitted Use
- The Use is Actually Existing

# Only the Substantial Use is Protected

The Primary Use of the Building or Lot is Protected,  
**NOT** Incidental Uses

Incidental Uses Can Still be Regulated like:

- ❑ Height of bushes along a public ROW
- ❑ Parking of commercial vehicles in a residential district
- ❑ Sign regulations (for new signage)

# Reasonable Accessory Uses

The Protection of the Existing Use Includes  
all Reasonable Accessory Uses

# Transfer of Nonconforming Status

The Protection of the Existing Use Runs With  
the Land to the New Owner

# Registration Requirements

“There are a lot of things in town that are nonconforming and are grandfathered in. The new guy across the street looks at it and thinks it’s legal and puts one up too.”

~Paul Benson

# Reconstruction and Restoration

Generally...



**Yes.**

Can repair this nonconforming building



**No.**

Cannot repair this nonconforming building

# Changes to a Nonconformity

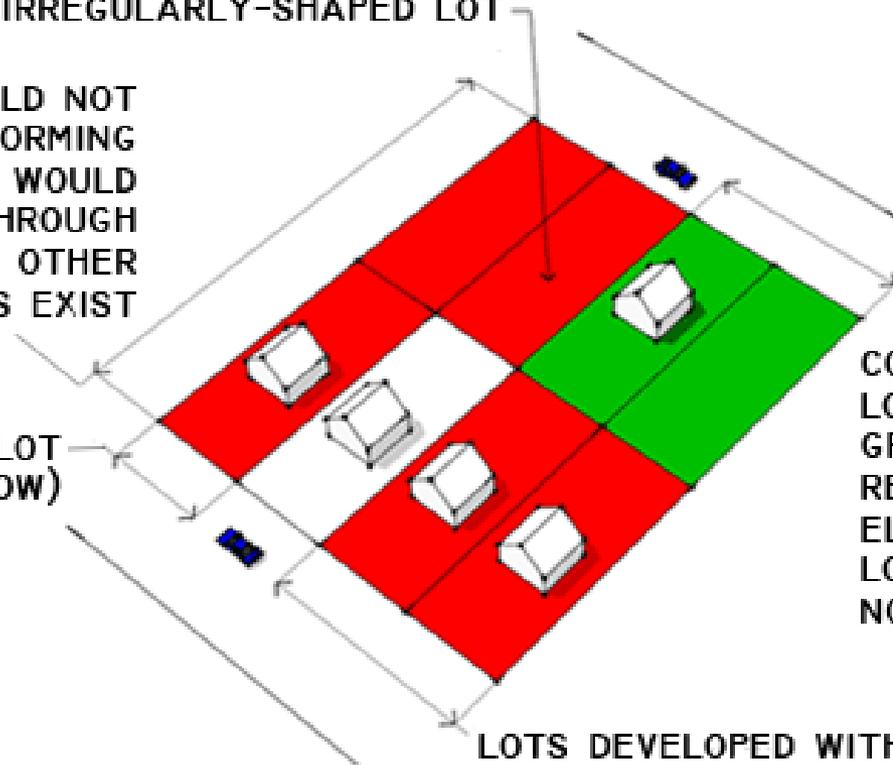
COMBINATION OF 3 REGULARLY SHAPED LOTS (ABUTTING LOTS SHOWN IN RED) WOULD RESULT IN IRREGULARLY-SHAPED LOT

COMBINATION WOULD NOT ADDRESS NONCONFORMING LOT WIDTH AND WOULD ALSO RESULT IN THROUGH LOT WHERE NO OTHER THROUGH LOTS EXIST

NONCONFORMING LOT WIDTH (TOO NARROW)

COMBINATION OF LOTS SHOWN IN GREEN WOULD REDUCE OR ELIMINATE LOT WIDTH NONCONFORMITY

LOTS DEVELOPED WITH EXISTING PRINCIPAL BUILDINGS

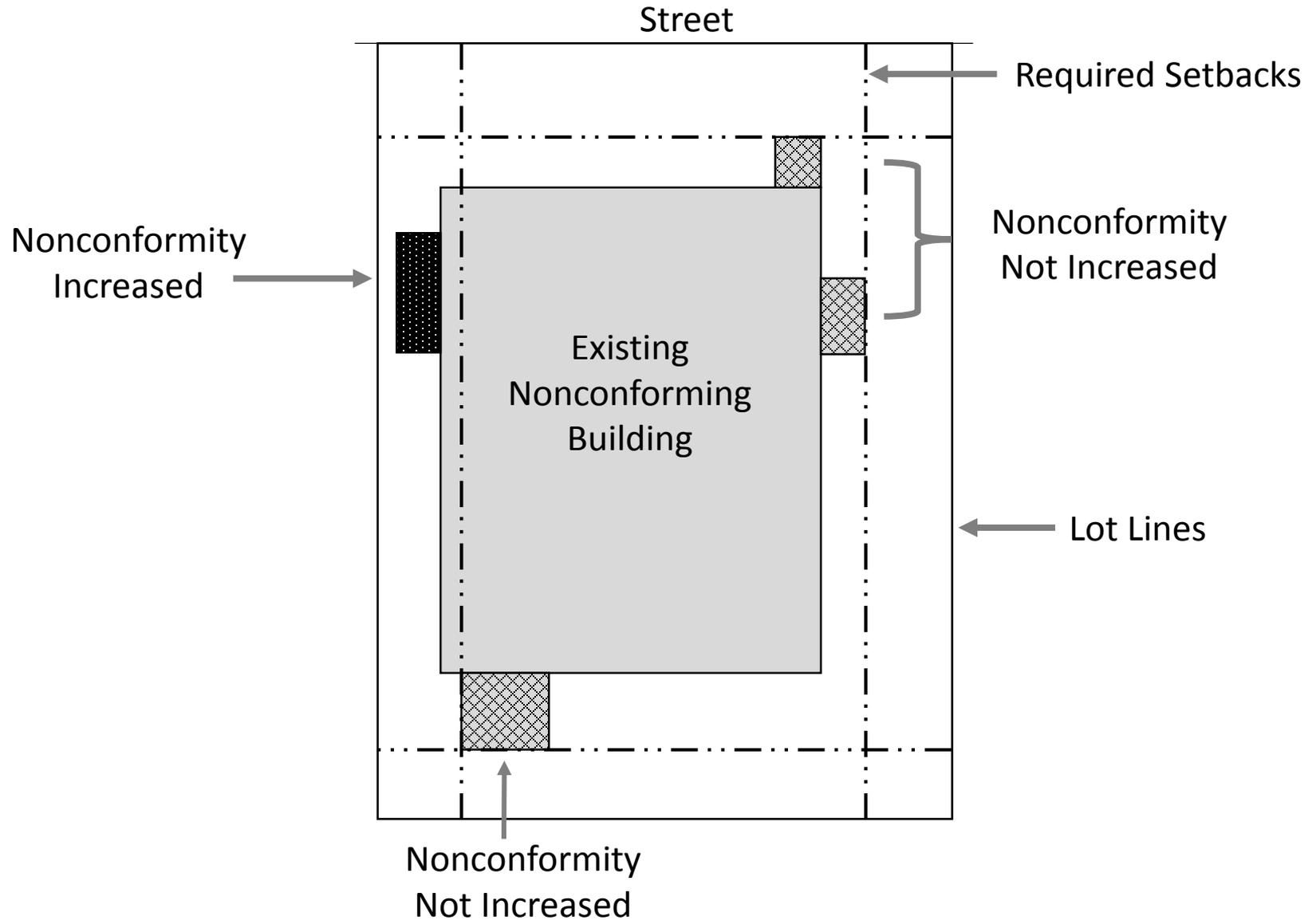


# Enlargement, Alteration or Extension

Municipalities can prohibit or restrict the expansion of nonconforming uses based on things like:

- ❑ The intensity of the use
- ❑ The physical footprint of the building, or
- ❑ Expansion of any part of the building

# Additions to a Nonconforming Structure



# Changing to Another Nonconforming Use



But they're both letters so it's ok, right?

Not necessarily.

# Abandonment



Abandoned gas station in a residential area

# Amortization

## Time Frame for Discontinuance of Nonconforming Uses.

Context in which amortization provisions are upheld:

- When the common law of nuisance would allow neighboring property owners to stop the continuation of a nonconforming use
- When the nonconforming use is somewhat noxious and the owner has little investment in it.

# Limitations and Concerns

## Noncomplying Buildings

A building that is nonconforming to the bulk standards in a zoning code does not equal a nonconforming use; and therefore is not treated the same way.

# Awarding Use Variances

ZBA can issue a use variance to permit the enlargement, expansion or reconstruction of a nonconforming building. **BUT...**

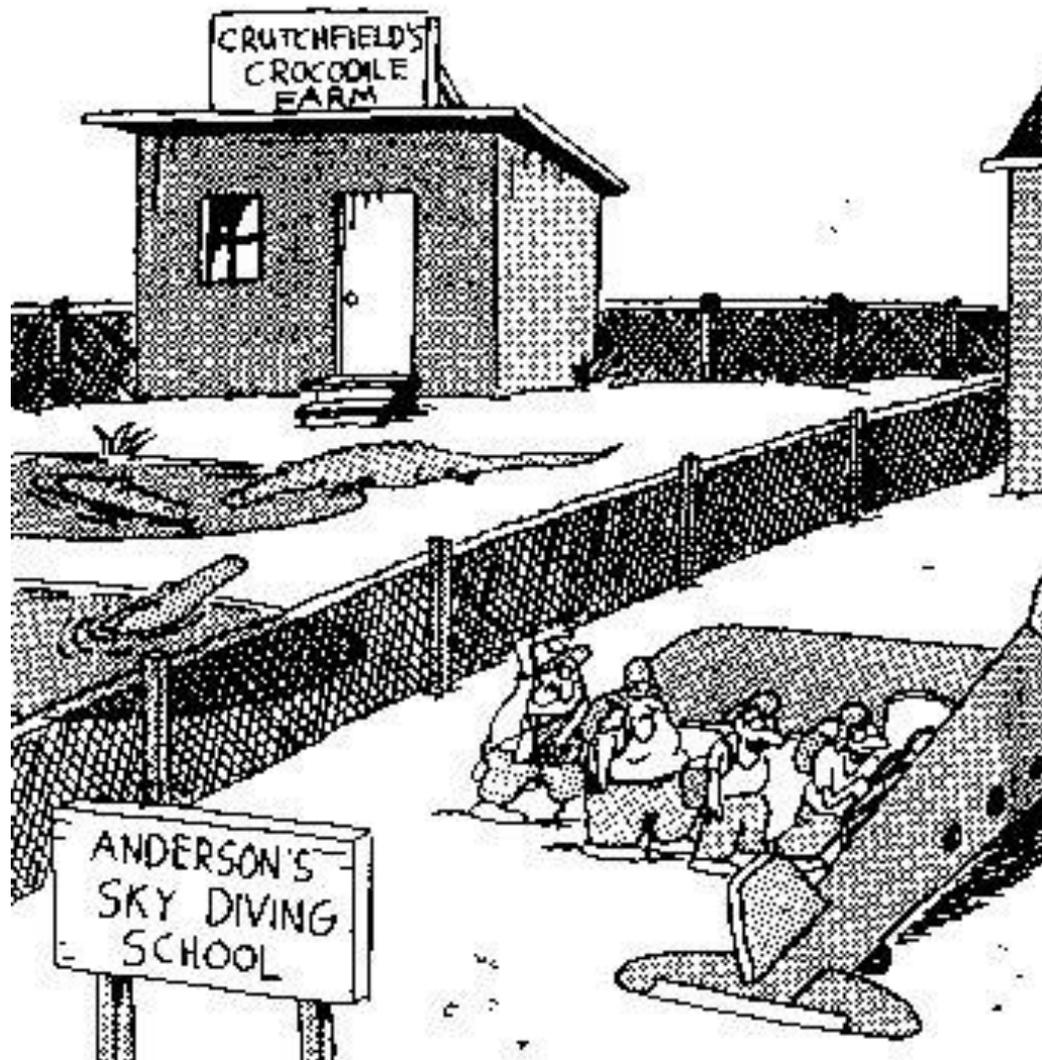
Property owner must:

- Prove that the variance will not alter the essential character of the neighborhood
- Show by competent financial evidence that they cannot realize a reasonable return by continuing the nonconforming use in its unaltered condition **OR** by using the property under any use allowed in the district

# Interpretations of Regulations



# Termination of Nonconforming Use

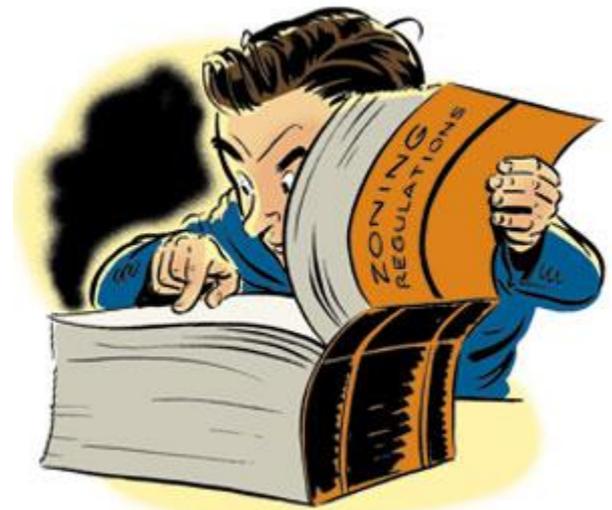
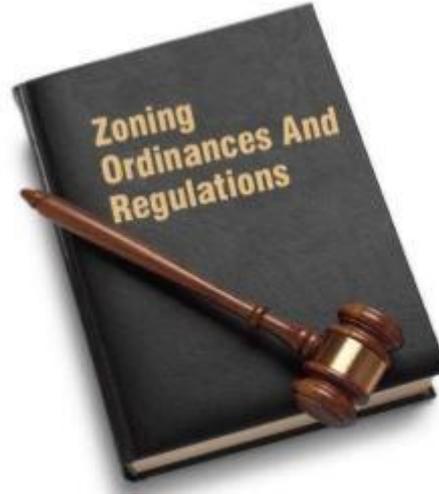


# Termination of Nonconforming Use

- ❑ *Darcy vs. Zoning Board of Appeals of Village of Fredonia, 1975*, established that the purpose of zoning provisions limiting the expansion, alteration, or restoration of a nonconforming use are intended to encourage the disappearance of nonconforming uses
- ❑ The allowance of nonconforming uses characterized by the courts as “grudging” tolerance.

# Use It, Or Lose It.....Maybe.

- Abandonment
- Destruction
- Forced Termination
- Amortization
- Accommodation / Regulation



# Abandonment

- ❑ Discontinuance of a nonconforming use, for a specified period of time, can constitute abandonment
- ❑ Discontinuance periods can apply even when the owner can prove they did not intend to abandon the use



# Abandonment

- Toys “R” Us v. Silva (20 dec 1996)
  - NY Court of Appeals finds that substantial, rather than complete, discontinuation of the nonconforming activity forfeits the nonconforming use. The good faith of the owner is irrelevant to the determination.

# Abandonment

- ❑ The right to continue a nonconforming use does not allow the owner to change to a *materially different use*.
- ❑ Consequence is to deem the prior nonconforming use abandoned and terminated.

# Destruction

- Fire
- Flood
- Force *majeure*



# Nuisance

- When common law of nuisance would allow neighbors to prohibit the continuation of the nonconforming use, a zoning ordinance can legally require the use to be terminated.



# Amortization

- ❑ *A time period given a nonconforming use before the property must convert to a conforming use*
  - *Allows the owner to recoup investment*
  
- ❑ *Rives v. City of Clarksville, Tennessee, supra:*
  - *Amortization of junkyard declared a nuisance, and by ordinance, ordered to abate in two years*

# Amortization

## □ Reasonableness of Period

### ➤ *Rives v. City of Clarksville, supra*—if facially reasonable

- Structure
- Nature of use (nuisance can accelerate)
- Location
- Cost
- Public benefit
- Period of use
- Amortization period

# Regulation

- ❑ Special Use Permit
- ❑ Variance
  - i.e. expansion of use
  - Typically a use variance
- ❑ Registration



*“OK, that’s five votes in favor of saving the historic old hotel, and one vote for stomping it to bits and eating everyone inside!”*

# Regulation

## ❑ Special Use Permits

- As long as use hasn't been terminated, it can be regulated



# Regulation

## □ Variance

- State law requires the applicant to show all of the following:
  - that the property is incapable of earning a reasonable return on initial investment if used for any of the allowed uses in the district (actual "dollars and cents" proof must be submitted);
  - that the property is being affected by unique, or at least highly uncommon circumstances
  - that the variance, if granted, will not alter the essential character of the neighborhood
  - that the hardship is not self-created.

# Regulation

## □ Registration

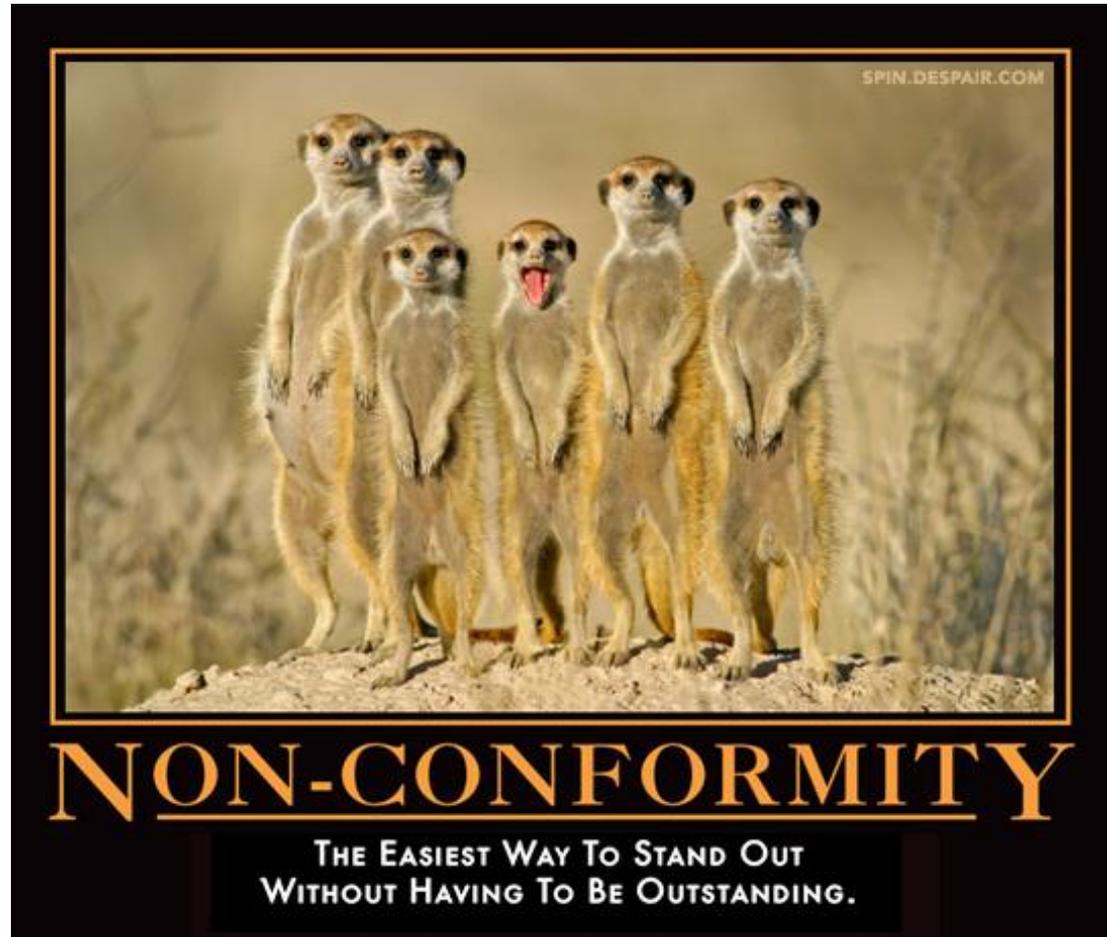
- Burden of determining historic use is on the owner
- Registration can help to define the nature and scope of nonconforming use



**ARE YOU REGISTERED ?**

# NONCONFORMITIES

- Origins in Early Land Use Regulations
- Evolution in Later Land Use Regulations
- Landmark Cases in New York State
- Case Studies for Discussion



# Early Land Use Regulations (Pre-Zoning)

A business could be declared a nuisance, in fact and in law, in particular places and in particular circumstances, even if it was not a nuisance *per se*.



"IF THE 'PUBLIC NUISANCE' CHARGE IS DROPPED, YOUR HONOR, MY CLIENT WILL PLEAD GUILTY TO 'PESKINESS.'"



# Early Land Use Regulations (Pre-Zoning)

A business could be declared a nuisance, in fact and in law, in particular places and in particular circumstances, even if it was not a nuisance *per se*



# Early Land Use Regulations (Pre-Zoning)

## Reinman v. Little Rock

U.S. Supreme Court, 1915

Little Rock, Arkansas



# Early Land Use Regulations (Pre-Zoning)

## Ford Model T Runabout

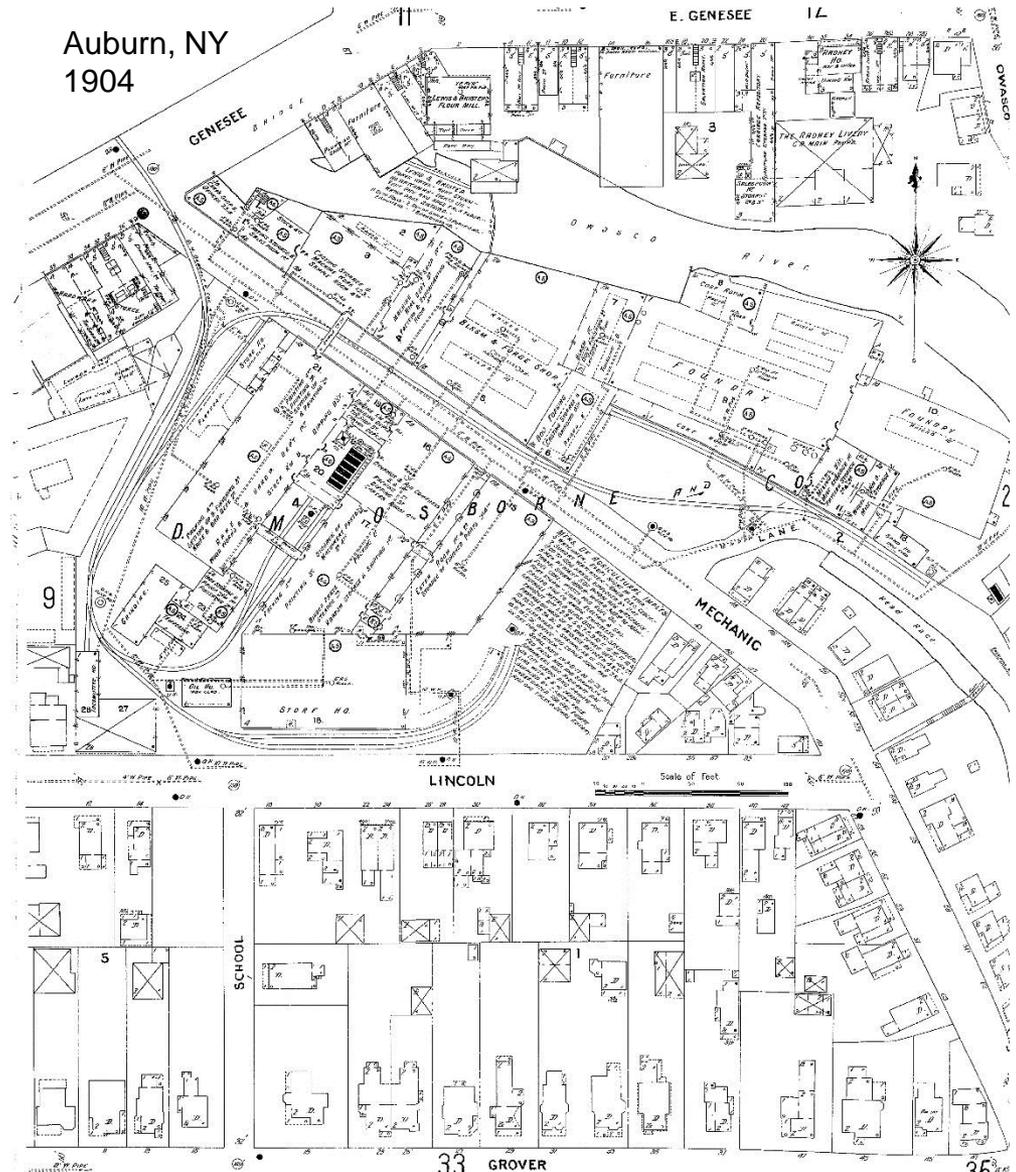
Year	Production	Price
1909	10,666	\$825
1911	34,858	\$680
1913	170,211	\$525
1915	308,162	\$390
1917	735,020	\$500
1925	1,911,705	\$260



# Early Land Use Regulations (Pre-Zoning)

In 1915, the domestic horse population in the U.S. peaked at 21,500,000

-- *Wild Horses: An American Romance*. Public Broadcasting Service (PBS), 2000.



# Early Land Use Regulations (Pre-Zoning)

## Reinman v. Little Rock

U.S. Supreme Court, 1915

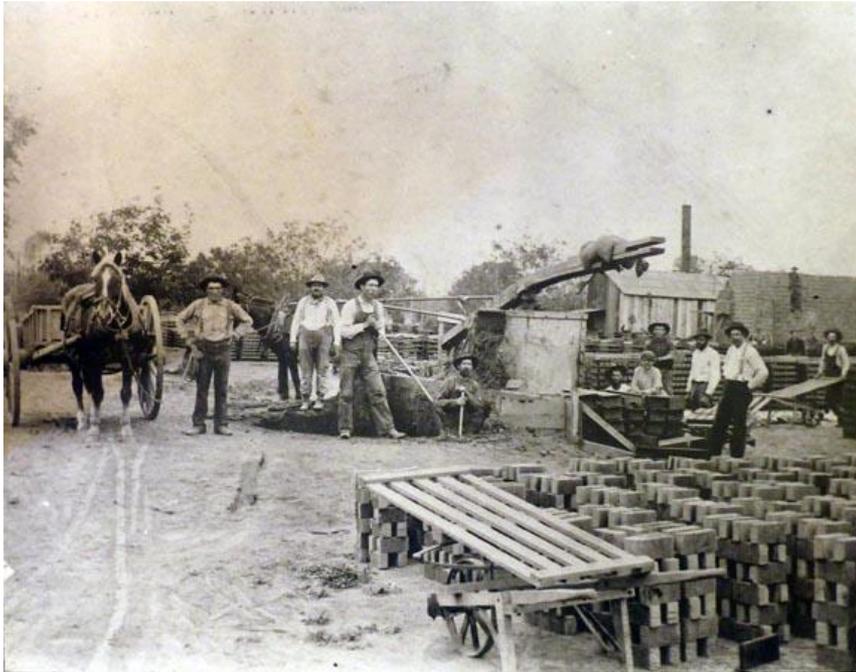
“...the argument that a livery stable is not a nuisance per se,...is beside the question. Granting that it is not a nuisance per se, it is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided that this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment.”



# Early Land Use Regulations (Pre-Zoning)

## Hadacheck v. Sabastian

U.S. Supreme Court, 1915

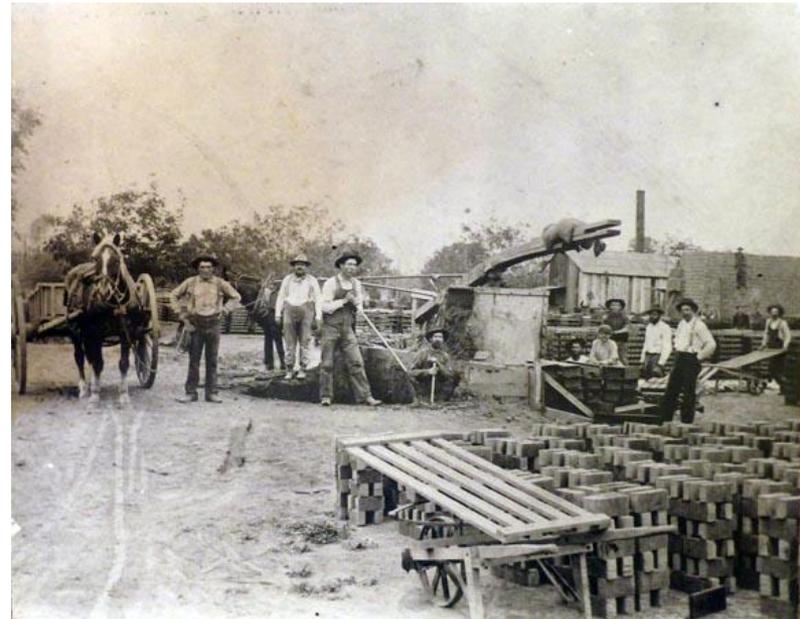


# Early Land Use Regulations (Pre-Zoning)

## Hadacheck v. Sabastian

U.S. Supreme Court, 1915

“The fact that a particular business is not prohibited in all sections of a municipality does not, for that reason, make the ordinance unconstitutional as denying equal protection of the law to those carrying on that business in the prohibited section -- conditions may justify the distinction and classification.”



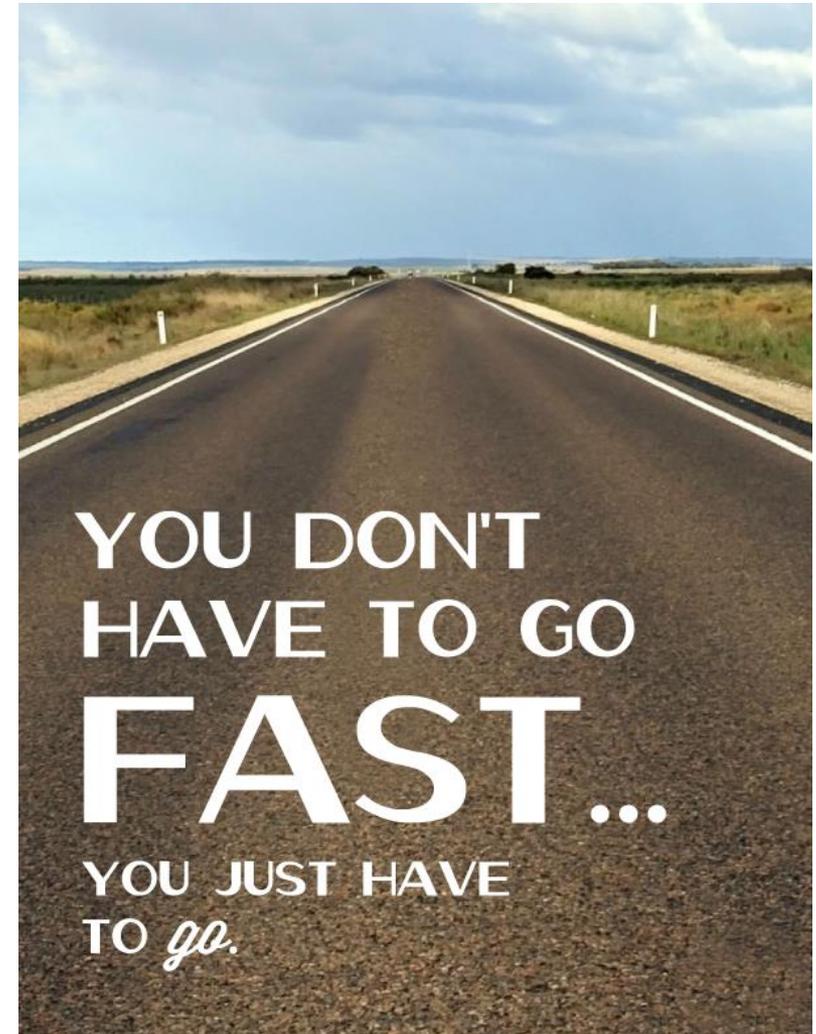
# Later Land Use Regulations (Zoning)

It is considered constitutionally questionable for new regulations to compel the immediate discontinuance of uses which exist at the time of the adoption of the regulations.



# Later Land Use Regulations (Zoning)

It is considered constitutionally questionable for new regulations to compel the **immediate** discontinuance of uses which exist at the time of the adoption of the regulations.



# Later Land Use Regulations (Zoning)

## Jones v. City of Los Angeles

U.S. Supreme Court, 1930

A retroactive ordinance which causes substantial injury and prohibits operation of a business which is not a nuisance (e.g., mental health facility) is an invalid exercise of police power as it takes away the right to operate a legitimate business.



# Later Land Use Regulations (Zoning)

## Enlargement of Nonconforming Uses

Prohibiting the enlargement of a nonconforming building is considered to be within the police power.



*“Yes, our business has become bigger,  
but Fred still likes to work at home.”*

# Later Land Use Regulations (Zoning)

## Austin v. Older

Supreme Court of Michigan, 1938

“An ordinance requiring an immediate cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained, but an ordinance prohibiting the enlargement of a nonconforming building is not subject to the same infirmity. This more limited restriction on the owner's rights in the use of his property is within the police power and such ordinances have been held valid.”



# Later Land Use Regulations (Zoning)

## Vested Rights of Accessory Nonconforming Uses

“Vested rights” are considered to be affected only when work of a substantial character had been commenced prior to enactment of the regulation, and enforcement would, therefore, cause serious loss to the owner.



# New York State Cases

## People v. Miller

Court of Appeals of the State of New York, 1952

Town of North Hempstead



# New York State Cases

## People v. Miller

Court of Appeals of the State of New York, 1952



# New York State Cases

## People v. Miller

Court of Appeals of the State of New York, 1952

“In this state,...existing nonconforming uses will be permitted to continue, despite the enactment of a prohibitory zoning ordinance, if, and only if, enforcement of the ordinance would, by rendering valueless substantial improvements or businesses built up over the years, cause serious financial harm to the property owner. This rule, with its emphasis upon pecuniary and economic loss, is clearly inapplicable to a purely incidental use of property for recreational or amusement purposes only.”



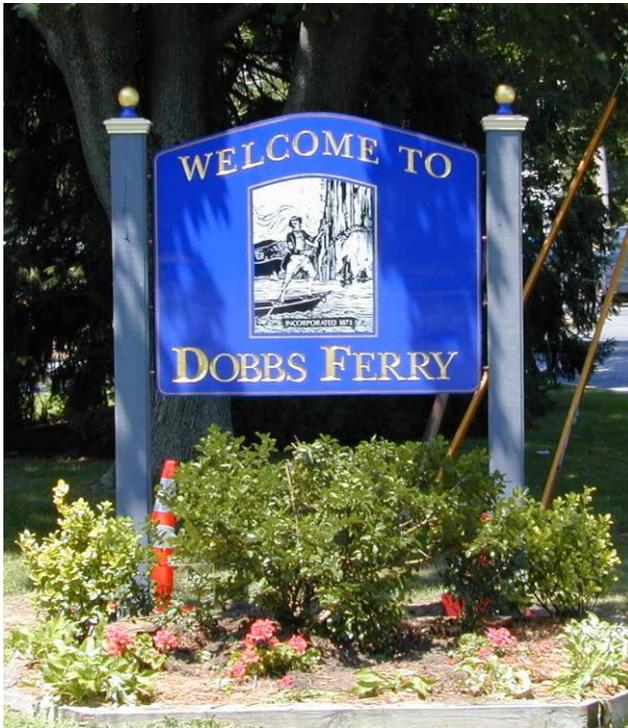
# New York State Cases

## Matter of Marzalla v. Munroe

Court of Appeals of the State of New York, 1987

Held that an abandoned nonconforming use could not be resumed

Village of Dobbs Ferry



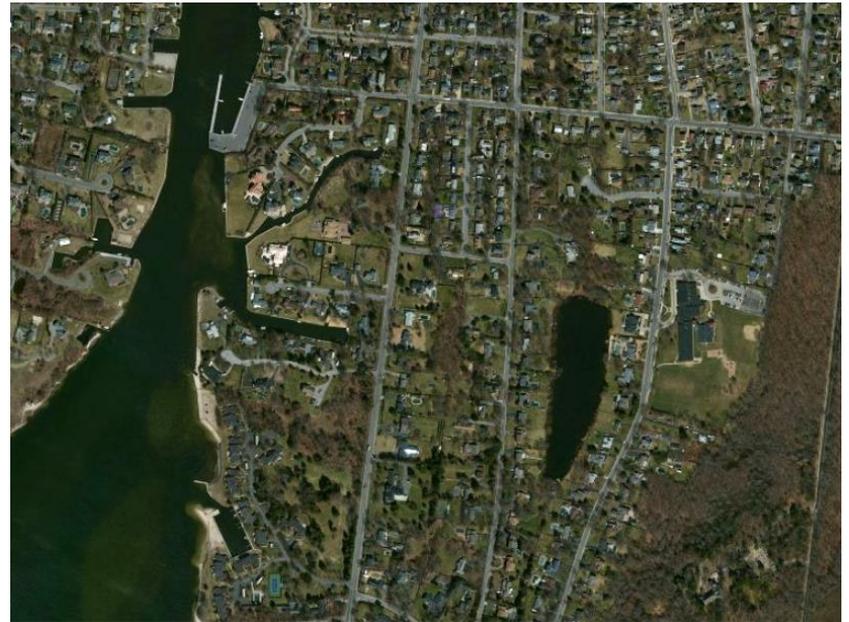
# New York State Cases

## Town of Islip v. P.B.S. Marina, Inc.

Appellate Division of the Supreme Court of New York, 1987

Held that discontinuance connotes a complete cessation, so minimal nonconforming function of itself, does not constitute an abandonment

Town of Islip



# New York State Cases

## Glacial Aggregates, LLC v. Town of Yorkshire

Appellate Division of the Supreme Court of New York, 2010

Held that enough activity had taken place at a mining site to establish a preexisting nonconforming use



# Case Studies

- **Toy Store**

New York City



- **Sand and Gravel Mine**

Town of Schoharie



- **Sand and Gravel Mine**

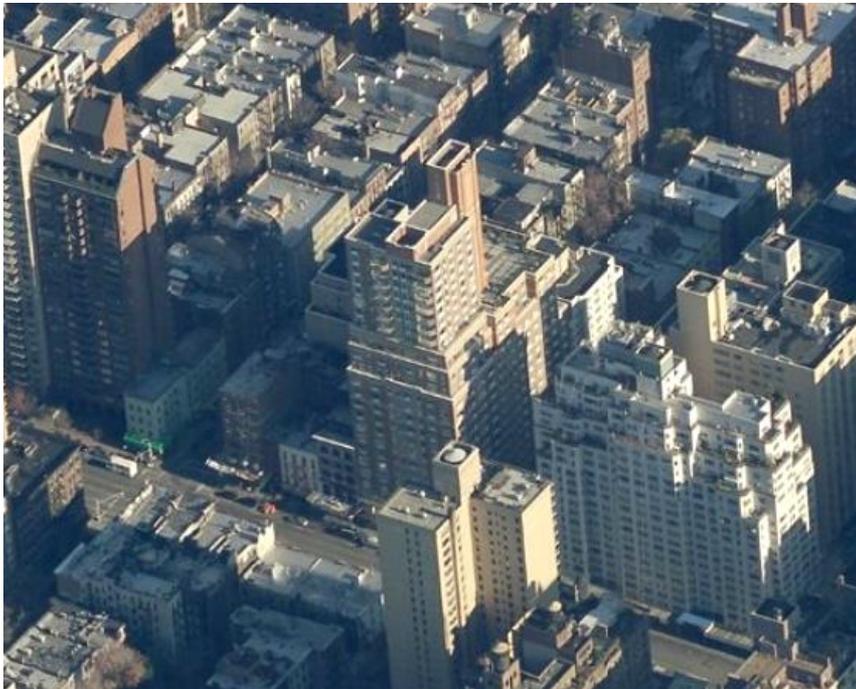
Town of Sterling



# Case Studies

## Toys “R” Us

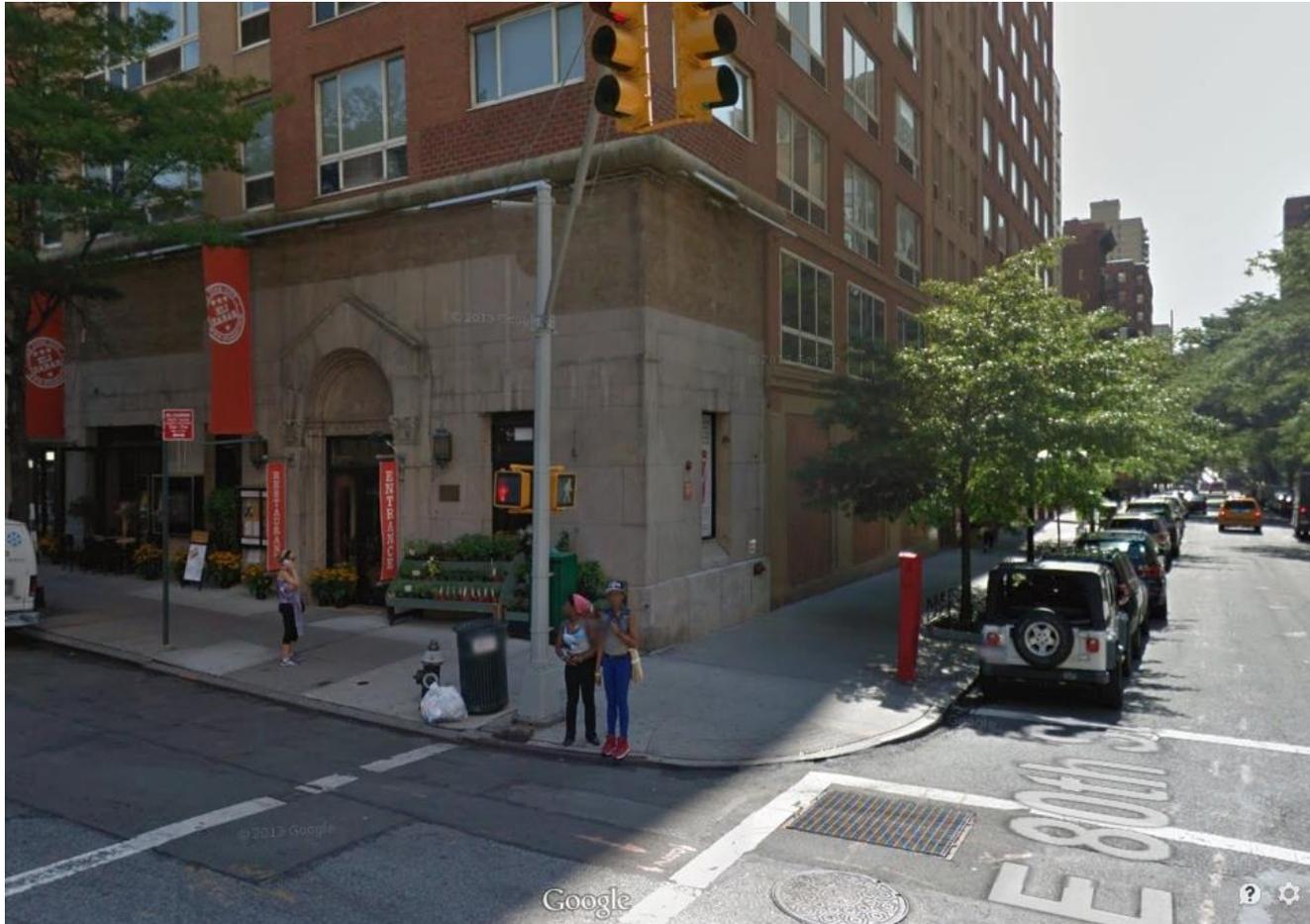
3<sup>rd</sup> Avenue and E. 80<sup>th</sup> Street, Manhattan



# Case Studies

## Toys “R” Us

3<sup>rd</sup> Avenue and E. 80<sup>th</sup> Street, Manhattan



# Case Studies

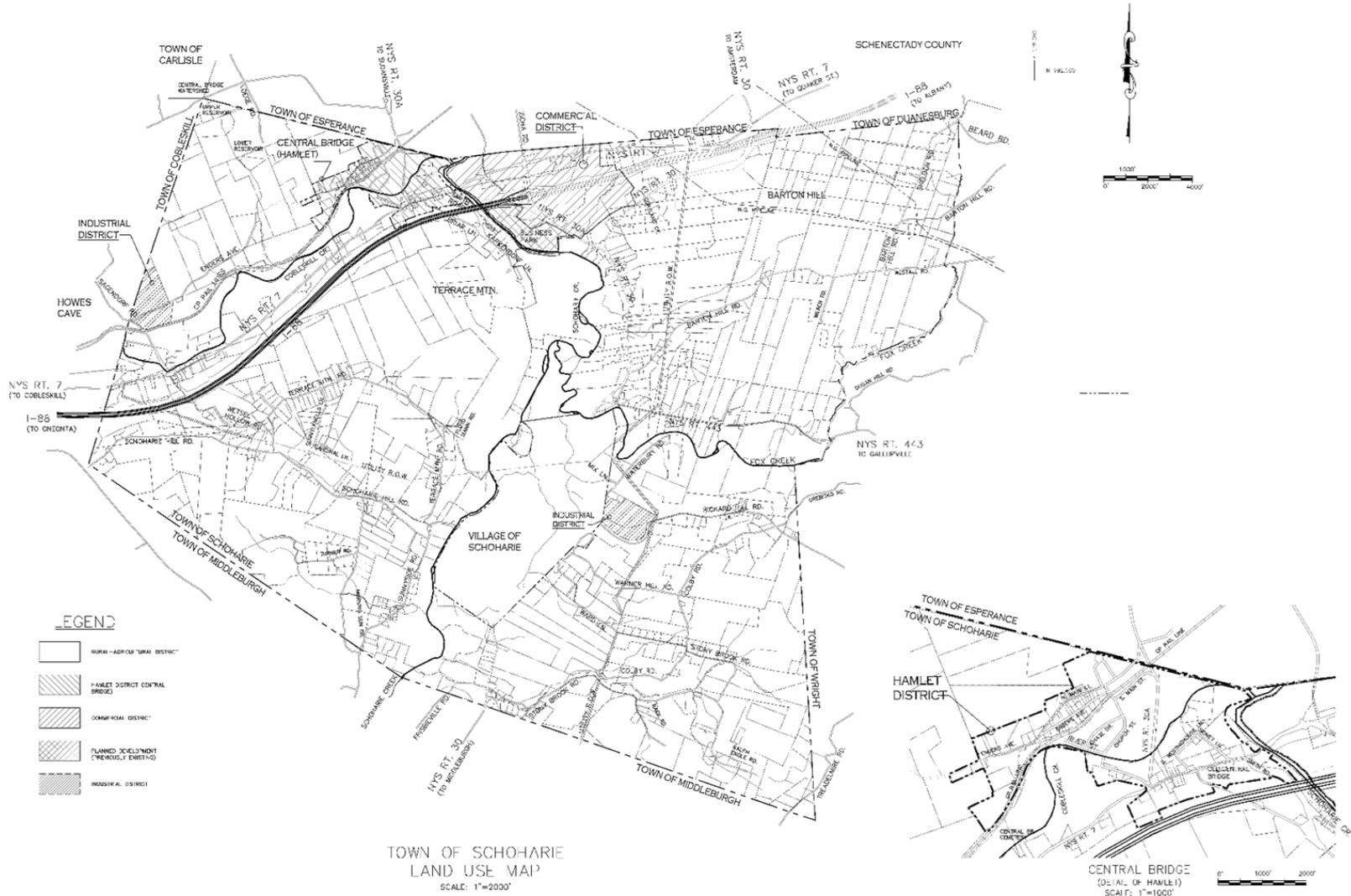
## Sand and Gravel Mine

Town of Schoharie



# Case Studies

## Sand and Gravel Mine Town of Schoharie



# Case Studies

## Sand and Gravel Mine Town of Sterling



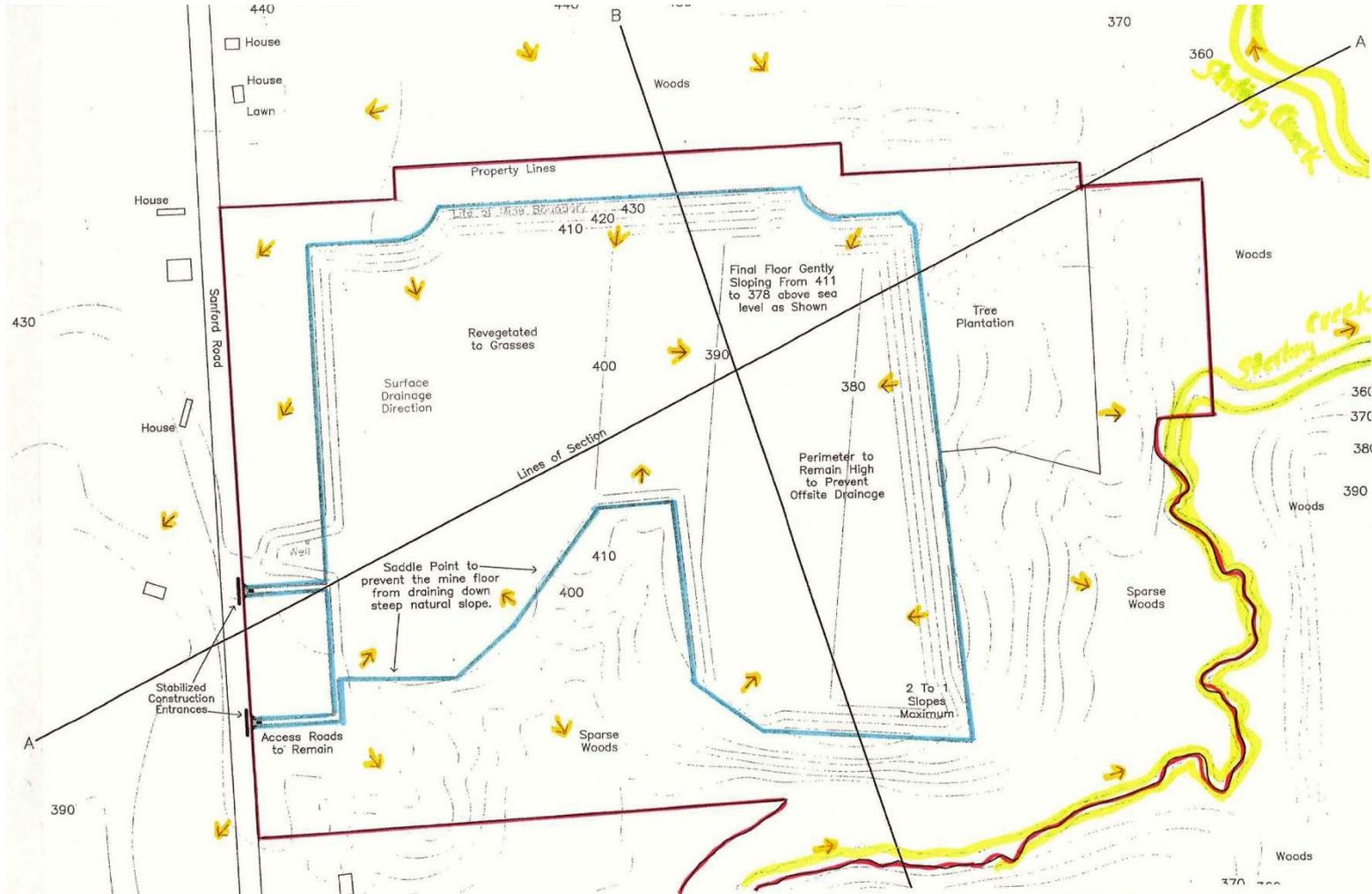
# Case Studies

## Sand and Gravel Mine Town of Sterling



# Case Studies

## Sand and Gravel Mine Town of Sterling



# Questions?



# NONCONFORMITY

That's what you get for being different

**Visit the Planning Department Training Website  
to view or download useful articles on  
Nonconforming Uses**

**Past Training Sessions  
March 18, 2015**

<http://www.cayugacounty.us/Departments/Planning-and-Economic-Development/Local-Planning-Assistance/Training/Past-Training-Sessions>