



Conforming & Nonconforming Uses, Structures & Lots

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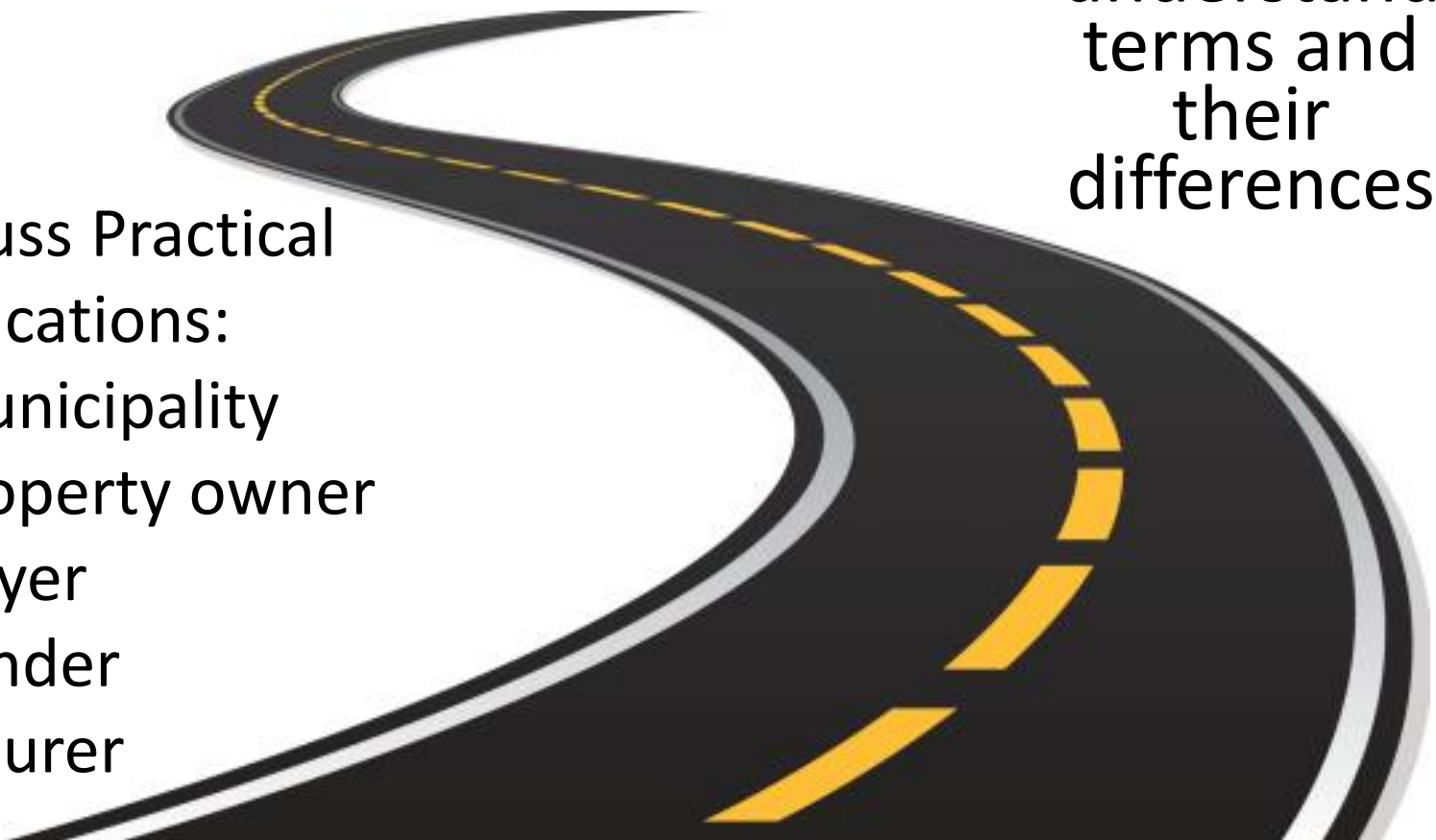
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Goals for Today:

Define and
understand
terms and
their
differences

Discuss Practical
implications:

- Municipality
- Property owner
- Buyer
- Lender
- Insurer



HISTORY OF NONCONFORMING

- How communities address uses and structures that predate zoning rules and do not conform to current standards
- Balance between letting remain “as is” v. achieving greater planning and zoning goals of having all uses and structures comply with current zoning and fit with the community vision, plan or pattern



HISTORY OF NONCONFORMING

- Core idea of Euclidean comprehensive zoning was based on the principle that land uses should be neatly separated.
- Philosophical justification for zoning would be impaired if nonconformities allowed to remain.
- Compromise path – allow to remain while imposing various restrictions to cause them to gradually disappear.
- Standard State Zoning Enabling Act (SZEA), promulgated by US Dept of Commerce in 1926, became the model for much of the zoning enabling legislation of states.
 - Initially failed to make provisions for nonconforming uses, leaving the issue to local bodies.

Legal Status of Uses, Structures & Lots

- Uses and Structures and Lots may be either:
 - Conforming
 - Nonconforming
- Independent analysis
 - Status of a structure is completely independent of whether its use is conforming.
 - Nonconforming uses and nonconforming structures can co-exist or only one can apply.
- Originally legally established

Conforming and Nonconforming USES

- Conforming Use
 - Use is allowed and meets all use standards
- Nonconforming Use
 - Use in existence and lawful on the date when a zoning ordinance becomes effective prohibiting such use

Nonconforming Use Examples

- Commercial uses in residential neighborhoods
- Multi-family use in single-family zone district
- Heavy industrial uses in areas rezoned for more mixed use
- Old greenhouses
- Plant husbandry uses allowed in old I-A/I-B, and not allowed in new I-MX zone



Rights and Restrictions – Nonconforming Use

| Runs with the Land | Yes |
|---|---|
| Continue “As Is” from the time it becomes nonconforming (grandfathered) | Yes |
| Enlargement or expansion | No* |
| Substantial change in character | No |
| Rebuild if structure housing nonconforming use is destroyed | Maybe. Depends on voluntary or involuntarily; threshold amounts |
| Certain acts terminate ability to continue use (Abandonment, vacancy (time period varies in different Zoning Codes), violation of other Code provisions | Yes. |

* Some municipalities, BOA is a path to allow some expansion. Some municipalities provide that if nonconforming use is enlarged or expanded without permission the use may be terminated.

Rights and Restrictions - Use

- BOA terminated non-conforming use for expansion. *Fire House Car Wash, Inc. v. Denver Bd. of Adjustment*, 30 P.3d 762 (Colo. App. 2001).
- Continued non-conforming uses are disfavored because they reduce the effectiveness of zoning ordinances, depress property values, and contribute to urban blight. *Hartley v. City of Colorado Springs*, 764 P.2d 1216 (Colo.1988).
- Zoning ordinances allowing indefinite continuation of a non-conforming use are to be strictly construed, and those restricting non-conforming uses are to be liberally construed. Additionally, non-conforming uses should be reduced to conforming uses as speedily as possible. *Anderson v. Board of Adjustment for Zoning Appeals*, 931 P.2d 517 (Colo. App. 1996). 9

Conforming and Nonconforming STRUCTURES

- Conforming Structure
 - Structure meets all building form standards of zone district (not including “non-structure” design standards such as parking or landscaping)
- Nonconforming Structure
 - Structure was lawfully erected, but later does not meet one or more standards for conforming structures due to a change in the zoning ordinance

Nonconforming **Structure** Examples

- Setbacks
 - Denver Baker neighborhood – residential buildings are very close and do not comply with internal setbacks



- Height
 - LoDo example -1331 and 1401 17th Street
- Main street zoning and surface parking

Rights and Restrictions – Nonconforming Structures

| Runs with the Land | Yes |
|---|-------|
| Continue “As Is” from the time it becomes nonconforming (grandfathered) | Yes |
| Increase degree of nonconformity | No* |
| Modify other conforming elements | Yes |
| Rebuild if involuntary destruction of structure | Yes** |
| Rebuild if voluntary destruction of structure | No |
| Obsolescent (or substandard) structure | Yes** |

* Some municipalities may allow certain increases (e.g., Denver allows rebuild or addition at same violating setback line)

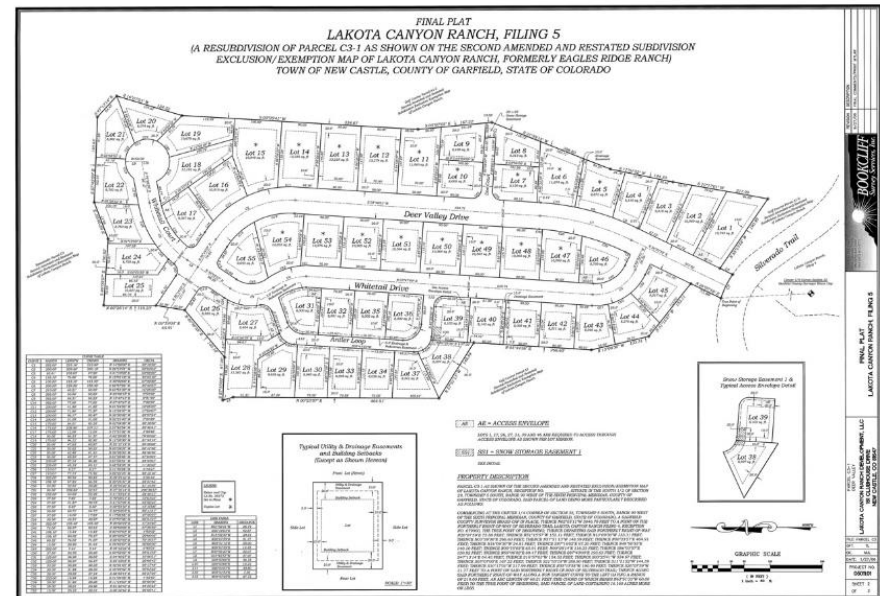
** Some municipalities place % limitations on replacement cost, or provide greater latitude for nonconforming residential structures to be rebuilt

Conforming & Nonconforming Lots

- Conforming Lot
 - Meets all current lot size requirements for zone district
- Nonconforming Lot
 - When a platted lot is too small or has too little frontage for the zone district in which it is located

Examples of Nonconforming Lots

- Older towns before modern subdivision statutes were in place
- Mountain communities
- Mining claims
- Older subdivisions



Rights and Restrictions - Nonconforming Lots

| Runs with the Land | Yes |
|---|------|
| Continue “As Is” from the time it becomes nonconforming (grandfathered) | Yes |
| If want to build on lot, must meet all zoning requirements (likely yields smaller structure or inability to build) | Yes |
| Limit use of nonconforming lots to situation where owner does not also own adjacent lots (owner cannot cure nonconformity by merging two small lots into one) | Yes* |

* Cannot require adjacent substandard lots under common ownership to be “merged”.
C.R.S. § 30-28-139 (2003).

Accounting for Conforming and Nonconforming Structures and Uses

- Shifting Philosophy
 - Nonconforming Structures and Sustainability
- Procedures to allow for Exceptions and Appeals



Denver's Response to Traditional Nonconformities Laws

- Conscious Change to “Kinder, Gentler” Approach to **Structures** Where Possible
 - Sustainability goals - facilitate reuse of existing structures
 - Urban design goals – often, nonconforming structures contribute positively to existing community character
- 2010 Code Update: New Middle-Ground “**Compliant**” **Legal Status** for Structures (DZC Division 12.6)
 - Legally existing structure that does not comply with specified zoning standards – setback, building height, build-to, surface parking location, pedestrian access, street-level activation – are “compliant” vs. nonconforming

Denver's Response to Traditional Nonconformities Laws

- “Compliant” structures in Denver (not nonconforming):
 - Puts owner/buyer in better position when drafting zoning compliance letter to state a structure is “compliant” vs. “nonconforming”
 - Greater ability to alter or expand without 100% zoning compliance
 - Example: can alter/expand building without 100% compliance with build-to standard provided either (1) don't reduce whatever compliant build-to element exists, or (2) if GFA is increased by more than 25%, install perimeter landscaping around any surface parking located between building and primary street (DZC, §12.6.3.2.D)
 - Example: allow residential structures to expand the amount of building encroaching into a side interior setback under certain conditions. (DZC, §12.6.3.2.F)
 - Rebuild “as was” allowed if structure is involuntarily destroyed/damaged

Uses: Pre-Existing 2-Unit & Multi-Unit Uses in Single-Family Residential Zones



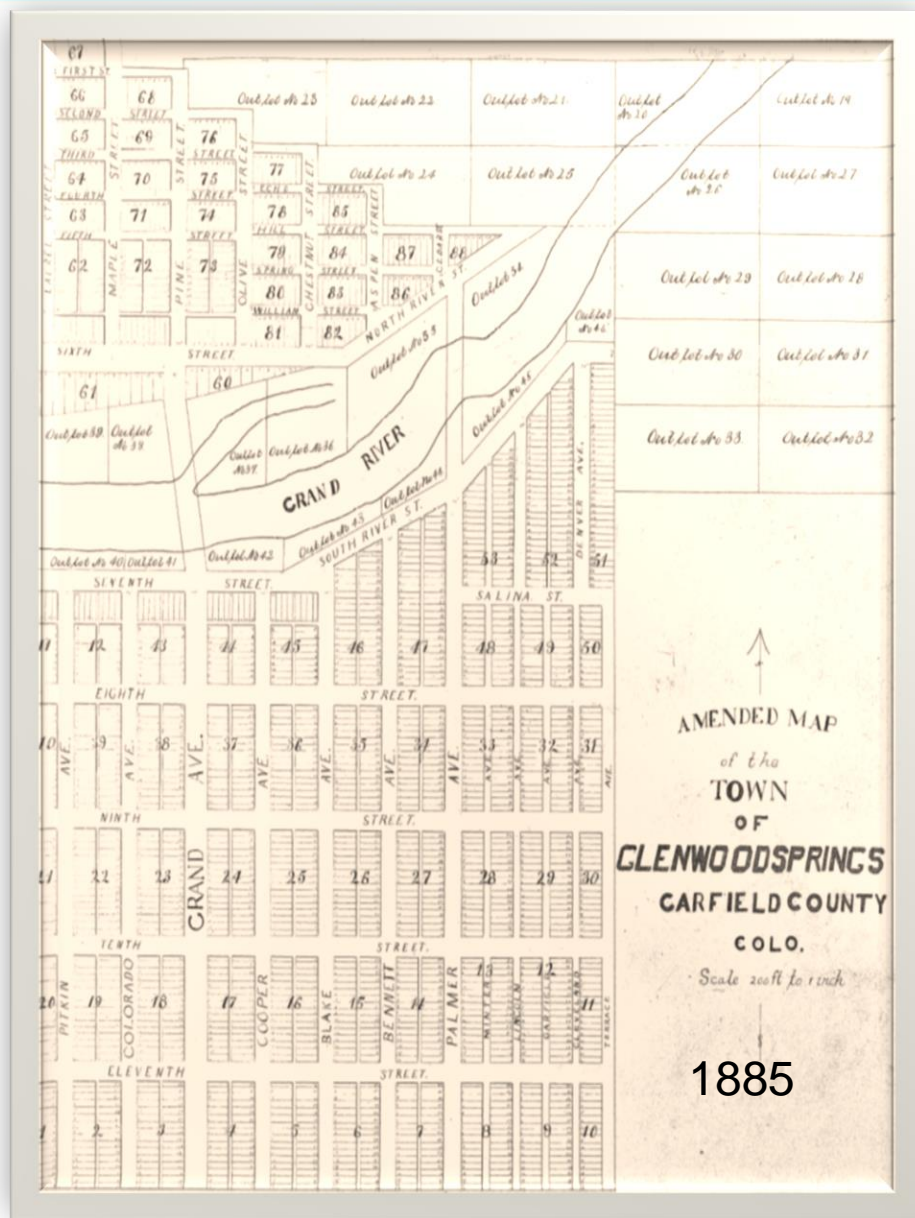
Denver's Response to Traditional Nonconformities Laws

- Greater acceptance of “**nonconforming**” residential uses
- Code amended in 2008 to change status of pre-existing duplex and multi-family uses in Denver's SU and TU zones
 - Pre-2008: Nonconforming uses with strict limits on expansion; use was terminated if the home was voluntarily demolished
 - After 2008: Conforming use – right runs with the land, so can demolish and rebuild a home without losing pre-existing duplex or multi-family use
 - Cannot increase or change the amount of land devoted to the use
 - Cannot increase the number of dwelling units when use was originally established
 - Must have been legally established – best evidence = zoning permit(s)
 - “Continuously maintained” means no cessation or interruption in the use on the land (i.e., no intervening changes to a different use)

Nonconformities

Residential Buildings & Lots

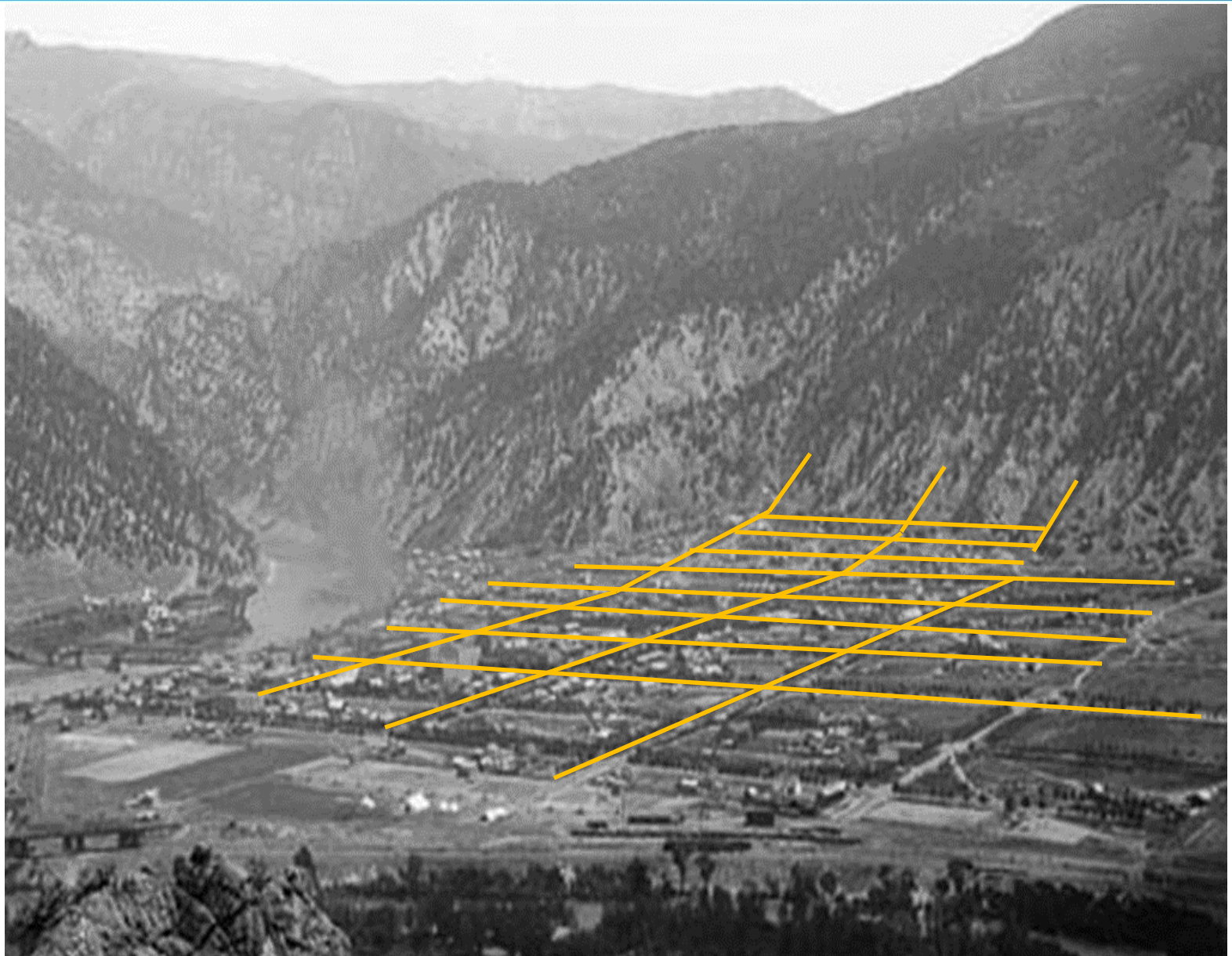












1950 - First Zoning Code Adopted



1500 square
foot lots





1950s - Nonconforming lots

The nonconforming use of land where no building of more than \$300 assessed valuation is in existence shall revert to a use conforming with this ordinance within 5 years after passage of this ordinance for residential use, and 3 years for commercial and industrial use.

1970 – Code Redraft

- From 3 to 7 residential zoning districts
- 6000 sf minimum lot sizes, 5000 sf for any lot created prior to March 1, 1965
- Nonconformities
- Where a lot was recorded in separate ownership prior to March 1, 1965 and does not meet the minimum lot area requirements for the district in which it is located, such lot shall be considered a legal lot for the district in which it is located.

1980

- Geologic Hazard Map Adopted
- Established development standards

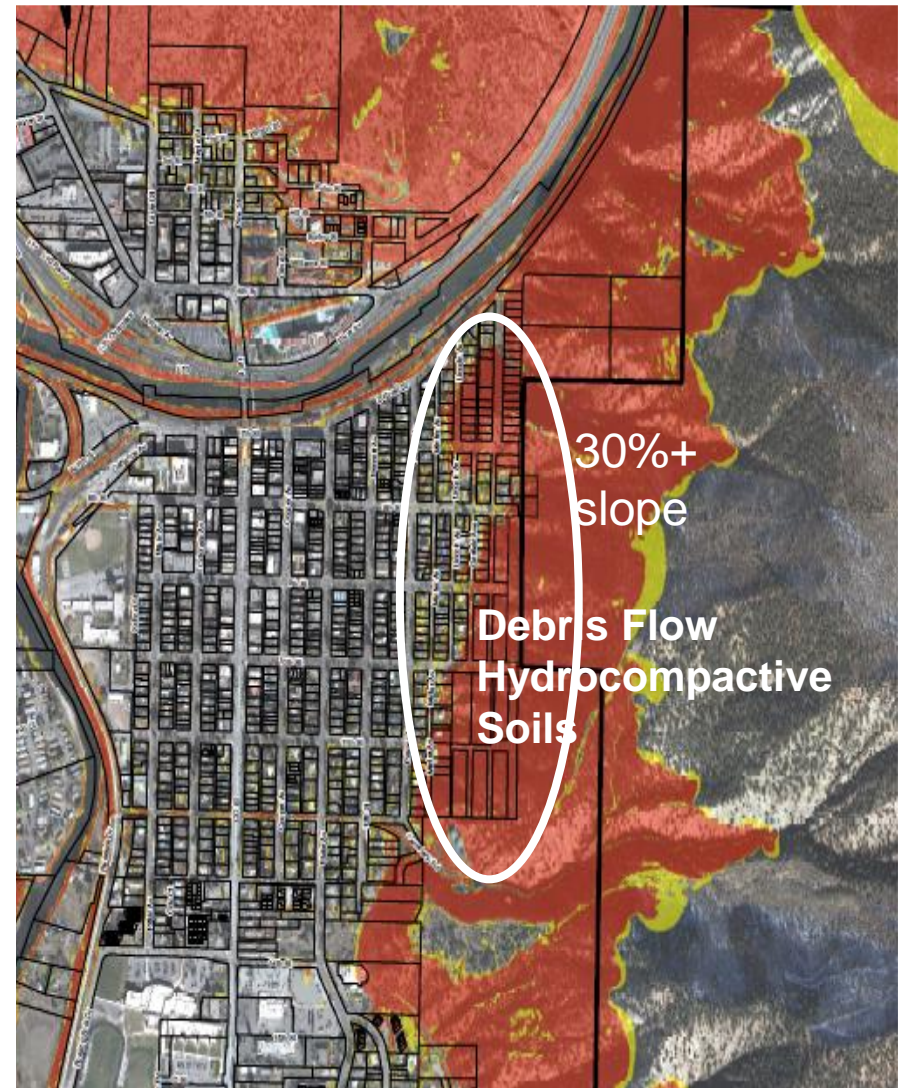
2000

- Created Hillside Preservation Overlay District
- Minimum lot size based on average slope

20-30% = 1 acre/unit

30-40% = 5 acres/unit

40%+ = 20 acres/unit



Nonconformities

- Steep Slopes – >20%
 - Single parcels
 - Adjacent parcels in single ownership prior to September 1, 2000
 - Eligible for one single family residence subject to the application of a special use permit.
- < 20% Slope
 - Lots created prior to March 1, 1965 may be developed
 - Buildings on substandard lots may be expanded
 - Compliance with all other zone district regulations



Steep Slopes & Nonconforming Commercial Uses

- Conversion to another commercial use
- Allowed if intensity is same or less than existing



Nonconforming commercial Structures

- Demolition = Compliance with Hillside Overlay
- Single family Only
- Commercial development frozen



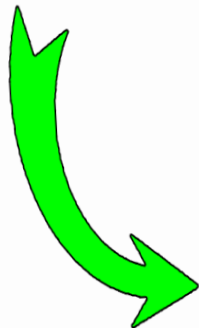
2018 – New Land Use Code

- Redefined Slope Calculations
 - Only within limits of site disturbance
 - Eliminated issues with commercial uses & structures
- Consolidated similar residential zoning districts
 - Proposed 6000 sf minimum lot size
 - Eliminated consideration of the 5000 sf lots created prior to March, 1965
 - Result: Nonconformed 76 properties, or 8% of the total – all in Original Town Site
- Solution
 - Reverted to 1970 code language

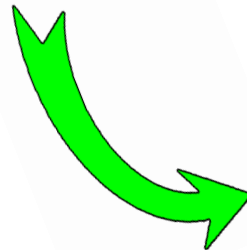


New Problem – Nonconformities

Structure on a
nonconforming lot =
Nonconforming structure



Expansion allowed if in
compliance with
Maintenance & Repair
Code



Repairs allowed but...
without expanding
building height or
footprint



Property Valuation & Non-Conformity

Property Valuation

- Basic property valuation equation: $\text{NOI} / \text{Cap Rate}$
- NOI = Net Operating Income
 - Essentially all revenues less all expenses
- Cap Rate is based on market sales comparables
 - Is an attempt to compare apples to apples across a variety of transactions
 - Determining appropriate Cap Rate is subjective

Acquisition Process

- Buyer performs own underwriting, determines price they can afford to pay for property
- Based on anticipated property income
- Encompasses buyer's vision for future of property
- Acquisition financing consists of combination equity/debt
- Financing typically vetted prior to offer submission, but commitments subject to final underwriting

Financing Acquisitions

- Financial institutions/equity providers will perform their own underwriting when decided whether to fund acquisition
- They are primarily concerned with worst-case scenarios
- “If everything goes wrong, can I still recover my investment, or hit my return targets”
- Financing may not see or support buyer’s vision for property - they may still finance, but it will cost you...

How Does Non-Conformity Impact This Process?

- If property value is based on in-place or anticipated income from a non-conforming use, buyer may be comfortable with NOI projections, but will a lender? Equity provider?
- If the structure is non-conforming and a casualty event occurs - assuming one is not allowed to rebuild - how is the property value assessed? Hint: it becomes a land play and banks HATE land plays...

What is a Buyer to Do?

- Non-conforming structure is generally a better case than non-conforming use.
- Most non-conforming structures are grandfathered so long as there is no change in use - eg multifamily building in a single-family district
- If there is a change of use, there tends to be more leeway in seeking a rezone to bring property into conformity if there is community buy-in for new use

What is a Buyer to Do?

- Non-conforming uses are a real challenge. It is difficult to underwrite to income from such a use and may be impossible to get financing for the acquisition.
- As ever, it depends on the degree of non-conformity
- Buyers are advised to clearly understand lease terms, buyout clauses, etc., and to plan for - and underwrite to - a future without the non-conforming use.

Practical Implications

- What these designations mean to:
 - municipality
 - property owner
 - party considering buying an existing building
 - lender
 - Insurer
- How these designations may help or hinder adaptive reuse of buildings

Practical Implications – Planning Goals

- Using nonconformity designations, along with zoning, to shape areas over the long-term to match municipal planning documents and redevelopment goals.

