

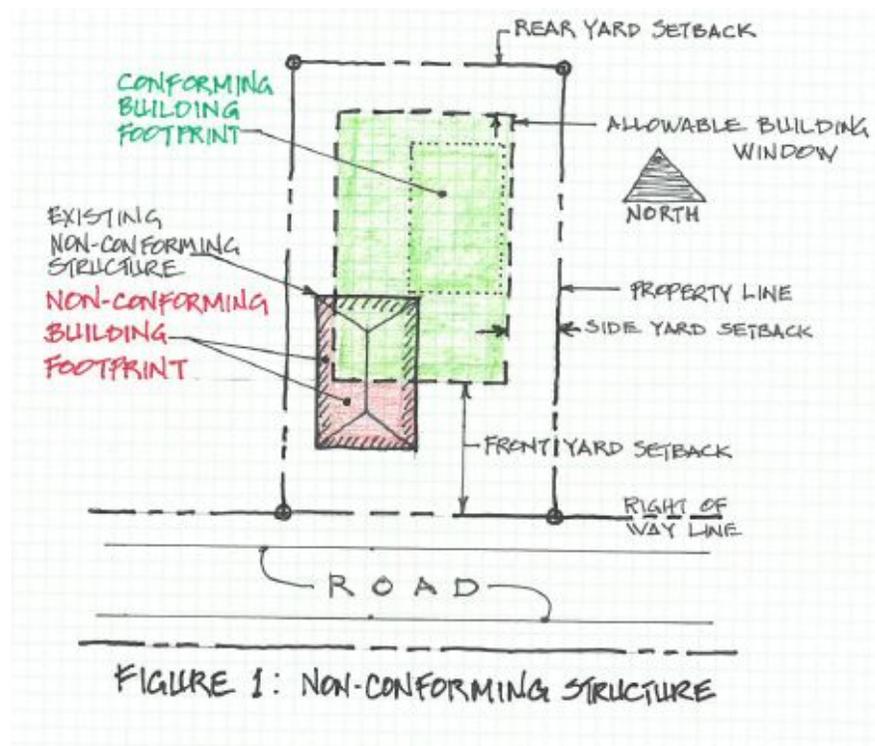
Are You a Non-Conformist?

In every community there are many properties, structures, and uses in existence that were created, built, or established before zoning requirements were adopted by the municipality. Often these properties, structures, or uses do not meet the current zoning requirements even though they were allowed at the time they were created. In the Planning and Land Use world, we refer to these lots, buildings, and uses as “legally existing non-conforming”.

In Scarborough, a lot that was legally in existence before the zoning ordinance was adopted or later changed, is considered a “lot of record”, and may be built upon even if it fails to meet the minimum requirements for lot area or road frontage in that particular zone. The lot and development that occurs on it must meet all other requirements unless a variance is obtained from the Board of Appeals. However, if the the non-conforming lot of record is owned by the same entity as an adjacent lot and also has continuous road frontage with that adjacent lot, it must be combined in order to make a (more) conforming lot.

If a building was allowed to be constructed prior to any established zoning requirements and now does not meet the requirements for minimum yard setbacks in that zone, it is a legally existing, non-conforming building. However, the ordinance does not allow a non-conforming

structure to be expanded, enlarged, or increased in height unless it meets the minimum space and bulk requirements of the zone in which it located.



In Figure 1, the portion of the structure shaded in red is non-conforming and could not be expanded, enlarged or increased in height without a variance because it is too close to the west side and front property line, but the green-shaded portion could be expanded, enlarged or increased in

height as long as in doing so, no new non-conformities were created.

So what happens when a property owner cannot expand a structure in a conforming manner? Sometimes there is no alternative other than to file a variance appeal. Variances can only be granted by the Board of Appeals, sometimes known as the Zoning Board, and can be difficult to obtain.

There are primarily 3 different types of variances authorized in Scarborough:

- The Standard Variance (also known as the “undue hardship” variance because it can be used for relief from any provision of the ordinance, but the appellant must demonstrate that no reasonable return can be realized without the benefit of the variance. If a home can be lived in, it provides the owner with a reasonable return according to case law. This is the most restrictive and difficult variance to obtain.
- The Practical Difficulty Variance, which can be used by any property that is not in the Shoreland Zone or Floodplain to obtain relief from dimensional standards only, but the appellant must prove that there is no feasible alternative to the variance, and would result in significant economic injury to the appellant if the variance is not granted. This is still difficult to demonstrate, but less difficult than the undue hardship variance.
- The Limited Reduction of Yard Size Variance, which is only available to residential properties where the dwelling existed on or before July 3, 1991. This variance can provide up to 5 feet of relief from a side or rear yard setback, and up to 10 feet of relief on a front yard setback. The standards deal generally with the reasonableness of the request and impacts to the neighboring properties. This is the easiest of the 3 variances to obtain.

In every case, appellants that are unsuccessful in obtaining variances did not adequately demonstrate that they met one or more of the standards. For example, simply stating that there is no feasible alternative to the variance request does not prove it. An appellant needs to show the various alternatives that were explored and why they would either be too difficult or too costly with respect to the proposed project. Many times, it takes professional third party opinions from subject matter experts to adequately demonstrate to the Board that a standard has been met.

It is important to note that in all 3 appeals, each standard must be met in order for the appeal to be granted, so even if the finds that 7 out of 8 standards were met, they must deny the appeal.

Planning and Code staff are available to assist and explain the various appeals to property owners, but at the end of the day, success is never guaranteed. The only predictable outcome is a building permit application that involves a conforming structure on a conforming lot for a conforming use.

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