

VARIANCES

[RSA 674:33 Powers of Zoning Board of Adjustment](#)

I. (b) Authorize upon appeal in specific cases such variance from the terms of the zoning ordinance as will not be contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

A variance is a relaxation or a waiver of any provision of the ordinance authorizing the landowner to use his or her land in a manner that would otherwise violate the ordinance and may be granted by the board of adjustment on appeal. *"Variances are included in a zoning ordinance to prevent the ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated."* Sprague v. Acworth 120 NH 641, (1980).

The local ordinance cannot limit or increase the powers of the board to grant variances under this authority, but this power must be exercised within bounds. In several decisions from 1952 to the present, the Supreme Court has declared that each of the following conditions must be found in order for a variance to be legally granted:

- (1) no decrease in value of surrounding properties would be suffered;
- (2) granting the variance would not be contrary to the public interest;
- (3) denial of the variance would result in unnecessary hardship to the owner seeking it;
- (4) by granting the variance substantial justice would be done; and
- (5) the use must not be contrary to the spirit and intent of the ordinance. (See Gelinas v. Portsmouth 97 NH 248, [1952])

Although the Supreme Court has recently stated that [RSA 674:33, I\(b\)](#) should not be read to imply that higher standards than are required by the statute, the Court's opinion in Gelinas did add the criterion relating to negative impacts on neighboring property values. Despite this seeming contradiction, the five Gelinas criteria, not the four in the statute, remain the standard for deciding variance requests.

Terms such as spirit, hardship, and injustice cannot be measured as specific quantities. Each case must be considered separately and the decision based on the judgment of the members of the board. Court decisions through the years, however, have shaped the meanings of these terms as they apply to zoning law. The discussion that follows represents a consensus of opinions on the terms. Although every judge in every jurisdiction might not agree with them completely, a board of adjustment can consider them to be acceptable guidelines.

THE FIVE VARIANCE CRITERIA

1. NO DECREASE IN VALUE OF SURROUNDING PROPERTIES WOULD BE SUFFERED.

Perhaps Attorney Tim Bates says it best in the OEP training video, Zoning and the ZBA: *"Whether the project made possible by the grant of a variance will decrease the value of surrounding properties is one of those issues that will depend on the facts of each application. While objections to the variance by abutters may be taken as some indication that property values might be decreased, such*

*objections do not require the zoning board of adjustment to find that values would decrease. Very often, there will be conflicting evidence and dueling experts on this point, and on many others in a controversial application. It is the job of the ZBA to sift through the conflicting testimony and other evidence and to make a finding as to whether a decrease in property value will occur. The ZBA members may also draw upon their own knowledge of the area involved in reaching a decision on this and other issues. Because of this, the ZBA does not have to accept the conclusions of experts on the question of value, or on any other point, since one of the functions of the board is to decide how much weight, or credibility, to give testimony or opinions of witnesses, including expert witnesses. Keep in mind that the burden is on the applicant to convince the ZBA that it is more likely than not that the project will not decrease values”*¹

Also, in Nestor v. Town of Meredith ZBA, 138 NH 632, (1994), the court stated that resolution of conflicts is a function of the ZBA.

2. GRANTING THE VARIANCE MUST NOT BE CONTRARY TO THE PUBLIC INTEREST.

In the case of Gray v. Seidel 143 N.H. 327 (February 8, 1999) the NH Supreme Court reaffirmed the variance standard in RSA 674:33, I(b) (1996), which states that the board has the power to “[a]uthorize . . . [a] variance from the terms of the zoning ordinance as will not be contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.” (Emphasis added) The court clarified that RSA 674:33, I (b) should not be read to imply an applicant must meet any burden higher than required by statute (i.e., there must be a demonstrated public benefit if the variance were to be granted) but merely must show that there will be no harm (i.e., “will not be contrary”) to the public interest if granted.

“COMMENT - Proving a Negative: The applicant still has the burden of persuasion on all 5 variance criteria. But my advice to ZBA members is not to be procedural sticklers when it comes to the “public interest” criterion. If an applicant makes even a conclusory statement like: “As you can see, there’s no adverse effect on the public interest,” that should be enough, unless abutters or board members themselves identify some specific adverse effect on the public interest, in which case the applicant will have the burden of overcoming it.

*To put it another way, if the applicant satisfies the other 4 criteria, a denial based solely on the “public interest” criterion is in my view unlikely to be upheld in court unless your decision identifies some specific way in which the proposed variance is contrary to that interest”*²

For the variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health,

¹ - *Zoning and the ZBA*, OSP video script (Tim Bates), pg. 3

² - 1999 Municipal Law Update: The Courts, H. Bernard Waugh, Jr., Chief Legal Counsel, NHMA, October 1999

safety or general welfare of the public? (see Chester Rod and Gun Club, Inc. v. Town of Chester, 152 N.H. 577 (2005) on page 107.)

3. DENIAL OF THE VARIANCE WOULD RESULT IN UNNECESSARY HARDSHIP TO THE OWNER SEEKING IT.

The term “hardship” has caused more problems for boards of adjustment than anything else connected with zoning, possibly because the term is so general and has so many applications outside of zoning law. By its basic purpose, a zoning ordinance imposes some hardship on all property by setting lot size dimensions and allowable uses. The restrictions on one parcel are balanced by similar restrictions on other parcels in the same zone. When the hardship so imposed is shared equally by all property owners, no grounds for a variance exist. Only when some characteristic of the particular land in question makes it different from others can unnecessary hardship be claimed. The fact that a variance may be granted in one town does not mean that in another town on an identical fact pattern, that a different decision might not be lawfully reached by a ZBA. Even in the same town, different results may be reached with just slightly different fact patterns. *“This does not mean that either finding or decision is wrong per se, it merely demonstrates in a larger sense the home rule aspects of the law of zoning that are at the core of New Hampshire’s land use regulatory scheme.”* Nestor v. Town of Meredith Zoning Board of Adjustment, 138 N.H. 632, 644 A.2d 548, (1994)

On January 29, 2001, the NH Supreme court issued an opinion in [Simplex Technologies, Inc. v. Town of Newington](#), which dramatically changed the standard for granting zoning variances. The court refined the long-held standard for unnecessary hardship and established 3 conditions, which must be used by boards of adjustment when determining if a hardship exists. (See Appendix F for background information about this significant court decision.)

On May 25, 2004, the NH Supreme Court issued an opinion in [Boccia v. City of Portsmouth](#), which further refined variance law to distinguish between use and area (dimensional) variances. In *Boccia*, the Court concluded that it must distinguish between use variances and dimensional variances, observing that the hardship criteria of *Simplex* could only logically be applied to uses of land. (See Appendix G for background information about this significant court decision.)

When faced with a variance application, the ZBA must first determine if it is a “use” or “area” variance. If it is a “use” variance, the *Simplex* analysis applies. If it is an “area” variance, the *Boccia* analysis applies.

Simplex Analysis

“Rather than having to establish that the ordinance prevents the owner from making *any reasonable use of the land* in order to demonstrate unnecessary hardship, a landowner can now establish unnecessary hardship by satisfying the following three conditions:

(1) *The zoning restriction as applied to the applicant's property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment.*

Rather than having to demonstrate that there is not any reasonable use of the land, landowners must now demonstrate that the restriction interferes with their reasonable use of the property considering its unique setting. The use must be reasonable. The second part of this test is in some ways a restatement of the statutory requirement that there be something unique about this property and that it not share the same characteristics of every other property in the zoning district. The facts of a case may support a conclusion that the zoning restrictions may interfere with the proposed use of a property, yet they may not support a conclusion that the ordinance interferes with a reasonable use of the property. “While its size may make it uniquely appropriate for (the) business, that does not make it unique for zoning purposes.” (See [Robert L. Garrison v. Town of Henniker](#), [August 2, 2006])

(2) *No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restrictions on the property.*

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose?

This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or “unnecessary” hardship.

(3) *The variance would not injure the public or private rights of others.*

This is perhaps similar to a “no harm - no foul” standard. If the granting of the variance would not have any negative impact on the public or on private persons, then perhaps this condition is met. Stated differently, would the granting of the variance create a private or public nuisance*?

[*Comment: A nuisance arises from use of property, either actively or passively, in an unreasonable manner. *Shea v. Portsmouth*, 98 N.H. 22 (1953). A nuisance can be either public or private. A private nuisance is defined as an activity which results in an unreasonable interference with the use and enjoyment of another's property, *Urie v. Laconia Paper Co.*, 107 N.H. 131 (1966); while a public nuisance is an unreasonable interference with a right common to the general public. A public nuisance is behavior which unreasonably interferes with the health, safety, peace, comfort or convenience of the general community. Conduct which unreasonably interferes with the rights of others may be both a public and private nuisance. *Robie v. Lillis*, 112 N.H. 492 (1972). In order for a nuisance to exist, the interference complained of must be substantial, that is, the harm alleged must be in excess of the customary interference a land user suffers in an organized society, however, not every intentional and substantial invasion of a person's interest in the use and enjoyment of land is actionable. *Id.* at 496.]

This requirement, to some degree, overlaps with the requirement that the granting of a variance not result in a diminution of value of surrounding properties.

All three conditions must be satisfied for unnecessary hardship to exist under this standard.³

TESTS TO DETERMINE WHETHER “UNNECESSARY HARDSHIP” EXISTS TO JUSTIFY GRANT OF A “USE” VARIANCE

Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001)

In this case, the supreme court radically changed the legal definition of what constitutes the “unnecessary hardship” that must be found to allow the Zoning Board of Adjustment to grant a “use” variance from a zoning ordinance. The other four variance criteria remain nominally unaffected by the decision, although some elements of each of those other criteria seem to be inherently part of the analysis ZBAs will have to undergo as they apply the new hardship tests.

For decades, for unnecessary hardship to exist, the applicant for a variance in New Hampshire had to show that unless the variance were granted, there would be no reasonable use of the property allowed under the zoning ordinance. Now, the supreme court has decided to substitute a more relaxed test, effective immediately. The new test for “unnecessary hardship” as applied to a “use” variance consists of 3 elements, and the applicant must meet each one. For “unnecessary hardship” to exist, the applicant must show:

- (1) that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment;
- (2) that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
- (3) that the variance would not injure the public or private rights of others. Let’s look at each of these elements.

I. REASONABLE USE

(1) the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment

In the later case of *Harrington v. Town of Warner*, 152 N.H. 74 (2005), the court wrote that this “first prong” of the Simplex hardship standard is the “critical inquiry” for determining whether unnecessary hardship has been established, and set out the following three general factors that the ZBA must take into account to evaluate whether the first prong of the hardship test is met by the applicant:

³ - The New Unnecessary Hardship Test [Post Simplex] - from *Summary of Impact of Simplex V. Newington* prepared for the Office of State Planning Seminary, May 12, 2001, Atty. Peter J. Loughlin

First, the question of whether the zoning restriction as applied to the property interferes with the landowner's reasonable use of the property involves a consideration of the owner's ability to receive a reasonable return on their investment – this factor does not require the landowner to show that without the variance he or she has been deprived of all beneficial use of the land, but the zoning restriction at issue must result in more than “mere inconvenience” to the economic fortunes of the landowner. The consideration of this factor by the ZBA will often require “actual proof . . . in the form of dollars and cents evidence” and might take into account evidence of original cost of the land, current market value and decline in value.

Second, Simplex requires a determination of whether the hardship is the result of the unique setting of the property. This factor requires that the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property: however, this factor does not require that the property for which the variance is sought be the only such property burdened by the zoning restriction. Moreover, the burden must arise from the property and not from the individual plight of the landowner; the landowner must show that the hardship is a result of the specific conditions of the property and not the area in general.

Third, the ZBA must consider the surrounding environment, which includes an evaluation of whether the applicant's proposed use would “alter the essential character of the neighborhood,” because “the impact on the character of the neighborhood is central to the analysis of a use variance.” Put another way, whether the proposed use of the property is reasonable will depend to a large degree on the setting that surrounds the property. For example, if an applicant is seeking a use variance to allow a pig farm in a residential neighborhood, the ZBA may well conclude that the proposed use of the property is not reasonable considering the unique setting of the property in its environment. In such a case, the ZBA would therefore find that the zoning restriction (that prohibits pig farms in the zone) does not interfere with the reasonable use of the property, considering the unique setting of the property in its environment.

II. FAIR AND SUBSTANTIAL RELATIONSHIP

(2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property

This element requires the ZBA to identify, in the abstract, the general purpose(s) of the zoning restriction for which the variance is sought. Why does the restriction exist in the first place? What purpose is it intended to achieve? The plain language of this test requires the ZBA to identify the general purposes of the entire zoning ordinance and then judge whether those purposes are advanced by the specific restriction in the ordinance that is causing the problem. However, I think this test may be more flexible than the language suggests. I would argue that a proper application of this test would also allow the ZBA to first identify the general purposes sought to be achieved by the specific restriction (not by the ordinance as a whole, which, of course, will have a host of general

purposes, some of which may have little relationship to the specific restriction for which the landowner is seeking the variance).

Next, the ZBA should look at whether those general, abstract purposes are advanced when the zoning restriction is applied to the particular piece of property for which the variance is sought -- this “as applied” inquiry must also take into account the unique setting of the property in its environment, just like the first element of the hardship test.

Continuing the pig farm example, the general purpose of restricting a zone to residential use is to separate residential areas from non-residential uses that are deemed incompatible, and then to preserve the residential character of the zone once it is established. In most cases, it would be very difficult for an applicant who sought a variance to allow the pig farm to show that there is no fair and substantial relationship between the general purpose of allowing only residential uses in that zone, and the impact of that restriction on the applicant’s specific property. That is so because in the “typical” case the restriction has exactly its intended effect when it is applied to the applicant’s property: it preserves the integrity of an existing residential zone from the impact of incompatible, non-residential uses.

However, one can imagine a situation where there are a number of other farming uses in the neighborhood that are either “grandfathered,” or were established as a result of earlier variances that were issued, so that there is already a strong presence of similar agricultural uses in the area where the applicant wishes to establish the pig farm. In such a case, the applicant may be able to show that there is no “fair and substantial” relationship between the general purpose of the zoning restriction that allows only residential uses, and the impact that restriction has on the applicant’s property.

III. NO INJURY TO PUBLIC OR PRIVATE RIGHTS OF OTHERS

(3) the variance would not injure the public or private rights of others

This third and final element of the new hardship test requires the applicant to show that the proposal would not injure the public or private rights of others. This encompasses part of one of the four other parts of the variance test that requires the applicant to show that no diminution of surrounding property values will result from the grant of the variance. However, the new third element of “unnecessary hardship” is broader than just property values. Indeed, the specific reference to the “private rights of others” raises the (scary!) possibility that the ZBA may now have to consider and actually rule on challenges to variances brought by opponents who claim that the proposed use is prohibited by private covenants in a deed, or because the boundary of the property is disputed, for example. We can only hope that the court did not mean to include that kind of dispute as within the issues that the ZBA must resolve, but only time will tell as new variance cases are decided.

In the meantime, and as a general matter, the ZBA should not be overly concerned about this third element of “unnecessary hardship” unless there is convincing evidence that

there will be a significant decrease in surrounding property values, or some clear harm to public health, safety or welfare if the variance is granted. Also see the write up of Chester Rod and Gun Club, Inc. v. Town of Chester, 152 N.H. 577 (2005) (which is located further on in these materials) for a more exhaustive explanation of what constitutes the “public interest” and “the public rights of others.”

From 2007 Land Use Law Update by Attorney Tim Bates, OEP Spring Conference

Boccia Analysis

An applicant seeking an area variance can demonstrate unnecessary hardship by establishing that:

(1) Special conditions of the property make an area variance necessary in order to allow the applicant to construct the development as designed; and

(2) The applicant cannot achieve the same benefit by some other reasonably feasible method that would not impose an undue financial burden.

In applying the first prong, the owner does not need to establish that without the variance the property would be valueless—rather, that practical considerations make it difficult or impossible to implement a permitted use, given the special conditions of the property. In the *Boccia* case, the Court found that this prong had been met by the developer, owing to the configuration of the property and the presence of wetlands.

The second prong calls for an examination of other reasonably feasible alternatives. The Court clearly stated that the developer’s financial considerations do indeed become part of the calculus of what is reasonable. Undue financial burdens should not be imposed upon a landowner, so the relative expense of alternatives must be examined.

Unnecessary Hardship - Two Factors

1. Special Conditions of the Property

In considering the first prong or factor of the Boccia test for unnecessary hardship for an area variance, the Malachy court stated flatly (quoting from Garrison v. Town of Henniker, a USE variance case) that “Special conditions requires that the applicant demonstrate that its property is unique in its surroundings.”

The court noted that nearly 65% of the property consists of wetlands or the 100- foot wetlands buffer, and that the configuration of the wetlands further reduces the buildable area. The court found that this evidence was sufficient to show that “special conditions” exist on the property that satisfy the first factor for an area variance.

2. Other Reasonably Feasible Methods

Under the second prong or factor for an area variance the applicant must show that there are no reasonably feasible alternative methods available to implement the proposed use without the variance. That analysis includes a consideration of whether the area variance is required to avoid an undue financial burden on the applicant, which includes examination of the relative expense of alternative methods. The court further explained this requirement as follows:

If the proposed project could be constructed such that an area variance would not be required, the burden is on the applicant to show that these alternatives are costprohibitive. Under this factor, **the ZBA may consider the feasibility of a scaled down version of the proposed use, but must be sure to also consider whether the scaled down version would impose a financial burden on the landowner.**

The supreme court had no trouble agreeing with the trial court that absent the variance, Malachy Glen “would have to reduce its project by more than 50% and that this would result in financial hardship. Thus, there was no other reasonably feasible method of effectuating the proposed use without the area variance.

From 2007 Land Use Law Update by Attorney Tim Bates, OEP Spring Conference

4. BY GRANTING THE VARIANCE SUBSTANTIAL JUSTICE WOULD BE DONE.

It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.

5. THE USE MUST NOT BE CONTRARY TO THE SPIRIT AND INTENT OF THE ORDINANCE.

The power to zone is delegated to municipalities by the state. This limits the purposes for which zoning restrictions can be made to those listed in the state enabling legislation, [RSA 674:16-20](#). In general, the provisions must promote the “*health, safety, or general welfare of the community.*” They do this by lessening congestion in the streets, securing safety from fires, panic and other dangers, and providing for adequate light and air. In deciding whether or not a variance will violate the spirit and intent of the ordinance, the board of adjustment must determine the legal purpose the ordinance serves and the reason it was enacted. “This requires that the effect of the variance be evaluated in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based.”⁴

⁴ - *Zoning and the ZBA*, OSP video script (Tim Bates), pg. 4

For instance, a zoning ordinance might control building heights specifically to protect adjoining property from the loss of light and air that could be caused by high buildings. The owner of a piece of property surrounded on three sides by water might be allowed a height variance without violating the spirit and intent, if the ordinance clearly states that this is the sole purpose for the building height limitation. On the other hand, if a landowner requested a variance for a proposed building that would shut out light and air from neighboring property, the granting of the variance might be improper.

As another example, consider the question of frontage requirements. Most zoning ordinances specify a minimum frontage for building lots to prevent overcrowding of the land. If a lot had ample width at the building line but narrowed to below minimum requirements where it fronted the public street, a variance might be considered without violating the spirit and intent of the ordinance, because to do so would not result in overcrowding. There are many other variations of lot shapes and sizes that might qualify for a variance; the principles remain the same. The courts have emphasized in numerous decisions that the characteristics of the particular parcel of land determine whether or not a hardship exists.

However, when the ordinance contains a restriction against a particular use of the land, the board of adjustment would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits industrial and commercial uses in a residential neighborhood, granting permission for such activities would be of doubtful legality. **The board cannot change the ordinance.**

In [Bacon v. Town of Enfield](#), No. 2002-591, (N.H. Jan. 20, 2004), the ZBA denied a variance for a small propane boiler shed attached to the outside of a lakefront house because (1) it did not satisfy the *Simplex* “hardship” standard; (2) it would violate the spirit of the ordinance; and (3) it would not be in the public interest. The Supreme Court noted that there were three grounds for the Superior Court’s decision, and explained, “In order to affirm the trial court’s decision, we need only find that the Court did not err in its review concerning at least one of these factors.”

Focusing on the “spirit of the ordinance” factor, the Court concluded, “While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and over development could be inconsistent with the spirit of the ordinance.”

In [Malachy Glen Associates, Inc. v. Town of Chichester](#) (March 20, 2007), the supreme court stated that the requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance.

The requirement that the variance not be contrary to the public interest is "related to the requirement that the variance be consistent with the spirit of the ordinance." Chester, 152 N.H. at 580.

[T]o be contrary to the public interest . . . the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives.

One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. . . .

Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare.

The new variance criteria can be summarized as follows:

- I. The value of surrounding properties will not be diminished.
- II. The variance will not be contrary to the public interest.
- III. Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.
 - A. Applicant seeking use variance - *Simplex* analysis
 - i. The zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.
 - ii. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.
 - iii. The variance would not injure the public or private rights of others.
 - B. Applicant seeking area (dimensional) variance - *Boccia* analysis
 - i. An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.
 - ii. The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.
- IV. Substantial justice is done.
- V. The variance is consistent with the spirit of the ordinance.

WHAT SHOULD MUNICIPALITIES DO FOLLOWING THE SIMPLEX AND BOCCIA DECISIONS?

- A. Change Variance Application:** If your variance application discusses the unnecessary hardship under the old standard, it should be revised to reflect the new standards differentiating between use and area variances.
- B. Seek Guidance:** If a variance application raises serious questions about the purpose or application of the Zoning Ordinance as applied to a particular piece of property, you may want to seek assistance from Town Counsel or, more importantly, the municipal or regional planning office.
- C. Master Plan:** Since the tests now focuses on the impact of the application on the ordinance, it is even more important to consider the relationship between the Zoning Ordinance and the Master Plan.

D. Making Findings: The change in the zoning requirement makes it even more important that boards make accurate findings of fact in regards to all the tests for a variance.

E. Keep Ordinance Current: The new standards established by *Simplex* and *Boccia* for determining unnecessary hardship puts an even greater premium on keeping zoning ordinances current.⁵

“Use” and “Area” Variances

New Hampshire law now distinguishes between a “use” or “area” variance. When looking at such distinctions, a “use” variance is one which permits a use of land for a purpose that is not allowed by the zoning ordinance such as a commercial use in a residential zone or a multi-family use in an area that only permits single family dwellings. An “area” variance (also called a “dimensional variance”), on the other hand, is one which involves physical aspects of the development such as building height, setback or size; the number of parking spaces required; frontage or lot size; etc.

“The critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction. If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction. Whether the variance sought is an area or use variance requires a case-by-case determination based upon the language and purpose of the particular zoning restriction at issue.” [Harrington v. Town of Warner](#) 152 N.H. 74 (2005)

New Hampshire law requires the existence of unnecessary hardship for the granting of any variance albeit use or area.

Distinguishing between a use or area variance isn't always simple, which didn't matter until the Court's decision in [Boccia v. City of Portsmouth](#), 151 N.H. 84 (2004) established separate unnecessary hardship factors to apply to area variances, while limiting the *Simplex* unnecessary hardship test to use variances.⁶

The distinction between a use and area variance is not always obvious. As a rule of thumb, if relief is needed from a regulation that controls what can be done on a lot, a use variance will probably be needed. If relief is needed from a regulation that controls where the use is permitted on a lot, an area variance is probably required. In cases where the distinction is not clear, it is necessary to determine whether the purpose of the regulation is to preserve the character of the surrounding area, in which case it would

⁵ - “What Should Municipalities Do?” from *Summary of Impact of Simplex V. Newington* prepared for the Office of State Planning Seminary, May 12, 2001, Atty. Peter J. Loughlin

⁶ - *Purpose of Zoning Regulation Key to Distinguishing Use and Area Variances* [Harrington v. Town of Warner](#) No. 2003-687, April 4, 2005 [LGC Legal Update](#)

generally be considered to be a use restriction. If, on the other hand, the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction. Whether the variance sought is an area or use variance requires a case by case determination based on the language and purpose of the particular zoning restriction at issue. ⁷

Requests for use variances are often the most difficult cases that zoning boards have to consider. Boards should not be swayed by opposition of neighbors or the fact that no abutters appear at the hearing. The board must review each variance criterion and grant the variance, only if they are all met. The board does not have the discretion to grant the variance because they like the applicant or because they believe the project is a good idea.

The granting of a “use” variance should not be confused with “spot zoning”, defined by the New Hampshire Supreme Court as the singling out of a parcel of land by the legislative body through the zoning process for treatment unjustifiably differing from that of surrounding land, thereby creating an island having no relevant differences from its neighbors. Bosse v Portsmouth, 107 N.H. 523, 226 A.2d 99 (1967). Boards should not dismiss use variance requests merely on the basis of a claim of improper spot zoning. On the contrary, although a use variance which has been granted with no basis for treating the subject parcel in a manner different from surrounding property may create an effect similar to spot zoning, the grant of a variance is not spot zoning.

All requests for variances should be reviewed very carefully but especially those requests for use variances. Denial of a proper variance request may result in a taking or loss of legitimate property rights of a landowner while the granting of an improper use variance may alter the character of a neighborhood forever beginning a domino effect as adjacent, affected properties seek similar requests due to the now changed character of the area.

Spot zoning occurs when an area is unjustly singled out for treatment different from that of similar surrounding land. The mere fact that an area is small and is zoned at the request of a single owner does not make it spot zoning. Persons challenging a rezoning have the burden before the Trial Court to demonstrate that the change is unreasonable or unlawful. The zoning amendment, which merely extends a pre-existing agricultural land boundary and does not create a new incongruous district is not spot zoning. The Court also noted that the zoning amendment was supported by a majority of the public and would protect the health and welfare of area residents. (See Miller v. Town of Tilton 139 N.H. 429, 655 A.2d 409 [1995])

⁷ - Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, 3rd Ed., § 24.03A