

## Variance Standard Changes in Simplex

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In January, the New Hampshire Supreme Court issued an opinion in Simplex Technologies, Inc. v. Town of Newington, which dramatically changed the standard for granting zoning variances. While Zoning Boards of Adjustment must pay heed to this decision, the case will also have wider impact that significantly affects Planning Boards.

**The Case:** Simplex wanted to use industrially zoned land for commercial purposes (a bookstore and a restaurant) in an area where surrounding properties were almost exclusively used for commercial purposes. Properties to the north were in a commercial zone (having been earlier rezoned from industrial), and properties to the south were in the same industrial zone as the Simplex property, but were used commercially (the Court was fuzzy on how they became commercial, though). The ZBA denied the variance, finding that none of the five criteria for granting a variance had been met.

The criteria come from RSA 674:33, I(b): (1) that the variance would not be contrary to the public interest; (2) that literal enforcement of the ordinance would result in an unnecessary hardship; (3) that the variance would be consistent with the spirit of the ordinance; and (4) that substantial justice would be done by granting the variance. Through its decisions, starting with Gelinas v. Portsmouth, 97 N.H. 248 (1952), the Supreme Court has added a fifth criterion: (5) that granting the variance would not cause diminution of surrounding property values.

The trial court affirmed the ZBA's denial, on the basis that the hardship criterion had not been met. To demonstrate hardship prior to Simplex, an owner had to show that the application of a zoning ordinance to his/her property resulted in a deprivation that was "so great as to effectively prevent the owner from making any reasonable use of the land." Governor's Island Club v. Gilford, 124 N.H. 126 (1983).

The Supreme Court evaluated the law of variance hardship, and determined that they had been getting it wrong for years. They found that their own pronouncements on the hardship standard over the last twenty years did not comport with earlier decisions. The Court also found that their more recent decisions "were inconsistent with the notion that zoning ordinances must be consistent with the character of the neighborhoods they regulate," and that those decisions did not jibe with constitutional balances between public regulation of nuisances versus private property rights.

To correct itself, the Court concluded, "We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property." The Court then announced the new three-part standard by which owners can demonstrate unnecessary hardship:

- (1) *A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;*
- (2) *No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and*

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

While the Simplex case has been remanded to the trial court for further proceedings, Zoning Boards throughout the state are being forced to deal with a sudden shift in how they deal with variances. Of course, everyone who has worked with ZBAs knows that if the hardship criterion under the old standard had been applied rigorously, then variances would have been very rare indeed. It seems that the Court was targeting the contradiction between providing an avenue for reasonable relief, and erecting an almost impassable barrier in front of it. Recognizing that contradiction, the Court's new hardship standard comports with the balancing test already applied by many Zoning Boards.

In some ways, however, the Court also applied an "equal protection" standard—implicit in the opinion is the concept that different property owners within a particular zone should be treated similarly. This standard is found in the Court's second criterion, calling for demonstration of a "fair and substantial relationship" between the ordinance's general purpose and its application to a particular parcel of land. The use of this language raises the bar for municipalities in defending their ordinances against legal challenge—the Court will no longer accept the existence of a rational relationship between a zoning ordinance and the object of its regulation as sufficient proof that the ordinance is constitutional.

***What does Simplex mean for Zoning Boards of Adjustment?*** The practical impact of Simplex is that all variance decisions made after January 29, 2001 must be gauged by the Court's new standard. The difficulty now faced by ZBAs is to properly interpret this standard, especially what constitutes a "fair and substantial relationship." It's not clear that there is any guiding case law (the Court looked back favorably on older decisions, but created a new rule), so Zoning Boards may want to consult with town attorneys for advice on how to proceed with variances. Remember, though, that Simplex is limited to a consideration of hardship, so if a variance application fails on other grounds (e.g., "spirit" of the ordinance), then the new hardship standard will have no bearing. To succeed in a variance request, the applicant must demonstrate that all criteria have been met.

***What does Simplex mean for Planning Boards?*** The unspoken impact of this case is that planning boards need to reexamine the zoning ordinances and amendments they propose, and more fundamentally, the master plans they develop and adopt. The statement that zoning ordinances should reflect the neighborhoods they seek to regulate is central to the Simplex Court's understanding of the role of the master plan. If the master plan identifies a neighborhood as being inappropriately used and suggests that zoning could be used to effect a change, then the planning board could develop a zoning ordinance that would slowly work out that change. Planning boards should also reexamine their zoning maps to determine if the boundaries make sense, in light of the master plan and any language in the zoning ordinance expressing the purpose of a particular zone. If there's a logical gap between those elements of local planning, it's time to make some adjustments.