

LECTURE TWO

The Five Variance Criteria in the 21st Century

Presenters:

Attorney Cordell A. Johnston
New Hampshire Local Government Center
25 Triangle Park Drive
Concord, NH 03302-0617
Tel: 603.224.7447, ext. 384

Attorney Christopher L. Boldt
Donahue, Tucker & Ciandella, PLLC
225 Water Street
Exeter, NH 03833
Tel: 603.766.1686

ABOUT THIS PUBLICATION

This publication is prepared by Attorney Cordell A. Johnston and Attorney Christopher L. Boldt for use in conjunction with the New Hampshire Local Government Center's (LGC) 2009 Municipal Law Lecture Series. We hope that you will find it useful both now and as reference material in the future. The information presented cannot and does not cover all issues that may arise, and is not intended as legal advice. The opinions expressed are those of the authors and do not necessarily reflect those of LGC. The New Hampshire Legislature may enact statutes or the New Hampshire Supreme Court may issue decisions that change the law or its interpretation. Before making any decisions in land use matters, it is always best to consult your municipal attorney or call the attorneys in LGC's Legal Services and Government Affairs Department. Legal Services attorneys are available to answer inquiries and provide general legal assistance to elected and appointed officials from member towns, cities and village districts. Attorneys are available Monday through Friday from 8:30 a.m. to 4:30 p.m. and can be reached by phone at 800.852.3358, ext. 384, or by e-mail at legalinquiries@nhlgc.org.

New Hampshire Local Government Center
25 Triangle Park Drive / PO Box 617
Concord, NH 03302-0617

Tel: 603.224.7447
NH Toll Free: 800.852.3358
Fax: 603.224.5406
www.nhlgc.org

CONTENTS

PART ONE – SETTING THE STAGE: VARIANCES IN THE 20TH CENTURY	7
I. CONSTITUTIONAL AND STATUTORY BASES	9
II. EARLY CASES: THE SEARCH FOR STANDARDS	10
A. When Is a Hardship ‘Unnecessary’?	10
B. The Court Legislates a New Criterion.....	12
C. The Emergence of ‘Special Conditions’	12
D. An Era of Stability	13
III. THE ‘NO REASONABLE USE’ DOCTRINE.....	13
A. A New Standard Based on a Misreading.....	13
B. The New Standard Takes Root.....	14
C. ‘We Have Stopped Off the Safety Valve’	14
ENDNOTES	16
PART TWO – <i>SIMPLEX</i> AND THE CASE LAW THAT STILL APPLIES.....	21
I. THE ‘PRIOR’ BASIC CRITERIA.....	23
II. THE CASES	23
A. <i>Simplex</i> and ‘Unnecessary Hardship’	23
B. <i>Rancourt</i> and ‘Reasonable Use’	25
C. <i>Bacon</i> , a Divided Court and ‘Spirit of the Ordinance’ vs. ‘Reasonable Use’	25
D. <i>Boccia</i> and Area Variances.....	27
E. <i>Vigeant</i> and ‘Reasonable Use’ Revisited	28
F. <i>Harrington</i> and the Distinction between Use and Area Variances with a Partial Analysis of the Simplex Criteria and a Comment on ‘Substantial Justice’	28
G. <i>Chester Rod and Gun Club</i> and an Analysis of ‘Public Interest’, ‘Rights of Others’ and ‘Spirit of Ordinance’ Criteria	30
H. <i>Garrison</i> and the Re-emphasis on ‘Uniqueness’	30
I. <i>Malachy Glen</i> and Analysis of the ‘Public Interest’, ‘Spirit of the Ordinance’, ‘Special Conditions’, ‘Other Reasonably Feasible Method’ and ‘Substantial Justice’ Criteria	31
J. <i>Naser</i> , Use of Conservation Easement Space in Yield Plan, and Analysis of the ‘Public Interest’ and ‘Spirit of the Ordinance’ Criteria	33
K. <i>Nine A</i> , Area and Use Variances Associated with Replacement of Non-Conforming Use	34
L. <i>Daniels</i> and the Impact of the Telecommunications Act on Use and Area Variances	34
M. <i>Farrar</i> , Unnecessary Hardship for Mixed Use and ‘Substantial Justice’	35
III. DISABILITY VARIANCES.....	36

PART THREE – A LEGISLATIVE RESPONSE TO BOCCIA.....	37
I. CAN THE LEGISLATURE OVERRULE THE SUPREME COURT?	39
II. WHY WAS LEGISLATION NEEDED?	40
III. THE NEW LAW	41
A. Codification of the <i>Simplex</i> Standard	42
B. Codification of the <i>Governor’s Island</i> Standard.....	43
C. The Legislature’s Statement of Intent.....	43
ENDNOTES	44
PART FOUR – APPLY THE NEW LAW	47
I. UNNECESSARY HARDSHIP	49
A. Paragraph (5)(A)— <i>Simplex</i> Standard	50
B. Paragraph (5)(B)— <i>Governor’s Island</i> Standard	51
II. PUBLIC INTEREST/SPIRIT OF THE ORDINANCE.....	51
III. SUBSTANTIAL JUSTICE	52
IV. NO DIMINUTION IN VALUE	53
ENDNOTES	54
APPENDIX – REQUIREMENTS FOR GRANTING A VARIANCE: A SUGGESTED APPROACH.....	59

PART ONE

SETTING THE STAGE: VARIANCES IN THE 20TH CENTURY

| 7

By Cordell A. Johnston

I. CONSTITUTIONAL AND STATUTORY BASES

Property rights are protected under both the federal and New Hampshire constitutions.¹ Zoning ordinances necessarily place restrictions on the use of private property and thus can come into conflict with constitutional property rights. A reasonable restriction on the use of property that provides benefits to the entire community will be upheld as a constitutionally valid exercise of legislative power;² but “arbitrary or unreasonable restrictions which substantially deprive the owner of the ‘economically viable use of his land’” are unconstitutional.³ Such a restriction may be challenged in court, and may be found to constitute a “taking” of property that requires “just compensation.”⁴

A zoning ordinance may be reasonable in its general application, but have an unduly burdensome—and hence unreasonable—effect on a particular property, because of specific conditions of that property. A variance allows the property owner in that situation to obtain relief without challenging the ordinance as a whole. Thus, a variance “saves the otherwise valid zoning ordinance from death at the hands of property owners with site-specific constitutional claims. It is the safety valve of the zoning ordinance.”⁵

That “safety valve” was created by the statute that established zoning in New Hampshire. It was enacted in 1925 as part of New Hampshire’s adoption of the Standard State Zoning Enabling Act,⁶ and, except for nominal, non-substantive changes, it remained intact without amendment for over 70 years.⁷ It was eventually codified in RSA 674:33, I(b), which, until amended in 2009, stated as follows:

The zoning board of adjustment shall have the power to ... [a]uthorize 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.

Stated more neatly, the statute has always required an applicant to establish four criteria to obtain a variance:

- (1) the variance will not be contrary to the public interest;
- (2) owing to special conditions, a literal enforcement of the ordinance will result in unnecessary hardship;
- (3) the spirit of the ordinance will be observed; *and*
- (4) substantial justice will be done.

The New Hampshire Supreme Court, in an act of pure judicial legislation, added a fifth requirement in one of its early decisions:

- (5) The variance would not diminish the value of surrounding properties.⁸

Note that the statute requires all of the criteria to be satisfied; thus, if the applicant fails to satisfy any one of them, the variance cannot be granted.

II. EARLY CASES: THE SEARCH FOR STANDARDS

From the beginning, most of the New Hampshire Supreme Court’s decisions interpreting the statute were concerned with the “unnecessary hardship” criterion. Unlike later cases, however, they focused not on the word “hardship,” but on the word “unnecessary.” That is, rather than struggling with the question of how severe a hardship must be to justify a variance, the Court accepted that any restriction on property constitutes a hardship; the critical question was whether that hardship was “unnecessary.”

The conclusion reached in the first cases was that if the applicant’s proposed use of the subject property would not adversely affect the public interest and would not injure other property owners, then the “hardship” suffered by the applicant was unnecessary.

A. WHEN IS A HARDSHIP ‘UNNECESSARY’?

The first significant decision by the New Hampshire Supreme Court under the variance statute was *Fortuna v. Zoning Board of Adjustment*,⁹ decided in 1948. The applicant in that case, Manchester Buick Company, proposed to build an addition to its existing garage. The garage had existed prior to adoption of the city’s zoning ordinance, and was now in a district that would not allow for expansion of the garage.

The zoning board of adjustment granted the application for a variance to expand the garage. A neighboring property owner appealed, and the superior court affirmed the ZBA’s decision. In its decision, the superior court made findings of fact that (1) the addition to the garage would not cause any “findable diminution in the value of [the neighbor’s] property”; (2) the variance was not contrary to the public interest, and in fact would be beneficial to the public interest by reducing traffic congestion; (3) the denial of a variance would result in unnecessary hardship to the applicant; (4) the spirit of the ordinance would be observed by granting the variance; and (5) substantial justice would be done by granting the variance.¹⁰

The Supreme Court cited these facts in affirming the superior court’s decision. The first finding of fact cited—that the addition would not cause any “findable diminution in value” of neighboring properties—was not one of the statutory criteria, nor did the Court say that it was a *necessary* condition to the granting of a variance. It did, however, cite this fact, together with the finding that the expansion would benefit the public interest by reducing traffic congestion, for the conclusion that “no public or private rights are injuriously affected” by the granting of the ordinance.¹¹ Because there would be no injury to “public or private rights,” the Court concluded that the hardship suffered by the applicant “is an unnecessary hardship, which, in connection with the other factors mentioned in the statute, will justify the allowance of a variance.”¹²

Stated succinctly, the Court’s reasoning process in *Fortuna* was as follows: If the proposed use would cause no injury to “public rights” (that is, the use is not contrary to the public interest) or to “private rights” (as demonstrated by the absence of diminution in surrounding property values), then the hardship caused to the applicant by the zoning restriction is *unnecessary*.

Just a few months later, in *St. Onge v. Concord*,¹³ the Supreme Court relied on its opinion in *Fortuna* for the conclusion that:

any hardship suffered by the [applicant] as a result of the interference with its right to use its property, without commensurate public advantage, is an unnecessary hardship. It may, therefore, be stated that “unnecessary” as used in this connection, means, “not required to give full effect to [the] purpose of the ordinance.”¹⁴

Unlike *Fortuna*, the *St. Onge* decision discussed not only what is meant by “unnecessary,” but what constitutes a “hardship.” The Court stated, “The requisite hardship may be said to result if a restriction upon use, when applied to a particular property, becomes arbitrary, confiscatory, or unduly oppressive because of conditions of the property distinguishing it from other properties similarly restricted.”¹⁵ However, the Court did not apply that standard to the facts before it. At least from what appears in the opinion, the only “hardship” was financial—the applicant was unable to make money on his four-apartment building and wanted a variance to add two apartments—and there was nothing to suggest that the restriction in the ordinance affected the applicant’s property differently from any other property in the area, yet the Court upheld the trial court’s ruling that a variance should be granted. This led one justice to dissent from the decision.¹⁶

In *Gelinas v. Portsmouth*,¹⁷ decided in 1952, the Supreme Court identified the necessary “hardship”—without expressly stating it as a requirement—by observing that the property in question was “useless in its present condition except as a breeding place for mosquitoes, and a depository . . . for ‘swill, orange skins, banana skins’ and the like. . . . In fact, owing to its condition and location. . . , it is ‘absolutely valueless unless used for a commercial purpose.’”¹⁸

The Court next considered whether this hardship was “unnecessary.” It first stated that, based on the facts of the case, “[t]he requirements of public interest, no diminution of surrounding values, the spirit of the ordinance and substantial justice may be found satisfied.” Citing *Fortuna*, it continued, “It is the law under these circumstances that the refusal of a permit for a variance is an unnecessary hardship on the owner.”¹⁹

Reading these first three cases together, it is unclear what level of hardship one needed to demonstrate. *Fortuna* seemed to require no real hardship—merely a showing that the restriction was “unnecessary.” *St. Onge* suggested that “the requisite hardship” existed if the restriction was “arbitrary, confiscatory, or unduly oppressive,” but upheld the variance based on mere financial hardship. *Gelinas* involved a property that was rendered “useless” by the zoning restriction, but the Court did not say that was a necessary element. It seems a fair conclusion that although some level of hardship had to be demonstrated, it was quite minimal. There was no case decided in this era in which the Supreme Court ruled against an applicant because the hardship was not sufficiently severe.

What is clear is that, after *Gelinas*, any sufficiently established hardship was deemed unnecessary if “[t]he requirements of public interest, no diminution of surrounding values, the spirit of the ordinance and substantial justice [could] be found satisfied.” Thus, the applicant’s task was (1) to demonstrate some minimal level of hardship, and (2) to satisfy the other variance criteria. Considered in light of the case law as it developed over the next half-century, this was a remarkably low standard. As will be seen, however, this liberal interpretation of “unnecessary hardship” would not last.

B. THE COURT LEGISLATES A NEW CRITERION

The other significance of the Court's decision in *Gelinas* is that it formally added a new condition, not present in the statute, for the granting of a variance: "In order to support a variance, it must be found that ... no diminution in value of surrounding properties would be suffered."²⁰ The Court cited *Fortuna* for this statement, but this was simply a careless misreading of the *Fortuna* opinion. The Court in that case had referred to the trial court's finding of no diminution in value, but it never said such a finding was required; instead, it cited the absence of diminished value as a fact that supported a finding of "unnecessary hardship." The *Fortuna* opinion did not establish no-diminution-in-value as a separate condition. Nevertheless, ever since *Gelinas*, it has been treated as one.

C. THE EMERGENCE OF 'SPECIAL CONDITIONS'

One element that the earliest decisions did not address is the statutory phrase "special conditions." The only mention of that requirement came in a dissenting opinion in the *St. Onge* case. In that case, the majority affirmed a superior court decision granting a variance on the ground that "the interference with [the applicant's] right to use its property, without commensurate public advantage, [was] an unnecessary hardship. Justice Laurence Duncan dissented, stating:

The office of the variance is to permit modification of an otherwise legitimate restriction in the exceptional case where, due to unusual conditions, it becomes more burdensome than was intended, and may be modified without impairment of the public purpose.... There is no evidence that [the plaintiff's] property is usable for permitted uses to less advantage than other comparable properties within the district.²¹

Justice Duncan's dissent was to no effect in *St. Onge*, but 15 years later, in *Bouley v. Nashua*,²² he wrote for the entire Court in explaining why a variance to construct a filling station in a residential zone was properly granted. Among other things, the Court's opinion in *Bouley* cited the trial court's finding that:

[t]he lot itself is somewhat below street level and would require fill. *Because of the peculiar situation of this lot*, with its greatest street frontage on Amherst Street and the large amount of traffic over Amherst Street, it is found as probable ... that no person would ever purchase this lot for the purpose of erecting a residence on it.²³

The Court in *Bouley* emphasized that "[v]ariations are provided for by zoning ordinances so that litigation of constitutional questions may be avoided and a 'speedy and adequate remedy afforded' in cases where 'special conditions' or exceptional environment may be thought to present such questions."²⁴ The Court proceeded to rule that "owing to [the] special conditions [arising out of the situation of the defendant's lot] a literal enforcement of ... the ordinance will result in unnecessary hardship."²⁵ The hardship was deemed unnecessary because, as stated in *St. Onge*, it was "unnecessary to accomplish the purposes of the ordinance."²⁶

Having recognized now the relevance of "special conditions," the Court proceeded to cement the importance of the requirement. In *Sweeney v. Dover*,²⁷ decided in 1967, with Justice Duncan again writing the opinion, the Court for the first time reversed the granting of a variance on the ground that no special conditions had been established.²⁸ In a series of decisions over

the following decade, the Court disposed of numerous variance cases on this basis, frequently overturning zoning board or superior court decisions in the process.²⁹

D. AN ERA OF STABILITY

By the 1970s and early 1980s, the Court had developed a fairly consistent approach to defining “unnecessary hardship.” First, the applicant had to demonstrate “special conditions” of the land that distinguished it from other properties, so that the restriction in the zoning ordinance imposed more of a burden on the subject property than on other properties. These special conditions had to relate to the character of the land, not the personal circumstances of the owner. Most applications failed on this basis.³⁰

If the requisite “special conditions” of the land were present and some undefined level of hardship resulted, the next question was whether the hardship was “unnecessary.” In this inquiry, the Court continued to follow its early decisions in *Fortuna*, *St. Onge*, *Gelinas*, and *Bouley*, stating that a hardship is “unnecessary” if no public or private rights would be injured by the proposed use of the property.³¹

Thus, the major challenge for the applicant was to establish that the property suffered from “special conditions” that distinguished it from other properties. Once this hurdle was cleared, as a practical matter the resulting hardship was deemed to be unnecessary if the other variance factors—public interest, spirit of the ordinance, substantial justice, and no diminution in value—were satisfied.³²

III. THE ‘NO REASONABLE USE’ DOCTRINE

A. A NEW STANDARD BASED ON A MISREADING

The Court’s approach, which had not changed significantly since the *Bouley* decision in 1964, was transformed radically by a single sentence in a 1983 opinion. In *Governor’s Island Club v. Town of Gilford*,³³ the Court reviewed a superior court decision upholding a variance to allow subdivision of a lakefront lot. The town’s zoning ordinance required each lot to have a total area of at least 30,000 square feet; the variance permitted a subdivision that would result in two lots, each smaller than 30,000 square feet.

The Supreme Court reviewed the case strictly on the question of whether unnecessary hardship had been established. Quoting prior decisions, the Court stated that the hardship “must arise from a special condition of the land which distinguishes it from other land in the same area with respect to [its] suitability for the use for which it is zoned.”³⁴

Then, however, the Court added this sentence: “*For hardship to exist under our test, the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land.*”³⁵ The land in question was already being used as a residential lot, and the Court held that this fact alone proved there was no hardship.³⁶

For the proposition that hardship does not exist if the owner can make “any reasonable use of the land,” the Court cited a single case—its 1980 decision in *Associated Home Utilities v. Town of Bedford*.³⁷ The Court in *Associated Home Utilities*, however, had said nothing of the sort. In that case, the Court had stated, “A review of the record reveals nothing to indicate that, due to the special conditions of the land, AHU is unable to make reasonable use of the parcel.”³⁸ This was a somewhat careless use of language, but it is clear from the context that it was not intended to signal an increased focus on the severity of the “deprivation.” In fact, the Court did not examine the existing use of the land or consider what the land could or could not be used for. Instead, it specifically based its decision on the absence of special conditions of the land.³⁹ There was nothing in *Associated Home Utilities* to distinguish it from the many other cases of that era in which the absence of “special conditions” was the deciding factor.

Nor was there anything in the cases decided between *Associated Home Utilities* and *Governor’s Island* that hinted at such a sudden shift.⁴⁰ If anything, movement in the opposite direction was suggested by the Court’s 1982 decision in *U-Haul Company v. City of Concord*.⁴¹ The property owner in that case operated a trailer rental and storage business, and it sought a variance to construct an apartment on the property for a resident manager of the business. The Supreme Court held, with almost no discussion, that the property was “unique” because it was less central to downtown Concord and less serviced by law enforcement than other properties “in the area,”⁴² and therefore had greater security requirements. On this basis alone, it held that unnecessary hardship was established.⁴³ By any standard, this was an extremely generous decision. There was no discussion of whether the applicant could make a reasonable use of the land without a variance. It is inconceivable that the Court would have found an unnecessary hardship if it had applied the rule it announced a year later in *Governor’s Island*.

B. THE NEW STANDARD TAKES ROOT

The newly announced *Governor’s Island* standard was cited frequently over the next several years,⁴⁴ although rarely was it the sole basis for a Supreme Court decision. More frequently, “unnecessary hardship” was found lacking because there was nothing unique about the land, the hardship was solely a personal financial hardship of the owner, the owner had actually created the alleged hardship, or some combination of these factors was present.⁴⁵

Nevertheless, the statement in *Governor’s Island* was repeated often enough that it was gradually accepted as an inviolable standard. A variance could not be granted unless it was established that there was *no* reasonable use of the property that did not violate the zoning ordinance.⁴⁶

Thus, the focus had clearly shifted. For 35 years, beginning with the *Fortuna* decision, the Court had not tried to measure the *severity* of the “hardship” caused by the zoning restriction in question; instead, it had focused on whether the hardship was “necessary” to achieve the purposes of the zoning ordinance or to protect public or private rights. If the hardship, regardless of its severity, was “unnecessary”—and if it was caused by special conditions of the land—the variance could be granted, assuming the other criteria were satisfied. Now, the question was not whether the hardship was necessary, but whether it was severe enough to warrant a remedy.

C. ‘WE HAVE STOPPED OFF THE SAFETY VALVE’

This significant change was accepted without dissent (at least from the Court) for almost a decade, until the 1992 decision in *Grey Rocks Land Trust v. Town of Hebron*.⁴⁷ The defendant in that case owned a marina that was a pre-existing, non-conforming use under the town’s zoning

ordinance, and he wanted to build an additional boat storage building on the property. This required a variance, which the ZBA granted; the superior court upheld the ZBA's decision.⁴⁸

On appeal, the Supreme Court reversed the decision. Applying the *Governor's Island* test made the analysis quite simple:

In order for the ZBA to have concluded that a hardship exists, it would have to have found that literal enforcement of the ordinance bars *any* reasonable use of the land. Thus, a showing that [the defendant] was making a reasonable use of the land at the time of the application for a variance would preclude a finding of hardship.

The uncontroverted fact that the Marina had been operating as a viable commercial entity for several years prior to the variance is conclusive evidence that a hardship does not exist.⁴⁹

This certainly was a correct application of *Governor's Island*—if the applicant was already making a reasonable use of the land, he obviously was precluded from claiming that the zoning ordinance *prevented* him from making any reasonable use of the land.

That approach, however, was too much for one member of the Court. In a lengthy dissent, Justice Horton stated that he did “not want to perpetuate the ‘hardship’ path this Court has followed in recent times.”⁵⁰ He described the constitutional role of a variance—“the safety valve of the zoning ordinance”—and discussed the different approaches to defining “unnecessary hardship” that had been taken both in earlier New Hampshire decisions and in cases from other states.⁵¹ He concluded:

I am uncertain what approach constitutes the proper approach to unnecessary hardship, but I am convinced that we have gone too far in our requirements. We have made it essentially impossible for a zoning board of adjustment, honoring the letter of the law of this State, to afford the appropriate relief to avoid an unconstitutional application of an otherwise valid general regulation. We have stopped off the safety valve.⁵²

It would be almost a decade, however, before Justice Horton's concerns were heeded.

ENDNOTES

¹ See U.S. Const. Amend. V; N.H. Const. Part 1, Arts. 2, 12.

² See *Burrows v. City of Keene*, 121 N.H. 590, 598 (1981).

³ See *id.*

⁴ See *id.*

⁵ *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 246 (1992) (Horton, J., dissenting).

⁶ 1925 N.H. Laws ch. 92; see 3 Rathkopf's *The Law of Zoning and Planning* § 58.1 (E. Ziegler, Jr. ed. 2009).

⁷ Compare N.H. Pub. Laws 42:60 (1926) with R.S.A. 674:33, I(b) (2008).

⁸ See subsection II.B, below.

⁹ 95 N.H. 211 (1948).

¹⁰ See *id.* at 212-13.

¹¹ *Id.* at 213-14.

¹² *Id.*

¹³ 95 N.H. 306 (1949).

¹⁴ *Id.* at 308.

¹⁵ *Id.*

¹⁶ See *id.* at 311 (Duncan, J., dissenting).

¹⁷ 97 N.H. 248 (1952).

¹⁸ *Id.* at 250.

¹⁹ *Id.* at 251.

²⁰ 97 N.H. at 250 (citing *Fortuna*).

²¹ 95 N.H. at 310-11 (Duncan, J., dissenting).

²² 106 N.H. 79 (1964).

²³ *Id.* at 82 (emphasis added). The evidence that “no person would ever purchase this lot for the purpose of erecting a residence on it” was more than enough to satisfy the uncertain standard for hardship that existed at the time. There was also evidence that the lot’s value if used for a filling station was \$17,500, but its value for residential purposes was not over \$3,000. “This,” the Court stated, “was evidence of hardship, and if unnecessary to accomplish the purposes of the ordinance was ‘unnecessary’ hardship.” *Id.* at 83.

²⁴ *Id.* at 84 (quoting Bassett, *Zoning* (1940); RSA 31:72, III, now codified at RSA 674:33, I(b)) (emphasis added).

²⁵ *Id.* (quoting RSA 31:72, III, now codified at RSA 674:33, I(b)).

²⁶ *Id.* at 83.

²⁷ 108 N.H. 307 (1967).

²⁸ *See id.* at 310 (“[T]he plaintiff failed to meet the requirements for the granting of a variance, and in particular to show the existence of special conditions with respect to this tract ... which would make enforcement of the restrictions of the ordinance an unnecessary hardship.”) (citing *Bouley*).

²⁹ *See, e.g., Hanson v. Manning*, 115 N.H. 367, 369 (1975) (“Absent ‘special conditions’ which distinguish the property from other property in the area, no variance may be granted even though there is hardship.”); *Simoneau v. City of Nashua*, 112 N.H. 18, 20 (1972) (reversing trial court decision because “no express finding or ruling was sought or made that such hardship would result from ‘special conditions’ peculiar to the plaintiff’s property”) (citing *Sweeney*); *Mills v. Manchester*, 109 N.H. 293, 295 (1969) (“There is nothing in the evidence from which it can be found that there is anything about this property, as distinguished from other property in the area, which makes it unsuitable for permitted uses.”).

³⁰ *See, e.g., Richardson v. Town of Salisbury*, 123 N.H. 93, 96-97 (1983) (“[T]he land could be used in the same ways as the neighboring land.... [T]he zoning ordinance did not affect the plaintiffs’ land any differently than the neighboring parcels.”); *Associated Home Utilities v. Town of Bedford*, 120 N.H. 812, 817 (1980) (“A review of the record reveals nothing to indicate that, due to special conditions of the land, AHU is unable to make reasonable use of the parcel. To the extent that potential hardship was discussed at all, it related only to ... personal inconvenience rather than to the special character of the land.”); *Rowe v. Town of Salem*, 119 N.H. 505, 507 (1979); *Ouimette v. City of Somersworth*, 119 N.H. 292, 294-95 (1979); *Carbonneau v. Town of Exeter*, 119 N.H. 259, 263 (1979).

³¹ *See Vannah v. Town of Bedford*, 111 N.H. 105, 111-12 (1971) (“An unnecessary hardship is one ‘suffered by the defendant as the result of the interference with its right to use its property as it sees fit, although no public or private rights are injuriously affected thereby....’”) (quoting *Fortuna*); *see also Carter v. City of Nashua*, 113 N.H. 407, 419 (1973) (quoting *Vannah*); *Bois v. City of Manchester*, 113 N.H. 339, 342-43 (1973) (finding of unnecessary hardship supporting variance for residential youth rehabilitation center was proper based on property’s unique suitability for the use and the mixed-use character of the neighborhood; such factors had to be “balanced against the injurious effects on public rights which might result from the granting of the variance”) (quoting *Vannah*); *Levesque v. Town of Hudson*, 106 N.H. 470, 474 (1965) (unnecessary hardship supporting variance to construct bank in residential zone was established

because district was already largely commercial and bank would improve appearance of the area and increase property values generally, relieve traffic congestion, furnish the community a needed facility, and not cause significant diminution in value of immediately surrounding property) (citing *Bouley*).

³² See *Carter v. City of Nashua*, 113 N.H. 407, 419 (1973) (“If the variance sought in such a case would not adversely affect the public interest and the spirit of the ordinance will be observed and justice done, it can be granted by the board.”) (citing *Bouley*).

³³ 124 N.H. 126 (1983).

³⁴ *Id.* at 130 (quoting *Ryan v. Manchester Zoning Board*, 123 N.H. 170, 173 (1983) (emphasis added in *Governor’s Island*)).

³⁵ *Id.*

³⁶ See *id.* The Court went on, however, to state, “The zoning ordinance has the same effect on this parcel as it does on every other parcel smaller than 60,000 square feet; *viz.*, to render a subdivision of that parcel impermissible. Any resulting injustice is general, rather than specific...” In other words, there were no “special conditions” present. That would have been a perfectly adequate basis for the Court’s decision, would have been consistent with precedent, and would have been much simpler than creating a new standard.

³⁷ 120 N.H. 812 (1980).

³⁸ *Id.* at 817.

³⁹ See *id.* (“In the absence of special conditions distinguishing a parcel from others in the area, no variance may be granted.... A review of the record reveals nothing to indicate that, due to the special conditions of the land, AHU is unable to make reasonable use of the parcel. To the extent that potential hardship was discussed at all, it related only to AHU’s unfruitful attempt to locate other land on which to conduct its business. As this relates only to personal inconvenience rather than to the special character of the land, it is irrelevant to AHU’s request for a variance.”) (citing *Hanson v. Manning*, 115 N.H. 367, 369 (1975)).

⁴⁰ See, e.g., *Ryan v. Manchester Zoning Board*, 123 N.H. 170 (1983); *Richardson v. Town of Salisbury*, 123 N.H. 93 (1983); *U-Haul Co. v. City of Concord*, 122 N.H. 910 (1982).

⁴¹ 122 N.H. 910 (1982).

⁴² See *id.* at 912. One has to wonder how the property could have been significantly farther from downtown Concord than other properties in the same area. The Court did not explain this.

⁴³ See *id.*

⁴⁴ See, e.g., *Crossley v. Town of Pelham*, 133 N.H. 215, 216 (1990); *Devaney v. Windham*, 132 N.H. 302, 307 (1989); *Rowe v. Town of North Hampton*, 131 N.H. 424, 428 (1989); *Alexander v. Town of Hampstead*, 129 N.H. 278, 285 (1987).

⁴⁵ See, e.g., *Crossley v. Town of Pelham*, 133 N.H. 215, 216 (1990) (approximately 200 other lots in the same area suffered from some nonconformity comparable to that of the defendants' lot); *Devaney v. Windham*, 132 N.H. 302, 307 (1989) (hardship consisted of financial loss and personal hardship not arising from characteristics of the land; further, hardship was self-created); *Goslin v. Town of Farmington*, 132 N.H. 48, 52-53 (1989) (land was currently used for a purpose permitted by the ordinance, and there was nothing unique about the land); *Rowe v. Town of North Hampton*, 131 N.H. 424, 428-29 (1989) (no evidence that natural characteristics of plaintiff's property distinguished it from other land in the same area); *Saturley v. Town of Hollis*, 129 N.H. 757, 761-62 (1987) (Court cited *Governor's Island*, but decided case based on public interest criterion).

In a line of cases separate from the *Governor's Island* decision, the Court was gradually moving toward the same "no reasonable use" standard, again based on a questionable reading of its own precedents. In *Richardson v. Town of Salisbury*, 123 N.H. 93 (1983) (decided nine months before *Governor's Island*), the Court reversed the granting of a variance. The trial court had found unnecessary hardship based in part on a finding that "the plaintiffs' parcel was unique in its frontage and depth." The Supreme Court disagreed, stating:

Even assuming, without deciding, that the property was unique in its frontage and depth, we find that the size of the parcel did not create any hardship or undue restriction as to its use. The record contains no evidence that the use of the property for residential or agricultural purposes, *similar to those in the surrounding area*, was hindered or precluded.... [T]he plaintiffs' counsel admitted before this court that *the land could be used in the same ways as the neighboring land*. ... [T]he master had no basis for overturning the board's conclusion that *the zoning ordinance did not affect the plaintiffs' land any differently than the neighboring parcels*.

19

Id. at 96-97 (emphasis added).

Clearly, the point was that although the property may have been unique, that uniqueness did not affect the plaintiff's ability to use his land, and it left him in no different situation from his neighbors. This was a straightforward application of existing law: the hardship was not related to "special conditions of the land."

However, subsequent cases read more into the *Richardson* holding. In *Margate Motel v. Town of Gilford*, 130 N.H. 91 (1987), it was abundantly clear that the unique dimensions of the property in question did substantially affect the owners' ability to use it, and the zoning ordinance affected them differently than their neighbors because of the uniqueness of the property. The Court, citing *Richardson*, stated, "The size and dimensions of a parcel do not create an unnecessary hardship when the land could still be used for the purposes permitted by the zoning ordinance." *Id.* at 94. Because there were a number of permitted uses that "the defendants have not shown are precluded by the uniqueness of the land," the Court found no unnecessary hardship. See *id.* at 95.

In *Rowe v. Town of North Hampton*, 131 N.H. 424 (1989), the Court quoted the statement from *Margate Motel* and then took it a step further, stating that it was "irrelevant" that the permitted uses available to the property owner were neither reasonable nor economically viable. See *id.* at 429. The Court in *Goslin v. Town of Farmington*, 132 N.H. 48 (1989) also cited *Margate Motel* and *Richardson* for the same proposition. Although both *Rowe* and *Goslin* could

have been decided on the more limited and precedentially consistent ground that the property in question was not, in fact, unique, the language of these decisions clearly indicated a developing philosophy that, regardless of any “special conditions,” there could be no unnecessary hardship if the land owner could make *any* use of the property without violating the ordinance. This was a dramatic departure that was not supported by the *Richardson* decision.

⁴⁶ See *Olszak v. Town of New Hampton*, 139 N.H. 723, 725-26 (1995); *Husnander v. Town of Barnstead*, 139 N.H. 476, 478 (1995); *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 243 (1992) (“[A] showing that [the defendant] was making a reasonable use of the land at the time of the application for a variance would preclude a finding of hardship.”).

Despite the strictness of this standard, there were occasional cases that were able to satisfy it. In *Husnander*, the intervenor had requested a variance from the zoning ordinance’s setback requirements to construct a single-family dwelling. There was evidence that although it would be possible to construct a dwelling within the allowable building envelope, it would be so odd-shaped as to be “dysfunctional.” (The Supreme Court opinion stated, “Depending upon one’s frame of reference, the building envelope could be described as a cradle, a sleigh, or a chemistry beaker tipped on its side.”) The lot’s slope, abundance of ledge, and remote location made other permitted uses unreasonable. The Court accepted the testimony that “the only reasonable use of this property was for a single-family home” and held that the unnecessary hardship requirement was satisfied. See 139 N.H. at 478-79.

In *Labrecque v. Town of Salem*, 128 N.H. 455 (1986), the Court affirmed the grant of a variance for a commercial use on property that was zoned for residential use. After citing the very strict *Governor’s Island* standard, the Court referred to findings of the trial court that the property could not be used for a residence because it could not satisfy septic and frontage requirements. Because “[t]he land thus was not suitable for the permitted use,” the Court held that the finding of unnecessary hardship was justified. See *id.* at 458-59.

⁴⁷ 136 N.H. 239 (1992).

⁴⁸ See *id.* at 241.

⁴⁹ *Id.* at 243 (citation omitted) (emphasis in original).

⁵⁰ *Id.* at 244 (Horton, J., dissenting).

⁵¹ See *id.* at 246-47.

⁵² *Id.* at 247.

PART TWO

SIMPLEX AND THE CASE LAW THAT STILL APPLIES

| 21

By Christopher L. Boldt

I. THE 'PRIOR' BASIC CRITERIA

Continuing in the vein of Attorney Johnston's historical analysis and before taking up the analysis of HB 446, it may be helpful to review the prior statutory criteria for a variance as set forth in RSA 674:33, I(b) as effective through December 31, 2009. While this statute is about to change, it is our hope that an analysis of the Court's interpretation of these criteria will help in your role as a ZBA member in applying the "new" criteria set forth in HB 446 in Part Three.

In short, under the prior version of RSA 674:33, I(b), an applicant for any variance had to provide evidence of five elements or criteria:

- (a) the variance will not be contrary to the public interest;
- (b) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship;
- (c) the variance is consistent with the spirit of the ordinance;
- (d) substantial justice is done by granting the variance; and
- (e) granting the variance will not diminish the value of surrounding properties.

Simplex Technologies v. Town of Newington, 145 N.H. 727, 729-730 (2001). What has become apparent through the various decisions from *Simplex* to *Boccia* and beyond (even ignoring the "area" hardship distinction) is that ZBA members continue to be called upon to evaluate each of the five required elements for any variance application that comes before them on an *ad hoc* basis with particular emphasis on how the variance would impact both the stated purposes of the municipal ordinance and the existing neighborhood involved. In short, the particular facts of a given application and the depth of the presentation to the ZBA may never have been more important. In all likelihood, the variance standards as set forth in these cases will be further refined and clarified as the Court receives the next wave of variance appeals.

II. THE CASES

A. SIMPLEX AND 'UNNECESSARY HARDSHIP'

Justice Horton's dissent in *Grey Rocks* was the "voice crying in the wilderness" for approximately nine years until the Court rendered its decision in *Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001). Underlying this reversal of fortunes was the variance application of Simplex Technologies to re-develop 6.2 acres of its former manufacturing facility abutting Woodbury Avenue into a commercial/retail shopping center. Simplex's site was located in the Town's industrial district; and Woodbury Avenue was the boundary line between the commercial and industrial zones. Additionally, two retail malls already existed on Woodbury Avenue across from the Simplex site on land that had formerly been in the industrial zone. The trial court held that the ZBA's decision was not unreasonable because Simplex failed to meet the five criteria of RSA 674:33, I(b) and the Supreme Court's prior decisions.

In its reversal of the trial court, the Supreme Court in *Simplex* started with the standard notation that a ZBA may authorize a variance if the following conditions of RSA 674:33, I (b), are met:

- (a) the variance will not be contrary to the public interest; (b) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (c) the variance is consistent with the spirit of the ordinance; and (d) substantial justice is done. In addition, the board may not grant a variance if it diminishes the value of surrounding properties.

Simplex, 145 N.H. at 729-730. The Court further noted the obvious that the hardship requirement is the most difficult to meet.

At this point, however, the Court began to lay the groundwork for the reversal of its prior standard. The Court began by noting Justice Horton's dissent in *Grey Rocks* with its concerns over a "substantial taking"; and then noted that its "current restrictive approach" was "inconsistent with [its] earlier articulations of unnecessary hardship." *Simplex*, 145 N.H. at 730, citing, *Fortuna v. Zoning Board of Adjustment of Manchester*, 95 N.H. 211, 212 (1948). The Court further commented that such restrictive approach was "inconsistent with the notion that zoning ordinances must be consistent with the character of the neighborhoods they regulate." *Simplex*, 145 N.H. at 731, citing, *Belanger v. City of Nashua*, 121 N.H. 389, 393 (1981). Finally, the Court recognized again that the "constitutional rights of landowners" require that zoning ordinances "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the regulation." *Simplex*, 145 N.H. at 731, citing, *Town of Chesterfield v. Brooks*, 126 N.H. 64, 69 (1985). The Court then summarized its rationale for the impending change of standard with the following statement of constitutional concerns:

Inevitably and necessarily there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions. The New Hampshire Constitution guarantees to all persons the right to acquire, possess, and protect property. See N.H. CONST. pt. I, arts 2, 12. These guarantees limit all grants of power to the State that deprive individuals of the reasonable use of their land.

Simplex, 145 N.H. at 731.

With that said, the Court announced its new standard. Instead of the prior requirement for unnecessary hardship that the applicant show no available use without a variance, the Court ruled as follows:

Henceforth, applicants for a variance may establish unnecessary hardship by proof that: (a) 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; (b) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on a property; and (c) the variance would not injure the public or private rights of others."

Simplex, 145 N.H. at 731-732. The Court then remanded the case to the trial court, which had “properly applied settled law, because of our departure from the existing definition of hardship.” *Id.*, at 732.

B. RANCOURT AND ‘REASONABLE USE’

The first decision to actually apply the new *Simplex* standard to a variance application on appeal was *Rancourt v. City of Manchester*, 149 N.H. 51 (2003). In *Rancourt*, the appeal was brought by abutters who had lost before the ZBA and the superior court on the applicants’ variance request to stable horses on the applicants’ three-acre residential lot. In starting its analysis, the Supreme Court noted that variance applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land: “Rather, they must show that the use for which they seek a variance is ‘reasonable,’ considering the property’s unique setting in its environment.” *Id.*, at 53-54.

In applying the three criteria for unnecessary hardship set forth in *Simplex*, the Supreme Court in *Rancourt* found that both the trial court and ZBA could rationally have found that the zoning ordinance precluding horses in the zone interfered with the applicants’ reasonable proposed use of the property considering the various facts involved: that the lot had a unique, country setting; that this lot was larger than surrounding lots; that the lot was uniquely configured with more space at the rear; that there was a thick wooded buffer around the proposed paddock area; that the proposed 1 ½ acres of stabling area was more than required per zoning laws to keep two livestock animals in other zones. *Id.*, at 54. “The trial court and the ZBA could logically have concluded that these special conditions of the property made the proposed stabling of two horses on the property ‘reasonable.’” *Id.*

C. BACON, A DIVIDED COURT AND ‘SPIRIT OF THE ORDINANCE’ VS. ‘REASONABLE USE’

Just when ZBAs, superior courts, property owners, abutters and land use attorneys were becoming comfortable in applying the *Simplex* standard, the New Hampshire Supreme Court issued the opinion in *Bacon v. Town of Enfield*, 150 N.H. 468 (2004) which indicated deep internal divisions among members of the Court and which was a sign post for things to come (some of which have now been “re-posted” by the Legislature).

At issue was Ms. Bacon’s belated request for a variance. Ms. Bacon had installed at her year-round residence on the shore of Crystal Lake a 4 by 5½ foot shed for a new propane boiler to heat her home without first getting the necessary variance. The shed, like most of Ms. Bacon’s house, was located within the 50-foot setback from the lake. The ZBA denied the variance because it “(1) did not meet the ‘current criterion of hardship’; (2) violated the spirit of the zoning ordinance; and (3) was not in the public interest.” *Id.*, at 470. At trial, Ms. Bacon’s contractor testified that the current location was the most practical, safest and most cost-efficient location but that other locations within the house or further away from the water would work and comply with the setback requirement. *Id.* The superior court upheld the ZBA’s action as reasonable and lawful by concluding that Ms. Bacon had not demonstrated unnecessary hardship under the *Simplex* standard and that the zoning restriction did not interfere with her reasonable use of the property. *Id.*

Justice Broderick’s “majority” opinion began with the standard notation of the five-part test for granting a variance and quickly focused on the ZBA’s and trial court’s findings that the variance

violated the spirit of the ordinance. *Id.*, at 471. Justice Broderick noted that Ms. Bacon did not dispute the trial court's characterization on the general or specific purposes of the ordinance regarding prevention of overcrowding of land, protection of shore lands and their effects on State waters. Noting that the single addition of this shed might not greatly affect the shore front congestion or the overall value of the lake as a natural resource, Justice Broderick found that the cumulative impact of many such projects might well be significant: "For this reason, uses that contribute to shore front congestion and over-development could be inconsistent with the spirit of the ordinance." *Id.*, at 473. Also, noting that reasonable minds could differ, Justice Broderick cited to *Britton v. Town of Chester*, 134 N.H. 434,441 (1991), for the proposition that it is not within the power of the Supreme Court to act as a "super zoning board." *Id.*

Justices Duggan and Dalianis concurred with the result but not the rationale of the "majority" opinion. Rather, their concurrence was based on the finding that Ms. Bacon failed to demonstrate unnecessary hardship under the *Simplex* standard. The concurrence noted that *Simplex* did *not* purport to establish a rule of reasonableness for granting variances:

Even under the *Simplex* standard, merely demonstrating that a proposed use is a "reasonable use" is insufficient to override a zoning ordinance.... Variances are, and remain, the exception to otherwise valid land use regulation.

Id., at 476. The concurrence suggested that two factors not included in *Simplex* should be considered: (1) the distinction between a use variance and an area variance; and (2) the economic impact of the zoning ordinance on the property owner. A use variance would allow the landowner to engage in a use of land prohibited by the zoning ordinance while an area variance would involve a use permitted by the ordinance but grant the landowner an exception from strict compliance with physical standards such as setbacks. *Id.* As such, the concurrence noted that use variances "pose a greater threat to the integrity of a zoning scheme", while area variances would allow the "relaxation of one or more incidental limitations to a permitted use which did not alter the character of the district as much as a use not permitted by the ordinance." *Id.*, at 477, quoting *Matthew v. Smith*, 707 S.W.2d 411, 413 (Mo. 1986). (This rationale became the basis of the Court's decision in *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004), which has now been statutorily overruled by HB 446.)

Regarding the economic impact factor, the concurrence noted that the U.S. Supreme Court decision in *Penn Central Transport v. New York City*, 438 U.S.104, 124 (1978), had recognized economic impact considerations as critical in deciding whether land use controls amount to a taking for constitutional purposes. However, in evaluating the economic impact factor with respect to area variances, the concurrence suggested that zoning boards and courts "will not grant a variance merely to avoid a negative financial impact on the landowner." Nor need the landowner show that without the variance the land will be rendered valueless. Rather, courts and zoning boards must "balance a financial burden of the landowner, considering the relative expense of available alternatives, against the other factors enumerated here and in *Simplex*." *Bacon* at 478. (It will be interesting to see whether this type of economic analysis maps over to the new criteria under HB 446.)

Additionally, the concurrence suggested that boards and courts must consider whether the hardship arises from the unique setting of the property and its environment via a hardship imposed solely on the subject property itself. *Id.*, at 478-479. The concurrence noted that where a zoning restriction imposes a burden on a number of similarly situated landowners, the proper remedy is an amendment of the ordinance, not a variance. Furthermore, while stating again that a mere showing that a proposed use is a reasonable use would be insufficient to override

the zoning ordinance, “the mere fact that alternatives exist to accomplish the same goal without a variance does not necessarily mean that no hardship exists.” *Id.*, at 479.

The dissent of Justices Nadeau and Brock summarily dismissed Chief Justice Broderick’s conclusion that the use violated the spirit of the ordinance and found instead that the environmental impact of Bacon’s use was so minimal as to be insufficient to violate the spirit of the ordinance. *Id.*, at 481. Regarding the concurrence’s treatment of the hardship standard, the dissent noted that the *Simplex* test was crafted with an eye towards Justice Horton’s dissent in the *Grey Rocks* case and was designed to afford the relief necessary to avoid an unconstitutional application of an otherwise valid, general regulation. *Id.*

The dissent read *Simplex* to state that the first prong of the hardship test is met “when special conditions of the land itself render the use for which the variance is sought reasonable and the ordinance interferes with that use.” *Id.*, at 481-482. The dissent also rejected the concurrence giving weight to available alternatives and would find that zoning boards are not permitted to consider whether other alternatives exist in deciding whether the requested use itself is reasonable. *Id.*, at 482.

D. BOCCIA AND AREA VARIANCES

While the decision in *Boccia v. City of Portsmouth*, 151 N.H. 85 (2004), is the presumptive basis for HB 446, I have kept a brief analysis of this case if only to assist ZBA’s in evaluating pending cases and those filed prior to the January 1, 2010 effective date of the new statute. As we now know, with the decision the Court modified the “unnecessary hardship” criteria by creating for the first time a distinction in New Hampshire between “use” variances and “area” variances. The Court commented that a “use” variance would allow the applicant to undertake a use that the zoning ordinance prohibits, while:

A non-use variance [would authorize] deviations from restrictions which relate to a permitted use ... that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to the required yards. Variances made necessary by the physical characteristics of the lot itself are non-use variances of a kind commonly termed “area variances.”

Id., at 90, *citing, Matthew v. Smith*, 707 S.W.2d 411, 413 (Mo. 1986). Noting that *Simplex* was decided primarily in the context of a “use” variance, the Court determined that the *Simplex* test for unnecessary hardship was inappropriate to apply when seeking an “area” variance. *Boccia*, 151 N.H. at 91. Accordingly, the Court created two new factors for consideration in the “area” variance hardship calculation. Specifically, these factors are:

- (1) whether an area variance is needed to enable the applicant’s proposed use of the property given the special conditions of the property; and
- (2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance ... (which) includes consideration of whether the variance is necessary to avoid an undue financial burden on the owner.

Id., at 92 (citations omitted).

In considering the first new factor of whether the variances are necessary to *enable* the applicant's proposed use, the Court noted that a landowner "need not show that without the variance, the land will be valueless." *Id.* In considering the record, the Court determined that the record supported a finding that the variances were needed to enable the proposed use of the property as a 100-room hotel as designed. Regarding the second factor, the Court noted that the issue was "whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for variances" and "whether an area variance is required to avoid an undue financial burden on the landowner." *Id.*, at 93. While adverse effect must be more than a mere inconvenience, a landowner need not show that without the variance the land would be rendered valueless or incapable of producing a reasonable return. Accordingly, boards and courts must "examine the financial burden on the landowner, including the relative expense of available alternatives." *Id.*

E. VIGEANT AND 'REASONABLE USE' REVISITED

Similarly, the "area" variance decision in *Vigeant v. Town of Hudson*, 151 N.H. 747 (2005) is retained both for its interim benefit and for the potential help it may provide to ZBA members analyzing the "reasonableness" issues raised in future variance applications. In *Vigeant*, the Court agreed in part with the Town's argument that the reasonableness of the proposed use must be taken into account and held that "it is implicit under the first factor of the *Boccia* test that the proposed use must be reasonable." *Id.*, at 752. However, the Court limited that holding:

When an area variance is sought, the proposed project is presumed reasonable if it is permitted under the Town's applicable zoning ordinance.... If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property.

Id., at 752-753. Furthermore, under the second *Boccia* hardship factor, the Court noted there must be no reasonable way for an applicant to achieve that proposed use without a variance; and in making this determination, "the financial burden on the landowner considering the relative expense of available alternatives must be considered." *Id.*, at 753. In the case of *Vigeant's* application, the ZBA had considered that the applicant could have made an alternate use with fewer dwelling units; but the Supreme Court rejected that argument out of hand: "In the context of an area variance, however, the question whether the property can be used differently from what the applicant has proposed is not material." *Id.* In light of the configuration and location of the lot in question, the Court determined that it was "impossible to comply with the setback requirements" such that an area variance is necessary to implement the proposed plan from a "practical standpoint." *Id.* In so finding, the Supreme Court upheld the trial court's determination that the ZBA's denial of the variance was unlawful and unreasonable.

F. HARRINGTON AND THE DISTINCTION BETWEEN USE AND AREA VARIANCES WITH A PARTIAL ANALYSIS OF THE *SIMPLEX* CRITERIA AND A COMMENT ON 'SUBSTANTIAL JUSTICE'

In the case of *Harrington v. Town of Warner*, 152 N.H. 74 (2005), the Court provided an analysis of the distinction between a use and an area variance:

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.

Id., at 78. The Court then analyzed the applicable provisions of the Warner zoning ordinance and found that it was a limitation on the intensity of the use in order to preserve the character of the area such that the provision was a use restriction requiring a use variance under the *Simplex* criteria. *Id.*, at 80.

While not actually analyzing each prong of the “three-prong standard set forth in *Simplex*” for unnecessary hardship, the Court noted that *Simplex* first requires “a determination of whether the zoning restriction as applied interferes with a landowner’s reasonable use of the property” and that “reasonable return is not maximum return.” *Id.*, at 80. Additionally, the Court held that, while the constitutional right to enjoy property must be considered, the “mere conclusory and lay opinion of the lack of ... reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence” of such interference with reasonable use. *Id.*, at 81.

The Court in *Harrington* continued with a “second” determination—whether the hardship is a result of the unique setting of the property; and the Court stated that this requires that “the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property.” While the property need not be the only one so burdened, “the burden cannot arise as a result of the zoning ordinance’s equal burden on all property in the district.” Furthermore, that burden must arise from the property and not from the individual plight of the landowner. Furthermore, the Court considered the “final” condition—the surrounding environment, i.e., “whether the landowner’s proposed use would alter the essential character of the neighborhood.” *Id.*, at 81.

The Court also considered the issue of “self-created hardship” and relied on its prior decision in *Hill v. Town of Chester*, 146 N.H. 291, 293 (2001), to find that self-created hardship does not preclude the landowner from obtaining a variance since “purchase with knowledge” of a restriction is but a “non-dispositive factor” to be considered under the first prong of the *Simplex* hardship test. *Id.*, at 83. The Court gave short shrift to the other issues raised by the abutters. The Court found that the applicant showed that the variance was not contrary to the spirit of the ordinance and did not detract from the intent or purpose of the ordinance because: (1) mobile home parks were a permitted use in the district; (2) the mobile home park already exists in the area; (3) the variance would not change the use of the area; and (4) were he able to subdivide his land, the applicant would have sufficient minimum acreage for the proposed expansion. Additionally, the Court found that “substantial justice would be done” because “it would improve a dilapidated area of town and provide affordable housing in the area.” *Id.*, at 85.

This comment on “substantial justice” is one of the few found in the case law of variances to that date. A previous statement suggests that the analysis should be whether the loss the applicant will suffer by its inability to reasonably use its land as it desires without the variance outweighs any gain to the public by denying the variance. See, *U-Haul Co. of N.H. & Vt., Inc. v. Concord*, 122 N.H. 910, 912-13 (1982) (finding that substantial justice would be done by

granting a variance to permit construction of an apartment in the general business district since it would have less impact on the area than a permissible multi-family unit); *see also*, Loughlin, §24.11, page 308, citing the New Hampshire Office of State Planning Handbook as follows:

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.

As more scrutiny is given to the “non-hardship” prongs of the variance criteria, we can expect further discussions on the element of “substantial justice.” See, Section I below, concerning *Malachy Glen*.

G. CHESTER ROD AND GUN CLUB AND AN ANALYSIS OF ‘PUBLIC INTEREST’, ‘RIGHTS OF OTHERS’ AND ‘SPIRIT OF ORDINANCE’ CRITERIA

In the case of *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577 (2005), the Supreme Court held that the zoning ordinance is the relevant declaration of public interest to be examined rather than any specific vote at Town Meeting. *Id.*, at 581. In that case, the ZBA had been faced with two variance application for competing cell towers—one on the Club’s property and one on the Town’s. A previous March Town Meeting had passed an article stating that all cell towers should be on Town-owned land, and the ZBA relied on that article to grant the Town’s application and deny the Club’s. On appeal, the trial court reversed the ZBA and ordered that it grant the Club’s variance.

In reversing the trial court in part, the Supreme Court stated what we as practitioners in the field have long espoused: that the criteria of whether the variance is “contrary to the public interest” or would “injure the public rights of others” should be construed together with whether the variance “is consistent with the spirit of the ordinance.” *Id.*, at 580. More importantly, the Supreme Court then held that to be contrary to the public interest or injurious of public rights, the variance “must unduly, and in a marked degree” conflict with the basic zoning objectives of the ordinance. *Id.*, at 581. In making such a determination, the ZBA should examine whether the variance would (a) alter the essential character of the locality or (b) threaten public health, safety or welfare. *Id.*

However, the Supreme Court took the unusual step of reprimanding the lower court for improperly ordering the issuance of the variance. Instead, the trial court was instructed to remand the matter back to the ZBA for factual findings on all five prongs of the variance criteria.

H. GARRISON AND THE RE-EMPHASIS ON ‘UNIQUENESS’

In the case of *Garrison v. Town of Henniker*, 154 N.H. 26 (2006), the Supreme Court upheld the reversal of variances granted for an explosives plant, which was to be located in the middle of 18 lots totaling 1,617 acres—all zoned “rural residential.” The applicant had sought use variances to allow the commercial use in the residential zone and to allow the storage and blending of explosive materials where injurious or obnoxious uses are prohibited. After an extensive presentation of the nature of the applicant’s business and the site, the ZBA voted 3-2 to grant the variances with two conditions: (1) the 18 lots had to be merged into one; and (2) the variances would terminate if the applicant discontinued the use.

Upon appeal by abutters, the trial court reversed the ZBA's decisions by finding that the evidence before the ZBA failed to demonstrate unnecessary hardship. In upholding that decision, the Supreme Court agreed with the trial court that, while the property was ideal for the applicant's desired use, "the burden must arise from the property and not from the individual plight of the landowner." *Id.*, citing, *Harrington v. Town of Warner*, 152 N.H. 74 (2005). In discussing the three-prong *Simplex* standard for unnecessary hardship, the Supreme Court focused on the first prong: that a zoning restriction "interferes with their *reasonable use* of the property, considering the unique setting of the property in its environment." *Garrison*, 154 N.H. at 30-31, citing, *Rancourt v. City of Manchester*, 149 N.H. 51, 53-54 (2003)(emphasis original). In doing so, the Court agreed with the trial court that the evidence failed to show that the property at issue was sufficiently different from any other property within the zone to be considered "unique."

As a minor "bone" to the applicant, the Supreme Court did agree that *Harrington's* requirement of "dollars and cents" evidence of lack of reasonable return may be met though either lay or expert testimony; but such evidence as presented was not enough to convince the Court that the hardship resulted from the unique setting of the property. *Garrison*, 154 N.H. at 32.

Thus, the Court charged applicants with presenting sufficient evidence to allow the ZBA to determine that the use is reasonable and that the property is unique, i.e., distinguishable from surrounding properties in a manner that could justify use relief.

I. MALACHY GLEN AND ANALYSIS OF THE 'PUBLIC INTEREST', 'SPIRIT OF THE ORDINANCE', 'SPECIAL CONDITIONS', 'OTHER REASONABLY FEASIBLE METHOD' AND 'SUBSTANTIAL JUSTICE' CRITERIA

In *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007), the Supreme Court affirmed the trial court's decision, which reversed the Town's ZBA and ordered that the area variance in question be granted. Malachy Glen had obtained site plan approval in 2000 for a self-storage facility on Dover Road (Route 4), which showed structures and paved surfaces within 100 feet of a wetland. At the time of approval, the Town did not have a wetlands ordinance; but prior to construction, the Town implemented such an ordinance creating a 100-foot buffer around all wetlands. Malachy Glen applied for a variance from this ordinance and was initially denied; that decision was reversed and remanded by the trial court for failure to consider the proper standard.

On remand, the ZBA *sua sponte* bifurcated the application into two separate requests, granted the variance for the needed driveway and denied the variance to build the storage units within the buffer zone. The trial court found that the denial was unlawful and unreasonable, in part, because the ZBA "failed to consider the evidence placed before it."

On appeal, the Supreme Court noted that "where the ZBA has not addressed a factual issue, the trial court ordinarily must remand the issue to the ZBA," *Id.*, at 105, citing *Chester Rod & Gun Club*. "However, remand is unnecessary when the record reveals that a reasonable fact finder necessarily would have reached a certain conclusion," *Malachy Glen*, 155 N.H. at 105, citing *Simpson v. Young*, 153 N.H. 471, 474 (2006)(a landlord/tenant damages case).

In addressing the variance criteria, the Court again cited to the *Chester* case that the requirement that the variance not be contrary to the public interest is "related to" the requirement of consistency with the spirit of the ordinance: "[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." *Malachy Glen*, 155 N.H. at 105 – 106. In making that determination, the Court restated that the ZBA is to ascertain whether the variance would "alter the essential character of the locality" or "threaten the public health, safety or welfare." *Id.* The Court rejected the ZBA's finding that the variance would be contrary to the public interest and to the spirit of the ordinance because "it would encroach on the wetlands buffer." *Id.*, at 106. The uncontroverted evidence was that this project was in an area consisting of a fire station, a gas station and a telephone company; that the variance for encroachment for the driveway had been granted; and that applicant's wetlands consultant had testified that the project would not injure the wetlands in light of the closed drainage system, detention pond and open drainage system designed for the project to protect the wetlands. The Court also rejected the ZBA's argument that it is not bound by the conclusions of the experts in light of their own knowledge of the area, in part, because the ZBA members' statements were conclusory in nature and not incorporated into the "Statement of Reasons" for their denial: "The mere fact that the project encroaches on the buffer, which is the reason for the variance request, cannot be used by the ZBA to deny the variance." *Id.*, at 107.

In examining the ZBA's treatment of the *Boccia* hardship standard for an area variance, the Court stated that "special conditions" requires that the applicant demonstrate that its property is unique in its surroundings. *Id.*, citing *Garrison*, 154 at 32-35 (a use variance case). Additionally, the Court cited to *Vigeant* for the propositions that the proposed project is presumed reasonable if it is a permitted use and that an area variance may not be denied because the ZBA disagrees with the proposed use of the property. *Malachy Glen*, 155 N.H. at 107. Furthermore, the Court cited to the national treatise, 3 K. Young, *Anderson's American Law of Zoning* §20.36, at 535 (4th ed. 1996), for the proposition that satisfaction of unnecessary hardship peculiar to the property "is most clearly established where the hardship relates to the physical characteristics of the land." *Id.*

The Court also rejected the ZBA's argument that there were other reasonably feasible methods available to the applicant via the elimination of a number of the desired storage units. The Court clearly stated that "the ZBA must look at the project as proposed by the applicant, and may not weigh the utility of alternate *uses* in its consideration of the variance application." *Id.*, at 108, citing *Vigeant*, 151 N.H. at 753 ("In the context of an area variance ... the question [of] whether the property can be used differently from what the applicant has proposed is not material"). While noting that if the proposed project could be built without the need for the area variance, then it is the applicant's burden to show that such alternative is cost prohibitive, the Court stated that "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." *Malachy Glen*, 155 N.H. at 108. In this case, the Court recognized that reducing the project by 50 percent would result in financial hardship to the applicant and that no reasonable trier of fact could have found otherwise. *Id.*

On the issue of substantial justice, the Court quoted the passage from Loughlin as found at the end of section D, above. *Malachy Glen*, 155 N.H. at 109. Additionally, the Court noted that the ZBA should look at "whether the proposed development was consistent with the area's present use." *Id.* The Court expressly held that the ZBA's stated reason of "no evidence" that a scaled down version of the project would be economically unviable "is not the proper analysis under the 'substantial justice' factor." *Id.* Since the ZBA applied the wrong standard, the trial court is authorized to grant the variance if it found as a matter of law that the requirement was met. In this case, the trial court had found via uncontroverted evidence that the project was appropriate for the area and did not harm the abutters or nearby wetlands, and that the general public would realize no appreciable gain from denying this variance.

J. NASER, USE OF CONSERVATION EASEMENT SPACE IN YIELD PLAN, AND ANALYSIS OF THE 'PUBLIC INTEREST' AND 'SPIRIT OF THE ORDINANCE' CRITERIA

In *Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment*, 157 N.H. 322 (2008), the Supreme Court affirmed in part, reversed in part and remanded the trial court's decision, which upheld the ZBA. The ZBA decision denied a variance and also found that the open space subdivision application did not comply with the zoning ordinance. At issue was the applicant's usage in its yield plan of approximately fifty acres previously burdened by a conservation easement given to the Town. The Planning Board had determined that this usage was improper; and the applicant appealed that decision to the ZBA and applied for a variance to allow the usage in the yield plan.

In first analyzing the yield plan issue, the Supreme Court looked to the zoning ordinance's definitions of "buildable area" and "yield plan": respectively, "the area of a site that does not include slopes of 25% or more, submerged areas, utility right-of-ways, wetlands and their buffers" and "a plan submitted ... showing a feasible conventional subdivision under the requirements of the specific zoning district..." The Court agreed with the Town that under these definitions, the yield plan showing development of lots within the Conservation Easement Area was neither "feasible" nor "realistic" since such land could not be developed. Thus, the Court found that there was no error in finding that the yield plan did not comply with the ordinance.

However, in examining the denial of the variance, the Supreme Court noted that ZBA found that the applicant failed to meet all but the "diminution in value" criterion and that the trial court focused only upon the "public interest" and "spirit of the ordinance" criteria. Relying heavily on its *Malachy Glen* decision, the Court looked to the objectives listed under the relevant portion of the zoning ordinance, which included conservation of agricultural and forestlands, maintenance of rural character, assurance of permanent open space and encouragement of less sprawling development. Since the applicant was seeking to develop 14 lots on the remaining 27 acres, the Court stated that "we fail to see how permitting the plaintiff to use the conservation land in this manner would 'unduly, and in a marked degree *conflict* with the ordinance.'" *citing, Malachy Glen*, 155 N.H. at 105 (quotations omitted; emphasis added). The Court continued by holding "as a matter of law, that this in no way conflicts with the ordinance's basic zoning objectives to conserve and preserve open space." Thus, the trial court's decision on the variance was reversed and remanded for consideration of the unnecessary hardship and substantial justice criteria.

Note two additional points of import in this case: (1) the Supreme Court effectively merged the "public interest" and "spirit of the ordinance" criteria into one discussion and implicitly found that these two prongs had been met (since they were not the subject of the remand); and (2) the Court did not state whether this was a "use" or "area" variance. This first point could be viewed as the continuation of a trend started with *Chester Rod & Gun Club*, supra. Indeed, in one recent "3JX" decision (i.e., one decided by a panel of three justices and thereby not considered "binding precedent") Justices Dalianis, Duggan and Galway remanded a case back to the ZBA in part because the Board found that the request did not conflict with the public interest so that it "could not, as a matter of law, also find that the variance is contrary to the spirit of the ordinance." *Zannini v. Town of Atkinson*, (Docket No. 2006-0806; issued July 20, 2007).

K. NINE A, AREA AND USE VARIANCES ASSOCIATED WITH REPLACEMENT OF NON-CONFORMING USE

In *Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361 (2008), the Supreme Court upheld the denial of both area and use variances for a lakefront development. The parcel in question totaled approximately 86 acres bifurcated by Route 9A: six acres bordering the lake in the Spofford Lake Overlay District (which allows single family dwellings only and imposes two-acre minimum lot size and building and impermeable coverage limitations), and 80 acres in the Residential District (which allows duplexes and cluster developments). The applicant sought various area and use variances to develop the six acres into either seven single-family lots (with the 80 acres remaining undeveloped) or a condominium cluster development of seven detached homes (together with three duplexes on 24 of the 80 acres). In either case, the applicant argued that it was benefiting the area by removing the vacant, non-conforming 90,000 square foot rehabilitation facility on the six-acre parcel.

In affirming the denials, the Supreme Court noted with favor the lower court's finding that the number of pre-existing, nonconforming lots around the lake was not a basis for bypassing the zoning ordinance requirements. Additionally, the Court stated that the spirit of the ordinance was to "limit density and address issues of over-development and overcrowding on the lake." Once again, the Court relied heavily upon its decision in *Malachy Glen* and stated that the factors of "alter the essential character of the locality" or "threaten public health, safety or welfare" are not exclusive. In combining its analysis of the "public interest" and "spirit of the ordinance" criteria, the Court addressed the applicant's argument that its replacement of a nonconforming use with a "less intensive, more conforming use" is consistent with the public interest and spirit of the ordinance: "We recognize that there may be situations where sufficient evidence exists for a zoning board to find that the spirit of the ordinance is not violated when a party seeks to replace a nonconforming use with another nonconforming use that would not substantially enlarge or extend the present use." However, this was not such a case. The Court also noted (with an erroneous reading that *Malachy Glen* did not involve a change in the ordinance) that the Town had the ability to change its ordinance to take the current character of the neighborhood into account, including the unique natural resource of the lake.

L. DANIELS AND THE IMPACT OF THE TELECOMMUNICATIONS ACT ON USE AND AREA VARIANCES

In *Daniels v. Londonderry*, 157 N.H. 519 (2008), the Supreme Court upheld the grant of use and area variances for the construction of a cell tower on a 13-acre parcel in the Town's agricultural-residential zone. Public hearings included testimony from the applicant's attorney, project manager, site acquisition specialist, two radio frequency engineers (as well as the ZBA's own radio frequency engineer) concerning the necessity of the tower to fill a gap in coverage, as well as two competing property appraisers. Thereafter, the ZBA granted the three variances with conditions including placement of the tower on the site, placement of the driveway, and maintenance of the existing tree canopy.

The Court rejected the abutters' contentions that the ZBA unlawfully and unreasonably allowed the Telecommunications Act of 1996 ("the TCA") to preempt its own findings regarding the statutory criteria. The Supreme Court noted that the ZBA correctly treated the TCA as an "umbrella" that preempts local law under certain circumstances but which still requires the application of the five variance criteria in this instance. The Court commented that the applicant had shown that the unnecessary hardship resulting from specific conditions of the

property, since it was this property that filled the significant gap in coverage: “that there are no feasible alternatives to the proposed site may also make it unique.” Additionally, the Court found no error in the trial court’s failure to explicitly address each of the *Simplex* factors in light of the “generalized conclusions applicable to these factors.”

Concerning the “diminution in value” criterion, the Court held that the ZBA is “not bound to accept the conclusion” of the tower company’s site specific impact study or of any witness (but the Court did not specifically address its contrary ruling in *Malachy Glen* where the uncontroverted evidence of the expert was erroneously ignored by the Board). Rather, the Court looked at the “substantial evidence” on property values tendered in the form of numerous studies, testimony of at least one expert, “the lack of abatement requests in comparable areas,” and the members’ own knowledge of the area and personal observations to uphold the decision. Finally, in one paragraph, the Court addressed the remaining criteria relying heavily on the fact that this tower would fill the existing coverage gap.

M. FARRAR, UNNECESSARY HARDSHIP FOR MIXED USE AND ‘SUBSTANTIAL JUSTICE’

The Court’s most recent analysis of the variance criteria prior to these materials going to press is *Farrar v. City of Keene*, No. 2008-500 (N.H. May 7, 2009). Here, the City’s ZBA granted both use and area variances to allow for the mixed residential and office usage of an historic 7000 sq. ft. single-family home located on a 0.44-acre lot in the City’s Office District, which abutted the Central Business District. The use variance was needed since the District allowed both multi-family and commercial offices, but did not clearly allow the proposed mixed use. The area variance was to address a lower number of on-site parking spaces based on that configuration. (The ordinance would have required 23, the applicant wanted only 10. The ZBA granted the variance with a requirement to create 14 spaces.)

The abutters appealed. The Superior Court affirmed the area variance but vacated the use variance based on a finding that the applicant had failed to submit sufficient evidence on the first prong of the *Simplex* unnecessary hardship criteria—that the zoning restriction as applied interferes with the applicant’s reasonable use of the property considering its unique setting in the environment. The applicant and the City appealed, contending that the trial court had overlooked the evidence—particularly the large size of the house and the lot size compared with the number of available parking spaces and the usual layout of the District—and that the trial court did not give sufficient deference to the ZBA and its members’ personal knowledge. The abutters in turn argued that the applicant’s financial hardship in retaining the property as a single-family residence was personal, unrelated to any unique characteristic of the property, and unsupported by any “actual proof.”

In addressing the first prong of the *Simplex* unnecessary hardship criteria, the Supreme Court noted that this issue is “the critical inquiry” for determining whether such hardship exists. The Court pointed to the *Harrington v. Warner* decision, *above*, for several “non-dispositive factors: first, whether the zoning restriction as applied interferes with the owner’s reasonable use of the property; second, whether the hardship is the result of the unique setting of the property; and third, whether the proposed use would alter the essential character of the neighborhood. The Supreme Court reviewed the evidence, including the size of the lot, the size of the house, the allowed uses in the District, and the fact that the adjacent historic homes had been turned into professional offices with their commensurate higher traffic volume than the proposed use, and held that “the ZBA could reasonably find that although the property could be converted

into office space consistent with the ordinance, the zoning restriction still interferes with [the applicant]’s reasonable use of the property as his residence.” The Court noted that the applicant’s minimal evidence of a reasonable return on his investment was sufficient since that issue was only one of the nondispositive factors for the ZBA to consider. In closing its analysis of this first prong of the *Simplex* unnecessary hardship test, the Court acknowledged that this is a “close case” and that in such instances “where some evidence in the record supports the ZBA’s decision, the superior court must afford deference to the ZBA” whose members have knowledge and understanding of the area.

In addressing the second prong of the *Simplex* unnecessary hardship test, the Supreme Court affirmed the lower court’s reasoning that the criteria had been met since the desired mixed use was allowed in the adjoining district and that the variance would not alter the composition of the neighborhood. As to the third prong—that the variance would not injure the public or private rights of other—the Supreme Court again noted that “this prong of the unnecessary hardship test is coextensive with the first and third criteria for a use variance” —namely that the variance would not be contrary to the public interest, and the variance is consistent with the spirit of the ordinance. In making its analysis of these issues, the Court looked to the purpose statement in the City’s zoning ordinance for the Office District, which included references to “low intensity” uses and serving as a buffer between higher density commercial areas and lower density residential areas. The Court upheld the lower court’s finding that the proposed use would be of lower intensity than a full-office use allowed in the District, that such office use would have more traffic, and that the abutters’ concerns were over a commercial use of the property.

Finally, the Supreme Court addressed the “substantial justice” criteria and cited the *Malachy Glen* decision, above, for the standard that “any loss to the individual that is not outweighed by a gain to the general public is an injustice.” In this case, the factors considered to support a finding that substantial justice would be done by the granting of the variance included: (1) the use would not alter the character of the neighborhood, injure the rights of others or undermine public interest; (2) the applicant currently resides at the property and wished to remain; (3) the applicant had made substantial renovations to the historic structure; (4) the structure would not be economically sustained as a single family residence; (5) the residential appearance of the building would not change; (6) adjoining buildings are currently offices; and (7) if the property was used entirely as offices, the traffic and intensity of usage would be greater.

III. DISABILITY VARIANCES

Additional authority granted to the ZBA by RSA 674:33, V concerns the power to grant variances *without* a finding of unnecessary hardship “when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises.” This statutory provision requires that the variance “shall be in harmony with the general purpose and intent” of the ordinance. RSA 674:33, V(a). Furthermore, the ZBA is allowed to include a finding in the variance such that the variances shall survive only so long as the particular person has a continuing need to use the premises. RSA 674:33, V(b).

PART THREE

A LEGISLATIVE RESPONSE TO *BOCCIA*

By Cordell A. Johnston

| 37

Almost immediately after the Supreme Court issued its decision in *Boccia*¹ establishing a separate unnecessary hardship standard for area variances, efforts began in the Legislature to reverse that decision. In the 2005 session, Rep. Kurk filed House Bill 359, which would have established a single standard for both use and area variances. That bill passed the House,² but was killed in the Senate.³

In the 2007 session, Reps. Sorg and Kurk filed House Bill 335, which again would have established a single standard for use and area variances. The House Municipal and County Government Committee retained the bill for study before the 2008 session,⁴ then in 2008 referred it to interim study.⁵ After a number of study committee work sessions in the summer and fall of 2008, the Municipal and County Government Committee voted in October 2008 to recommend the bill for legislation in 2009.⁶

Finally, in 2009, Rep. Kurk introduced a bill that passed both the House and the Senate. The bill started out as House Bill 446, but due to some interesting procedural maneuvers, it ended up as part of Senate Bill 147, and was passed by both houses.⁷

I. CAN THE LEGISLATURE OVERRULE THE SUPREME COURT?

The thoughtful reader might ask an initial question—does the Legislature have the power to overrule the Supreme Court’s decision? After all, it is stated earlier in these materials that the purpose of a variance is to protect a land owner’s constitutionally protected property rights. If that is the case, and if the Supreme Court interprets the statute to protect constitutional property rights, how can the Legislature override the Court’s interpretation?

The answer is that although the Court has traditionally stated its variance standards as a matter of constitutional requirement, it did not do so in *Boccia*. Thus, in *Simplex*, for example, the Court made it clear that its newly announced standard was intended specifically to protect “the constitutional right to enjoy property.”⁸ In *Boccia*, however, there was no such reference. Instead, the Court indicated that it was adopting a separate standard for area variances because to do so “will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met.”⁹

Further, the Court had previously recognized that the Legislature’s intent is controlling. In *Ouimette v. City of Somersworth*,¹⁰ decided in 1979, the Court had expressly declined to establish a separate test for area variances because the statute “does not distinguish between types of variances.”¹¹ Subsequently, the concurring justices in *Bacon v. Town of Enfield*,¹² on whose opinion the *Boccia* decision relied, stated that they “disagree[d] ... that the statutory language precludes the adoption of this distinction between types of variances.”¹³ Although they rejected the *Ouimette* Court’s interpretation of the statute, there seemed to be a continuing recognition that the issue remained a matter of “the statutory language.” Thus, presumably the Court would respect a clear statement from the Legislature that there should be no separate test for area variances.

II. WHY WAS LEGISLATION NEEDED?

Although the *Boccia* decision was perhaps not universally criticized, one would have to look hard to find a ZBA member, planner, or municipal attorney who believed that the decision “greatly assist[ed] zoning authorities.” First, the newly created distinction immediately gave rise to a whole new basis for litigation. Before a zoning board could get to the merits of a case, it had to decide what standard to apply. That required a preliminary determination as to whether the application called for a use variance or an area variance, and that decision provided fertile ground for dispute. Although the Supreme Court tried to provide a standard for distinguishing between the two,¹⁴ the issue remained far from clear in many cases. Zoning boards and applicants alike expressed confusion about which standard should be applied in many cases. Many zoning boards developed two different application forms—one for use variances and one for area variances—but they frequently encouraged applicants to file both forms because it was unclear which standard would apply. Further, many applications could require both a use variance *and* an area variance, requiring the board to apply two different standards to the same case.¹⁵

Second, once it could be agreed that the *Boccia* standard applied, there seemed to be nothing to apply. The first prong of the *Boccia* standard is that due to special conditions of the land, “an area variance is needed to enable the applicant’s proposed use.”¹⁶ Apart from the “special conditions” requirement, which would apply under any standard, this merely says that the applicant needs a variance to do what he wants. This presumably would be true in every case, unless the applicant has simply misunderstood the ordinance and does not need a variance at all.

40 |

The second prong is that “the benefit sought by the applicant can [not] be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.”¹⁷ Again, it seems unlikely that the applicant would be before the board if he had some other “reasonably feasible method” for achieving the desired result.¹⁸ In short, *Boccia* seemed to require the applicant to demonstrate only that (1) there were special conditions of the land and (2) he could not do what he wanted to do without a variance.¹⁹ If special conditions were established, unnecessary hardship was almost automatically established.

Finally, there was a great deal of frustration that the Court kept changing the law, and it was hoped that legislation would provide some stability. Because the Court’s decision in *Simplex* was constitutionally based, it could not be undone by legislation; but the *Boccia* decision could.

III. THE NEW LAW

SB 147 completely rewrote RSA 674:33, I(b), to read as follows:

I. The zoning board of adjustment shall have the power to:

...

(b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

- (1) The variance will not be contrary to the public interest;*
- (2) The spirit of the ordinance is observed;*
- (3) Substantial justice is done;*
- (4) The values of surrounding properties are not diminished; and*
- (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.*

(A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(ii) The proposed use is a reasonable one.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

The definition of “unnecessary hardship” set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

This revision accomplishes several things. First, it lists the criteria for a variance a little more neatly than the old statute. Second, it finally codifies the no-diminution-in-value requirement that the Supreme Court has observed since 1952, but that has never been part of the statute. Third, it codifies in subparagraph (5)(A), with some clarifying language changes, the *Simplex*

standard. Fourth, it also codifies in subparagraph (5)(B) the *Governor's Island* standard, as an alternative to the *Simplex* standard. Finally, in the last sentence, it overrules *Boccia* by eliminating the separate standard for area variances.

The first two of these points are self-explanatory, and the last has already been discussed. The third and fourth merit further explanation.

A. CODIFICATION OF THE *SIMPLEX* STANDARD

Recognizing the constitutional basis for *Simplex*, the drafters of the new law believed that if the Legislature was going to overrule *Boccia* and establish a single standard for use and area variances, that standard had to be based on *Simplex*—even though some would have preferred to turn the clock back to *Governor's Island*. Thus, the heart of the new statute is the *Simplex* definition of “unnecessary hardship,” in subparagraph (5)(A).

The statute does not, however, use the exact language from the *Simplex* opinion, because, frankly, that language—especially the language of the first prong—is confusing at best. Although lawyers and zoning board members who are familiar with the case law may understand what is meant by the requirement that “a 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,” the meaning is far from clear to someone reading it for the first time. Is “unique setting” the same as “special conditions”? Is the “unique setting” something that has to be established, or is it assumed (as the language seems to suggest) that every setting is unique, and it is merely something that the ZBA must “consider”? Does the reference to “interfer[ence] with the reasonable use of the property” require a showing that the restriction prohibits *any* reasonable use, or just that it interferes with the applicant’s proposed use (which must be shown to be reasonable)? Does the applicant have to tie the reasonableness of the use to the “unique setting”?

Because the *Simplex* language is so muddy, the new law incorporates language from subsequent cases that interpreted and applied the *Simplex* standard. For example, *Rancourt v. City of Manchester*²⁰ clearly states that under *Simplex*, the applicant must demonstrate that “special conditions of the land render the use for which the variance is sought ‘reasonable.’”²¹ *Garrison v. Town of Henniker*²² emphasizes that “unique setting” refers to “a special condition of the land which distinguishes it from other land in the same area with respect to the suitability for the use for which it is zoned.”²³ Thus, the first prong of the *Simplex* standard was rewritten in SB 147 to state that “owing to special conditions of the property that distinguish it from other properties in the area, ... the proposed use is a reasonable one.”

The second prong of the *Simplex* standard—“no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restrictions on the property”—was reasonably clear, and thus was left largely intact in SB 147. The third prong—“the variance would not injure the public or private rights of others”—was eliminated. This was not intended as a substantive change to the hardship standard; instead, it was eliminated because it was felt to be redundant of the other statutory criteria. Case law after *Simplex* had made it clear that the “public or private rights of others” inquiry is “coextensive” with the “public interest” and “spirit of the ordinance” elements under the statute.²⁴ This being the case, there seemed to be no reason to duplicate those questions under the hardship standard, since the applicant must satisfy all five elements under the statute to obtain a variance.

B. CODIFICATION OF THE GOVERNOR'S ISLAND STANDARD

Why, one might ask, does the new law codify the old *Governor's Island* standard in addition to the *Simplex* standard, if *Governor's Island* was overruled by *Simplex*?

The answer is that *Simplex* did not entirely overrule *Governor's Island*. The Court in *Simplex* said the definition of unnecessary hardship, as established in *Governor's Island* and subsequent cases, had become “too restrictive in light of the constitutional protections by which it must be tempered.”²⁵ The Court therefore adopted a less restrictive test. However, there is not a one-dimensional spectrum of variance cases, so that an application that satisfies *Simplex* will automatically satisfy *Governor's Island*. There may be a rare case in which the applicant could satisfy the *Governor's Island* test but not the *Simplex* test.

This most likely would happen where there is clearly a “fair and substantial relationship ... between the general purposes of the zoning ordinance and the specific restriction on the property”—and the variance therefore fails on the second prong of *Simplex*—but because of special conditions, the effect of the restriction on the property is to preclude any reasonable use. If such an application is judged solely on the *Simplex* standard, it fails, but the result would be to deprive the owner of any reasonable use of the land—an unconstitutional taking. Thus, there has to be a secondary “safety valve,” since the alternative would be for a court to invalidate the zoning restriction altogether. Subparagraph (5)(B) provides relief for the applicant in that rare case.

C. THE LEGISLATURE'S STATEMENT OF INTENT

During the legislative process, some questions were raised about the language of the bill, specifically whether it could be read as somehow modifying the *Simplex* test for unnecessary hardship, given the slightly different language it uses. In response, the Legislature included the following “statement of intent” in the bill. This will go in the 2009 session laws, but will not become part of the statute:

The intent of ... this act is to eliminate the separate “unnecessary hardship” standard for “area” variances, as established by the New Hampshire supreme court in the case of *Boccia v. City of Portsmouth*, 155 N.H. 84 (2004), and to provide that the unnecessary hardship standard shall be deemed satisfied, in both use and area variance cases, if the applicant meets the standards established in *Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001), as those standards have been interpreted by subsequent decisions of the supreme court. If the applicant fails to meet those standards, an unnecessary hardship shall be deemed to exist only if the applicant meets the standards prevailing prior to the *Simplex* decision, as exemplified by cases such as *Governor's Island Club, Inc. v. Town of Gilford*, 124 N.H. 126 (1983).

This ought to answer any questions about the new law's meaning.

ENDNOTES

¹ *Boccia v. City of Portsmouth*, 151 N.H. (2004).

² See 2005 N.H. House Journal No. 29, at 851, 921 (March 30, 2005).

³ See 2005 N.H. Senate Journal No. 20, at 432 (June 2, 2005).

⁴ See 2007 N.H. House Calendar No. 51, at 1807 (March 15, 2007).

⁵ See 2008 N.H. House Journal No. 7, at 395 (Jan. 2, 2008).

⁶ See 2008 N.H. House Calendar No. 62, at 2367 (Oct. 22, 2008). Because a new legislature began in January 2009, HB 335 itself could not be acted on during the 2009 legislative session. When a bill is sent to interim study between sessions of a legislature, the interim study committee's only options are to report the bill as either "recommended for future legislation" or "*not* recommended for future legislation." In either case, this is merely a recommendation, and has little effect. If the bill is not recommended, that does not prevent a legislator from introducing an identical bill; if the bill *is* recommended, nothing will happen unless a legislator takes the initiative to file a bill.

⁷ House Bill 446 passed the House easily in March 2009. In the Senate, however, the Public and Municipal Affairs Committee voted to "re-refer" it—the Senate equivalent of retaining a bill—meaning it would see no further action until 2010. Upon learning of the Senate's action, Rep. Kurk moved to attach the HB 446 language to a Senate bill that was then in the House—Senate Bill 147 (which had to do with an entirely different subject, data collection practices by health care providers). The House adopted the amendment and passed SB 147 with the HB 446 language attached. To make a long story short, a committee of conference eventually agreed to the bill as amended, with some further modifications, and both chambers passed the amended bill. Thus, the relevant language ultimately was included in the adopted version of SB 147. The original bill, HB 446, remains "re-referred" for 2010, but it is unlikely that anything will happen with it, and the passage of SB 147 makes it a moot issue.

⁸ *Simplex Technologies v. Town of Newington*, 145 N.H. 727, 731 (2001). The Court stated, "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 ... adopt an approach more considerate of the constitutional right to enjoy property."

⁹ 151 N.H. at 91-92.

¹⁰ 119 N.H. 292 (1979).

¹¹ *Id.* at 295.

¹² 150 N.H. 468 (2004).

¹³ *Id.* at 477 (Duggan & Dalianis, JJ., concurring).

¹⁴ See *Harrington v. Town of Warner*, 152 N.H. 74, 78-80 (2005).

¹⁵ See, e.g., *Farrar v. City of Keene*, No. 2008-500 (N.H. May 7, 2009); *Daniels v. Town of Londonderry*, 157 N.H. 519 (2008).

¹⁶ 151 N.H. at 92.

¹⁷ *Id.*

¹⁸ The court in *Boccia* stated that the second factor “includes consideration of whether the variance is necessary to avoid an undue financial burden on the owner.” *Id.*; see also *id.* at 93. If there is a way to construct the project so that an area variance is not needed, “the burden is on the applicant to show that these alternatives are cost-prohibitive.” *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 108 (2007). Although it is conceivable that a ZBA might identify a cost-effective alternative that the applicant has overlooked, it seems unlikely; presumably most applicants would rather find an alternative that complies with the ordinance, even if it is a little more expensive, than spend the money, time, and effort to go through a variance proceeding.

¹⁹ The applicant would, of course, still have to satisfy the other four variance criteria, as the court noted in *Boccia*, see *id.* at 94. In defense of *Boccia*, it should be noted that the practical effect of the ruling was to turn the clock back to the 1950s and 1960s, when an “unnecessary hardship” was deemed to exist if (1) there were special conditions of the land, so that the ordinance affected the subject property differently from other properties, and (2) the proposed use would not injure the “public or private rights” of others, a requirement that was deemed satisfied if the other four criteria—public interest, spirit of the ordinance, substantial justice, and no diminution in property values—were established. In essence, the “unnecessary hardship” criterion was extraneous, except for the requirement of special conditions. See part one, section II, above. Although *Boccia* could be understood from this perspective, the court seemed to think it was creating a meaningful standard. Finding the meaning has been the challenge.

²⁰ 149 N.H. 51 (2003).

²¹ *Id.* at 54.

²² 154 N.H. 26 (2006).

²³ *Id.* at 33; see also *id.* at 32 (must show that the property is “burdened by the zoning restriction in a manner that is distinct from other similarly situated property”); *id.* at 34 (finding “no evidence in the record that would demonstrate that the proposed site was different from any other property in the rural residential district”).

²⁴ See *Farrar v. City of Keene*, No. 2008-500, slip op. at 5 (N.H. May 7, 2009); *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580 (2005). The “private rights” element is also covered, at least in part, by the no-diminution-in-value criterion. See *Fortuna v. Zoning Board of Adjustment*, 95 N.H. 211, 213-14 (1948) (citing “no findable damage to the value of the plaintiff’s property” in stating that there was no injury to “private rights”).

²⁵ 145 N.H. at 731.

PART FOUR

APPLYING THE NEW LAW

By Cordell A. Johnston

| 47

The new law takes effect January 1, 2010 and applies to any application for a variance that is filed on or after that date. If an application for an area variance, or an appeal from a ZBA decision on an area variance, is pending as of January 1, the *Boccia* standard will still apply until the case is finally resolved.

The new law should make life significantly easier for zoning boards. They will no longer have to decide whether an application calls for a use variance or an area variance; they will not have to try to keep two different standards for unnecessary hardship in their heads; they will not have to try to understand the *Boccia* standard; they will be able to find the applicable standard for unnecessary hardship right in the statute, rather than having to read several supreme court decisions; and they will find all of the other criteria spelled out in the statute more clearly than before.

Although most of the focus of these materials has been on the unnecessary hardship criterion, ZBA members must remember that this remains only one of five elements that must be satisfied before a variance can be granted. Regardless of how compelling a case the applicant makes for unnecessary hardship, the variance must be denied if any one of the other criteria is not satisfied.

The following is intended to help zoning boards understand how to apply the criteria for a variance under the new law.

I. UNNECESSARY HARDSHIP

There should be no change in how zoning boards judge unnecessary hardship in use variance cases, since the new statute merely codifies the existing case law. Area variances, of course, will now be judged under the same standard as use variances.

The Supreme Court's concern about applying the same standard to both types of variances is appreciated, but unwarranted. The concurring opinion in *Bacon v. Town of Enfield*,¹ on which the *Boccia* decision relied heavily, stated that different standards are necessary "because of the differing impacts each type of variance has on the zoning scheme." Specifically, "use variances pose a greater threat to the integrity of a zoning scheme.... In contrast, the area variance is 'a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use not permitted by the ordinance.'"²

That is certainly true, but it does not call for a separate standard. It merely means that when a single standard is applied to both use and area variances, it will usually be easier to obtain an area variance. Because an area variance poses less of a "threat to the integrity of a zoning scheme," it is far more likely than a use variance to satisfy several of the statutory criteria, most notably "public interest" and "spirit of the ordinance." It is also far more likely to satisfy the *Simplex* test: when an applicant is seeking a variance for a prohibited *use*, it is still fairly difficult to establish that special conditions of the land render the proposed use "reasonable," or that there is no fair and substantial relationship between the purpose of the ordinance and the specific restriction on the applicant's property. These arguments become much easier when the proposed use is a permitted one that merely requires a dimensional variance.

A. PARAGRAPH (5)(A)—SIMPLEX STANDARD

1. Special Conditions

Under the new law, as under *Simplex*—and, for that matter, under the law prior to *Simplex*—the applicant first has to establish that there are “special conditions of the property that distinguish it from other properties in the area.” The Supreme Court in *Garrison v. Town of Henniker*³ underscored the importance, and the strictness, of this requirement. Without special conditions, the application fails.

It is not enough to demonstrate that the property would be difficult to use for other purposes, or that it is uniquely suited for the applicant’s proposed use.⁴ Even if those facts are present, the applicant still must demonstrate that the property is different, in a meaningful way, from other properties in the area. “The property must be ‘burdened by the zoning restriction in a manner that is distinct from other similarly situated property.’”⁵

If the property is surrounded by lots of similar size, shape, topography, and other characteristics, and all are subject to the same zoning restrictions, it is unlikely that the requisite “special conditions” can be established,⁶ regardless of how well suited it is for the applicant’s proposed use. On the other hand, if the size, configuration, location, or other characteristics make the property truly unique, the applicant probably can clear this hurdle.⁷

2. No Fair and Substantial Relationship

Second, the applicant must establish that, *because of* the special conditions of the property, “no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.” There is little case law interpreting this requirement, but this does not leave zoning boards in the dark: words do have meaning on their own.⁸

This element involves a preliminary inquiry: what are the “general public purposes of the ordinance provision”? These may include public safety, separation of inconsistent uses, reducing traffic congestion, encouraging denser development in a particular section of town, mitigation of noise problems, promoting esthetics, and any number of other purposes.

Once the purposes of the ordinance provision have been established, the property owner needs to establish that, because of the special conditions of the property, application of the ordinance provision to his property would not advance the purposes of the ordinance provision in any “fair and substantial” way.⁹ For example, a zoning ordinance may prohibit retail businesses in a residential district because of a desire to limit commercial traffic on residential streets. There may be a lot in the district that, unlike all the other lots in the area, is large enough that it has frontage both on a quiet residential street and on a busy commercial street. If the property owner can site a retail business on the property so that access is only from the commercial street, there may be no “fair and substantial relationship” between the purpose of the use restriction and its application to that particular property.

Using the same hypothetical, the zoning board might conclude that the restriction serves the additional purpose of limiting noise in the residential area. The property owner may then need to show that the lot is large enough and the proposed business can be placed toward the commercial end of the lot so that the prohibition on a retail business would not have a “fair and substantial relationship” to the goal of noise mitigation.

3. Reasonable Use

Finally, the applicant must establish that, *because of* the special conditions of the property, the proposed use is reasonable. This is not exactly how the Court stated this requirement in *Simplex*—there, it said applicants must show that the zoning restriction “interferes with their reasonable use of the property, considering the unique setting of the property in its environment.”¹⁰ That statement was not helpful, but the Court clarified it in *Rancourt v. City of Manchester*,¹¹ stating that “after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought ‘reasonable.’”¹²

The new law does not require—nor did *Rancourt*—an investigation of how severely the zoning restriction interferes with the owner’s use of the land. It merely requires a determination that, owing to special conditions of the property, the proposed use is reasonable.¹³ This is necessarily a subjective judgment—as is almost everything having to do with variances—but presumably it includes an analysis of how the proposed use would affect neighboring properties and the municipality’s zoning goals generally. It clearly includes “whether the landowner’s proposed use would alter the essential character of the neighborhood.”¹⁴

B. PARAGRAPH (5)(B)—GOVERNOR’S ISLAND STANDARD

In the event the applicant is unable to satisfy the *Simplex* standard as codified in paragraph (5) (A), he or she may still establish unnecessary hardship under the standard in paragraph (5)(B). This, however, will be almost impossible.

This provision states that unnecessary hardship is established “if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.” This is the old *Governor’s Island* standard, under which unnecessary hardship is established only if “the deprivation resulting from application of the ordinance [is] so great as to effectively prevent the owner from making any reasonable use of the land.”¹⁵

Under this standard, it is not enough to show that the *proposed* use is reasonable; the applicant must establish that there is no *other* reasonable use of the property that would comply with the zoning ordinance. Even though the restriction significantly limits the value of the property, the standard is not met if the property can be put to *any* reasonable use. If the owner is currently making a reasonable use of the property, that fact is “conclusive evidence that a hardship does not exist.”¹⁶ Further, the owner still must show that the subject property is unique, so that the zoning restriction imposes more of a burden on it than on other properties in the area.

II. PUBLIC INTEREST/SPIRIT OF THE ORDINANCE

The new law does not change the existing requirements that the variance “will not be contrary to the public interest” and that “the spirit of the ordinance shall be observed.” Thus, all of the existing case law remains relevant.

As Attorney Boldt has indicated in his materials, the Supreme Court in its recent decisions has effectively merged the “public interest” and “spirit of the ordinance” requirements, so they are

always examined together.¹⁷ These two requirements also encompass the third prong under *Simplex*, whether the variance would injure “the public or private rights of others.”¹⁸

The Court has stated that the first step in determining whether the variance would be contrary to the public interest or violate the public rights of others is to examine the zoning ordinance, because the purpose of the ordinance is to protect the public interest. Any variance, of course, is to some extent inconsistent with the zoning ordinance. “Thus, to be contrary to the public interest or injurious to the public rights of others, the variance must ‘unduly, and in a marked degree,’ conflict with the ordinance such that it violates the ordinance’s ‘basic zoning objectives.’”¹⁹

The Court has suggested several ways of determining whether the variance would violate the ordinance’s “basic zoning objectives.” The most obvious, of course, is to look at the ordinance itself,²⁰ which may include an explicit statement of purpose; if not, the purpose of the applicable section of the ordinance may be capable of inference.

Beyond that, the zoning board should also consider whether the proposed use would “alter the essential character of the neighborhood,”²¹ and whether it would “threaten the public health, safety or welfare.”²² If the proposed use would have either of these effects, or if it would violate the explicit or implicit statement of purpose in the ordinance itself, it can be found to be contrary to the public interest and the spirit of the ordinance.

III. SUBSTANTIAL JUSTICE

This element also is not changed by the new law, and it is probably the most subjective of all the requirements. The limited case law that exists on this factor indicates that granting a variance will be deemed to achieve substantial justice if, in the absence of the variance, there would be a loss to the property owner that is not outweighed by a gain to the general public;²³ stated differently, substantial justice is done if granting the variance would not cause a harm to the general public that outweighs the benefit to the property owner.

If the proposed use would provide incidental public benefits, that may be considered as well.²⁴ Granting a variance may also achieve substantial justice if the proposed use is consistent with the present use of the surrounding area.²⁵

Although the Court has not expressly stated this, it seems appropriate in this inquiry to weigh the benefit of the variance to the applicant not only against the harm to the general public, but against any harm to other individuals. If the variance would have a significant adverse impact on an individual neighbor, even though the public in general is not harmed, that would seem to raise a significant doubt about the justice of the action. This view is consistent with the Court’s stated intent to prevent “injury to the private rights of others,” part of the third prong of *Simplex*. The Court subsequently folded that factor into the public interest/spirit of the ordinance criterion,²⁶ but it seems to belong more appropriately within the substantial justice criterion.

IV. NO DIMINUTION IN VALUE

The requirement that the proposed not diminish the value of surrounding properties also has not changed—but it finally has been put into the statute. This is the one criterion that is most susceptible to objective evidence—an applicant (or an abutter) should be able to hire an appraiser to state, in real numbers, the likely effect of the project on surrounding property values.

The ZBA is not necessarily bound to accept the conclusion of an expert witness, even if it is not contradicted by other expert testimony. The Supreme Court has approved the following approach on this point:

[T]he ZBA does not have to accept the conclusion of experts on either side on the question of value or any other point since one of the functions of the Board is to decide how much weight or credibility to give that testimony or the opinions of witnesses, including expert witnesses.... [T]he burden is on the applicant to convince the ZBA that it is more likely than not that the project will not decrease values.²⁷

Thus, the ZBA may discount the opinion of an expert whose opinion lacks credibility, and may also rely on non-expert evidence, including the personal knowledge of ZBA members themselves;²⁸ and, of course, if there is competing evidence on the question of value, it is the ZBA's job to weigh the evidence and decide whom and what to believe.²⁹ However, the board may not simply ignore expert testimony if it is not contradicted and there is no basis for questioning its credibility. When there is credible, uncontroverted expert testimony, the board must have a very sound basis to disregard it.³⁰

ENDNOTES

¹ 150 N.H. 468 (2004).

² *Id.* at 476, 477 (Duggan & Dalianis, JJ., concurring) (quoting *Matthew v. Smith*, 707 S.W.2d 411, 416 (Mo. 1986)).

³ 154 N.H. 26 (2006).

⁴ *See id.* at 34 (“[T]he record ... demonstrates that the proposed site was large, difficult to develop because of its topography and relatively isolated location, and ideally suited to [the applicant’s] needs.... These factors alone, however, do not distinguish [the] proposed site from any other rural land in the area.”).

⁵ *Id.* at 32 (quoting *Harrington v. Town of Warner*, 152 N.H. 74, 81 (2005)).

⁶ *See id.* at 34-35; *see also Crossley v. Town of Pelham*, 133 N.H. 215, 216-17 (1990) (if unnecessary hardship were demonstrated where approximately 200 lots in surrounding area suffered from “some nonconformity of size or configuration[,] ... it would follow that two hundred of [the applicants’] neighbors ... could perfect identical claims”).

⁷ *See Rancourt v. City of Manchester*, 149 N.H. 51, 54 (2003), *cited in Garrison*, 154 N.H. at 34-35.

⁸ In *Harrington v. Town of Warner*, 152 N.H. 74, 80 (2005), the Supreme Court stated, “As our cases since *Simplex* have emphasized, the first prong of the *Simplex* standard [interference with reasonable use, considering unique setting of the property] is the critical inquiry for determining whether unnecessary hardship has been established.” The Court then proceeded to disregard the “fair and substantial relationship” prong (as well as the third prong—injury to public or private rights) and focus solely on the first prong. For the statement that the first prong was “the critical inquiry,” the Court cited a single decision, *Rancourt v. City of Manchester*, 149 N.H. 51, 53-54 (2003).

However, nothing in *Rancourt* had suggested that the first prong was the “critical” one. The plaintiffs in *Rancourt* had challenged the granting of a variance, and their sole argument on appeal was that there were no special conditions of the land that rendered the proposed use reasonable—*i.e.*, the first prong of *Simplex* was not satisfied. The Supreme Court addressed that argument, holding that there were special conditions that rendered the use reasonable. It then stated, “Because the plaintiffs do not otherwise challenge the trial court’s rulings on the *Simplex* unnecessary hardship test on appeal, we do not address them.” 149 N.H. at 54. Thus, it was eminently clear that the court limited its review to the first prong because that was the only issue raised—not because the first prong is the “critical” one.

In cases decided after *Harrington*, the court seemed to reaffirm the relevance of the “fair and substantial relationship” requirement. *See Farrar v. City of Keene*, No. 2008-500, slip op. at 5 (N.H. May 7, 2009) (affirming finding that “there was no substantial relationship between the general purposes of the zoning ordinance and this specific property”); *Daniels v. Town of Londonderry*, 157 N.H. 519, 528 (N.H. 2008) (quoting the requirement and finding that it

had been satisfied). However, in *Farrar*, the Court also repeated *Harrington's* statement that “the first prong of the *Simplex* standard is the critical inquiry.” See slip op. at 3; see also *Garrison v. Town of Henniker*, 154 N.H. 26, 32 (2006) (quoting *Harrington*). It is unclear what this means—if both prongs have to be satisfied, are not both of them critical? The new law answers the question by clearly including the “fair and substantial relationship” requirement.

⁹ This is comparable to the standard suggested in *St. Onge v. Concord*, 95 N.H. 306, 308 (1949): “It may, therefore, be stated that ‘unnecessary’ as used in this connection, means ‘not required to give full effect to [the] purpose of the ordinance.’”

¹⁰ 145 N.H. at 731-32.

¹¹ 149 N.H. 51 (2003).

¹² *Id.* at 54.

¹³ In a case decided after *Rancourt*, the Court adopted a more muddled approach, and one that is irreconcilable on its face with *Rancourt*, although it did not acknowledge the inconsistency. In *Harrington v. Town of Warner*, 152 N.H. 74 (2005), the Court stated:

This [reasonable use] factor includes consideration of the landowner’s ability to receive a reasonable return on his or her investment. Although “[r]easonable return is not maximum return,” this factor requires more than a “mere inconvenience.” This factor, however, does *not* require the landowner to show that he or she has been deprived of all beneficial use of the land. Rather, this factor should be applied consistently with our sound policy, enunciated in *Simplex*, of being “more considerate of the constitutional right to enjoy property.” Nevertheless, “mere conclusory and lay opinion concerning the lack of ... reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence.”

Id. at 80-81 (emphasis in original) (citations omitted). Apparently, then, *Harrington* would require an applicant to prove that the zoning restriction causes some measurable decrease in the property’s value. The amount of the required decrease is not quantified, but it is more than a “mere inconvenience” and less than a deprivation of all beneficial use of the land.

The Court in *Rancourt* had not considered at all the effect of the zoning restriction on the landowners’ ability to receive a reasonable return on their investment. Rather, the Court simply examined the proposed use of the property in light of its “special conditions” and determined that it was reasonable. See 149 N.H. at 54. Given that the variance in question merely allowed the owners to construct a two-horse barn on their residential property, see *id.* at 52, it is unlikely that the denial of the variance would have affected the return on their investment in any material way. Thus, it seems that they would have failed the test announced in *Harrington*.

The new law adopts *Rancourt's* formulation over *Harrington's* because it is clearer and because, while *Harrington* is inconsistent with *Rancourt*, it did not expressly overrule *Rancourt*. Further, in the two cases in which the Court actually purported to follow the *Harrington* approach—one of them being *Harrington* itself—it affirmed the grant of a variance even though there was, in fact, no “actual proof” about return on investment. In *Harrington*, the only evidence on this point was “[the land owner’s] unsupported conclusion that, without the variance, he might

have to let the property ‘go back to the previous owner.’” 152 N.H. at 82. The Supreme Court acknowledged that this was inadequate but affirmed the finding of unnecessary hardship anyway, specifically on the ground that it found the proposed use “reasonable.” *See id.* at 82-83. That is exactly what the Court had done in *Rancourt*. Similarly, in *Farrar v. City of Keene*, No. 2008-500 (N.H. May 7, 2009), the Court acknowledged that the applicant “submitted minimal evidence of a reasonable return of his investment in the property,” slip op. at 4, but still concluded that unnecessary hardship was established, *see id.* at 4-5.

In both *Harrington* and *Farrar*, the Court stated that evidence of adverse effect on “reasonable return” is just one of three “nondispositive factors”—and therefore, apparently, not an absolute requirement, even though it was explained in terms of the “actual proof” that is “required.” *See Harrington*, 152 N.H. at 80; *Farrar*, slip op. at 3, 4. This seems to explain how the applicants got around this “requirement” in both cases.

The second nondispositive factor, according to *Harrington*, is whether the property is “burdened by the zoning restriction in a manner that is distinct from other similarly situated property.” 152 N.H. at 81. Of course, this factor is *entirely* dispositive if it is not satisfied—in the absence of special conditions, the inquiry ends. The third factor is “consideration of the surrounding environment.” *Id.* “This includes evaluating whether the landowner’s proposed use would alter the essential character of the neighborhood.” *Id.* That certainly makes sense, but it seems to be an obvious element of any evaluation of the reasonableness of the use.

Thus, in the end, it appears that *Harrington’s* test comes down to this: there must be special conditions of the property, and the proposed use should not alter the essential character of the neighborhood. Evidence of adverse effect on the owner’s investment return is encouraged but not required. If this is different from the approach taken in *Rancourt*, the difference is minimal.

¹⁴ *Harrington v. Town of Warner*, 152 N.H. 74, 81 (2005); *see also Farrar v. City of Keene*, No. 2008-500, slip op. at 4 (N.H. May 7, 2009).

¹⁵ *Governor’s Island Club v. Town of Gilford*, 124 N.H. 126, 130 (1983).

¹⁶ *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 243 (1992).

¹⁷ *See Farrar v. City of Keene*, No. 2008-500, slip op. at 5-6 (N.H. May 7, 2009); *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 105-06 (2007); *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580-81 (2005).

¹⁸ *See Farrar v. City of Keene*, No. 2008-500, slip op. at 5 (N.H. May 7, 2009).

¹⁹ *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 581 (2005) (quoting *Coderre v. Zoning Board of Review*, 251 A.2d 397, 401 (R.I. 1969)); *see also Farrar v. City of Keene*, No. 2008-500, slip op. at 5 (May 7, 2009) (quoting *Chester Rod & Gun*).

²⁰ *See Naser v. Deering Zoning Board of Adjustment*, 157 N.H. 322, 327-28 (2008); *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 581 (2005) (“The relevant public interest is set forth in the applicable zoning ordinance.”).

²¹ See *Farrar v. City of Keene*, No. 2008-500, slip op. at 5-6 (N.H. May 7, 2009); *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 105-06 (2007); *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580-81 (2005). Note that this is also one of the factors identified in *Harrington v. Town of Warner*, 152 N.H. 74 (2005), to be considered in determining whether the proposed use is “reasonable” for purposes of the unnecessary hardship criterion.

That a proposed use is consistent with the character of the existing neighborhood is not, however, conclusive. A municipality may adopt or amend a zoning ordinance with the specific intent of altering an existing pattern of development. When that is the case, the fact that the proposed use is consistent with the existing neighborhood, which was developed before the zoning restriction was enacted, will not control. See *Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361, 366-68 (2008).

²² See *Farrar v. City of Keene*, No. 2008-500, slip op. at 5-6 (N.H. May 7, 2009); *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 105-06 (2007); *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580-81 (2005).

²³ See *Farrar v. City of Keene*, No. 2008-500, slip op. at 6 (N.H. May 7, 2009); *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 109 (2007).

²⁴ See *Harrington v. Town of Warner*, 152 N.H.74, 85 (2005) (substantial justice would be done because proposed use “would improve a dilapidated area of town and provide affordable housing in the area”).

²⁵ See *Farrar v. City of Keene*, No. 2008-500, slip op. at 6 (N.H. May 7, 2009); *Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 109 (2007); *Labrecque v. Town of Salem*, 128 N.H. 455, 459 (1986).

²⁶ See note 18, *supra*, and accompanying text.

²⁷ *Daniels v. Town of Londonderry*, 157 N.H. 519, 528-29 (2008) (quoting ZBA chairman’s comments).

²⁸ See *id.* at 529; see also *Continental Paving v. Town of Litchfield*, No. 2008-370 , slip op. at 6-7 (N.H. April 9, 2009); *Nestor v. Town of Meredith*, 138 N.H. 632, 636 (1994).

²⁹ See *Nestor v. Town of Meredith*, 138 N.H. 632, 636 (1994).

³⁰ See *Continental Paving v. Town of Litchfield*, No. 2008-370 , slip op. at 6-7 (N.H. April 9, 2009).

APPENDIX

Requirements for Granting a Variance: A Suggested Approach

THE APPLICANT MUST ESTABLISH **ALL** OF THE FOLLOWING.

Requirement	Explanation
1. The variance is not contrary to the public interest.	The proposed use must not conflict with the explicit or implicit purpose of the ordinance, and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure “public rights.”
2. The spirit of the ordinance is observed.	
3. Substantial justice is done.	The benefit to the applicant should not be outweighed by harm to the general public or to other individuals.
4. The values of surrounding properties are not diminished.	Expert testimony on this question is not conclusive, but cannot be ignored. The board may also consider other evidence of the effect on property values, including personal knowledge of the members themselves.
<p>5. Literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship means:</p> <p><i>Because of</i> special conditions of the property that distinguish it from other properties in the area:</p> <p style="padding-left: 40px;">(a) There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property; and</p> <p style="padding-left: 40px;">(b) The proposed use is a reasonable one.</p> <p><i>Alternatively</i>, unnecessary hardship means that, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance.</p>	<p>The applicant must establish that the property is burdened by the zoning restriction in a manner that is distinct from other similarly situated property.</p> <p>(a) Determine the purpose of the zoning restriction in question. The applicant must establish that, because of the special conditions of the property, the restriction as applied to the property does not serve that purpose in a “fair and substantial” way.</p> <p>(b) The applicant must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood.</p> <p>As an alternative to (a) and (b) above, the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.</p>

