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

In 2009, RSA 674:33 was amended to codify the five variance criteria, including diminution of property values and, more importantly, overrule the separate criteria for "area" variances established by the landmark decision in *Michael Boccia & a. v. City of Portsmouth & a.*, 151 N.H. 85, 104 [2004].

The legislature clarified its action by including a statement of intent in SB147 (Chaptered Law 307 of 2009) 307:5 Statement of Intent. "The intent of section 6 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*, 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, Inc. v. Town of Newington & a.*, 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 & a.*, 124 N.H. 126 [1983]."

COMMENT: Proving a Negative

"The applicant still has the burden of persuasion on all five variance criteria, but my advice to ZBA members is not to be procedural sticklers when it comes to the "public interest" criterion. If an applicant makes even a conclusory statement like: "As you can see, there's no adverse effect on the public interest," that should be enough, unless abutters or board members themselves identify some specific adverse effect on the public interest, in which case the applicant will have the burden of overcoming it. To put it another way, if the applicant satisfies the other four criteria, a denial based solely on the "public interest" criterion is, in my view, unlikely to be upheld in Court unless your decision identifies some specific way in which the proposed variance is contrary to that interest."

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

The Five Variance Criteria

1. The variance will not be contrary to the public interest.

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

For the variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public? (See *Chester Rod and Gun Club, Inc. v. Town of Chester*, 152 N.H. 577 [2005] on page D-24.)

2. The spirit of the ordinance is observed.

The power to zone is delegated to municipalities by the state. This limits the purposes for which zoning restrictions can be made to those listed in the state enabling legislation, RSA 674:16-20. In general, the provisions must promote the *"health, safety, or general welfare of the community."* They do this by lessening congestion in the streets; securing safety from fires, panic and other dangers; and providing for adequate light and air. In deciding whether or not a variance will violate the spirit and intent of the ordinance, the board of adjustment must determine the legal purpose the ordinance serves and the reason it was enacted. *"This requires that the effect of the variance be evaluated in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based."*[7]

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

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

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

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

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

[7] Zoning and the ZBA, NH OSP video script (Timothy Bates, Esq.), pg. 4.

In *Malachy Glen Associates, Inc. v. Town of Chichester*, [March 20, 2007], the supreme court stated that *"The requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance." [Chester Rod and Gun Club v. Town of Chester, 152 N.H. at 580]*

[T]o be contrary to the public interest... the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality... Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare."

The new statutory language was tested in the case of *Harborside Associates, LP v. Parade Residence Hotel, LLC*, 162 N.H. 508 [2011]. The opinion discusses each element in the context of two separate variances granted to permit the installation of two different types of signs on a hotel property, and is currently the only case our supreme court has decided that interprets the meaning of the newly revised statute. Based upon the language of the opinion, we now can state the following regarding application of the elements to actual applications for relief:

a. Public interest and spirit of the ordinance. As held in *Farrar v. Keene*, 158 N.H. 68 [2009], the two elements are related. For a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives. There are two methods to answer this question:

   1. Examine whether granting the variance would alter the essential character of the neighborhood; or
   2. Examine whether granting the variance would threaten the public health, safety or welfare.

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New Hampshire Local Government Center, page 32. [October 2012]

3. Substantial justice is done.

It is not possible to set up rules that can measure or determine justice. Board members must determine each case individually. 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 granting a variance that meets the other four qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance.

Any loss to the individual which is not outweighed by a gain to the general public is an injustice. Also, the court will examine whether the proposed development is consistent with the area's present use. (*Malachy Glen Associates v. Town of Chichester* 155 N.H. 102 (2007) [October 2012])[8]

4. The values of surrounding properties are not diminished.

Perhaps Attorney Timothy Bates says it best in the OEP training video, Zoning and the ZBA:

> *"Whether the project made possible by the grant of a variance will decrease the value of surrounding properties is one of those issues that will depend on the facts of each application. While objections to the variance by abutters may be taken as some indication that property values might be decreased, such objections do not require the zoning board of adjustment to find that values would decrease. Very often, there will be conflicting evidence and dueling experts on this point, and on many others in a controversial*

[8] NHMA Law Lecture #1 - Procedural Basics for Planning and Zoning Boards, Fall 2012; Attorney Steven Whitley, Mitchell Municipal Group, P.A. and Attorney Paul G. Sanderson; New Hampshire Local Government Center, page 32.

application. It is the job of the ZBA to sift through the conflicting testimony and other evidence and to make a finding as to whether a decrease in property value will occur."

"The ZBA members may also draw upon their own knowledge of the area involved in reaching a decision on this and other issues. Because of this, the ZBA does not have to accept the conclusions of experts on the question of value, or on any other point, since one of the functions of the board is to decide how much weight, or credibility, to give testimony or opinions of witnesses, including expert witnesses. Keep in mind that the burden is on the applicant to convince the ZBA that it is more likely than not that the project will not decrease values."[9]

Also, in *Nestor v. Town of Meredith Zoning Board of Adjustment*, 138 N.H. 632, 644 A.2d 548 [1994], the court stated that the resolution of conflicts is a function of the zoning board of adjustment.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

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

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

On May 25, 2004, the New Hampshire Supreme Court issued an opinion in *Michael Boccia & a. v. City of Portsmouth & a*, which further refined variance law to distinguish between use and area (dimensional) variances. In *Boccia*, the court concluded that it must distinguish between *use* variances and *dimensional* variances, observing that the hardship criteria of *Simplex* could only logically be applied to uses of land.

This distinction between "use" and "area" variances has caused confusion for boards and has been the subject of much litigation. The legislature addressed this issue in 2009 with the passage of SB147 to remove this distinction and codify the five variance criteria in the statute. Boards must now use the "reasonable use" and "relationship" criteria from the *Simplex* decision for determination of unnecessary hardship for all variance cases. The statute also now codifies the much stricter pre-*Simplex* standard for unnecessary hardship derived from *Governor's Island Club v. Town of Gilford*, 124 N.H. 126 [1983] which would still apply if the applicant was unable to meet the *Simplex* standards.

[9] Zoning and the ZBA, NH OSP video script (Timothy Bates, Esq.), pg. 3.

Rather than having to establish that the ordinance prevents the owner from making *any reasonable use of the land* (the *Governor's Island* standard) in order to demonstrate unnecessary hardship, a landowner may now establish unnecessary hardship by satisfying the following conditions:

RSA 674:33, I(b) (5) (A) Powers of Zoning Board of Adjustment

(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. (the relationship test)

Why 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*?

Simplex did not entirely overrule *Governor's Island*. In *Simplex*, the court 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." [145 N.H. at 731]

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.

"The Five Variance Criteria in the 21st Century," NHMA Law Lecture #2, Fall 2009

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose? 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.[10]

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

And:

(ii) The proposed use is a reasonable one. (the reasonable use test)

[10] 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'."

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*, where 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."[11] That statement was not helpful, but the court clarified it in *Bonnita Rancourt & a. v. City of Manchester* [12] stating that "after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable'." [13]

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 (see the corresponding write-up on page II-16). 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]

The two paragraphs that follow are from *The Five Variance Criteria in the 21st Century*, New Hampshire Municipal Association Law Lecture #2, Fall 2009.

> The second of the two parts of the hardship criteria in RSA 674:33, I(b)(5)(A)(ii) – "The proposed use is a reasonable one" – cannot be considered in isolation and must be read in conjunction with the introductory language in subparagraph A – ". . . owing to special conditions of the property that distinguish it from other properties in the area . . ." - so that the criterion as a whole is ". . . owing to special conditions of the property . . . the proposed use is a reasonable one." In other words, the board needs to find that a use (or dimensional requirement) which otherwise must be considered unreasonable (because it violates the ordinance) is rendered reasonable by the special conditions of the property (or of its setting or environment, as *Simplex* says).
>
> Board members should also be cognizant of the intent of Ch. Law 307 (2009) (the law that amended RSA 674:33) which was to eliminate the separate "use" and "area" variance standards of the *Boccia* decision and to deem that the unnecessary hardship standard is satisfied if the applicant meets the standards established in *Simplex* as those standards have been interpreted by subsequent decisions of the supreme court.

In the context of these sign variances, (*Harborside Associates, LP v. Parade Residence Hotel, LLC*, 162 N.H. 508 [2011]) the court stated the test to mean, "...hardship exists when, owing to special conditions of the land, (1) there is no fair and substantial relationship between the general public purpose of the ordinance and the specific application of the ordinance to the property at issue, and (2) the use for which the variance is sought is "reasonable." The court did not reach the second test for hardship set forth in the statute, since it determined the applicant had provided sufficient evidence to establish entitlement under the first test. We also learn that the size of a building may constitute the "special conditions" that form the basis for "unnecessary hardship." [October 2012] [15]

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[11] 145 N.H. at 731-32.
[12] 149 N.H. 51, 54 [2003].
[13] Id. at 54.
[14] *John R. Harrington & a. 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] NHMA Law Lecture #1 – Procedural Basics for Planning and Zoning Boards, Fall 2012; Attorney Steven Whitley, Mitchell Municipal Group, P.A. and Attorney Paul G. Sanderson; New Hampshire Local Government Center, page 32 [October 2012].

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 *John R. Harrington & a. 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.

Taken from "The Five Variance Criteria in the 21st Century"
New Hampshire Municipal Association Law Lecture #2, Fall 2009.