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A Brief History of Variance Standards for the Municipal Law Practitioner

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Introduction:

As Judge Horton noted in his dissent in the Grey Rocks case, "'anyone who attempts to organize and set forth a clear picture of the American law on variances either (a) has not read the case law, or (b) has simply not understood it.'" Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239, 247 (1992), *quoting*, 5 N. Williams & J. Taylor, American Land Planning Law 12 (1985). With that said, this article attempts to briefly summarize the history of New Hampshire Supreme Court decisions establishing standards for variances, starting with a general overview of the pre-Simplex approach and running through the Court's July 15, 2004 decision in Shopland v. Town of Enfield. I leave it to the reader to determine whether or not I have successfully avoided or sadly confirmed Judge Horton's prognosis.

In short, the Court's very recent decisions of Bacon v. Town of Enfield, Boccia v. City of Portsmouth, and Shopland v. Town of Enfield have marked an unsettled and shifting course for Boards, Courts and land use practitioners to follow when addressing variance issues. The Supreme Court Justices are divided on these standards, which create for the first time a distinction between "use" and "area" variances and the elements for "unnecessary hardship" under each type; but the Justices' debate and discussion presented by the cases is nothing if not educational and intellectually challenging. Caution should be used when advising potential applicants as the particular facts of a given application and the depth of the presentation to the Zoning Board of Adjustment 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.

Citations to very recent decisions are to the Court's Docket Number and date of decision since New Hampshire Reporter citations have yet to be assigned. Accordingly, pinpoint citations for these most recent cases are unavailable; but an updated version of this article will be available on the author's website as cases are published in the New Hampshire Reporter. For actual application of these decisions to any fact pattern facing a current or prospective property owner, I urge such person to contact their legal counsel as this article is not intended to provide substantive legal advice on a given issue.

The World According to Grey Rocks – the Pre-Simplex Standard:

If in the beginning was the Word, in the case of a variance request, the original word was "NO". Variances, whether for a commercial/retail use in a residential zone or for a construction of a building within a set back or buffer zone, were not favored under statute or case law. Starting with the guidelines set forth in RSA 674:33, an applicant for a variance was (and still is) required to satisfy each of five requirements:

1. that a denial of the variance would result in unnecessary hardship to the applicant;
2. that no diminution in value of surrounding properties would occur;
3. that the proposed use would not be contrary to the spirit of the ordinance;
4. that granting the variance would benefit the public interest; and
5. that granting the variance would do substantial justice.

See, RSA 674:33, I (b) (1983 and Supp. 2003); See also, Grey Rocks, 136 N.H. at 242; Rowe v. Town of North Hampton, 131 N.H. 424, 427 (1989); and Gelinas v. Portsmouth, 97 N.H. 248, 250 (1952). Moreover, the hurdle for meeting the "unnecessary hardship" criterion was incredibly high: "'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.'" Grey Rocks, 136 N.H. at 242, citing, Governor's Island Club v. Town of Gilford, 124 N.H. 126, 130 (1983). Moreover, the hardship itself must result from "'some unique condition *of the parcel of land* distinguishing it from others in the area….' [so that it is the] 'uniqueness of the land, not the plight of the owner, [which] determines whether a hardship exists.'" Grey Rocks, 136 N.H. at 242 – 243, citing, Crossley v. Town of Pelham, 133 N.H. 215, 216 (1990); and Rowe v. Town of North Hampton, 131 N.H. at 428.

In Grey Rocks, the Supreme Court reversed the award of a variance to the Newfound Lake Marina, which variance had been granted by the Hebron ZBA and upheld by the Grafton County Superior Court. The Marina had wanted to build a fifth boat storage building on its 35 acre tract which would be 450 closer to the abutter, Grey Rocks, than the existing buildings. The Marina was a pre-existing non-conforming use in the Town's "Lake District", which purposes were limited to "protect [scenic, recreational and environmental] values and encourage only such further developments as will not harm the environment or destroy this district or any part thereof as a natural and scenic resource of the Town." Grey Rocks, 136 N.H. at 241. Grey Rocks objected at the hearing that the application "doesn't meet the requirements of Zoning"; and the opinion does not address what issues were raised but denied in the Motion for Rehearing. *Id.*, at 242. On appeal to the Supreme Court, Grey Rocks asserted that the ZBA had made no factual findings on the record relating to hardship and no supporting facts appeared in the record so that the Trial Court's affirmance of the variance was neither reasonable nor legally correct. *Id.* The Supreme Court agreed and held that the "uncontroverted fact that the Marina had been operating as a viable commercial entity for several years prior to the variance application is conclusive evidence that a hardship does not exist." *Id.*, at 243. The Court also found that the ZBA had failed to find that the applicant's land was unique. *Id.*, at 244.

Additionally, the Court rejected the applicant's argument that the company had the right to develop the existing non-conforming use in a way that results in a mere intensification of the use via natural expansion and growth of trade because the proposed expansion would be too substantial. *Id.* In so doing, the Supreme Court noted in *dicta* that it has "never permitted an expansion of a non-conforming use that involved more than the internal expansion of a business within a pre-existing structure." *Id.* In conclusion on this point, the Court held "as a matter of law that the construction of a new building…would substantially impair the natural scenic, recreational and environmental values of the surrounding property, contrary to the purposes of the Lake District, and is therefore beyond the scope of the 'natural expansion'…to which the Marina is entitled." *Id.*, at 245.

Justice Horton's dissent in Grey Rocks marks the first substantial suggestion that the "hardship" standard being followed by the Court is on a collision course with the constitutional protection that a person "be protected in the use and enjoyment of one's property" as set forth in

Part I, Article __ of the New Hampshire Constitution so that the then current standard approximated a "substantial taking". See, Grey Rocks, 136 N.H. at 245 – 249; See also, Justices Nadeau and Brock's dissent in Bacon v. Town of Enfield, Docket No. 2002-591 (Issued 1/30/04). Justice Horton would have rejected the "no reasonable use" standard because it had "stopped off the safety valve" that variances where intended to provide. Grey Rocks, 136 N.H. at 247. Instead, Justice Horton suggested that either an "arbitrary and capricious" standard or a "reasonable use" approach would be more favorable, fair and in compliance with the constitutional and statutory mandates. Id. Under an "arbitrary and capricious" standard, a Board and/or Court would start with the basic acknowledgment of the right to use and say that an "unnecessary hardship" is "'whether the zoning limitation, viewing the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property.'" Id., citing, Protomastro v. Board of Adjustment, 3 N.J. 494, 501, 70 A.2d 873, 876 (1950). Under the "reasonable use" approach, a Board and/or Court would consider whether "'the proposed use is reasonable and the restriction legitimate but more burdensome than was intended, then the restriction may be modified so long as there is no impairment of the public purpose of the regulation.'" Id., citing, Hodge v. Pollack, 223 S.C. 342, 347-348, 75 S.E.2d 752, 754 (1953), which in turn cites St. Onge v. Concord, 95 N.H. 306, 308 (1949) as its authority.

Justice Horton would also have affirmed the Trial Court's decision since the "ladder of review mandates that we not substitute our judgment for that of the zoning board, but give appropriate deference to each stopping point on the ladder." Id., at 248. He also rejected the theory that no variance is available where an existing use is in place: "[t]his may be appropriate when the subject property is small, or 'used up,' but it is not appropriate when there is a reasonably useful portion of that property." Id., at 249.

Simply Simplex – The "New" Standard:

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. When the ZBA denied the variance, Simplex argued to the Rockingham County Superior Court (Galway, J.) that the denial of the variance was unreasonable, that the enforcement of the ordinance in this case was discriminatory, and that the ordinance on its face was unconstitutional. Judge Galway 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; and the Trial Judge rejected Simplex's other arguments for reasons not stated in the subsequent decision on appeal.

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 Judge Horton 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 the "constitutional rights of landowners" so 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.

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 Hillsborough County Superior Court (Barry, J.) on 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, 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 unique, country setting; that this lot was larger than surrounding lots; that the lot was uniquely configured with more space at rear; that there was a thick wooded buffer around 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. "Trial court and ZBA could logically have concluded that these special conditions of the property made the proposed stabling of two horses on the property 'reasonable'." Id.

But Wait! There's More – Boccia, Before and Beyond:

Just when ZBA's, Superior Courts and land use practitioners were becoming comfortable in applying the Simplex standard, the New Hampshire Supreme Court issued it a highly "fractured" opinion in Bacon v. Town of Enfield, Docket No. 2002-591 (Issued 1/30/04). With Justice Broderick writing alone the "majority" decision concurred in by Justices Dalianis and Duggan on other grounds, followed by a dissent of Justices Nadeau and Brock dissenting, the Bacon decision was a sign post for things to come.

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 x 5½ foot shed for a new propane boiler to heat her home without 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." 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.

In upholding the ZBA's action as reasonable and lawful, the Grafton County Superior Court's (Morrill, J.) concluded 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.

Justice Broderick's "majority" opinion began with the standard notation of the five-part test for granting a variance:

> "In order to obtain a variance, a petitioner bears the burden of showing that: (1) a variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done . . .; and (5) the ZBA may not grant a variance if it diminishes the value of the surrounding properties."

Justice Broderick's decision focused on the ZBA's and Trial Court's findings that the variance violated the spirit of the ordinance noting 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 noted 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." 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".

Justice Broderick also rejected Ms. Bacon's claim that the ZBA decision violated her right to equal protection under law via selective enforcement:

> In order for the plaintiff to show that the enforcement of the ordinance was discriminatory, she must show more than that it was merely historically lax….Instead, "the plaintiff must show that the selective enforcement of the ordinance against [her] was a conscious, intentional discrimination."… In addition, the plaintiff must assert and demonstrate that "[town] impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner" in order to set forth an equal protection claim.

In this regard, Justice Broderick found that the plaintiff had not met her burden.

Justices Duggan and Dalianis concurred with the result but not the rationale of the "majority" opinion. Rather, their concurrence is 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.

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. Accordingly, 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. While noting that dicta in Ouimette v. Somersworth, 119 N.H. 292, 295 (1979) indicated that the Court would not distinguish between types of variances because of the language of RSA 674:33, I (b), the concurrence disagreed that the statutory language precluded the adoption of this distinction between types of variances.

Regarding the economic impact factor, the concurrence noted that the U.S. Supreme Court has recognized economic impact considerations as critical in deciding whether land use controls amount to a taking for constitutional purposes, citing the decision in Penn Central Transport v. New York City, 438 U.S.104, 124 (1978). 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."

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. The concurrence noted that where a zoning restriction imposes a burden on a number of similarly situated landowners, the property remedy is an amendment of the ordinance. 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". In this case, however, the concurrence found that Ms. Bacon failed to demonstrate unnecessary hardship, especially in light of the evidence of alternate locations which complied with the ordinance without prohibitive costs.

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 that the concurrences' interpretation of the hardship standard would undermine the efforts previously made to make more reasonable the requirements of the test in light of the tension between zoning ordinances and property rights. The dissent would conclude that the environmental impact of Bacon's use was minimal and that this de minimis impact was insufficient to violate the spirit of the ordinance.

Regarding the concurrence's treatment of the hardship standard, the dissent noted that the Simplex test was crafted with an eye towards Judge Horton's dissent in the Gray Rocks case and was designed to loosen the structures which had made it essentially impossible for a ZBA, honoring the letter of the law, to afford the relief appropriate to avoid an unconstitutional application of an otherwise valid, general regulation.

The dissent would read Simplex to state that the first prong of the hardship test would be 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." 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. Specifically, the dissent noted that Ms. Bacon's use would be shielded from view by a deck, heavy shrubbery, a neighboring fence, all sufficient to render her use reasonable as it directly related to the special conditions of her land.

With the stage thus set, the Court was ready for a case which would allow "clarification" of the New Hampshire standards for variances; and the right case was Boccia v. City of Portsmouth, Docket No. 2003-493 (Argued 3/11/04; Issued 5/25/04), another case where the abutters had lost before the ZBA and the Trial Court. Boccia concerned a seven acre undeveloped parcel at the intersection of Kearsarge Way and Market Street Extension in Portsmouth, which was owned by the Intervenor Ramsey and which abutted the residential property of Boccia and others. Ramsey's property had eventually been rezoned from residential to "general business" to permit a hotel use after a lengthy procedural battle prior to the instant suit. After the rezoning, Ramsey filed applications with the ZBA for six "area" variances in connection with the development of a 100-room hotel. The variances concerned front, side and rear setbacks, together with setbacks from residentially zoned property and vegetative buffer requirements. The ZBA granted the variances with stipulations; and the abutters successfully appealed that original decision arguing that the ZBA had improperly viewed the rezoning order of 1998 as the basis for granting the variances. The Rockingham County Superior Court (Abramson, J.) originally remanded the case back to the ZBA for reconsideration of the Simplex standards.

On remand, Ramsey argued that he met the appropriate standards for the variances considering his plan to redevelop a blighted property, that other hotel developers had received similar relief, and that due to the size, configuration and amount of wetlands traversing the property, he had met the unnecessary hardship standard. The abutters argued that Ramsey could not demonstrate hardship in light of their presented plans for a 60 room hotel which would not need the variances. After considering the Simplex five part test for variances, the ZBA again granted the variances; and the abutters again appealed to Rockingham County Superior Court. This time, Judge Tina Nadeau upheld the ZBA's action finding that it had properly applied the Simplex standard in the context of a 100-room hotel being a reasonable use of the property.

In reversing and remanding this case back to the Superior Court yet again, the Supreme Court relied heavily on the special concurrence of Justices Duggan and Dalianis in the Bacon v. Town of Enfield case. The decision was authored by Justice Galway and did not include the participation of Justice Nadeau for obvious reasons. The Supreme Court noted that the five

requirements for a variance are statutory in origin via RSA 674:33, I (b) and case law. Specifically, a petitioner for a variance must show: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; and (4) substantial justice is done. Additionally, a variance may not be granted if it will diminish the value of surrounding properties. The Court further noted that the statute's language derived from the Standard State Zoning Enabling Act, which was drafted by the United States Department of Commerce in the 1920's as a model zoning enabling legislation.

Giving an historical perspective, the Court cited to Governor's Island Club v. Town of Gilford, 124 N.H. 126, 130 (1983) and the Gray Rocks case for the previous standard for unnecessary hardship which required "that the deprivation resulting from the enforcement of the ordinance had to be so great as to effectively prevent the landowner from making any reasonable use of the property." The Court continued by commenting that in Simplex:

> We established a new and less restrictive standard. Applicants for a variance may now prove unnecessary hardship by demonstrating that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

The problem in the Court's eyes, however, was that the current unnecessary hardship test does not distinguish between "use" and "non-use" or "area" variances as noted in the Bacon special concurrence.

The Court commented that a "use" variance would allow the applicant to undertake a use which 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."

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. 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; (Pennsylvania citations omitted); 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 (New York and treatise citations omitted). The second factor includes consideration of whether the variance is necessary to avoid an undue financial burden on the owner (citing to Bacon, Pennsylvania cases and treatise).

The Court noted repeatedly that as with the Simplex test for use variances, "these factors for unnecessary hardship are to be applied in conjunction with the other four prongs of the existing five-part test for variances."

In considering the first 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. In considering the record, the Court determined that the record supported a finding that the variances were needed to enable to 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." 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.

Furthermore, the Court provided a "flow chart" of the 5 prongs of the variance test with a breakout under the "unnecessary hardship" prong between "use" variances (which use the three-part Simplex analysis) and "area" variances (which use the two-part Boccia analysis). In this case, the Court found that it was unclear on the record whether there were reasonably feasible alternative methods to implement the proposed use without undue financial burden to the

landowner that would obviate the need for the variances. The Court even gave examples of alternatives such as use of underground parking or an additional level to the hotel. Finding that the remaining four prongs had been met, the Court remanded the case to the Superior Court to determine whether the developer had made an appropriate showing of hardship under these new factors.

Shortly thereafter, the Supreme Court returned to the shores of Crystal Lake and rendered its decision in Shopland v. Town of Enfield, Docket No. 2002-812 (Argued, 10/8/03; Issued 7/15/04). At issue was the Shoplands' 378 square foot seasonal cottage on the shores of the Lake, which they wish to expand by building a two-bedroom, one bath addition comprising 338 square feet. The Town's Zoning Ordinance prohibited any structure within 50 feet of the seasonal high water mark of the Lake; and, like most properties around the Lake, almost all of the Shoplands' existing home was within that setback making it a pre-existing, non-conforming use. Accordingly, to expand the footprint, the Shoplands sought the required variance. At the hearing, and subsequently, Mr. Shopland responded to the ZBA's request that he make his expansion by adding another story by saying that his current home was on pylons and not a sturdy foundation so that any construction would require further excavation for such foundation and thereby more disturbance within the setback. The ZBA denied the variance finding that it was contrary to the public interest since violating the setback would endanger the health of the Lake and establish a bad precedent, that there was no unnecessary hardship and that substantial justice by providing a variance to the Shoplands was outweighed by the potential loss suffered by the greater public if harm was done to the Lake.

On appeal, the Grafton County Superior Court (Smith, J.) agreed that the Shoplands had met the Simplex standard for unnecessary hardship and thereby vacated the ZBA's decision. The Supreme Court reversed and remanded the matter back to the Superior Court holding that "[i]n light of our decision in Boccia, the Shoplands' variance application must be reviewed under the two factors for establishing unnecessary hardship in an area variance application." The Court further commented that the Superior Court should consider whether the case needed to be remanded to the ZBA to allow further evidence and proceedings so that the parties could address the Boccia standard.

Justice Galway did not participate in this decision written by Justice Duggan and joined in by Chief Justice Broderick and Justice Dalianis. Justice Nadeau, joined in by retired Chief Justice Brock, wrote a lengthy dissent as his "first opportunity to discuss the substance and significance of Boccia . . . because I believe Boccia was wrongly decided." Justice Nadeau believed the Court erred in creating a "needless test" and constructing "this arbitrary distinction" between variances, unintended by both Simplex and RSA Chapter 674. Justice Nadeau did not believe that Boccia and Simplex could co-exist harmoniously but that Simplex alone must govern all requests for variances. Accordingly, he would view the Simplex standard as having been met in this case and would have affirmed the Superior Court. Note that retired Chief Justice Brock did not participate in the Boccia decision either.

In Conclusion, the Answer is "Yes", "No", and "Maybe":

The Court has thus left ZBA's, Courts and land use practitioners with a set of variables to apply in variance situations whose outcome will be difficult to predict. In the case of a "use" variance, the applicant will be faced with applying the three-part Simplex standard for unnecessary hardship while recognizing that Boards and Courts may no longer consider it to be a pure "reasonable use" standard. The chances for a use variance could be considered to increase with the number of prior similar uses in the immediate area or applicable zone; but the odds for the "first time" applicant could be considered slim in light of the statements in the Bacon concurrence and the Boccia decision.

However, the variables to be applied in an area variance could be viewed as more favorable to an applicant although much more difficult to apply. An applicant should always be able to meet the first of the Boccia unnecessary hardship prongs, i.e., to show whether an area variance is needed to enable the proposed use of the property given the special conditions of the property. The "wildcard" will be the second prong of 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 giving due consideration to whether the variance is necessary to avoid an undue financial burden on the applicant. Given that the applicant will be the party with available preparation time and resources, this second prong could be viewed as placing abutters at a disadvantage unless they are prepared to do the necessary "homework" as did the abutters in Boccia.

In either case, it is important to remember that regardless of which standard is applied for determination of whether unnecessary hardship exists, that hardship is but one of five elements necessary for an applicant to prove in order to obtain the variance. One can safely assume that more attention will be paid to the other four elements in future variance hearings and court proceedings. As these recent cases indicate, the New Hampshire Supreme Court is not a passive court but one that is actively engaged in debate and evaluation of matters before them. While one may not always agree with the outcome, the recent decisions certainly have captivated the attention of those working in this volatile field.