ZONING BOARD OF ADJUSTMENT
TOWN OF EAST KINGSTON, NEW HAMPSHIRE

Case No: _____
Submission Date: _____

APPLICATION FOR VARIANCE

Name of Applicant(s): _____

Address: _____

Phone: _____ Email: _____

Owner: _____

Location of Property: _____ MBL#: _____

NOTE: Please be advised the application must be completed in full before it is deemed eligible for placement on the board's agenda. Your application will be reviewed by the Land Board Secretary or designee who will contact you about the application's completeness and the public hearing process. Additional information may be supplied on a separate sheet if the space provided is inadequate.

A variance is requested from article _____ section _____ of the zoning ordinance to permit:

_____

_____

_____

_____

Facts in support of granting the variance:

1. Granting the variance would not be contrary to the public **interest** because:

_____

_____

_____

_____

2. If the variance were granted, the **spirit** of the ordinance would be observed because:

_____

_____

_____

_____

3. Granting the variance would do substantial **justice** because:

_____

_____

_____

_____

4. If the variance were granted, the **values** of the surrounding properties would not be diminished because:

5. Unnecessary Hardship
   a. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in **unnecessary hardship** because:

      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 because:

- and -

      ii. The proposed use is a reasonable one because:

   b. Explain how, 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.

Applicant's Signature _____ Date _____

If you are not the owner, provide authorization from the current owner to act on this application on their behalf. ◯ Not applicable

FOR OFFICE USE ONLY

◯ Property Card ◯ All Questions Answered ◯ Owner Authorization ◯ Abutter's List Attached

Public Hearing Date: _____ Fees Paid: _____ For the ZBA: _____

In an effort to assist applicants in their filing for variances, this excerpt from the NH Government Local Government Center "The Five Variance Criteria In The 21st Century" has been provided.

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.

Back to Application

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.

Back to Application

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.

Back to Application

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]