APPENDIX D: SIMPLEX V. NEWINGTON BACKGROUND INFORMATION

The following discussion of *Simplex Technologies, Inc. v. Town of Newington* and its effect on variance applications is from materials prepared by Attorney Peter Loughlin, distributed at the Office of State Planning's Annual Planning and Zoning Conference on May 12, 2001. We are grateful to him for allowing us to use this material.

In his October 1992 dissenting opinion in *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 246, Justice Sherman Horton stated: "I would ask for a full reconsideration of our definition of hardship, in the appropriate case." Justice Horton determined that the appropriate case to reconsider the definition of unnecessary hardship was the otherwise unremarkable case of *Simplex v. Newington*. On January 29, 2001, the New Hampshire Supreme Court signaled a new tact on the subject of unnecessary hardship when it stated as follows:

"We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property."

The supreme court's decision represents a significant change in the law regarding variances; however, contrary to some speculation, it did not reverse the entire body of variance law that has been developing over the last 50 years. Rather, it represents the latest stage in the continuing evolution of this one particular aspect of zoning law. Much of the law regarding variances remains unchanged.

1. **Aspects of variance law not changed by *Simplex v. Newington*.**

   a. Purpose of Variances: The reason why variances are part of the law of zoning remains unchanged. "Variances are included in a zoning ordinance to prevent an ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated." *Ouimette v. City of Somersworth*, 119 N.H. 292, 294 [1979].

   b. Burden of Proof: The parties seeking a variance continue to have the burden of establishing each of the requirements for that variance. *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 243 [1992].

   c. Presumption of Validity: There continues to be a presumption that all zoning ordinances are valid, and the party challenging their constitutionality carries the burden of overcoming this presumption. *Town of Nottingham v. Harvey*, 120 N.H. 889, 892 [1980].

   d. Financial Hardship Not Enough: The law regarding financial hardship remains the same. The fact that the application of an ordinance may cause a landowner to suffer some financial loss is not (by itself) sufficient to create an unnecessary hardship. *Governor's Island Club v. Town of Gilford*, 124 N.H. 126, 130 [1983]; *Olszak v. Town of New Hampton*, 139 N.H. 723, 661 A.2d 968 [1995].

   e. Personal Circumstances of Owner: A hardship does not exist if it just relates to the personal circumstances of the landowner. *Ryan v. City of Manchester*, 123 N.H. 170, 174 [1983] (Health problems which prevented landowner from working outside her home did not justify variance for business in home in residential district.)

   f. Necessary Hardship: Variances may still be granted only if the application of an ordinance creates an "unnecessary hardship." All land use regulations may cause hardship to a

landowner. The hardship may be considered "necessary" if it affords commensurate public advantage and is required in order to give full effect to the purposes of the ordinance. (*Grey Rocks* - Dissent - page 247.)

2. **The statute authorizing variances.**

The New Hampshire Supreme Court created the definition of unnecessary hardship for this State and has now redefined it. The standard zoning enabling legislation adopted by the New Hampshire Legislature in 1925 spells out the basic requirements for a variance and those requirements cannot be changed by the court. RSA 674:33, I(b) provides that the Zoning Board of Adjustment shall have the power to:

"Authorize 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."

3. **Requirements continue to exist in order for a variance to be granted.**

   a. The granting of a variance cannot result in the diminution of value of surrounding properties.

   b. The variance cannot be contrary to the public interest.

   c. The granting of a variance will result in substantial justice remains in place.

   d. The use resulting from the variance must not be contrary to the spirit and intent of the ordinance.

4. **There must be special conditions related to the property that is the subject of the variance application.**

The requirements regarding special conditions have not changed and must be kept in mind when applying the new standard for hardship. The statute allows the granting of a variance only when "owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship." Unless there are special conditions regarding a particular piece of property that cause the ordinance to result in unnecessary hardship, a variance cannot be granted. Examples of "special conditions" might be where the unusual shape of a lot causes the setback requirements to eliminate any reasonable building envelope, (*Husnander v. Town of Barnstead*, 139 N.H. 476, 660 A.2d 447, [1995] - banana shaped building envelope unusable without relief) or where all other lots enjoyed the benefits sought by applicant. (*Belanger v. Nashua*, 121 N.H. 389 [1981] - most other lots had commercial uses.)

If all other lots in the zoning district are similarly affected by the zoning ordinance so that there are no "special conditions" affecting the lot of the applicant, the applicant is not entitled to variance relief. *Hanson v. Manning*, 115 N.H. 367 [1970] ("Absent 'special conditions' which distinguish the property from other property in the area, no variance may be granted even though there is hardship." p 369 - applicant had 130 acres characterized by ledge and wetlands just like every other parcel in that portion of the town; *Crossley v. Town of Pelham*, 133 N.H. 215 [1990] - 200 of applicants' neighbors had homes also on undersized lots which could not accommodate a two car garage without variance relief).

5. **What *Simplex v. Newington* has changed.**

Simplex v. Newington has not turned zoning law, or for that matter all variance law, on its ear. It does, however, reflect two significant changes: (1) it signals the New Hampshire Supreme Court's changing attitude toward private property rights and the granting of variance relief, and (2) it explicitly marks the change in the court developed definition of "unnecessary hardship."

The change in the court's attitude.

Before *Simplex*: Between 1987 and 1992, the court took a very hard line on variances. In each of ten cases decided during that time period, the court ruled that variances should not have been granted.

After *Simplex*: Just how far the court's attitude concerning unnecessary hardship will evolve remains to be seen. The clear thrust of the court's thinking at the present time is summarized in the following paragraph from the *Simplex* decision:

"Inevitably and necessarily, there is a tension between zoning ordinances and property rights, as Courts balance the rights 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 powers to the State that deprive individuals of the reasonable use of their land."

In short, rather than routinely finding that the difficult conditions for variances have not been met, the court will now be much more inclined to try to attempt to strike a balance between municipal regulations and private property rights.