

## Evolution of the Hardship Standard

❶ **Standard State Zoning Enabling Act (1926):** "...where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship..."

❷ **Old RSA 674:33, I(b):** "...if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in an unnecessary hardship..." Originally adopted in NH in 1925 (1925 N.H. Laws 92), based on an earlier draft of the Standard State Zoning Enabling Act.

Case Law	❸ New RSA 674:33, I(b)(5)
<p>❹ <b>Simplex Test:</b> A landowner can establish unnecessary hardship by satisfying all three of the following conditions:</p>	(A) For the purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
(1) the zoning restriction as applied to the applicant's property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment;	(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
(2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and	(ii) The proposed use is a reasonable one.
(3) the variance would not injure the public or private rights of others.	
<p>❺ <b>Governor's Island Test:</b> "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. [Citation omitted]. If the land is reasonably suitable for a permitted use, then there is no hardship and no ground for a variance, even if the other four parts of the five-part test have been met" 124 N.H. 126, 130 (1983).</p>	(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.
<p>❻ <b>Boccia Test (Area Variance):</b> (1) whether an area variance is need 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.</p>	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. 2009 N.H. Laws 307 §6 (see Statement of Intent, below).

**2009 Legislative 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 v. City of Portsmouth*, 151 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)." 2009 N.H. Laws 307 §5 (emphasis added).