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March 20, 2003

Stephen Halleran
Town Administrator
Town of Plainfield
P.O. Box 380
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Re: Variance Standards

Dear Steve:

In your letter of March 11, 2003 you inquired about the hardship standard for variances as it now is interpreted since the *Simplex* case and other recent cases which have relied on *Simplex*. Earlier this year the Supreme Court ruled in the case of Bonnita Rancourt & a. v. City of Manchester, ___ N.H. ___, (1-10-2003) that trial courts were still improperly applying the hardship standard. The Supreme Court wrote that

In *Simplex*, we held that our prior test was "too restrictive in light of the constitutional protections by which it must be tempered." *Simplex*, 145 N.H. at 731. We thus adopted an approach that was more considerate of a property owner's constitutional right to use his or her property.

Under *Simplex*, to establish "unnecessary hardship," an applicant for a variance must show that: (1) a zoning restriction applied to the property interferes with the applicant's "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." *Id.* at 731-32. Under *Simplex*, applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land. *Id.* at 730-32. 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 732.

The plaintiffs assert that the intervenors were not entitled to a variance because there were no "special conditions" that warranted it. *See RSA 674:33, I(b).*

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To support their argument, however, they mistakenly rely upon case law developed before *Simplex*. Whereas before *Simplex*, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned, see Margate Motel, Inc. v. Town of Gilford, 130 N.H. 91, 94 (1987), after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought "reasonable." In the first prong of the *Simplex* test, "special conditions" are referred to as the property's "unique setting . . . in its environment." Bonnita Rancourt & a. v. City of Manchester, ___ N.H. ___, (1-10-2003).

The key to this passage from the *Rancourt* case is the court's statement that "hardship exists when special conditions of the land render the use for which the variance is sought reasonable." The board must therefore consider "special conditions" which make the request "reasonable." This explanation must be read in the context of the other criteria, namely, that


- (1) a zoning restriction applied to the property interferes with the applicant's 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.

Thus, now the board must consider the setting of the property, the uniqueness or special conditions of that setting, the relationship between the purpose of the restriction and how it specifically affects the application as well as the rights of others. With the tower concern your mention in your letter, the board must consider whether the site is unique or whether the level of trees is simply a condition throughout the town and whether the height restriction furthers a town policy in a reasonable manner. And, what is the basis or purpose of that policy and does it unfairly prohibit all possible tower installations in the town.

The board's analysis for variances has always required a significant discussion of uniqueness of the applicant's property and that analysis continues and the board's decision will be based on the specific circumstances facing the applicant. While this is not an easy task, these recent statements by the court provide more guidance than had been available.

I trust that this helps and if you have any further question, please call.

Very truly yours,



Barry C. Schuster

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encls.

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March 11, 2003

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RE: Variance Criteria

Dear Barry:

In working through the application for a height requirement variance as part of a current wireless communication tower application the Zoning Board has asked that you comment on the current legal standards being used to demonstrate hardship to obtain a variance. Linked to the hardship question is the concept of uniqueness for the property. By example, if many properties in the area face the same set of problems limiting tower height (surrounding tree height) then can the property in question rely on tree height has a unique characteristics that makes the viability of a tower more difficult, thus justifying the need for the variance?

The Board plans to take this issue up next at their April meeting.

Regards,



Stephen Halleran