

**NEW HAMPSHIRE HOUSING FINANCE AUTHORITY
VARIANCE AND WAIVER RULES
HFA 117**

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HFA 117**

HFA 117 PART ONE: Overview, Purpose, Applicability

HFA 117.01 Overview and Purpose

New Hampshire Housing (NH Housing) allocates scarce public resources through a variety of processes, including via the Qualified Allocation Plan (QAP), notices of funding opportunities and the annual NH Housing Program Plan. Further, NH Housing has promulgated Policies and Rules to advance certain objectives, including ensuring well-built housing and controlling costs. NH Housing recognizes that there will be times that an Applicant may seek relief from Policies and Rules. These Variance and Waiver Rules provide the standards and the procedures for making a Request and for deciding when relief should be granted or denied.

While the Applicant will be impacted by the decision on their Request, because NH Housing awards funds via a competitive process, the decision could also impact others. Therefore, these rules aim to provide a fair process to Applicants and to Impacted Parties. Specifically, these rules provide notice to Impacted Parties when a Waiver is requested during an Active Competitive Funding Round.

- (a) These rules are intended to:
- (1) Provide a defined process for seeking, deciding and appealing a Variance or a Waiver;
 - (2) Treat parties, including Applicants and Impacted Parties, fairly and consistently, especially when allocating scarce resources;
 - (3) Recognize that each project can bring unique realities and at times there can be extenuating circumstances that will warrant granting a variance or a waiver; and
 - (4) Provide an efficient process so NH Housing can make prompt and good decisions at the right level.

HFA 117.02 Applicability

- (a) These Variance and Waiver Rules apply to programs administered by NH Housing's Multifamily Housing Division (MHD).
- (b) NH Housing does not have the authority to vary or waive the Laws unless the applicable Law provides such authority.
- (c) These rules shall be read in conjunction with the Laws that apply to the program under which the funding is being provided.
- (d) When there is a conflict between these rules and the Law, the Law controls.

HFA 117.03 Rulemaking

These rules are adopted pursuant to RSA 204-C:9, which empowers NH Housing to adopt rules relative to programs and operations.

HFA 117 PART TWO: Definitions

HFA 117.04 Definitions

In addition to the definitions in HFA 101.04, these words or terms shall have the following meanings throughout these Variance and Waiver Rules.

“Active Competitive Funding Round” means the period between: i) the first day of the application period to accept preliminary or final applications for funding; and ii) the date NH Housing makes funding decisions for a round as evidenced by the dates on funding reservations letters, inclusive of the appeal period detailed in the letter and any subsequent appeals. The applicable Active Competitive Funding Round is the round directly related to the Request. A Request in anticipation of a funding round shall be considered part of an Active Competitive Funding Round.

“Applicant” means the party seeking a Variance or a Waiver for its own project or other funding.

“Assigned Staff” means the NH Housing staff member, including program managers and construction analyst, assigned the specific project or assigned to review and process the Request.

“Board” means NH Housing’s Board of Directors.

“Committee” means NH Housing’s Multifamily Housing Committee.

“Executive Director” means NH Housing’s Executive Director or designee.

“Good Cause” means based on the judgement of the decision authority, e.g., staff, Executive Director, Committee or Board, the facts, circumstances and policy considerations to support granting a Request. Good Cause exists when the Applicant has shown adherence to federal standards and good cause by demonstrating through written narrative that:

- (1) The Request is consistent with applicable state and federal laws, regulations, policies and/or standards;
- (2) Adherence to the Rule or Policy would otherwise create a substantial hardship or violate principles of fairness;
- (3) Unnecessary Hardship exists; and
- (4) The request improves project feasibility and does not adversely affect project feasibility.

For Requests that impact the eligibility of a project to be evaluated under the scoring criteria, to show Good Cause, the Applicant must demonstrate that all potential reasonable options have been exhausted.

“Impacted Parties” means parties that are applying for NH Housing resources and that have a substantial and immediate interest in the Request because NH Housing’s decision on the Request would have a substantial and immediate impact on that impacted party. A party with a general interest or theoretical interest is not an Impacted Party. Example of an Impacted Party: A developer that is competing for the same resources as the Applicant.

“Law(s)” means the applicable state and federal laws, regulations and policies.

“NH Housing” means New Hampshire Housing Finance Authority.

“Policy” means a NH Housing-established policy that is published on the Website.

“Request” means the formal written request by the Applicant for a Variance or a Waiver, using the Request Form and stating the Good Cause for granting the Request.

“Request Form” means the NH Housing required document to file and seek a Request.

“Rule(s)” means a NH Housing-promulgated rule under RSA 204-C:9 that has been approved by the Board and published as an “HFA” rule on the Website.

“Supervisor” means the Assigned Staff’s supervisor or the Managing Director of Multifamily Housing Division, or designee.

“Threshold Requirement” means any project requirement that is listed in a Rule, the Qualified Allocation Plan or Notice of Funding Availability as a threshold requirement or a primary program policy, e.g., HFA 109.04.

“Unnecessary hardship” means:

- (1) The hardship must be related to the project itself and not to personal considerations of the Applicant;
- (2) The hardship must be based on unique conditions of the project; and
- (3) The hardship must not be self-created.

“Website” means www.nhhousing.org.

HFA 117 PART THREE: General Rules

HFA 117.05 Variance or Waiver Request Overview

- (a) To Request a Variance or a Waiver, the Applicant shall:
 - (1) Complete and file the Request Form; and
 - (2) Provide all required documents and detailed information to support the Request; summary statements are not sufficient as the Applicant must support the request.
- (b) NH Housing will only act on a Request when the Applicant has filed the required Request Form, has fully completed that form and has provided all information requested by NH

Housing. NH Housing may reject, without review, an incomplete Request, including Requests that lack needed supporting documents and information.

- (c) On the Website, NH Housing shall provide the Request Form, which shall include the following:
 - (1) The development's name and address and NH Housing program for which the development is seeking or has received resources, e.g., 9% Low-Income Housing Tax Credits (LIHTCs), tax-exempt bonds combined with 4% LIHTCs, supportive housing, or any other NH Housing administered funding;
 - (2) The Applicant's name, title, contact information;
 - (3) NH Housing Policy or Rule for which relief is requested, including stating the specific section or provision;
 - (4) The reasons supporting the request, which shall include providing Good Cause for granting the Request;
 - (5) Any documents that support the Request; and
 - (6) Such other information deemed warranted by the Applicant or by NH Housing.

HFA 117.06 Variance Request

- (a) Generally, Variances are designed to allow the prompt resolution of Requests that are not directly connected to an Active Competitive Funding Round.
- (b) Variance includes the following:
 - (1) Modification of a Policy or complete noncompliance with a policy;
 - (2) Modification of a Rule when no Active Competitive Funding Round; and
 - (3) Modification of a Rule by the Executive Director under HFA 117.09 Executive Director Enumerated Variance Authority.
- (c) There shall be two general types of Variances:
 - (1) Policy Variance; and
 - (2) Rule Variance.

HFA 117.07 Policy Variance

- (a) The Assigned Staff will provide a recommendation to the Supervisor, and the Supervisor may grant or deny a variance of a Policy when the Applicant has shown Good Cause for granting the Request.
- (b) Upon making the decision, NH Housing shall notify the Applicant in writing.
- (c) If the Variance Request is denied by staff, the Applicant may, in writing, within seven (7) business days of the notification, appeal the staff decision to the Executive Director. Failure to timely file an appeal means the decision is final and no longer appealable.
- (d) The Executive Director shall:
 - (1) Review the Request, the supporting material, and the staff decision, making any inquiries deemed warranted; and
 - (2) Either affirm or alter the staff decision.

- (e) This Executive Director's decision shall then be provided to the Applicant in writing. The Executive Director's decision shall be final with no further appeal.
- (f) For Policy Variance, no notice shall be given to any other party.

HFA 117.08 Rule Variance, Executive Director General Authority

- (a) In the administration of programs and the approval of projects, the Executive Director may, for Good Cause, grant a Variance of a Rule to accomplish program and participation goals, provided such Variance is consistent with any applicable Law and will help ensure fair treatment of parties seeking to participate in programs.

HFA 117.09 Executive Director Enumerated Variance Authority

- (a) In addition to the general authority in HFA 117.08 and when Good Cause is shown, the Executive Director may grant a Variance of the following:
 - (1) Varying the Rule-established total development costs (TDC) (see the QAP for all TDC limits) by 10% or less;
 - (2) Varying the Rule-established investment limits (see the QAP for limits) less than 10%; and
 - (3) Varying the Design and Construction Policy Rules, HFA 111.

HFA 117.10 Appeal on Certain Variances

- (a) If the Executive Director denies a Variance under HFA 117.08 (General Authority) and HFA 117.09 (Executive Director Enumerated Variance Authority), the Applicant may, within seven (7) business days, file an appeal that will be heard by the Committee. Failure to timely file an appeal means the decision is final and no longer appealable.
- (b) Provided an Applicant is entitled to file an appeal and has filed a timely appeal, the Committee will hold a hearing on the Applicant's appeal.
- (c) The Committee will hear from the Applicant, any other parties in attendance and NH Housing staff, and the Committee shall issue a decision that will be recorded in the Committee minutes.
- (d) NH Housing will not provide notice of the hearing to any other party.
- (e) The Committee's decision is final. There is no appeal of the Committee's decision to the Board.

HFA 117.11 Waiver

- (a) Waiver includes the following:

- (1) Complete noncompliance with a Rule;
- (2) Modification of a Rule when the project is part of an Active Competitive Funding Round; and
- (3) Modification of any Threshold Requirement at any time except as enumerated under HFA 117.09 (Executive Director Enumerated Variance Authority).

(b) There are two types of waivers:

- (1) Project-specific Waivers, which are initiated by the Applicant and, if granted, only apply to that project; and
- (2) Board-initiated Waivers, which will apply to all impacted projects.

HFA 117.12 Waiver Standard: Applicant-Initiated Waiver Request

(a) NH Housing allocates scarce resources via written standards and through a competitive process. Therefore, any Request for a Waiver of a Rule that impacts an Active Competitive Funding Round deserves the highest level of scrutiny, a strict standard to grant and a process that provides Impacted Parties notice and an opportunity to participate.

(b) The Applicant has the burden to show that “Good Cause” exists to grant the Waiver Request.

(c) For Applicant-Initiated Waiver Requests,

(1) Upon receipt of a Waiver Request, NH Housing will:

- A. Review the Request and all related information;
- B. Provide a staff recommendation to the Committee, with a copy to the Applicant;
- C. Schedule a hearing on the Request in front of the Committee; and
- D. Notify the Applicant and any Impacted Parties of the Committee hearing date.

(2) At the Committee hearing on the Request, the Committee shall:

- A. Open the public hearing on the Request;
- B. Provide the Applicant a reasonable opportunity to present the reasons for the Request and to answer any Committee questions;
- C. Hear from NH Housing staff about the Request, including the staff recommendation and receive other input from the staff;
- D. Provide Impacted Parties a reasonable opportunity present information to the Committee and to answer any Committee questions; and
- E. Close the public hearing, meaning no further input or comments will be accepted.

(3) Once the public hearing is closed, the Committee, within the public meeting, shall:

- A. Deliberate on the Request;
- B. Decide the Request based on all of the presented information and the Committee’s own judgment; and
- C. Memorialize the decision in a Committee motion that will be voted on by Committee members and included in the Committee minutes.

(d) Appeal of Committee Decision

- (1) The Applicant or any Impacted Party may, in writing, within seven (7) business days of the Committee decision, file an appeal that will be heard by the Board. Failure to timely file an appeal means the decision is final and no longer appealable.
- (2) If an appeal is filed, NH Housing shall schedule the appeal for the next Board meeting, provided, however, that NH Housing shall provide the Applicant and any Impacted Party with at least 24 hours, excluding Sundays and legal holidays, before such meeting. If sufficient time is not available to provide the 24-hour notice, the Appeal shall be heard at the next month's Board meeting.

(e) During a public meeting, the Board will:

- (1) Review the information on the Request, including the Request, the staff recommendation, the information from any Impacted Party and the Committee's decision;
- (2) Deliberate on the Request;
- (3) Decide the Request based on all of the presented information; and
- (4) Memorialize the decision in a Board motion that will be voted on by the Board and included in the Board minutes.

(f) Unless the Board decides to open a public hearing, appeals shall be handled as a public meeting, meaning the Board will not receive any new information or hear from any party.

HFA 117.13 Board-Initiated Waiver

- (a) The Board can initiate a Waiver. Generally, these Board-initiated Waivers shall be when the Board determines a Rule should be waived for all parties seeking funding or already funded under a specific program. This authority includes waiving provisions in the Qualified Allocation Plan or a NOFO.
- (b) When such a Waiver is being considered, the Board agenda shall include the proposed Waiver, the Board minutes shall include the vote, and if passed, the Waiver shall then be published on the Website. No hearing shall be necessary.

HFA 117.14 Executive Authority to Convert a Variance into a Waiver

The Executive Director may decide to treat a variance Request as a waiver Request that would then require the Committee to review and decide that Request.

HFA 117.15 Conditions with Granted Variances or Granted Waivers

- (a) In granting a Variance or a Waiver, NH Housing may impose conditions on the Applicant that could include:
 - (1) Additional requirements for the project;

- (2) Penalties or conditions for any future funding applications from the Applicant; and/or
- (3) Such other conditions warranted by the Request.

HFA 117.16 Recording of Decisions on Variances and Waivers

- (a) To ensure consistency and to create a record of decisions on Requests:
 - (1) Committee and Board actions on each Request shall be maintained in the Committee or Board minutes; and
 - (2) In addition to providing the Decision in writing to the Applicant, staff-level and Executive Director decisions shall be recorded in a variance and waiver report, including:
 - A. Project name and program funding;
 - B. Applicant name;
 - C. Request, including the specific citation to the Rule or Policy; and
 - D. Summary of the decision.
- (b) These variance and waiver reports shall be shared, on a quarterly basis, with NH Housing's internal multifamily working group.

HFA 117.17 Consideration of Decisions

- (a) Decisions on Requests are not binding precedent in other Requests.
- (b) In deciding Requests, NH Housing may review prior decisions to strive for consistency and fairness, while recognizing that projects and Requests can present unique circumstances.