

INDIANA FIRE PREVENTION AND BUILDING SAFETY COMMISSION

REQUEST FOR EXCEPTION FROM REGULATORY MORATORIUM

TO: Cris Johnston, Director
Office of Management and Budget

FROM: Robin Nicoson, Chairman
Fire Prevention and Building Safety Commission

DATE: November 24, 2020

RE: Request for exception from Executive Order 13-03 for amendment of 675 Ind. Admin. Code 12-5 (Variances)

The Fire Prevention and Building Safety Commission (Commission) respectfully requests an exception to the Regulatory Moratorium to amend its rules governing variances contained in 675 Ind. Admin. Code 12-5 and the associated fee schedule contained in 675 Ind. Admin. Code §§ 12-3-4 and 13.

History and Background of the Rule

Pursuant to its statutory authority, the Commission adopts building, fire safety, and equipment rules that govern: (1) the construction of buildings; (2) the design, installation, and operation of regulated lifting devices; (3) the design, installation, and operation of boiler and pressure vessels; (4) the operation of regulated amusement devices; and (5) fire safety in general. Generally speaking, these rules must be complied with; however, in specific circumstances, an applicant may request, and be granted, a variance (an order waiving or modifying the rule) from a rule of the Commission.

The authority to grant variances is established in Indiana Code § 22-13-2-11. In order to set procedures for the administration of the authority to grant variances, the Commission created rules in 675 Ind. Admin. Code 12-5 (the Variance Rule). The Variance Rule laid out processes for: (1) applying for a variance; (2) considering a variance; and (3) issuing a sanction on a previously issued variance. These rules were originally adopted by the Commission in 1987. From 1987 to June 30, 2019, the authority to grant a variance was left solely to the Commission who would consider variance requests at its monthly Commission meeting.

In 2019, as part of a government efficiency bill, the Indiana General Assembly amended Indiana Code § 22-13-2-11 and other relevant statutes to allow the Indiana Department of Homeland Security (IDHS) to grant variances. One of the primary reasons for this legislation was to eliminate the inherent delays present in the current process that existed due to the fact that variances were required to be acted on at a public meeting of the Commission that only occurred once a month. In addition to authorizing the IDHS the authority to grant variances, the legislature also made the following relevant changes: (1) restricted the authority of the Commission to grant variance only if the IDHS placed the variance on the Commission's agenda for consideration; (2) eliminated the

Boiler and Pressure Vessels Rules Board, transitioning its rulemaking authority to the Commission and the variance authority to the IDHS and the Commission; (3) eliminated the Regulated Amusement Device Safety Board, transitioning its rulemaking authority to the Commission and the variance authority to the IDHS and the Commission; (4) required local building officials and local fire officials receive notice of variance requests filed in their jurisdiction; (6) and required a five day waiting period before a variance determination can be made to allow for the submission and review of comments from interested parties.

Due to the amendments made to Indiana Code § 22-13-2-11, the Variance Rule conflicted with the new statutory language. In order to eliminate the conflicting language that existed between the statute and the Variance Rule, the legislature granted the Commission emergency rulemaking power to modify the Variance Rule. On July 2, 2019, the Commission adopted an emergency rule modifying the Variance Rule, however, this emergency rule is set to expire July 1, 2021.

Reasons for the Proposed Rule

The primary reason for the proposed rule is to bring the Variance Rule up to date with legislative changes that occurred in 2019 by incorporating the changes made by the Commission’s emergency rule that is currently in effect. A copy of the emergency rule – LSA Document # 19-333(E) – can be found at this link: <http://iac.iga.in.gov/iac//20190703-IR-675190333ERA.xml.pdf>.

As mentioned above, the legislature modified the statutory framework governing the variance process in 2019, resulting in the need to modify the Variance Rule to: (1) avoid conflict between the statute and the rules of the Commission; and (2) implement the new statutory framework. Since July 2019, the Commission has been operating under an emergency rule that has addressed these concerns, however, the emergency rule will expire by July 1, 2021. Therefore, the Commission must adopt this proposed rule to avoid reverting back to the outdated rules that conflict with the statutory amendments made in 2019.

Statutory Authority for the Proposed Rule

IC § 22-12-6-6 and IC § 22-13-2-13

Executive Order 13-03 Exceptions to the Regulatory Moratorium

As outlined below, the Commission respectfully requests an exception under Paragraph 6, subparagraphs (b), (e), and (f) to the Regulatory Moratorium for the proposed rule modifying the Variance Rule.

This proposed rule repeals existing rules and reduces the regulatory impact of the Variance Rule.

Pursuant to subparagraph 6(b), the Regulatory Moratorium does not apply to “rules that repeal existing rules or reduce their regulatory impact.” Here, the proposed changes to the Variance Rule reduce their regulatory impact as follows:

Proposed Rule §	Analysis
675 IAC § 12-5-2	Limited the application of the definition of “undue hardship” so that it does not apply to boiler and pressure vessel variance requests which would limit the instances in which an applicant could obtain a variance. This definition was not originally intended to apply to boiler

	and pressure vessel requests but when the Boiler and Pressure Vessel Rules Board was dissolved it brought the consideration of variances within the scope of these rules and the Commission's consideration. Therefore, the application of this definition needed to be limited to avoid the unintended consequence of limiting the instances in which a variance for a boiler or pressure vessel may be obtained.
675 IAC § 12-5-5(c)(2)	Expressly permitted variance applications to be filed if an address did not exist for a location or had not yet been assigned to a location. As currently written, applications for variances were required to include an address for the property in question.
675 IAC § 12-5-5(c)	Eliminated the requirement that the local building official and local fire official were required to acknowledge receipt of a variance. Modified this provision to be merely a notice requirement. In the past, local officials could postpone the consideration of a variance indefinitely if they failed to acknowledge receipt of a variance application.
675 IAC § 12-5-6	Deleted the section which required a 28-day waiting period for variances to be placed on the Commission's agenda for consideration. Consideration of variances are now completed on a rolling basis by the IDHS and may be placed on the Commission's agenda without delaying the 28-day period.
675 IAC 30-2	Deleted this rule, which set up the procedure for consideration of variances by the now dissolved Boiler and Pressure Vessel Rules Board.

This proposed rule addresses matters pertaining to the control of waste, fraud, or abuse within the IDHS and perpetrated against the IDHS.

Pursuant to subparagraph 6(e), the Regulatory Moratorium does not apply to “rules to address matters pertaining to the control, mitigation or eradication of waste, fraud or abuse within a state agency or wasteful or abusive activities perpetrated against a state agency.” Here, the proposed changes to the Variance Rule are intended to alleviate the issues that will come with having to administer a variance program based on rules that were drafted to administer a foregone statutory framework. If these rules are not promulgated, the current emergency rule will expire and the outdated Variance Rule will snap back into effect, leaving the IDHS and the Commission the unenviable role of attempting to administer the program with a patchwork framework at best. This will assuredly result in government waste as the agency will have no clear set of directions in how to administer the program resulting in inefficiencies and unpredictability, at least temporarily until a temporary fix can be implemented.

Additionally, as mentioned above, prior to the emergency rule going into effect, the requirement that local building officials and local fire officials acknowledge variance requests, before the request could be considered, resulted in the state administering a program whereby applications

could effectively never be consider if a local building official or local fire official refused to acknowledge it.

Lastly, by failing to adopt this proposed rule, the agency would be drastically modifying the current state of affairs for the variance program for the third time in less than two years. This will require the IDHS to modify business practices, technology development, policies, procedures, staffing, and numerous other items to accommodate yet another change. This change will result in a significant amount of wasted resources devoted to this new program by the state. Not only will this back and forth affect the IDHS, it may also have a significant impact on the regulated public as they as well have expended time and resources to become accustomed to this rule modification.

For these reasons, this proposed rule addresses the potential waste of government time and resources in having to administer a patchwork regulatory framework and eliminates the enabling of wasteful or abusive practices that the local official acknowledgement created.

This proposed rule reduces State spending.

Pursuant to subparagraph 6(f), the Regulatory Moratorium does not apply to “rules that reduce State spending.” Here, the proposed rule may reduce State spending on defending and enforcing determinations made regarding the administration of a variance program that, if this proposed rule is not adopted, would be based on a set of rules that were not drafted to administer the current statutory framework.

For these reasons, the Regulatory Moratorium does not apply to this proposed rule.

Fiscal Impact Analysis as described in FMC #2010-4

According to Financial Management Circular #2010-4, the agency proposing the adoption of a new rule or adoption of an amendment to an existing rule must complete, and submit to the Budget Agency, a fiscal impact analysis on state and local government. The following is the Commission’s fiscal impact analysis of the modifications contained in this proposed rule.

Estimated Fiscal Impact on State and Local Government

The proposed changes to the Variance Rule should not create a fiscal impact on state and local government. The rule being proposed, except in a few instances, has been in effect for the last two years. Additionally, when comparing the proposed rule to the rule currently in place, no fiscal impact on state and local government is created. The major changes to the variance program occurred in the legislative amendments and the rule modifications are merely implementing the changes that occurred in statute (generally, the IDHS issuing determinations on variance requests). The one notable item of impact on state government that was not included in the emergency rule, nor put in place by the statutory amendments, is the requirement that the IDHS produce a report of determinations made to be submitted to the Commission before each meeting of the Commission. While this requirement will place an additional burden on the IDHS, the compilation of a report is already performed by staff and will eventually be an automated function in the new processing system. Outside of this modification, these rules does not create an impact on state and local government.

Anticipated Effective Date of the Rule

July 1, 2021

Sources of Revenue Affected by the Rule

The source of revenue associated with this proposed rule is the variance application fee identified in 675 Ind. Admin. Code 12-3-4. However, this source of revenue should not be impacted.

Appropriations, Distributions, or Other Expenditures of Revenue Affected by the Rule.

NA

Administrative Impact to State and Local Governments

This rule creates a de minimis impact on state government by requiring a monthly report of determinations be prepared for the Commission by the IDHS. Outside of this requirement, however, the rule does not create an administrative impact. The current framework for variances is already in place and no other administrative obligations have been created.

Does this Rule Create an Unfunded Mandate on a State Agency or Political Subdivision?

The amendments to the Variance Rule do not create an unfunded mandate.

Cost-Benefit Analysis as described in FMC #2010-4

According to Financial Management Circular #2010-4, the agency proposing the adoption of a new rule or adoption of an amendment to an existing rule must complete and submit to the Budget Agency a cost-benefit analysis of the proposed rule or amendment. The following is the Commission's cost-benefit analysis of the amendments to the Variance Rule.

Statement of Need

The amendments to the Variance Rule are needed, as provided above, to implement the statutory changes made to Ind. Code § 22-13-2-11 and to ensure the modifications made by the emergency rule do not expire.

These rules have the potential to affect every business and individual in the State of Indiana. The Commission's rules apply, with limited exceptions, to all structures in Indiana and a variance may be sought for any one of these rules.

This proposed rule is a general rule that is intended, in most part, to adopt the emergency rule currently in place to put into effect statutory changes that occurred in 2019, authorizing the IDHS to grant variances. This proposed rule was originally drafted by the IDHS who presented it to the Commission for consideration at a public meeting. After presenting to the Commission for adoption, a period of public comment on the rule was opened and written comments and oral testimony was heard. All comments were considered and a few were implemented in this draft proposed rule.

Evaluation of Costs and Benefits

The benefits of the amendments to the Variance Rule exceed the costs. As provided above, this rule will ensure consistency in government operations by continuing, in most part, the modifications currently put in place by the emergency rule which is set to expire on July 1, 2021. This rule will ensure that the administrative code provisions will not conflict with the statutory language regulating this subject and that, to the greatest extent possible, all governmental waste in this program is eliminated. However, the costs in failing to adopt this rule are significant as the state and businesses will be left with a patchwork regulatory framework with no clear

administrative provision on how to implement the variance program. In conclusion, the benefits of this rule outweigh the costs.

Total Estimated Economic Impact On All Regulated Persons Greater than \$500,000?

The total estimated economic impact of the proposed rule on all regulated persons is less than \$500,000. As provided above, this rule generally is implementing modifications made by statute and continuing in effect the current emergency rule.

Copy of the Proposed Rule

A copy of the proposed rule has been attached.

Contact Information for Agency Staff

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