

ECONOMIC DEVELOPMENT AUTHORITY[261]

Adopted and Filed

Rule making related to waivers

The Economic Development Authority hereby amends Chapter 199, “Uniform Waiver and Variance Rules,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is adopted under the authority provided in Iowa Code section 15.106A.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code chapters 15 and 17A and 2020 Iowa Acts, House File 2389.

Purpose and Summary

2020 Iowa Acts, House File 2389, amended Iowa Code section 17A.9A to remove references to “variances” and change how agencies report on rule waivers that are granted or denied. The changes to Chapter 199 amend the rules to conform to the changes implemented by House File 2389, delete references to repealed programs, and replace references to the “department of economic development” and the “department” with references to the “economic development authority” and the “authority.” These amendments also clarify that a waiver may be granted only in response to a petition and may not be granted on the Director’s or Economic Development Authority Board’s own motion.

Public Comment and Changes to Rule Making

Notice of Intended Action for this rule making was published in the Iowa Administrative Bulletin on February 24, 2021, as **ARC 5438C**. No public comments were received.

Exhibit A, Sample Petition (Request) for Waiver, has been updated in paragraph “d” and numbered paragraph “1” to clarify a petitioner must explain and prove by clear and convincing evidence that applying the rule will result in “undue hardship,” rather than “hardship.” These changes make the language consistent with Iowa Code section 17A.9A and with previously proposed amendments to subrule 199.2(1).

Adoption of Rule Making

This rule making was adopted by the Authority on May 21, 2021.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Authority for a waiver of the discretionary provisions, if any, pursuant to 261—Chapter 199.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

Effective Date

This rule making will become effective on July 21, 2021.

The following rule-making actions are adopted:

ITEM 1. Amend **261—Chapter 199**, title, as follows:

UNIFORM WAIVER AND VARIANCE RULES

ITEM 2. Amend rule 261—199.1(ExecOrd11) as follows:

261—199.1(ExecOrd11 17A,15) Applicability. This chapter outlines a uniform process for the granting of waivers ~~or variances~~ from rules adopted by the ~~department~~ authority. The intent of this chapter is to allow persons to seek exceptions to the application of rules issued by the ~~department~~ authority.

199.1(1) Definitions.

"Authority" means the economic development authority created in Iowa Code section 15.105.

"Board" or "IDED board" means the ~~Iowa department of economic development board created by Iowa Code chapter 15~~ members of the economic development authority board appointed by the governor and in whom the powers of the authority are vested pursuant to Iowa Code section 15.105.

"Department" or "IDED" means the ~~Iowa department of economic development authorized by Iowa Code chapter 15.~~

"Director" means the director of the ~~department of economic development~~ authority or the director's designee.

"Director/board" means either the director or the board depending on which one has decision-making authority pursuant to rule ~~261—199.2(ExecOrd11 17A,15).~~

"Person" means an individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any legal entity.

"Waiver ~~or variance~~" means an agency action which suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person.

199.1(2) Authority.

a. A waiver ~~or variance~~ from rules adopted by the ~~department~~ authority may be granted in accordance with this chapter if (1) the ~~department~~ authority has exclusive rule-making authority to promulgate the rule from which waiver ~~or variance~~ is requested or has final decision-making authority over a contested case in which a waiver ~~or variance~~ is requested; and (2) no statute or rule otherwise controls the grant of a waiver ~~or variance~~ from the rule from which waiver ~~or variance~~ is requested.

b. No waiver ~~or variance~~ may be granted from a requirement which is imposed by statute. Any waiver ~~or variance~~ must be consistent with statute.

ITEM 3. Amend rule 261—199.2(ExecOrd11) as follows:

261—199.2(ExecOrd11 17A,15) Director/board discretion. The decision on whether the circumstances justify the granting of a waiver ~~or variance~~ shall be made at the discretion of the director upon consideration of all relevant factors, ~~except for the below listed programs, for which the board shall make the decision, upon consideration of all relevant factors.~~ The director may refer a petition for waiver to the board for decision. In the case of petition referred to the board by the director, the

board shall make the decision on whether the circumstances justify the granting of a waiver, upon consideration of all relevant factors.

1. ~~Community Economic Betterment Account (CEBA) program, 261—Chapter 53.~~
2. ~~New Jobs and Income Program (NJIP), 261—Chapter 58.~~
3. ~~Workforce Development Fund, 261—Chapter 8.~~
4. Accelerated Career Education Program Physical Infrastructure Assistance Program (ACE PIAP), 261—Chapter 20.

199.2(1) *Criteria for waiver ~~or variance~~.* The director/board may, in response to a completed petition ~~or on its own motion~~, grant a waiver ~~or variance~~ from a rule, in whole or in part, as applied to the circumstances of a specified situation if the director/board finds each of the following:

- a. Application of the rule to the person at issue would result in undue hardship ~~or injustice~~ to that person; and
- b. Waiver ~~or variance~~ on the basis of the particular circumstances relative to that specified person would be consistent with the public interest; and
- c. Waiver ~~or variance~~ in the specific case would not prejudice the substantial legal rights of any person; and
- d. Where applicable, substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

In determining whether waiver ~~or variance~~ should be granted, the director/board shall consider whether the underlying public interest policies and legislative intent of the rules are substantially equivalent to full compliance with the rule. When the rule from which a waiver ~~or variance~~ is sought establishes administrative deadlines, the director/board shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all licensees, grantees and constituents.

199.2(2) *Special waiver ~~or variance~~ rules not precluded.* These uniform waiver ~~and variance~~ rules shall not preclude the director/board from granting waivers ~~or variances~~ in other contexts or on the basis of other standards if a statute or other ~~department~~ rule authorizes the director/board to do so, and the director/board deems it appropriate to do so.

ITEM 4. Amend rule 261—199.3(ExecOrd11) as follows:

261—199.3(ExecOrd11 17A,15) Requester’s responsibilities in filing a waiver ~~or variance~~ petition.

199.3(1) *Application Petition.* All petitions for waiver ~~or variance~~ must be submitted in writing to the Iowa Department of Economic Development Authority, Office of the Director, ~~200 East Grand 1963 Bell Avenue, Suite 200, Des Moines, Iowa 50309-1819~~ 50315, Attention: Legal Counsel. Petitions for waiver may be delivered, mailed, or sent by email or other electronic means reasonably calculated to reach the intended recipient. If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.

199.3(2) *Content of petition.* A petition for waiver ~~or variance~~ shall include the following information where applicable and known to the requester (for an example of a petition for waiver ~~or variance~~, see Exhibit A at the end of this chapter):

- a. A description and citation of the specific rule from which a waiver ~~or variance~~ is requested.
- b. The specific waiver ~~or variance~~ requested, including the precise scope and operative period that the waiver ~~or variance~~ will extend.
- c. The relevant facts that the petitioner believes would justify a waiver ~~or variance~~.
- d. A signed statement from the petitioner attesting to the accuracy of the facts provided in the petition, and a statement of reasons that the petitioner believes will justify a waiver ~~or variance~~.
- e. A history of any prior contacts between the ~~department~~ authority and the petitioner relating to the regulated activity, license, grant, loan or other financial assistance affected by the proposed waiver ~~or variance~~, including a description of each affected license, grant, loan or other financial assistance held by the requester, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, license, grant or loan within the last five years.

f. Any information known to the requester regarding the ~~department's~~ authority's treatment of similar cases.

g. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question, or which might be affected by the grant of a waiver ~~or variance~~.

h. The name, address, and telephone number of any person or entity who would be adversely affected by the grant of a petition.

i. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver ~~or variance~~.

j. Signed releases of information authorizing persons with knowledge regarding the request to furnish the ~~department~~ authority with information relevant to the waiver ~~or variance~~.

199.3(3) *Burden of persuasion.* When a petition is filed for a waiver ~~or variance~~ from a ~~department~~ rule, the burden of persuasion shall be on the petitioner to demonstrate by clear and convincing evidence that the director/board should exercise its discretion to grant the petitioner a waiver ~~or variance~~.

ITEM 5. Amend rule 261—199.4(ExecOrd11) as follows:

261—199.4(ExecOrd11 17A,15) Notice. The ~~department~~ authority shall acknowledge a petition upon receipt. The ~~department~~ authority shall ensure that notice of the pendency of the petition and a concise summary of its contents have been provided to all persons to whom notice is required by any provision of law, within 30 days of the receipt of the petition. In addition, the ~~department~~ authority may give notice to other persons. To accomplish this notice provision, the ~~department~~ authority may require the petitioner to serve the notice on all persons to whom notice is required by any provision of law or who may be impacted by the requested waiver, and provide a written statement to the ~~department~~ authority attesting that notice has been provided.

ITEM 6. Amend rule 261—199.5(ExecOrd11) as follows:

261—199.5(ExecOrd11 17A,15) Department Authority responsibilities regarding petition for waiver ~~or variance~~.

199.5(1) *Additional information.* Prior to issuing an order granting or denying a waiver ~~or variance~~, the director/board may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the director/board may, on its own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the director/board, the director's/board's designee, a committee of the board, or a quorum of the board.

199.5(2) *Hearing procedures.* The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply in three situations: (a) to any petition for a waiver ~~or variance~~ of rule filed within a contested case; (b) when the director/board so provides by rule or order; or (c) when a statute so requires.

199.5(3) *Ruling.* An order granting or denying a waiver ~~or variance~~ shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and operative period of the waiver if one is issued.

199.5(4) *Conditions.* The director/board may condition the grant of the waiver ~~or variance~~ on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means.

199.5(5) *Time for ruling.* The director/board shall grant or deny a petition for a waiver ~~or variance~~ as soon as practicable, but in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the director/board shall grant or deny the petition no later than the time at which the final decision in that contested case is issued.

199.5(6) and 199.5(7) No change.

ITEM 7. Rescind rule 261—199.6(ExecOrd11) and adopt the following new rule in lieu thereof:

261—199.6(17A,15) Submission of waiver information. Within 60 days of granting or denying a waiver, the authority shall make a submission on the Internet site established pursuant to Iowa Code section 17A.9A for the submission of waiver information. The submission shall identify the rule(s) for which a waiver has been granted or denied, the number of times a waiver was granted or denied for each rule, a citation to the statutory provisions implemented by these rules, and a general summary of the reasons justifying the authority’s actions on waiver requests. If practicable, the report shall detail the extent to which granting a waiver has established a precedent for additional waivers and the extent to which the granting of a waiver has affected the general applicability of the rule itself.

ITEM 8. Amend rule 261—199.7(ExecOrd11) as follows:

261—199.7(ExecOrd11 17A,15) Voiding or cancellation. A waiver ~~or variance~~ is void if the material facts upon which the request is based are not true or if material facts have been withheld. The director/board may at any time cancel a waiver ~~or variance~~ upon appropriate notice if the director/board finds that the facts as stated in the request are not true, material facts have been withheld, the alternative means of compliance provided in the waiver ~~or variance~~ have failed to achieve the objectives of the statute, or the requester has failed to comply with the conditions of the order.

ITEM 9. Amend rule 261—199.8(ExecOrd11) as follows:

261—199.8(ExecOrd11 17A,15) Violations. Violation of conditions in the waiver ~~or variance~~ approval is the equivalent of violation of the particular rule for which the waiver ~~or variance~~ is granted and is subject to the same remedies or penalties.

ITEM 10. Amend rule 261—199.9(ExecOrd11) as follows:

261—199.9(ExecOrd11 17A,15) Defense. After the director/board issues an order granting a waiver ~~or variance~~, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

ITEM 11. Amend rule 261—199.10(ExecOrd11,17A) as follows:

261—199.10(ExecOrd11,17A,15) Appeals. Granting or denying a request for waiver ~~or variance~~ is final agency action under Iowa Code chapter 17A. An appeal to district court shall be taken within 30 days of the issuance of the ruling in response to the request unless a contrary time is provided by rule or statute.

Exhibit A

Sample Petition (Request) for Waiver/~~Variance~~

BEFORE THE IOWA ~~DEPARTMENT OF~~ ECONOMIC DEVELOPMENT AUTHORITY

Petition by (insert name of petitioner) for
the waiver of (insert rule citation)
relating to (insert the subject matter).



PETITION FOR
WAIVER

Requests for waiver ~~or variance~~ from a ~~department~~ an authority rule shall include the following information in the petition for waiver ~~or variance~~ where applicable and known:

- a. Provide the petitioner’s (person asking for a waiver ~~or variance~~) name, address, and telephone number.
- b. Describe and cite the specific rule from which a waiver ~~or variance~~ is requested.
- c. Describe the specific waiver ~~or variance~~ requested; include the exact scope and time period that the waiver ~~or variance~~ will extend.
- d. Explain the important facts that the petitioner believes justify a waiver ~~or variance~~. Include in your answer why (1) applying the rule will result in undue hardship or injustice to the petitioner; and (2)

granting a waiver ~~or variance~~ to the petitioner is consistent with the public interest; and (3) granting the waiver ~~or variance~~ will not prejudice the substantial legal rights of any person; and (4) where applicable, how substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

e. Provide history of prior contacts between the ~~department~~ authority and petitioner relating to the regulated activity, license, grant, loan or other financial assistance that would be affected by the waiver ~~or variance~~; include a description of each affected license, grant, loan or other financial assistance held by the petitioner, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, license, grant or loan within the last five years.

f. Provide information known to the petitioner regarding the ~~department's~~ authority's treatment of similar cases.

g. Provide the name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question, or which might be affected by the grant of a waiver ~~or variance~~.

h. Provide the name, address, and telephone number of any person or entity who would be adversely affected or disadvantaged by the grant of the waiver ~~or variance~~.

i. Provide the name, address, and telephone number of any person with knowledge of the relevant or important facts relating to the requested waiver ~~or variance~~.

j. Provide signed releases of information authorizing persons with knowledge regarding the request to furnish the ~~department~~ authority with information relevant to the waiver ~~or variance~~.

I hereby attest to the accuracy and truthfulness of the above information.

Petitioner's signature _____ Date _____

Petitioner should note the following when requesting or petitioning for a waiver ~~or variance~~:

1. The petitioner has the burden of proving, by clear and convincing evidence, the following to the director/board: (a) application of the rule to the petitioner would result in undue hardship or injustice to the petitioner; and (b) waiver ~~or variance~~ on the basis of the particular circumstances relative to the petitioner would be consistent with the public interest; and (c) waiver ~~or variance~~ in the specific case would not prejudice the substantial legal rights of any person; and (d) where applicable, how substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

2. The ~~department~~ authority may request additional information from or request an informal meeting with the petitioner prior to issuing a ruling granting or denying a request for waiver ~~or variance~~.

3. All petitions for waiver ~~or variance~~ must be submitted in writing to the Iowa ~~Department of Economic Development Authority~~, Office of the Director, ~~200 East Grand~~ 1963 Bell Avenue, Suite 200, Des Moines, Iowa ~~50309-1819~~ 50315, Attention: Legal Counsel. If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.

ITEM 12. Amend **261—Chapter 199**, implementation sentence, as follows:

These rules are intended to implement ~~Executive Order Number 11 and 2000 Iowa Acts, House File 2206~~ Iowa Code section 17A.9A and chapter 15.

[Filed 5/24/21, effective 7/21/21]

[Published 6/16/21]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 6/16/21.