



TOWN OF LINCOLN, NH
 Planning & Zoning Department
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APPLICATION FOR AN EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS

Per NH RSA 674:33-a, effective 1/1/1997

To: Zoning Board of Adjustment,
 Town of Lincoln

Name of Appellant:

Address of Appellant:

Appellant's Telephone Number: _____

Appellant's Email Address, if any: _____

Name of Property Owner:

Address of Property Owner: _____

(If same as applicant, write "same")

Owner's Telephone Number: _____

Owner's Email Address, if any: _____

For property located at _____

(Number, Street, Tax Map & Lot #)

NOTE: This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if the space provided is inadequate.

APPLICATION FOR AN EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS

An Equitable Waiver of Dimensional Requirements is requested from the following sections of the
 Land Use Plan Ordinance Article IV and under Article VIII.

An Equitable Waiver of Dimensional Requirements is requested from Article VI (District and District Regulations), Section B (District Regulations), Paragraph 2 (Land Use Schedule), Subparagraph 2 (Land Use Schedule), Sub-subparagraph 4 (Dimensional Chart) and/or Section of the Land Use Plan Ordinance to permit:

Facts in support of granting the waiver:

1. Does the request involve a dimensional requirement, not a use restriction?

☐ YES

☐ NO

2. Explain how the violation has existed for 10 years or more with no enforcement action, including written notice, being commenced by the Town.

OR

Explain how the nonconformity was discovered after the structure was substantially completed or after a vacant lot in violation had been transferred to a bona fide purchaser

AND

How the violation was not an outcome of ignorance of the law or bad faith but resulted from a good faith error in measurement or calculation.

- 3. Explain how the nonconformity does not constitute a nuisance nor diminish the value or interfere with future uses of other property in the area.**

- 4. Explain how the cost of correction far outweighs any public benefit to be gained.**

Appellant's Name

Property Owner's Name

Appellant's Signature

Date

Property Owner's Signature

Date

Equitable Waiver of Dimensional Requirement Explained:

The Lincoln Land Use Ordinance cannot limit or increase the powers of the ZBA to grant equitable waivers of dimensional requirements beyond the statutory authority. Each of the listed conditions must be found in order for such a waiver to be legally granted.

Here is the applicable State Statute:

RSA 674:33-a Equitable Waiver of Dimensional Requirement

- I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:
 - (a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;
 - (b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;
 - (c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and
 - (d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.
- IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

Here are excerpts from the State of NH's Zoning Board of Adjustment handbook:

Zoning Board of Adjustment in New Hampshire: A Handbook for Local Officials (2020)

NH Office of Planning and Development, Johnson Hall, 107 Pleasant Street, Concord, NH 03301

Excerpts:

This provision was approved by the legislature to address the situations where a good faith error was made in the siting of a building or other dimensional layout issue. In the past, when it was discovered that a building had been improperly sited and slightly encroached into the setback area, the only relief available was to seek a variance. Often, these variances were granted because there was no reasonable alternative for the landowner and no particular harm was being done. But in most cases, there would be a serious question as to whether the requirements for a variance could be met.

The legislature addressed this problem by creating the equitable waiver provision of RSA 674:33-a. When a lot or structure is discovered to be in violation of a physical layout or dimensional requirement, the zoning board of adjustment may grant a waiver only if each of the four findings as outlined in the statute are made:

- (a) lack of discovery;
- (b) good faith error in measurement or calculation;
- (c) no diminution in value of surrounding property; and
- (d) the cost of correcting the mistake outweighs any public benefit.

In lieu of the zoning board of adjustment finding that the violation was not discovered in a timely manner and that the mistake was made in good faith, the owner can meet the first two parts of the four-part test by demonstrating that the violation has existed for ten or more years and that no enforcement action was commenced against the violation during that time by the municipality or by any person directly affected.

Equitable waivers may be granted only from physical layout, mathematical, or dimensional requirements and may not be granted from use restrictions. Once a waiver is granted, the property is not considered to be a nonconforming use and the waiver does not exempt future use, construction, reconstruction or additions on the property from full compliance with the ordinance. The fact that a waiver is available under certain circumstances does not alter the principle that owners of land should understand all land use requirements. In addition, the statute does not impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or compliance of property inspected by them.

The application and hearing procedures for equitable waivers are governed by RSA 676:5-7. Rehearings and appeals are governed by RSA 677:2-14. The burden of proof rests with the property owner seeking an equitable waiver.