

### ***A question regarding 'grandfathered' applications***

Plan-link posting and replies, September 2012

*Posting:*

I have a question about 'grandfathered' applications.

Suppose that during a subdivision applicant's design review stage, the town made a couple of changes to the ordinance. One (say in increase in lot size) clearly cannot be applied to the project per 676:12. The other change would benefit the applicant (i.e. a decrease in the width required for interior roads).

Can the applicant avoid the one change and still benefit from the second by redesigning the plan with narrower roads? Or is the project governed by the old ordinance in its entirety?

Thanks in advance for any input.

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*Reply 1:*

The design review phase is the more formal portion of the preliminary review process outlined in [RSA 676:4, II](#). Assuming that the required notice was given, the project would not be bound by any changes to the zoning ordinance, subdivision or site plan review regulations that are proposed provided that a formal application is filed with the planning board within 12 months of the end of the design review process.

The applicant is therefore protected from any zoning, subdivision or site plan changes for 12 months after the design review process ends. The board should clearly note when the design review process is over, presumably at the end of the applicant's audience with the planning board at a particular meeting unless the process extends on to subsequent meetings. In any event, it should be declared "over" by the board at some point which starts the 12 month window for the applicant to submit their formal application. If they don't, then any changes in subdivision or site plan adopted by the board, or any zoning changes approved by the legislative body would apply to the project, or any changes that are formally proposed but not yet adopted pursuant to [RSA 676:12 I](#).

The question is, if the applicant is now in their 12 month window where they are using the "old" regulations and not bound by the "new" or "proposed" changes, can they still design their project based on the less restrictive changes, in other words can they pick and choose what to use or not? I believe they cannot and are subject to the "old" regulations in their entirety. If they wish to seek the benefit and reduced expense of narrower roads, they could apply for a waiver when they submit their formal application which I assume the board would readily approve since the board wants narrower roads not wider as evident by the changes in the regulations.

This is just my opinion and not necessarily right or wrong. I urge you to seek additional advice as well as consult with town counsel.

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*Reply 2:*

Thanks to Chris for this review of [RSA 676:4, II](#) and [RSA 676:12, VI](#). I agree with most of what he says, but I'd take a more nuanced approach to the final point.

I think it's important to remember what the purpose of vesting is in the final sentence of [RSA 676:12,VI](#) (below) – it is intended to **protect the applicant** against regulatory changes made in response to a pre-application proposal. Distinguish this from the vesting found in [RSA 674:39](#), which protects the results of an approval for a limited period of time. So under these circumstances, shouldn't the applicant be able to decide if a provision should apply or not? It's true that the first sentence of the paragraph says "No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application..." You could construe this to mean that anything within the same zoning warrant article must be taken as a whole; so if it's a comprehensive rezoning, then it's all or nothing. But if you have separately enumerated articles, then I think the applicant should be able to choose.

I think this provides a logical outcome. If you have different standards being amended in a zoning ordinance, to the extent there is an integrated impact among them, they should be part of the same warrant article and the applicant should not be able to parse them out. But if there is no clear relationship between the changes, then they should be separate warrant articles and the applicant should be able to differentiate between them. I think the same reasoning applies to subdivision and site plan regulations, though these tend to be amended by planning boards in one fell swoop.

I'm not sure that it makes sense that the law should both protect the applicant and allow the planning board to "stick it to him" at the same time. But I wholeheartedly agree with Chris' point about consulting with legal counsel. As far as I know, this issue has not been decided by the Supreme Court.

[RSA 676:12, VI.](#)

*The provisions of paragraph I shall not apply to any plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) prior to the first legal notice of a proposed change in a building code or zoning ordinance or any amendment thereto. No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment. The provisions of this paragraph shall also apply to proposals submitted to a planning board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the planning board within 12 months of the end of the design review process.*