COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

BRIERNECK REALTY, LLC

v.

GLOUCESTER ZONING BOARD OF APPEALS

No. 05-05

DECISION

August 11, 2008

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

BRIERNECK REALTY, LLC, Appellant	)	
v.	)	No. 05-05
ZONING BOARD OF APPEALS OF GLOUCESTER Appellee	)	

DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR § 56.00,[1] brought by Brierneck Realty, LLC (Brierneck), from a decision of the City of Gloucester Zoning Board of Appeals (Board) denying an application for a comprehensive permit to build twelve residential units at the corner of Thatcher Road (also known as Route 127A) and Witham Street, Gloucester, Massachusetts. Although the Board denied Brierneck's comprehensive permit, it was closely divided in its decision. Exh. 1. This project raises interesting questions concerning the permitting of housing, or any development, near coastal zones. It also tangentially exposed environmental issues which the city may face in upcoming decades resulting from potential environmental change. While we acknowledge the importance of these issues, our decision is based on the record before us. The Board did not meet its burden of demonstrating a valid local concern that outweighs the need for affordable housing. In addition, Brierneck demonstrated unequal treatment in the city's actions regarding subsidized and unsubsidized housing.

1. During the pendency of this appeal, following the parties' submissions of post-hearing memoranda, DHCD changed its regulations pertaining to Chapter 40B. By its terms, the new regulation, 760 CMR 56.00, supersedes, in most respects, both 760 CMR 30.00 and 31.00, under which the developer brought its appeal. The new regulations themselves indicate that they are generally to be applied to matters pending before us. 760 CMR 56.08(3). Since many provisions of the new regulations are identical to those in the previous version, few issues of fairness with regard to retroactive application are raised. Where we are required to apply the former regulations, we so indicate. See *Cozy Hearth Community Corp. v. Edgartown,* No. 06-09, slip op. at 3-4 (Mass. Housing Appeals Committee Apr. 14, 2008).

Therefore for the reasons set forth below, the decision of the Board is overturned and we order a comprehensive permit to issue to conform to this decision.

I. PROCEDURAL HISTORY AND BACKGROUND

On July 6, 2004 Brierneck submitted an application to the Board for a comprehensive permit to build 12 townhouse condominium units. Exhs. 3, 3A, 3D. The project has received a letter of eligibility from the Massachusetts Housing Finance Agency (MassHousing) stating that the project would be eligible under both the Housing Starts Program of MassHousing and the New England Fund Program (NEF) of the Federal Home Loan Bank (FHLB) of Boston. Exh. 3G.

The Board's public hearing began on September 30, 2004 and continued on three additional sessions. Pre-Hearing Order, § II, ¶ 6; Exh. 1. The Board filed its decision denying the application with the Gloucester city clerk on February 4, 2005, and filed an amendment to that decision on February 7, 2005. Exhs. 1; 2; Pre-Hearing Order, § II, ¶ 1.

On February 23, 2005, Brierneck filed its appeal with the Housing Appeals Committee. The Committee held a Conference of Counsel on March 18, 2005. The Board thereafter filed a motion to dismiss and the developer filed a motion for summary disposition. The presiding officer denied both motions on November 21, 2005.

After the January 9, 2006 Pre-Hearing Conference, the presiding officer issued a Pre-Hearing Order signed by the parties. Following a jointly requested remand to the Board, the presiding officer granted Brierneck's request for a revocation of the remand on August 17, 2006. The parties thereafter submitted prefiled direct testimony and Brierneck filed prefiled rebuttal testimony. On January 5, 2007, Brierneck filed a motion in limine, seeking to exclude portions of the testimony of certain Board witnesses. The first evidentiary session of the Committee's *de novo* hearing and a site visit were both held in Gloucester on January 8, 2007. The evidentiary hearing continued on January 9 and 10, 2007. After receipt of the parties' written arguments on the motion in limine, the presiding officer denied it on April 3, 2007. Following the submission of a verbatim transcript, and several requests for extensions of the deadline to submit briefs, Brierneck and the Board filed their post-hearing memoranda on October 31 and November 1, 2007, respectively.

II. FACTUAL OVERVIEW

Brierneck proposes to develop a parcel containing two vacant lots totaling 5.947 acres, located at the corner of Thatcher Road (Route 127A) and Witham Street in Gloucester. The parcel is located directly across from Good Harbor Beach and the Atlantic Ocean within the Coastal Barrier Resources System. Pre-Hearing Order, § II, ¶ 1; Exhs. 3A; 3C; 3H; 13. The roughly one and a half acre upland front part of the lot, where the project is to be constructed (the development site), formerly a salt meadow, was filled in the late 1970's. Exhs. 1, 2, 4M; 27, ¶ 10; 28, ¶ 6; Tr. III, 26-27. The record indicates the filling was accepted by the state Department of Environmental Protection (DEP).[2] Exh. 1, p. 2. The Federal Emergency Management Association (FEMA) Map dated July 20, 1992 for the area indicates the parcel is within an A2 floodplain and a coastal barrier resource area. Exh. 14B. See Exh. 14A; Tr. I, 37. However, on May 25, 2006, FEMA officially certified a map amendment redesignating the development site as in Zone B and therefore outside the Special Flood Hazard Area, or 100-year flood plain. Exh. 15; see Exhs. 3; 23, ¶ 20; Tr. I, 48, 55-56. Although federal flood insurance is not available, it would not be required for the development site. Tr. I, 40, 47-48. The Supplement to the city's Community Development Plan indicates the project site to be in the 500-year flood zone. Exh. 8B, Fig. 5.

The front upland development site, where the buildings are proposed to be constructed, is zoned Extensive Business (EB), and the rear portion, consisting of salt marsh, is zoned R-3 (Medium/High Density Residential). Exhs. 3C; 12, § 2.1.1; 20, ¶ 7; 28, ¶ 5. The EB zone was established "to accommodate business, retail and service uses serving a city-wide clientele." City of Gloucester Zoning Ordinance, § 2.1.1. Exh. 12. Most uses permitted in the EB district are only allowed by special permit. The Zoning Ordinance prohibits multifamily uses in either portion of the project site. Exh. 12, § 2.3; Exh. 28, ¶ 5. The remaining 4.5 acres of salt marsh include portions located in the flood plain. No building is proposed to be located in either the flood plain or salt marsh. The development site was previously developed and occupied by a restaurant, until it burned down. The building has since been razed and the property is vacant. Exhs. 3C; 3D; 20, ¶ 8; 32, ¶¶ 2-3.

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2. The Board decision contained typographical errors referring to "illegal" filling of the site, which the amendment to the decision deleted. See Exhs. 1, 2.

Brierneck contemplates building 12 residential condominium townhouse units located in one building including three to be restricted as low and moderate income units. The style of the building construction is intended to complement the architecture of the neighborhood. The developer proposes two one-way driveways to the development located on Thatcher Road, to serve for access and egress. The access and parking areas are to be constructed using grasscrete pavers with sand filling to enhance rainwater infiltration on the site. An approximately 35-foot wide area to the rear of the building will have natural plant growth, to a post and rail fence to block access to the wetlands located at the rear of the property. The naturally planted areas are available to residents for passive recreation. Exhs. 3A; 20, ¶¶ 26, 28, 32-33; 22, ¶ 10; 25, ¶ 15.

The project was approved with conditions under the Wetlands Protection Act by the Gloucester Conservation Commission. Exhs. 3; 4H; 20, ¶ 13. The Massachusetts DEP subsequently issued a Superseding Order of Conditions which was to be in effect to January 17, 2008. Exhs. 3, 4I; 5, 6. The Order of Conditions for the project precludes the use of fertilizers on site. There will be no residential lawns and gardens that will use fertilizers, herbicides or insecticides. Exh. 32, ¶ 4; Tr. II, 218.

Amelia's Restaurant, the sole commercial establishment opposite Good Harbor Beach, lies directly across Witham Street from the development site. Tr. I, 68. That restaurant is not in the Coastal Barrier Resources System. Exh. 14B. The city zoning map shows that the development site and the parcel across the street where Amelia's restaurant is situated, are two of several pockets zoned for business in the general Brierneck area, which is primarily designated as "Medium/High Density Residential," Exhs. 8B, Fig. 1; 12. The salt marsh portion of the parcel and parcels to the northwest of the site on Witham Street are included in the residential district. Exh. 8B, Fig. 1. Although most parcels immediately neighboring the site are single and two-family homes, Nugent Farm, the abutter to the west of the site, is a large multifamily condominium development with over 100 units. Multifamily development exists to the east as well. Tr. I, 64-67; II, 215-216. The neighboring beach, Good Harbor Beach, is a major tourist attraction in Gloucester. It is a barrier beach, and within the Coastal Barrier Resources System and the 100-year coastal flood area. Exhs. 8B, Fig. 5; 13; 14A; 14B. Flooding has been observed on the marsh portion of the parcel, as well as on Witham Street near the intersection of Thatcher Road, at the Thatcher Road bridge, and on Witham Street adjacent to the beach. Exh. 29, ¶¶ 3-4; 30, ¶¶ 4-5; Tr. I, 115, 123.

The city central fire station is located in the center of Gloucester, approximately 2.3 miles to the west of the development. The development could be accessed by fire equipment from the city center via Thatcher or Witham Streets. It could also be accessed via Rockport. Exh. 20, ¶¶ 23-25; Exh. 21, ¶¶ 27-31; Tr. I, 124.

Additional facts specific to the disputed issues are addressed below in the discussions of these issues.

III. MOTIONS

A. Brierneck's Motion for Partial Summary Disposition

Brierneck sought partial summary disposition on whether certain off-site safety issues, including off site flooding, were legitimate local concerns under Chapter 40B. In her ruling denying the motion, the presiding officer stated,

> An off-site condition may raise a local concern because either the project impacts the provision of municipal services to the community in general or the off-site condition affects the health, safety or other concerns of residents of the project. Here, the question of off-site flooding raises the issue of loss of general access to the site, and particularly, loss of emergency access to the site – issues that appear primarily to concern the health and safety of residents of the site.

Brierneck Realty, LLC v. Gloucester, No. 05-05, slip op. at 3 (Mass. Housing Appeals Committee Nov. 21, 2005 Rulings on Motion for Partial Summary Disposition and Motion to Dismiss) (Nov 21, 2005 Rulings), citing *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 00-11, slip op. at 10 (Mass. Housing Appeals Committee Apr. 10, 2002). She determined that a review of the particular facts in the context of the evidentiary hearing was necessary to determine whether the alleged off-site conditions present a legitimate local concern. We concur in the presiding officer's determination.

B. Board's Motion to Dismiss

The Board moved to dismiss on the ground that the project was not fundable because the programs that would fund it are prohibited by law from doing so. In so moving, the Board relied on the federal Coastal Barrier Resources Act (CBRA), 16 U.S.C. § 3501, *et seq.*, to argue that the proposed project lies in the Coastal Barrier Resources System, and thus subject to the CBRA restriction on federal spending in coastal areas. It also argued that Massachusetts Executive Order No. 149, issued by former Governor Michael S. Dukakis on November 29, 1978, Exh.

18 (ID) prohibited funding under state law. The presiding officer denied this motion noting that the subsidizing agency had issued a project eligibility letter which established a rebuttable presumption of fundability, and stating that this matter fell within the category of issues that were "characteristically within the province of the subsidizing agency, such as financing arrangements, profit projections, the developer's qualifications, and marketability." *Brierneck Realty, LLC v. Gloucester,* No. 05-05, slip op. at 7 (Nov. 21, 2005 Rulings), quoting from *Farmview Affordable Homes, LLC v. Sandwich*, No. 02-32, slip op. at 3 (Mass. Housing Appeals Committee May 21, 2004 Ruling on Motion to Quash Subpoenas). See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee June 25, 1992). In its post-hearing memorandum, the Board renewed its argument that the project is not fundable by a subsidizing agency. We address the renewed argument below in the discussion of Preliminary Requirements.[3]

C. Brierneck's Motion in Limine

Brierneck submitted a motion in limine seeking to preclude portions of the opinion testimony of the city conservation agent, chief administrative officer, planning director and fire chief. In addition Brierneck requested the exclusion of lay opinion testimony of a neighbor of the site. The presiding officer denied that motion, ruling that the parties may raise in their briefs issues regarding the validity and credibility of the opinion testimony of any of these witnesses or other witnesses in their post-hearing briefs. *Brierneck Realty, LLC v. Gloucester,* No. 05-05, slip op. at 2 (Mass. Housing Appeals Committee Apr. 3, 2007 Ruling on Motion in Limine).

We concur in the presiding officer's ruling. The admission of expert testimony is a matter of discretion, particularly in an administrative proceeding where the rules of evidence are more relaxed than in a court proceeding. *100 Burrill Street, LLC v. Swampscott*, No. 05-21, slip op. at 2 n.2 (Mass. Housing Appeals Committee June 9, 2008). As both parties acknowledge, the important question is whether the witness has sufficient "education, training, experience and familiarity" with the subject matter of his or her testimony. *Letch v. Daniels*, 401 Mass. 65, 68, 514 N.E. 2d 675 (1987). See *Commonwealth v. Frangipane*, 433 Mass. 527, 535, 744 N.E. 2d

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3. The Supreme Judicial Court has characterized the inquiry into whether a project is fundable as part of the developer's *prima facie* case. *Woburn v. Housing Appeals Committee,* 451 Mass. 581, 591, 887 N.E. 2d 1051 (2008), citing *Middleborough v. Housing Appeals Committee,* 449 Mass. 514, 520-521, 870 N.E. 2d 67 (2007).

25 (2001); *Commonwealth v. United Books, Inc.*, 389 Mass. 888, 896, 453 N.E. 2d 406 (1983). "Whether a person who might qualify as an expert in one subject is qualified to give an expert opinion in another somewhat related subject will depend upon the circumstances of the case." M. S. Brodin, *et al., Handbook of Massachusetts Evidence* § 7.5.2 at 425 (8th ed. 2007) and cases cited. If an expert is considered to have sufficient qualifications to render an opinion, questions regarding the source of the witness's qualifications go to the weight of the testimony, not its admissibility. *Id.* at 426. Also see *id.* § 7.4.1 at 407, quoting Proposed Mass.R.Evid. 702 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise").

Lay opinions, sometimes characterized as "shorthand expressions" are permitted if the subject matter cannot be reproduced or described precisely as it appeared to the witness at the time and the facts can be comprehended and understood by people. *Handbook on Massachusetts Evidence* § 7.2.1 at 395-396. "The witness must have personal knowledge of the facts on which the opinion is based and the opinion must be one which lay persons in general are capable of drawing." *Id.* at 396.

The admission of this testimony under the less strict rules governing administrative proceedings does not prejudice Brierneck as this Committee is experienced in evaluating such testimony. The parties' arguments raised regarding the nature of expert or lay opinion testimony are directly related to the relevance and credibility of the witnesses' testimony. Thus, we take the arguments as addressed to the weight, if any, to be accorded opinion testimony regarding a specific matter in dispute. In some circumstances testimony of a witness is entitled to no weight. Where necessary below, we discuss the extent to which a challenged witness's opinion was credible, relevant or entitled to receive any weight.

IV. PRELIMINARY REQUIREMENTS

A. Fundability

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, an appellant must satisfy three preliminary requirements found in 760 CMR 56.04(1). The parties stipulated that Brierneck has met two of the three requirements, namely

that it is a limited dividend organization (see 760 CMR 56.04(1)(a)) and that it controls the site (see 760 CMR 56.04(1)(c)).[4] Pre-Hearing Order, § II, ¶¶ 3-4.

The outstanding requirement is found at 760 CMR 56.04(1)(b), which states "The Project shall be fundable by a Subsidizing Agency under a Low or Moderate Income Housing subsidy program." The Board has renewed its argument in support of its motion to dismiss that Brierneck cannot meet this requirement, and relies on testimony submitted at the hearing.

Brierneck has applied for alternate funding under either the New England Fund or the MassHousing Housing Starts program. Therefore, to establish fundability, it must only show it meets the standard of either program. Brierneck submitted the project eligibility letter from MassHousing, see Exh. 3G, which established a rebuttable presumption of fundability through either the NEF or the Housing Starts Program pursuant to the Committee's prior regulations, 760 CMR 31.07(1)(a) and 31.01(2).[5]

To rebut this presumption, the Board argues that the project is not eligible for federal funding because construction of a structure or improvement on the site is prohibited by the CBRA, and the developer cannot meet the federal requirement for insurance in a flood plain. It also argues that it is against public policy to use state funds to construct housing or structures in an area which has been deemed by the local community and the federal government to be a flood hazard area.

We find that Brierneck has established fundability with regard to the Housing Starts program, and the Board has not successfully rebutted the presumption. The Board apparently renews the argument in its motion that Massachusetts Executive Order No. 149 prohibits

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4. Formerly 760 CMR 31.01(1)(a) and 31.01(1)(c) respectively.

5. The project eligibility letter requirements set out in the new regulations, 760 CMR 54.04(4), do not apply retroactively to the project eligibility letter for this proceeding. Under the transition rules found at § 56.08(3)(c), § 56.04(4) does not apply to project applications filed with a board before the effective date of the regulation, February 22, 2008. Since § 56.04(4), which specifies the findings in determination of project eligibility, is inapplicable, we look to the provisions of the predecessor regulation. See generally *Cozy Hearth, supra,* No. 06-09, slip op. at 3-4. Also see *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 628, 307 N.E. 2d 316, 318 (1974) ("once a trial has begun, practical considerations of efficiency and finality dictate that such a statute then in effect will control the trial itself and will be the standard used in any subsequent appellate review of the trial") and cases cited. This rule is applicable here because of changes to the regulatory scheme that occurred effective February 22, 2008, after the conclusion of the evidentiary hearing in the matter and the submission of post hearing memoranda. Therefore, the existence of a difference in treatment accorded by the new and former regulations would require us to apply 760 CMR 31.07(1)(a) and 31.01(2).

MassHousing from funding the project under the Housing Starts program. It argues that the city and the Commonwealth must work to implement hazard mitigation policies, and stop waste of taxpayer dollars on construction on vulnerable coastal barriers. To the extent the Board relies upon Executive Order No. 149, the Board did not avail itself of the opportunity to demonstrate that the executive order remains in force. See Tr. III, 101-102; Exh. 18 (ID). In any event, we agree with the presiding officer's ruling that the language of the executive order does not appear to prohibit state funding for this project. Paragraphs 1(ii.) and (iv.) of that Executive Order state:

> ii.) All state agencies responsible for the administration of grant or loan programs, involving the construction of structures, roads, or other facilities shall evaluate potential flood hazards to such facilities and, in order to minimize both the exposure of such facilities to flood damage and the need for future state expenditures for flood protection and disaster relief, shall to the extent possible avoid the use of floodplains for such construction. ...
>
> iv.) All state agencies responsible for programs which affect land use planning, including state permit programs, shall take flood hazards into account when evaluating plans, and encourage land use appropriate to the degree of hazard involved.

Exh. 18 (ID). Generally, executive orders based on policy considerations do not bind the Governor's discretion. See *Lambert v. Executive Director of Judicial Nominating Council*, 425 Mass. 406, 409 n.7, 681 N.E.2d 285 (1997). Additionally, the executive order appears to be in the nature of a request or suggested direction for the execution of duties, and may not be binding on the employees of the Governor. See *id,* citing *Shapp v. Butera*, 22 Pa. Commw. 229, 348 A.2d 910, 914 (1975) (although *Shapp's* extension of this proposition to the Governor's subordinates was not expressly adopted by *Lambert's* citation to *Shapp,* the context suggests the Supreme Judicial Court would be amenable to this view). Therefore, the Board has not shown that state law prohibits funding this project and it has not rebutted the presumption of fundability. Moreover, since the development site is not in a flood plain, the applicability of the executive order would be limited.

The main thrust of the Board's argument is addressed to whether Brierneck can meet federal requirements of the NEF program. The FEMA map has established the special flood hazard area, or 100-year flood elevation for the property at 9 feet above sea level. FEMA's Flood Insurance Rate Maps state that the development site is at an elevation of 9 feet above sea level. Exhs. 14A; 14B; 15; 23, ¶ 12. This is consistent with the testimony of Brierneck's land surveyor who stated the elevation of the upland area of the parcel, which he termed the project

site, is between 8.0 and 12.3 feet above sea level, the elevation of the building location is 10.3 to 12.0 feet above sea level and the elevation of the salt marsh is 6.5 feet above sea level. Exh. 23, ¶¶ 9-11. Although the 1992 FEMA map indicates the property was located within a special flood hazard area A2 (area of 100-year flood), upon a request for correction by the developer's land surveyor, FEMA issued a recent Letter of Map Amendment which has amended the Flood Insurance Rate Map to change the designation of the upland portion of the site (the development site) from Zone A2 to Zone B. Exh. 15; see Exhs. 14A; 14B; 16; 23, ¶¶ 14-20; 31, ¶¶ 17, 20; Tr. 1, 48, 55-56. Zone B is outside the flood hazard area in which flooding is statistically predicted to occur once in 100 years.[6]

The Letter of Map Amendment states that "the Federal mandatory flood insurance requirement does not apply" to the development site. Exh. 15; Tr. I, 46-48. The Board has not demonstrated that it would be required outside the 100-year flood plain. Therefore, on the evidence in the record, we find that flood insurance would not be required for this project. Exh. 15; Tr. I, 48, 56.

The Board argues that the development site is actually within the flood plain, despite the map amendment issued by FEMA. The city conservation agent and planning director both questioned FEMA's map amendment and suggested that the need for modification of flood maps precludes development on the site. See Tr. II, 103, 148, 161-162. We do not consider these views to outweigh the determination by FEMA in its map amendment to find the development site is outside the 100-year flood plain. Exhs. 15; 23, ¶¶ 10-20; 33, ¶¶ 16, 34.

The Board also argues the project parcel is located in the Coastal Barrier Resources System and that unlike a floodplain designation, a CBRA designation cannot be changed, and thus the CBRA prohibits all federal funding and eligibility for federally insured flood insurance for any construction. See 16 U.S.C. § 3504. Also see § 3503 (requires boundary review and modification every five years). The purpose of the CBRA is to "minimize the loss of human life, wasteful expenditure of Federal revenues, and the damage to fish, wildlife, and other natural resources associated with the coastal barriers along the Atlantic and Gulf coasts... by restricting future Federal expenditures and financial assistance which have the effect of encouraging

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6. Brierneck argues that the development site may be in Zone C, "an area of minimal flooding." This distinction is not critical to our decision as both Zones B and C are outside the 100-year flood plain. See Tr. I, 55-56. Also see Exhs. 8B, Fig. 5; 14A; 14B; 15; 23, ¶ 20.

development of coastal barriers...." 16 U.S.C. § 3501(b). The Board argues that the NEF financing represents a federal subsidy and therefore § 3505 applies to the NEF project, prohibiting the construction of subsidized housing on the site.

We need not determine conclusively whether the CBRA would preclude Brierneck obtaining NEF funding for this project.[7] Under our former regulations the Committee would normally not consider evidence about the subsidizing agency's financing arrangements for a project, other than evidence concerning the status of the project before the subsidizing agency. 760 CMR 31.07(4)(a). *Farmview, supra,* No. 02-32, slip op. at 2-3 and cases cited. For this reason the presiding officer correctly determined that it was appropriate to defer the issue to MassHousing to address in the context of its final approval when the choice of funding source is determined. This deferral is also consistent with the new project eligibility requirements of the current regulations which leave conclusive determinations of project eligibility including fundability to the subsidizing agency. See 760 CMR 56.04(4), 56.04(6).

Accordingly, we find that Brierneck has established fundability for the purposes of this proceeding. Complete review of the funding will occur in the ordinary course in the subsidizing agency final approval.

B. Regional Need for Low or Moderate Income Housing

The City of Gloucester has not satisfied any of the statutory minima set forth in the second sentence of the definition of "consistent with local needs" in G.L. c. 40B, § 20. Pre-Hearing Order, § II, ¶ 2. As case law and Committee precedents establish, this failure to meet the statutory minima establishes a rebuttable presumption of a substantial regional housing need that outweighs local concerns. 760 CMR 56.07(3)(a). See § 56.03(1).[8] See *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 367, 294 N.E. 2d 393, 413 (1973)

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7. The CBRA states, subject to a few listed exceptions, that, "no new expenditure or new financial assistance may be made available under authority of any Federal law for any purpose within the System...." 16 U.S.C. § 3504(a). Financial assistance is defined, with some exclusions, as "any form of loan, grant, guaranty, insurance, payment, rebate, subsidy, or any other form of direct or indirect Federal assistance...." 16 U.S.C. § 3502(3). In its motion to dismiss, the Board argued that the CBRA prohibits FHLB Boston from funding the proposal under its NEF program because such funding would be financial assistance made under authority of federal law. In opposing the motion to dismiss, Brierneck countered that FHLB Boston is a private entity and not subject to the CBRA. We need not decide that issue, as we find the project fundable through the Housing Starts Program.

8. See former 760 CMR 31.07(1), 31.07(1)(e) and 31.04(1) and (2).

(municipality's failure to meet statutory minimum housing obligations "will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal").

Where as here, neither party has introduced specific evidence challenging the existence of a regional need for affordable housing, the rebuttable presumption leads to the finding that the housing need exists. The Gloucester Community Development Plan supports this presumption as well. See Exhs. 8A; 8B.

V. STANDARD OF REVIEW

A. Appellant's Burden of Proof

When the Board has denied a comprehensive permit, the central question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, a developer has alternative means to prove its case before the Committee. First, a developer "may establish a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute (which shall be limited, in the case of a Pre-Hearing Order, to contested issues identified therein), that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." 760 CMR 56.07(2)(a)(2). Alternatively a developer may prove that "Local Requirements and Regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 56.07(2)(a)(4); G.L. c. 40B, § 20.

The Board contends that Brierneck has failed to make its *prima facie* showing that the proposal complies with state or federal requirements or other generally recognized standards. It argues that the project fails to meet design standards because federal laws—the Federal Emergency Management Act and the CBRA—discourage developing the parcel. It also contends that Brierneck has failed to prove unequal treatment. The Board did not contest whether Brierneck had met its burden in any other respect.

Brierneck argues that it has submitted sufficient evidence of compliance with state or federal requirements or generally accepted standards with respect to certain contested issues, and that it has demonstrated unequal treatment as to the remaining issues. We find that Brierneck has met its burden. Brierneck submitted evidence concerning the project's compliance with state

or federal requirements or generally accepted standards concerning site and architectural design (See discussion of fundability above; Exh. 25, ¶¶ 8-19; 36, ¶¶ 5-11; Tr. I, 67); open space (Exhs. 3E; 8A, p. 61); traffic (Exhs. 3J; 20; 21; 22; 34); stormwater management and on-site flooding (Exhs. 3L; 4H-4R; 5; 21, ¶¶ 32-35; 24; 33, ¶¶ 9-14); water (Exhs. 21, ¶¶ 6-12; 33, ¶¶ 17-33); sewer (Exh. 21, ¶¶ 13-23); and emergency vehicle access (Exh. 21, ¶¶ 24-31).[9]

For the reasons stated above in our discussion of the fundability issue, we find that Brierneck has met its *prima facie* burden on the issue of compliance with generally accepted standards or state requirements. In particular it has shown that the project site is outside the 100-year flood plain. The FEMA maps and the FEMA map amendment approving the redesignation of the development site show that the project is outside the special flood hazard area. Exhs. 13; 14A; 14B; 15, 23, ¶¶ 19, 20; Tr. I, 55-58. Brierneck's evidence that the upland portion of the site is not in the 100-year flood plain is sufficient to establish *prima facie* evidence of compliance with design standards, state standards or federal standards. As in all our cases, this Committee does not adjudicate compliance with state and federal requirements. Rather, we expect the developer to present a threshold showing of compliance as its *prima facie* case. Brierneck has done so.

B. Board's Burden of Proof

Once the Appellant has demonstrated that its proposal complies with state or federal requirements or other generally recognized standards, the burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, design, open space or other local concern that supports the denial of a comprehensive permit, and second, that such concern outweighs the regional need for low or moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 56.07(2)(b)(2). See *Hanover, supra,* 363 Mass. 339, 365; *Hilltop Preserve*, *supra,* No. 00-11, slip op. at 4.[10] If one of the local concerns put forth by the Board to justify its denial is based

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9. The potential local concerns regarding the adequacy of sewer capacity and open space, identified in the Pre-Hearing Order, were not briefed by the Board and are therefore waived. Pre-Hearing Order, § IV, ¶¶ 3-6. See *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14, 153 N.E. 2d 636, 639 (1958). Also see *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E. 2d 595, 598 (1995) and cases cited. Accordingly we need not consider the challenged opinion testimony relating to water and sewer issues given by the Gloucester chief administrative officer, see Exh. 27, or the fire chief, see Exh. 30.

10. By contrast, there is no shifting burden of proof regarding unequal treatment: The developer simply has the burden of proof, and the Board may attempt to rebut the developer's proof. G.L. c. 40B, § 20; 760

on the inadequacy of existing municipal services or infrastructure, it not only has the burden of proving that inadequacy of services or infrastructure is a valid local concern that outweighs the regional need for housing, but it also must prove that due to "unusual topographical, environmental, or other physical circumstances" the installation of adequate services is not technically or financially feasible. 760 CMR 56.07(2)(b)(4).

VI. LOCAL CONCERNS

The Board has raised a number of local concerns, but has focused primarily on the effect of storm flooding over neighboring roadways on emergency access to the site. The Board also raises issues concerning the health and safety effects on inhabitants of the site from on-site-flooding affecting the structures on the site and health issues arising from contamination of stormwater discharging to wetlands and the salt marsh. Additionally the Board argues that the project is inconsistent with the public policy of the city's Community Development Plan concerning economic development, managing growth and fostering both the natural environment and tourism. The Board argues that the local concerns arising from the location of the project outweigh the need for affordable housing. As explained below, our analysis of the local concerns raised by the Board leads us to overturn the Board's denial of the permit.

A. On-Site Flooding

The Board argues that the project raises a substantial public health and safety risk, and that housing should not be constructed in a known hazard area because under both federal and state law the risk of flooding is a legitimate reason for prohibiting residential developments. It argues that it has demonstrated a local concern based on the location of the parcel in a coastal barrier resource area and in, it alleges, a flood plain, with the city zoning prohibition of residential use of the parcel. The Board suggests that the benefit of adding three units of affordable housing does not outweigh the risk to human life, health and property. It cites *Lexington Woods, LLC v. Waltham,* No. 02-36, slip op. at 19-20 (Mass. Housing Appeals Committee Feb. 1, 2005) to argue that because of the flood plain and coastal barrier resource system, the parcel represents such a serious topographical challenge that it outweighs the regional need for affordable housing. The Board also argues that protection of rescue workers

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CMR 56.07(2)(a)(4). If the developer meets its burden, we will rule that the municipality has violated Chapter 40B, § 20 and the denial will be vacated.

and residents, neighboring property and consideration of the city's resources are legitimate reasons to restrict residential development in a flood plain, referring to *Andrews v. Town of Amherst,* 68 Mass. App. Ct. 365, 376 n.17 (2007) and *Gove v. Zoning Board of Appeals of Chatham,* 444 Mass. 754, 761, 831 N.E. 2d 865 (2005).

The Supreme Judicial Court has identified the following three basic public policy objectives of restricting the use of flood plains: "(1) the protection of individuals who might choose, despite the flood dangers, to develop or occupy land on a flood plain; (2) the protection of other landowners from damages resulting from the development of a flood plain and the consequent obstruction of the flood flow; and (3) the protection of the entire community from individual choices of land use which require subsequent public expenditures for public works and disaster relief." *Turnpike Realty Co. v. Dedham, supra,* 362 Mass. 221, 228, 284 N.E. 2d 891 (1972), quoted in *Andrews v. Town of Amherst, supra,* 68 Mass. App. Ct. 365, 376 n.17.

The Board's argument, however, is not supported by the facts of this case. It has not demonstrated that the project on this development site, located on upland surrounded by low lying marsh lands that are in a flood plain presents too great a safety risk to local concerns. The evidence of flooding on the upland portion of the parcel, where the housing is proposed to be situated, is limited and speculative. FEMA has determined the development site to be outside the special flood hazard area or 100-year flood plain elevation of 9.0 feet above sea level. Exhs. 15; 33, ¶ 16; see Exhs. 14A; 14B; 23, ¶¶ 9-13; Tr. 1, 50; II, 104-105. The occupied structures will be several feet above Elevation 9.0 feet. Exh. 23, ¶¶ 9-13; Tr. I, 56-57; also see Exh. 3. A neighbor of the site who testified for the Board acknowledged that during the high tide occurring in January 2003 about which he submitted photographs, the development site remained above the flood levels. Tr. II, 60, 62, 65, 66, 68, 70; Exh. 29, ¶ 5.

The city conservation agent testified that she had observed wrack line on the northerly side of the Thatcher Road bridge closest to Witham Street and that the tidal benchmark for the bridge shows at an elevation of 10.039 feet. However, this observation of a yearly high water flow mark off-site does not establish the presence of these water flow levels on the development site, which is further inland. See Exhs. 5; 23, ¶¶ 9-11; 31, ¶ 6; 33, ¶¶ 16, 34; 35, ¶ 4. Nor would it outweigh the determination made by FEMA in its map amendment. Exh. 15. We also note that the conservation agent's testimony that the original filing for the project in 1975 identified the seasonal maximum groundwater elevation on the development site to be 11 feet, see

Exh. 31, ¶ 7, was credibly contradicted by the testimony of the developer's land surveyor that this would be higher than the site elevation. Exh. 35, ¶ 7. Therefore her testimony does not present credible evidence of flooding on the development site or a local concern based on on-site flooding. [11]

The city planning director described two "potentially restrictive structures in the adjacent salt marsh-tidal creek system"—a foot bridge crossing at Good Harbor Beach and a culverted road crossing on Thatcher Road—that were identified in the Massachusetts Executive Office of Environmental Affairs "Atlas of Tidally Restricted Marshes: North Shore of Massachusetts." However, his testimony that study of the effect of storm surges and flooding on these tidal restrictions precludes development of the subject site does not, without more, establish a local concern that outweighs the need for affordable housing. Exh. 28, ¶ 7.[12] The planning director also testified that the flow restriction resulting from the culvert under the bridge can lead to "the full height of the tide [being] reached at this point on any given tidal cycle or during extreme events," Tr. II, 105, and suggested that the culvert may result in higher than predicted flooding on the parcel during significant coastal storms. Exh. 28, ¶ 7. He stated his assumption that enlarging the culvert would reduce the restriction. Tr. II, 106. However, we do not consider this possibility to be established. There is no independent evidence that the water level at the culvert causes flooding on the upland development site. [13] See Tr. II, 105-106. The Thatcher Road bridge culvert is off-site and approximately .20 miles from the proposed development. See Exh. 28, ¶ 7; Tr. II, 105. The Board's evidence concerning this potential source of flooding on the site was not supported by detailed testimony of an engineer, who could have explained the effects of culverts on surrounding land.

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11. We find the conservation agent's generalized opinion about the potential future consequences of global warming on this parcel to be unsubstantiated on the record, and therefore speculative and accord it no weight. Nevertheless, we are mindful that the question of the effect of environmental changes on coastal flood zones is appropriately under consideration by federal and state authorities, and may well be appropriate for consideration in municipal zoning. See Exh. 31, ¶ 16.

12. This testimony was challenged as outside the scope of his expertise. We accord very little weight to his unsubstantiated opinion.

13. The developer's engineer also discredited this opinion, pointing out that if the culvert were to have an effect of higher flooding on the parcel, the Flood Insurance Rate Map should have included the effect of any such culvert. Exh. 33, ¶¶ 15-16.

Brierneck's civil engineer testified that he was unaware of any regulation prohibiting construction of property near the coastline but above the flood zone. Exh. 33, ¶ 40. With the Letter of Map Amendment, no other FEMA requirement would preclude construction in the Coastal Barrier Resource Area, according to the developer's land surveyor. Exh. 35, ¶ 2. Therefore, the Board has not adequately demonstrated that the risk of flooding on the site represents a danger to residents of the project. We find that there is no local concern with regard to on-site flooding that outweighs the need for affordable housing.

B. Stormwater Management

The Board also challenged the proposed stormwater management system for the site, raising concerns that it would discharge contaminated water into the salt marsh and sewer system. The city engineer and the planning director both testified that the proposed stormwater management system needs further detail, and raised questions about the potential failure of the infiltration system. Exhs. 26, ¶ 7; 28, ¶¶ 8-9. The city conservation agent also criticized the stormwater management system as inadequate under state requirements.

Their testimony does not demonstrate a valid local concern regarding stormwater management. First, they did not raise or argue any issues regarding *local* stormwater management requirements. Nor has the Board raised in its brief any issue of local stormwater management regulations. The city engineer also acknowledged that he had not fully acquainted himself with the developer's stormwater management plans or reviewed the stormwater management application information in sufficient detail to establish any local concerns with regard to it. Tr. III, 86-88, 89-90. See Exh. 26, ¶¶ 4, 7. Ultimately, however, DEP, the state authority responsible for evaluating the stormwater management issue, has already determined that the stormwater management system proposed for this project meets state requirements. Exhs. 4; 4A-4R; 5; 6; 33, ¶ 5. The Board's witnesses acknowledged that they did not bring any concerns about asserted inadequacies in the DEP superseding order of conditions to that agency. The DEP would be the appropriate forum in which to raise these concerns. In light of the DEP's determination, we do not accord any weight to their opinions.

Furthermore we have previously stated that, where no local requirement forms the basis for the Board's dispute with the proposal, the matter may be resolved by the imposition of a condition mandating compliance with state requirements. See *Canton Property Holding, LLC v. Canton*, No. 03-17, slip op. at 23-24 (Mass. Housing Appeals Committee Sept. 20, 2005), citing

9 North Walker Street Development, Inc. v. Rehoboth, No. 99-03, slip op. at 6-7 (Mass. Housing Appeals Committee June 28, 2005); *Rising Tide Development, LLC v. Lexington*, No. 03-05, slip op. at 26-27 (Mass. Housing Appeals Committee, June 14, 2005). We find credible the testimony of the developer's attorney witness that the submission of correspondence indicating the change in the number of units in this instance would not materially affect the Superseding Order of Conditions. Exh. 24, ¶¶ 12-18. In any event, the record indicates that the DEP Superseding Order was extended to January 17, 2008. Exh. 6. There is no indication in the record of an additional extension. We will require as a condition to this permit, as we normally do, that the developer comply with all DEP stormwater management requirements, as well as the Wetlands Protection Act.

C. Off-Site Flooding and Emergency Access

The Board argues that the potential for flooding of Thatcher Road and Witham Street, the access roads to the project site, raises health and safety concerns that outweigh the housing need in this instance. It points to the testimony of the city fire chief, who testified that he observed Witham Street under water during major storm events, and that sending fire trucks and the fire fighters into the floodwaters to access the parcel would pose an unnecessary threat to both the residents and public safety personnel. Tr. I, 115-117, 139. While focusing his concern on Witham Street approaching Thatcher Road, he also stated he has observed flooding on Thatcher Road at the bridge and culvert for the tidal inlet during significant coastal storms. Exhs. 14B; 17; 30, ¶¶ 4-5; Tr. I, 115-116, 139. He indicated some storms were impassable to his car, but acknowledged that fire trucks could travel on those roads during such storms, which he believed were 100-year storms. Exh. 30, ¶ 5; Tr. I, 115, 123-124, 127, 131-132. The neighbor testified that he has observed the marsh land on the parcel and Witham Street flooded during storms. Photographs he submitted of a major storm in January 2003, a month before he purchased his home, show flooding on the marsh as well as Witham Street and neighboring properties.

Nevertheless, Brierneck's witnesses testified, and the Board's fire chief acknowledged, that the intersection of Thatcher Road and Witham is accessible via alternate routes if flooding occurs on one side of the project, including transport through Rockport. Exhs. 20, ¶¶ 23-25; 21, ¶¶ 27-31; Tr. I, 124, 127, 142-143. The time to travel through Rockport would be consistent with the response times that occurred in Gloucester when finances caused a partial reduction of town services. Tr. I, 124-128.

Brierneck argues that the Board has exaggerated the risk involved. It points out that the flooding pictures admitted into evidence show that the flood levels on the surrounding roads did not render them impassable. The neighbor acknowledged that the roads were still passable. Exh. 29, ¶¶ 2-5, 6; Exhs. 39V, 39Z; Tr. Tr. II, 25-26, 64, 71-73, 75. See Tr. II, 39-75; Exhs. 39A-39Z. He saw no danger to prevent the purchase of his property in a flood zone,[14] even though he experienced the January 2003 storm one month before his purchase of his property. Tr. II, 24-27. The Board's witnesses acknowledged that fire trucks were able to get through the neighboring roads even when flooded. The major concern expressed by the fire chief related to the potential of salt water rusting the fire equipment from traveling over flooded roadways, rather than concern about access. Although he also expressed a general concern about the possible instability of flooded roads, he provided no explanation of the basis of that concern.[15] Tr. I, 123-124, 126-127. The Board has not demonstrated that emergency access in the context of a 100-year flood is a serious risk. Cf. *Lexington Woods, supra,* No. 02-36, slip op. at 20.

The Board raised the argument of technical feasibility in the Pre-Hearing Order at § 4, ¶ 8. In its brief, the only argument made by the Board is that the topographical nature of the site, in a coastal barrier resource area, makes it technically infeasible to provide additional emergency access resources. Because we find that the Board has not demonstrated that roadway flooding represents a serious enough local concern to outweigh the need for affordable housing, we do not need to decide whether the Board has demonstrated that it would be technically infeasible to provide adequate emergency access services.

In any event, the Board did not demonstrate technical infeasibility. The city planning director referenced the potentially restrictive culverted road crossing on Thatcher Road and testified that the restriction affected the height of the tide in this location. Exh. 28, ¶ 7; Tr. II, 105. He said he assumed that enlarging the Thatcher Road bridge culvert would reduce the restriction, Tr. II, 106. Although the city has held some public discussions about improving the flooding and access situation, the record does not indicate that efforts to mitigate the roadway

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14. Although the neighbor to the development site testified that his property was at a higher elevation than the development site, this evidence is of little weight. The fact that he is required to carry flood insurance on his property does not contradict the FEMA determination that the development site is not in the flood plain. See Exh. 29, ¶ 5.

15. The city has not implemented weight restrictions on vehicles traveling in that area based on the potential for damage to the roads in that vicinity. Tr. III, 96.

flooding in this neighborhood have been undertaken. See Tr. I, 116-119, 143. The Board did not submit evidence regarding the feasibility of doing this. Therefore, the city's decision to permit construction of market rate homes in the neighborhood in locations that would be subject to the same emergency access issues without opposition by the fire chief, Tr. I, 119-120, contradicts the Board's argument of the seriousness of the flooding concern.[16] Otherwise, it is likely the city would have evaluated the feasibility of addressing the situation. See *Millhaus Trust of Upton v. Upton*, No. 74-08, slip op. at 20-23 (Mass. Housing Appeals Committee July 8, 1975) (inadequate water supply for firefighting did not justify denial of comprehensive permit where town had been derelict in implementing needed improvements to system). Therefore the Board has not demonstrated a valid local concern regarding emergency access that outweighs the need for affordable housing.

D. Gloucester Community Development Plan

The Board argues that the project is inconsistent with the city's legitimately created comprehensive plan with respect to economic development, fostering the natural environment, managing growth and fostering tourism. Exhs. 8A; 8B. This Committee has held that a municipality's long-term municipal planning interests—when expressed in a *bona fide*, effective master plan or comprehensive plan—may be a sufficiently substantial local concern to outweigh the regional need for affordable housing. *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 5-6 (Mass. Housing Appeals Committee Sept. 18, 2002) and cases cited. See 760 CMR 56.07(3)(g).[17] In *Stuborn*, the Committee determined that the Barnstable planning needs to protect parcels suitable for marine activities focused on the commercial harbor area outweighed the need for affordable housing to be built on the harbor. *Id.* at. 10-14. The *Stuborn* case set out the standard: *First, "Is the plan bona fide?* (Was it legitimately adopted, and, more importantly, does it continue to function as a viable planning tool in the town?)." *Second, "Does the plan promote affordable housing?" Id.* at 5. Plans that make "adequate provision for the development of both affordable housing and multi-family housing generally ... may actually further the purposes of the Comprehensive Permit Law." *Oceanside Village, LLC v. Scituate,* No. 05-03, slip op. at 20 (Mass. Housing Appeals Committee July 17, 2007) remanded on other

16. See the discussion of Equal Treatment below.

17. See former 760 CMR 31.07(3)(d).

grounds, *Scituate Zoning Board of Appeals v. The Housing Appeals Committee,* No. PLCV2007-01016 Plymouth Super. Ct. June 2, 2008 (Chin, J.). *Third, "Has the plan been implemented in the area of the site?" Stuborn, supra,* No. 98-01, slip op. at 6. The answers to the three questions determine the amount of weight accorded the plan. Then in evaluating whether the "provisions of the plan are unnecessarily restrictive as applied specifically to the proposed project," we must determine whether the proposed housing actually would undermine the plan to a significant degree. *Id.* at 6. Thus, if the project is inconsistent with the plan's goals, the Committee is still required to balance the weight to be given to the plan goals against the regional need for affordable housing:

> [W]e consider the totality of the [municipality's] planning interests, and determine whether those interests are sufficient to outweigh the regional need for affordable housing. The comprehensive plan is added to the [municipality's] side of the scale, and the strength of the plan itself, the extent to which it has actually been implemented, and the extent to which it encourages affordable housing all lend weight to the [municipality's]argument that local planning concerns with regard to a particular proposal outweigh the regional need for housing.

Id.

The city's Community Development Plan dated August 13, 2001 (plan) is detailed and thoughtful. In addition to other goals, the plan includes goals and strategies to increase affordable housing and multifamily housing. The plan recognizes "the need for affordable housing" as "a dominant theme in the community and in [the] Plan." Exh. 8A, p. 58.

> The Plan calls for City actions that will promote an increased supply of quality housing for all levels of income, with modifications in land use regulations and practice, supporting increased density, where appropriate. A Housing Coalition of multi-discipline housing interests, to address and assist in housing issues, is recommended.

Exh. 8A, Summary p. 2. The plan objectives include encouraging housing development where consistent with the plan's land planning vision, increasing the supply of permanently affordable rental and owner-occupied housing, facilitating building of more multifamily housing in a variety of neighborhoods and supporting opportunities for infill-housing construction, consistent with existing neighborhood patterns. Exh. 8A, p. 59. Strategies of the plan include increasing the housing supply in all neighborhoods through regulation and proactive programs, revising zoning ordinances, codes and regulations to allow more housing options, including easier permitting of multifamily dwellings and establishing citywide standards and conditions appropriate for

multifamily units, and replacing the current geographic restrictions and special permitting process required by the present ordinance. Exh. 8A, pp. 61-62, 64; Tr. II, 96-98, 212-213.

Brierneck argues that the plan has no specific goals for the project site, but calls for multifamily housing throughout the city. Exh. 8A, pp. 61-62; Tr. II, 98, 212. It also argues that the city has not taken steps to implement the plan.

A planning and implementation review committee was established to review and document the steps taken toward implementing the plan. Tr. III, 49. In 2004 the city published a Housing Report as a supplement to the plan. It identifies modifications to regulations pertaining to multifamily housing as one of a number of solutions to regulatory barriers to the development of affordable housing, and notes that "The city's zoning bylaw does not encourage affordable housing nor does it permit a variety of housing types." Exh. 8B, p. 36. It lists as a zoning code activity to "Update the zoning ordinance to enable by-right multifamily housing, or straight forward special permit procedure, in locations where the use is consistent with neighborhood character and there is adequate infrastructure available to serve higher densities." Exh. 8B, p. 38.

However, beyond the issuance of this report, the record contains little specific evidence regarding the plan's implementation, including the revision of zoning ordinances to permit multifamily housing. According to the city planning director and city chief administrative officer, implementation activities have included provisions to encourage mixed use and multifamily housing in the downtown area. Tr. II, 114-115; III, 49-50, 52-57, 73-74. The city chief administrative officer stated that the city has appointed a Community Housing Coalition. Although he states the CHC has been active, he did not provide significant detail regarding the actions the coalition has taken to promote the planning goals of the city. Exh. 27, ¶ 12. See Tr. III, 49. Indeed, the developer's manager stated that the CHC actually endorsed this development. Exh. 32, ¶ 6. The Board did not adequately demonstrate the implementation of the plan's integral role of modification of regulations to change zoning restrictions to increase multifamily housing in a variety of neighborhoods. We find that the plan's implementation since 2001 has not been demonstrated sufficiently. See Exhs. 8A, 8B.

The Board argues that the project is inconsistent with the goals of the plan to protect the natural environment, foster areas that are significant tourist attractions, in particular the Good Harbor Beach salt marsh complex, and to manage growth with methods that reinforce the existing pattern of development, density and open space. See Tr. II, 95-96; III, 51-57;

Exh. 28, ¶ 12. The Board also argues that putting a multi-family housing development in an extensive business zoning district contradicts the plan. Tr. III, 51-57. The city chief administrative officer stated that Good Harbor Beach is a significant tourist attraction. Tr. III, 51, 55-57. He and the planning director testified that the plan did not envision the site as a residential development, that the parcel is significant to the city's economic development, and constructing the condominium in an extensive business district will undermine the city's legitimate planning goals. Exh. 27, ¶ 5; 28, ¶ 12; Tr. III, 55-57.

We find that the Board has not demonstrated that the proposal is inconsistent with or would undermine the plan. Indeed, the plan's goal of protecting commercial space appears to focus more on the protection of industrial park space. Exh. 8A, pp. 14-15, 19; Tr. III, 55, 80-82. Although it argues that the designation of the development site as commercial is essential, it is clear from the city zoning map that this parcel and the parcel across the street where Amelia's restaurant is situated, are two of several pockets zoned for business in the general Brierneck area, which is primarily designated as residential. Exh. 8B, Fig. 1; Exh. 12. The Board has not shown how the open space and economic benefits of the Good Harbor Beach are compromised by the construction of this project. The witnesses did not indicate how the other business and commercial areas of the neighborhood or the city fail to adequately serve the tourist industry and Good Harbor Beach area. The city will continue to be able to benefit from tourists visiting Gloucester to enjoy the land and seascapes and engage in recreational activities and patronize hotels, restaurants, shops and other visitor-services, all to the benefit of the city's tax base. See Exh. 8A, p. 24.

Brierneck argues that since the extensive business district restricts multi-family dwellings, permitting multifamily dwellings on the project site is consistent with the goals of the community development plan to ease such restrictions. We find that although the plan lists the development site among those not available for housing because zoned business or industrial, the proposed use of the site is consistent with the general goals for the area in which the parcel is located, including allowing "existing single-family homes to convert into multiple units in appropriate areas," "mixed-use development and vertical expansion of existing housing in appropriate areas," and reducing the minimum project size that triggers the requirements for inclusion of affordable units." Exh. 8B, Figure 4-1.

Finally, we disagree with the Board that the design of the proposed building is out of character with the neighborhood. The city planning director testified that the proposed building, with a single footprint, is out of character with the neighborhood and surrounding salt marsh-dune landscape. Exh. 28, ¶¶ 10-11. The city administrator testified that the height of the proposed building is incongruous with the salt marsh, Good Harbor Beach, low density single family homes and limited low density commercial use. Exh. 27, ¶ 6. We find the testimony of the developer's architect to be more credible on this point. He testified that the proposed building will have traditional cedar clapboard siding with white trim, a weathered gray color "in keeping with the coloration of other traditional seaside buildings," Exh. 25, ¶ 14, and a dark gray roof. It will present a convex curve of approximately 268 feet toward Thatcher Road and a reverse curve toward the rear of the property, to reduce the visual impact of the building. The design varies the placement of each unit so the massing of the building is not as one solid element, but rather a series of attached townhouses of varying distances from the street. The building height of 33 feet is equal to or less than the heights of similar buildings in the vicinity. Exhs. 25, ¶¶ 8-15; 36, ¶¶ 4-5, 8, 11. For example, off Rockport Road is a residential condominium in an area of small residential homes. On Witham Street, adjacent to the harbor, lies a 3-story residential building. Across the salt march to the west is Nugent Farm, a large residential condominium development consisting of multi-story connected townhouses of a scale similar to that proposed here. Exh. 36, ¶ 6-7, 11; Tr. II, 216-217. We find that the design of the project is in keeping with the neighborhood.

The proposed project fits the character of residences in the general Good Harbor neighborhood and it is consistent with the general residential nature of the area. The project is consistent with strategies of the plan to increase multi-family housing and to overcome zoning restrictions to do so. It certainly does not "undermine the plan to a significant degree." *Stuborn, supra,* No. 98-01, slip op at 6. We therefore conclude that the Board has not demonstrated a valid local concern with regard to the city's plan that outweighs the need for affordable housing.

VII. EQUAL TREATMENT

Brierneck has also alleged that "local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 56.07(2)(a)(4); G.L. c. 40B, § 20. Brierneck raises several examples of unequal treatment. First it cites the

Board's requirement of acceleration and deceleration lanes (albeit not pursued in the Board's brief, and therefore waived), where none was required for the nearby Nugent Farm project, a large multifamily condominium project to the west. Exh. 36, ¶ 6; Tr. I, 64-65; III, 24-25. Second, it argues that the Board requires it to redesign the stormwater management system to upgrade and protect against a 100-year storm although the city regulations do not establish this standard or hold other development in the area to this requirement. Tr. II, 93-94. Finally it argues that no statutes or regulations prohibit construction in coastal barrier resource areas and the city has not sought to prohibit construction of other residences in the area. See Exh. 33, ¶ 40; Tr. III, 29. Specifically it argues that other parcels in the area have been developed despite their proximity to the beach and the coast and reliance on Thatcher Road for emergency access. Brierneck's manager stated that the city granted building permits for substantial construction in the Brierneck neighborhood between 2003 and 2006 on Palfrey Road, Salt Island Road, Cliff Road and Witham Street, which similarly rely on Thatcher Road for emergency access. Exhs. 19; 20, ¶¶ 41-43; 38A. The fire chief has not tried to prevent construction of other houses in the Brierneck area because of flooding off Thatcher and Witham. Exh. 19; Tr. I, 120, 125-126. On the contrary, within a quarter-mile distance of the site, subject to the same primary access roads is a residence for which the Board exercised its discretion to grant a variance for construction of a new home on Cliff Road. Exh. 19, Tr. I, 81, 87. See *Bruzzese v. Board of Appeals of Hingham*, 343 Mass. 421, 423, 179 N.E. 2d 269 (1962) (granting variance is discretionary).

The Board argues that Brierneck's parcel is "unique" in its vulnerability to storm damage. It argues that the developer did not demonstrate that any of the other developed parcels were located in the Coastal Barrier Resource Area. See. Tr. I, 72-73. It also argues that that the single-family homes in the neighborhood near the beach are not at the same elevation, are not surrounded by a tidal salt marsh and barrier beach and therefore cannot be compared to the development site. Therefore it argues that the city has not treated this project differently than other parcels similarly situated.

We find, however, that with respect to the question of emergency access affected by flooding on Thatcher Road, particularly with respect to the grant of a variance for the construction of housing, the city has treated Brierneck differently than similarly situated market rate housing. Therefore it has not applied local requirements and regulation as equally as

possible to subsidized and unsubsidized housing in violation of G.L. c. 40B, § 20 and 760 CMR 56.07(2)(a)(4).

VIII. CONCLUSION AND ORDER

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that:

1. The comprehensive permit shall conform to the application Brierneck submitted to the Board, except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development shall be constructed as shown on drawings by Merrimack Engineering Services, 66 Park Street, Andover, Massachusetts 01810, as revised through June 10, 2004 and by Joseph D. LaGrasse Associates Inc., Architects, Engineers, Interiors, Land Planners, One Elm Square, Andover, MA 01810, revised through June 25, 2004. Exh. 3D.

(b) Design and construction shall be in compliance with the state Department of Environmental Protection stormwater management requirements.

(c) Design and construction shall be in compliance with the state Wetlands Protection Act.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

(e) This comprehensive permit is subject to 760 CMR 56.00 and DHCD Guidelines issued pursuant thereto with respect to cost certification.

(f) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(g) The Board shall take whatever steps are necessary to ensure that a building permit is issued to the Applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Issued: August 11, 2008

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer