



United States Department of the Interior
NATIONAL PARK SERVICE

FIRE ISLAND NATIONAL SEASHORE

120 Laurel Street
Patchogue, New York 11772
(631) 687-4750

IN REPLY REFER TO:

January 7, 2013

Mr. Edward Romaine
Supervisor, Town of Brookhaven
1 Independence Hill
Farmingville, New York 11738

Dear Mr. Romaine:

First of all, I want to take this opportunity to congratulate you on your recent election as the new Supervisor of the Town of Brookhaven. Fire Island is a major feature of Long Island and the majority of Fire Island National Seashore is located within the boundary of the Town of Brookhaven. I know you have numerous issues confronting you as you take up the reigns as Town Supervisor, especially in the aftermath of Superstorm Sandy. I hope that we can meet in the not too distant future to talk about Fire Island and our mutual concerns and interests. I will contact your office to set up an appointment. Again, congratulations.

On December 12, 2012, I had the opportunity to meet with Commissioner Martin Haley, Art Gerhauser and staff from the Town's Department of Environmental Protection to discuss some proposed changes to Chapter 85 of the Town of Brookhaven's Zoning Code regarding reconstruction of structures on Fire Island. I appreciated the opportunity to meet with Town staff and said I would provide in writing my comments and recommendations regarding the proposed changes to the Town's code. The following represent the comments and concerns of Fire Island National Seashore regarding the proposed resolution that would amend the code entitled LOCAL LAW AMENDING CHAPTER 85 OF THE CODE OF THE TOWN OF BROOKHAVEN ENTITLED "ZONING" BY AMENDING ARTICLE XVI ENTITLED "GREAT SOUTH BEACH IN FIRE ISLAND NATIONAL SEASHORE".

In that meeting the intent of the legislation was discussed. In short it seemed the intent is to allow homeowners of non-conforming structures whose property has been damaged or destroyed due to fire or other natural disasters such as Superstorm Sandy to rebuild to previous dimensions if the structure/s had a Certificate of Occupancy or Existing Use issued by the Town without having to go to the Board of Zoning Appeals (BZA) for review of their legal non-conforming

status. It would also allow them to alter and expand those structures and possibly extend the non-conforming features without review by the BZA.

Fire Island National Seashore and the National Park Service have a number of concerns regarding the proposed amendments to the Town's Code. Our concerns are based upon the authority the National Park Service has regarding building and zoning on Fire Island as authorized in the Fire Island National Seashore enabling legislation of 1964 and articulated in the Code of Federal Regulations, 36 CFR Part 28 – Federal Zoning Standards for Fire Island National Seashore. Section 28.11(c)(4) of the Federal Zoning Standards allows the reconstruction of legally constructed non-conforming structures damaged or destroyed by fire or natural disaster to previous dimensions but does not allow the enlargement, alteration, intensification, extension, or relocation of the structure without conformance with the approved local code. Brookhaven's current code requires structures damaged greater than 75% to be brought into code and if they desire to maintain their previous dimensions they are required to go back to the BZA for review and approval.

Our first concern regards the issue of altering, intensifying or expanding the existing non-conforming development. If the property and structures currently exceed lot occupancy limitations and height restrictions the amendments would allow an intensification of these non-conforming developments. The National Seashore strongly objects to any intensification of lot occupancy and height beyond the current limitations of 35% lot occupancy and 28 feet elevation above average ground or base flood elevation. In the meeting it was agreed that language would be added that would not allow properties to exceed either the 35% lot occupancy or 28-foot height restrictions. There was proposed language regarding the lot occupancy requirements that I reviewed which stated, "However, nothing herein shall be construed to diminish those lot occupancy requirements set forth in Section 85-170 "RD Residential District and OFD Oceanfront Dune District; dimensional requirements". We applaud the Town for that proposed addition, but feel that it does not go far enough. Specific language must be added to address the Coastal Erosion Hazard Area as well as the provisions for maximum height requirements and the potential for the intensification of existing non-conforming developments, which are explicitly prohibited under both town code and 36 C.F.R. Part 28 – Federal Zoning Standards for Fire Island National Seashore.

Secondly, we are concerned with the statement, "These provisions would give Fire Island Residential District residents the same ability to rebuild their homes as residents on the mainland of the Town of Brookhaven." Fire Island is not the same as the mainland of Long Island, be it the Town of Brookhaven or the Town of Islip. Both are located within the boundaries of a national park, and are therefore subject to the zoning and other provisions of the National Park Service. Additionally, the properties on Fire Island are subject to the provisions of Article 34 of the New York State Environmental Laws, specifically the Coastal Erosion Hazard Area Law.

Brookhaven has opted to undertake enforcement of that state law by incorporating it into the Brookhaven Town Code, Chapter 76 – Coastal Erosion Hazard Areas. It is unclear how the Town can grant its residents the blanket ability to rebuild their damaged and/or destroyed structures that are located within the state's mapped Coastal Erosion Hazard Area.

Per Brookhaven Town code, Chapter 76 – Coastal Erosion Hazard Areas, hereafter referred to as CEHA, the Code specifically states, after recognizing the importance of protecting natural protective features, such as the beach and dunes, the intent is:

(3) To regulate new construction in environmentally sensitive areas, including but not limited to the siting of structures a safe distance away from areas of active erosion and away from reasonably anticipated impacts of coastal storms in order to prevent premature damage and/or destruction thereof, and prevent damage to natural protective features and other natural resources.

(4) To regulate the construction of erosion protection structures in coastal areas which are subject to serious erosion, in order to assure that, if justified, the construction and operation of such structures will minimize or prevent damage of or destruction to improvements thereto on private and public real property, natural protective features, and other natural resources.

(5) To restrict public investment in services, facilities, or activities which are likely to encourage new permanent development in erosion hazard areas.

Although these provisions are in keeping with the state law, and accordingly approved by New York State Department of State in order that the Town of Brookhaven administer the law, the proposed resolution appears to negate the original intent of the state law, and subsequently the town code. Additionally it could undermine the Town code's definition of *Restoration*, which reads,

“The reconstruction without modification of a structure, the cost of which equals or exceeds 50% of the estimated current full replacement cost thereof at the time of restoration. Modifications, however, may be allowed if they do not exceed preexisting size limits *and* are intended to mitigate the impacts to natural protective features and other natural resources.”

The modifications for reconstruction being proposed under the resolution would not meet these provisions and would do nothing to mitigate the impacts to the natural protective features that the law is intended to protect. We believe the proposed reconstructions and modifications would implicitly harm the protective features that the law is intended to protect, and could increase public investments in services, facilities and activities that are part and parcel of the permanent development allowed within erosion hazard areas. By preventing these kinds of developments, the town could more readily restore and rebuild these protective features, which would serve to more adequately protect the properties located to the north of them, thereby offering greater

protection to the entire barrier island, which in turn protects the mainland of the Town of Brookhaven on Long Island. Specific language should be added to address CEHA restrictions and regulations.

Thirdly, the statement that buildings must have a "Certificate of Occupancy, a Certificate of Existing Use, or its equivalent," is cause for concern. Without a definition of "equivalent", there is no way to determine how that could possibly be interpreted, which would lead to confusion and possible litigation.

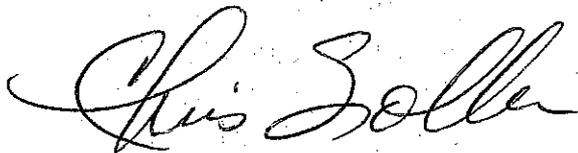
Fourthly, as the National Seashore has discussed in the past with the BZA, we are extremely concerned about the notion of increasing setback developments. Item 3 of the proposed code revision would allow for the extension of setback variances, even though not encroaching deeper within their respective side, front, or rear yard setbacks. Fire Island is comprised, for the most part, of very densely developed communities. Most of these developments are wood frame structures, including houses, decks and fencing. The close proximity of these developments to each other increases the potential for fires spreading through communities, as the flames jump from one property to the next. In fact, it is clear that one of the reasons that the original building codes require setback areas were to address this potential hazard. And, we know from past experience that a fire in one structure usually jumps to adjacent properties. We certainly saw this occurrence last winter with the fire that destroyed two major commercial properties in Fire Island Pines. Although the Federal Zoning Standards are silent on the issue of setback variances, we strongly urge you to rethink your decision to allow this additional development. Also expansion of setback variances without review by the BZA does not allow the adjacent property owners that may be impacted by such expansion to review or comment on proposed changes or alterations to non-conforming structures.

Finally, with regard to 36 C.F.R. Part 28 – Federal Zoning Standards for Fire Island National Seashore, we find that the proposed resolution is inconsistent with the 1985 Secretary of the Interior's approval of the Brookhaven Town Code. Per that approval, via the Secretarial Issue Document, it stated that "... the relatively few deviations from the standards (which can be effectively enforced by refusing to issue a Certificate of Exemption from Condemnation), do not justify continuing to hold the threat of condemnation over the majority of properties which conform to these standards." In light of the now proposed amendment, the Secretary of the Interior's approval of the Town's zoning ordinance would be in jeopardy if adopted as proposed because it: 1) would allow for the intensification of non-conforming development; 2) is silent on the issue of the New York State Coastal Erosion Hazard Law, as adopted by the Town of Brookhaven; and 3) fails to recognize that the communities on Fire Island are, in fact, different from the mainland of the Town by virtue of their location within a national park. Over the years we have been in discussion with New York State Departments of State and Environmental Conservation (DOS and DEC) regarding the Coastal Erosion Hazard Area Law. We hope that

officials from the DOS and DEC will have the opportunity to review the proposed amendment and can provide guidance regarding CEHA and any inconsistencies the proposed amendment may raise.

It is our recommendation that if the Town wants to revise its code to allow the reconstruction of legally built non-conforming structures damaged or destroyed by fire or natural disaster that the proposed code revision reflect only that and not allow for expansion, alteration or intensification of the non-conforming structure or non-conforming setbacks, etc. The code should include language regarding CEHA, lot occupancy requirements and height restrictions found in the Federal Zoning Standards and the Town's current code as we have discussed above. Without the changes we are proposing the Secretary of Interior's continued approval of the Town's code as stated above would be in jeopardy. We would be happy to discuss this further and appreciate the opportunity to work with the Town regarding this important matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Chris Soller".

K. Christopher Soller, Superintendent

cc: Commissioner Martin Haley
Art Gerhauser, Building Department
Tom Carrano, Department of Environmental Protection