



United States Department of the Interior  
NATIONAL PARK SERVICE  
Fire Island National Seashore  
120 Laurel Street  
Patchogue, NY 11772



In Reply Refer to:

January 18, 2013

Supervisor Edward Romaine  
Councilman Steve Fiore-Rosenfeld  
Councilwoman Jane Bonner  
Councilwoman Kathleen Walsh  
Councilwoman Constance Kepert  
Councilman Timothy Mazzei  
Councilman Daniel Panico

Re: **Introductory Local Law #3 of 2013**

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" Number 8 on the agenda of Public Hearing on January 22, 2013

Dear Supervisor Romaine and Town Councilmembers:

As you may be aware, we have been working with Commissioner of Buildings Martin Haley, regarding the proposed language of the resolution referenced above. Our first set of comments regarding this proposed amendment was sent directly to Supervisor Romaine for his review and consideration. We are now putting our comments forward to the Board for formal consideration of our concerns.

Unfortunately, the draft amendment of the code included in the online agenda of Town Board meeting for January 22, 2013 does not reflect any changes to the original proposal that we recommended to Commissioner Haley. Therefore, this letter will reiterate our comments and concerns that were sent to Supervisor Romaine in a letter of January 7, 2013 (copy enclosed) and to Commissioner Haley in a letter of January 14, 2013 (copy enclosed), for the Town Board's review and deliberations on this matter.

We submit these comments based upon the authority of the National Park Service found in the Fire island National Seashore's enabling legislation of 1964, Public Law 88-587, and subsequent legislation, and the authority 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 Board of Zoning Appeals (BZA) for review and approval.

With regard to the proposed amendment being considered by the Town our concerns are as follows:

1. The proposed language of 85-166 A.2 would authorize altering, intensifying or expanding existing nonconforming development including increasing non-conforming lot occupancy and height. 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 a meeting Seashore Superintendent Chris Soller had with Commissioner Haley, Chief Building Inspector Arthur Gerhauser, and staff from the Town's Department of Environmental Protection on December 12, 2012, it was agreed that language would be added that would not allow properties to exceed either the 35% lot occupancy or the 28-foot height restrictions. This language is not included in the online draft of this proposed amendment. We agreed that the proposed language to be included would be, "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."
2. In the legislative intent, Section 1 of Introductory Law # 3 of 2013, there is 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 Brookhaven on Long Island. If it was there would be no need for Chapter 85 of the Town Code specifically for Fire Island. Additionally, communities on Fire Island are located within the boundaries of Fire Island National Seashore, a unit of the National Park System, and are subject to Chapter 36 of the Code Federal Regulations Part 28 making Fire Island residents distinct from those of the mainland of Brookhaven.
3. 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, as referenced in your own Town Code, Chapter 76 – Coastal Erosion Hazard Areas. Chapter 76 recognizes the importance of protecting natural protective features, such as the beach and dunes, and goes on to specifically state it is its intent:

(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.

These provisions are in keeping with the state law, and accordingly were approved by New York State Department of State in order that the Town of Brookhaven may administer the law. The proposed language of the code amendment appears to negate the original intent of the state law, and subsequently the town code. Additionally undermined is 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 draft resolution would not meet these provisions and would certainly do nothing to mitigate the impacts to the natural protective features that the law and Chapter 76 of the Town Code are intended to protect. On the contrary, we find that these proposed reconstructions and modifications could harm those protective features, and could result in increased public investments in services, facilities and activities that are part and parcel of permanent developments 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.

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

4. As the National Seashore has discussed in the past with the Brookhaven BZA, we are extremely concerned about the notion of increasing setback developments. Section 85-166 A.2. of the proposed code revision would allow for extensions 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 fire 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 in November of 2011 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 nonconforming structures.
5. Sections 85-166 A. 1 and 3 as proposed would allow the reconstruction of non-conforming structures and accessory structures. We understand the desire to allow such reconstruction but feel it should be tied to a specific situation such as a property being severely damaged or destroyed due to fire or natural disaster as opposed to the wholesale tearing down of nonconforming buildings and then allowing the rebuilding to previous dimensions without review by the Board of Zoning Appeals. The Town's code is not designed to perpetuate nonconforming development, thus reconstruction should be limited to instances where reconstruction is not out of choice by a homeowner, but rather due to a hardship.
6. 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 the 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.

It is our recommendation that if the Town wants to revise its code to allow the reconstruction of legally built nonconforming 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 nonconforming structures or nonconforming 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.

We would like to recommend the following language be substituted for the amendment to address our concerns:

**Section 1.** Legislative Intent. The amendment will permit the rebuilding of non-conforming one- and two-family dwellings and the rebuilding of non-conforming accessory structures in the Residential District on Fire Island. However, nothing herein shall be construed to diminish the requirements set forth by Federal, New York State (CEHA for example) and Suffolk County rules and regulations, or in other Chapters of the Town Code in particular those lot occupancy and building requirements set forth in 85-170 "RD Residential District and OFD Oceanfront Dune District; dimensional requirements" and "Chapter 76. Coastal Erosion Hazard Areas".

Section 2. Text Amendmet. Chapter 85 of the Code of the Town of Brookhaven entitled "Zoning" Article XVI entitled "Great South Beach in Fire Island National Seashore" is hereby amended by adding the words underlined and deleting the words with a strikethrough as follows:

§ 85-166 Conformance required; nonconforming uses: certificates of occupancy.

A. Conformity with article provisions. ~~No~~ All buildings or land shall be used and ~~no~~ all buildings shall be erected or structurally altered ~~except~~ in conformity with the provisions of this article, except as follows:

1. Legislative Intent: The Town Board encourages land use which is consistent with the characteristics of Fire Island and which constitutes wise resource management. Nothing herein shall be construed to diminish the requirements set forth by Federal, New York State and Suffolk County rules and regulations that pertain to Fire Island, or those lot occupancy and building requirements set forth in 85-170 "RD Residential District and OFD Oceanfront Dune District; dimensional requirements" of this article and the rules and requirements set forth in "Chapter 76. Coastal Erosion Hazard Areas" of the Town's Code.

2. An existing nonconforming building used as a one- or two-family dwelling with a Certificate of Occupancy, a Certificate of Existing Use or its equivalent, located in the Residential District, whether situated on a conforming or a nonconforming lot, may be structurally altered, restored, repaired in whole or in part, or reconstructed in whole or in part if severely damaged or destroyed by fire or natural disaster, provided that said building does not encroach deeper into any nonconforming front yard, side yard or rear yard than the distance into said front yard, side yard or rear yard than the existing building encroaches and the degree of nonconformity shall not be increased, nor shall the height of the dwelling be increased.
  
3. Non-conforming accessory building(s) or structure(s) when accessory to a one- or two-family dwelling with a Certificate of Occupancy, a Certificate of Existing Use or its equivalent, situated in the Residential District, whether located on a conforming lot or a nonconforming lot may be structurally altered, restored or repaired in whole or in part, or reconstructed in whole or in part if severely damaged or destroyed by fire or natural disaster, provided that said accessory building(s) or structure(s) do not encroach deeper into any nonconforming front yard, side yard, rear yard than the distance into said front yard, side yard, or rear yard than the existing accessory building(s) or structure(s) encroaches and the degree of nonconformity shall not be increased, nor shall the height of the accessory building(s) or structure(s) be increased.

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Without the changes we are proposing the Secretary of the Interior's continued approval of the Town's code may be in jeopardy. If the final version of this code is deemed to be inconsistent with the federal standards, we will be required to consult with the Secretary's Office for further guidance. We would be happy to discuss this further and appreciate the opportunity to work with the Town regarding this important matter.

Sincerely,



K. Christopher Soller, Superintendent

cc: Commissioner Martin Haley  
Chief Building Inspector Arthur Gerhauser  
Tom Carrano, Department of Environmental Protection  
BZA Chairman Paul D'Chance

Enclosures (2)