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# Land Regulation at Fire Island National Seashore

## A History and Analysis, 1964-2004

## Fire Island National Seashore

## Special History Study

# LAND REGULATION AT FIRE ISLAND NATIONAL SEASHORE

## A HISTORY AND ANALYSIS, 1964-2004


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# Executive Summary and Research Findings

## Narrative Summary

Fire Island is a long, narrow barrier island lying off the south shore of Long Island within a short driving distance of New York City and the dense population centers of suburban Nassau and Suffolk Counties. As late as the beginning of the 1960s, much of Fire Island remained undeveloped. There was a state park, however, at its western end, and a number of small communities consisting of lightly built seasonal vacation homes connected by wooden walkways and a few narrow lanes. A new bridge connected the public to the state park; otherwise, the only access to the island was by ferry.

In 1964, Congress established the Fire Island National Seashore, largely in response to pressure to protect the island from the real estate development and population growth which was engulfing Long Island. For the national park system, this was a period of expansion and experimentation. Public recreation was intended to play a more substantial role than in the classic national parks of the west which resulted in the establishment of new areas such as national seashores. The subsequent decision to leave substantial amounts of land within the Seashore in the hands of homeowners prompted the development of a complex system of land use regulation which was intended to achieve federal land management objectives through the medium of local zoning ordinances. There were two legislative objectives: first, to protect the Seashore's natural environment; and second, to make its natural beauty available to the visiting public for recreational uses in harmony with the first.

The National Park Service (NPS) quickly began to implement these goals, as the enabling legislation, Public Law 88-587, September 11, 1964 codified at 16 U.S.C. & 459e (the Act) directed, by promulgating federal zoning standards for the localities and launching a land acquisition program. By 1967, it was clear that the system was failing to produce the results intended by Congress, the Department of the Interior (DOI), and many of the Seashore's proponents. Local authorities were not adopting appropriate ordinances; instead, they were granting inappropriate variances to homeowners, allowing them to build structures which violated federal zoning standards. Enforcement was nonexistent or ineffective. The government had failed to acquire the primary dune line and forestall further construction

there. NPS policy, as implemented in day-today decisions by on-site and regional managers, was drifting away from the goals set by Congress and the NPS itself towards something amounting to tacit acceptance of the situation.

From the middle of the 1970s until 1991, DOI, NPS, and Congress studied, proposed, and implemented measures intended to fix the problems. The NPS sponsored consultant studies of the Island's environment and its zoning problems; proposed model zoning ordinances; drafted a general management plan, a land acquisition plan, and a land protection plan; and on two occasions issued new zoning standards. Congress amended the Seashore's establishing Act in 1976, 1978 and 1984. Congress's fact-finding arm, the General Accounting Office, issued a report on land acquisition and management on Fire Island.

Throughout this period, the NPS continued its normal operations on Fire Island, which included pressing local authorities to bring their zoning ordinances into conformance with federal standards, reviewing and commenting on countless requests for variances and special permits, and occasionally initiating condemnation proceedings. Yet despite these activities, and despite the new measures, the number and size of structures within the Seashore continued to rise, as did the resident population, density, and developed land area. With these changes came increasingly severe environmental impacts, including water usage, effluents from septic tanks and swimming pools, foot and vehicle traffic, and taller and more visible buildings. Meanwhile, storms continued to batter the island, pushing the primary dune line northward in many places. Longstanding worries about the Seashore's environmental health and natural beauty, focusing especially on the ocean beach and primary dune, continued to be raised, but were joined now by new concerns focusing on the island's less visible ecosystem elements, such as its shallow fresh water aquifer.

Measures adopted in Washington had relatively little effect on any of these trends. One reason lay in the design of the regulatory system itself. The legislators had made it clear that they wanted to preserve Fire Island much the way it was in 1964. In the future, as they envisioned it, the Seashore's ecosystems and natural beauty would remain largely untramelled, the balance between private development and public land roughly the same. Local officials and public witnesses generally supported these goals; yet by leaving a large number of lots open to development, in the face of strong population and real estate pressure, Congress almost ensured that they would not be met. The lack of adequate enforcement tools

only exacerbated this fundamental flaw; so did peculiarities of local politics, especially the fact that while Fire Island owners paid property taxes to the local jurisdictions, very few of them voted there. None of the remedies proposed between 1975 and 1991 effectively addressed any of these underlying problems.

A second reason for failure was the fact that the political climate was changing. During the second half of the 1970s, distrust of federal land ownership and regulation was becoming increasingly evident among the public and politicians. By 1991 the climate of opinion had diverged dramatically from that of 1964. Where the debate over the Seashore's establishment had been marked by broad support for public goals and general acceptance of regulatory restrictions imposed in order to meet them, later debates over proposals to establish a special dune district or issue new zoning standards were dominated by support for private property rights and objections to their infringement through regulation. This was true both on Fire Island and in Washington. The changing political climate narrowed the range of policy options available to Congress and the NPS. It left little support for the kind of tough regulatory and enforcement measures which might have mitigated the flaws in the Seashore's original design. At the same time, it led legislators and agency officials to gradually redefine the problem which they were trying to solve: rather than fixing the failure to meet Congressional or public objectives, reform measures were increasingly designed to lighten the regulatory burden on private property owners.

Moreover, the land use regulatory system established under the auspices of the Act was woefully inadequate to the task at hand: see Chapter Three of this report for an analysis of development records from 1991 to the present. The federal zoning standards established on Fire Island espoused an unsophisticated view of land use regulation in a highly complex environment dominated by extreme weather and extreme real estate pressures. The reliance on a single, outdated zoning tool—lot occupancy—coupled with reluctance to prohibit development that stepped over the dune line, either by regulatory measures or by acquisition, virtually guaranteed that the system would not fulfill the bill drafters' intent to maintain the island as it was in 1964, nor would the island's ecosystem be protected.

## Synopsis of Major Research Finding

The Seashore's major public purpose was to protect the environment of Fire Island. Its secondary purpose was to provide natural recreation for the visiting public, insofar as that was compatible with environmental protection and distinct from the kinds of mass recreation available at state parks and beach resorts elsewhere in the region.

While many legislators and witnesses expressed support for the rights of existing property owners within the Seashore, it was broadly accepted that the attainment of public (i.e., legislative) objectives was the primary consideration and that the accommodation of private property rights should be compatible with those objectives.

The proposal to establish the Seashore enjoyed remarkably broad support from the public, including Fire Island property owners, because the Seashore was seen as the only way to protect the island's still largely undeveloped natural quality from real estate development. While opposition to a roadway proposed earlier by Robert Moses contributed to residents' interest in a Seashore, this proposal had been defeated before serious debate on the Seashore began and played little role in the development of legislation. Similarly, local interest in obtaining federal funding to control shore erosion was not a major cause for public support.

Although the Moses highway had already been defeated, the concept of a roadless Seashore was fundamental to Fire Island's establishment. Legislators and many local interests fought hard to ensure the absence not only of roads but indeed of vehicles, especially on the beach. This conception of the Seashore was nurtured not only by recent opposition to the roadway proposed by Robert Moses but also by the contemporary movement in Congress to define and protect wilderness.

While concern over erosion was widespread, few supporters saw the establishment of a Seashore as a route to dramatic federal erosion control measures. Such measures were incurring growing opposition because of the environmental damage they caused, as well as their expense, and many legislators and witnesses sought to ensure the adoption of methods of erosion control more in harmony with natural systems. It was widely agreed that the goal of such measures within the Seashore should be to protect public beaches and public investment in recreational development, not to protect private homes; many witnesses

pointed to the island's houses as a factor exacerbating erosion and called for federal condemnation of those located on the dunes and most vulnerable to storms.

In establishing the Seashore, legislators generally felt that the existing balance between public land and private development was acceptable. It could be characterized as a balance between broad stretches of natural land, on the one hand, and a moderate number of modest seasonal vacation homes grouped in clusters near the Seashore's western end, on the other. The legislators made it clear that their intent was to preserve this balance, and to do so, prompted by DOI, they created a complex regulatory system which would let many private landholdings continue to exist while ensuring that federal objectives were met. Washington officials referred to this regulatory system as "the Cape Cod formula."

Despite its name, the so-called Cape Cod formula differed in important ways from the system previously adopted at Cape Cod. In particular, it exempted all of the land within the Seashore's most heavily developed areas from condemnation and opened all vacant land within these delineated areas to future development. The system thus promoted or at least accommodated significant growth and was in fundamental conflict with Congress's own vision of a stable and lasting balance between public land and private development. As the environmental effects of growth became clearer, it became increasingly evident that the system was also in conflict with Congress's mandate to protect the Island's fragile environment.

By 1967, the failure of land management on Fire Island was already becoming apparent. Criticism came from the Seashore's local supporters and from the highest levels of DOI. Critics alleged that there was too much development on the NPS's own land and that there was not enough regulation on private land. By 1975, the NPS had satisfied its critics on the first count by dropping most of its recreational development schemes. By contrast, the failings of the regulatory system have persisted to the present.

By the mid-1970s, efforts were underway to study and reform the regulatory system. These efforts, culminating in the issuance of new zoning standards in 1991, were promoted by the NPS, DOI, and Congress. Largely unsuccessful, they may be summarized as follows:

- *Improving zoning*. The Act made local zoning enforce federal restraints on private property, but the system proved ineffective. The most far-reaching proposals to solve the problem, direct federal zoning and federal issuance of a model ordinance

were not adopted by the localities. Limits on height, number of bathrooms, or other building elements were sometimes considered, but just as often, new regulations became more rather than less permissive. A major change came with the shift of federal zoning standards from a focus on acreage, frontage, and setback requirements to one based on controlling the size of structures and the density of population. This was legislatively mandated in 1984 and implemented through new federal standards in 1991. However, density was never clearly defined and the trend to lighten the impact of federal regulation on property regulation largely vitiated the effort to make it more effective by redefining its basis.

- *Protecting the dunes*. The primary dune line was early identified as a major scenic feature and a critically important element in the island's defense against the ocean. Consultants and NPS planners proposed federal purchase of dune property and several houses; however, this proposal met stiff homeowner opposition, and the administration and DOI opposed Congressional efforts to fund it. Less far-reaching proposals were hardly more successful. Plans to limit homeowners' rights to rebuild severely damaged houses after major storms were defeated. Although a dune district was established, it brought little new federal authority. Moreover, with a fixed inland boundary the northward recession of the dunes caused by coastal storms often rendered the boundary meaningless.
- *Improving enforcement*. The only enforcement tool provided by Congress was the federal power to condemn property on which zoning violations had been committed. This was considered excessively punitive for many violations and was too expensive to use where most needed. Consultants and some agency officials and legislators argued for authorizing DOI to seek injunctions to block violations. This proposal was adopted, but with such stringent restrictions as to severely limit its usefulness. Instead, NPS officials proposed other remedies without specifically mentioning them, such as tax incentives or cooperative agreements. Condemnation remained the only enforcement tool but was politically unpopular and inadequately funded; at times, DOI actually opposed Congressional funding for land acquisition. As zoning violations accumulated, the response of NPS staff was to forgive them, a policy which was confirmed by a Congressional amnesty in 1984.

- *Supporting federal land acquisition*. Within a few years of establishment, land acquisition had become limited to infrequent condemnations used to enforce violations. Meanwhile, important federal land acquisition goals, largely focusing on protecting the dunes, remained unmet. Consultants also proposed that the federal government acquire undeveloped property within the communities in order to control density, a major goal of the 1984 amendments. Proposals to facilitate federal land acquisition were not implemented and DOI opposed moves to increase acquisition funding. A revolving fund, drawing on the profits from resale of condemned properties, was authorized by Congress in 1984 but had little impact as it required resale of the property. This concept might have been workable to prevent excessive density, but was unworkable to prevent inappropriate development, such as on the dunes.
- *Enhancing procedural requirements*. In discussions shortly after the Seashore's establishment, NPS officials decided the park would monitor local zoning permit applications and would testify whenever permit requests failed to meet federal standards. This placed a substantial and growing procedural burden on Seashore staff. In addition, the frequent expressions of opposition created local friction without significantly advancing federal land management objectives. The amendments of 1984 increased the monitoring burden on Seashore staff and made the superintendent responsible for determining whether variances would make the subject properties potentially liable to federal condemnation.

Two major reasons for the failure of reform efforts may be identified. First, they did not address the underlying problems of the system, the built-in conflict between the legislative goal of stasis and the permission to develop property, and the political insulation of local governments from the island's non-resident property owners. Second, because they were crafted within a political climate increasingly hostile to federal regulation, they did not forcefully seek to secure the Seashore's congressionally legislated objectives but often focused on lightening the regulatory burden and making the federal presence more palatable to property owners.

Quite apart from the lack of success of attempts at reform, the zoning standards adopted for the island's developed communities were never remotely adequate to the task of preservation. The following problems and possible solutions have been identified:

- Traditional zoning, which is designed to separate uses from each other, is poorly suited to manage the problems of development on a dynamic barrier island where the dominant land use problems are erosion and impacts on natural resources. In particular, the federal standards' single-minded focus on lot occupancy misses other measures that have significant impacts on the ecosystem of the islands, such as enclosed floor area, number of bathrooms, and density of septic systems. Instead, the adoption of performance-based measures that would better address the interlocking problems of development on Fire Island should be considered. These measures could include maximum lot coverage by buildings, walks and other structures; maximum floor area ratio for buildings alone; maximum floor area ratio for buildings plus decks; and the location, installation, or expansion of septic systems.
- The concern of the federal zoning standards, lot occupancy, is only a minor piece of the myriad local and state rules that actually shape development on Fire Island. The federal dune district line, delimiting the area most in need of protection from development, has never been re-mapped, with the consequence that it has literally drifted out to sea as the island has shifted over time. At the same time, the state government has mapped a Coastal Erosion Hazard Area (CEHA) line which is aimed at protecting the same resource feature as the dune district. Rather than maintaining two separate lines, the CEHA line should be adopted as a single line to delimit the dune area, and it should be regularly remapped to ensure that it remains relevant.
- NPS is not able to enforce the federal standards effectively because it lacks a usable enforcement mechanism. Additionally, the local governments' zoning regimes do not encourage strict enforcement of the local standards; instead, there is a strong bias toward granting variances. Therefore, it is suggested that the State constitute a commission for Fire Island which would be fully responsible for land use planning, zoning, permitting and enforcement on the island, with the possible exception of the two incorporated villages of Ocean Beach and Saltaire.

# Introduction

Fire Island National Seashore recently passed its fortieth anniversary. It remains a marvelous expanse of sun-drenched, wind-swept ocean beach complete with impressive dunes, remarkable and unique tracts of forest, and a bay shore that offers its own array of vistas, wetlands, fishing, and shellfish beds. Fire Island also remains a fabled summer community whose special quality of life is symbolized for arriving visitors by the tumble of small, hand-pulled carts that wait patiently for their owners to disembark from the ferry – the only means of access for most visitors to the island. That all of this has somehow survived within a short drive of the nation's largest metropolitan area (New York City) is a small miracle.

Yet all is not well at the Seashore. Established in 1964 in a flush of Congressional enthusiasm for national seashores, Fire Island was given an unusual and largely untested regimen of land use control that legislators and officials of the Department of the Interior (DOI) called the "Cape Cod formula," after the Cape Cod Seashore where they had previously introduced something similar. The Cape Cod formula, or system, allowed privately owned property to survive within the designated boundaries of the Seashore and delegated land use control to local authorities and zoning ordinances. The formula worked reasonably well at Cape Cod, and Interior Secretary Stewart L. Udall predicted to Congress that it would "work even better" at Fire Island.[1] At Fire Island, however, major changes to the formula were made: most importantly, new development was permitted. The result has been problematic at best, entangling park and National Park Service (NPS) staff in controversies with local authorities and property owners over issues that neither are central to nor protect the public's interest in the National Seashore. There have been some improvements since the mid-1970s, yet many problems remain unsolved. Meanwhile, the original intent that led to the Seashore's creation – and the public benefits that the Seashore's land use regulation system was designed to bring about – have become obscured.

[1] House Hearings, p. 132

This paper seeks to describe what the Cape Cod formula was intended to accomplish at Fire Island and how it has actually worked in practice. The goal is to provide a basis for assessing and fixing its shortcomings. Chapter One reviews the intent of Congress and DOI in establishing the Seashore and sets the design of its land use system within the historical context of aspirations and concerns expressed by legislators, agency officials, local elected officials, landowners, civic groups, and other members of the public at the time. Chapter Two traces the subsequent efforts to correct the system's increasingly evident failures through 1991: the critiques, policy proposals, administrative rules, and legislative amendments. Chapter Three analyzes the system's actual performance, focusing on the period since the implementation of the current federal zoning standards in 1991.

## Study Methodology

It is important for the reader to understand what this study is and what it is not. The central question is whether Fire Island's land management system has succeeded in achieving the public purposes laid out by Congress and the policies of DOI and NPS itself. This study is an exploration of the policy questions and not a complete history of the Fire Island Seashore. The available time and funds did not permit the extensive interviews, comprehensive search of local and national press, analysis of aerial and satellite photography, and so forth, which a full history of land use within the Seashore would have required. More importantly, the specific nature of the policy questions which prompted the report called for a more focused approach.

To answer these questions, the first task was to establish the public purposes and policy goals of the Seashore's creators. Because the Seashore was established more than forty years ago, and because decades of argument and criticism have obscured its original purposes, it was important to do this with care. Fortunately, the legislative record is ample, extending to well over four hundred pages of hearing transcripts, debates, mark-ups, reports, alternate bills, and documents prepared by DOI. Presenting and analyzing them is the burden of Chapter One.

Chapter Two traces the evolution of federal policy from 1964 to 1991. It shows how Congress and DOI developed new policy tools as they realized that the existing system was not achieving the Seashore's original purposes. It also shows how Congressional and NPS goals gradually diverged from those of the Seashore's founders. As in Chapter One, the focus is on policy goals, assumptions, and tools, and again, the sources are mainly official documents: draft and final regulations, NPS plans, policy reports, and internal memos. Chapter Two shows that within a few years of the Seashore's establishment, officials and many residents believed the system was not working. The results continued to diverge ever more widely from those envisioned by the Seashore's founders.

Chapter Three approaches the question from a different perspective. It studies the performance of the regulatory system itself, based on an analysis of a sample taken from 877 land use application records on file at the Seashore from 1991 through 2004, plus municipal planning, zoning, and permitting records corresponding to the sample. Based on these records, the chapter analyzes the planning and zoning approval procedures used by the local governments, traces the production and impact of the objection letters which form the park's only method for seeking to block permits that violate the Seashore's zoning standards, and assesses the results in light of federal land management goals. Again, it finds wide divergences between goals and performance.

This research began with records from 1991, the date when the most recent federal zoning standards were released. Layered on top of the establishing Act and subsequent amendments, those zoning standards have provided the framework for land use regulation for the last seventeen years, or a little less than forty percent of the Seashore's history. They are still in place today, so that understanding how the system has worked since 1991 has direct implications for the continuing evolution of the Seashore. While a comparable analysis of results before 1991 would have historical interest, it would not have been directly relevant to policy makers.

# Chapter One

## Origins, Goals, and Methods of Land Use Regulation at Fire Island

**by Ned Kaufman**

## Fire Island in 1964

What kind of place was Fire Island in 1964? One answer is that it was an eroding barrier island of extraordinary beauty and natural interest. Another is that it was a public park and a well-established place for summer homes. The story of how these strands came together in the 1960s begins about seventy years earlier.[2]

In 1892, the state of New York bought Sammis's Surf Hotel, together with a large tract of land around it, as a quarantine center for passenger ships suspected of carrying cholera. In 1908, with the cholera threat over, Governor Charles Evans Hughes authorized its use as a state park – the first on Long Island – and created the Fire Island State Park Commission to manage it. The land was the nucleus of what would eventually become Robert Moses State Park. In the 1890s, the Fire Island Chautauqua Association founded Point O'Woods as a summer colony associated with the kind of high-minded cultural recreation pioneered by the Chautauqua Association in upstate New York. Other communities began to appear between the late 1890s and the 1930s; a few more in the late 1940s and 1950s. In 1963, DOI estimated that there were about 2,500 houses within the boundaries of the proposed Seashore; about 100 of these occupied year-round, the rest only during the summer months.[3] In addition, there were 17 churches and about 30 commercial properties, including 12 apartments or hotels, 2 yacht clubs, 10 restaurants, and 6 stores.[4]

As the 1960s opened, all was not well on Fire Island. Two forces in particular worried residents: weather and development. As a barrier beach, Fire Island is exposed to the full force of Atlantic Ocean weather, which continually remolds the island, sometimes with severe and sudden effect. The gradual appearance of houses on the island had not deterred

[2] The discussion of Fire Island's development is drawn from Koppelman and Forman, p. 6 ff.
[3] Crafts, Senate Hearing, Dec 63, p. 35.
[4] NPS Regional Director Ronald Lee, Senate Hearing, Dec 63, p. 36-37.

the hurricanes and nor'easters that regularly lash the island. In 1931, a series of storms reopened the Moriches Inlet. A particularly severe hurricane struck in 1938. An eyewitness described it:

> Shortly before four the dunes gave way before the terrible force of the roaring surf, houses collapsed, cars were tumbled like leaves; some of the stauncher houses were floated intact and whirled crazily in the core of the hurricane. Geography changed as new inlets were pushed through by the angry sea demanding an outlet for its force. For over two hours there was no difference between the Atlantic Ocean at its worst and the usually placid Moriches Bay, as the latter was swollen by the inrush of lashing water.[5]

Of 1,219 houses on Fire Island, the 1938 hurricane destroyed 265 and damaged 32 others. More storms followed in 1944, 1950, 1953, 1954, 1960, and, the most recent (before 2004), in 1962, destroyed 100 houses and damaged 30.[6]

While these storms did not endanger Fire Island's existence as a geological entity, they were a constant threat to property owners. They also threatened public investment in parks and beaches. The storm threat itself provoked a series of responses that eventually became equally worrisome.[7] The federal government built the first stone jetty on Fire Island between 1939 and 1941 at Fire Island Inlet. According to Koppelman and Forman, it trapped the sand that longshore currents moved westward along the island, building up a deep new beach along the state park. But in 1948, the ever-drifting sand finally overwhelmed the jetty's capacity to impound it and, flowing around the jetty, began to clog the inlet. The following year, the Long Island State Park Commission proposed to dredge it. In the meantime, shifting tidal currents caused by the jetty were also scouring sand from Oak Beach, on the north side of the inlet, and from 1946 to 1959 vast quantities of sand were pumped onto the beach in order to save it. In 1959, the inlet was dredged, but the results were not entirely successful: boatmen, supported by the U.S. Coast Guard observed that the currents had become dangerously strong. The course of the inlet would be shifted.

More ambitious erosion control measures were already under study, and in 1959 the U.S. Corps of Engineers released a plan that called for moving tens of millions of cubic yards

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[5] Ernest S. Clowes, *The Hurricane of 1938 on Eastern Long Island* (Bridgehampton, NY, 1939), pp. 9-10, quoted in Koppelman and Forman, p. 19-20.
[6] Koppelman and Foreman, p. 20.
[7] Description of erosion control measures drawn from Koppelman and Forman, p. 23 ff.

of sand, increasing the depth of the beach, building up and planting vegetation on the dunes, and constructing as many as fifty groins between Fire Island Inlet and Montauk Point. The federal government would pay 51 percent of the cost, while New York State and Suffolk County would share the remaining 49 percent. This ambitious construction program would generate very high annual maintenance costs, which local, state, and federal governments would share. Some Fire Island property owners were pleased, but few of them lived or voted in Suffolk County. The County's Board of Supervisors, most of whose constituents lived not on the barrier island but on the mainland of Long Island, balked at the high cost of maintaining beach houses for a small number of non-resident owners.

The situation was complicated by the existence of another ambitious plan for Fire Island. In 1924, wishing to develop a network of parks and parkways, the state of New York established the Long Island State Park Commission and picked Robert Moses to run it. The new commission absorbed the responsibilities of the Fire Island State Park Commission. Moses brought expansive visions of new parks equipped with public facilities and reached by highways and bridges capable of serving tens of thousands of people. In 1926 he built a new bathhouse that could accommodate 350 people at the park on Fire Island. The following year he proposed building a bridge over Fire Island Inlet, linking the park to the newly developed Jones Beach just to the west. On Fire Island itself, the bridge would mark the start of a new highway stretching eastward along the entire length of the island. Moses soon elaborated the plan: the highway, connecting three new parks, would be built atop a spine of hydraulic fill twelve feet high, for which sand would be dredged from a new boat channel extending along the island. Pedestrian underpasses would tunnel under the roadway.

Moses built and demolished many things during the ensuing decades: parks, bridges, highways, tunnels; however his Fire Island proposal went nowhere. After the hurricane of 1944, Moses tried to resuscitate it. Again in the 1950s, with Fire Islanders and the Corps of Engineers studying proposals for erosion control, he and his allies argued for the roadway as the best solution; it would provide the hard frosting, as it were, that would stabilize a vast man-made dune extending along the spine of the island. Although it would protect the houses in its lee, its construction would require the demolition of those that stood in its path, while

the impetus towards new parks along its length might threaten others. Fire Islanders favored erosion control, they opposed the highway.

Meanwhile, the NPS's shoreline surveys as well as emerging federal policy-making on outdoor recreation identified Fire Island as a high priority for a new National Seashore. In 1957 Congressman Stuyvesant Wainwright floated the idea at a meeting with local residents and representatives of the Corps of Engineers. Residents did not at first support it, while some county officials let it be known that they preferred a solution that kept control closer to home; nevertheless, the idea was now on the table. The first of what would eventually total seven distinct bills was introduced in Congress in 1958.

After the 1962 storm, Interior Secretary Udall visited Fire Island to study the Seashore proposal. Later he would recall meeting Robert Moses, who told him he was "20 years too late."[8] This was bluster. Moses himself was aging and under increasing attack. His reputation had been hurt in 1956 when he had bulldozed trees and a playground in Central Park in order to build a parking lot for an expensive restaurant. It had been further damaged in 1959 when he attempted to throw Joseph Papp's popular summer Shakespeare festival out of the park. By 1960, tension was building with New York State's Governor Nelson Rockefeller, who had his own expansive visions of parks and public transportation. Rockefeller wanted his brother Laurance to take Moses's place as chairman of the State Council of Parks, one of the five state agencies Moses ran. Laurance was a well-known and experienced conservationist, who since 1958 had been chairman of the President's Outdoor Recreation Resources Review Commission (the Commission's final report, issued in 1962, would have a direct impact on Fire Island). Moses told Rockefeller that if this was what the governor wanted, he would resign from all of his state posts – including the Long Island State Park Commission. In the past, offers like this had always been rejected, frequently accompanied by augmentations of his power and influence, but at the end of 1962, Rockefeller called his bluff and accepted Moses' resignations.[9] Meeting shortly afterwards, the New York State Council of Parks (which Moses had led since its foundation almost forty years earlier) voted to rename the park on Fire Island Robert Moses State Park. This was a

[8] House Hearings, p. 129.
[9] The story of Moses's fall from power is told in Part VII of Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* (New York, 1974).

tribute to the vanquished. Early in 1963, Rockefeller announced that the state lacked the money to build Moses's road. The highway was dead.

## Changing Concepts of Parks

The national park system was expanding. NPS was experimenting with new kinds of areas (national seashores, national rivers), a new emphasis on outdoor recreation, and a new dedication to serve the nation's rapidly growing eastern cities. All of these factors came to bear on the emerging idea of a Fire Island National Seashore.

The interest in public recreation was hardly new. As early as the 1930s, the NPS had begun to develop areas designed primarily for public recreation: the Blue Ridge and Natchez Trace Parkways, a large recreation area adjacent to the new Hoover Dam (later called Lake Mead National Recreation Area), Cape Hatteras National Seashore. During the 1950s, with the automobile, interest in outdoor recreation became acute, at the same time that an expanding and suburbanizing postwar population was making the acquisition of public land urgent. Nowhere was this more true than around New York City. In 1958, an influential local planning group, the Regional Plan Association, launched a program to secure park, recreation, and open space for the city; its final report, issued in 1960, was tellingly called "The Race for Open Space." Emphasizing the need for recreational opportunities along the seashore, it called the shoreline a "rare and precious thing in this mushrooming New York region," which "must be kept in as natural a state as possible and yet be available to all." The report pointed to Fire Island as a rare stretch of undeveloped seashore that was facing "terrific pressure to build summer residences." The island was "too valuable a resort" to be limited to a few property owners; its development would be "catastrophic."[10]

Within NPS, planning was moving in a parallel direction. In the mid-1950s, the NPS surveyed the Atlantic and Gulf coasts for potential seashore recreation areas; out of 126 areas identified, Fire Island was one of 16 whose acquisition was given the highest priority. Three years later, Congress established an Outdoor Recreation Resources Review

[10] Quoted by Stanley Tankel, House Hearings, p. 93[10] House Report, p. 5.

Commission to assess and plan for the "outdoor recreation wants and needs of the American people." Under the chairmanship of Laurance Rockefeller, the Commission released its report, *Outdoor Recreation for America*, in 1962. The report, a milestone in the history of the park system, confirmed that the demand for outdoor recreation was growing at the very time that development and population growth were closing off access to it. Indeed the greatest need for recreational land was near the rapidly growing urban areas – exactly where it was hardest and most expensive to procure. New blocks of well-managed public land were needed, close enough to major cities to support weekend or Sunday visits. It was up to the federal government to lead the way, and so the report urged the administration to establish a new Bureau of Outdoor Recreation within DOI, as well as a Recreation Advisory Council which would bring together the heads of all relevant agencies under the chairmanship of the Secretary of the Interior.[11]

After John F. Kennedy became president in 1961, the executive branch became an avid proponent of both outdoor recreation and federal land acquisition. Kennedy's 1962 message to Congress, entitled "Our Conservation Program," called Congress's recent approval of the Cape Cod National Seashore Area as a "pathbreaker" for other important proposals then before the legislature. He urged Congress to approve the Point Reyes and Padre Island National Seashores and Sleeping Bear Dunes National Lakeshore, as well as the Ozark Rivers National Monument.[12] In April 1962, following the commission's recommendation, the president established a Recreation Advisory Council, and Interior Secretary Udall set up a Bureau of Outdoor Recreation, to which Congress gave legislative recognition in 1963 with passage of the National Outdoor Recreation Act.

That year, the new Recreation Advisory Council issued a very influential circular laying out the executive branch's policies on national recreation areas. With a number of new areas either recently approved or moving forward in Congress, this was as much an attempt to regularize the situation as to chart a new direction. The circular sought to modify rather than supplant traditional park values. On the one hand, it called for a system of national

[11] House Report, p. 5 ; "Outdoor Recreation for America – ORRRC Report," 1962, reprinted in Dilsaver, pp. 224-236.
[12] President John F. Kennedy, "Our Conservation Program: Message from the President of the United States Relative to Our Conservation Program," March 1, 1962, House of Representatives, 87th Congress, 2nd Session, Document No. 348: quote, p. 4.

recreation areas "more clearly responsive to recreation demand" than the existing units, which were primarily intended to preserve "unique natural or historic resources." Yet on the other, it emphasized that the "natural endowments" of these new areas should, like those of the national parks, be "well above the ordinary...." Though "strategically located within easy driving distance...from urban population centers...," they should resemble national parks in being "spacious" and "nonurban in character."[13]

Meanwhile, the national park system was growing and becoming more diverse. The "conservation-minded 87th Congress" established new national seashores at Cape Cod, Point Reyes, and Padre Island. In 1964, with the Ozark National Scenic Riverway, Congress authorized a new type of park unit which the Wild and Scenic Rivers Act would extend in 1968.[14] Congress created yet another new class of public land, the officially designated wilderness, with the Wilderness Act of 1964, and in 1966 it established the first national lakeshores, at Pictures Rocks and Indiana Dunes on the Great Lakes. The National Trail System Act of 1968 gave the NPS responsibility for the 2000-mile Appalachian Trail. In 1972, Congress authorized new national recreation areas at Gateway in New York City and Golden Gate in San Francisco. The national park system had not only been dramatically expanded but also transformed with new areas that served a far wider range of needs, and called for a far wider range of management policies, than ever before.

## Fire Island Is Established

It was in the context of this transformation that Fire Island entered the arena of Congressional debate. Congressman Stuyvesant Wainwright introduced the first bill; in 1962 Rep. John V. Lindsay introduced a second in the 87th Congress; another by Rep. William F. Ryan soon followed.[15] The issue heated up during the 88th Congress. Ryan reintroduced his bill as H.R. 4999. On June 10, 1963, DOI reported favorably on the Lindsay bill, and also

[13] Recreation Advisory Council, "Federal Executive Branch Policy Governing the Selection, Establishment, and Administration of National Recreation Areas: Circular No. 1," March 26, 1963; reprinted in Dilsaver, pp. 263-268.
[14] Rep. William F. Ryan, House Hearings p. 18.
[15] For the Wainwright bill, see Pike, in House Hearings, p. 22; Keating called Lindsay's the first bill: see House Hearings, p. 14. For Ryan, H.R. 13028 of 87th Congress, summer of 1962.

brought forward a much more detailed alternative proposal. Meanwhile, Rep. Grover had submitted yet another bill, while Senators Javits and Keating had submitted S. 1365 in the Senate. Rep. Pike (Wainwright's successor) introduced his own bill on June 18, 1963, whereupon O'Brien and Ryan formally introduced DOI's proposal as H.R. 6936.[16] There were now a total of ten Fire Island bills in play,[17] representing seven distinct proposals, and the House Subcommittee on National Parks held two hearings to consider them: one in Islip, Long Island, on September 30, 1963, and a second in Washington, DC, on April 10, 1964. On December 11, 1963, the Senate Subcommittee on Public Lands held its own hearing. Finally, the House Subcommittee held two executive sessions to mark up the bill (the Pike bill, H.R. 7107 was now considered the basic text) before sending it to the full Committee on Interior and Insular Affairs for two more mark-up sessions. By July 1964, the committee report recommended enactment. The House passed the bill on August 20, the Senate the following day. Though the bills differed slightly, a way was found to avoid the need for a conference committee.[18] President Johnson signed the bill into law on September 11, 1964.

## Defining the Seashore's Public Purpose: Conservation or Recreation?

Like many parks, Fire Island National Seashore represented not a single vision so much as the resolution of several visions of what the park should be. To understand how Fire Island's land use system arose and what end it was designed to achieve it is essential to revisit the texture of congressional debate. The debate was organized along two distinct lines of discussion. One sought to define the balance between the public's interest in the Seashore and the interests of the private landowners. This discussion, which continued long after the Seashore's creation, has received a great deal of attention and is discussed in detail below. The main focus of congressional debate was the effort to define the Seashore's public purpose: would it be primarily a place for public recreation or for environmental protection?

[16] House Hearings, p. 145, 148, et.al.
[17] H.R. 3693 (Lindsay); H.R. 4999 (Ryan); H.R. 6111 (Grover); H.R. 6213 (Wydler); H.R. 6934 (O'Brien); H.R. 6936 (Ryan); H.R. 7107 (Pike); H.R. 7297 (Kelly); H.R. 7359 (Keogh); and H.R. 7512 (Carey).
[18] "Senate Whisks Fire Island Bill to LBJ," *Newsday*, August 22, 1964.

The NPS was established in 1916 with the dual mission of protecting the parks' natural features and developing them for public use,[19] and efforts to shift the emphasis one way or the other were unabating; these issues were mirrored at Fire Island. Although a strong policy current was flowing towards public recreation, another, exemplified by the Wilderness Act of 1964, was flowing towards natural conservation. The case for Fire Island pointed to either or perhaps both positions. The "urgent reason" for the Seashore bill, Interior Secretary Udall told Congress, was the "unique combination of factors" that placed "some of the Nation's finest beaches in close proximity to the largest concentration of people in the entire United States." In a similar vein, Senator Javits pointed out in one and the same breath that Fire Island was "one of the last unspoiled stretches of natural beach on the east coast" and that it "provides perhaps one of the opportunities for the establishment of public recreational facilities, easily accessible to almost 20 percent of the population of the United States....and especially for the 11 million people of the New York metropolitan area."[20] What did statements like these (and there were many) mean? Was the beach a natural asset to be cherished in its own right, or was it merely an absence of private development – a template upon which to erect facilities for public recreation? The legislators believed that one did not have to choose between these extremes; the purpose of areas like Fire Island was "neither merely that of providing present opportunities for outdoor recreation...nor merely that of preserving for the enjoyment of future generations the natural conditions and scenery which such areas now afford, but a blend of the two."[21] The question was how to blend them, and it was not an easy question to answer.

After many compromises and much ambiguity, natural conservation emerged as the dominant principle, with public recreation a close second. Still, everyone agreed on three points: defining the Seashore's public purpose was the most important question, the public purpose lay somewhere along an axis between public recreation and natural conservation, and third, the question of private property had to be solved in such a way as to support that public purpose. Legislators, DOI/NPS officials, and even most public participants thus agreed to place the issue of property rights second to the interests of the broader public. As

[19] Organic Act of 1916.
[20] Udall: House Report, p. 9; Senate Hearing, Dec 63, p. 2; Javits: Senate Hearing, Dec. 63, p. 9.
[21] House Report, p. 6.

Senator Javits put it, the problem of private property rights "must be worked out without losing sight of the overall concern for the protection of the natural features of the seashore and its public outdoor recreational potential."[22]

To understand how that question was addressed, it is necessary to carefully consider the arguments for recreation and conservation.

**The Argument for Recreation**

The Seashore proposal received a great boost from the growing enthusiasm of both the executive branch and Congress for providing public recreation for the urban masses. New broad public recreation policies, apropos to Fire Island, also supported the argument for a recreation area. The Recreation Advisory Council announced that these policies were "binding" upon its member agencies (which included DOI/NPS) and listed "National Seashore" as one of the names typically used for areas designed "predominantly for recreation use"; within these areas "outdoor recreation shall be recognized as the dominant or primary resource management purpose." These areas might include scenic resources, but only if their "preservation and enjoyment" was "compatible with the recreation mission." Furthermore, the areas should be "designed to achieve a comparatively high recreation carrying capacity" for whatever kinds of recreation were chosen (they might of course be low-impact activities like hiking or boating). In these areas, then, recreation was clearly to be the first priority, conservation secondary. [23]

In 1964, Interior Secretary Udall released a letter on national park management to NPS Director Conrad Wirth, implementing the policy circular. The letter called for separate and specific management concepts for natural, historical, and recreational areas. Udall declared that outdoor recreation was to be "recognized as the dominant or primary resource management objective" for recreational areas. Natural resources could be "utilized and managed for additional purposes" as long as these uses were "compatible with fulfilling the recreation mission of the area. Scenic, historical, scientific, scarce, or disappearing resources

[22] Senate Hearing, Dec. 63, p. 10.
[23] Circular, 1963, pp. 263-268.

within recreational areas shall be managed compatible with the primary recreation mission of the area." Additionally, "physical developments shall promote the realization of the management and use objectives."[24]

This proclamation came three months after NPS had completed its formal proposal to establish a national seashore at Fire Island. Jointly authored by the Bureau of Outdoor Recreation and the National Park Service (in that order), the proposal showed how Fire Island complied with the new recreational area standards. Both bureaus were represented at the congressional hearings: the testimony presented by DOI emphasized the recreational aspects of the proposal. As Assistant Interior Secretary Carr said, Fire Island was among DOI's "highest priorities," representing "an opportunity to provide for the future welfare of millions...."[25]

Though these policies were intended to benefit recreation-starved city-dwellers, few organizations testified specifically in support of public recreational development at Fire Island. The Hempstead Town Lands Resources Council listed recreation among four reasons for supporting the legislation, yet placed it last, stressing instead the attractions of "naturally wild areas which will be preserved"- the "true recreation, i.e. 'Refreshment of the strength and spirits after toil."[26] The Babylon Tuna Club asked for a new inlet to eliminate pollution in the bay, and the Long Island Beach Buggy Association sought assurances that surf fisherman would have access to a certain stretch of beach in beach cars, while simultaneously calling for the strengthening of other conservation measures, such as a ban on roads and a preference for less-invasive erosion control methods.[27]

Officially, the policy direction behind the Fire Island proposal was mainly to provide public recreation for a growing urban population. Congress endorsed this position in many statements, and in the final expression of its views, the House Interior Committee appended the Recreation Advisory Council's policy circular to its report. Yet by then, the content of Congress's hearings and debates had in fact shifted far from this initial position.

[24] Udall letter, June 10, 1964, in Dilsaver, p. 274.
[25] Senate Hearing, Dec 63, p. 26.
[26] House Hearings, p. 44.
[27] House Hearings, p. 99.

**The Argument for Environmental Protection**

Despite endorsing the new public recreation policies, legislators and agency officials showed that they also recognized Fire Island's unique natural qualities and responded to its wild beauty. "I know of no other place," said Senator Javits, "– and I have been to Nantucket and many others, and they are all very beautiful – where one has a feeling of being at sea while on land, having the touch of the ocean and actually living at sea...."[28] Javits had lived on Fire Island for four seasons and knew its moods. Senator Keating, addressing the House committee, called for the "preservation in its natural state of as large a portion of Fire Island as possible."[29] Congressman Hugh L. Carey emphasized the need for "preservation and maintenance" of migratory waterfowl and showed a sportsman's familiarity with the island's birds, game fish, and shellfish.[30] Congressman James R. Grover, whose district lay close to Fire Island, spoke eloquently of the "priceless treasure of sand and water, flora and fauna, which God and nature have created in this great barrier beach" and cautioned DOI that "encouraging or permitting oversaturation or overpatronage of the area will destroy the 'forever wild' aspects so desirable to retain to whatever extent possible."[31]

Recapitulating these themes, the House committee report devoted relatively little space to Fire Island's recreational potential but dwelt lovingly on its natural resources, noting the dunes, marshy areas, the sunken forest, a variety of common and rare plants, breeding and wintering grounds for various bird species, and both bay and ocean fish. The report also approvingly quoted naturalist Robert Cushman Murphy's 1933 description of Fire Island – 'mostly roadless, trackless, isolated, and alluring,' existing 'as if in an unworldly trance,' a place whose beach offered 'infinite solace for body and soul,' displaying 'not only the usual charms of an unspoiled seashore' but also an assemblage of plants and animals 'so rare in our northern latitudes that they are in the nature of wonders.' Warning of the "danger of overuse" by visitors, the report noted that the existence of intensive recreational facilities at Robert Moses State Park and Smith Point County Park would "help to assure the carrying out of the quieter mission of the Fire Island National Seashore." The committee endorsed, and even

[28] Senate Hearing, Dec. 63, p. 9.
[29] House Hearings, p. 14.
[30] House Hearings, p. 86.
[31] House Hearings, p. 119.

added its own emphasis to, DOI's pledge to develop and manage the island's recreation resources "for maximum public use, *consistent with the protection objectives*."[32] In other words, while supporting the recreation policies of DOI and the Recreation Advisory Council, the committee inverted one of their central points: recreation would be adjusted to the needs of conservation, rather than the other way around.

The committee's emphasis has to be understood in light of the NPS's reputation at that time for overdeveloping its natural treasures. This was partly a result of Mission 66, the ambitious ten-year program which the NPS launched in 1956 to improve the condition and quality of visitor services in its parks by restoring and developing them. By 1963, with public and congressional interest in protecting disappearing wilderness growing, concerns about NPS's tendency to overdevelop that wilderness were also rising. They were not assuaged when NPS Director Wirth, the author of Mission 66, sought to exempt the national parks from the provisions of the Wilderness Act the following year.

At Fire Island, Congress had particular reason to fear NPS overdevelopment. To begin with, NPS's proposal was jointly sponsored by the new Bureau of Outdoor Recreation, which was presumably even more devoted to recreational development; then there was the proposal itself. A prominent component of Mission 66 was the provision of visitor contact stations, many of them substantial structures equipped with bookstores, exhibitions, and even small theaters. At Fire Island, the NPS envisioned no less than nine visitor contact stations, plus a larger visitor center.[33] There was more. Testifying before the House, NPS Director George Hartzog pointed to a map with ten circles representing possible locations for public service facilities. At Smith Point, a major point of entry, the NPS would provide a "parking area, visitor center, boat and tent rental, marina, ferry terminal, and entrances to bicycle and walking trails." There would be four "developed areas" to the east, and four to the west of Smith Point, each providing facilities like "beach access, boat docking, picnic and swimming areas, bicycle and foot trails...."[34]

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[32] House report, pp. 5-7; for Murphy's testimony, see also House Hearings, pp. 75 ff.
[33] Map, "Proposed Fire Island National Seashore," included in Senate Hearing, Dec. 63. The map illustrates Interior's proposal for a 52-mile-long Seashore: however, all but two of the proposed visitor contact stations were located within the 33-mile proposal eventually adopted.
[34] House Hearings, p. 129.

All of this suggested an approach inconsistent with Congress's appreciation of Fire Island's natural values. The legislative language sought to cap the risk of inappropriate recreational development. The Senate bill, S. 1365, prohibited any "development or plan for the convenience of visitors" that would be "incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing." Senator Keating particularly favored this language, which resembled stipulations made previously at Cape Cod National Seashore, and it was also included in Rep. Pike's House bill.[35]

At Fire Island, there were other reasons why both Congress and perhaps even the NPS itself might wish to limit recreational development. The proposed Seashore was bracketed by Robert Moses State Park to the west and Smith Point County Park to the east. Moses State Park (originally called Fire Island State Park) had existed since 1908. But in 1963, as the Fire Island hearings got underway, the Long Island State Park Commission was completing a causeway and bridge that would bring cars there for the first time, as well as new parking fields and a second bathhouse. State park officials, the NPS told the Senate, expected annual visitation to climb from 175,000 to about 3 million.[36] Even so, these crowds represented little more than the overflow predicted from Jones Beach, the even more intensively developed park which lay only fifteen miles to the west and could accommodate 28,000 cars at a time.[37] In the hearings, both legislative bodies, and seemingly the NPS too, sought to draw a bright line between the developed public recreation offered by Jones Beach and Moses State Park and the quieter, more nature-oriented atmosphere they envisioned for the Seashore. The House report drew the contrast explicitly, endorsing the recommendations in NPS's development plan restricting travel within the Seashore to foot trails and bicycle paths and limiting parking lots to the existing state and county parks.[38]

At the hearings, the public espoused natural conservation even more enthusiastically than Congress, and public testimony on the Seashore's natural values far outweighed statements on its recreational potential. The list of conservation groups registering their support was impressive and included the New York State Council of Parks, Garden Club of

[35] House Hearings, p. 14.
[36] Regional Director Ronald Lee, Senate Hearing, Dec. 63, p. 34.
[37] According to Lee: Senate Hearing, Dec. 63, p. 34[37] House Report, p. 7.
[38] House Report, p. 7.

America Conservation Committee, Wilderness Society, Izaak Walton League, National Wildlife Federation, Sierra Club, Sport Fishing Institute, New York Chapter of the Appalachian Mountain Club, and National Parks Association. Excerpts suggest the flavor of this testimony.

Dr. Robert Cushman Murphy was curator emeritus of the American Museum of Natural History and (according to another witness) an "internationally known naturalist." A Long Island resident, he said he was "authorized to speak for conservationists united for Long Island on the advisory committee..." Emphasizing the rarity of Fire Island's environment, Murphy observed that, of the "11 distinct types of country" that Long Island once boasted, Fire Island preserved the only substantial undisturbed remnant. Murphy spoke authoritatively of the interdune swales with their mature trees and described the island as "one of the great waterfowl flyways of the continent." He believed the Seashore proposal offered "the only certainty that the barrier beach can be kept forever in its unspoiled state." The Sierra Club's William Zimmerman concluded more dramatically, "This wild bit of coastline, its flora and fauna largely undisturbed by man, cries out to be preserved, to be set aside for the refreshment and recreation of men, women, and children of today, and of mankind for generations to come." The Garden Club of America described the island's unique sunken forest, its remarkable mixture of northern and Gulf Stream fish species, and the way in which a great variety of migratory song birds shared space with ducks and other waterfowl. The National Parks Association emphasized the distinction between parks like Jones Beach, or Coney Island, developed for "mass recreation purposes," and a "park-type preserve in which the protection of nature is the dominant theme."[39]

Perhaps the most personal statement came from Michael Nadel, Assistant Executive Director of the Wilderness Society, recalling a visit to Fire Island around 1926. After finding a private boat owner to ferry him across the bay, Nadel recalled, he wandered across the dunes and salt marshes. "I remember at one point, as I stood remote and alone atop one of the higher dunes, the waters of the bay chopped away almost at my feet, on one side. On the other below me, the sea rolled up with blue in its eye and a white froth on its lips. It was terribly beautiful, and terribly awesome." There were more intimate charms, especially the

[39] Senate Hearing, Dec 63, pp. 56-57, 73, 77; House Hearings, p. 120.

sunken forest, "dark mysterious, damp, dense." Nadel alluded to a lifetime spent wandering the Yukon, McKinley National Park, the boundary waters, the Rockies and Cascades, the Tetons, the Adirondacks, and concluded: "But I have never forgotten over the years and many experiences of grand and majestic and lonely scenery, the magic of Fire Island. I would like my daughter, and some day, her daughter, to see what I saw."[40]

The conservation groups were not alone in calling for conservation. The Regional Plan Association (RPA), a group as committed to development as to conservation, had published an influential study, "The Race for Open Space," in 1962. Summarizing the statistics on Suffolk County's explosive growth, the RPA testified that "it is imperative to preserve all our remaining open beach." It was not public recreation primarily that the RPA had in mind: "What the New York region needs," argued its director, "is a place for people to sit on a mountain top and commune with Mr. Maker." He sought to present Fire Island in terms that western senators like Bible or Simpson, familiar with the glories of the Rocky Mountains, might understand: much of the island, he assured them, was "still virgin and possesses natural growth and wildlife that should be conserved as part of the country's heritage."[41] The managing editor of the Babylon Town Leader made a similar point. He contrasted Fire Island with the rest of the Long Island's barrier beaches, "developed" with everything from private houses to "mass recreation parks." Fire Island, he urged, should be "left relatively untouched – for passive recreation, for camping, and for research by naturalists, oceanographers, and marine biologists."[42]

A persuasive and detailed conservation statement came from the Suffolk County League of Women Voters, which described Fire Island and Great South Bay as "one geographic and ecological entity" – an unusual use of a word only then gaining currency – and argued for "inclusion of the entire island and much of the contiguous bay bottom."[43] Though confident that the NPS would succeed in balancing recreation and conservation needs, the League urged Congress to delineate the Seashore's "primary purposes," especially "preservation of natural features in as nearly their present condition as possible..." The

[40] Senate Hearing, Dec 63, p. 74.
[41] Senate Hearing, Dec 63, p. 69.
[42] John A. Meyer, House Hearings, p. 42.
[43] Mrs. Donald Larson, Senate Hearing, Dec 63, p. 59.

League believed that S. 1365 (Javits-Keating) embodied the "primary conservation purpose of the seashore" but urged the NPS to accommodate "only those recreational activities that are compatible with this principle" and that did not duplicate those offered at the state and county parks. Specifically, that meant "low-density recreational uses" like "fishing and boating, hiking, camping, picnicking, painting, photography, beachcombing, nature study in many forms and simply the quiet and solitary enjoyment of wild, natural surroundings...," all of which required "space" and the "dispersal of people." To this end, the League recommended locating support functions outside the Seashore.

The League's analysis of recreational land use encapsulated its overall views on Fire Island. The group endorsed the system of recreational zoning developed by the Outdoor Recreation Resources Commission's report. This system encompassed five categories of recreational land (plus a sixth for historic sites), ranging from "high-density" to "primitive areas." The League believed that only the three lowest-density zones should be accommodated within the Seashore: "primitive areas" (essentially wilderness areas without any manmade facilities), "unique natural areas," and "natural environment areas." Throughout, the League urged DOI to place the emphasis on "enjoyment of resources 'as is' for 'close to nature' outdoor experiences, rather than on manmade facilities."[44]

The testimony of groups with a strong stake in public recreation was particularly interesting. Not surprisingly, groups like the Suffolk County Fish & Game Association or the Appalachian Mountain Club stressed natural conservation, since their kinds of recreation called for large expanses of undisturbed natural environment. But even local recreation groups emphasized conservation over recreational development. The Babylon Rod and Gun Club stated simply that it was vital to consider "maintaining the natural environment for posterity."[45]

In general, public testimony emphasized the glories of the ocean front, beach, and dunes. But expert witnesses and public officials also laid out a thorough case for the environmental values of the bay front. The NPS's Ronald Lee, director of the Northeast region, told the Senate that the Great South Bay was a "very important area for migratory

[44] Senate Hearing, Dec 63, pp. 61-63.
[45] House Hearings, p. 125.

waterfowl...important for shellfishing...important for other kinds of fishing...a nature study." Lee explained why it was important to include some of the islands and much of the bay bottom in the Seashore. At Cape Hatteras, he noted, the Seashore boundaries had been pushed offshore to enable the NPS to administer the places where people swam and fished: in other words, in order to manage recreation. But at Fire Island, he thought it "would be desirable to consider" the offshore extension "as a part of the conservation project."[46]

The League of Women Voters also testified extensively on the importance of the bay front, arguing that protection of the wetlands, offshore islands, and bay bottom was essential if they were to "continue to provide the essential conditions of life for all the marine and wildfowl populations they now support." With this concern in mind, the League also emphasized the need for restraint in fighting beach erosion on the ocean side, since the bay bottom was being severely damaged by dredging for sand. In addition to the scientific and esthetic values of the bay front, the League noted that multi-million-dollar economic activities including commercial and sport fisheries, boating, and even hunting depended on the health of the wetlands and bay bottom.[47] Even more forceful was the testimony of the Hempstead Town Lands Resources Council, whose primary reason for supporting the Seashore proposal was to ensure protection of the marsh islands, wetlands, and mud flats in the bay, which formed an important "ecological unit" as well as a rich shellfish habitat. Calling the shallow waters of the bay the "great 'Greenhouse,'" the Suffolk County Fish & Game Association told Congress, "If you do not protect this shallow area, you have lost it all." The association urged Congress to incorporate the shallow waters of the bay within the Seashore and to prohibit development and bulkheading along its margins.[48]

Property owners and local officials were also committed to conservation. Their views came up during a discussion of a local advisory commission. Many legislators feared that the existence of such a group would "handicap the Secretary of the Interior" in administering the Seashore, because they believed it could become an uncompromising and obstructive voice for environmentalism. Though legislators acknowledged and indeed shared concern over NPS overdevelopment, it was not, as Rep. O'Brien put it, as if DOI was "going to run hog

[46] Senate Hearing, Dec 63, p. 38.
[47] Senate Hearing, Dec 63, pp. 61, 64; House Hearings, pp. 64-65.
[48] House Hearings, p. 85.

wild and put a lot of commercial or industrial things in a national seashore park." The department needed its hands free to manage the Seashore: "there may be certain things required that are essential to the orderly development of the seashore, and I would rather leave it to the Secretary than to 15 people...." After much debate, the commission was eventually adopted as a concession to local interests, but Congress gave it a purely advisory role and limited its life span in order to prevent it from becoming a "perpetual guardian of the seashore."[49]

The subcommittee's view of local residents as potential environmental extremists appeared to be confirmed when a representative of a local citizens' group handed one of the members of the full committee a proposed amendment extending to the entire Seashore environmental protections which had been designed for a particularly fragile portion of it, the eight-mile stretch from Davis Park to Smith Point County Park. This measure would have prohibited all road access to the Seashore as well as any form of visitor-oriented planning or development "incompatible with the preservation of the flora and fauna or the physiographic conditions now prevailing" anywhere in the Seashore; it would also have required government to exert "every effort...to maintain and preserve the seashore [i.e., the entire Seashore] in as nearly its present state and condition as possible."[50] Rep. Udall initially supported the amendment, but Rep. Kyl pointed out that "we are naming this area a seashore to differentiate from the national park because some of the use contemplated is different from that of a national park...." Besides, the restrictions were simply unreasonable: "As a matter of cold hard fact, anything in the way of a visitor convenience that is erected – and they are going to have to have some – is going to be a detraction from the physiographic features, and they are going to have to destroy a few plants and perhaps even chase a rabbit or something down the island a ways to build a building to take care of the visitors." The NPS would "do as good a job as possible"; but they had to be allowed to do it.[51]

When they felt pushed by residents, legislators stood up for DOI, staking out a middle position between environmental extremism and recreational overdevelopment. But at other

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[49] *Handicap*: Aspinall, House Subcommittee Transcript, June 30, 1964, p. 81; the rest, O'Brien, *ibid.*, p. 83, House Committee Transcript, July 28, 1994, p. 11; see also *ibid.*, pp. 9 ff., and House Subcommittee Transcript, March 12, 1964, pp. 64-69.
[50] House Committee Transcript, July 22, 1964, p. 20-21; cf PL. 88-587 Sec. 7(b).
[51] House Committee Transcript, July 22, 1964, p. 24-25.

times, the legislators expressed a firmer environmental position than Interior's. In fact, Congress's environmental position gradually hardened as legislators distinguished their views from DOI's and defined their own intent. The process can be traced in the statements of purpose contained in the various bills. Lindsay's statement of purpose (H.R. 3693) was unspecific, as befitted a bill which was essentially a placeholder: "preserving certain unspoiled shoreline areas for the enjoyment and inspiration of the people of the United States." The same words appeared in the Senate bill, S. 1365.[52] The statement of purpose in O'Brien's bill (H.R. 6934) was weighted towards recreation, as one might expect since this was really DOI's bill: it called for "preserving public outdoor recreation purposes certain relatively unspoiled and undeveloped beaches, dunes, and other natural features...which possess high recreation values to the Nation...."[53] With the Pike bill, which committee leaders and many witnesses identified as the basis for legislation, momentum swung towards natural protection: its public purpose was "conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features...which possess high values to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban population."[54] Rep. Wydler was "personally disturbed by references to its [i.e. Fire Island's] becoming a public seashore recreation area with all this can imply." Fire Island, he said, was "in the main, an unspoiled part of Americana," and "the purpose of this bill, as I see it, is to maintain Fire Island in a state of wilderness."[55]

Wydler had recently introduced one of the bills that would lead, in less than five months, to passage of the landmark Wilderness Act. In an interview, he "emphasized the Park Service must spell out how it intends to keep the bulk of Fire Island a wilderness" and said he was "skeptical" that the plan put forward in the department's prospectus would do so.[56] Wydler was not the only legislator to pick up the language of the wilderness movement in speaking about Fire Island. When Grover expressed anxiety over the Island's "forever

[52] House Hearings, p. 1, Senate Hearings, Dec 1963, p. 1.
[53] House Hearings, p. 2; and House Committee Report, p. 12.
[54] House Hearings, p. 4.
[55] House Hearings, p. 149.
[56] Edwin J. Safford, "Opposition Fades to Udall Fire Island National Park Plan," *Long Island Press*, April 11, 1964.

wild" quality, he was adopting one of its key phrases. The words "forever wild" were taken from the clause in the New York State Constitution which had created the Adirondack Forest Preserve, one source of inspiration for the wilderness bill. Others used the phrase as well. The Suffolk County Fish & Game Association testified that it was "essential that the 'forever wild' concept be accepted" within the 4 ½ mile stretch east of Smith Point Park. Suffolk County Executive Dennison, though distrusting the motives of many park supporters, nonetheless favored acquisition of a four-mile stretch by Suffolk County and "urged that it should be kept 'forever wild.'"[57] The discussion of roadways within the Seashore, summarized below, contained other strong echoes of the wilderness movement. Such verbal appeals did not make Fire Island a wilderness area, but they did give voice and direction to the shift in focus from recreation to natural conservation.

The evolving statements of purpose contained in the bills were accompanied by increasingly detailed instructions to DOI on how to manage the Seashore. The Lindsey bill offered none; DOI's (as introduced by O'Brien) gave the Secretary a free hand to pursue the "conservation and development of natural resources" in support of the bill's purposes; but the Pike bill explicitly directed the Secretary to "administer and protect" the Seashore "with the primary aim of conserving the superb and fragile natural resources located there," and it provided quite specific instructions on how to do so.[58] The League of Women Voters advocated an even more explicitly conservation-oriented statement of purpose with three goals: first, "preservation of natural features in as nearly their present condition as possible"; second, "accommodation of only those recreational activities that are compatible with this principle"; and third, "the increase and dissemination of scientific knowledge and understanding...."[59] Maurice Barbash, representing the Citizens Committee for a Fire Island National Seashore, asked for more stringent conservation provisions, including tighter zoning standards to preserve the dunes and other natural features.[60]

Though some legislators might have wished for more, the statement of purpose in the final Act was unequivocal: "conserving and preserving for the use of future generations

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[57] Harry G. Kilthau: House Hearings, p. 86; Art Bergmann, "Dennison Hits Motives In Seashore Park Plan" (unidentified press clipping, March, 1963).
[58] *O'Brien*: Sec. 7, House Hearings p. 4; *Pike*: Sec. 7(a) - Sec. 7 (b), House Hearings p. 6.
[59] House Hearings, p. 67.
[60] House Hearings, p. 159.

certain relatively unspoiled and undeveloped beaches, dunes, and other natural features...which possess high values to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban populations...."[61] Equally clear were the Act's instructions to DOI to "administer and protect the Fire Island National Seashore with the primary aim of conserving the natural resources located there."[62] This sentence prompted a revealing discussion during the mark-up. Originally it had been followed by another which began, "To this end, the area known as the Sunken Forest shall be preserved...." The committee stripped out the words "to this end," thereby removing a potential source of misunderstanding; the direction to conserve Fire Island's natural resources pertained to the entire Seashore, not merely to the Sunken Forest.[63]

While embracing conservation as a primary purpose, the legislators did not entirely reject recreation,[64] however, their emphasis on conservation was clear and DOI seemed to share the vision. DOI had started out with a strong orientation towards recreation; while extolling Fire Island's "outstanding recreation potential," Secretary Udall simultaneously remarked that the Seashore would give the public "an opportunity to enjoy the natural values associated with the seashore and which are lost in the intensive use areas that are available elsewhere."[65] In March 1964, NPS and the Bureau of Outdoor of Recreation, formally proposed and promised that "most" of the island would be restricted to "activities compatible with the maintenance of the natural scene," with the undeveloped portions "set aside for protection of natural values and activities compatible with this preservation objective...."[66] Though less forthright than Congress's position, the assurance effectively stood the Recreation Advisory Council's policy on its head; whereas the Council had called for making natural protection compatible with public recreation, DOI now proposed the opposite.

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[61] Proposed amendment to H.R. 7107, House Committee Report, p. 1, and P.L. 88-587, Sec. 1 (a).
[62] Amended bill, Sec. 7, House report, p. 3; and P.L. 88-587, Sec. 7 (a).
[63] House Subcommittee Transcript, March 12, p. 52-3.
[64] Late in the process, for example, Rep. Kyl described the Seashore as a "pure recreation area." Similarly, Rep. Morris emphasized the need for recreation near New York City. But these remarks were made to advance specific political goals, Kyl's to buttress the case against earmarking monies from the not-yet-approved Land and Water Conservation Fund for Fire Island, Morris's to link the Fire Island bill to former President Kennedy's conservation initiatives, especially his call for federal acquisition of land. See House Subcommittee Transcript, March 12, p. 29; and House Committee Transcript, July 22, p. 2.
[65] House Hearings, p. 125.
[66] *Report*, pp. 3, 4, 21.

The NPS continued to signal its commitment to natural conservation in numerous ways as it began to manage the park. Planner Donald Humphrey explained to the Advisory Commission that NPS's congressional mandate was "to preserve the natural environment of this Seashore" and to provide "in an intelligent manner" for its use then and in the future. The Seashore hired a Chief Park Naturalist. Humphrey promised that development would be "sensitive," limiting cars to Smith Point County Park, protecting the ambiance of the beach; "developments will be behind the beach so that, from the beach, you should be able to see practically no development. The beach will be left in its natural condition."[67] The Seashore projected by the NPS would include public recreation as an important focus alongside natural conservation, but it would be recreation of a type different from what the state and county parks offered and compatible with the natural environment. The Seashore would offer the kinds of nature experiences that were becoming increasingly rare along the eastern seaboard.

## Public Support for the Seashore

While residents in general clearly supported, and at times led, the movement to establish environmental conservation as the Seashore's primary purpose, the bases for local support deserve closer attention because they bear directly on the private property question. What benefits did local residents, property owners, and government officials hope to gain from the new Seashore? What harms did they hope to avert?

### Unanimity of Support

Rep. O'Brien reported how broad local support for the Seashore was to his colleagues in the House: the "extraordinary degree of unanimity among the people in the area affected," calling it "most unusual....when we get involved in matters of this sort."[68] Senator Javits also called attention to the strong local support, pointing to the Suffolk County Board of Supervisors, the administrations of both Islip and Brookhaven townships, and the local chambers of commerce. Members of the public noted the same phenomenon. Mrs. Donald

[67] "Minutes of the Organization Meeting of the Fire Island National Seashore Advisory Commission, Washington, D.C., August 26, 1965: Park History files, fol FINS Correspondence 1965-74.
[68] House Committee Transcript, July 22, 1964, p. 3.

Larson, speaking for the local council of the League of Women Voters, commented that support came from "civic and sportsmen's groups, scientists, educators, commercial interests, professional planners, and conservationists alike," as well as "public officials on all levels of government." Suffolk County Executive Dennison said "the opposition is so minute as to be almost indistinguishable...." Charles Lowry, President of the Fire Island Association – a homeowners' group, commented to Senator Bible that the Fire Island hearing might well be the first time in the senator's experience that "an association of property owners has appeared before you to give enthusiastic and almost unanimous support for a national park proposal."[69] The Fire Island Association represented all 18 communities on the island, including some 3,000 property owners and 1,500 renters. Lowry explained the reasons for this unusual show of support; most of the residents, he explained, had been attracted to Fire Island because it offered "the only relatively unspoiled natural beach area" in the New York metropolitan area.[70] "We want to keep it that way, even if it means giving up some of our rights to private beaches and exclusivity."

**Controversies over Boundaries**

For Keating, the Seashore's boundaries was the "major controversy," and O'Brien, observed that the boundaries was the "only serious area of disagreement" that remained unsolved as the end drew towards a conclusion.[71] There was a proposal to extend the park boundary eastward from Moriches Inlet to a point 20 miles into the town of Southampton, thereby expanding the Seashore from the initial 32-mile proposal to more than 52 miles of shoreline. "The Kennedy administration…sprang a surprise on Republican sponsors…," reported one newspaper after Secretary Udall revealed the proposal at a press conference in June 1963. Senator Javits noted "strong local opposition" to the move,[72] and by the time the House subcommittee held its first hearing in April 1963, it had attracted so much controversy that it was effectively withdrawn, removing the only source of opposition to the Seashore.

[69] Senate Hearing, Dec 63, pp. 10, 61, 48-49, 51.
[70] House Hearings, p. 81; Senate Hearing, Dec 63, p. 51.
[71] House Hearings, p. 13; House Committee Transcript, July 22, 1964, p. 3.
[72] *Kennedy*: James E. Warner, "Fire Island – and Then Some," *New York Herald Tribune*, June 12, 1963; *Javits*: House Committee Transcript, July 22, 1964, p. 3.

The principle that the boundaries of the Seashore would incorporate some private property and eliminate others was never in doubt, although *which* properties to include were controversial. Southampton Town Supervisor Stephen F. Meschutt opposed the eastward extension to Southampton because it would have included within the Seashore 674 houses whose maintenance and upkeep formed an important part of the town's year-round economy. Suffolk County Executive H. Lee Dennison agreed that the Southampton segment was "already greatly built up" and, as "an important part of our county's general economy," should be excluded. Yet he applauded the Pike bill because it would "enable the elimination" of houses throughout the eight-mile stretch of Seashore west of Smith Point. Similarly, the Commissioner of the Long Island State Park Commission, Perry B. Duryea, Jr., called the inclusion of the "substantially developed beach" in Southampton "not feasible," yet urged the inclusion of "uninhabited" land on Fire Island and indeed argued that it should be "acquired by a governmental agency as soon as possible."[73] Both Dennison and Duryea, in other words, balanced calls to exclude one area with calls to include others.

The objections to the inclusion of private property that roiled Southampton were not significant elsewhere on Fire Island. Quite the contrary, Charles S. Lowry, speaking for the Fire Island Association, told the House that several members had offered to donate their property to the Seashore - "that's how strongly they feel." He was underlining the difference between Southampton, where the inclusion and federal acquisition of private property were opposed, and Fire Island proper, where they were welcomed.[74]

The Seashore's boundaries remained uncertain until late in the legislative process. In the spring and summer of 1964, the House committee was still considering three possible boundaries: that proposed by Rep. Pike, a somewhat reduced proposal submitted by DOI that drew the boundary at the Brookhaven/Southampton Town line, and Representative Hugh Carey's which extended it about a mile and a half eastward from the town line to Moriches Inlet. They chose to "take the middle course," the Carey boundary, but they also included

[73] House Hearings, pp. 45, 32, 36.
[74] House Hearings, p. 80.

some islands that DOI had overlooked.[75]

It is not exactly accurate to say that there was no opposition to the Seashore within Fire Island proper, but it was "minute," in the view of County Executive Dennison. The "one dissent, in a hearing filled with enthusiasm…"[76] came from William B. Hoffman; Hoffman's testimony, and the reception it received in Islip and in Washington, served to underline the general unanimity of support. Claiming to represent the Fire Island National Seashore Community Committee, Hoffman urged Congress to exclude the developed communities at the island's western end (Kismet, Saltaire, Fair Harbor, Ocean Beach, Seaview, Point O'Woods, and Cherry Grove). He revealed a deep fear of the powers which he thought the bills gave to DOI, especially the "dictatorial and practically limitless powers to take any property" for the purpose of beach access and the power to "veto" the Army Corps of Engineers' erosion control measures. He opposed the taking of private property to create public beaches in part because he believed that Long Island already had a "superabundance" of public beaches. He was combative and evidently irritated the congressmen. They in turn established through questioning and other testimony on the record that his fears of dictatorial powers were exaggerated or ill-informed, that his organization was of doubtful legitimacy, and that his claim of widespread opposition was unfounded. When it emerged that Hoffman simply did not want the public anywhere near his house, his credibility declined even further.[77]

**The Highway Threat and Support for a Roadless Seashore**

Why did Fire Island property owners support the Seashore's creation? In their study of the island, Koppelman and Forman argue that they believed the Seashore offered the best hope of protecting their homes against two great threats: the Moses highway and erosion. The legislative record, however, requires modifying this claim.

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[75] House Subcommittee Transcript, May 12, p. 3 ff.; June 30, 1964, p. 85 ff.; House Committee Transcript, July 22, 1964, p. 4 et. seq.; and July 28, 1964, p. 1 ff.

[76] Edwin J. Safford, "Opposition Fades to Udall Fire Island National Park Plan," *Long Island Press*, April 11, 1964.

[77] House Hearings, pp. 53-62, 81-82; see also p. 149 ff. One other written statement, from John W. Scherger, "a taxpayer of the Village of Saltaire," requested specifically the excision of Saltaire from the Seashore: House Hearings, pp. 98-99, 155.

Koppelman and Forman note that residents did not generally support the Seashore when it was first proposed in 1957. However, when the highway threat reemerged, "the local citizens protested as one man." The Sierra Club's representative at the hearings implied that Barbash's group, the Citizens' Committee for the Fire Island National Seashore, arose as a vehicle to fight the highway.[78] Barbash himself was more circumspect. He explained that there was "no real active stimulus for a national park before" March or April 1962, implying that the great storm had catalyzed the group's formation. In his account, the Citizens' Committee was not precisely an anti-road group but was formed rather to settle the question of "the ultimate disposition of Fire Island, whether it should be subdivided, whether a four-lane highway would be the best answer for it."[79] The League of Women Voters saw the situation differently: the "recent threat" of the highway had "alerted people as nothing else might have done to the various forms of manmade encroachments endangering the total character of Fire Island as we presently still know it."[80]

The League's choice of wording is significant. Testifying in the fall of 1963, the group characterized the highway proposal as a "recent" threat because by then – indeed well before Congress began to consider the Seashore seriously – the highway issue was dead. There had once been a connection between highway opposition and Seashore support: Lindsay's 1962 Seashore bill had quickly won "heavy popular support," with one newspaper describing it as "Lindsay's alternative" to the highway. The same article had hinted at the complexity of the situation when it also characterized the highway as "a means of controlling erosion."[81] In any case, Moses resigned from both the State Council on Parks and the Fire Island State Park Commission. Governor Rockefeller, to Moses's surprise, refused to reinstate Moses and named his brother Laurance to replace him at the State Council, thus withdrawing the highway funding. "Seems Fire Island Road Is About Washed Up," reported one newspaper in mid-January 1963. Barbash commented that "with Mr. Moses' departure, the road no longer stands a chance of approval….It is now a race against time to preserve the area against erosion or further subdivision."[82]

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[78] William Zimmerman, Jr., speaking for the Sierra Club: House Hearings, p. 120.
[79] House Hearings, pp. 50, 53.
[80] House Hearings, p. 69.
[81] "Fire Island National Park," *New York World-Telegram and Sun*, September 12, 1962.
[82] "Seems Fire Island Road Is About Washed Up," *New York Standard*, January 14, 1963.

References to the Moses highway virtually disappeared from the newspapers, only reappearing briefly when Moses himself opened the new bridge to the newly renamed Robert Moses State Park.[83] From then on, erosion and development, the threats named by Barbash, dominated accounts of Fire Island. It was in this post-highway climate that O'Brien, Ryan, Grover, Javits, Keating, Pike, and DOI introduced their bills, Congress ultimately passed the Seashore Act and President Johnson signed it. When legislators occasionally discussed Moses or the highway most references to the highway threat in the congressional debate were phrased in the past tense. John Bucalo, Chairman of the Long Island Division of the United Taxpayers Party, as well as several other civic organizations, alluded to the "four-lane highway which was proposed by Robert Moses," adding "we seriously objected to that at the time." Bucalo knew well that the highway was dead and he publicly took credit for having persuaded the governor to strike it from the budget.[84]

There are other reasons to question the connection between the highway and the Seashore. Some participants believed that, far from the Seashore having been devised to defeat the roadway, the defeat of the roadway was actually a precondition for the Seashore's success. "Udall Aide Asserts Fire Island Road Will Bar Park Plan," reported the *New York Times* in the fall of 1962; that did not sound like the pronouncement of an agency girding up for battle with Robert Moses. DOI's view at that time, when the highway was still viable, was that the island was simply too narrow for both a roadway and a park: a choice would have to be made.[85] As late as March 1963, it was reported that Udall rejected the proposal on the grounds that the island lacked (in Pike's words) "adequate land."[86] Udall changed his mind and in June DOI brought out its own bill and the secretary scheduled a press conference to "Tell Why U.S. Should Acquire Fire Island."[87] Why Udall changed his mind was never entirely clear, but by June, enough time had passed to be certain that the roadway was really

[83] See, e.g., Walt Bregi and Bob Weiss, "Moses Bridge, Park Open; 35,000 Visit Over Weekend," *Newsday*, June 15, 1964.
[84] *Discussions of Moses*: see, e.g., House Subcommittee Transcript, June 30, 1964, p. 97; *Bucalo*: House Hearings, p. 101, 103; *exceptions to past tense*, see Lindsay, Ryan, and Robert E. Young (president, New York State Conservation Council), House Hearings, pp. 141, 147, and 171.
[85] Byron Porterfield, *New York Times*, October 23, 1962. The aide was Ronald F. Lee, northeast regional director of the NPS.
[86] Art Bergmann and Ed Smith, "Pike Says Udall Rejects U.S. Fire Island Park," *Newsday*, March 27, 1963.
[87] "Udall to Tell Why U.S. Should Acquire Fire Island," *Long Island Press*, June 11, 1963.

dead. The *New York Times* now reported that Suffolk residents were confident of the Seashore's eventual success and the reason was not only that they had gained Udall's support, but that "Their optimism was based in part on the fact that Robert Moses…was no longer the ruling force in the state's park system."[88]

Between 1962 and the Seashore's establishment in 1964, something else had changed. The Sierra Club's spokesman claimed that local citizens had "protested as one man" against the Moses highway. That is roughly how highway opponents would later remember it; but it is not what observers thought they saw at the time. Not only was the Suffolk County Board of Supervisors pushing strongly for the roadway, but Secretary Udall later recalled that in 1962 "…there seemed to be almost unanimous support" for the highway. Commenting on the progress that the Seashore proposal had made by the spring of 1964, he remarked to the House committee that "it is almost miraculous that public opinion has swung around this way." This was no more than a month after DOI brought forth its prospectus. The implication was that not only Moses's defeat but also a significant shift in public opinion had been necessary for the Seashore to move forward.[89]

Though not established to block the highway, the Seashore was strongly shaped by the roadway fears that Moses had elicited. As late as the summer of 1964, Rep. O'Brien commented on the existence of an "overwhelming fear of the construction of a huge highway, as favored by Mr. Moses at one time."[90] That fear permeated the development of the legislation. The Lindsay bill was the first to specify that access would be provided only by ferries. The Pike bill went further. It stipulated that within the Sunken Forest no roads would be developed but that access would continue to be provided "by those trails already existing" plus "similar trails limited in number to those necessary to allow visitors to explore and appreciate the beauty and tranquility of this section of the seashore." Additionally it directed that, within the eight-mile stretch west of Smith Point County Park, access "shall be provided by ferries and footpaths only, and no roads shall be constructed in this section except such minimum roads as may be necessary for park maintenance vehicles."[91] During

[88] Warren Weaver, Jr., "Fire Island Bill Appears Stalled," *New York Times*, June 5, 1963.
[89] "'Miraculous Turn Around,' Says Udall," *Long Island Commercial Daily Review*, April 14, 1964.
[90] House Committee Transcript, July 28, 1964, p. 2.
[91] House Hearings, pp. 2 and 6.

the hearings, nervous inquiries about the kind, number, and scale of access points to the Seashore came up again and again; witnesses and legislators repeatedly expressed their preference for relying as much as possible on ferries. James N. Dunlop, President of Sunken Forest Preserve, Inc., reminded Congress that when the Preserve's directors decided (in 1962) to offer this unique piece of Fire Island to the federal government, it was on the express condition that Congress "provide guarantees against such encroachments as a motor highway." Many speakers stressed provisions to keep all or part of the Seashore roadless; in September 1963, for instance, Maurice Barbash urged Congress to extend the roadless provision of the Pike bill "to the maximum extent feasible throughout the entire seashore." The following April, Rep. Carey quizzed Secretary Udall as to whether DOI would favor "clear and definite language" such as that contained in the Pike bill "to preclude at any time anything but necessary access roads, bicycle paths, and so on?" Udall assured him it would.[92]

DOI staked out its position on access to, and travel within, the Seashore in its legislative report in 1963 and later elaborated it in its formal proposal. It began by acknowledging the two existing road bridges to the island, one already in operation at Smith Point County Park and the other under construction at Robert Moses State Park. DOI's plan was to restrict automobile access to these two intensively developed portions of the park and, beyond them, to provide "supplemental ferry service," with shuttle stops along the Bay Shore, plus "a system of trails for bicycles, hikers, and other recreationists connecting points of interest on the island."[93] DOI emphasized that roads were "not envisioned as a means of circulation" and that none would be built "along the length" of the island. As for the trail, it was intended to be "stabilized" for "foot and bicycle" use as well as interpretive tours – aided by wayside exhibits or interpretive signs – and was to "meander generally on the bayside." The proposal made clear that the trail system was intended as a means to enjoy the island's natural scenery rather than to travel among communities or even to gain access to the beach.[94]

A notable feature of the access and roadway discussion was that its emphasis seemed to broaden from blocking a specific highway to creating a roadless preserve. In this, Seashore advocates were clearly motivated by something beyond fear of Robert Moses. Their language

[92] House Hearings, pp. 115, 49, 50, 134.
[93] House Hearings, p. 127.
[94] *Proposal*, pp. 4, 16-17.

was merging with that of the wilderness movement, which regarded the absence of roads as a defining characteristic of wilderness and indeed enshrined it as such in the 1964 Wilderness Act. Borrowing a key phrase of the wilderness movement to summarize the essence of the Seashore proposal, *Newsday* emphasized its "forever-wild concept," pointing particularly to the ban on roads in some areas.[95] Similarly, when Maurice Barbash asked Congress to expand the "concept of a roadless national seashore" from the areas identified in the Pike bill to the entire Seashore – or when he called for keeping the entire park "in its roadless natural state" – he was echoing the language of the wilderness movement.[96] Making the ban on roads as extensive and unbreakable as possible was a goal of many advocates, and as late as July 1964, a group of citizens handed Rep. Morris a proposed amendment that would have extended it throughout the Seashore. Though this was not adopted, the committee agreed to explain in its report that it "opposed the creation of any superhighway as such but only roads which would be in conformity with service to the area as a seashore would be acceptable to the Committee."[97] The report did not mention the highway, but it quoted and strongly endorsed DOI's recommendations on access: to rely on foot trails and bicycle paths as the "major means of travel," not to build a road "the length of Fire Island," and to restrict automobile access to the existing bridgeheads and to parking areas within the state and county parks.[98]

Legislation not only could ban roadways, but it was generally agreed, that it should. Driving on the beach was a separate concern. Not surprisingly, the Long Island Beach Buggy Association asked Congress to strike the ferry-and-footpath limitation from the Pike bill in order to allow surf fishermen to drive their beach cars onto the beach. While urging consideration of "a completely roadless park" the League of Women Voters also wondered whether the ferry-and-footpath language was "too restrictive," noting that "sand vehicles, if their use is properly and carefully controlled," would be helpful to surf fishermen.[99] However, other witnesses failed to take up this theme; many supported the Pike language. The Appalachian Mountain Club's representative especially praised the idea of ferry access

[95] Leonard Baker, "House Unit OK's Fire Island Seashore," *Newsday*, July 1, 1964.
[96] House Hearings, pp. 49-50.
[97] House Committee Transcript, July 22, p. 23, and July 28, 1964, pp. 2-3.
[98] House Report p. 7.
[99] House Hearings, pp. 99, 71.

to "scattered bathing and camping facilities," with the undeveloped areas between them "accessible by trails only" – a formulation which implied that these areas would *not* be accessible by vehicles over the beach. DOI addressed the question more explicitly in its discussion of shore fishing: a boat rental service would provide access for bay fishing, while the interpretive walking-bicycle trail and ferries would provide access to Moriches Inlet for jetty fishing and "to the more remote stretches of the ocean beaches for surf fishing."[100]

The legislators were even less enthusiastic about driving on the beach than DOI. None spoke out explicitly in favor of sand or beach cars, and the House committee discussed how to ban driving on the beach. The difficulty, as Rep. Haley explained, was that federal regulation did not apply to land between the low tide and high tide marks, a strip of beach which could be several hundred feet wide. At first the rest of the committee did not appear to understand the nature of the threat but simply reiterated that no road ever would be built there. Haley, who had experience with the problem in his own state of Florida, explained that people drove on the sand *without* a road: what, he asked, would keep them from doing so on Fire Island? Rep. Carey had an answer:

> I might observe that Fire Island is not Daytona. The sands are not hard packed; they are just not that type sand. I do not think you would get anything but a huge flotation vehicle over them.[101]

Saylor of Pennsylvania agreed: "If anyone tries to put an automobile on this area, he will end up real deep in sand." Haley was evidently not convinced that this would deter drivers, but lacking his direct experience of the problem, the rest of the committee appeared to accept this logic. In any case, the committee's report made clear that it was opposed to driving on the beach by endorsing DOI's recommendations on access in its report, especially the requirement, which it quoted approvingly, that 'automobile access to the island be restricted to the existing bridgeheads and parking areas at the State and county parks and such additional parking areas as may be developed therein.'[102]

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[100] *Proposal*, p. 19.
[101] House Committee Transcript, July 28, 1964, pp. 5-6.
[102] House Report, p. 7.

From beginning to end, then, the legislative record shows that opposition to a specific highway – which as O'Brien commented would never "be permitted under any circumstances that I can foresee"[103] – blended with an increasingly dominant, wilderness-inspired, vision of a seashore which was not only roadless but carless. However, experience would prove that Haley's concern about the beach was justified.[104] Within a few years, George Biderman was complaining that "the beach which the National Seashore was established to preserve has become the highway the National Seashore was established to prevent." Despite restrictions on driving, a study in 1977 found that vehicles had driven no less than 289,000 miles on Fire Island's beaches during the previous year. The vehicles belonged mostly to utility companies, contractors, and residents, both year-round and summer.[105] Although Congress's intent to ban vehicles was clear enough, the legislators' faith in the softness of the sand was evidently misplaced.

**The Role of Erosion and Erosion Control**

With the highway threat at an end, it was indeed a race against time and erosion was a daily fear that could never be put aside. The 1962 storm provided a vivid reminder of the island's fragility, and the defeat of the roadway only exacerbated fears of erosion; after all, the road was intended to be merely the top layer of a massive, miles-long artificial dune or dike which had been sold as an erosion control measure of gigantic proportions. The roadway's defeat, then, simultaneously made the search for a solution more urgent and the Seashore proposal more attractive. In March 1963, Brookhaven Town Supervisor Charles R. Dominy said he considered the road "dead, but was convinced that the erosion control work that would have come with the road is necessary": the Seashore offered the best way to get it done.[106] Evans K. Griffing, Chairman of the Suffolk County Board of Supervisors, agreed, with the road "apparently a dead issue," a Seashore "would help rid the county of costly beach maintenance."[107] The Board, in fact, became an early and strong Seashore backer,

[103] House Committee Transcript, July 28, 1964, p. 3.
[104] Letter, Biderman to Hartzog, December 4, 1967: Park History files, fol FINS Correspondence 1965-74.
[105] Don Smith, "Fire Island Ban of Driving Asked," *Newsday*, April 15, 1977.
[106] "Best Plan for Fire Island Is U.S. Seashore: Dominy" (unidentified newspaper clipping, March 7, 1963).
[107] Don Smith, "Suffolk board to Back Fire Island Park," *Newsday*, April 3, 1963.

citing that it "would save Suffolk residents many millions of dollars by relieving them of a 'heavy and continuing tax burden' for stabilizing and maintaining the shore line."[108]

Controlling erosion was a much more complex problem than defeating a highway and the influence of erosion control (as efforts to resist the natural processes of the seashore were generally known) on the Seashore was more complex too. Koppelman and Forman show that, prior to 1963, the Suffolk Board of Supervisors opposed erosion control measures, largely for financial reasons. Local government was responsible for 49 percent of the cost of such measures, and the supervisors balked at assuming such large financial burdens on behalf of non-resident owners. These considerations are evident in the statements made by local officials, and it is reasonable to argue, as Koppelman and Forman do, that they supported the Seashore primarily because it promised to break the long financial stalemate on erosion control. This is what they told the newspapers; it was not, however, what they told Congress and even their own official actions suggest more complex considerations. In any case, the stalemate was not merely financial. Difficult technical issues had been argued for years without resolution and (as Koppelman and Forman show) steep bureaucratic hurdles remained to be cleared before erosion control could be implemented according to any plan.

The legislative record makes clear that erosion control was a major concern for many Seashore supporters. According to the Commissioner of the Long Island State Park Commission, this was "…the major problem to be solved on Fire Island, the problem that brought this whole situation into sharp focus." Referring especially to the storm of March 1962, he called on the NPS to develop a plan for "adequate shore protection."[109] The New York State Council of Parks, led by Laurance Rockefeller, held that "shoreline and storm damage protection should be a major management objective of the seashore."[110] Some speakers hoped that establishing the Seashore would encourage action on the problem, others that at least it would not impede efforts currently being planned.[111] The linkage between erosion control and support for the Seashore was complex: efficiency and federal assumption of responsibility were only two of many conflicting expectations; another was of the work

[108] "U.S. Park Is Urged for Fire Island," *New York Times*, April 9, 1963.
[109] Perry Duryea, Jr., House Hearings, p. 36.
[110] Henry Diamond, representing Laurance Rockefeller, Senate Hearing, p. 39.
[111] See, e.g., House Hearings, pp. 36, 37, 39, and 47.

and how it was to be done in a manner consistent with the Seashore's public purpose. This was the thrust of the RPA's position; while endorsing the "plea for a plan for erosion prevention…," the organization argued that the subject had not yet been "dealt comprehensively with" – and this despite the many studies and plans which had been prepared. One of the "great advantages of a national seashore," for the RPA, was that it would lead to a "comprehensive view of the implications of beach erosion control and so on."[112]

It was clear as early as the spring of 1963 that a National Seashore, while holding out the possibility of federal payments, was anything but a prescription for rapid and sweeping action. Secretary Udall told the press that "a national seashore would not need as much protection as developed land," and that adoption would allow the Army Corps's $44,500,000 program to be "scaled down" to $10,500,000.[113] At that time there were several erosion control plans theoretically on the table, and the Seashore proposal was the least aggressive of them. The Moses roadway plan had called for expenditure of $100,000,000 and construction of a massive, twenty-mile long hard-topped artificial dune. The Army's plan called for something over $40 million, and that figure (unlike the Moses plan) did not include land acquisition but would go entirely to beach stabilization.[114] Yet the National Seashore plan won adherents within local government. "Supervisors Back Fire Island Park, Delay Erosion Plan," reported a local paper in April. In voting unanimously for the Seashore, the Suffolk County Board of Supervisors might, in fact, have set back erosion control measures "by at least two years," because in doing so they had indicated they would not appropriate the county's $3 million share of the $12 million Army Corps project. Although the NPS was expected to eventually pay the full cost of maintaining its own park area, it would have to acquire the land first, and that could "take years."[115]

Perhaps the prospect of full federal payment for a portion of Fire Island's erosion control outweighed the disadvantages of the Seashore measure. With increased public awareness of the environmental impact of storms on the beach, aggressive erosion control

[112] House Hearings, pp. 95-96.
[113] Leonard Baker, "Key Dem Predicts OK For Fire Island Park," *Newsday*, June 19, 1963.
[114] Francis Wood, "Fire Island: Lots of Plans," *Newsday*, April 8, 1963.
[115] *Long Island Press*, April 9, 1963.

was seen as simply throwing money away. The Suffolk County Board of Supervisors, having once backed the Moses plan, now wanted the federal government to "assume responsibility for the undeveloped Fire Island areas."[116] By January 1964, they had persuaded state engineers to drop their demand for extensive erosion control and, at least temporarily, to cut back the $76 million federal erosion program for Long Island's south shore to "a $4,000,000 pilot project of jetty construction." This would be limited to the Westhampton-East Hampton area to the east of the proposed Seashore. The supervisors argued that this approach would permit the beach to repair itself, bypass the shellfish beds on the bay side, save the county a substantial sum of money, and keep houses on the tax rolls which the Corps would otherwise condemn.[117]

As the legislative process wore on, the emphasis in Washington shifted from getting erosion control done to ensuring that it was done properly. Early bills authorized the Army Corps of Engineers to develop shore erosion or beach protection measures (subject to congressional approval and consistency with the Act), while directing DOI to "undertake and contribute to" them.[118] Since the Corps had previously (1960), been authorized to develop an erosion plan for 83 miles of the Long Island shoreline (including Fire Island) this provision effectively amended the existing authorization. Rep. Kyl objected to the open-ended commitment imposed on DOI, and with Pike's support, an amendment was adopted requiring the Corps's erosion control or beach protection measures to be "acceptable to the Secretary of the Interior." This limited the Corps' authority to "undertake" or "contribute to" such programs, leaving the Corps with responsibility for carrying them out while giving DOI a decisive voice in setting policy.[119] The League of Women Voters approved of the provision and, concerned with the damage done both to the dunes and to the bay bottom from which hydraulic fill was removed, called for "less catastrophic techniques of erosion control" wherever possible.[120]

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[116] Francis Wood, "Fire Island: Lots of Plans," *Newsday*, April 8, 1963.
[117] Art Bergmann, "NY to Back Suffolk Plan On Erosion," *Newsday*, January 23, 1964; [houses on tax rolls] "Supervisors Hold Firm on Erosion," *Suffolk [name illeg*], January 30, 1964.
[118] House Subcommittee Transcript, March 12, 1964, p. 54.
[119] House Subcommittee Transcript, March 12, 1964, p. 55-56; and P.L. 88-587, Sec. 8 (a).
[120] House Hearings, p. 70.

The goals which erosion control should serve within a National Seashore received some attention. Whereas previous erosion control measures on Fire Island had been "primarily for the protection of private property," Rep. Kyl asked the committee counsel whether the "purpose of the protection would be somewhat altered by this bill." "Yes and no," Witmer answered. Most of the private property was in the western part of the island, and the counsel did not "expect that there would be very much change in that work. But such work as is carried out in the eastern half....would have to be consistent with the existence of the seashore and its purposes."[121] The kind of distinction he had in mind was perhaps what the Long Island Beach Buggy Association meant when it remarked that "in many of the uninhabited areas of Fire Island," the pumping of fill might be replaced by less intrusive measures like "snow fencing and the planting of beachgrass" which would "more naturally preserve the beauty of the seashore."[122] However, there is little basis in the legislative record (and none in the Act itself), for making distinctions in erosion control among sectors of the Seashore; it all had to be consistent with the Act's public purposes of conservation and (secondarily) recreation.

A distinction was made between public and private property, and most discussions emphasized that the purpose of erosion control was to protect the former. Secretary Udall used the terms "shore erosion control" and "beach protection plan" interchangeably,[123] reflecting an approach which the NPS had developed within a broader context. In the wake of the 1962 storm, Udall called for dedicating shoreline areas for public use. A task force of state and federal officials under his direction reconnoitered the shoreline from Virginia to eastern Long Island and recommended that Fire Island "be protected for public recreation purposes."[124] The comments of legislators during the Fire Island hearings were generally consistent with this understanding – and with Senator Javits' caution that private property rights need to be addressed "without losing sight of the overall concern for the protection of the natural features of the seashore and its public outdoor recreational potential."[125] Rep. Ryan placed erosion control in a different framework. He saw the entire barrier island as a

[121] House Committee Transcript, July 28, 1964, p. 7-8.
[122] House Hearings, p. 99.
[123] House Hearings, p. 127.
[124] *Report*, p. [1].
[125] Senate Hearing, Dec. 63, p. 10.

vast bulwark whose ability to withstand hurricanes needed to be strengthened. For Ryan, too, however, the point of erosion control was not to protect houses on Fire Island, but it was to shield the mainland of Long Island.[126] Even those who, like Commissioner Duryea of the Long Island State Park Commission, called most urgently for erosion control on Fire Island, did not ask for protection of private houses.

The reason for this distinction was not that legislators failed to see a connection between Fire Island's private houses and the subject of erosion control. Rather, legislators and witnesses stressed a different connection, observing that the presence of houses exacerbated the problem of erosion and led to demands for costly and destructive measures. Dr. Murphy, the naturalist, claimed that it was "human occupancy, and the erection of homes intended to be permanent, that continue to create the hazards" which erosion control was then called upon to remedy. Arguing that the "erosion problem" was aggravated if not partly created" by houses and footpaths which compromised the dunes' ability to function as "storm buffers," the League of Women Voters pointed out that prohibiting construction on large sections of the island would allow "less catastrophic techniques of erosion control" to be employed. Murphy went further, calling the "ultimate liquidation" of much private property on the dunes one of the best arguments for federal sovereignty on Fire Island. Local officials did not disagree. Rather than demanding federal erosion control for private houses, Dennison urged Congress to authorize federal acquisition of houses outside the main communities, in part because removing them would reduce the cost of "beach protection or erosion structures."[127]

While it is true, then, that erosion control received considerable attention during the Congressional hearings; its role in generating support for the Seashore was complex. While federalizing the problem presented clear advantages to local governments, the Act's requirement that work meet DOI's approval, plus the strong emphasis placed on avoiding environmental damage, dampened any hope of speedy and decisive action. In any case, legislators and witnesses generally agreed that the intended beneficiaries of such erosion

[126] House Hearings, p. 19.
[127] House Hearings, pp. 66, 76, 70, 64; Senate Hearing, Dec 63, p. 48.

control as might be carried out were not be the island's private houses but rather the public beach and public investments in the island.

**The Major Reason for Public Support:**
**Protecting Fire Island from Real Estate Development**

If the highway was no longer a threat and the bills provided little assurance of erosion protection for their houses, why did homeowners and local officials support the Seashore? Maurice Barbash, chairman of the Citizen's Committee for a Fire Island National Seashore and the developer of Dunewood just a few years earlier, provided one explanation. In his extensive testimony, he never mentioned erosion control or the highway, but he did dwell on the development pressure that was threatening the island. Charles Lowry – whom Barbash described as the voice of Fire Island's property owners – went farther. Emphasizing once again the remarkable unanimity of Fire Island property owners behind the Seashore, Lowry explained: "Most of us came to Fire Island because it offers the only relatively unspoiled natural beach area" near New York. "We want to keep it that way, even if it means giving up some of our rights to private beaches and exclusivity." Though he mentioned the island's houses, he did not ask Congress to protect them; quite the contrary, he assured the legislators that "Several of our members have...offered to donate their acreage and property to the national seashore – that's how strongly we feel." It was exactly what Barbash emphasized: "...nowhere else in America," he told the Senate, "can one unspoiled seashore mean so much to so many people." Its miraculous "roadless isolation" made it truly "the wilderness within the city." "Perhaps," he told the House, "it is this paradox, the wilderness within the city," that lay behind the broad support for the Seashore.[128] If Barbash and Lowry were right, it was not the fear of a highway or of erosion, but rather of real estate development that propelled local enthusiasm for the Seashore.

Many witnesses offered frightening statistics on the development threat to the island, which were recapitulated in both DOI's proposal and the House report. The problem was not simply that Fire Island lay close to New York City; Brookhaven itself, according to its town supervisor, was the third largest township in New York, with about 130,000 people and

[128] Senate Hearing, Dec 63, pp. 41, 51-52; House Hearings, p. 48.

rapidly growing; Suffolk County, as County Executive Dennison pointed out, was the fastest growing area in the United States; with about 825,000 residents, it was adding another 50,000 each year, or at that rate two million by 1980. Lacking the resources needed to acquire open space, the county needed federal help. Every inch of Fire Island's shorefront, Dennison urged, "should be in public hands in anticipation of this tremendous growth...." Charles Lowry pointed out that six new developments were currently planned for the island. Asked about the effect on Fire Island of a ten-year delay in establishing the Seashore, Dr. Robert Cushman Murphy replied simply, "I think it would be gone" - "residential development" would overwhelm it.[129]

The subject of development pressure came up frequently and predictably triggered expressions of extreme anxiety as well as urgent calls for government action. While waiting for that action, some took personal or professional risks to do what they could. In May 1963, Brookhaven town officials began moving towards a moratorium "halting further private development…until Congress acts on the proposed national seashore plan."[130] *Newsday*, Long Island's leading newspaper, strongly supported the ban and unsuccessfully urged Islip to do the same.[131] Maurice Barbash, a builder by trade, "voluntarily stopped building" on the island in the same year "to cooperate with the Interior Department in preserving the seashore."[132] Even so, such measures could not hold back the flood and urgent calls for government action continued. Brookhaven Town Supervisor Dominy, fearing he would be unable to sustain the town's moratorium in court, addressed Congress "with a sense of urgency." The Managing Editor of the Babylon Town Leader worried that Fire Island would be "covered with cottages, road houses and hotdog stands unless the Congress acts soon." John Bucalo, the head of several local taxpayers' organizations, asked for government action before the "great influx of population" permanently changed the "sparsely developed" island. "Time is of the essence," argued the Bellport Bay Yacht Club, "demands for permission to subdivide and build will be deluging the location authorities." County Executive Dennison

[129] *Brookhaven*: Senate Hearing, Dec 63, p. 49; *Dennison*: Senate Hearing, Dec 63, p. 47; *Lowry*: Senate Hearing, Dec 63, p. 52; *Murphy*: House Hearings, p. 78.
[130] Don Smith, "One Town Would Halt Building on Fire Island," *Newsday*, May 8, 1963.
[131] "Stop Sign," *Newsday*, May 9, 1963.
[132] Edwin J. Safford, "Opposition Fades to Udall Fire Island National Park Plan," *Long Island Press*, April 11, 1964.

summarized, "the urgency here against our exploding population is to get it in public hands and get in conservation all that may be feasible."[133]

To Maurice Barbash, the choice was stark: either a National Seashore or "further subdivision." Maintaining the status quo was not an option: "Tomorrow or the day after tomorrow will certainly be too late. Fire Island is on the brink of development today. It will be engulfed tomorrow and the opportunity lost forever." While the threat of irrevocable loss made rapid action essential, swiftly rising land values made it prudent. A few weeks after the hearing, Barbash wrote to the Senate committee, again urging speed and asking the Senate to forego the Long Island hearing it had planned to hold the following spring (it was not in fact held).[134]

DOI and Congress shared the sense of urgency. "Unless this beach is protected soon for public purposes," said Interior Secretary Udall, "we are convinced that it will be developed for limited private use...." If so, the opportunity to establish the Seashore would be lost forever. To Udall, the "trend of rising prices and rising development" made the present moment a "last chance opportunity": "the urgency becomes clear."[135] Javits quoted Udall approvingly at the Senate hearing.[136] Rep. Grover (co-sponsor of a bill with Keating) addressed his colleagues in the House, "There is, gentlemen, a sense of urgency...."[137] Months later, as the House subcommittee was marking up the bill, Rep. Rivers urged his colleagues to action: "[B]ecause of the high density of population surrounding that area....there will not be anything left to preserve if we do not act right away."[138]

## Private Property within the Seashore

According to E.C. Crafts, director of the Bureau of Outdoor Recreation, there were about 2,500 homes within the proposed Seashore, only about 100 of which were occupied during the summers.[139] Of this total, about 1,197 were in the town of Brookhaven and about

[133] House Hearings: *Barbash*, p. 39; *Town Leader* (John A. Meyer), p. 43; *Bucalo*, p. 101; *Bellport*, p. 113; *Dennison*, p. 31.
[134] Senate Hearing, Dec 63, pp. 41, 80.
[135] House Hearings, pp. 126, 130.
[136] Senate Hearing, Dec. 63, p. 8.
[137] House Hearings, p. 29.
[138] House Subcommittee Transcript, May 12, 1964, p. 13-14.
[139] Senate Hearing, Dec 63, p. 35.

1,575 in the town of Islip. In addition to houses, there were 17 churches and about 30 commercial properties, including 12 apartments or hotels, 2 yacht clubs, 10 restaurants, and 6 stores. Finally, there were a substantial number of undeveloped or vacant lots. Most of Fire Island's private properties, whether developed or not, were small, and ownership was widely dispersed. Ronald Lee, director of the NPS's Northeast Regional Office, thought there were about 6,000 individual owners.[140] These, then, were the private properties whose rights and future Congress and DOI agreed to consider.

The fact that the federal government had the right to condemn some or even all of the island's properties to create a National Seashore was not in doubt. The government had done it many times before. As Rep. Burton remarked, "national parks are always including somebody's property" – by which he meant taking it.[141] At Fire Island, moreover, the government always intended to acquire a number of privately owned lots, through condemnation if necessary, nor was this in itself controversial. The novelty at Fire Island was the government's decision *not* to condemn a large number of properties, and indeed to formally give up the right to condemn them in the future. In exchange for this gift of secure future tenure, Congress and DOI designed a system to regulate the use and development of private property within the Seashore. No definitive explanation was ever given for why this course was adopted, but Senator Javits suggested one when he remarked that he was "deeply concerned with the protection of the rights of those presently owning property" within the proposed Seashore. Politics were obviously a factor too. Javits said that the problem of private property rights "must be worked out without losing sight of the overall concern for the protection of the natural features of the seashore and its public outdoor recreational potential."[142] Together, these two statements frame fundamental questions. What were the rights of those presently owning property? How did Congress intend to balance them with the public purposes of environmental conservation and public recreation? What results was this regulatory system intended to achieve?

[140] According to NPS Regional Director Ronald Lee, Senate Hearing, Dec 63, p. 36-37.
[141] House Subcommittee Transcript, May 12, 1964, p. 6.
[142] Senate Hearing, Dec. 63, p. 10.

**The Cape Cod Formula**

Secretary Udall explained that DOI proposed to "apply the Cape Cod formula" as the regulatory system adopted at Fire Island. Senator Bible defined it as "the formula whereby we say if you own a home on Cape Cod or Fire Island Seashore, as long as you conform with the zoning ordinances of the local authority, whatever that authority may be, then you are permitted to maintain your residence there." Or, as the counsel to the House subcommittee stated, "Within the zoned areas, you cannot condemn, period, as long as they [properties] conform to the approved zoning ordinances."[143] The idea sounded straight-forward, but putting it in practice was not. There were subtleties, ambiguities, exceptions, and even exceptions to the exceptions; moreover, the name itself was misleading.

The Cape Cod formula was so called because it was modeled on the regulatory framework adopted at Cape Cod National Seashore a few years earlier. The Cape Cod legislation suspended the Secretary of the Interior's authority to condemn any private property during the Seashore's initial year of existence. During that year, the Secretary was supposed to issue zoning standards that would prohibit commercial or industrial uses (except with the Secretary's express permission), promote the preservation and development of the Seashore in accordance with the Act (by means of such provisions as "acreage, frontage, and setback requirements"), and ensure that the Secretary was notified of all variances or exceptions issued by the local authorities. The standards could not, however, accomplish these goals by themselves; they simply set the conditions which local zoning ordinances would have to meet in order to remain legally valid within the Seashore. In other words, the local government's right to continue regulating private property within the Seashore was conditioned on its passing a zoning law which met the new federal standards. Congress directed the Secretary to approve any law which did so and to disapprove any which did not.

It was at this point in the process, after a local zoning law had been approved, that the Cape Cod formula's central feature took effect: the suspension of DOI's power to condemn property. This suspension would remain in effect as long as the property continued to conform to the approved zoning bylaw and did not receive any variances or exceptions

[143] House Hearings, p. 13; Senate Hearing, Dec. 63, p. 12; House Subcommittee Transcript, May 12, 1964, p. 25.

inconsistent with the Secretary's regulations. The law exempted private property from condemnation, however it also placed this protection at the end of a chain of conditions:

- The Secretary had to pass standards that conformed to Congress's instructions;
- The local authority had to pass a zoning law that conformed to the standards;
- The property in question had to conform to the zoning law.

There were further conditions. Suspension from condemnation was limited to "improved property," which was specifically defined as "a detached, one-family dwelling whose construction had been begun before September 1, 1959," together with such land as the Secretary (within certain limits) deemed "reasonably necessary" for its enjoyment.[144] If the Secretary did condemn such a property for non-compliance with zoning, the Cape Cod formula allowed its owner to retain a twenty-five-year residency or even a life interest in it.[145] Commercial and industrial property, by contrast, was safe from condemnation only insofar as the Secretary might approve its use or as long as an initial application to continue that use was under review.

The decision to apply the Cape Cod formula to Fire Island was not automatic. The Javits-Keating bill (S. 1365) contained no such provision. Later, Javits said he thought it was implicit, and he "expressly endorsed" the Cape Cod formula. Yet he also pointed to the Oregon Dunes Bill, just reported out of the Interior Committee at the time of the Senate hearing, as a "valuable precedent for acceptable language...." Other legislators cited Point Reyes and Sleeping Bear. David Brower, writing for the Sierra Club, supported "legislative pioneering" such as that contemplated for Sleeping Bear Dunes and Oregon Dunes.[146] Nevertheless, once DOI had introduced the Cape Cod formula to the Fire Island debate it quickly became the basis for discussion. Bible thought some such provision was essential. Noting that the issue of "tak[ing] care of people who already have homes in this area" had been raised at every previous national seashore, he remarked that the Cape Cod Formula had "worked out reasonably well" there. Keating, who had recently visited Cape Cod, agreed that it had "worked out with comparatively little friction" and enjoyed "universal support" among

[144] P.L. 87-126, 87th Congress, S. 857, August 7, 1961, Sec. 4(b)-(e) and Sec. 5; reprinted in Burling, *Birth of the Cape Cod National Seashore*, p. 61-62.
[145] P.L. 87-126, 87th Congress, S. 857, August 7, 1961, Sec. 4(a); reprinted in Burling, *Birth of the Cape Cod National Seashore*, p. 60-61.
[146] Senate Hearing, Dec 63, pp. 13, 10, 29-30, 44, 78.

residents.[147]

DOI's bill for Fire Island was, as Under Secretary Carr put, "broader" than the Cape Cod model, "more generous" to owners of improved property; it was "the Cape Cod formula on a more generous basis." The difference was that at Fire Island commercial property was protected from condemnation along with single-family detached houses.[148] Far more significant changes lay ahead. Pike's bill swung the balance to federal ownership by permitting condemnation of any property within the eight-mile stretch. Outside that area, however, the momentum was in the opposite direction. None of the three bills under discussion at this time – DOI's, O'Brien's version, or Pike's – distinguished between the settled communities in the western part of the Seashore and the less developed areas outside them; nor did they make any allowance for the future development of any unimproved property. They said simply that unimproved property would remain subject to condemnation, while improved property (outside the eight-mile stretch) would be protected.

A different view began to emerge during the House hearing in the fall of 1963. While Brookhaven Town Supervisor Charles Dominy urged the taking of all "sparsely settled or vacant" land, he thought that "heavily populated areas, such as Point O' Woods, Ocean Bay Park, Ocean Beach, and Fire Island Pines, et cetera," should be exempted.[149] The League of Women Voters suggested that the densely settled communities towards the west should be treated "as autonomous enclaves to be governed by the local authorities." Though these areas should be included within the "general boundaries authorized for the seashore," all property within them should be protected from condemnation.[150] Speaking to the Senate a few months later, Maurice Barbash expanded on the idea, arguing that areas not administrable for park purposes (especially those located towards the western end) should be delineated and placed within a "zone which permits their continued development subject to a building and zoning ordinance approved by the Secretary of Interior."[151]

The following April, Secretary Udall returned to Congress with a map delineating a series of communities within the western portion of the Seashore, presenting DOI's support

[147] Senate Hearing, Dec 63, pp 12-13, 30.
[148] Senate Hearing, Dec. 63, pp. 20, 26.
[149] House Hearings, p. 38.
[150] House Hearings, p. 66; virtually identical language in Senate Hearing, p. 60.
[151] Senate Hearing, p. 43.

to exempt all property within them from condemnation. Given appropriate zoning regulations, this would assure their "orderly development" and would "complement, and not detract from, the national seashore, at the same time allowing the owners of property to improve their property."[152]

By this point, the system had diverged quite far from the Cape Cod model. According to Udall's own figures, the change removed from the threat of condemnation a further 2,257 parcels, totaling 479 acres of undeveloped land, resulting in the complete exemption of one fourth of the Seashore from the Secretary's condemnation authority.[153] Yet the rhetoric adopted by Udall and the legislators obscured the magnitude of the change. Udall remarked that "there are these little communities on Fire Island and we propose to apply the Cape Cod formula to them." Rep. Carey assured William B. Hoffman, the sole hostile witness, "You are getting the same treatment and the same protection as was accorded to the villages and hamlets on Cape Cod. Definitely this follows the Cape Cod plan."[154] These statements are confusing. Perhaps they were meant to reassure environmental advocates by downplaying the differences from Cape Cod; or they may have been meant to reassure nervous property owners. Although the exemption for settled communities did not follow the Cape Cod *formula*, it did arguably follow the Cape Cod *plan*, which had excluded some of the peninsula's settled villages from the Seashore. Carey's statement was not incorrect, then, if what he meant was that the settled communities, though included within the Seashore, would be treated like the excluded villages of Cape Cod. At best, the result was ambiguous. Discussions of the Seashore's public purposes, access, erosion control, and so forth, did not distinguish among zones within the Seashore; neither did discussions about the Seashore's future. The implications and likely impacts of allowing continued development within the settled communities never fully squared with the decision to include them within the Seashore.

By April of 1964, the Cape Cod formula had been significantly breached, amidst great confusion as to its actual provisions and intent. While exempting the settled communities, the new bills proposed to exempt from the exemption "any beach or waters," as

[152] House Hearings, p. 126.
[153] House Hearings, p. 126.
[154] House Hearings, p. 130 and 153.

well as adjacent land "necessary for public access."[155] They made another exception, as already noted, for the roughly eight-mile stretch from Davis Park to Smith Point County Park, where all property would remain open to condemnation. This exception, too, was modified by a further qualification that within the eight-mile stretch, owners of condemned properties that were not in violation of zoning were given the right to retain a life interest or a twenty-five year interest in the property, at their election.[156]

The Cape Cod formula as adopted on Fire Island, the Cape Cod/Fire Island formula, was a complex system which attempted to achieve federal goals of environmental protection and public recreation while deferring to the interests of local property owners. The impact of political compromises can be clearly traced in the ultimate solution, with its complicated machinery for balancing greater emphasis on conservation or public access in some areas with greater permissiveness towards property owners in others. Whether located inside the settled communities or throughout the Seashore, exemption from condemnation was predicated on two specific conditions which were emphasized again and again: local authorities had to pass "approved zoning ordinances" and they and the property owners within their jurisdictions had to "conform" to those ordinances. The system's success depended on meeting these conditions.

**Achieving Federal Goals through Local Laws**

American law assigns the power to regulate land use and development to the states, which normally assign it in turn to counties or municipalities, so that in practice land regulation is a local matter. At Fire Island, however, federal authorities tried to achieve federal land management goals using local laws. The theoretical question of how this might affect the balance between federal and local power was publicly explored. Rep. Kyl alluded to it when he described the proposed Advisory Commission as "obviously an attempt, and I think a useless attempt, to try to make the people there think they are retaining local control of this area, and they are not."[157] The implication was that the federal government was really in charge. Certainly Congress intended the federal government to be able to meet its land

[155] Secretary Udall, House Hearings, p. 126.
[156] P.L. 88-587, Sec. 2(e).
[157] House Subcommittee Transcript, March 12, 1964, p. 69.

management goals, which called for some control over private land. The question of how to achieve federal goals without dictating to the local jurisdictions was a difficult one; the answer was the process whereby Congress legislated general requirements, DOI translated them into zoning standards, and the localities adopted zoning codes which conformed to them. It was an indirect process, and because the federal government could not or would not coerce the localities to do their part, it resorted instead to carrots and sticks. By passing a conforming ordinance and thereby lifting the threat of condemnation, local officials could make their voters happy and by failing to do so, they would presumably expose themselves to angry voters.

The federal goals for local zoning were anchored in the intentions which Congress laid down for DOI's zoning standards: first, to prohibit commercial and industrial uses which the Secretary deemed inconsistent with the purposes of the Act; and second, to promote the "protection and development for purposes of this Act" of land within the Seashore through "acreage, frontage, and setback requirements." As a further safeguard, Congress forbade the Secretary from approving any local ordinance containing provisions which he considered adverse to such "protection and development," or failing to ensure that he would receive notice of all zoning variances or exceptions granted by the local authority.[158]

The phrase "protection and development for purposes of this Act" is crucial and calls for explanation. Since the context appears to be the regulation of real estate, one is tempted to assume that by "development" Congress meant constructing or enlarging buildings in order to "improve" property or bring it closer to its "highest and best use," as defined by a real estate developer or zoning board. In the context of national parks, development had another meaning. Both can be detected in Rep. Pike's remark that his bill kept certain tracts "in an undeveloped condition."[159] On the one hand, Pike urged the condemnation of private property to forestall the development of houses in the almost pristine eight-mile stretch just west of Smith Point County Park - development in its real estate sense. In relation to the Sunken Forest, another undeveloped area, he cannot have meant this. The area was being donated to the federal government as a roadless forest preserve, so the question of building

[158] P.L. 88-587, Sec. 3.
[159] House Hearings, p. 24.

houses there did not arise. Instead, Pike was saying that the NPS should not build recreational or public facilities there. This was the governmental or park sense of the term, and it was very common in government circles. Under this meaning, development denoted the process of making a park hospitable to visitors, including construction of visitor centers, parking lots, beaches, marinas, boardwalks, and trails – not private houses.

Considering that national park legislation had dealt for nearly a century with public lands and that the inclusion of private land as a permanent park feature was relatively novel to the Fire Island bill drafters, it seems likely that the governmental meaning was the one intended by the phrase "protection and development for purposes of this Act." Instead of denoting two seemingly opposite activities, the phrase would then encompass the official actions needed to carry out the Act's public purposes of protecting the Seashore's natural resources and developing them for public recreation. Though the ambiguity is unfortunate, it is clear that the phrase "protection and development" was not an invitation to real estate development.

The Cape Cod/Fire Island formula was like a highly engineered machine that would run smoothly as long as each part and connection worked perfectly – as long as DOI produced acceptable standards, each locality produced acceptable zoning regulations, each local government applied the regulations meticulously, and every landowner followed them to the letter. Conversely, the failure of any single part along this chain might make it very difficult for the federal government to meet its land management objectives. The place where failures were most likely to occur was also where the federal government would be most helpless to repair them: at the local level of the improper variance or the defiant homeowner.

Congress and DOI recognized that such failures might occur, but they devoted little attention to the possibility. The House subcommittee considered it in the context of the burden that the condemnation threat might impose on some property owners. They feared that owners of undeveloped properties within the eight-mile stretch would be unable either to sell or develop their lots; not so, countered the committee counsel:

> "You certainly can develop it if you want to take the risks involved. It is still private property and you can do anything with that property – I am now speaking law-wise. I

> may not be speaking practical-wise, but speaking law-wise, you can do anything with it you want to until the Government acquires it."[160]

Although Witmer knew this was not a reasonable plan for building a family vacation house, as his comment revealed, the legislation gave federal authorities no power to prevent an owner from building a house which flouted the federal standards. The best the government could do was condemn it after the fact.

The possibility that owners might abuse this situation was considered. Rep. Kyl noted that at Point Reyes, "people are building property figuring they are going to get more money back for it than they put into it, knowing the government is going to take the land."[161] The same thing could happen at Fire Island and if it did, it would compromise federal land management goals and exhaust land acquisition funds. Maurice Barbash, as a builder, saw the weakness in the system and urged Congress to provide for "remedies other than condemnation"; the Secretary, he reasoned, "should have the power and should be required to seek injunction and other enforcement remedies." At the same time, errant owners should be given an opportunity to cure violations before suffering the "ultimate remedy of condemnation."[162]

The legislators did not act on Barbash's advice. Condemnation - blunt, unwieldy, politically controversial and, for minor infractions, manifestly unfair – was the only enforcement tool provided within the law. If used on a large scale, condemnation would also become unaffordable. The legislators created a conundrum which has bedeviled Seashore administrators to this day: the federal government is unable either to forestall major infractions before they require condemnation or to respond flexibly to the many minor infractions which may not justify condemnation yet are typical of small-scale private development, e.g., improper decks, swimming pools, building additions. Sometimes it is easier for DOI to ignore than to prevent or punish violations. Understanding this, homeowners are tempted to violate rather than obey the law. These would not have been disastrous problems if local zoning authorities had been perfect partners; they have not been,

[160] House Subcommittee Transcript, March 12, p. 42.
[161] House Subcommittee Transcript, March 12, p. 43.
[162] House Hearings, p. 49.

and the federal government's lack of enforcement mechanisms has frustrated the achievement of its land management goals.

**Balancing Public Interests and Private Rights**

The Cape Cod/Fire Island formula could equally well be seen as a mechanism to protect private property rights or as a mechanism to protect the public interest by limiting those rights. What private interests or rights did Congress, DOI, and the public mean to protect or to limit? How did these interests or rights relate to the public interest in the Seashore?

Numerous public statements promised deference to the rights of property owners. Senator Javits, as we have seen, assured the House that he was "deeply concerned with the protection of the rights of those presently owning property...," and he asked the committee to "work out a satisfactory solution between the conflicting needs of the Secretary of the Interior to protect the natural features of the seashore and the very important rights of those owning property in the area." Representing the Fire Island homeowners' association, Charles Lowry said he favored the Pike bill because it "contains the most thorough provisions for the protection of the public interest and the private interests involved."[163] These statements came as close as anyone ever did to placing the protection of private property rights on an equal plane with the public's interest. Javits, as we have seen, also said that the problem of private property rights "must be worked out without losing sight of the overall concern for the protection of the natural features of the seashore and its public outdoor recreational potential." In the same statement, Lowry promised the legislators that local organizations would "work in close cooperation with the National Park Service to create the kind of national seashore which will preserve the natural resource of this unspoiled beach and which will reconcile our private interests with the public interest to the benefit of all." Both men conceded that private property rights were not absolute; they had to be reconciled or balanced with the public interest.

[163] *Javits*: House Hearings, p. 118, 119; *Lowry*: House Hearings, p. 81.

Interior Secretary Udall suggested a policy framework to strike a balance between private property rights and the public interest. In his letter on national park management of July 1964, Udall reaffirmed the principles first enunciated in 1918 by, Franklin K. Lane, a predecessor, in a letter to the NPS's first director, Stephen T. Mather. One of these principles was that "the national interest must dictate all decisions affecting public or private enterprise in the parks."[164] Since Udall's Interior Department had brought the Cape Cod formula to Congress, it seems safe to say that DOI, at least, was prepared to defend the proposition that it would serve the "national interest." Since no one – not legislators, public witnesses, or agency officials – ever proposed that protecting private property at Fire Island was *in itself* a national interest, it is reasonable to conclude that the "national interest" to be served by the Cape Cod/Fire Island formula was that contained in the Act's public purpose, namely environmental protection and outdoor recreation.

DOI's proposal argued that the pressure of real estate development, though intense, had not yet made the establishment of a Seashore impossible, since private development remained "limited primarily to several small but rather intensively developed communities in the western half of Fire Island," and that "[o]utside these communities, large sections of Fire Island still are relatively undeveloped and possess outstanding recreation resources." The implication was that further real estate development, if allowed to continue, would compromise the Seashore's public purposes of conservation and recreation, and that it could and should be blocked.[165] For DOI, then, the balancing act appeared to involve securing as much advantage for the public as was still possible, at least outside the settled communities.

Given the tremendous emphasis that all parties placed on protecting the island's environment from development, legislators as well as local politicians expressed a similar determination. Rep. Pike told the House subcommittee he believed "there is a general uniformity of opinion that as much of this 4,450 acres as can be preserved should be preserved," and that "there is a general consensus of opinion that as much of it should be preserved in its natural state as is possible." County Executive Dennison assured the subcommittee, "I fully support any program which will insure the public acquisition of the entire

[164] Udall, letter of July 10, 1964, in Dilsaver, p. 273.
[165] *Proposal*, pp. 3, 15.

shore front that is possible and conserve all of the area that is feasible for conservation."[166] It was consistent with this position that no bill entirely relinquished the government's power of condemnation but only to limit its application. Thus when Rep. Grover was asked whether his bill (co-sponsored with Keating and Javits) allowed condemnation, he replied, "My bill I think generally would permit that...." Nor did members of the public urge Congress to give up condemnation entirely; to the contrary, many called on government to use it. Dr. Robert Cushman Murphy argued that the prospect of the "ultimate liquidation" of some part of the island's private holdings was in fact the Seashore's most important benefit.[167]

A discussion during the House subcommittee mark-up sheds more light on the condemnation issue, and on the question of balancing private rights and public interest. Rep. Kyl worried that the threat of condemnation had created problems for owners of unimproved properties at Cape Cod. They found their "capital tied up," as the lots could neither be developed nor easily sold. Kyl told of one owner who, unable to build a house for his family and wishing to go elsewhere, could not sell his property because the government was not ready to buy it.[168] The legislators admitted that something similar could happen within the eight-mile stretch of Fire Island where DOI would retain condemnation authority. They agreed that mortgage bankers would probably not be swayed by promises of eventual government purchase. The committee counsel pointed out that Congress could alleviate the problem by not conditioning DOI's condemnation authority on the availability of Congressional funds, but, as he also pointed out, the committee had already rejected this unusual step. In sum:

> "...I think everybody was fully aware that, when you create a national seashore or a national park and there are lands that are going to be taken, and they are going to betaken under certain conditions, then unless the Government is in a position right then and there to put down cash, people are taking risks, and that is just inescapable….[169]

Discussions like these made it clear that Congress's primary goal – strongly supported by the public – was to curb real estate development, not to encourage it, and that Congress was willing to inflict some pain on individual property owners in order to do this.

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[166] House Hearings, pp. 23, 31.
[167] House Hearings, pp. 30, 76.
[168] House Subcommittee markup, p. 39-44; quotes, Witmer p. 42, Kyl p. 40.
[169] House Subcommittee Transcript, March 12, p. 44.

In fact, all participants in the debate were willing to restrict the right to develop property; no one argued for protecting it in its entirety.

The rights of existing homeowners presented a somewhat different question. Testifying to the House, Sen. Keating referred to the question of "balancing the interests of the existing landholders" with that of the visiting public and asked "what kind of protection should be offered to owners of improved property that will be consistent with full public access and enjoyment of the beaches."[170] Evidently Keating believed the preeminent public right was that of visitors to enjoy the beach; at the same time, his statement underscores the general understanding that the property right which especially required protection was that of homeowners to enjoy their property. Congressman Carey seemed to agree. At the Islip hearing, William B. Hoffman (the Seashore's sole opponent) stated that, in addition to his house, he owned several vacant lots which he wished to pass on to his children. Carey assured him that Congress did not intend to "disturb the present owners in the developed areas...." and promised that the final bill would protect the "present interests of the owners of developed areas."[171] Yet he gave Hoffman no reassurance that he would be able to develop the vacant lots. In a similar vein, Congressman O'Brien suggested that the central goal was "to protect the occupancy of a person who has made his home there and for a substantial period of time so perhaps his children can occupy it....."[172] Evidently the protected right here was occupancy, which belonged to those who were not merely owners but also residents.

The Cape Cod/Fire Island system was complex and in some cases ambiguous. Yet its operation rested on four sharp and fundamental oppositions:

- Developed versus undeveloped property;
- Property inside versus outside the settled communities;
- Ocean frontage versus the rest of the island;
- Current versus future conditions.

Reviewing the Congressional record on these four basic oppositions can clarify Congress's intentions for Fire Island.

[170] House Hearings, p. 14.
[171] House Hearings, p. 58.
[172] House Hearings, p. 60.

**Improved vs. Unimproved Property, Settled Communities vs. Isolated Houses**

An individual lot might or might not already be developed. Both types of property existed within Fire Island's settled communities; both types also existed outside them. This meant that, for private property in general, there were essentially four possible conditions, which can be summarized in the following chart:

| | *Settled Communities* | *Areas Outside Communities* |
|---|---|---|
| *Developed Property* | Developed lots within settled communities | Developed lots outside settled communities |
| *Undeveloped Property* | Undeveloped lots within settled communities | Undeveloped lots outside settled communities |

It was generally understood that the greatest deference to property rights would be extended to developed lots within settled communities: pre-existing houses within already developed areas. It was also generally agreed that the least deference would be extended to undeveloped lots outside the communities: empty parcels within areas that remained largely in their natural condition. Developing the former would have the least impact on the Seashore's environment balance and scenic resources, developing the latter the greatest. Uncertainty surrounded the shaded areas in the diagram: undeveloped plots within largely developed areas, and developed plots within largely undeveloped areas.

Instead of commonly used but imprecise words like developed and undeveloped, Congress and DOI preferred the terms "improved property" and "unimproved property." These were defined in a very different way from the way laymen used them. In the Interior bill, improved property was any building whose construction had begun before 1963, together with as much land (up to a three-acre limit) as the Secretary deemed "reasonably necessary" for its use. At the urging of Rep. Pike, the limit was reduced to two acres; he thought this would "make a great deal more land available" for conservation purposes without impairing the usefulness of these properties as houses.[173] Unimproved property, then, was everything else, including lots without buildings and buildings constructed after 1963.

[173] *Interior*: Sec. 2 (f); House Hearings, p. 10; *Pike*: House Hearings, p. 138.

The Cape Cod/Fire Island formula accorded greater respect to improved than to unimproved property. At the House hearing in April 1963, Senator Keating said that if the Secretary of Interior were given condemnation authority, "it should be within restrictions and I would be inclined to be opposed to condemnation of improved property." "When it comes to unimproved property, that is a different matter and which is something I do not know." (Keating, incidentally, thought DOI agreed with this position.) The public had differing views on the distinction between improved and unimproved property. John Bucalo, representing several taxpayers' associations, thought the government should not condemn "privately owned dwellings." But the Bellport Bay Yacht Club, which urged preservation of the island "in its present natural condition," assumed that it would be "possible over the years to return those areas presently developed back to nature if it is thought desirable" – implying that houses might be condemned and removed.[174]

By the time Congress held the first hearing in the fall of 1963, the distinction between the columns in the chart – between what Secretary Udall called "small but rather intensively developed communities" and the isolated parcels of property that lay outside them[175] – was eclipsing that between the rows. At the hearing, Rep. Pike walked his colleagues through a map of the Seashore, pointing out the distinctions. According to Pike, the "first parcel of undeveloped land which truly merits preservation," was east of Point O'Woods, a tract that included the Sunken Forest; next came the community of Cherry Grove. Proceeding eastward, "the communities become less frequent, and more open land is available for park purposes." Fire Island Pines, Water Island, and Davis Park were "interspersed with undeveloped areas." Finally, from Ocean Ridge (east of Davis Park) to Smith Point County Park lay a "relatively undeveloped" eight-mile stretch with about 100 houses.[176] County Executive Dennison argued that there was "a great deal of difference" between the communities and the isolated properties. Of approximately 2,600 houses, he said, about 2,400 were in the "concentrated communities."[177] By contrast, he noted, the eight-mile stretch of Seashore between Davis Park and Smith Point contained some 116 "scattered

[174] House Hearings: *Keating*, pp. 15-16; *Bucalo*, p. 103; *Bellport*, p. 112.
[175] Senate Hearing, Dec. 63, p. 3; House report, p. 11.
[176] House Hearings p. 21.
[177] Senate Hearing, Dec 63, p. 48.

homes"; another 2 ½ mile stretch (now called the Talisman/Barrett Beach parcel and including Blue Point) had 56 more "scattered homes."

A consensus was emerging that the settled communities should be handled differently from the rest of the Seashore. Brookhaven Town Supervisor Charles Dominy urged the taking of all "sparsely settled or vacant" land but thought that "heavily populated areas, such as Point O' Woods, Ocean Bay Park, Ocean Beach, and Fire Island Pines, et cetera," should be exempted.[178] Mrs. Donald Larson, for the League of Women Voters, thought the incorporated villages and "densely settled communities" should be included within the Seashore's boundaries but "treated as autonomous enclaves to be governed by existing local authorities." Within them, condemnation power should be waived as long as "certain minimum zoning and land-use standards" are agreed upon with the Secretary. Small, undeveloped parcels within the communities should be left in private ownership, although the communities should be encouraged to acquire them for "local park purposes," and certainly "incompatible commercial, industrial, or residential uses" such as "high-rise apartment houses or hotels"[179] should be disallowed. Maurice Barbash agreed that, within the "highly developed areas,"

> where the Park Service has really nothing to gain by taking over existing houses and they state they do not want the houses, it would be proper to delineate these areas and allow the single, little property owner to build a house there, because allowing a 60 by 100 plot to lie there fallow serves nobody's interest.[180]

Senator Bible agreed that "it does not make good commonsense to prevent something being done with a vacant lot that lies between two improved pieces of property."[181]

DOI's position on improved versus unimproved property evolved in concert with its position on the communities. The department's draft bill and report, prepared in June 1963, exempted all improved property (wherever it might lie) from condemnation but contained no special recognition of the settled communities and indeed permitted acquisition of undeveloped properties within them. At the final hearing in April 1964, Udall testified that

[178] House Hearings, p. 38.
[179] Senate Hearing, Dec 63, pp. 60, 61; House, p. 66.
[180] Senate Hearing, Dec 63, p. 43.
[181] Senate Hearing, Dec. 63, p. 44.

the department now wished to amend its proposal to protect from condemnation "private property, both improved and unimproved...within certain designated communities," provided that it was maintained in accord with acceptable zoning standards. Thus, he told the House, "We do not propose to acquire undeveloped land inside the communities if it is controlled by satisfactory zoning": instead, the department would focus its acquisition program on "substantial tracts" outside the communities.[182] DOI's proposal made this distinction visible with a map which clearly delineated the communities which would "remain undisturbed" – that is, where land was "not to be acquired." Still, DOI did not intend to remove all checks on development within the communities. The proposal envisioned that both improved and vacant property there could be "retained and developed" in accordance with the anticipated zoning standards. In the department's report on the legislation, Udall wrote that "these communities...could retain their present state of development as long as adequate zoning," approved by the Secretary, was in place "and the development remains compatible with the purposes of a national seashore."[183]

By April 1964, the principle was generally accepted that all property within the developed communities would be exempt from condemnation. As Rep. Carey put it, "the excluded communities are definitely defined in the legislation. There will be no taking of the internal holdings in these communities,"[184] or, as the House report later explained, the legislation "exempts from condemnation most of the land within a number of small communities on the western part of the Island as long as the owners conform to approved and valid local zoning ordinances." [185]

Outside the settled communities, however, the distinction between improved and unimproved properties remained important and problematic. The House report quoted with approval the NPS's recommendation that "'the undeveloped portions of Fire Island be set aside for the protection of natural values and [for] activities compatible with this preservation objective."[186] Within an eight-mile stretch of Seashore, this was accomplished by retaining

[182] House Hearings, p. 126, 129; see also p. 130.
[183] *Proposal*, p. [12-13], i; House Report, p. 11.
[184] House Hearings, p. 154; see also Senator Javits's testimony, House Hearings, p. 118.
[185] House Report, p. 8.
[186] House Report, p. 7.

condemnation power over all property, improved or not. This left the remainder of the Seashore to be resolved.

There was general agreement that, within these broad areas, unimproved property should be condemned, especially where this would consolidate a large area of public land. Local officials were united in favor of this policy. Suffolk County Executive Dennison had already condemned a four-mile stretch of "undeveloped shore front," and Perry B. Duryea, Commissioner of the Long Island State Park Commission, urged public acquisition of the "uninhabited" four-mile stretch of beach between Moriches Inlet County Park and Smith Point County Park "in order to forestall subdivision and private development."[187] DOI cautiously agreed. Under-Secretary Carr testified "that the power of eminent domain may be used if necessary to acquire unimproved private property" within the "underdeveloped stretches." These would be maintained "largely in their natural state," providing "stretches of undeveloped land and natural beach." Crafts, of the Bureau of Outdoor Recreation, explained that the power to condemn undeveloped property was "a permissive power" which the Secretary would not automatically invoke but would use mainly to acquire property "in the areas which have the minimum of development." The department's proposal, however, recommended more boldly that "all unimproved private lands" outside the communities be acquired.[188] Public voices also supported this position. The Sierra Club's David Brower urged that "undeveloped beaches, dunes, forest, and marsh remain in as nearly pristine condition as possible consistent with erosion control, that they be brought under public ownership for the common enjoyment."[189]

The question of improved property prompted more disagreement. DOI recommended that the government "not acquire improved property" outside the settled communities (and behind the beach) as long as zoning standards were met.[190] But local officials favored public acquisition, by condemnation if necessary. Brookhaven Town Supervisor Charles Dominy urged the "taking of all Fire Island lands in Brookhaven Town which are sparsely settled or vacant," though he would allow residents to continue enjoying their houses for some

[187] House Hearings, pp. 33, 36.
[188] Senate hearing, Dec. 63, pp. 25, 35; *Proposal*, p. 22.
[189] Senate Hearing, Dec 63, p. 77.
[190] *Proposal*, p. 22.

period.[191] County Executive Dennison pleaded for public acquisition of the "160-some homes" in the sparsely developed stretches. In his view they were "separate, isolated islands of private ownership within a national park" which would compromise the public's interest in the Seashore while burdening local government with problems of "police, welfare, health and safety." They also exacerbated erosion; removing them would reduce the cost of beach protection or erosion control. Moreover, doing so "would give us more than 20 miles which can be considered natural conservation areas." Essentially, then, Dennison wanted a clear separation between inhabited communities and conservation areas, and while insulating county government from the administrative problems posed by "private isolated islands," he also wanted to maximize the latter, "if we are going to have a conservation area, let's have all we can get that is feasible."[192]

Within the legislature, views on developed properties outside the communities varied. Senator Bible's initial reaction to the prospect of condemnation was to remark that owners would "look a little unkindly at this treatment."[193] The House was generally more supportive of condemnation. Rep. Lindsay's bill allowed the Secretary to condemn any property east of Fire Island State Park. Pike's limited the "condemnation of homes" (i.e., improved property) to the eight-mile stretch of "sparsely inhabited property" west of Smith Point County Park. Still, as Pike pointed out, his bill was more permissive than DOI's proposal, which flatly prohibited condemnation of improved property. Pike believed that the House would eventually find the additional condemnation authority which he sought to give DOI "a worthwhile addition," for like Dennison he foresaw "continual problems with isolated private holdings." His bill would have the effect of creating "an uninterrupted stretch of some 15 miles without residences." Pike predicted that some people would be "outraged because I have said take any homes, but I think if you are going to have a viable national park you are going to have to take the homes in the sparsely settled areas so that you have got enough land which is undeveloped and in public ownership to make it worth while."[194] Not surprisingly, County Executive Dennison supported the Pike bill.

[191] House Hearings, p. 38.
[192] Senate Hearing, Dec 63, p. 48; House Hearings, p. 32.
[193] Senate Hearing, Dec 63, p. 48.
[194] House Hearings, p. 23, 137, 28.

Public voices were split on the question of improved property outside the communities. An analysis requested by the Senate from the National Parks Association concluded that:

> Developed residential properties already in existence should be allowed to remain. The best way to do this is to obtain easements, by eminent domain if need be, against further development incompatible with protection of natural conditions. Other than this, eminent domain should not be used: many properties will come onto the market and can be acquired that way.[195]

The Sierra Club's David Brower similarly wanted government to defer to the rights of owners as long as they "respect the natural scene and the public interest," and to win them over to the idea of federal stewardship, so that the NPS would eventually acquire the inholdings from willing sellers. By contrast, Dr. Robert Cushman Murphy, naturalist and Long Island resident urged the use of condemnation "when necessary." His main concern was the damage they did to the dune system and the calls they provoked for destructive erosion control measures: "…no responsible Government organization," he declared, "can assume the protection of scattered homes, particularly along areas of the beach which would make a part of the natural nearly primitive wilderness of the seashore." The League of Women Voters was equally decisive in calling for public acquisition of "all remaining undeveloped or sparsely developed land." These parcels had great potential for establishing "bay-to-ocean sections of open land" and, beyond their environmental value, would add amenity to the adjacent developed areas. Certainly the "growth of an unbroken, densely settled strip, stretching for miles along the beach" would be very undesirable and would isolate residents from any natural areas other than the waterfronts.[196]

**The Beach and the Dunes**

Notwithstanding the protections extended to private property, it was always understood that (in Javits' words) "the entire dune and ocean front should be preserved for the public."[197] Generally the word beach was used to describe this sector of the island, but it was ambiguous. Sometimes the term clearly referred to the ocean beach: the strip of sand

[195] Senate Hearing, Dec 63, p. 77.
[196] Senate Hearing, Dec 63, pp. 54-55, 61, 78; House Hearings, p. 63.
[197] Senate Hearing, Dec. 63, p. 11.

fronting the water; at other times it included the dunes behind it. Sometimes, particularly when Long Islanders spoke, it was shorthand for "barrier beach," meaning the entire island, as when naturalist Dr. Murphy called on the NPS to keep the "barrier beach...forever in its unspoiled state."[198] In the following discussion, the word beach, except where otherwise indicated, refers to the ocean frontage, including at least some portion of the dunes behind the actual sand beach.

Legislators, officials, and public witnesses all emphasized the distinction between the beach and the land behind it. Though Javits supported exempting the developed communities from condemnation, he called on the Secretary of Interior to "acquire beach or water areas as he deems necessary for public access."[199] Similarly Brookhaven's Charles Dominy opposed government acquisition of land within the "heavily populated areas" but thought "the actual beach frontage in these areas should be taken and preserved." Here, DOI was in full and unwavering agreement. Secretary Udall told Congress that DOI would "acquire the beach front" in front of the communities; DOI's proposal recommended that the federal government "acquire the beach area along the Atlantic Ocean in front of all the communities to assure unrestricted public access to the beach"; and the department's report on the legislation promised that the federal government would acquire the entire beach, together with enough land above the mean high tide to ensure "continuous free public access to and along the beach at all times." At the NPS, George Hartzog reaffirmed that the Seashore would provide "continuous public ownership of the beach from one end of Fire Island to the other," including acquisition of 6.6 miles of "beach strip," averaging 175 feet in depth, in front of the communities.[200]

One goal of this policy was to serve the public's interest in enjoying the Seashore. Another was to control erosion by forestalling the construction of houses. Noting the damage inflicted by houses and pathways on the dunes, Mrs. Larson of the League of Women Voters

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[198] House Hearings, p. 76. See also Hempstead Town Lands Resources Council Chairman Rob Vandivert ("...the marshes and bays on the north side of the barrier beaches all along Long Island's south shore..."), Babylon Town Leader's Managing Editor John A. Meyer ("the barrier beaches on the south shore of Long Island run from Coney Island in Brooklyn to Montauk on the island's easterly tip"), and Islip Town Supervisor Harwood (favors a "national park being established on Fire Island or the Barrier Beach, as it was known some time ago." (House Hearings, pp. 43, 42, 112.

[199] House Hearings, p. 118.

[200] House Hearings, pp. 38, 130, 128, 129; *Proposal*, p. 21; House Report, p. 11.

noted that "as manmade structures multiply along the beach, more and more erosion protection measures are required or demanded." One of the "most urgent reasons" for bringing the entire barrier beach into public ownership was "to forestall the further increase of this demand."[201] Noting that the Army Corps of Engineers had made a "major investment" in erosion control so that Fire Island could serve "as a barrier beach" to protect the mainland, Javits pointed out that guarding this investment was yet another reason why "the entire dune and ocean front should be preserved for the public instead of having these public funds already expended benefit commercial developers."[202]

The NPS understood well the implications of this policy for regulating development. In 1965, master planner Donald Humphrey told the newly established Advisory Commission that:

> Developments will be behind the beach so that, from the beach you should be able to see practically no development. The beach will be left in its natural condition. The entire south shore of Long Island from Coney Island to Montauk Point is used for recreation in one form or another and we feel we want to have a type of recreation that cannot be found along that shore or perhaps anywhere else.

Regional Director Ronald Lee commented that this was a "very fine statement." The Commission chairman, George Biderman, remarked that "for many of the Commission members who have had this dream for so many years, this was one of the most eloquent statements he had ever heard on this subject."[203]

**Current and Future Conditions**

Neither the legislators nor the public spent much time discussing the future conditions they hoped the Cape Cod/Fire Island formula would produce within the Seashore, although the issue was a central one and often in their minds.

In its simplest form, the issue was whether the island would continue to look as it did in 1964, or whether development would significantly change it. It was easy to say what kinds of change were not wanted. No one wanted Fire Island to turn into the kind of seaside resort

[201] Senate Hearing, Dec 63, p. 64; House Hearings, p. 66.
[202] Senate Hearing, Dec. 63, p. 12.
[203] "Minutes of the Organization Meeting of the Fire Island National Seashore Advisory Commission, Washington, D.C., August 26, 1965": Park History files, fol FINS Correspondence 1965-74.

that was common from Cape Cod to Cape May. No one wanted high-rises, dense development, amusement parks, or clusters of motels and restaurants; but it was harder to say how much development, and of what kind, was acceptable. Maurice Barbash, builder, argued that areas whose "limited size" or "proximity to intensive development" made them not "efficiently administrable for park purposes" should be zoned for "continued development," subject to approved zoning ordinances. He called for a survey to identify areas where development might be carried on, and he asked Congress to permit "further development or improvement of properties located within those areas not intended to be acquired...in accordance with standards prescribed by the secretary, which shall take into consideration present land use patterns."[204]

This was about as strong a statement as anyone ever made in favor of continued development. Among the public, there was also evidence of support for capping or controlling growth. Dominy called on the federal government to take all "sparsely settled or vacant" lands outside the settled communities "on a basis where present inhabitants could be allowed use of present facilities, but would not be permitted to enlarge or develop their lands further." In its analysis carried out at the Senate's request, the National Parks Association urged DOI to obtain easements, using condemnation if necessary, to prevent "further development incompatible with protection of natural conditions."[205] All of these statements, including those in favor of development, must be read in the context of the universal fear that development would ruin the island if not controlled. Though few attempted to say exactly where the limit on growth should be placed, almost everyone begged Congress to impose one, and quickly.

For most of the island DOI's goal was basically stasis. Udall told the Senate that DOI's bill would allow the "communities, as well as the owners of more scattered improved properties," to "retain their present state of development," as long as there was adequate zoning and "the development remains compatible with the purposes of a national seashore." This was consistent with the general understanding that the Cape Cod/Fire Island formula would allow property owners to continue enjoying things as they were without

[204] Senate Hearing, Dec 63, p. 42; House Hearings, pp. 49, 159.
[205] *Dominy*: House Hearings, p. 38; *National Park Association*: Senate Hearing, Dec 63, p. 77.

necessarily being able to develop their property. Other provisions supported the idea of stasis; thus even where eminent domain was exercised, owners were allowed to continue enjoying the use and occupancy of their homes for 25 years or life. Similarly, Under-Secretary Carr assured the Senate that DOI did not wish the island to "revert to its natural state," even though it did plan to use eminent domain to keep "undeveloped areas largely in their natural state"; elsewhere, owners could "maintain and continue to use the homes that are established." In the future as Carr envisioned it, both developed and undeveloped areas would remain much as they were. Government would use its powers to perpetuate this condition of stasis, which would benefit everyone – not least the property owners themselves, for Udall pointed out that the Seashore's restrictions would protect them from undesirable neighboring uses.[206]

At the final hearing, Udall appeared to have adopted a somewhat more development-oriented position. Explaining that DOI now planned to exempt all property within the communities from condemnation, he noted that this would assure their "orderly development, under appropriate zoning regulations. This would complement, and not detract from, the National Seashore, at the same time allowing the owners of property to improve their property."[207] Outside the communities, however, DOI's position remained unchanged. Whereas properties within the communities could be both retained and "developed," outside the improved properties could only be "retained";[208] in short, modest development or improvement within the communities, stasis leaning toward natural reversion outside them, and in broad terms a continuation of the current balance between developed and undeveloped areas.

Congress held more tightly to stasis than did DOI or the public. Javits believed it was possible to accommodate private property rights only because the communities on Fire Island already "very much conform to a park idea." Stressing the rusticity of development there,[209]

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[206] *Carr*: Senate Hearing, Dec 63, p. 26; *Udall*: *ibid*., pp. 3-4; House Report, p. 11.
[207] Udall's statement, House Hearings p. 126.
[208] *Report*, p. 15.
[209] "Some parts of Fire Island, for example, do not have electricity, and by design. People want it that way. The architecture, the fencing, the fact that most places on Fire Island don't have gardens and no desire to have them." "There are no plush affairs, with the exception of one or two, on Fire Island. The whole character is seashore.... [E]ssentially it is a very substantial but essentially beach cottage area." (Senate Hearing, Dec 63, pp. 16-17).

Javits urged Congress to "commit itself to the policy of allowing the enjoyment of the homes and private places as they exist at the time of the establishment of the park." Questioned by Senator Allott, he developed the point at length; indeed, he argued, the only reason zoning could "take the place" of condemnation power was "because the character of the residences now there is entirely compatible right now." Moreover, this condition was "what the people want." They had "fought many battles...to maintain that character."[210] For Javits, the Cape Cod/Fire Island formula was not a blueprint for change so much as a way for residents to perpetuate the conditions they loved so much.

During the hearing, Allott and Javits found themselves unintentionally at cross-purposes. Allott asked Javits whether the houses on Fire Island were "permanent homes" or "just a summer type of residence." Javits replied that they were "permanent summer homes," meaning that Fire Island was no "transient summer residence as you would think of in some very populous beach" but a place to which people "return constantly" and feel a long-term connection. However, Allott was driving towards something else: "This is the point I want to make. It is not an annual year-around residential type." Javits agreed that it was not.[211] In effect, Allott had confirmed Javits's own point: the modest, seasonal character of the houses made them compatible with the Seashore, while the character of the residents made them good stewards of it.

The consistent emphasis on the right of residents to continue enjoying things as they were may help to explain an otherwise puzzling oversight. Discussions of growth tended to focus on development of vacant parcels. Even the proponents of modest growth never clarified whether the benign growth they envisioned was intended to include increases in the bulk or density of existing houses. It does not appear, in fact, that the likelihood of this kind of growth was ever considered. The statements of Javits and others on the character of the residents and their devotion to the existing houses suggest a faith that residents would discourage such intensification of use, even if zoning were to permit it.

In the face of intense development pressure, emphasized by speaker after speaker, legislators appeared to believe that, by drawing a line around Fire Island, they could protect it

[210] Senate hearing, Dec 63, pp. 16-17.
[211] Senate hearing, Dec 63, p.18.

from growth and create a future in which the existing communities could continue in harmony with expanding areas of public land. Because the Seashore's houses and their owners currently supported the goals of a national seashore, they would continue in the future as long the Cape Cod/Fire Island formula allowed them. Compared with standard park practices, which would have eliminated the existing communities, the Cape Cod/Fire Island formula suggested itself as a way to save the communities, respect the rights of existing residents, and perpetuate an existing balance which everyone found harmonious and sustainable. There is nothing in the record to suggest that legislators (or anyone else) thought the current level of development could be greatly raised without upsetting that balance and frustrating the Seashore's public purpose, and there is much to suggest that they thought otherwise: the future they envisioned was a condition of something very close to stasis, and the Cape Cod/Fire Island formula was to be the tool which would bring it about.

The conundrum was that the Cape Cod formula, as modified for Fire Island, was also a blueprint for growth, in the communities if not throughout the Seashore. In this it departed from the actual Cape Cod system, but legislators and agency officials consistently obscured the crucial differences and never explained how permission to continue building and developing could be reconciled with their vision of stasis. They left an unresolved contradiction. Much of the Seashore's later history of development, conflict, and failed regulatory efforts stems from this contradiction.

# Figures to Chapter One

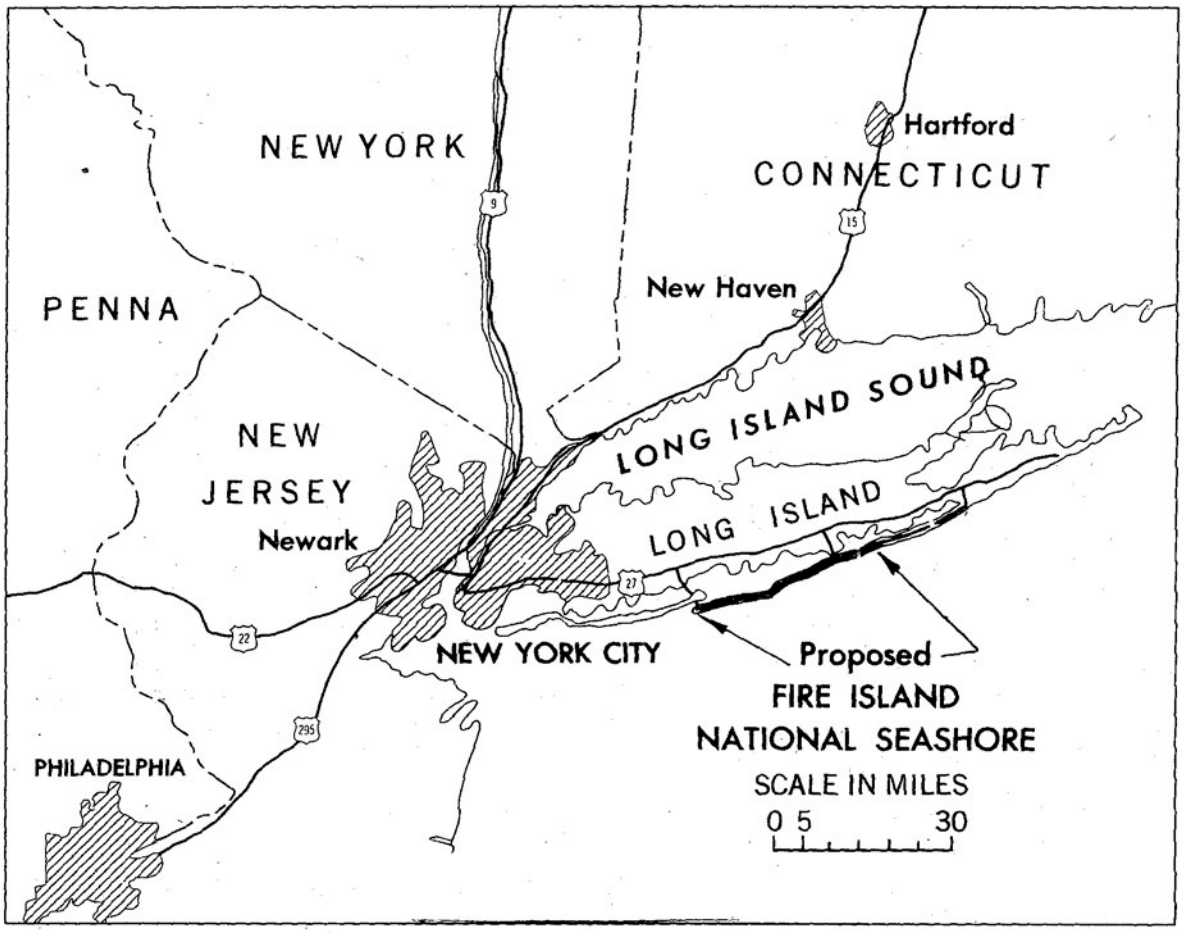



**Figure 1-1**: The location map published by the DOI in 1964 emphasizes the Seashore's location on the edge of metropolitan New York City and close to other major northeastern population centers.

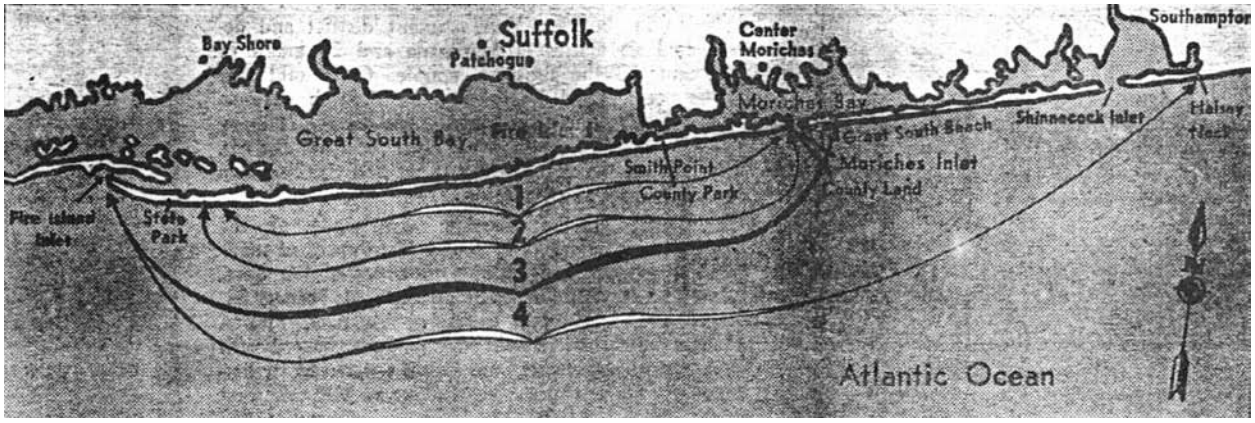
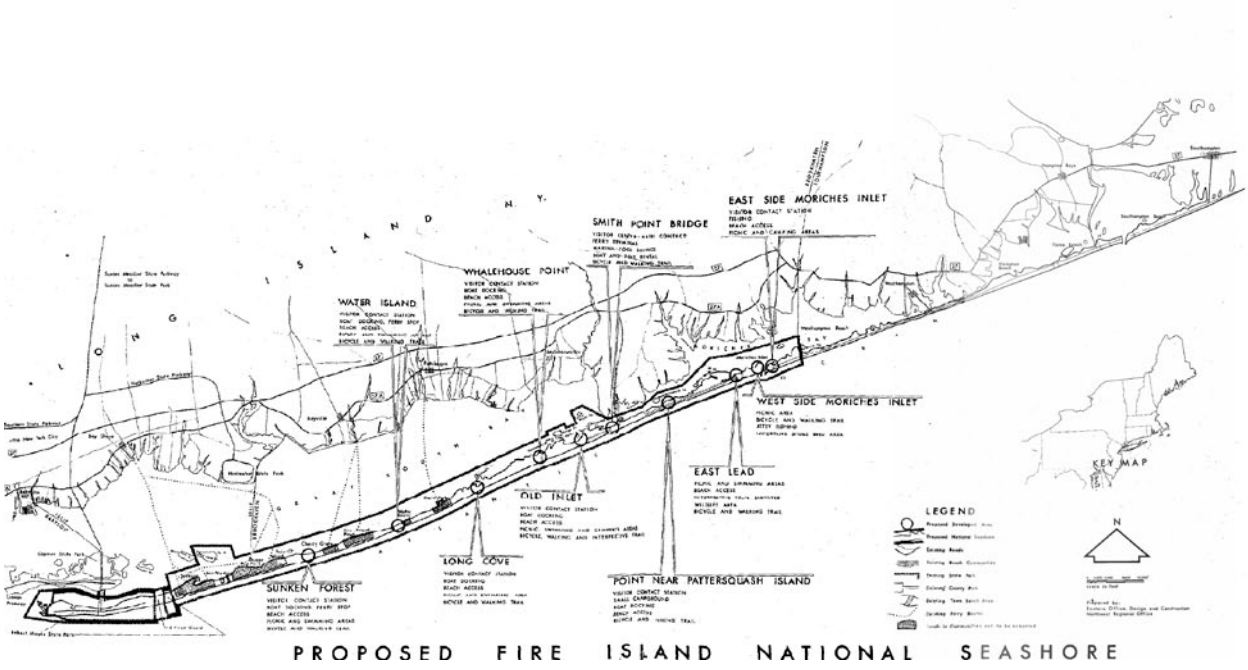
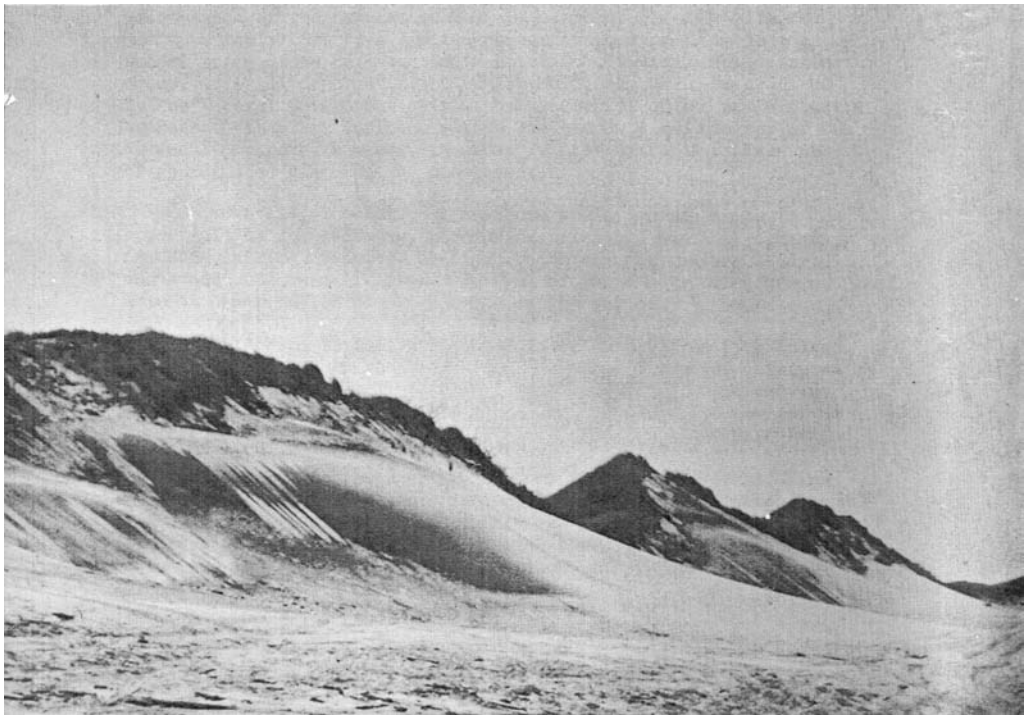



**Figure 1-2**: Various boundaries were under consideration for the Seashore as of December, 1963. No. 1: supported by Rep. Otis Pike. No. 2: supported by Reps. Lindsay, Grover, and Wydler, and Sens. Javits and Keating bills. No. 3: the plan proposed by Interior in December, 1963, which puts the eastern boundary at the Brookhaven-Southampton town line. No. 4: Interior's original proposal.

**Figure 1-3**: The map accompanying Interior's formal proposal of 1964 maintains the eastern boundary introduced by the Department in December, 1963. The map reveals ambitious plans for recreational development and visitor services within the Seashore.





**Figures 1-4 and 1-5**: Magnificent ocean-facing dunes (above) and a scene from Fire Island Pines containing "typical development and sand stabilization fences" (below) suggest the two faces of Fire Island in 1964, when the DOI published these photographs. Note the wheel tracks on the beach below.

# Chapter Two

# The Regulatory System Evolves, 1964-1991

**by Ned Kaufman**

## Launching the Seashore

Once the Act was signed, NPS quickly got to work organizing the new Seashore. The success of its regulatory system depended on the rapid issuance of federal zoning standards, and these were published in draft in October 1965, and finalized the following April.[212] Although it would take years to persuade the localities to adopt conforming ordinances, other federal actions closely followed the Act's adoption: DOI established an advisory commission, NPS began work on a master plan, and the agency launched an energetic program of land acquisition. The Seashore was off to a lively start.

This chapter traces the evolution of the Seashore's efforts to regulate private land through three phases: in the first, the basics mechanisms are put in place; in the second, their failure to produce the desired results becomes clear and leads to criticism; and, in the third, NPS, DOI and Congress seek to address the problems through reports and consultant studies, amendments to the establishing Act, and new policies, culminating in the new zoning standards of 1991.

### The Master Plan and the Advisory Commission

According to Koppelman and Forman, the NPS prepared a draft master plan as early as the spring of 1965.[213] From later comments, it seems to have reverted to the agency's

[212] Koppelman and Forman, p. 80. The authors do not reference their source for the zoning standards. NPS personnel familiar with Fire Island and consulted in connection with this study had never seen the document, and research failed to find a copy of it in the files. A copy of the draft standards (see below) was located just as the study was being finalized, too late to allow a continued search for the final version.

[213] No copy was located in preparing this report. However, Koppelman and Forman cite it as *The Master Plan: Fire Island National Seashore*, U.S. Department of Interior, National Park Service, Fire Island National Seashore, New York, May 1965, and discuss it on pp. 68-69. Officials also made reference to its contents in the context of criticism during the following decade: see following.

original emphasis on recreational development. According to Koppelman and Form, the plan spoke of achieving "protection through development" and presented natural conservation as a means by which to provide "distinct and unique recreational, interpretive and educational opportunities" to the urbanized masses of the northeast. It designated at least ten areas for major recreational development and two more for secondary development. Envisioned were ferry terminals, campgrounds, marinas, bicycle trails, picnic areas, first aid facilities, bathhouses, orientation facilities, maintenance facilities, employee stations, and more, all adding up to increased "visitor use capacity."[214] All of this put NPS on a potential collision course with Congress and the public, which had distrusted NPS's propensity to over-development and, after exhaustive discussion, opted for natural protection free of intensive development. It was an entirely different vision – one more in tune with Congress and the public – that NPS presented to the new Fire Island National Seashore Advisory Commission in the fall of 1965.

The Commission was established under the requisites of the Act, and convened on August 26, 1965, with George Biderman as Chair. There were fourteen other members, including Maurice Barbash (Citizen's Committee for a Fire Island National Seashore), Charles Dominy (Brookhaven Town Supervisor), and naturalist Robert Cushman Murphy, as well as five NPS representatives, including Regional Director Ronald F. Lee and Fire Island's Superintendent, Henry G. Schmidt. At the first meeting, the NPS presented its plans for preserving the Seashore's natural environment, including the ambience of the beach and the dune front, and promised to push forward with the required zoning standards. The Commission warmly endorsed all of this and, stressing the pressure of a hot real estate market, Biderman emphasized the importance of quickly issuing the zoning standards.[215]

**The Zoning Standards and Local Regulations**

By October 1965, the draft zoning standards were ready for publication in the Federal Register. They stayed close to the text of the Act and strongly enunciated the public goals: to

[214] Quoted by Koppelman and Forman, pp. 68-69.
[215] "Minutes of the Organization Meeting of the Fire Island National Seashore Advisory Commission, Washington, D.C., August 26, 1965: Park History files, fol FINS Correspondence 1965-74.

manage the Seashore to promote both conservation and public enjoyment of the island's natural resources. Corresponding to the lands inside and outside the mapped communities, the standards established two districts: the Developed Areas and the Seashore districts. The general requirements distinguished subtly between the two, as seen in the following chart, by placing greater emphasis on natural conservation outside the communities.

| **Seashore District** | **Developed Areas District** |
|---|---|
| Zoning ordinances shall conform to the standards and be consistent with the purposes of the Act so that "natural resources and values will be preserved and protected and any uses within such district will be compatible with preservation of the flora and fauna and the physiographic conditions now prevailing." | Zoning ordinances shall conform to the standards and be consistent with the purposes of the Act so that "the natural resources and cultural values of the Seashore will be preserved and protected, and any developments or uses within such district will be in accord with the purposes of the Seashore." |

In both districts, rules already in force within the local jurisdictions were adopted as the standards, i.e., height limits, frontage and setback requirements, and maximum plot occupancy. Signs were regulated in both districts (although more strictly in the Seashore district) and restrictions were required on clearing land, burning cover, removing sand, and other ground-affecting actions.[216]

Writing the zoning standards was the easy part. A year later, with the rules finalized and approved, Superintendent Henry G. Schmidt announced them to the local jurisdictions and expressed his hope that conforming ordinances would be implemented "as soon as possible," reminding officials that private property was not exempt from condemnation until this had happened.[217] Progress was painfully slow. By the fall of 1968, a list of memos, letters, and meetings organized by the NPS to encourage the process already filled two pages, yet Islip's ordinance was not submitted until June 1969. It was approved later that summer.[218]

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[216] Fire Island National Seashore, Proposed Zoning Standards, *Federal Register*, vol. 30, no. 207, October 26, 1965, pp. 13678-13580.
[217] Letters, Henry G. Schmidt, Supt, to mayors of Saltair and Ocean Beach and supervisors of Islip and Brookhaven, October 3, 1966 (FINS Annex Files: fol 1966).
[218] *Two pages*: "Chronology – Zoning Standards," attached to memo, Assistant Superintendent to Regional Director, September 30, 1968 (FINS Annex Files: fol 1968); *Islip*: Koppelman and Forman, p. 80.

The other three jurisdictions would not have approved ordinances for another 16 years, by which time the zoning standards were in the process of being replaced for a second time.

The process of implementing the standards raised new and challenging policy questions that reverberated all the way to Washington. The law required local zoning boards to notify NPS of requests for variances, but it did not tell NPS how to respond to them. The Director's office asked for guidance. Park leadership answered that NPS should present its view to the local boards. Regional leadership agreed.[219] A second question had bigger implications. What should NPS do if a locality approved construction in violation of federal standards? On one level, the answer was clear: Congress had prescribed condemnation, and NPS's own zoning standards had confirmed the penalty. The realities of park management prompted a more lenient answer: though the Director's office favored forceful action "when the deviation may result in developments on or near the crest of the dune," within the communities it seemed "doubtful that we should acquire scattered properties that promise little recreational use…simply to preclude their development;" doing so would encourage owners to violate the standards simply in order to trigger condemnation and thereby garner funds with which to buy other property.

These were cogent considerations, but another argument was more debatable: by exempting communities with approved zoning from condemnation, Congress had "expressed a general policy against acquisition of these properties." Though perhaps inconsistent with the intent of the Act, this argument lent force both to NPS's growing unwillingness to acquire property and to its desire to shift enforcement responsibility to the communities. The director's office called on the localities to take more "responsibility for more rigid adherence to their zoning ordinances" and, in particular, to "take all possible measures to protect the dune line in its natural state, as a safeguard against hurricane damage." Seashore staff agreed; acquiring parcels within the community "would not be in the public interest." Local zoning boards should determine if a variance would "destroy existing dune protection to the community and this responsibility should not be assumed by the United States." Though the

[219] Memos, Deputy Assistant Director (Harthon L. Bill) to Regional Director, Northeast Region, November 25, 1966; Acting Superintendent (Robert J. Branges) to Regional Director, November 29, 1966; and Regional Director to Director, December 6, 1966 (FINS Annex Files: fol 1966)

NPS Northeast Regional Office reiterated its concern for ensuring the integrity of the dune line, it agreed that local agencies should "acquire the foredune within the communities."[220]

**Land Acquisition**

Coming at the end of 1966, these reservations signaled a change in what had started out as a vigorous program of federal land acquisition which was specifically included within the "intent of Congress" as stated by the Act.[221] Rep. Aspinall stressed this point and, to support it, even proposed channeling acquisition funds directly from the Land and Water Conservation Fund then under consideration. Though political considerations regarding the Fund legislation prevented this proposal from being adopted, no one in Congress questioned the wisdom of a vigorous land acquisition program,[222] and the Act authorized $16 million for it. "This is a lot of money," said Udall, equal to the ceiling at Cape Cod and greater than the $14 million ceiling at Point Reyes.[223] The amount was less than DOI had initially requested; the department had first proposed a Seashore of 55 miles, whereas by 1964 the boundaries were capped at 33 miles. At about that time, NPS appraisers estimated the land to be acquired at $15,700,000,[224] with about $8,230,000 needed to purchase 2,732 acres of privately owned land.[225] Congress authorized an additional $1.1 million in October 1964, bringing the total to $17.1 million, which the park's land acquisition officer thought would "come very close" to covering NPS's needs.[226]

The NPS took Congress's authorization to acquire land as a broad mandate. The zoning standards declared that it was the "clear intention of the act" that DOI should acquire

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[220] Memos, Deputy Assistant Director (Harthon L. Bill) to Regional Director, Northeast Region, November 25, 1966; Acting Superintendent (Robert J. Branges) to Regional Director, November 29, 1966; and Regional Director to Director, December 6, 1966 (FINS Annex Files: fol 1966).
[221] P.L. 88-587, Sec. 2(a).
[222] House Subcommittee Transcript, May 12, 1964, pp. 28-29.
[223] House Hearings, p. 130.
[224] Memo, Staff Appraisers to Chief, Division of Land and Water Rights, April 2, 1964 (Desk Book: Fire Island, under Tab (8), Land Costs.
[225] "Proposed Fire Island National Seashore: Estimated Cost of Real Estate," Desk Book: Fire Island: under Tab (8), Land Costs. Other sums included privately owned improvements (such as docks, motels, swimming pools, and 82 houses and summer cottages: $385,000), 2,800 acres of privately owned submerged lands ($230,000), about 89 squatter shacks ($178,000), publicly owned lands (above and below water), public improvements, and acquisition costs ($319,000).
[226] Leslie W. Piel, "Minutes of the Organization Meeting of the Fire Island National Seashore Advisory Commission, Washington, D.C., August 26, 1965": Park History files, fol FINS Correspondence 1965-74.

"all land" within the Seashore boundaries "except certain 'improved property' and property within delineated communities." NPS set out to acquire everything except what had been specifically excluded from purchase, and NPS quickly laid out a sequence for land acquisition, starting with the Sunken Forest-Sailor's Haven area and the stretch from Smith Point County Park to Moriches Inlet. [227] NPS also made it clear that it intended to enforce the standards with condemnation, warning that if the Secretary determined that a variance violated the standards, he would not simply lift its immunity but would affirmatively "subject the property to acquisition by condemnation."[228]

In October 1964, DOI put in place the necessary process of buying land. Secretary Udall announced the opening of a land office in Patchogue.[229] DOI had already been appraising properties and had met with the Justice Department "concerning the commencement of condemnation proceedings immediately." It was poised to open negotiations within a week with property owners "bent on development that would conflict with the plan legislated by the Congress" and to file condemnation suits on essential and threatened tracts.[230] By the summer of 1965, the land acquisition office boasted five permanent employees, and by fall, realty officer Leslie W. Piel announced that the NPS had already acquired almost 200 acres: 12 acres (in 7 tracts) through direct purchase and 186 acres (in 23 tracts) by condemnation, at a total cost of just under $1,375,000. Piel estimated that the NPS still had to acquire a little over 2,700 acres, and further negotiations were underway.[231] A couple of years later, George Biderman praised the "speedy land acquisition program which cut short some cut-throat speculators."[232]

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[227] In the master plan, according to Koppelman and Forman, pp. 68-69 (see below).
[228] Proposed Zoning Standards, p. 13579. See also GMP, 1977, p. 106: the law's "clear intention" was that "all lands within the seashore district [i.e. outside the mapped communities], except certain improved properties as of July 1, 1963, be acquired."
[229] Department of the Interior, news release, "Udall Promises Immediate Action to Acquire Fire Island National Seashore" (for release October 21, 1964), Park History files, FINS Correspondence 1965-74.
[230] Department of the Interior, news release, "Remarks by Secretary of the Interior Stewart L. Udall on the Fire Island National Seashore, Garden City, Long Island, October 21, 1964" (for release October 21, 1964), Park History files, fol FINS Correspondence 1965-74.
[231] Minutes of the Organization Meeting of the Fire Island National Seashore Advisory Commission, Washington, D.C., August 26, 1965: Park History files, fol FINS Correspondence 1965-74. Piel estimated the Seashore's total acreage at a little over 4,500, in 1,500 individual tracts, then subtracted about 1,600 acres (representing the 17 established communities plus town- and county-owned lands), leaving a total of about 2,900 acres to be acquired by the federal government.
[232] George Biderman, "Prefatory Remarks, Meeting of the Fire Island National Seashore Advisory Commission, Smithtown, NY, Nissequogue Golf Club, Dec. 1, 1967": Park History files, fol FINS Correspondence 1965-74.

The reservations which had become apparent by the end of 1966 marked the beginning of a broader policy shift. "Land acquisition as a major objective ended in 1969," as NPS officials put it some years later, [233] and the Land Acquisition Office was disbanded that year. How had the program succeeded in meeting the goals of Congress and DOI? At first glance, the figures suggest it had been successful. In 1977, the NPS calculated that the federal government owned 2,792 acres in fee, comprising four large bay-to-ocean strips (1,639 acres), six smaller bay-to-ocean strips (183 acres), all of East Fire Island and its satellite islands (156 acres) and most of West Fire Island (102 acres). In addition, the NPS managed 3,151 acres of New York State beachfront and ocean – an area extending from the mean high water line 1,000 feet into the ocean – through an easement. The federal government could be said to control 5,943 acres, but the basis used for calculating land area was different from that used in 1965. The gap between what had been acquired and what remained was therefore larger than it appeared. More importantly, as agency officials noted, the federal government did not own the beach, the primary dune line, or the marshlands; and except for a small tract at Sunken Forest, it owned none of the bay bottom.[234]

Judged against the goals of Congress or NPS itself, the land acquisition program had not succeeded; nor was there much hope of reviving it. The late 1970s saw discussions about the need for an acquisition program focused on the primary dune, but money and political will were both in short supply. As an agency official explained in 1979, "Land acquisition at this time is primarily for the purpose of squelching the most flagrant violations involving use and development of lands within the 17 identified communities."[235] The NPS was no longer mounting an energetic effort to build out the blocks of public land envisioned in 1964.

Within a few years of the Seashore's establishment, there were mixed results. In some ways, the Seashore was progressing well. Early benchmarks had been met: the issuance of zoning standards, the launching of an aggressive land acquisition effort, the convening of the advisory commission, the creation of a master plan. However, troubling problems were

[233] Draft Staff Report, 1979, p. 1.
[234] GMP, 1977, pp 11-12. The plan put the area within the Seashore's original boundary (i.e. excluding the 611-acre William Floyd Estate on the mainland, added to the Seashore by legislation in 1965) at 19,356 acres of land and water, instead of the 4,500 acres calculated in 1965. The calculation also did not include the Lighthouse tract, originally owned by the U.S. Coast Guard and eventually transferred to the NPS.
[235] Draft Staff Report, 1979, p. 1.

emerging. Agency policy had decisively departed from the intent of the Congress and of Secretary Udall to acquire the beach and dune line and to enforce violations through condemnation. The land acquisition program had been abandoned. The struggle continued urging localities to adopt conforming ordinances. Even with ordinances in place, there was neither money nor will to enforce them, and "without authority to condemn, or funds to do so," the zoning regulations were "meaningless."[236]

Public support was beginning to erode, which was the most damaging symptom of all to the livelihood of the Seashore.

## Criticism of the Seashore Begins

In 1967, George Biderman and the Advisory Commission, which had so recently praised NPS's work, became harsh public critics. This attack began an avalanche of criticisms. Biderman first expressed his dissatisfaction in a letter to NPS Director Hartzog and in remarks to the Advisory Commission, which the Commission then unanimously adopted as a statement of its own views. Admitting that there had been successes (especially in land acquisition), Biderman nonetheless charged that the "balance sheet...is on the negative side. We're not making it. We are not making the goals as they were established five years ago."[237] Quoting and upholding the Act, Biderman called Fire Island a "vest-pocket wilderness" and he reminded policy makers that all uses had to be consistent with the Seashore's "conservation and preservation." Although the Secretary and on-site staff honored these concepts, Biderman charged that staff-level policy was contravening the intent of Congress and the administration.[238]

Threats to the Seashore came from both the private and public sectors. Within the middle levels of NPS, Biderman saw "entirely too much of the 'public works' kind of thinking," exemplified by a 150-boat marina and plans for a 6,000-car parking facility. Private development posed an equally serious threat. The pristine ocean front envisioned by

[236] Memo, Assistant Superintendent, Fire Island (Thomas F. Norris, Jr.) to Regional Director, Northeast Region, September 30, 1968 (FINS Annex Files: fol 1968).
[237] George Biderman, "Prefatory Remarks, Meeting of the Fire Island National Seashore Advisory Commission, Smithtown, N.Y., Nissequogue Golf Club, Dec. 1, 1967" Park History files, fol FINS Correspondence 1965-74.
[238] Letter, Biderman to Hartzog, December 4, 1967: Park History files, fol FINS Correspondence 1965-74.

master planner Humphrey and endorsed by the Commission was being lost. The beach had become a highway, and from Davis Park to Kismet, "building on and even in front of the ocean front dunes is permitted to continue." The bay front, too, was under attack from dredging and commercialization. Unless these trends were stopped, Biderman envisioned "not one 'vest-pocket wilderness area' but an eight-mile stretch supplemented by a series of 'vest-pocket parks.' These, in turn, will be punctuated by 'saturation resort development.'"[239]

Biderman offered a solution: the "National Seashore must prevent destruction, commercialization and befouling of the water frontage." First, the NPS should acquire more land to protect both the bay and ocean fronts. Second, the town should adopt zoning to stop "over-commercialization, over-crowding and honky-tonk development within the communities." Third, the NPS was "mandated – both by the Act and by the fundamental purpose of the Seashore – to step into the vacuum" created by the towns' propensity to grant variances and exceptions. In the face of this "clear abdication of local responsibility," NPS was mandated "to use the power of eminent domain to prevent non-conforming uses of any land within its boundaries."

Biderman was not the Seashore's only critic. Superintendent Henry Schmidt noted that his complaints were "basically a repetition" of criticisms made by Secretary Udall in the summer of 1967. Udall's complaints fell under the following headings:

a. The "failure of middle management...to assume a positive and inflexible role based on laws in matters related to preservation of Fire Island."
b. NPS's failure to establish meaningful vehicle regulations.
c. NPS's failure to provide public access to the developed areas at a reasonable cost.
d. The failure of land acquisition officials to use the Secretary's authority to enforce the zoning standards.
e. Park planners' "inadequate concept" of the Act's "basic purposes," revealed by their "elaborate plans for development within the natural zone." [240]

These criticisms were indeed very close to Biderman's. From their different vantage points, Biderman and Udall had converged in attributing many of the problems to middle

[239] Ibid.
[240] Letter, Superintendent, Fire Island & New York City Group (Henry G. Schmidt) to Regional Director, December 28, 1967 (FINS Annex Files: fol 1967). Schmidt references two documents for Udall's views, neither of which have been located for this study: a letter to the NPS director of June 16 and (as the specific source for the five headings) a memo of June 14, 1967.

management and agency planners who were not supporting the intent of Congress and the Secretary. This divergence between operational policy and legislative goals was now compromising three fundamental areas of the Seashore's mission: the preservation of federal land, the regulations of private land, and the protection of the beach and dunes.

During the next two years, Biderman pressed forward with his criticisms, again focusing on the very points which had puzzled NPS late in 1966. How, he asked, could the acquisition of the "entire ocean beach," or of non-conforming properties, be "still in controversy"? "I see no reason," he declared, "why either of these should be in question," and he backed up his charges by quoting what Udall and NPS Director Hartzog had promised to Congress: Udall stated that the federal government "would acquire the beach front for public access all along the area including these communities." "If the Congress and the public can not rely on the stated intent of the Secretary of the Interior and the Director of the National Park Service," asked Biderman, "what can we rely on?"[241]

The issue of enforcement was almost as clearcut. Biderman described a conversation in which Hartzog had conceded the need to use condemnation for enforcement yet expressed "practical and cost reservations." Hartzog assured him that if Congress were to allow the resale or lease of condemned properties, he would put the policy into effect. By 1969, Congress had authorized resales and leases, yet the NPS was still not condemning properties in violation.[242]

Biderman again offered solutions: sell or lease back properties with covenants or other restrictions. Dismayed by the opinion of government lawyers that the NPS lacked authority to protect the dunes without a legislative amendment, Biderman proposed a solution to this problem as well: amend the zoning standards to prohibit construction within thirty feet of the dune crest. Again quoting from the public record, he reminded NPS of Congress's intent to protect the dune.[243] He might have added that NPS's own zoning standards had placed its mandate to protect the environment front and center. But nothing happened. Soon the Advisory Commission (with which Biderman was still associated,

[241] Letter, Biderman to Lemuel A. Garrison (Regional Director), March 5, 1969 (FINS Annex Files: fol 1969).
[242] *Ibid*. The conversation took place in 1968. The authorization for sale or lease-back, according to Biderman, was contained in S. 1401.
[243] Letter, Biderman to Thomas F. Norris, Jr. (Asst Supt), October 29, 1968 (FINS Annex Files: fol 1968).

although no longer chair) was recommending not a 30-foot but a 100-foot setback from the dune crest. By 1969, Biderman urged the NPS to ask Congress for more money to acquire the dune and beach; if not, NPS would end by "deviating from the legislative intent."[244]

Critics and criticisms multiplied. In 1969, Senators Javits and Goodell (who had replaced Keating) called publicly on Interior Secretary Walter Hickel (Udall's successor) to take "immediate steps" to protect the Seashore. Their main concern was protecting the beaches and dunes from erosion, yet, they also sought to clarify the NPS's authority to control development.[245] In 1970, the Advisory Commission adopted a resolution urging the NPS to acquire, as quickly as possible, the "remaining ocean front and as much of the adjoining dune as may be necessary," plus the rest of the islands and marshlands in the bay. The Advisory Commission asked Congress for additional funding, fully recognizing that lack of money was not the only problem.[246] Criticizing NPS's reluctance to enforce the zoning standards, the group called on the NPS to quickly condemn non-conforming properties, believing (in Biderman's words) that "it would take only a few such condemnations at minimal cost to the Government to deter future developers" from exploiting the Seashore Act as an "empty shell."[247]

In 1970, the NPS returned the previously condemned Tract 2203, a bay-to-ocean strip in Ivy Beach, to owners who planned to build 60 houses on it.[248] Biderman believed that this property could not legally be developed. Lying outside the mapped communities it was not exempt from condemnation, and he pointed to the stipulation in the zoning standards that "unimproved property...will be subject to condemnation in the event it is developed by the owner for any purpose." To Biderman, DOI was legally obligated to condemn Tract 2203 the moment development began.[249]

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[244] Letter, Biderman to Lemuel A. Garrison, NPS, May 8, 1969 (FINS Annex Files: fol 1969).
[245] Press release: "Goodell and Javits call for Immediate Steps to Protect Fire Island National Seashore," from the Offices of Senators Charles E. Goodell and Jacob K. Javits, April 29, 1969: copy included in "Legislative History" compiled for FINS superintendent.
[246] Letter and attachment, George Biderman to Charles Warren (Office of Senator Javits), June 17, 1970 (copy in park files; from Dept of Special Collections, SUNY Library, Stony Brook).
[247] Letter, Biderman to Javits, September 20, 1973: copies in park files; originals – SUNY.
[248] Letter, orig-SUNY, Biderman to Charles Warren (Office of Sen Javits), March 24, 1973: copies in park files.
[249] Letters, Biderman to Edward A. Hummel (NPS), and Biderman to Joe Shapiro, February 2, 1971: copies in park files; originals – SUNY.

Plans proceeded, however, and the following October, Biderman warned Javits that the matter was reaching a crisis - heading toward the courts. He accused NPS not merely of being "laggard in its land acquisition program" but of actually breaking the law in revesting title to the property.[250] A lawsuit was filed by the Natural Resources Defense Council, a leading national environmental group, together with Biderman and Charles Lowry (then chairman of the Advisory Commission). The complaint alleged that Interior Secretary Rogers C. B. Morton and the NPS were causing "irreparable injury" to the "scenic, environmental and ecological resources" which Congress had directed them to preserve and protect. Since the Seashore's establishment, the lawsuit claimed, there had been a 40 percent increase in residential buildings, a substantial rise in use of motor vehicles on the supposedly roadless island, continued construction on the ocean dunes, and a stream of zoning variances for swimming pools, new construction, and fill on wetlands.

The lawsuit charged that DOI not only failed to acquire and protect the ocean beach, but, by not adequately regulating development, had effectively repealed sections of the Act. Compounding its transgressions, while DOI permitted development to proceed, it failed to prepare the environmental impact statement required under the National Environmental Protection Act (NEPA), nor did it prepare an acceptable master plan. The central problem, alleged the plaintiffs, was DOI's policy of "concentrating on the undeveloped areas and neglecting to control use and development in the private communities within the Seashore." DOI had irreparably harmed the island's environmental and ecological resources, including the "beach, dunes, water supply, wetlands and vegetation" and was bringing increased population pressure to bear on a "fragile resource."

The plaintiffs sought various remedies. From DOI, they demanded an environmental impact statement, regulation of motor vehicle traffic in accordance with it, and acquisition of the beach in front of the developed communities. At the same time, they sought to enjoin the local communities from permitting any new or expanded commercial structures, approving any variances or zoning changes, or issuing any new motor vehicle permits to Seashore residents until the environmental impact statement was completed.[251]

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[250] Letter, SUNY, Biderman to Charles Warren (office of Senator Javits), October 7, 1971: copy in park files.
[251] Press release, "Federal Suite Charges U.S. Violates Own Laws; Seeks Fire Isl. Development Curbs," Fire Island Association, Inc., August 9, 1972: - copies in park files; originals – SUNY.

The court decided in favor of the government, but this was hardly a victory to savor. Though DOI had broken no laws, the court confirmed the depressing facts presented by the plaintiffs. They had "demonstrated beyond peradventure" that the settled communities had experienced significant development since 1964, and that this intensification of use, together with the commercial expansion which accompanied it, had "materially increased the ecological effect" on the island's water supply and increased the risk of contamination or sea water intrusion. Development might already have exceeded the island's environmental capacity to absorb its impacts. The plaintiffs were also correct in asserting that the government had "not exerted its power to temper or to prevent the development." Since only one zoning ordinance had been approved, DOI, evidently, was not even receiving all of the notices of changes and variances which the law required. Finally, the government had never once used its only power – condemnation – to block a disapproved variance.

Despite these disturbing facts, the court's job was to judge the legality, not the wisdom, of the government's actions. While the government had "not moved forward," the Act did not "of its own terms require the Government to do so." True, DOI had failed to protect the Seashore's natural resources, but since the Act did not specifically require the department to take any action which it had failed to take, it had not violated the Seashore Act; nor had it violated NEPA, because failing to block development was not a major governmental action as the law defined it. As to condemnation, "that power is manifestly a discretionary one the exercise of which cannot be coerced." In sum, though Congress had directed DOI to protect the natural environment at Fire Island, it appeared that nobody could compel the department to actually carry out Congress's intent.[252]

After the lawsuit was settled, NPS announced that it would finally commission a study of the environmental impacts of private development, but that this would take at least another year.[253] Meanwhile, Biderman informed Javits that NPS would need about $1 million to block immediate development threats to about 200 acres within the Seashore. These threats included the development plans for Tract 2203, continuing encroachments on the ocean beach in front of the developed communities, and various planned developments

[252] *Biderman v. Secretary of the Interior.*
[253] Letter, Biderman to Javits, September 20, 1973: copies in park files; originals – SUNY.

within the communities that conflicted with the zoning standards.[254]

Following the lawsuit, the NPS's own development plans also came under attack. Early in 1976, six congressmen, including Otis Pike, author of one of the early bills, wrote to DOI protesting a recently circulated proposal for recreational development within the eight-mile zone east of Davis Park. Alluding to a long history of "grandiose plans" from the NPS, Assistant Secretary Nathaniel P. Reed commented to NPS Director Gary Everhardt, "I don't disagree with the concepts" expressed by the angry legislators.[255]

By 1976, the Seashore had weathered nearly a decade of severe criticism. Detractors, including professionals at NPS and DOI, principally alleged two kinds of failing: over-development of public property and under-regulation of private property. The latter was the more complex problem, since it implied multiple causes and kinds of failure. The lawsuit had made it clear that the Act, while giving DOI authority to protect the island, did not compel it to do so. Nor did the Act give DOI authority over local governments; approved zoning ordinances had not been adopted and variances were being granted. There was neither cash nor political will for condemnation. The federal government had not gained control of the all-important primary dune. In practice, agency policy was diverging from congressional intent.

Though the problems which plagued the NPS's management of public and private land appeared quite different, Biderman and his associates saw both essentially as failures to carry out the park's legislative mission to protect the Seashore's environment. Groups like the Fire Island Association and the Advisory Commission regarded the Act as a pledge which had been broken. In 1973, in a bitter denunciation of DOI addressed to Senator Javits, Biderman quoted Udall's own promise that the Act's development restrictions would not only promote the Seashore's objectives but also "benefit the owners of improved properties" by protecting their surroundings. Washington had "made a commitment to the Fire Island communities" and, in exchange, property owners had offered their strong support – even, as Biderman reminded Javits - "in the expectation that our tenancy would be limited."[256] By not protecting the island, the government had broken its commitment to the property owners.

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[254] Letter, Biderman to Charles Warren (Office of Senator Javits), March 24, 1973: copies in park files; originals – SUNY.
[255] Memo, Assistant Secretary for Fish and Wildlife and Parks, to Director, NPS, March 3, 1976: NPS-WASO, Planning Files, fol: FINS 1965-75.
[256] Letter, Biderman to Javits, September 20, 1973: copies in park files; originals – SUNY.

After this point, criticism of the Seashore changed; NPS abandoned its development plans. Following the attacks of 1976, one official wrote that most of the proposals in the 1965 master plan had never been built and were "now regarded as infeasible and incompatible" with legislation. He assured the director that the new management plan would "reflect substantial deemphasis of development and reinforcement of our intention to preserve the 8-Mile Zone in its natural state."[257] NPS's new direction won widespread appreciation. Suffolk legislator John Foley praised the "very basic change from heavy federal development to resource preservation."[258]

Criticisms of the regulatory system, however, continued unabated. The next 15 years or so would produce a series of technical fixes or tune-ups, offered at times by the NPS, DOI, or Congress, in an ongoing effort to solve the problem – though without ever altering the essential outlines of the regulatory system that was responsible for them.

## Solving the Regulatory Problems

### A Proposed Boundary Change

DOI's first reaction to mounting criticism exacerbated the problem. NPS planners, working on the new master plan, believed they had found "almost universal" public support for "increased federal involvement in land use control, particularly in the wetlands and dune areas," and they had promised that NPS would be responsive. Then in 1975, the department's "top management" suddenly announced the "complete deletion of all federal lands and communities west of Point O'Woods from the national seashore." All federal lands and responsibilities within a six-mile stretch of Seashore, including thirteen of the island's seventeen communities, would simply be turned over to local ownership and management.[259] The proposal "created severe public controversy," not only because of its sudden appearance but because it ran counter to public opinion. The public now viewed the government's about-face as a "betrayal of the spirit of cooperation" and an "abdication of legislatively-mandated

[257] Memo, Assistant Director, Development, to Director, March 10, 1976: NPS-WASO, Planning Files, fol FINS 1965-75.
[258] Karl Grossman, "Seashore Plan: Winner in 2d Try," *LI Press*, July 28, 1976.
[259] GMP, 1977, p. 104. For NPS frustration, see memo, Assistant Director, Development, to Associate Director, Park System Management, March 10, 1976: NPS-WASO, Planning Files, fol. FINS 1965-75.

responsibility."[260]

The proposal was eventually withdrawn, but not without a severe loss of public trust. In its place, Assistant Secretary Reed asked for a "major revision to the current zoning standards."[261] In particular, planners argued that the 1966 standards did not "effectively focus on the two resource areas most crucial to achieving the Service's resource management objectives – namely, the dunes and the wetlands."[262] To present the new policies, NPS commissioned a series of studies, including an analysis of options for land use controls. Carried out by lawyers Richard Babcock and Richard Roddewig and submitted at the end of 1975, this effort became known as the Babcock report.[263]

**The Babcock Report and the Model Zoning Ordinance**

The conclusion reached by Babcock and Roddewig was stark: the "Cape Cod Formula does not appear to work on Fire Island."[264] Worse, the authors argued that it "*cannot work on Fire Island because of the geographic and political isolation of the island from the sources of local power*." They identified three major problems:

- First, the granting by local authorities of more than 300 variances during the previous decade, which had allowed residential buildings to be constructed "despite violations of acreage, frontage, set back, sideyard or maximum plot occupancy requirements."
- Second, the establishment of new commercial uses despite the Act's requirement that federal zoning standards prohibit such uses.
- Third, the increase in "'groupers' (large non-family related groups)" and "'midnight conversions'," both of which led to the multiplication of kitchens and bathrooms which simultaneously drew down the island's limited supply of fresh water and increased the load of wastewater that went back into the

[260] Memo, Acting Assistant Director, Planning and Development (James W. Stewart), to Deputy Director, nd [but shortly after January 3, 1977]: NPS-WASO, Planning Files, fol. FINS 1965-75.
[261] Memo, Director to Regional Director, North Atlantic Region, July 8, 1975: NPS-WASO, Planning Files, fol. FINS 1965-75.
[262] Memo, Acting Assistant Director, Planning and Development (James W. Stewart), to Deputy Director, nd [but shortly after January 3, 1977]: NPS-WASO, Planning Files, fol. FINS 1965-75.
[263] Richard F. Babcock, Esq., and Richard J. Roddewig, Esq. (for Ross, Hardies, O'Keefe, Babcock & Parsons), "Report to National Park Service on Fire Island National Seashore," December 1, 1975. The ecological consulting firm of Jack McCormick and Associates produced an environmental resource study which "reinforced the need for strict prohibition of development" in these areas. See memo, Acting Assistant Director, Planning and Development (James W. Stewart), to Deputy Director, nd [but shortly after January 3, 1977]: NPS-WASO, Planning Files, fol. FINS 1965-75.
[264] Babcock, p. ii.

ground.[265]

In the authors' view, the rapid development of vacant lots posed a serious environmental danger. Their fear was not that this would by itself "tip the ecological scales." Although Babcock and Roddewig found evidence that development had already affected the quality of the island's aquifer, they found "no conclusive evidence" that development *since the Seashore's establishment* was responsible, as opposed to what had taken place previously. What they feared instead was that the disappearance of vacant lots would increase the pressure to raise density and intensity of use on already-developed lots to the point where this pressure would become irresistible. In this scenario, it would eventually become legal to replace single-family houses with "higher density uses such as multiple-family dwellings, town houses and condominiums." The result would be the growth of something like an "Atlantic City" within the Seashore, putting "severe overuse pressures" on conservation lands.[266]

The authors considered three sweeping reform proposals: preempt local zoning regulation by drafting and enforcing federal land use controls; establish a revolving fund for purchasing substandard lots; or acquire and hold all undeveloped lots. They rejected all three. Despite their harsh criticism, the report's authors argued that the system could be fixed. The federal government, they said, "must be more precise in its standards and must have available more flexible sanctions."[267] The first step was for DOI to promulgate a Model Zoning Ordinance, implement it as a federal regulation, and require the local authorities to adopt it as a special district within their jurisdictions.

NPS incorporated this recommendation into its draft master plan, released in June 1976, then turned to the same Chicago firm to develop a model ordinance.[268] Their proposal, elaborating on the Babcock report, focused both on protecting the dunes and wetlands and on regulating property within the developed communities. To accomplish the former, the authors proposed to divide the dune system into three parallel bands or "hazard zones." Within Zone A, extending seaward from the seaward base of the dune, no permanent

[265] Babcock, p. 23.
[266] Babcock, pp. 44, 36, 37.
[267] Babcock, p. 23.
[268] Ross, Hardies, O'Keefe, Babcock & Parsons (Chicago), "Report to the National Park Service: Outline of Key Standards for Model Zoning Ordinance for Fire Island Communities," November 29, 1976.

construction would be allowed. Within Zone B, boardwalks would be permitted, while in hazard Zone C, extending landward from the dune crest or a point slightly below it, construction would be permitted as long as the pilings met performance standards for "stability and coverage." A similar system of zones would protect the island's wetlands; in the most restrictive, all construction (other than piers and related uses) would be prohibited.

With regard to the communities, the authors argued that the NPS had two distinct interests. The first was to discourage uses of land that "adversely affect the management...of federal property" by detracting from the "enjoyment of the natural areas," or that overburden local recreation facilities, compromise drinking water, or harm native vegetation. The second was to "maintain neighborly relations with the fellow occupants of a small and fragile island." From a management perspective, this distinction was helpful because it showed officials how to separate federal from purely local interests in zoning. It also pointed to two quite different strategies. To achieve the first objective, regulation was required. For the second, the authors counseled NPS to stay out of zoning issues like "setbacks, number and kind of shops, building design, etc.," which dragged NPS into "time-consuming squabbles" without achieving any real benefit.[269] To achieve both goals, then, NPS should limit its intervention to "First Level Standards" designed to serve NPS's "property management interest."

The first level standards suggested by the authors covered issues such as the installation of below-ground swimming pools, site grading, clearing and planting of vegetation, noise and air pollution, signage, land uses likely to attract day visitors (e.g., amusement parks), and population density. This last was critically important, and especially difficult to regulate because of the "grouper" problem, which threatened to create densities much higher than those typical of single-family zoning. Confronted with large numbers of shared houses, the zoning controls specified in the 1964 Act – "acreage, frontage, and setback requirements"– had proven to be largely useless in regulating density. Instead, the report recommended floor area ratios: that is, limits on the size of buildings expressed as a multiple of lot size. Even this was at best an indirect way of controlling density, and it was hoped that the towns themselves would adopt more direct controls, such as limits on the

[269] Model Zoning, p. 9-10.

number of bathrooms, kitchens, or entrances, or a stricter definition of family. Even without this, floor area ratios would give NPS some influence on density and environmental impacts. Density could be enforced on the basis of building plans, saving NPS from becoming mired in "sticky inquiries into interpersonal relationships."[270]

Zoning standards would have little value without the ability to enforce them, and both the 1975 and 1976 reports noted the inadequacy of condemnation to provide either real enforcement, or a credible threat. The consultants believed that injunctive relief – the power to go to court to block an action inconsistent with federal guidelines – was "the essential lever compelling the four Fire Island local authorities to adopt the model ordinance"[271] as well as an essential tool for enforcing it. They also urged NPS to acquire conservation easements within the communities, by condemnation if necessary, in part because such property interests would strengthen NPS's standing in state court when it sought injunctions and might even make it possible to prosecute zoning violators in criminal court for trespass.

Land acquisition was important in other ways. Protecting the dunes was a key NPS goal, and as the consultants pointed out, "The barrier dunes of Fire Island are part of one system – disruptions in any one point can affect the stability of the entire system." The damage caused by construction could extend beyond the site itself, ultimately compromising the environmental performance of the entire dune system. For this reason, the authors forcefully urged NPS to acquire dune lots within the communities, arguing that to permit "further development on beaches or dunes or in wetlands" would violate "the congressional mandate to conserve and protect." NPS might even need to acquire improved properties, for if the dunes were to perform their "natural protective role," it would be necessary to remove structures which interfered with their stability. Fortunately, acquisition was not always necessary: where the dune district boundary cut across zoning lots, owners might retain them as long as building was limited to the portions outside the district. But one way or another, it was crucial that NPS establish ownership within the dune and beach zone. A final advantage of doing so, urged the authors, was that it would allow NPS to go to court protecting its interests as a landowner: it could sue for special damages arising from the

[270] Model Zoning, p. 12.
[271] Babcock, p. 58.

development of neighboring properties.[272]

While emphasizing the beach and dunes, the authors also called attention to the special environmental importance of the wetlands, noting that submerged land constituted about 75% of the Seashore's total acreage and that tidal wetlands fronting Great South Bay played an important role in the Bay's ecology. They quoted with approval a court decision that stated that "the bay is the most valuable single natural resource of the entire region." In recognizing the susceptibility of the entire system to local changes, they urged NPS to acquire all unimproved wetland areas, whether in the settled communities or not, totaling several hundred lots.[273]

While all of these actions could be undertaken by administrative decision, Babcock and Roddewig also advised the Secretary of the Interior to seek two amendments to the Act: first, to clarify the park's conservation and preservation purposes and NPS's obligation to acquire land; and second, to authorize annual grants to local zoning authorities to offset the additional costs of adopting and administering the proposed model zoning ordinance.[274]

**The General Management Plan**

As the Babcock report and the model ordinance study were being written, NPS was preparing a general management plan. The first draft completed and withdrawn in 1975 was roundly criticized for over-emphasizing recreational development and for proposing to eliminate the western communities from the Seashore. A new version in 1976 was better received, although the proposal to create a dune district attracted criticism. Amended and completed in 1977, the final plan was generally praised. Between first and final versions, the work evolved along two broad and opposing trajectories: regulation of private property decreased while respect for nature on federal lands increased.

The 1975 draft was the last expression of the penchant for intensive recreation development which NPS had inherited from the 1950s and from Mission 66. The final plan of 1977 presented a heightened awareness of environmental issues. Reaffirming that the Seashore's "primary management concern" was to preserve and enhance the island's

[272] Babcock, pp. 48, 46, 49, 51; see also pp. v, 62.
[273] Babcock, pp. 61, 48-49.
[274] Babcock, pp. 77-78.

"serenity and natural beauty," it argued that the visitor's ability to appreciate the "sounds, sights, smells, and sensations" of natural environments as distinct as the beach, tidal marsh, and holly forest "without interference from development" was "integral" to the "Fire Island recreational experience." It went beyond mere appreciation of natural features to concern for the systems that produced them. While acknowledging that the island's environment had been "culturally manipulated," it maintained that those systems were still critically important. Rather than merely protecting the dunes as scenery, the plan sought to protect the natural processes that continuously shaped and reshaped them. Thus it rejected erosion control measures "devised exclusively to protect private property values" and, instead, sought to "restore and maintain the dune and beach system by environmentally compatible methods" and to reinstate "natural geomorphic processes." While promising to study the prospects for sand nourishment, the plan explicitly ruled out new groins, bulkheads, revetments, or other "artificial beach-stabilization devices" other than snow fences in areas of sparse vegetation and rapid erosion.[275]

The central problem identified by the planners was the "ill-defined" relationship between the communities and NPS. They found that both local and federal authorities had "failed to exercise proper responsibility."[276] Only two of the four local governments (Islip and Saltaire) had submitted zoning ordinances, of which only Islip's had been acted on. Local zoning boards had granted over 300 variances, with significant impact on the island's character. New commercial uses as well as high-density residential uses had become established. The increase in groupers – unrelated vacationers sharing houses, often in large numbers – made it futile to try to control density by limiting buildings to single-family houses. As for enforcement - condemnation - the only available sanction had "not been utilized." The future looked bleak: development of "nearly all lots, including substandard ones, dune properties and wetlands," plus steady increases in density on already developed lots, illegal conversions of single-family houses to multiple dwellings, and additional commercial development. All of this would "threaten," and indeed "would be in contradiction to the conservation and preservation mandate" of the Seashore.[277]

[275] GMP, 1977, pp. 23, 16, 105, 32-33.
[276] GMP, 1977, pp. 1, 11.
[277] GMP, 1977, pp. 100, 102.

Why had the Cape Cod formula failed so badly? The island's political situation, argued the plan, was "dramatically different" from that of Cape Cod. At Fire Island, almost all property owners were absentees who did not vote in the towns, or even in the county. Thus local governments had little political incentive to solve the land-use problem. (The authors might have added that, although the owners did not vote, they did pay substantial property taxes to the towns and county, which gave them another incentive to leave things alone.) Federal authority was compromised by Washington's "undetermined legal authority to enjoin local governments from granting variances," the lack of acquisition funds, and DOI's reluctance to get involved. Compounding the problems was a feature of New York state law which appeared to allow property owners to build houses on substandard zoning lots as long as they were held in single and separate ownership before the local code's enactment.[278]

A more succinct diagnosis was offered by an NPS official. John Debo believed that three problems explained the difference between NPS's experience on Fire Island and Cape Cod. First, Fire Island's local governments were unwilling to accept the "premise of a federal/local land use control partnership," which was that they bore some responsibility in exchange for exemption from condemnation. Second, even when they accepted the premise, some were unwilling to enforce zoning standards. Third, NPS was just as unwilling to exercise its "sole sanction," condemnation.[279] Neither diagnosis acknowledged that the so-called Cape Cod formula at Fire Island was not the same as the system practiced on Cape Cod, and that most of the failures at Fire Island stemmed from the differences.

Unfortunately, the plan's proposed remedy was vague: "To establish direct federal involvement with local governmental jurisdictions in a cooperative effort to provide appropriate land uses within the exempted communities of the national seashore." It did not specify what "direct federal involvement" meant, nor what uses were "appropriate." Nor did it spell out exactly what results NPS sought to achieve; it left the federal role in regulating private land somewhat unclear, asserting on the one hand that the Act gave the federal government "considerable authority to regulate land use and development," yet conceded that

[278] GMP, 1977, pp. 101-102.
[279] Memo, John Debo to Charles Clapper, August 15, 1977 (FINS Annex Files: fol Zoning – Legal Material).

"federal control" was "limited by existing legislation to certain zoning standards," and that the communities were largely "exempted from direct federal control."[280]

Federal control was strongest, of course, over federal lands, and here the plan proposed a complex system of land management in which the Seashore was divided into four areas, confusingly called zones: Natural, Historic, General Outdoor Recreation, and Special-Use. Each zone was further partitioned into sub-zones. All of the dunes, for example, were included within either the Dune District (a sub-zone of the Special-Use zone) or the environmental protection/primitive subzone of the Natural zone.

Within the communities, land use was controlled by local zoning, which NPS proposed to bring into consistency and conformance with federal standards by issuing a model zoning ordinance. This would establish a minimum lot size (half-acre) for new subdivisions; prohibit high-density residential uses and conversion of single-family to multiple-family dwellings; set limits on lot coverage, height, population density, and number of bathrooms; and establish rules for grading and clearing of sites, introduction of exotic vegetation, and signage. It might also (depending on an analysis of future commercial and industrial needs) down-zone property currently zoned for those uses. The model ordinance would be adopted by the localities in one of two ways. In Islip and Brookhaven, it would "comprise the basis" of a special Fire Island zone to be incorporated into the townships' zoning ordinances. In the incorporated villages of Saltaire and Ocean Beach, which lay entirely inside the Seashore, new local regulations would "essentially be composed" of the model ordinance's standards.[281]

To address critical conservation needs, the planners proposed to map two special zones within each community, one to protect the wetlands on the bay side and the other to protect the dunes on the ocean side. Safeguarding the dunes had long been a major goal of the Seashore's critics, including both Biderman and Udall. The Advisory Commission had urged a setback of 30 or (later) 100 feet from the dune crest for new construction, and the dune district now promised to accomplish something similar. It would extend from the mean high water mark landward to a line 40 feet inland of the crest of the primary dune, as mapped

[280] GMP, 1977, pp. 28, 8, 48.
[281] GMP, 1977, pp. 48, 102-103.

in 1976. The regulations would permit "limited construction" along the landward edge of the district but would "prohibit additional structural development and stabilization devices other than snow fences" and would tightly regulate dune crossings.[282]

The area proposed for inclusion in the new district included about 250 unimproved properties plus 257 structures. These too would be affected by the new zoning, especially the 48 houses which were situated on or seaward of the dune crest. An internal memo of 1976 recommended that "any structures on the ocean side of the dune be acquired either by the United States or by the local municipalities."[283] In fact, the success of the dune district proposal was predicated on broad federal acquisition of private property, and the earliest version seems to have called for removing as many as "several hundred houses."[284] The number being discussed in the summer of 1976 was "more than 300," and this prompted a storm of criticism. Nearly 400 people attended a public hearing in July 1976 and "were unified in their opposition."[285] Though Biderman's group, the Fire Island Association, supported "a limited amount of removal on a very selective basis," even Biderman called the NPS proposal "crazy." The region reported back to the director in Washington that, while most people found the plan "basically acceptable" (even complimenting NPS on its decreased emphasis on recreational development) the proposal to remove structures in the dune district had drawn "fervent opposition." [286]

The planners went back to work and the following year brought forth a modified plan, which still called for "direct federal acquisition" of private property but on a more modest basis. It proposed the "eventual elimination" of any structure that damaged the dune system and prompted demands for erosion control measures. The 48 structures on or seaward of the dune crest were the biggest problem, and the plan promised that the government would acquire many of them, as long as their removal would not cause long-term harm to the dune. The government would also acquire all unimproved properties within the dune district in

[282] GMP, 1977, pp.103, 104-105.
[283] Memo, Chief, Division of Land Acquisition, NAR (Thomas R. Coleman) to Files, August 4, 1976 (FINS Annex Files: fol Dune District).
[284] Letter, Biderman to Director [NPS], September 19, 1977 (FINS Annex Files: fol Dune District).
[285] Mitchell Freedman and Dallas Gatewood, "Plan to Destroy Homes is Opposed," *Newsday*, July 25, 1976.
[286] *Limited removal*, *region reported*: memo, Acting Regional Director to Director, August 30, 1976: NPS - WASO, Planning Files, fol. 1965-75; *"crazy"*: Mitchell Freedman and Dallas Gatewood, "Plan to Destroy Homes is Opposed," *Newsday*, July 25, 1976.

order “to prevent additional development.” Any developed property which was not condemned could remain, but if storm damage reduced its market value by more than 50%, NPS would consider acquiring it.[287]

The new plan greatly reduced the threat to existing houses and pushed it off into an indefinite future, however, it did not end the controversy. When Biderman asked three members of the Fire Island Association to form a committee to look into the new plan, they broke away and formed a new group called Guardians of the Dunes with the motto “Don’t Tread on Me,” and issued what Biderman – charging that they had not even seen the NPS’s proposal – called an “incendiary leaflet.”[288] Not only did they object to the “probable condemnation” of up to 48 houses, but they charged that the dune district would prevent the Army Corps from nourishing or protecting the beach. They claimed that it would become a “*permanent cutting edge* which could well cut house after house away from our communities.”[289] In another broadsheet on the “Dune District Emergency,” the group labeled the taking of houses “impractical, high-handed, wasteful of taxpayer money, dangerous to the dunes themselves, punitive to those who had fought the hardest to protect the dunes....”[290]

The planners nevertheless moved forward, and local press treated the signing of the master plan in 1978 as a joyous occasion. One reason was NPS’s renunciation of its recreational development schemes. But “chief among the modifications” approvingly cited by *Newsday* was “the announcement that the proposal to remove 48 houses within the dune district boundary has been dropped.” Actually, NPS retained the intention of condemning these houses, but it had relegated it to the future and had not proposed to fund it. In the meantime, explained Regional Director Jack Stark, the dune district would prevent all future construction in the dune district as well as the rebuilding of homes which met the criteria of the “fifty/ninety rule.”[291] The fifty/ninety rule would allow NPS to acquire the sites of structures destroyed by storms, provided that “major storm activity destroys 90 percent or

[287] GMP, 1977, p. 105.
[288] Letter, Biderman to Director [NPS], September 19, 1977 (FINS Annex Files: fol Dune District).
[289] Leaflet, “An Urgent Message To Those Who Own Houses Along the Ocean on Fire Island,” September, 1977 (FINS Annex Files: fol Dune District).
[290] Memo, David Ash (Property Owners Association, Inc., Fire Island) to OBP Association Membership, September 12, 1977 (FINS Annex Files: fol Dune Districts). See also Robert H. Spencer, Letter, *Newsday*, (date removed from clipping but evidently late August, 1978).
[291] “After 14 years, FINS Plan is Signed,” *Newsday*, March 16, 1978.

more of all structures within a community, and damage to each structure is in excess of 50 percent or more of its fair market value."[292]

Though the General Management Plan (GMP) presented a bold initiative, enforcement took a step back from the Babcock report. The planners believed that "local enforcement," through the model zoning ordinance, was the best option. If it failed, they promised only that injunctive relief "may be sought" and direct federal regulation "considered." Meanwhile, condemnation remained not only the "final alternative" but, in reality, the only alternative, and an unsatisfactory one. With no new enforcement tools, DOI would remain unable to prevent illegal construction before its progress triggered the need for condemnation. Even within the dunes, the Seashore's acquisition program would continue to be driven by enforcement, rather than by planning; and if Congress failed to provide adequate funding, illegal construction would continue to harm the dunes, impair the ambiance of the public beach, incite calls for publicly funded erosion control, and drive up the cost of eventual acquisition – the very outcomes the dune district was designed to prevent.

The GMP's position on land acquisition outside the dune district was hard to pin down. Some signs pointed towards restitution of an energetic program based on planning rather than enforcement. The plan reaffirmed the federal commitment to acquire land outside the communities and proposed implementing the "fifty/ninety rule" through a legislative amendment. This standard would only arise after a catastrophic storm. No community has ever lost 90% of their structures; even in the 1938 hurricane, only about 20% of the houses on the island were lost.

Other signs pointed away from an energetic acquisition program. In fact, the plan proposed to transfer 41 acres of land in Davis Park *back* into the community development zone where it would be exempt from acquisition. This land included 115 improved and 3 unimproved properties and was deemed "not essential to the management of the seashore district." Moreover, the fifty/ninety rule set the bar so high that little short of a terrific storm would trigger it. NPS officials admitted to Congress that many experts thought it was too permissive, but that NPS wanted to provide a "fair and equitable solution" by giving

[292] GMP, 1977, p. 107.

homeowners "an even chance at continued occupancy" after a severe storm. When the House later approved the rule, as part of the National Parks and Recreation Act of 1978, Rep. Downey's assistant told two local reporters that it had been included simply to comply with President Carter's executive order on flood plain management and recent legislation on flood insurance, which reflected a "national intention to discourage any development in dangerous flood plains." Downplaying its practical significance, he assured them that even the famous storm of 1938 would not have activated the rule.[293] In any case, the provision provoked so much opposition that it was removed from the final legislation.

In sum, then, the plan's actual proposal for land acquisition was limited to about 53 acres in 80 parcels, most to be acquired from willing sellers as opportunities arose. Included in this total was tract 2203, to be acquired "to prevent imminent development in this area."[294] The plan made clear that – apart from the dune district – federal land acquisition would be limited and would continue to be guided by enforcement needs.

**The Acts of 1976 and 1978 and the New Zoning Standards of 1980**

More confusing than the plan were the events which accompanied it leading to the passage of legislation in 1976 and 1978. On February 27, 1975, S. 687 was introduced, containing important new funding and enforcement measures for the Seashore. The funding provision, a $10 million authorization for land acquisition, was included at the behest of Senator Javits, who was angry at the laxity of local authorities in granting variances.[295] Given the NPS's increasing focus on the problem of the dunes, and the fact that the original authorization had been almost entirely spent, one might have thought DOI would welcome this proposal. However, the department opposed it, explaining that it could not assess its acquisition needs until the master plan was complete, but that "virtually all" privately owned land not exempted from condemnation had already been acquired.[296]

The enforcement provision authorized DOI to seek injunctions in federal court against actions deemed "inconsistent with the purposes of the act or...adverse to the

[293] Michael Gross and Steve Bedney, "Seashore Passes House," *Fire Island News*, July 22, 1978.
[294] GMP, 1977, pp. 107-108.
[295] According to George Biderman in "Draft Staff Report," (compilation of comments), np.
[296] Statement for Witness, p.2. The only exception noted was tract 2203, acquired but revested and determined to be "not needed for management or public use."

protection and development of the area" – in other words, improper variances and other zoning violations. This was exactly the alternative to condemnation urged by the Babcock report (which would be submitted in less than a month), and again one might have expected DOI support. However, even while acknowledging the problems with condemnation, the department told Congress it did not want injunctive authority. This stance hinted at an aversion to enforcement, for without injunctive relief, condemnation would remain the department's only enforcement tool. Without acquisition funds it could not be used and DOI had just rejected Congress's offer of funding.

Congress did not pass the legislation. But in 1976 an omnibus parks bill containing measures on Fire Island was adopted. It did not include injunctive relief, and instead of the $10 million sought by Javits, it authorized a more modest $2 million in acquisition funding. This was provided against the wishes of the White House's Office of Management and Budget, which ordered DOI to testify against any increase in acquisition funding. However, Assistant Secretary Reed privately asked George Biderman to "get him one million." Biderman asked Congress for two, and that is what went into the bill.[297]

Publicly, NPS supported the scaled-down authorization, explaining that the planning process had progressed far enough to justify it. But NPS's explanation revealed its ambivalence about acquiring land. An internal memo approving support for the bill noted that the draft general management plan had identified "49.15 acres of fastland in 79 parcels for acquisition to prevent adverse development and to forestall the granting of variances from local zoning regulations." It reasoned that "the $2 million authorized in these bills will be adequate to begin acquisition of these properties on a priority basis."[298] In other words, having turned down injunctive authority, thereby ensuring that land acquisition would continue to be driven by enforcement, and having turned down $10 million to fund land acquisition, NPS now asked for $2 million to "begin" that program.

Actually, the funding shortfall was worse than this estimate suggested. NPS's hopes for protecting the dunes hinged on creating a dune district, and "direct federal acquisition"

[297] Biderman, in "Draft Staff Report..." (Compilation of comments), np. See also Stewart and Ritenour, p. 24.
[298] Memo, Associate Director (Richard C. Curry) to Legislative Counsel (DoI), July 21, 1976: NPS-WASO, Planning Files, fol. FINS 1965-75, and Memo, Associate Director (Richard C. Curry) to Legislative Counsel (DoI), July 21, 1976: NPS-WASO, Planning Files, fol. FINS 1965-75.

was central to the proposal. In fact, in January 1977, a high-ranking planning official advised that "eventual outright Federal ownership of the dune system" was both the right and indeed the only strategy that had "any chance of public acceptance."[299] NPS staff estimated it would cost $4 to $6 million to acquire the 250 unimproved properties within the proposed district, and that the incremental purchase of storm-damaged houses would eventually incur a "similar cost."[300] Thus NPS foresaw the need for as much as $12 million – in 1976 dollars, with inflation rising steeply – simply to protect the primary dune line.

The twists and turns continued. During the summer of 1976, the Solicitor's Office at Interior criticized NPS for not fully considering the alternatives, disagreed with the Babcock report's opinion that "direct federal zoning" was unconstitutional, urged further study of federal authority to protect its own land under the Constitution's property clause (as well as the implications of the commerce, general welfare, and treaty power clauses), and offered to help solve the problem.[301] NPS Director Everhardt told his staff that "…we do not desire to obtain legislative authority to impose direct federal zoning on these private lands, and we reach this conclusion as a matter of management policy."[302] Since DOI had already rejected injunctive authority, that seemed to narrow the options, but a few months later, the near-final plan promised that NPS "would seek a legislative amendment" authorizing injunctive relief against local authorities, which could be used to block illegal conversions, variances in conflict with the model zoning ordinance, and construction within the dune and wetlands districts.[303] NPS officials reported that this proposal "met with general public acceptance."[304] Evidently injunctive relief was back on the table.

Later that year, however, the solicitor's office at DOI returned to the theme of "direct federal zoning." The department's lawyers spotted two "major weaknesses" in the NPS's concept of model zoning backed up by injunctive relief. First, the success of model zoning

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[299] Memo, Acting Assistant Director, Planning and Development (James W. Stewart), to Deputy Director, nd [but shortly after January 3, 1977]: NPS-WASO, Planning Files, fol. FINS 1965-75.
[300] Summary, p. 7.
[301] Memo, Assistant Solicitor, Parks and Recreation, to Director, NPS, July 20, 1976: NPS-WASO, Planning Files, fol. FINS 1965-75.
[302] Memo, Director to Regional Director, North Atlantic Region, [date unclear, but shortly after July 20, 1976: NPS-WASO, Planning Files, fol. FINS 1965-75.
[303] Summary, p. 4.
[304] Memo, Acting Assistant Director, Planning and Development (James W. Stewart), to Deputy Director, nd [but shortly after January 3, 1977]: NPS-WASO, Planning Files, fol. FINS 1965-75.

was predicated on local cooperation, "which has not worked in the past." Second, it was not clear how injunctive relief could be used "to force a local jurisdiction to adopt the model zoning standards against its will." Charging that NPS had not "fully considered" the "direct regulation of private land use concept," and citing recent court decisions to support its position, DOI once again offered legal help to develop the "direct zoning concept."[305]

NPS officials responded to half of this message. In light of DOI's concerns, planners now advised the director against "reliance on injunctive relief as the sole enforcement tool" and instead proposed local enforcement. If that failed (and history strongly suggested that it would), they promised to explore "other options and alternatives,"[306] which might (according to the GMP) include injunctive relief, direct federal regulation, or neither. There was no clear strategy. Nor was direct federal zoning, the proposal favored by DOI (though incompletely explained in the record), ever explored in any depth.

The dune district proposal moved forward, but there were technical problems to solve. The biggest was to define a reference line from which to establish the landward boundary. After considering at least five different methods, it was decided to use the dune crest. Yet even this presented difficulties, particularly where destruction or significant damage to the dunes made interpolation necessary.[307] There were political problems too. The proposal to allow the removal of houses within the dune district had encountered "fervent opposition," and as Congress prepared to amend the Act in 1978, NPS believed that the proposed dune district would continue to "draw the greatest negative commentary." The department nonetheless proceeded, perhaps because other ways of protecting the dunes, such as simply prohibiting owners from developing their property, seemed likely to prove even more unpopular. Moreover, NPS staff believed that area Congressmen would provide "strong

[305] Memo, Assistant Solicitor, Parks and Recreation (s. Charles P. Raynor for David A. Watts) to Director, NPS, August 19, 1977 (FINS Annex Files: fol Zoning – Legal Material).
[306] Memo, Acting Assistant Director, Planning and Development (Gerald D. Patten), to Director, September 2, 1977: NPS-WASO, Planning Files, fol. FINS 1965-75.
[307] Memo, Bill Gregg (WASO) to Paul Buckley (North Atlantic Regional Office), September 29, 1976: NPS - WASO, Planning Files, fol. 1965-75. For alternatives, see Norbert P. Psuty, "Final Report on the Establishment of a Dune Crest Line within Fire Island National Shoreline [sic]," nd (FINS Annex Files: fol Dune District).

support" and funding for the proposal.[308]

As Rep. Downey's assistant suggested, policy initiatives outside Fire Island supported the notion of a dune district. In 1977, President Carter called for a sweeping plan to preserve the nation's barrier islands, stretching along the Atlantic coast and around the Gulf of Mexico; the threat came not only from storms but also from inappropriate construction. Meanwhile, the storms continued to batter Fire Island. "Surf Chews Beaches and Tumbles Houses," reported a local newspaper in January 1978. The article focused on the case of five houses left standing "on stilts, now about 50 feet out in the ocean. The porches have collapsed. The whitecapped waves thunder in from the Atlantic, surge under the buildings and crash onto what little is left of Westhampton Beach."[309] The Army Corps of Engineers chose this moment to reintroduce its sweeping plan for beach stabilization along Long Island, devised in 1958 and authorized in 1960. It called for widening the beach to a minimum depth of 100 feet, constructing 50 groins, and raising an artificial dune 20 feet high and many miles long. Still, although many homeowners called for action, the plan provoked "sharp controversy," and Suffolk County Executive John V. N. Klein strongly opposed it.[310] By contrast, the dune district was both less expensive and more in tune with Carter's environmentalist policy.

Despite its evident advantages, the NPS anticipated that it would have to defend the proposal. Park superintendent Richard W. Marks prepared an exhaustive, indeed urgent, justification for controlling construction and renovation in the dune district. "It has been collectively determined," he wrote, "that development contributes to, and is directly responsible for, weakening the dune structure in addition to altering the systemic pattern of shore dynamics." Following the ecological line of argument that now characterized agency thinking on Fire Island, Marks emphasized the need to assure the integral functioning of environmental systems and natural processes. "It is the contention of the National Park Service," he wrote, "that what affects part of this system will in fact affect the whole."

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[308] Memo, Acting Assistant Director, Planning and Development (James W. Stewart), to Deputy Director, nd [but shortly after January 3, 1977]: NPS-WASO, Planning Files, fol. FINS 1965-75.
[309] "Surf Chews Beaches and Tumbles Houses," (clipping from unidentified newspaper, January, 1978, in clipping binders at FINS office, Patchogue, Long Island).
[310] Karl Grossman, "F.I. Plan Called 'a Waste of Money'...But Vacation Homeowners Plea for Army Corps Erosion Control," *LI Advance*, February 23, 1978.

Instead of adopting "short term immediate remedies," NPS wanted to "manage the dune system as one unit free of manipulation." Essential to this effort was that construction on the fore dunes be "halted and eventually reversed," if not, the island's forests could be overwhelmed by migrating dunes.

Marks brought forth a battery of studies and expert recommendations supporting NPS's argument for acquiring property on the dunes. One was an environmental inventory carried out by Jack McCormick and Associates, which recommended purchase of all federally insured storm-damaged houses, reasoning that to rebuild these structures with taxpayer dollars was tantamount to the government harming its own property. Marks also cited federal policies, noting that the condemnations urged by McCormick were consistent with President Carter's environmental initiatives. In light of all the scientific and policy reasons for acquiring the dunes, Marks characterized the NPS's own proposals as deferential to property owners, as for example in the fifty/ninety rule.[311]

Like the master plan, the final legislation – the National Parks and Recreation Act of 1978 – represented the last stage of a retreat. Early versions had contained not only the basic dune district provision but also a construction ban, acquisition funding, and provisions for purchasing storm-damaged houses. *Newsday* called these "contained substantial benefits for Fire Island," but they had proven "so controversial that they threatened passage of the entire bill," an omnibus parks bill, and were dropped.[312] Though *Newsday* nonetheless hailed the final bill as a victory, it was problematic, for the dune district it approved was so weakened as to cast its success in doubt. The bill authorized only $5 million for land acquisition, withheld the authority which DOI had sought to condemn improved properties, and even "said 'no' to storm damage taking."[313] The solution it offered for unimproved property was no more satisfactory. It allowed owners to maintain property "in its natural state" but subjected it to condemnation as soon as development began.[314] This was exactly what agency

[311] Memo, "Justification for Establishment of Dune District," from Superintendent (Richard W. Marks) to Regional Director, July 17, 1978: NPS - WASO, Planning Files, fol. 1965-75.
[312] Editorial, "More Protection for Fire Island," *Newsday*, October 7, 1978. Marks offered a similar explanation: "Saving Fire Island for Future Generations," *Newsday*, November 5, 1978.
[313] Stewart and Ritenour, p. 23.
[314] Public Law 95-625, 95th Congress, November 10, 1978 (short title: "National Parks and Recreation Act of 1978") [excerpt reprinted in Fire Island National Seashore, "Legislative History of Fire Island National Seashore," nd], Title III, Section 322b and d.

planners had feared would be more unpopular than outright acquisition, since it left owners paying taxes on their properties without being able to develop or sell them. Moreover, it left one of the Seashore's biggest problems unsolved: NPS still could not acquire property according to a plan but only in response to a violation of zoning, and then most likely at a price inflated by the very construction that triggered the condemnation.

Perhaps most damaging to the dune district's prospects was the decision to permanently fix its northern or landward boundary at the line mapped in 1978. Was this an oversight? Were the legislators and agency officials unaware that the dunes were gradually migrating northward and might eventually overrun the boundary? To the contrary, evidence suggests the decision was intentional, part of the political price for approving the dune district. Agency officials as well as property owners understood that the dune line would gradually migrate northward. This is why early opponents warned that any move to allow condemnation within the dune district would "establish a 'cutting edge' that must march northward so long as the dunes remain unprotected and without nourishment."[315] Since NPS was already under attack in some quarters for opposing the kinds of dune nourishment or beach replenishment that some owners believed would stabilize the dunes, it was possible to conclude that NPS's intent was to do just that. Replying to these attacks, Superintendent Marks assured critics that, without making commitments for Congress, "my expectation is that the Dune District boundary would remain stationary for the life of this plan (approximately ten years)."[316] Later that year, the Guardians of the Dunes Committee of Davis Park announced that a dune district might be acceptable as long it had "permanent boundaries."[317] That is what Congress provided.

Following the Act's passage, the NPS began to draft new zoning standards. Completed in 1980, they continued the retreat.[318] Of the comprehensive environmental zoning proposed by the GMP, they retained only the dune district, mapped now as an overlay

[315] Memo, David Ash (Property Owners Association, Inc., Fire Island) to OBP Association Membership, September 12, 1977 (FINS Annex Files: fol Dune Districts).
[316] Letter, Richard W. Marks (Superintendent) to Robert H. Spencer, January 13, 1978 (FINS Annex Files: fol Dune District).
[317] Robert Spencer, chairman, quoted in Steve Bedney, "Seashore Update: Protests Continue," *Fire Island News*, July 15, 1978.
[318] Final Rule, Jan. 1980, p. 3261-3270, and (with additional public comments and revisions) Final Rule, Jan. 1980, p. 59569 ff.

across the existing Seashore and Community Development Districts. Although the standards prohibited new construction within the district, they did not provide any mechanism for acquiring the structures that were already compromising the dune system. The regulations did not mention wetlands at all.

Further, instead of the fifty/ninety rule, which would have allowed condemnation of severely storm-damaged houses but which had been dropped from the final legislation, the new standards allowed owners to reconstruct "improved properties" (as defined by the original law) as long as they had been legally built in the first place and the reconstruction met current zoning standards. This provision increased the likelihood that even severely storm-damaged houses, located in the most harmful places, would be rebuilt. Moreover, this provision applied not only to the Community Development but also the Seashore districts. Within the Community Development district the law was even more generous, allowing owners to rebuild even houses built after 1963, as long as they had not been built under a variance or exception. These rebuilt houses would remain permanently exempt from condemnation. Even owners of houses initially constructed under variances were permitted to rebuild; though such houses would not enjoy exemption from condemnation, the rules instructed their owners to apply to local zoning authorities for special permits to rebuild them.[319] The rules, in short, guaranteed that the primary dune would not soon be returned to its natural condition, if ever.

There remained, in theory, one way in which the federal government could remove an existing house from the dune district. The beach and water, as the rules noted, had always been subject to DOI's condemnation authority.[320] As the sea washed away the dune, some houses would find themselves standing on the beach, or even in the water, and logic suggested they would then be liable to condemnation. At least one NPS staff member considered this possibility.[321] But the standards did not. Nor, of course, did they allow for remapping the district as the battering of the Atlantic reshaped the shoreline.

The new standards covered other issues besides the dune district. They contained new

[319] Final Rule, Jan. 1980, p. 3268, 28.5.
[320] Final Rule, Jan. 1980, p. 3269, 28.21(a)(2).
[321] Memo, Park Manager, Fire Island (Warner M. Forsell) to Superintendent, Fire Island, February 5, 1976 (FINS Annex Files: fol Dune District).

controls on private development throughout the Seashore, and in some regards these tightened the old standards. They prohibited in-ground swimming pools, which compromised the island's shallow fresh-water aquifer, and imposed a 28-foot height limit on all structures. They also provided an explicit standard for assessing applications for new commercial or industrial uses: "provision of 'a service to the community in support of community living.'"[322] Yet the final rules gave evidence of a retreat in other areas: between the proposed and final rules, NPS raised the limits on lot coverage for accessory structures and on number of bathrooms and relaxed the deadline on rebuilding nonconforming structures following storm damage or destruction.[323]

Enforcement of the new standards remained unchanged. Much of the Seashore continued to lack approved local ordinances, and condemnation, hampered as it was by political risks and lack of funding, remained the only federal enforcement tool. The new standards implied that DOI was unlikely to use it except perhaps in the most egregious situations. Thus, as already noted, the rules actually directed owners of houses within the dune district to seek local permission to rebuild them, even though they remained nominally subject to condemnation; apparently the federal government was prepared to accept their continued existence. Rather than a swift sword of justice, condemnation had become an uncertainty, a calculated risk, with which owners might choose to live. Like floods or erosion, it was one of the hazards of living in an extraordinarily beautiful and desirable place.

## Environmental Management and Wilderness on Fire Island

In December of 1980, Congress designated over 1,300 acres of the Seashore as the Otis Pike Fire Island High Dune Wilderness and authorized $500,000 for its establishment.[324] From one perspective, this marked a high point of environmental stewardship on Fire Island; from another, it signaled the growing divergence between the management of the Seashore's public and private lands. As regulatory fervor had diminished, ecological understanding had grown.

[322] Final Rule, Jan. 1980, p. 3263.
[323] Instead of rebuilding, owners would only have to begin reconstruction within a year.
[324] Public Law 96-585.

From the outset, environmental fervor had strongly shaped aspirations for Fire Island. The legislative campaign to establish the Seashore unrolled alongside that for the Wilderness Act, the law which created a new category of federally protected wild land. References to the island as a "vestpocket wilderness" and calls to protect its "forever wild" and roadless character revealed the influence of the wilderness movement. The wilderness movement was only one manifestation of broader changes in environmental management, which increasingly emphasized ecological systems and the need to minimize human interference with them. At Fire Island, NPS came under growing pressure from Congress and public critics to temper its emphasis on recreational development and adopt a more ecologically oriented management approach. In 1973, for example, Biderman protested Assistant Secretary Reed's "assumption that Fire Island can be treated as anything other than an ecological whole and that maximum development of one segment will not have serious impact upon the natural resources of the whole area." The court case then in process presented evidence that the Seashore "must be treated as a unit," which Biderman alleged DOI had not yet begun to do.[325] Further pressure to think in terms of natural systems came from the Babcock report in 1975, which described the dynamic systems that were constantly reshaping the "beach and dune system" and warned that "development on beaches and dunes interferes with these natural processes."[326] In discussing water quality, the Babcock report also showed a heightened awareness of the limits of natural systems.

By the middle of the 1970s, it seemed that the NPS was coming around to such views. Reaffirming the Seashore's primary commitment to natural conservation, the new GMP asserted intent not only to preserve "natural features" and "natural plant and animal communities" but also to manage the island "in ways that will enhance natural processes and mitigate the impacts of human interference with these processes."[327] Reflecting this attitude, the Regional Director pledged in 1977 not to undertake "artificial erosion control measures devised exclusively to protect private property values"; instead, NPS's "resource management efforts" would "complement the natural dynamics of the system."[328]

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[325] Letter, Biderman to Javits, September 20, 1973: copies in park files; originals – SUNY.
[326] Babcock, p. 46-47.
[327] GMP, 1977, p. 24.
[328] Memo, Regional Director (Jack E. Stark) to Director, February 1, 1977. Stark sought to have these commitments written into the legislation authorizing acquisition of the dunes.

Among the Plan's conservation measures was a promise to ascertain whether the eight-mile zone between Davis Park and Smith Point County Park met the standards for designation under the Wilderness Act of 1964. NPS soon proposed an area of about 1330 acres for immediate wilderness designation and pointed out that an additional 17 acres could be added by 1993, as the use rights to 20 private houses now owned by the government expired.[329] In 1980, Congress designated an area slightly larger than what NPS had proposed as wilderness, simultaneously reassuring the public that the designation would not stop NPS from repairing breaches in the dunes when necessary "to prevent loss of life, flooding, and other severe economic and physical damage to the Great South Bay and surrounding areas."[330]

The proposal which NPS submitted to Congress called the wilderness designation a "continuation of the general management planning process." It could even be seen as the culmination of the plan's environmental management initiatives. Yet it also intensified what the proposal itself called the "sharp juxtaposition" between the Seashore's best-preserved natural areas and the "other, more manipulated areas of Fire Island," tacitly acknowledging that this contrast had grown sharply and was probably now irreducible.[331] As the least trammeled of the Seashore's natural features received heightened protection, the communities themselves – even the dunes and wetlands within them – were increasingly opened to development.

## Changing Views on Private Property and Public Purposes

Over the course of the next decade the balance of policy on the competing interests of private land owners versus public owners and regulators shifted in favor of private owners. A reaction developed against what some perceived as fiscally wasteful and intrusive efforts by government to regulate and tax private property. One early conflict, dubbed the Sagebrush Rebellion, began in the 1970s as a protest by some property owners and state and local policy-makers against federal ownership and management of public lands in 11 western

[329] Wilderness Study, pp. 2, 18.
[330] P.L. 96-585, Sec. 1(d).
[331] Wilderness Study, p. 5.

states. Other protests were launched by the National Parks Inholders Association, a group founded by Charles Cushman in 1977 to represent the demands of those who owned private lands within the legislatively authorized boundaries of the national parks.

The growing discontent with public land policies reached the national level during the Reagan administration, which was much less sympathetic to regulatory actions in general than preceding administrations. The 1980 appointment of James Watt (closely associated with the Sagebrush rebels) as Secretary of the Interior, symbolized and solidified these changes. Other branches of government were also beginning to show skepticism about public land acquisition. By 1978, motivated as much by cost-cutting as by respect for property rights, the General Accounting Office (Congress's investigative and fact-finding arm) had begun issuing critical reports on DOI's land acquisition policies. In response, DOI promised to work more closely with state and local governments to "minimize land acquisition and river protection costs." In 1979, a new NPS policy tightened up the acquisition process by requiring each park to prepare a plan affirmatively justifying the need to acquire land as opposed to other alternatives.[332]

Fire Island was not immune to these trends. In 1979 Charles Cushman made a well-publicized visit to Fire Island. In a front-page interview in a local publication he accused NPS of an "'overall pattern of intimidation'" and attacked the very basis of the Seashore's regulatory framework:

> The Park Service is trying to prohibit building through zoning. That is wrong... and it's illegal. The proposed zoning laws are unworkable and over-restrictive. On an island inhabited essentially by sun-worshippers it is unreasonable to allow such a small percentage of land space for decking and pools. This just fits in with the plan to make Fire Island unliveable.[333]

When the Senate announced, later that summer, that it would investigate DOI's land acquisition policies, Cushman commented to the same local publication that the hearings had arisen from "a flurry of complaints...from people who have had their land taken from them

[332] USGAO Report, pp. 6, 3.
[333] "F.I. Interview: Charles Cushman – Executive Director, National Parks Inholders Association," *Fire Island Newsmagazine*, May 22-June 5, 1979.

by the Park Service."[334] When he accused Superintendent Marks of abusing federal authority to condemn property, the *New York Times* covered the story.[335]

Cushman attracted media attention and gave visibility to Fire Island property owners who resented NPS, but the threat of condemnations associated with the dune district had already stirred up furious opposition. Biderman accused the ringleaders of paranoia, reminding islanders that "… we have been given more protection of property rights than we sought" and arguing (as he had for years) that the real problem was not the NPS's eagerness to condemn but rather its reluctance to enforce the zoning standards.[336] His became an increasingly isolated argument. Where residents at the Seashore's foundation had stressed their common interest in preserving the island's environment and securing the public good, Seashore owners and their advocates now asserted their right to improve and enjoy their own property as they wished. Attacks on the legitimacy of regulation came from many directions. Called as an expert witness before the Brookhaven Town Council in 1978, a swimming pool engineer called the denial of a permit "an unusual restriction to the property owner" because pools were "an acceptable item on Fire Island."[337] Attacking the ban on driving, the Fire Island National Seashore Advisory Board accused NPS of wrongly allowing the needs of "the casual transient summer visitor" to shape policy: "The two-month visitor may appreciate the beauty of the island but is innocent of and not concerned with the local resident who may be deprived of his livelihood by the visitor's uninformed conclusion."[338]

It seemed that many residents had rejected or perhaps forgotten that a key premise for the Seashore had been created to protect the island's environment, not their houses. At the original hearings, Senator Javits had promised to respect private property rights, but only insofar as they were consistent with the Seashore's public purpose. Residents had accepted the consequent limitation of their property rights as part of a deal which allowed them to retain property within a National Seashore; and they had welcomed the Seashore because it saved the island (including their property) from the real estate development they feared. Now

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[334] "N.P.S. Acquisition Policies Prompt Senate Hearing," *Fire Island Newsmagazine*, July 3, 1979.
[335] Irvin Molotsky, "Fire I. Supervisor Defends His Policies," *NY Times*, August 29, 1979.
[336] Steve Bedney, "Seashore Update: Protests Continue," *Fire Island News*, July 15, 1978. See also Biderman, letter to Director [NPS or Regional], September 19, 1977 (FINS Annex Files: fol Dune District).
[337] Memo, Staff Park Ranger to Supt, April 25, 1978 (FINS Annex Files: fol Model Zoning – Comments).
[338] Fletcher Bedsall, "Criticizes F.I.N.S," *Long Island Advance*, December 8, 1977.

they appeared less grateful for government's intervention and more ready to resent its interference.

A second important fact had become obscured: the Seashore was established to provide recreation for the public rather than privacy for residents' homes. It was created, in short, for the benefit of those very summer visitors whose influence many residents now resented, and above all for day trippers from the city. In 1964, inspired by the vision of DOI's Seashore prospectus, *Newsday* had looked forward to the day when Fire Island would "provide recreation facilities for 6,000,000 persons a year."[339] President Johnson's advisers urged him to make a political visit to the proposed Seashore because it was "essentially designed to serve the people of New York City and its immediate suburbs."[340]
Jubilant over the bill's passage, *Newsday* had again editorialized: "The point is that the last great barrier beach in the Northeast not already built upon is to be saved for the people of the United States."[341]

A decade and a half later, these original understandings continued to guide NPS language. The new zoning standards reaffirmed that the goal of managing the Seashore (including regulating private property) was "to assure the conservation of its natural resources and the widest possible public use, understanding and enjoyment of its natural and scientific features."[342] "'What is Fire Island all about?' asked Superintendent Marks. 'It presents an opportunity to be in a resource that is perhaps unique in the world, to live on the oceanfront in such harmony that the structures are in harmony with the environment.'"[343] In answer to residents who wished to loosen the ban on driving, Marks countered, "'why should the citizenry of this country – which is paying for the seashore – have to put up with vehicles running up and down the beach?'" [344]

These questions suggest that Marks' view of the public/private balance was still roughly that of 1964; but Marks, like Biderman, was embattled. Among many residents by the end of the 1970s, it seemed that the memory of Fire Island as a *National* Seashore had

[339] Leonard Baker, "U.S. Details Vast Fire Island Plans," *Newsday*, April 8, 1964.
[340] "Johnson Studies Fire Island Visit," *New York Times*, February 8, 1964.
[341] "At Last, a Fire Island Bill," *Newsday*, August 22, 1964.
[342] Fire Island National Seashore, Proposed Zoning Standards, *Federal Register*, vol. 30, no. 207, October 26, 1965, pp. 13678- 13580; quote p. 13578.
[343] Irvin Molotsky, "Fire I. Supervisor Defends His Policies," *NY Times*, August 29, 1979.
[344] Irvin Molotsky, "Federal Aide Urges Banning of Vehicles From Fire Island," *NY Times*, July 12, 1977.

faded, to be replaced by a more uncompromising assertion of private property rights and a greater readiness to criticize government.

NPS itself had contributed to the changes. Fifteen years of Seashore management might have reconciled property owners to the federal presence; instead, it had provoked deep resentment. The problem was not that NPS had been consistently imperialistic but that it was perceived to be inconsistent. An example of this was taking place just as the dune district condemnations were being discussed: squatters were being evicted from the eight-mile stretch at the eastern end of the Seashore. While the evictions themselves did not deeply trouble many Fire Island property owners – lacking proper title, the cottage residents were not true owners and, moreover, were not perceived to belong to the same social class – a local reporter nonetheless noted the "irony" of the situation: if the cottages were truly such blight on the wilderness that NPS had to condemn them, then why were NPS staff and their families now occupying them? NPS's public facilities, products of its initial period of overdevelopment, seemed even more hypocritical to some; for while the NPS objected to modest cottages, it allowed its own "mammoth boardwalk, dubbed 'the monster' by nearby residents," to remain. Public showers and information booths, the same reporter commented sarcastically, were also apparently "part of the natural state."[345]

The dune district proposal brought deep differences of opinion to the surface. One source of resentment was the inconsistency of NPS's eagerness to condemn houses that it had allowed to be built in the first place; it seemed intent on penalizing homeowners for its own record of lax or nonexistent enforcement. Another source of friction was just as fundamental. Saltaire owner (and veteran CBS reporter) Charles Collingwood claimed, "We dune dwellers have done a better job of protecting the dunes than the National Park Service."[346] An example came from the owner of a dune-facing house in Cherry Grove, who assured Superintendent Marks he had "spent approximately $7,000 with a local contractor, to provide and install a row of concrete cistern collars along the dune as an erosion barrier, put in snow fencing, sand bagging and beach grass, to maintain and build up the dune in front of the property, and 30-foot foundation poles under the house."[347]

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[345] Aaron Biller, "Bayberry Dunes Revisited," *Fire Island News*, July 1, 1979.
[346] Mitchell Freedman and Dallas Gatewood, "Plan to Destroy Homes is Opposed," *Newsday*, July 25, 1976.
[347] Letter, William L. Drexler to Richard Marks, December 21, 1977 (FINS Annex Files: fol General 1978).

The problem was that NPS officials not only did not regard this as genuine stewardship, but some owners felt that the NPS regarded them as "some species of predators."[348] Stewardship for NPS involved letting the natural processes of dune formation unroll according to their own rhythms, free of human intervention. To property owners, on the other hand, energetically tending the dunes constituted stewardship, and owners who had invested time and money in doing so found NPS's stance puzzling. "If any human beings have a profound respect for the preservation and conservation of the dunes," proclaimed the Guardians of the Dunes, "it is the owners of the dunes themselves…It has been the owners who have spent tens of thousands of dollars of their own money erecting sand fencing …[and] planting grass and other vegetation on the dunes. They have been the true Guardians of the Dunes."[349] If the NPS demanded a dune district, argued one Guardian, at least NPS should allow homeowners to accomplish "erosion control and dune restoration" in their own way.[350]

There was another factor aggravating resentment against the dune district: the lack of a fixed boundary. "They wish to take the dune district out of the previously 'exempt communities' and then tie the hands of the communities to protect the dunes," wrote Spencer.[351] If NPS blocked both private investment and federal erosion control, reasoned some property owners, then of course the dunes were going to erode, and a moveable boundary would become an ever-advancing line of condemnation; accordingly they called for a fixed boundary.

This, then, was the situation that confronted Seashore managers at the end of the 1970s. On the one hand, private property owners felt that they, not NPS, were the real stewards of Fire Island. On the other, they were increasingly interested in securing their own rights as property owners, leading to positions which sometimes conflicted both with NPS's conservation mandate and with the interests of the visiting public which Congress had designated as the Seashore's major beneficiary. As for the NPS itself, it had not established its legitimacy as steward or regulator on the island, in part because its policies had changed

[348] Freedman and Gatewood, *op. cit.*
[349] Freedman and Gatewood, *op. cit.*
[350] Steve Bedney, "Seashore Update: Protests Continue," *Fire Island News*, July 15, 1978.
[351] Robert H. Spencer, Letter, *Newsday*, late August 1978.

over time and had not always been adequately explained or carried out. Meanwhile, a new political climate was dramatically shifting the balance between the claims of private property and public purposes as expressed through government regulation. It was within this increasingly difficult climate that future attempts to fix the land regulation problem at Fire Island would be introduced.

**The Staff Report on Land Acquisition and a Summary of the Situation**

In the fall of 1979, NPS conducted a study of land acquisition policies on Fire Island. Part of an agency-wide review, the study offered one of the first clear manifestations of this new political climate. The study's authors were asked to consider whether NPS's approach was "too aggressive" and they concluded it was not: land acquisition on Fire Island was "in line" with the authorizing law and legislative history. They also pointed out that during the decade since the Seashore's land acquisition program had been shut down public mistrust and confusion had become pervasive. By 1979, NPS was acquiring land mainly to block violations, yet many islanders nonetheless believed that the federal government intended to acquire the entire island and return the land to its "natural state."

The study found other problems. The "single most controversial" action of government, according to the authors, was the use of declarations of taking to block building within the dune district or construction not in accord with the zoning standards. The problem, again, was inconsistency. The power was exercised "in a few selected cases" while many violations went unchallenged, resulting with some residents angry at federal action, and others critical of NPS for not being "aggressive enough in pursuing violations." Public confusion was exacerbated by recent policy changes. From 1964 to 1976, the Seashore's management had not been "actively involved" in local zoning hearings, and there had been a long hiatus in use of the condemnation power. Then, in 1978, when $2 million became available, NPS had begun acquiring property in response to variances. The authors found that condemnation of violations had "only occurred recently and then only in selected cases," and that while the acquisitions made with the original $16 million had "gone well," those involving the $2 million appropriated in 1976 had "created opposition."

The problem was compounded by other misunderstandings. Some residents saw measures like the establishment of the dune district, or the tightening of driving regulations, as evidence of an "aggressive plan to destroy the viability" of the communities.[352] In fact, the original Act had been ambiguously drafted and at many points was open to misreading and even manipulation. Thus, the study authors commented, while some property owners were genuinely confused by the regulations and surprised to learn that their property might be taken from them, others played the system.

Beneath these symptoms lay fundamental policy problems which had originated with the Seashore itself. Some legislators had worried about the implications of preventing homeowners from developing their property while withholding the relief of federal purchase. The dune district now did precisely that. The owner of a vacant parcel could neither develop nor sell it, for without development potential it had little market value. As for NPS, lacking funds to pursue a genuine land acquisition policy, the agency had to target its resources at "flagrant violation of zoning." Thus it was neither able to act according to a plan nor to buy land from willing sellers. The only way for an owner to dispose of a piece of property was to build on it, thereby forcing NPS to buy it. This in turn meant that the agency had to buy land which it did not want and at artificially inflated prices. The system hurt both the government and the public. Meanwhile, NPS's apparent refusal to buy desirable property from willing sellers fed the perception that its acquisitions were motivated by harassment rather than by policy. "Congress has trapped us," the authors concluded.[353] This was arguably true in ways that went beyond the problem of condemnation. Congress had given the Seashore an expansive environmental mission, yet with the blessing of the executive branch it had failed to provide sufficient land acquisition funds to carry it out.

As the political frictions of the late 1970s suggested, the Cape Cod formula had created an even deeper management problem: the problem of managing relations with a large group of established property owners within the boundaries of the Seashore. Over the years, NPS staff across the country had developed elaborate ways of consulting with stakeholders, such as public meetings, the distribution of draft documents, and hearings to collect public

[352] Stewart and Ritenour, pp. 2, 3, 5, 7, 17, 25, 23.
[353] Stewart and Ritenour, pp. 12, 19.

responses. NPS regularly considered the interests of a wide range of stakeholders, including neighboring landowners, owners of businesses serving park visitors, nearby municipal and county governments, and elected officials in Washington. The agency rarely had to consider the opinions of residents within a park. Some parks indeed had inholders, but they were generally viewed as temporary obstacles to park management who would eventually disappear, rather than as long-term stakeholders, and their views were generally given less weight than those of other park users perceived to be more in tune with the park's public purposes, such as hikers, outfitters, Civil War history buffs, and concessionaires.

At Fire Island the situation was different. Technically, as the report pointed out, Fire Island did not have an inholder problem: the law not only acknowledged the right of residents to remain but explicitly renounced any intention to acquire their property. They were thus permanent residents, with far more legitimacy in the consultative process than mere inholders or neighbors. At Fire Island, moreover, park managers had to consider not only their interests but also those of the civic groups, advocacy organizations, and local, county, state, and federal officials who represented them. The Cape Cod/Fire Island formula, in short, created several powerful classes of stakeholders and advocates who saw themselves as permanent co-owners and co-administrators; this simultaneously enhanced residents' leverage in park management while complicating planning and policy-making and heightening the emotional intensity of the political process.

One casualty of this situation, ironically, was public discourse about the Seashore's future. The report reveals that it had become politically impossible for NPS officials to express views about park management that could be construed as threatening the rights of property owners. When NPS Deputy Director Hutchinson remarked that the island should eventually be returned to a natural condition, some residents took his comments as proof that the NPS intended to "force residents off the Island."[354]

In sum, the report advised:

> NPS must be very careful before submitting proposed legislation that would increase NPS authority to take land. Recommend we be neutral – truly neutral – until requested to testify and then attempt to remain neutral.[355]

[354] Stewart and Ritenour, p. 4.
[355] Stewart and Ritenour, p. 30.

This policy tied the hands of Seashore managers as they sought ways of carrying out Congress's intent, effectively silencing one of its most important stakeholders.

### The General Accounting Office Report of 1981: "The NPS Should Improve its Land Acquisition and Management at Fire Island"

While acknowledging growing skepticism about federal land acquisition policies, the 1979 study concluded forcefully that land protection practices at the Seashore were consistent with law and policy. After 1980, such affirmations would become rare. The increasingly adverse political climate became starkly evident in a report prepared in 1981 by the U. S. General Accounting Office (GAO) at the request of New York Senator Daniel P. Moynihan and former Senator Javits. The report's title signaled its findings: "The National Park Service Should Improve Its Land Acquisition and Management at the Fire Island National Seashore."[356]

The GAO found fault with the Seashore at many points. Some of the report's recommendations addressed problems of inconsistent policy and public misunderstanding which were widely recognized. For example, the authors urged NPS to justify its requests to Congress for condemnation actions, to develop a clear plan for land acquisition, and to divest parcels it did not need for management or conservation purposes. All of these suggestions might have helped to improve relationships between residents and park managers.

Moynihan and Javits asked the GAO specifically to determine whether the Seashore's new zoning standards were "more restrictive than necessary" to meet the requirements of the act, and whether NPS was "exceeding its condemnation authority."[357] The GAO faulted NPS on both counts, finding that the standards improperly restricted the rights of owners in four distinct ways:

- First, by requiring community-district houses rebuilt after storm damage to meet current zoning regulations even if the original house had been built under a variance. The GAO said this allowed the NPS to "condemn properties

[356] U.S. General Accounting Office, "Report To The Honorable Daniel P. Moynihan, United States Senate: The National Park Service Should Improve Its Land Acquisition and Management at the Fire Island National Seashore," U.S. General Accounting Office, May 8, 1981 (copy in NPS-WASO, Planning Files).
[357] USGAO Report, p. i, 1.

in the exempt communities even when planned development would not have harmed natural resources."

- Second, by prohibiting seashore district owners from increasing the lot coverage of their houses "even if it would not violate local zoning ordinances." The GAO reasoned that since the Act had not distinguished between the rights of improved property within the community and seashore districts, "owners of improved property in the seashore district should be allowed full use of their property if the use complies with local zoning ordinances."
- Third, by requiring pre-1963 dune district houses built under variances and rebuilt after storm damage to meet the more restrictive current regulations. Again, the problem was the difference in treatment; since the Act did not distinguish between pre-1963 dune district and non-dune district homes, the standards "should not distinguish between dune district homes and homes in the exempt communities and the seashore district. Dune district homes should be permitted to be rebuilt to previous dimensions, even if the homes were originally built with approved variances."
- Finally, by not shielding non-conforming post-1963 dune district houses rebuilt under special permits to full size from possible condemnation, "even though the Park Service may not be able to show how the reconstruction harms Fire Island's natural resources."[358]

These criticisms were based on assumptions about the Seashore's purpose and about the appropriate balance of private and public interests that were consistent with the ascendant property rights movements and correspondingly different from those of Congress in 1964. They amounted to a fundamental attack on the NPS's authority to set restrictive standards on private property within the Seashore. One index of the change was the report's description of the exempt communities as "zoned for development."[359] While technically true, this misrepresented the spirit of the Act, which had created the Seashore largely to oppose development and, within that broad assumption, had zoned the communities for continued use and occupancy.

The report suggested a shift in views on an even more basic question: could the Seashore curtail property rights previously enjoyed by owners in order to achieve its Congressionally-mandated public purpose? The Congress of 1964 had strongly implied that it could, and the public agreed at that time. The GAO report implied just as forcefully that it could not. In fact, it questioned the legitimacy of any infringement on the rights of private

[358] Quotations from USGAO Report, pp 7, 11, 12-13, 11, 12.
[359] USGAO Report, p. 14.

owners that stemmed from being located within the Seashore. Where the government's pursuit of the public interest clashed with a private citizen's pursuit of his property interest, the GAO report generally resolved the conflict in favor of the property owner. An example was the government's requirement that houses rebuilt following storm damage meet current zoning standards. In the GAO view, the owner's prior receipt of a local variance established a right that could not be over-ruled by federal regulators, and the report accordingly cited the rule as an example of unfair regulation.

Similar reasoning was behind the GAO's objection to the stiffer rules which the standards sought to apply to seashore district property. The GAO report argued that the differential treatment was unfair to property owners in the seashore district. The report reflects no awareness that the seashore district's standards carried forward the Cape Cod formula of development stasis and that the standards for the communities represented the exception. To meet this objection, it proposed relaxing the seashore district requirements to match those of the communities. Another alternative, tightening the community requirements to match those of the seashore district, which was not considered, suggested that a restriction on property owners, rather than differential treatment, was the real issue for the GAO. The report's criticism of the stricter rules within the dune district followed the same pattern, ignoring the environmental issues that led NPS to favor a dune district in the first place. By calling into question the government's authority to establish stricter standards where environmental conservation required them, the GAO appeared to undercut a basic policy tool devised to achieve the Seashore's legislative purpose. At least this was the case in theory; in practice, NPS officials admitted that their rulings made no distinction between houses inside and outside the dune district. The report correctly pointed out that this practice "conflicts with the zoning standards."[360] Instead of asking NPS to tighten up its practices to conform to the standards, the report called for loosening the standards to conform to NPS's lax practice.

The report's elevation of private interests against those of the public was accompanied by a second and equally important shift: the demotion of federal authority vis a vis the localities. Like the emphasis on individual rights, this was a central theme of the property rights movement in the western states. In reality, Congress and NPS had always

[360] USGAO Report, p. 11.

been careful to respect the authority of local governments on Fire Island; indeed it was this consideration as much as deference to property owners which had recommended the Cape Cod formula. Congress had been forthright in asserting a federal interest – what the legislature later called DOI's "trust responsibility... to protect park resources."[361] Both Congress and NPS recognized that the relationship between federal and local power amounted to a balancing act. The GAO expected NPS to defer to local authorities virtually wherever conflicts arose. Thus the report argued that NPS had no right to prevent owners from increasing the lot coverage of seashore district houses if the local zoning code permitted such an enlargement. Faced with such a discrepancy between federal and local rules, GAO wanted to revise the federal standards downward to match the local code.

The effect of this shift was to negate federal authority in important areas. Under the Cape Cod plan, local authorities were expected to issue zoning codes which conformed to the federal standards; exemption from condemnation was predicated on this, and although the federal government could not compel local authorities to bring their ordinances into compliance, the Act assumed that the promise of exemption from condemnation would motivate them to do so. GAO proposed to resolve remaining discrepancies between local and federal requirements by simply relaxing federal standards to meet those of the non-compliant local codes.

A similar deference to local authority marked the report's discussion of variances granted by the town of Brookhaven. NPS believed that Brookhaven – which still lacked an approved zoning ordinance – was granting these improperly and without considering their environmental consequences. The GAO report proposed to resolve the disagreement with the simple observation that "The assistant town attorney disagrees. He claims that variance applications are not 'rubber stamped' and are considered in light of the act's purpose." It also claimed (without offering any evidence) that "local communities generally consider Fire Island's natural resources when granting variances and therefore the Park Service's practice of objecting to most variances is unwarranted."[362] The implication was that the federal government should surrender its stewardship responsibilities to the judgment of local zoning

[361] Report 1984, p. 3.
[362] USGAO Report, pp. 13, 18.

authorities, a view which would have surprised the legislators, and probably also the local officials of 1964.

Perhaps the greatest change in the federal government's ability to protect the Seashore's natural resources lay in the report's discussion of environmental harms. The federal standards required that to retain their exemption from condemnation, houses rebuilt following storm damage had to comply with current zoning standards, even where (in GAO's words) they "would not have harmed natural resources."[363] GAO found this requirement unfairly burdensome. Challenging the government's right to establish a uniform rule, GAO instead demanded that NPS individually assess the environmental impact of each development proposal. GAO argued that the property rights of individuals overrode the federal government's effort to establish a standard that could be uniformly enforced. Under GAO's view, NPS would either have to defer to the discretion of local zoning boards or affirmatively defend each individual objection to a variance by demonstrating the specific harm that it would inflict.

GAO's objection to the dune district took this line of thought further. The report's authors believed that NPS should have to "show how the reconstruction harms Fire Island's natural resources" before disapproving the reconstruction of a post-1963 house. Arguing once again that individual property rights outweighed broad environmental concerns, GAO called on NPS to show affirmatively how any *specific* house caused *specific* harm to the island's natural resources. The problem was that the nature of a barrier island's environment did not lend itself to this kind of analysis. The Babcock report had established that *any* house, located *anywhere* within the dune district, threatened the island's natural resources, because "the barrier dunes of Fire Island are part of one system": "disruptions in any one point can affect the stability of the entire system."[364] In some cases, it might be possible to show – before construction began – that a house would inhibit the growth of dune grass or alter wind patterns adversely. But quite often, *specific* harm caused by a particular project could not be demonstrated, since the problem was disruption of the system as a whole rather than harm to a particular dune. It was in the nature of a dynamic system that although a probability of

[363] USGAO Report, p. 7, 11.
[364] Babcock, p. 48; see also p. 62.

future harm could be reasonably predicted, no specific and immediate harm could be definitely identified.

Moreover, the real threat to Fire Island's resources was not any specific project but rather the steady accumulation of projects; it was the problem of incremental growth. The harm caused by any single project might be inconsequential, or at least invisible, yet cumulatively, the impacts of many small interventions would be catastrophic. This could be demonstrated; it could be shown that heavily built-up areas of the dunes fared far worse than unbuilt areas, that the cumulative impact of houses, pilings, walls, bulkheads, dune crossings, decks, and even simple foot traffic was harmful. To require proof that any single proposal could, by itself, cause unacceptable harm would make it extremely difficult to slow broad-scale development. To protect a fragile and dynamic environment such as Fire Island, a line had to be drawn somewhere, and a broadly defensible line, albeit imperfect in spots, was better than none. To require NPS to weigh the environmental harm of each application individually would open the gates even wider to the incremental growth that experts feared would eventually overwhelm everything from the beachfront scenery to the underground aquifer.

Beyond criticizing specific practices of the NPS, then, the GAO report represented a broad attack on federal authority over land use at Fire Island. Throughout, it emphasized the rights of property owners and advised NPS to be "more reasonable" to them.[365] It made it harder for NPS to justify federal actions from issuing zoning standards to condemning property. It discouraged land acquisition and regulation. It questioned the basic assumption that the federal government, having defined a public interest in the Seashore, had both the power and responsibility to advance it through regulation.

**The Land Protection Plan of 1984**

By 1984, both the Reagan administration's hostility to federal land acquisition and its deference to private property rights were becoming strongly evident in the NPS's own planning for Fire Island. Since 1979, NPS policy had called for each park to produce a land protection plan by the following year, setting forth its goals for acquiring land or otherwise

[365] USGAO Report, p. 7.

achieving its legislative purpose. In the case of Fire Island, this planning exercise was unusually demanding, since it included not only the standard question of what land (if any) the federal government should acquire for public purposes but also how to regulate the private land within park boundaries. The Fire Island land acquisition study of 1979 had emphasized the need for such a plan; the GAO study had criticized NPS for lacking it. Completed in August 1984 and approved that fall, Fire Island's land protection plan clearly showed the influence of the property rights movement.

The approved plan was not, in fact, the first such plan for Fire Island, and it bears comparison with a "Draft Land Acquisition Plan" submitted for approval by Superintendent Richard Marks in August 1979. The tone of the earlier document was matter-of-fact. It summarized the Act's public purposes, the provisions of the zoning standards, and the mechanics of federal land acquisition. It made clear that the federal government preferred to purchase from willing sellers but left no doubt that, "if no agreement can be reached, then we proceed to institute proceeding through U.S. Federal Court." The document was essentially a manual on how to enforce the law through condemnation.[366]

The 1979 plan was not approved; instead came investigations and reports, and when the Land Protection Plan was finally approved in 1984, it revealed a significant shift in attitude. The differences began with the change in name, from Land Acquisition to Land Protection Plan. This was part of an agency-wide change which had been initiated during James Watt's tenure at DOI as a way to shift agency thinking away from acquisition to other forms of land management. The new plan declared that "major federal land acquisition" within the Seashore was "about complete"; in the future, federal acquisition would "be used only where other methods of protecting land are found insufficient to accomplish the Seashore's mandate" – that is, as a last resort. Beyond that, it argued that the earlier emphasis on federal purchase needed to be "rethought in light of Congressional intent, cost effective management and emerging federal budget limitations." The land protection plan provided scant encouragement for the goals of the dune district and little support for land acquisition through condemnation, stressing instead, the "guarantee of federal protection" that the law

[366] Land Acquisition Plan, *passim*.

and regulations offered to exempt communities.[367]

With major land acquisition off the table, and condemnation relegated to a last resort, the central question became how to regulate the park's private land and enforce compliance with federal standards. The plan proposed three interrelating tools: regulation, tax policy, and "cooperation," and addressed them in varying degrees.

Regulation's failure to work in the past went unexplained, but the plan promised to use "alternatives to acquisition" to "encourage compliance." Although no new policies were proposed, the plan exhorted local interests to use existing tax laws to benefit the Seashore: municipalities by lowering tax rates on undeveloped property and property owners by donating land to lower their tax payments. "Cooperation," which meant the execution of cooperative agreements, would be "voluntary," and therefore "by their very nature palatable to private property owners as a means of federal involvement in land use control." The plan's authors imagined that cooperative agreements throughout the Seashore would create "good will and a sense of community commitment to its land protection responsibilities." However, apart from a proposal to negotiate agreements with municipalities or community organizations to manage four specific and quite atypical tracts of land,[368] the plan offered no suggestions on how cooperative agreements could be used to encourage zoning compliance.

Though not explicitly put forward as a land protection tool, the plan did offer one further proposal to "support municipal enforcement" by providing "substantive and strategic support services" to municipalities when landowners or developers challenged their zoning ordinances. In this vein, the plan called on NPS to provide "the most up-to-date environmental data available concerning barrier ecology in support of municipal ordinances."[369] Since the high cost of defending the denial of a variance forms a significant incentive for many municipalities to allow rather than deny them, this suggestion had some merit. The plan did not explain, however, how NPS was to "support" municipalities whose ordinances themselves were out of step with the latest environmental data, or which continued to grant improper variances despite the offer of strategic support.

[367] Land Protection Plan, pp. 1, 7.
[368] Land Protection Plan, pp. 2, 17, 18, 27.
[369] Land Protection Plan, pp.23-24.

The plan's recommendations on enforcement depended heavily on good will and cooperation and did not clarify what was to be done in their absence. Injunctive relief was never mentioned. Tax policies and cooperative agreements, perhaps helpful to the Seashore, could not serve as enforcement mechanisms since they did not address the problem of what to do when a property owner broke the law or a municipality granted an improper variance. Condemnation remained the only enforcement tool. The plan counseled agency officials *not* to condemn the property of offending owners within the communities but, rather to "use the appropriate court system to prohibit such violations, enforcing the law and keeping the property in private ownership."[370] The problem was that, in general, the court system offered no way to prohibit violations other than condemnation, so this recommendation seemed designed to leave property in private hands even if it meant turning a blind eye to violations. At times, the plan seemed to elevate the goal of keeping property in private hands above the protection of natural resources, a shift which was contrary to previous NPS policy and appeared inconsistent with the intent of the Act.

An even more striking policy reversal concerned the dunes. The general management plan had pointed to the continuing erosion of the primary dune as a compelling justification for putting it in public hands. The dynamics of a barrier island, its authors argued, made it both dangerous and harmful to build houses there; the failure of the primary dune would endanger the entire island. The Land Protection Plan reached an opposite conclusion: the "dynamics of the barrier beach constitute another reason why acquisition is an inappropriate enforcement mechanism." Why? "The purchase of a potentially never-ending succession of properties exposed by a migrating dune line represents a potentially staggering cost to the taxpayer." The plan acknowledged that the dune constituted the island's "basic line of defense," and that its ability to defend the island depended on its being "maintained in a natural condition with native vegetation," yet promised that condemnation would be used only in "extraordinary conditions." In its place, the Seashore would "rely on and support local zoning ordinances, which recognize the dynamic nature of the dunes to protect dune ecology."[371]

[370] Land Protection Plan, p. 19.
[371] Land Protection Plan, pp. 18, 21, 22.

Within the seashore district, the Land Protection Plan was only slightly less averse to federal acquisition. Here, most land was already in federal ownership, so one might contemplate acquiring land useful for conservation or public recreation. Yet the plan argued that "continued private ownership of improved property in the Seashore District" did not interfere with agency objectives because the houses in question were neither in "visitor service areas" nor on the sites of proposed public facilities.[372] This was to define the issue in the narrowest possible way. Certainly it had been framed much more broadly in 1964 when County Executive Dennison and others had urged NPS to acquire these isolated houses – not because they interfered with specific plans for public facilities but in order to consolidate an uninterrupted sweep of natural land. Now, the Land Protection Plan not only renounced the intention of acquiring the 45 houses in question but also declared that owners could maintain, rebuild, or even enlarge pre-1963 houses,[373] effectively precluding the reversion of these parts of the seashore district to natural conditions.

**Federal Stewardship for the Communities**

The Land Protection Plan continued the relaxation of enforcement that had occurred over the previous decade and took another significant step in reducing federal authority over the Seashore. In place of the active pursuit of environmental goals through federal oversight and management, it pictured a more advisory role for the federal government. The government would encourage, advise, and offer technical and perhaps legal assistance, but only rarely would it act.

It was within this context of retrenchment that a new sense of stewardship responsibility for the settled communities began to appear. The communities had figured importantly in the creation of the Seashore. Their prominence had grown during the legislative process, to the point where they were mapped and explicitly distinguished from the rest of the Seashore. Yet as historical or social entities with distinctive characters and traditions, they had hardly figured. It was not that the communities lacked definable characters, or even that they were unrecognized. Writing in a slightly facetious vein, one

[372] Land Protection Plan, pp. 20-21.
[373] Land Protection Plan, p. 26, 27.

reporter commented in 1978, "Island folklore insists the community of Kismet is for lusty singles; Saltaire is for Irish Catholics, Fair Harbor for the middle class; Point O'Woods for millionaire Christians; and Cherry Grove for homosexuals."[374]

But characteristics such as these were never part of the official or public discussion, nor was the notion such qualities might have heritage value to the nation. Instead, legislators, agency officials, and even residents spoke of the communities mainly as aggregates of privately owned land parcels. They emphasized the seasonal quality of the houses, the long-term attachment of their owners, and the broad support of Fire Island residents for natural protection. They showed no further interest in any special character the communities might have as social organisms: that is, in distinctive lifeways, traditions, shared experiences, or common understandings. Far less did anyone propose that the federal government bore any responsibility for protecting their character.

As the property rights movement gathered momentum, these ideas began to emerge. The 1980 zoning regulations introduced them, claiming "that respect for diversity and uniqueness of the character of Fire Island communities is in the public interest."[375] The Land Protection Plan went much further, calling the communities a "cultural resource important to the identity and appearance of Fire Island." The Seashore was now estimated to house over 20,000 people during the summer (surely far more than when it had been established), and the plan showed a new interest in their wealth, family structures, and habits. If there was one thing on which all of the communities could agree, asserted the plan, it was "their determination to retain individual community lifestyles."[376] How different was this assertion from the congressional record of 1963-64 when the consensus which struck legislators and witnesses was the determination to protect the island's natural environment and block development.

What was novel was not merely the recognition of community character as a positive attribute but also the sense that the federal government was somehow responsible for protecting it. Although the Seashore's protective mandate, as established by Congress, was

[374] Richard R. Growald, "Fire Island: Send Me Your Richer Huddled Masses," *The Record – Bergen/Passaic/Hudson Counties*, August 29, 1978.
[375] *Federal Register*, vol. 45, no. 12, January 17, 1980, 28.1(a)(3).
[376] Land Protection Plan, p. 7.

strictly limited to natural resources, consciousness of the communities as entities whose cultural values deserved protection now began to appear alongside it. Thus agency staff justified the sign controls in the new zoning standards as measures to "preserve the aesthetically pleasing, non-commercial appearance of Fire Island's residential communities," and characterized restrictions on commercial and industrial uses as efforts to "preserve the traditional character of Fire Island."[377]

One of the most striking claims was advanced in the Land Protection Plan, which called the federal zoning standards the "basis for natural and cultural resource protection *and the continuation of the lifestyle within the Developed Communities District*." The plan went further, asserting that the "primary objective" of NPS management within the developed communities was "to allow continued prosperity while seeking a balance between inevitable change and retention of an historic lifestyle," and that "the purpose of the Federal Standards and the local zoning ordinances is to meet these community objectives while protecting national and municipal interests."[378] These assertions represented a substantial departure from the Act, the legislative history, and previous agency policy, none of which contained any suggestion that the zoning standards (or the federal government) should be responsible for assuring the "continuation of the lifestyle" of the island's communities, much less that they were intended to achieve "community objectives."

The Act defined the purpose of the zoning standards much more narrowly: to prohibit most new commercial or industrial uses and to promote the "protection and development [in the ambiguous sense already noted] for purposes of this Act of the land within the national seashore." It sought through the mechanism of federal zoning standards to define and protect a federal interest in the Seashore, and hundreds of pages of congressional transcripts, reports, and agency plans offer no evidence that protecting community character was recognized as part of that federal interest. Indeed the Act did not even permit the Secretary to consider "continuation of the lifestyle" as a factor in deciding whether to approve a local zoning ordinance; his discretion was strictly limited to the factors stated in the law, prohibiting

[377] "Draft Zoning Standards for Communities Within Fire Island National Seashore," May 2, 1978,, p. [4] and [2] (FINS Annex Files: fol Zoning – Legal Material).
[378] Land Protection Plan, pp. p. 17 (emphasis added), 18-19.

commercial and industrial uses and promoting the Seashore's "protection and development" as defined by the Act's purposes.

Neither the Act nor previous policy recognized the communities' social character or "lifestyle" as a federal concern, yet the Land Protection Plan now made its protection a centerpiece of agency policy, placing it on a par with the legislatively mandated goals of environmental protection and public recreation. While new trends in environmental management within some other parks and heritage areas would soon begin to recognize traditional "lifestyle" as a cultural resource, at Fire Island the new view of the communities was not only novel but also potentially in conflict with the Seashore's legislative purpose.

**The Amendments of 1984: Interior and Congress Diverge**

The GAO report was not the only factor prompting NPS to rethink private property rights. The new Secretary of the Interior, James G. Watt, had founded the Mountain States Legal Foundation a few years earlier to work for the preservation of property rights for private owners and tenants of public land in the west. He brought to DOI a general skepticism about the need for federal land ownership or regulation of private enterprise. In the fall of 1983, Watt resigned and was succeeded by William P. Clark, who shared many of Watt's views. Meanwhile, up to 1984, NPS was led by Russell Dickenson, who had been appointed during the Carter administration, and then by another respected parks professional, William Penn Mott. However, cuts in the discretionary funds appropriated for domestic programs during these years substantially reduced the funds available for managing natural resources. The effect of these developments was that DOI now appeared more ready than Congress to compromise on carrying out the Seashore's original public mandate. The difference became apparent; amendments to the Fire Island Act were being debated just as NPS was developing its Land Protection Plan.

Congress was not disrespectful of local interests. Both Senator Moynihan, a sponsor, and the House committee stressed that the legislation responded to the criticisms of residents and GAO. Like DOI, Congress was quite willing to criticize government's performance at Fire Island; thus the House committee faulted DOI's zoning guidelines for failing to meet the "special zoning needs of the Fire Island Communities." The legislators seemed less perturbed

by local disagreements than DOI. Testifying to Congress, the department seemed willing to paper over the conflicts, calling its relationship with the towns a "successful partnership," reiterating that the 1964 Act had largely been "successful," and attributing this to the "cooperative efforts of both the towns and the National Park Service." By contrast, the House at least frankly acknowledged the controversies embroiling the Seashore.[379]

According to the House committee, the amendments were intended to answer three specific requests made by residents: first, that NPS be allowed to use injunctions as an alternative or precursor to condemnation; second, that NPS avoid "automatic condemnation" for "minor zoning violations" by establishing a process to assess whether a non-conforming structure "might harm" Seashore resources; and third, that NPS sell condemned property into the real estate market, with covenants to prevent future abuse.[380] The legislation met all three demands, yet it attempted to balance them with federal management needs. The result was a pragmatic compromise that maintained protection for the Seashore's natural resources although less than under the original Act. The amendments gave DOI limited authority to seek injunctions, directed the department to re-sell some condemned properties, authorized a revolving fund for future acquisitions based on the proceeds from property sales, amended the basis for federal zoning standards (and local zoning ordinances), forgave most previous zoning variances (thus freeing many houses from the threat of condemnation), and defined and narrowed the scope of DOI's future condemnation authority.

While the amendments appeared to give DOI the long-desired injunctive authority, the bill narrowly limited its use to cases where the intended construction was determined to be "inconsistent" with the Seashore's legislative purpose or "likely to cause significant harm to [its] natural resources."[381] Procedural limits further narrowed its use to cases where the government had already initiated condemnation proceedings. In fact, the measure may have been prompted as much by budget issues as by the need for stronger enforcement measures. Explaining the problems of relying on condemnation for enforcement, Rep. Thomas J. Downey, the bill's sponsor, alluded to cases where owners had pursued non-conforming

[379] Moynihan: Congressional Record - Senate, July 28, 1983, S 11087; House: Report 1984, p. 8.
[380] Report 1984, pp. 3-4.
[381] Congressional Record, House, July 28, 1983, E3828. Rep. Downey, the bill's sponsor, wanted its use even more narrowly restricted to "cases of gross violations which degrade the character of the communities or which threaten the natural resources....".

construction even after condemnation had begun, thereby artificially inflating the price of the land. As a result, NPS had "either backed away from the whole situation or expended hundreds of thousands of dollars needlessly."[382] The injunctive authority as defined by the new bill would end this problem. Environmental protection was not the legislators' primary goal as suggested by the instructions Congress gave DOI to renegotiate with property owners following issuance of an injunction; while DOI should seek to have inconsistent uses "abated," significant harms to natural resources could be merely "mitigated."[383]

If federal budget concerns shaped the injunction provision, Congress evidently considered NPS's mandate at Fire Island when it authorized the agency to resell condemned property. Like injunctive authority, this new power was carefully limited in scope; it applied only to land acquired after 1982 and located outside the dune district, the beach, or the eight-mile zone. Moreover, resold land had to be placed under covenants or similar restrictions to prevent future abuses. Just as important, the Act directed that the proceeds from sales be placed in what Senators Moynihan and D'Amato called a "revolving fund" for future land acquisitions within the Seashore. These provisions proved to have different interpretations: Moynihan emphasized that they implemented GAO's recommendation to sell unneeded land, and Rep. Downey explained that they provided funds "for future enforcement action."[384]

Potentially more far-reaching were the provisions in the bill relating to the federal zoning standards. In place of the existing ineffective 1964 standards, which were based on "acreage, frontage, and setback requirements," the amendments called for new standards based on "limitations or restrictions on the size, location or use of any commercial, residential, and other structures." Representing a belated acceptance of the Babcock report's warning that rising population density posed as great a threat to natural resources as building bulk, the bill also required that the new standards "seek to reconcile the population density of the seashore at the time of enactment ...with the protection of the natural resources of the Seashore…" as called for in the Act.[385]

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[382] Congressional Record, House, July 28, 1983, E 3828.
[383] P. L. 98-482, Sec. 5
[384] Cong. Record, July 28, 1983; Senate, S 11087-8; House, E 3828; P. L. 98-482, Sec. 2
[385] P. L. 98-482, Sec. 4.

Admirable in theory, measures to restrict the growth in population density were problematic in practice. DOI's report pointed out that as applied to the Seashore in 1964, the goal of the Cape Cod formula had been "to preserve the status quo in terms of development density."[386] Rep. Downey told the House that, as of 1984, the settled communities contained about 4,500 structures, compared with fewer than 3,000 when the Seashore was established; the number of buildings had grown by more than 50 percent. Some of this increase had been foreseen, for even while describing the future in terms of stasis, Congress had provided for the development of vacant lots within the communities. Of concern, however, was that one third of the more than 1,500 new structures, according to Downey, had been built under variances[387] and unquestionably exceeded what Congress had intended in establishing the Seashore. The amendments accepted the 1984 density level as a starting place thereby acknowledging that it was too late to return to the density envisioned by Congress twenty years earlier and abandoning the original levels of resource protection as specified in the 1964 act.

It was still well worth trying to hold to the 1984 density level, if NPS could, since Downey estimated that future growth would add another 1,000 structures. A policy of hortatory admonitions could not, by itself, stop legal construction on buildable lots. It was not even clear that the amendments would significantly cap the granting of variances. The first step in Congress's new approach was to declare an amnesty, forgiving all previous variances except for those within the dune district. This had the immediate effect of removing a major irritant from NPS's relationship with property owners, lifting the threat of condemnation from a twenty-year backlog of violations, and giving the Seashore management a clean slate. DOI's condemnation authority could focus on violations of the new standards. However, the Act simultaneously narrowed the scope of that authority. No longer would the granting of a variance automatically expose a property to the threat of condemnation; from now on, condemnation would be limited to cases where a variance would lead to the property's use "in a manner that fails to conform to any applicable standard" contained in the new zoning regulations.[388] This not only limited its scope but

[386] Report 1984, p. 9, 7.
[387] Congressional Record, House, July 28, 1983, E 3828.
[388] P. L. 98-482, Sec. 3.

placed the burden of proof on the government. While the effects of this measure on future construction would be likely to depend on enforcement issues, shifting the burden of proof could make it harder for NPS to sustain condemnation proceedings. This in turn could make it hard to hold the line against the incremental development that was changing the face of the Seashore and threatening its natural resources.

DOI neither strongly supported nor opposed the bill as a whole. DOI supported the call for zoning standards based on limiting "development density," seeing new standards as a preferable alternative to condemnation for assuring the "retention of existing density." DOI also favored the amnesty on past variances, which promised not only to clear up the troublesome backlog but also to relieve NPS of the burden of opposing every new variance regardless of its impact on the public interest. NPS had already informally declared its own amnesty: "As a rule," wrote Superintendent Marks in 1979, "we are not going to proceed against properties which were developed prior to January 1975" unless the violations were especially serious.[389] The amnesty declared by Congress was not only broader but official.

DOI opposed the revolving acquisition fund, asserting a "clear need to minimize and control the magnitude of future Federal land acquisition" within the Seashore.[390] Interior's position was reminiscent of 1976, when the department had rejected Congress's offer of dedicated acquisition funds. Now, as then, DOI's rationale focused on its aversion to large-scale or planned land acquisition. Again, as in 1976, the direct result of rejecting funding would be to limit DOI's enforcement capacity, which continued to be based on condemnation.

DOI's position on injunctive relief was ambivalent. On the one hand, the department wanted authority to issue injunctions whether or not condemnation proceedings had already been started. On the other, DOI sought to apply even tighter substantive restrictions on the use of injunctions. Whereas amendments allowed injunctions wherever the proposed use or construction would not conform to zoning standards, DOI wanted to require that the new use or construction would likely cause "significant damage to the natural resources...."[391]

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[389] Land Acquisition Plan, p. 7. The criteria which Marks believed pre-1975 variances would have to meet were a little unclear but appeared to include change to commercial use and additions to structures.
[390] Report 1984, p. 7-8, 9.
[391] Report 1984, p. 10.

Congress declined to make the requested change.

**Interior Issues New Zoning Standards**

In 1985, DOI was finally able to approve zoning ordinances for all four jurisdictions within the Seashore, certifying that they meet the federal zoning standards. In fact, two of the ordinances did not quite meet the standards and were approved with exceptions. A more serious problem was that the standards they did meet were those of 1980, which Congress had ordered the department to replace. A draft of the new standards was published in 1987 and finalized, with almost no changes, in 1991. Meanwhile, the Reagan administration was continuing to readjust the balance between federal regulation and private property. Reagan's Executive Order 12630, titled "Governmental Actions and Interference with Civil Constitutionally Protected Property Rights" and issued on March 15, 1988, reflected the political climate in which DOI was now working.

The Executive Order focused on the impact of government regulation on the value of private property. Under the constitution and existing law it was well established that the government could not take away (or condemn) a person's property without just compensation. It was also generally accepted that government *could* take actions that decreased the value of private property in the course of pursuing other legitimate public policy goals. Such diminution of value was not seen as an unconstitutional taking, and the government therefore did not need to compensate the property owner for the reduction in value. The Executive Order, however, asserted that governmental actions – including regulations – which merely reduced the value of a property might be unconstitutional and require compensation. The Order directed agencies to determine whether any of their actions, especially "regulations imposed on private property that substantially affect its value or use," had "takings implications." [392] If so, NPS would have to provide a lengthy justification for taking the action, or continuing the regulation, in question.

The draft standards were written a few months before the Executive Order. Their "goal," according to NPS, was "to permit the landowner greater flexibility in determining

[392] Executive Order 12630, Sec. 1, 3 (a). Actions "abolishing regulations" or modifying them in a way which "lessens interference with the use of private property" were exempted from the need for departmental review.

siting, configuration, interior arrangement, and design."[393] In 1991, promulgating the final standards, NPS certified that they were free of takings implications and, indeed, "lessen[ed] interference with the use of private property."[394] These claims were clearly in the spirit of the Reagan administration and in that of George H.W. Bush, his Vice President and successor. However, they raised a question concerning the intent of Congress. While altering the basis of zoning regulation, the 1984 amendments had not expressly called for loosening the restrictions on private property, but, this is what they did.

The new regulations changed the 1980 standards in several important ways. They:

- replaced the old rules on lot size, frontage, and setback with a single rule setting a minimum lot size;
- removed the limit on bathrooms;
- loosened the limits on height and lot coverage;
- lifted the ban on in-ground swimming pools; and
- removed all controls on commercial signs except for the prohibition against self-illuminated signs.

All of these changes had the effect of "lessening…interference" with private property, but only the decision to permit in-ground pools represented an explicit loosening of existing standards. The old rule prohibited in-ground pools because they could contaminate the fresh water aquifer which lay just beneath the surface. In lifting the ban, NPS contended that "in-ground" had never been clearly defined, and that the "impact of swimming pools on a barrier island" had never been determined.[395] The problem of groundwater contamination, a central motivation for density-based regulation, was relegated to future discussion.

In other areas, the new rules implied a de facto loosening of standards, if not an explicit one. Rules on lot size, coverage, and height were examples of this. The new rule for existing lots to be a minimum of 4,000 square feet, allowed greater flexibility in siting and design, while capping development at ten units per acre. Technically this met Congress's demand for density-based regulation, but it would not lead to notably low densities within the Seashore. The GMP of 1977 had recommended a density cap of two units per acre; even by ordinary suburban standards, a density of ten units per acre was fairly high.

[393] Proposed Rule, Oct. 1987, p. 37586.
[394] Final Rule, Aug. 1991, p.42790.
[395] Final Rule, Jan. 1980, p. 3263; and Final Rule, Aug. 1991, p. 42789.

The impact of the new lot occupancy rules was ambiguous. The old rule capped lot occupancy at 25 percent for the main house plus 10 percent for auxiliary structures. The new rule set a single maximum of 35 percent for all structures on the lot. This did not necessarily produce actual increases in bulk or density, but there were other adjustments. Within the Seashore District, the old rule had prohibited increases to the lot coverage of existing improved property. Explaining that this had led "to the anomalous result that a homeowner can add a complete second story on a house but cannot put on a deck,"[396] the new rule allowed homeowners to expand up to 35 percent on lots up to 7,500 square feet and up to 2,625 square feet on larger lots. Now owners would be able to add both a deck and a second floor. Moreover, the second floor might be taller under the new rule, as a result of the new way of calculating the height limit. The 1980 rule set a height limit of 28 feet above average ground level. The new rule allowed owners to calculate the height limit from the minimum datum set by FEMA, which might be higher. "The Service," it said, "acknowledges the fact that this change may result in taller structures along the shore" but asserted that it was nevertheless "consistent with the Congressional goal of using population density as the guiding criterion."[397]

Under the new rule, NPS would more often leave the job of setting limits to local authorities, and this too could have the effect of loosening regulations. The removal of the limit on the number of bathrooms (the old rules had permitted no more than one kitchen and two and a half bathrooms per house) left the county rules on septic capacity as the only cap on water use and disposal. In general, the new rule justified laxer federal regulations on the grounds that the localities might be stricter if they wished. Thus the relatively high density ceiling was justified partly by pointing out that the local jurisdictions could set lower limits. Similarly, the restrictions on commercial signage were lifted on the grounds that local regulations were sufficient, though this left the federal government no recourse should a municipality subsequently relax its rules.

In lessening interference with private property, these changes did not necessarily endanger the federal interest in the Seashore. Arguably, signage, for example, did not affect

[396] Proposed Rule, Oct. 1987, p. 37587.
[397] Final Rule, Aug. 1991, p. 42789; Proposed Rule, Oct. 1987, p. 37586.

the federal interest one way or another, yet some of the rule changes almost certainly made it harder for NPS to limit density and protect natural resources. The loosening of the height and lot occupancy restrictions could result in higher density and impair the Seashore's scenic resources, while the removal of restrictions on swimming pools and bathrooms might harm the ecological systems which density-based regulation was intended to protect. Whether in practice these changes actually weakened the federal ability to regulate density or reconcile it with resource protection, as mandated by Congress, could be debated. However, few features of the new regulations clearly enhanced that ability.

One critic of what NPS frankly described as a "reduction of regulatory controls" was New York State, which called instead for a "reduction of development on the island;" only this, argued the state, would both reduce hazards and protect the natural environment. In response, NPS promised to "vigorously enforce prohibitions on multiple-family homes, excessive lot coverage, and inconsistent commercial and dune-front development."[398] Unfortunately, without any new powers of enforcement NPS was unlikely to achieve greater success in this area than it had in the years before 1984.

The 1984 amendments had directed DOI to "seek to reconcile the population density of the seashore at the time of enactment ...with the protection of the natural resources of the Seashore."[399] However, there were several ways to define and measure density and the standards did not indicate which was to be used. The result was continuing ambiguity about how to meet the congressional mandate. If population density meant the total number of people on the island, NPS might well choose to regulate the direct impacts of population, such as water and septic system use. The new rule left it up to local authorities to set limits in these areas. Another approach, suggested by the Babcock report, recommended floor area ratios as a way to cap the number of people who could be accommodated on each lot, but these were overlooked and the new standards measured only the building's height and footprint on the lot, a more indirect way to regulate density. Overall, there were many ways to interpret this mandate, such as development caps within parts of the island or an island-wide cap on the size and number of buildings, and no clear direction to administrators.

[398] Final Rule, Aug. 1991, pp. 42789-90.
[399] P. L. 98-482, Sec. 4.

The new rule did, however, considerably increase the obligations of Seashore staff, adding to the existing avalanche of paperwork. Under the prior rule, the park was already supposed to receive copies of all applications for variances, exceptions, special permits, and certificates of occupancy; notice of dates and times of public hearings concerning such applications; notices of approval or disapproval of all applications for variances, exceptions, special permits, or certificates of occupancy; and copies of all variances, exceptions, special permits, or certificates granted. To this list the new rule added applications, hearing notices, and permits for all commercial and industrial uses.

More important in terms of staff burden, the new rule increased the Superintendent's responsibilities with regard to this dune-sized accumulation of paperwork. The old rules directed the Superintendent to inform the applicants and zoning authorities whether the action at issue would violate the zoning standards and render the property liable to condemnation.[400] The new rule required the Superintendent to provide "written comments on the application." That was only prudent, and the substance of the written comments – a judgment as to whether the permit would bring the property's use out of line with the zoning standards – was essentially the same as the judgment which the Superintendent was already making. Under the old rules this was an administrative convenience: the law decreed that *any* variance or exception would lead to loss of immunity from condemnation, and the superintendent's notice amounted to little more than a policy judgment as to whether the offending variance was likely to trigger condemnation or be ignored. The 1984 amendments sought to end the uncertainty created by this system by legislating a hard and fast standard under which condemnation would be limited to cases in which the government judged that the property would otherwise be used "in a manner that fails to conform to any applicable standard." Under the new rules, then, the Superintendent's judgment was substantively the same as before, but now it had the force of law.

The 1991 rules further taxed the Superintendent. Upon approval of a local zoning ordinance, each property owner could request a Certificate of Suspension of Authority for Acquisition by Condemnation (the very name suggests the convoluted nature of the entire system). The applications, directed to the Superintendent, were to contain:

[400] Final Rule, Jan. 1980, p. 3269.

- a current survey of the lot showing the dimensions of all buildings, accessory structures, garbage and bicycle racks, access walks, any extensions of upper floors beyond the structures beneath, the line of mean high water, the toe of the dune, and the crest of the dune if any of these lines traversed the lot;
- plans, elevations, and sections of each structure showing ground level, building height, and the plan of each floor including all rooms and cooking facilities;
- copies of the original and all subsequent building permit applications and permits, certificates of occupancy, certified-as-completed surveys, variances, special use permits, certificates of pre-existing use, and "other documents relating to local authorization to develop or use the property"; and finally
- for commercial or industrial uses, "further information describing the type, mode, and manner of operation," as well as all local, county, state, or federal licenses or permits required for construction, occupancy, and operation of the commercial activity.

Upon receipt of this mass of material, the Superintendent was expected to conduct an interior and exterior site inspection. Finally, after considering all of this evidence plus "other pertinent information," he or she was to decide whether or not to suspend the Secretary's condemnation authority.

In effect, these rules turned the Superintendent's office into zoning inspectors and examiners for four municipalities with four separate ordinances, over 4,500 structures, and as many as 1,000 buildable lots. Had the municipalities themselves decided to create such an office they would most likely have hired staff with specialized training and experience. The park, however, was neither authorized nor funded to staff such an office. Its zoning responsibilities had to be carried out, as best the staff could manage them, along with all of the other duties involved in running a national park, and this during a period of system-wide budget cuts.

## Looking Forward and Backward: the Situation in 1991

The zoning standards of 1991 represented the culmination of more than 25 years of efforts to fix the system of land regulation at Fire Island. Since their adoption, almost 17 more years have passed without any significant modifications. These new rules did not solve the problem of land management within the Seashore; rather, they are a reminder of how far the Seashore evolved from the goals and assumptions prevalent at its establishment. In 1964, legislators imagined that the Seashore's communities would persist in a kind of stasis. By

1991, a significant increase in density had not only taken place but been accepted, and efforts to hold the line against further increases had ambiguous prospects of success. There had been other changes too. In 1964, many residents had criticized NPS for promoting over-development and under-regulation; now the loudest voices clamored for more development and less regulation. In 1964, the vision of a sweeping stretch of beach and dune unmarred by evidence of human occupation had inspired park planners and property owners alike; now houses crowned the dunes and stood out on pilings over the beach.

While the regulatory system took the Seashore farther from its origins, NPS's own environmental management efforts followed an arc. At first, NPS officials were criticized for not protecting the island's ecology. A decade later, NPS planners had learned to see the Seashore from an ecosystem perspective. By the mid-1980s, the efforts of agency planners to clear the dunes were being blocked, while the regulations had been relaxed to allow large houses, in-ground pools, and unlimited bathrooms. By 1991, environmental management had effectively fallen to a standard comparable to that of 1964. The Fire Island of 1991, with its higher population density and higher levels of development, was no longer the Fire Island of 1964. If its environmental systems and scenic beauty had been in danger then, their survival was far more uncertain in 1991.

# Figures to Chapter Two


**Figure 2-1**: A map published by the General Accounting Office in 1981 shows the overall pattern of land use management within the Seashore. Apart from the municipal parks, the Seashore is a patchwork of fairly densely settled communities and more open areas. Labeling the former "exempt communities" underlines the aversion of property owners (and of the GAO itself) to federal regulation within them. The Otis Pike Fire Island High Dune Wilderness would soon be established in the region here labeled High Dune Area.

## Storm eats dunes

Ocean front homes in the Leja Beach community opposite Patchogue teeter on the edge of sand dunes after storm-pushed waves tore into the protective barrier at high tide on Monday. Broken porches and damage to a large entertainment spot, the Leja Beach Casino, was reported. A deep freeze that followed the first storm has created icing problems at bayside marinas, with town officials fearful that the major damages suffered last winter will be repeated. Damage to Fire Island houses once again raised the issue of whether building on unstable dunes should be permitted in the recreational area, with town Environmental Protection Director George Proios paraphrasing the Biblical injunction against "the folly of men who build their homes on shifting sands." (For story, see page 17A)

## Leja homes teeter

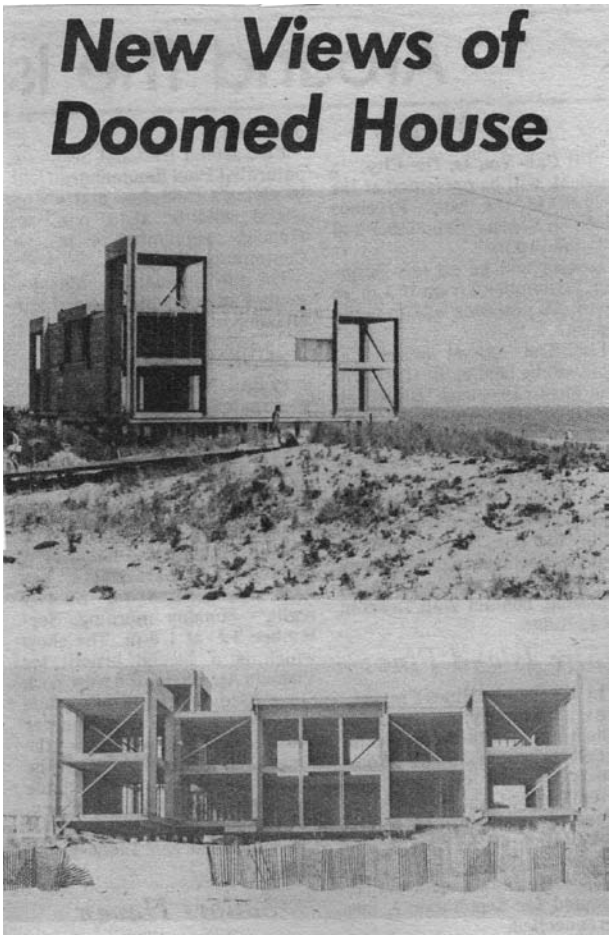
FIRE IS NATL SHORE
120 LAUREL ST
PATCHOGUE
NY 11773

Seaside house has nearly been swept off Fire Island and into sea.

**Figures 2-2, 2-3:** Storms continued to be a prominent part of life on Fire Island after the Seashore's establishment, and both local and national newspapers regularly covered the destruction they caused. These clippings show storm damage to Leja Park and Ocean Beach in 1978, as the NPS's dune district proposal was being debated.

**Figure 2-4 (above):** Storms continued to batter the island. This house in Point O'Woods was washed away at the beginning of November 1991.

**Figure 2-5 (below):** The house in question, under construction in 1978, was "doomed" not by the ocean but by condemnation. Seashore Superintendent Richard Marks threatened not only this but many other condemnations of improperly built or sited houses. Note: the house was not condemned, suggesting the difficulties of zoning enforcement on Fire Island.



# Chapter Three

## The System in Action, 1991-2004

**By Charles Starks**

## Introduction

The previous chapters have been devoted to a detailed examination of the historical record of the origin of Fire Island National Seashore (FINS) and the evolution of its regulatory scheme for private land within park boundaries during the period between 1964, when the Seashore was established, to 1991, when the federal land use standards in their current form were adopted. These chapters have made it abundantly clear that, since the establishment of the park, both the developed communities and the ideas that informed the regulatory scheme adopted for them diverged sharply from the intent of the legislation that created FINS.

This chapter is designed to show how the regulatory scheme in place since 1991 works on the ground to consistently produce outcomes that are at odds with the legislation. It will examine two central procedures of the current scheme and three ancillary procedures. From the perspective of the park, the following procedures are central:

1. The planning and zoning approval procedure used by the local governments with jurisdiction over private lands in the park, which, consistent with New York State law, essentially follows the model promulgated in the *Standard State Zoning Enabling Act*,[401] published by the U.S. Department of Commerce in 1924.
2. The Park's procedure for objecting to applications that do not meet the federal zoning standards, which involves the issuance of an "objection letter," detailing the specific item or items of non-compliance with the federal standards at a point during the local planning and zoning process.

To examine both the objection letters and the planning and zoning approvals, a database was created consisting of all 877 land use application records the Seashore had on

[401] Reprinted in Mandelker, Cunningham and Payne, *Planning and Control of Land Development*, Fourth Edition, Charlottesville, VA.: Michie, 1995, pp. 197-201. The concepts in this model legislation form the basis for most state and local zoning laws in the United States, even in states that did not adopt the model.

file from late 1991, when the current federal zoning standards were enacted, to early 2006 (when the Seashore's files stopped). A sample of these records was then extracted from the database using a method which will be detailed later in this chapter, and municipal planning, zoning and permitting records in Brookhaven and Islip corresponding to the records in the sample were examined.

As discussed extensively in Chapter Two, the FINS's objection letters, in most cases, constitute empty threats because the only enforcement mechanism available to FINS is land acquisition by eminent domain, and that mechanism is deemed politically too draconian to use in all but the most egregious of circumstances. Moreover, as will be documented in this chapter, many development applications result in objection letters so that acquiring all the lands subject to objectionable building would very quickly begin to fundamentally change the relationship of FINS to the developed communities.

In addition to these two procedures, the following four ancillary procedures are also of interest and will be discussed as well, albeit in more cursory fashion:

- Suffolk County's rules governing the location of septic systems, which serve as a de facto limit on summer population density in the developed communities on Fire Island.
- State-imposed land use regulations, namely the Coastal Erosion Hazard Act and the Tidal Wetlands Act, which were implemented in the decades following the establishment of FINS and have come to influence development to varying degrees. Note that the federal zoning standards have never been coordinated with these regulations, continuing to focus exclusively on local zoning.
- The State Environmental Quality Review Act (SEQRA), which imposes an environmental impact process analogous to that of the National Environmental Protection Act (NEPA) on all but the most minor aspects of land use in New York State, including many public and private development activities and new plans and regulations at local and state levels of government.
- The granting of building permits and certificates of occupancy by local governments following planning and zoning approval.

Because these procedures are not central to the land use process established by the federal regulations, they will not be examined in a systematic way like the zoning and approval processes. Rather, the treatment of these procedures will supplement the evaluation of land use and highlight the ways in which they interact with, counteract and complicate the federal-local zoning scheme.

Before examining the above-listed processes and their effects on the Seashore, it will be useful to consider in more detail the reasons they were chosen as objects of study, their strengths and limitations, and why other methods of evaluating the effects of land use change on Fire Island were not used in this study.

**The Jurisdictions**

This chapter will focus mainly on the developed communities under the direct zoning jurisdiction of Brookhaven and Islip. It is a peculiarity of government in New York State that there are three possible layers of local government: county, city or town, and village. While cities are independent of towns and cannot have a lower-order layer of government within them, it is not only possible but common for towns to be partly subdivided into incorporated villages. The villages remain within the town's jurisdiction for certain purposes, but the planning and zoning functions are assigned to the village government. In Islip, four incorporated villages have been formed within town boundaries, two of which are on Fire Island—Ocean Beach and Saltaire. Brookhaven has eight incorporated villages within its boundaries, but none are on the island.

In contrast to Brookhaven and Islip, Ocean Beach and Saltaire have developed a reputation for taking care of their own land use matters without either involving NPS or allowing egregious variances. Both have their own zoning regimes, and during the period studied, only 15 of the 877 development applications in FINS files were in these villages. Moreover, only one of those applications resulted in an objection letter from NPS.

Because the overwhelming majority of the applications, objectionable and not, were filed under the zoning regimes of Brookhaven and Islip, it was decided for purposes of simplicity within this study to focus exclusively on the two large municipalities. This chapter will return briefly to Ocean Beach and Saltaire in considering alternative ways of organizing the control of land use within the park.

**The Local Planning and Zoning Approval Process**

Later, this chapter will explore some of the animating ideas behind traditional local zoning, principally to show how poorly suited they are to Fire Island, but the chapter begins with the procedures involved in obtaining a development approval. It is noteworthy that these procedures were not modified in any way, or even addressed by the federal zoning standards; with the exception of the issuance of objection letters by NPS, those standards are concerned solely with the substantive content of the regulations.

The federal zoning standards, therefore, were to be implemented using the approval processes that were in place prior to the establishment of the Seashore; there was no requirement that the framework in which decisions about individual properties were made be changed in response to the establishment of the Seashore, other than the addition of a referral to NPS for a determination of compliance with federal standards. The procedure by which planning and zoning approvals are sought remains, in broad outline, as follows:

1. The prospective applicant designs a project, such as the expansion of an existing dwelling or the construction of a new building.
2. The applicant, his agent, or the local government building inspector (if the plans have already been submitted) examines the local zoning laws to determine which approvals will be needed and whether any variances are required.
3. The applicant is determined to require one or more approvals, such as site plan review (granted by the Planning Board, and typically required for uses other than one- and two-family homes), or a zoning variance (granted by the Zoning Board of Appeals, and required when the application does not comply with one or more zoning standards).
4. The applicant makes application to the required board or boards (in some cases, approval of both the Planning and Zoning boards is required). It is at this stage that the application is supposed to be referred to NPS for its review, although, as we shall see, this does not always happen.
5. At a public hearing, the applicant makes a case based on the requirements in local law and in statutory and case law. Objectors, such as NPS or other interested parties, may also make their case against the application, again based on legal standards.
6. Approval is granted or denied by vote of the Board at the conclusion of the hearing.

While this process may be familiar, it is worth examining for two reasons. First, it is well known in the planning and development community that applicants proposing small projects, at least in areas which are perceived to have lax zoning regimes, almost always design their projects before examining local zoning laws to determine whether their

proposals are in conformity. Thus, from the beginning, applicants view the zoning law not as a guide for private development—if that were the case, they would examine the law before designing their proposals—but rather as a set of hurdles which must be jumped in order to use their property as they desire. The number and nature of the variances requested and granted on Fire Island suggests that this is the case there.

Second, discretion to approve or deny the project is vested exclusively in the local planning and/or zoning boards, bodies which are made up of volunteers appointed by the municipal governing body, which itself is an elected body. The standards for granting those approvals are highly subjective.

Additionally, in both Brookhaven and Islip, as in most communities, there is no requirement that the majority of the members of these boards have any particular expertise.[402] The nature and interests of the membership therefore can vary greatly depending on the priorities of the governing body. A peculiarity unique to Fire Island is that the island has very few permanent residents and is not even accessible by car, while the remainder of Brookhaven and Islip are very populous, sprawling suburbs.[403] To ask a board of lay volunteers, whatever their motivations and level of engagement, to give the same consideration to applications on a remote island they rarely, if ever, visit, as to those in places they know well and drive by on a regular basis, is a tall order, and it would not be surprising if decisions on these applications were made with less than full information.

From the perspective of applicants seeking to construct small projects, the local planning and zoning approval process is usually the paramount consideration in obtaining the necessary permission to build. If other approvals are required, they are seen as adjunct to this process, and they almost always involve application to an agency with less discretion than the municipal boards (or in the case of NPS, referral to an agency with essentially no enforcement power). For example, approval for septic systems is granted by the Suffolk County Health Department. Its approvals are, for the most part, not discretionary or subjective, but rather are based on formulas. If an application is denied, the applicant can try

[402] New York State has recently imposed a minimal education requirement for planning and zoning board members.

[403] According to U.S. Census data, the population of Brookhaven in 2000 outside incorporated villages was 412,708. Its land area was 246 square miles. The population of Islip in 2000 outside incorporated villages was 316,126. Its land area was 102 square miles.

to re-engineer the plans so that the numbers fit the department's standards, but there is less opportunity to appeal to subjective standards than is the case with zoning approvals simply because septic systems are much more highly engineered than zoning plans. Therefore, it is the zoning approval process in which the applicant has the greatest chance of getting the rules bent to allow the project contrary to the federal and local zoning standards.

This chapter focuses on the zoning process precisely for this reason—it is the most democratic stage in the construction process, where, ideally, the community's values and interests are weighed in the decision making process. The other approval processes, which rely more on formulas and numbers, do not lend themselves to these considerations. Currently, this means that it gives projects that otherwise might never get built a good chance of slipping through.[404] Precisely because of the democratic nature of the zoning regime, however, it is also where a significant opportunity exists to change the rules so that the values of environmental stewardship of FINS become more prominent, thereby creating better outcomes for the island.

The use of the zoning process as the basis for this study has posed difficulties. Archival recordkeeping in Islip and Brookhaven has been quite poor until very recently, and many records are inaccessible. In Brookhaven, they take the form of paper files which are organized by an archaic and almost unusable system of street intersections, while in Islip they were scanned into microfilm files which are not easily accessible or readable, and as a result, unable to be fully investigated. Fortunately, some of the records from both jurisdictions had been put in electronic form and were available for this study. Additionally, NPS files, although they exclude the most recent years in the study period, are relatively thorough and extend all the way back to 1991. The records at FINS offices do not indicate the final decision on the applications—for this, the Town records had to be used—but they do show the nature of the applications, which variances were requested, and whether an objection letter was issued.

Thus, the records are not as complete as might be preferred, yet it was still possible to use available records to paint a picture of ongoing change on the island and to show how the

[404] It should be acknowledged here that the federal flood insurance program contributes significantly to property owners' ability to build projects for which they might otherwise not be able to obtain financing; this problem is beyond the scope of this study, but we will examine it briefly at the end of this chapter.

zoning process repeatedly and systematically subverts the values expressed in the legislation that established FINS. Only by examining the records of development approvals, incomplete though they may be, was it possible to tease out the relationships between the flawed approval process and the flawed results in the ground. This could not be done using proxies, such as documentation of changes in land use or land cover over the years, because such proxies cannot show the actual relationship between those changes and the processes that are creating the problems.

The intent of this chapter is not to show that the communities have grown and that this growth has caused impacts from 1964 to the present—that much is certainly known without the need for a study—but rather to show that the rules that are supposed to protect the island from the impacts of development are in fact arranged to facilitate inappropriate development. There are several specific problems with the zoning regime that this chapter will document:

- Traditional zoning, which is designed to separate uses from each other, is poorly suited to manage the problems of development on a dynamic barrier island where the dominant land use problems are erosion and impacts on natural resources.
- The concern of the federal zoning standards, lot occupancy, is only a minor piece of the myriad local and state rules that actually shape development on Fire Island.
- The federal standards' single-minded focus on lot occupancy misses other measures that have significant impacts on the ecosystem of the islands, such as enclosed floor area, number of bathrooms, and density of septic systems.
- NPS is not able to enforce the federal standards effectively because it lacks a usable enforcement mechanism.
- The local governments' zoning regimes do not encourage strict enforcement of the local standards; instead, there is a strong bias toward granting variances.

Following the analysis in the next section, this chapter recommends changes, both procedural and substantive, that would address these problems and create better land use outcomes on the island in the future.

## Description and Analysis of the Land Use Regulatory System on Fire Island

### The Basis of Local Zoning

Local zoning gradually came into being beginning in the late 1800s as an attempt to create districts that would isolate those industrial land uses that were seen as public nuisances

in locations that were physically separate from residential areas.[405] Under the common-law doctrine of nuisance law, those who are subject to incidental injury caused by the activities of others may seek remedies from those who cause the injury, and industrial uses created odors, sights and sounds that made them obvious targets of nuisance lawsuits. Early zoning can thus be seen as an attempt to rationalize land uses so as to allow industrial uses to exist without constantly being subject to legal action by injured neighbors, and to protect the health of the public from threats posed by industrial activity. However, in the 1910s and 1920s, under the influence of the planning movement, the concept of nuisance was significantly extended to create the concept of zoning that we know today.

The American "city beautiful" movement, which is conventionally believed to date approximately from the 1893 Columbian Exhibition in Chicago, was inspired by that exhibition's neoclassical vision of what a city could be: clean, ordered, and beautiful.[406] The practitioners of the movement drafted numerous plans for the redevelopment and extension of American cities and towns in the first decades of the 20th century along these precepts, usually under the auspices of development interests or civic organizations.[407] At the same time, the urban reform, or "city practical," movement was busy making institutional reforms to local governments themselves, and it was this movement that first suggested that zoning be implemented in cities in the United States.[408] It was the uneasy combination of these two ideologies that led to the notion that the police power, through zoning, could be used to implement plans.[409]

On a national level, this took the form of the Standard City Planning Enabling Act, published in 1928,[410] and the Standard State Zoning Enabling Act, published in 1926. These acts formed the basis for most state legislation authorizing local governments to plan and zone. The New York State zoning legislation does not derive specifically from the model act,

[405] Larry Gerckens, "American Zoning and the Physical Isolation of Uses," *Planning Commissioners Journal* Reprint Article #573.
[406] John Reps, *The Making of Urban America*, Princeton, N.J.: Princeton University Press, 1955, p. 497-8.
[407] William H. Wilson, *The City Beautiful Movement*, Baltimore: Johns Hopkins University Press, 1989.
[408] Jon A. Petersen, *The Birth of City Planning in the United States, 1840-1917*, Baltimore: Johns Hopkins University Press, 2003, p. 240.
[409] The process by which zoning became a tool of planners is described in Petersen, pp. 308-15.
[410] Mandelker, Cunningham and Payne, p. 20.

having first been adopted in 1917,[411] but the current zoning enabling legislation in New York, which has been amended extensively over the decades, largely conforms to principles in the act, and shares its faults. The planning enabling legislation in use in New York State today is a patchwork, having elements that date back to the era of the model acts but with much of its substantive language dating only to 1993,[412] but it too shares the model statute's conceptual basis.

To say that the marriage of zoning and planning has been imperfect, either nationally or in New York State, would be an understatement. From the beginning, there was an underlying tension between the ideals of the "city beautiful" planning advocates and those of the "city practical" urban reformers who advocated zoning, and the model enabling legislation did not resolve this tension. Planning is inherently an ambitious and long-range undertaking which involves controls on private land use, investments in public infrastructure (including the protection of natural infrastructure), and the coordination of both. The major tools provided to control private land use are zoning, subdivision and site plan regulations, while the tool to control public infrastructure is capital budgeting. In New York as throughout most of the United States, however, the enabling legislation does not require any significant linkage between planning and/or land use regulations and capital budgeting, with the result that strict adherence to plans is rarely if ever achieved.[413] This characteristic of planning has the advantage of providing flexibility for the local government as circumstances change, but the lack of rigor in plans can easily lead them to be ignored when decisions are made.

Because there is no link between planning and budgeting, plans take on the character of a flexible statement of preferences, or a wish-list of desired initiatives, rather than rational programs of improvement, and it is difficult to evaluate the extent to which an adopted plan

[411] *State of New York Local Government Handbook*, Fifth Edition, New York State Department of State, Division of Local Government Resources, 2000, p. 76.
[412] "Zoning and the Comprehensive Plan," New York State Department of State, Division of Local Government Resources, 1999, p. 8.
[413] It is noteworthy that the standard zoning enabling act was published two years before the planning act, and there was no requirement in the zoning act that the zoning be in accordance with a plan. Many states still do not have such a requirement.

is being used by the local government in setting its priorities.[414] The link between planning and zoning is better established, though still highly subject to interpretation,[415] but in the absence of an infrastructure capital program tied to the plan, almost any land use change, even one endorsed by the plan and the zoning, could be opposed on the basis that the public infrastructure cannot support it.

Conversely, land use changes not envisioned in the plan and not allowed by zoning can be, and often are, supported by applicants who argue that the infrastructure is adequate, and that the changes are "reasonable" considering the circumstances. Because local plans are flexible, and plans and zoning are not well integrated, the door is always open to variances that benefit an applicant at the expense of the public interest. The zoning approval process on Fire Island has provided ample opportunity for applicants to make these arguments before a sympathetic audience. Additionally, in both Brookhaven and Islip there is significant evidence to indicate that corruption has played a part in the granting of approvals and building permits.[416]

After planning became established in the 1910s, zoning quickly evolved into the familiar hierarchical model known as Euclidean zoning, named for the city of Euclid, Ohio, which was the defendant in a landmark Supreme Court case. At its root, the Euclidean model has three categories—residential, commercial and industrial land uses—with residential at the top, meriting the most protection, and industrial at the bottom. Much of the history of zoning for the next few decades consists of the expansion of that hierarchy to an intricate level of detail, with different uses, densities, and intensities within the three main categories separated from one another just as strictly as the three categories are separated. From the

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[414] New York law allows local governments to prepare capital plans, but the statute enabling this does not mention comprehensive planning.

[415] New York State's zoning laws contain a statement that requires that zoning be in accordance with a comprehensive plan, but courts have interpreted this requirement very loosely—so much so that the "comprehensive plan" itself may take the form of little more than scraps of evidence that the governing board gave "some thought to the community's land use problems," in the words of New York's highest court (*Town of Bedford v. Village of Mt. Kisco)*. By contrast, in some states, such as Connecticut, the legislated link between planning and zoning is so tight that any change in zoning regulations usually cannot be undertaken unless the specific document known as the comprehensive plan or master plan is revised first.

[416] See, for example, Alfonso A. Castillo, "Town inspector gets probation, short jail stay," *Newsday*, March 6, 2007, and "Previous Coverage of Brookhaven Corruption," retrieved from www.newsday.com/news/local/longisland/ny-brookhaven-sg,0,1391648.storygallery on November 21, 2007; Julia C. Mead and Vivian S. Toy, "A G.O.P. Stalwart Quits Islip Post, Then Pleads Guilty," *The New York Times*, March 10, 2006.

beginning, zoning also included bulk requirements. These took the form of building height requirements, minimum lot widths and depths, and minimum front, side and rear yards. The purpose of these had nothing to do with environmental protection, but rather was to ensure that residents had adequate access to light and air, the lack of which was suspected to cause disease.[417] Many of the subdivisions platted at the time of the popularization of zoning had lots that were quite small, even in rural areas. Fire Island was typical in this regard, with many of the subdivisions platted to a standard of only 40 feet by 100 feet. This platting standard produces 8 lots per acre once an allowance is made for streets, a development intensity exceeded by only the most urbanized areas. By contrast, planners today in rural areas where conservation values are paramount often advocate a minimum lot size of 10 acres—sometimes much more.

By the time FINS came on the scene, the unsophisticated Euclidean model of land regulation had reached the end of its practical development, and zoning practitioners were turning to more holistic and flexible models variously known as planned development or performance zoning. These new types of zoning typically set baseline targets for the development of sites—for example, maximum coverage of the site by buildings or paved surfaces, minimum separation of buildings, minimum open space preservation, and maximum residential density—but allowed considerably more flexibility in the details of site planning as long as the performance targets were met. While the performance-based models are not without problems, it is surprising that there was no attempt at the time of the park's creation or over the years of studies and controversy which followed to adapt them for the developed communities, especially since this time period was the heyday of performance zoning.[418] By emphasizing the attainment of development and preservation targets which, theoretically, can be linked to the ability of the natural and manmade infrastructure to support development, the performance models of zoning offer a way to directly address through land use regulation the

[417] Richard Babcock in *The Zoning Game: Municipal Practices and Policies* (Madison: University of Wisconsin Press, 1966) identified these types of bulk regulations as part of zoning's "pantheon of myths" (p. 17) and "legal fictions" (p. 116) and suggested that even at the time of their invention, they had no legitimate basis.
[418] One aspect of performance zoning—lot coverage, or "lot occupancy"—was grafted onto the Euclidean zoning in place on the island, but the performance approach as a whole was not considered even in the Babcock report of 1975.

problems of erosion and environmental conservation that are central to the land use dilemma on Fire Island.

Performance zoning was not adopted and the Seashore has been left with a set of remarkably crude zoning regulations as the main regulatory bulwark against the combined effects of man and sea on its fragile environment. Indeed, considering how exceptionally ill-suited Fire Island is to the application of traditional zoning, it is ironic that the island is one of the very few places in the United States where local zoning is a matter of federal law.

**The Federal Standards and the Local Regulations**

As has been described earlier in this report, local governments were expected to tune their zoning regulations to those set by the federal government in the 1960s. These standards, generally recognized as unworkable, were the subject of a lengthy review process in the 1970s and 1980s, resulting, on August 29, 1991, in the publication of the revised standards in the Code of Federal Regulations.

In form, the standards resemble a stripped-down version of a conventional local zoning ordinance. The first subpart of the zoning standards divides the entire area within FINS jurisdiction into two base districts and one overlay district (that is, a district which is applied atop portions of the base districts and modifies or supersedes the regulations in the base districts). The second subpart of the regulations provides a list of permitted and prohibited uses and a short list of bulk regulations that apply to all development.

The districts can be described in brief as follows:

1. The Community Development District is a base district which includes the areas the regulations describe as the "developed communities."[419] In this district, single-family homes, community facilities, churches, and schools are permitted. Commercial and industrial uses are permitted "with the approval of the local zoning authority and review by the Superintendent [of the Seashore]." Additionally, commercial or industrial uses may only be located within a local zoning district in which such uses are allowed.[420] Multiple family dwellings and guest houses are prohibited, although these uses that were in existence before

[419] 36 CFR 28.3(b).
[420] 36 CFR 28.12(b).

1964 may continue as nonconforming uses.[421] Local zoning districts which are residential in nature must not allow uses other than single family homes.[422]

2. The Seashore District is a base district which includes all areas not in the Community Development District.[423] Most development in this area is prohibited, except the "alteration, expansion, movement, and maintenance," and in certain cases reconstruction, of existing single-family homes and accessory structures. As well, this district permits "any use consistent with the purposes of this Act, which is not likely to cause significant harm to the natural resources of the Seashore," below mean high water level in the Atlantic Ocean and Great South Bay.[424]

3. The Dune District is an overlay district which includes all those areas in the Community Development and Seashore districts that lie between from the mean high water line to 40 feet landward of the primary natural high dune crest—mapped in 1976.[425] This district permits only dune crossings, dune protection measures and the maintenance and reconstruction of existing structures.[426] The regulations include provisions allowing the remapping of the Dune District, but this has never been done, with the result that it is now located well seaward of the actual dune line due to erosion.

The bulk regulations include the following provisions:

- The minimum lot area is 4,000 square feet.[427]
- The maximum lot occupancy, including all buildings, swimming pools and accessory structures, as well as upper-story portions of buildings that overhang beyond the ground-story limits of the building, is 35 percent.[428]
- The maximum height above mean sea level, or above the minimum elevation necessary to qualify for federal flood insurance, is 28 feet.[429]
- Internally lighted signs are prohibited.

Additionally, the standards include provisions allowing nonconforming uses to continue, and even be reconstructed within a year after being destroyed, provided they are not

[421] 36 CFR 28.10(a).
[422] 36 CFR 28.12(a).
[423] 36 CFR 28.3(c).
[424] 36 CFR 28.10(b).
[425] 36 CFR 28.3(d).
[426] 36 CFR 28.10(c).
[427] 36 CFR 28.12(c).
[428] 36 CFR 28.12(d) et seq. There is an additional restriction on properties in the Seashore District which limits lot occupancy to 2,625 square feet on lots over 7,500 square feet in area.
[429] 36 CFR 28.12(f).

expanded. This allowance for the continuation and rebuilding of nonconforming uses is a huge obstacle to environmental management on the island because it virtually insures that the dune line cannot reestablish itself once it reaches the line of buildings. It is commonly understood that barrier islands on the U.S. east coast are retreating landward due to rising sea levels, while Fire Island itself has a number of complex processes working on it that interact with, and sometimes mask, this long-term trend.[430] Dunes do stabilize the island in the short term, but they move in response to the general retreat and the local processes that shape the island's development. When the dune line retreats sufficiently to reach the oceanfront row of buildings, usually in a large storm that causes property damage, the buildings inhibit the reformation of the dune, and if the houses are maintained or reconstructed, the dunes fail to adequately reestablish themselves. This is exactly what has happened on parts of the island such as Fair Harbor (see Figures 3-1 through 3-5).

The federal standards are simple as zoning standards go. The local regulations which are supposed to implement these standards are significantly more complex—perhaps arbitrarily so, at least as they apply to Fire Island.

On the Islip portion of the island, there are six zoning districts, described below. Within these districts, some uses are permitted by right, while others are permitted only by special permit or exception, which requires enhanced scrutiny by the Town Board, Planning Board or Zoning Board of Adjustment. An asterisk (*) is used to denote permitted uses which are clearly contrary to the federal standards. In addition to the principal uses described below, these districts also permit accessory uses.

- The Ocean Front Dune District (AAAB District) is a district which corresponds to some extent with the Park's dune district, but includes some additional properties north of the dune district. The district permits single-family dwellings (*) and municipal park and recreation facilities (*). Private membership clubs (*), public utilities (*), churches (*) and community facilities (*) are permitted by special permit from the Town Board.[431]
- The Residence BAA District, which applies to the vast majority of Islip's Fire Island lands outside the AAAB District, permits single-family dwellings, parks and public schools. Private membership clubs, public utilities, community buildings, churches,

[430] The mechanisms alluded to here are explained in Leatherman, Stephen P., *Barrier Island Handbook*, College Park: University of Maryland Laboratory for Coastal Research, 1988, and in Norbert P. Psuty, Michele Grace and Jeffery P. Pace, "The Coastal Geomorphology of Fire Island: A Portrait of Continuity and Change," Boston: U.S. Department of the Interior, National Park Service, 2005.
[431] Islip Code § 68-59.1 et seq.

private schools, boathouses, bathhouses, historical or memorial monuments, stores (*) and offices (*) are permitted by special permit from the Planning Board. Child care centers (*) are permitted by special exception from the Zoning Board of Appeals. [432]

- The Residence CAA District, applicable only to one large property on the Great South Bay in Kismet (as well as other properties on the mainland), permits one-family and two-family (*) dwellings.[433] Private club mooring wharfs, automobile parking fields (*), private membership clubs, cemeteries and private schools are permitted by special permit from the Planning Board.[434] Public utilities, community buildings, boathouses, bathhouses, historical or memorial monuments, model houses, boat berths, child care centers (*) and school bus parking (*) are permitted by special exception from the Zoning Board of Appeals.[435]
- The Business District (BD), applicable only to a few properties in Kismet and other properties on the mainland, permits single-family dwellings; two-family dwellings (*); stores; offices; banks; broadcasting studios; community buildings; places of business of bakers, confectioners, decorators, dressmakers, artists, florists, furriers, milliners, opticians, artisans, photographers, printers, tailors, needle trades, hands-craftsmen and "businesses of a similar and no more objectionable nature"; nonprofit fraternities or lodges; historical or memorial monuments; churches; automobile parking fields; funeral parlors; child day care centers; veterinarians; public schools; and private schools. Dormitories and bars are permitted by special permit from the Town Board. Restaurants, outdoor displays, billiard halls, health clubs, convenience markets, universities, mixed use buildings, private parking garages, and bank drive-in windows are permitted by special permit from the Planning Board. Public utilities are permitted by special exception from the Zoning Board of Appeals.[436]
- The Business 1 District (B1), applicable to some scattered properties near the Great South Bay in Kismet, Fair Harbor, and Seaview, and other properties on the mainland, permits single-family dwellings, two-family dwellings (*), public schools, banks, broadcasting studios, laundromats, community buildings, private schools, personal service establishments, dry cleaners, retail businesses, nonprofit fraternities or lodges, historical or memorial monuments, churches, holiday tree sales, child day care centers, funeral parlors, health clubs and veterinarians. Dormitories (*), bars, psychiatric clinics (*) and nursing homes (*) are permitted by special permit from the Town Board. Restaurants, billiard halls, outside seating, assembly halls, walk-up counters, taxi offices, stores, offices, bank drive-in windows, and spray booths are permitted by special permit from the Planning Board. Public utilities and wholesale food distribution facilities are permitted by special exception from the Zoning Board of Adjustment.[437]
- The Business 3 District (B3), applicable only to a few properties in Kismet near the Great South Bay, and other properties on the mainland, permits single-family

[432] Islip Code § 68-135 et seq.
[433] Islip Code § 68-150 et seq.
[434] Islip Code § 68-46.1.
[435] Islip Code § 68-47.
[436] Islip Code § 68-256 et seq.
[437] Islip Code § 68-271 et seq.

> detached dwellings, two family detached dwellings (*), stores, offices, banks, retail businesses, child day care centers, broadcasting studios, nonprofit fraternity lodges, historical or memorial monuments, churches, automobile parking fields, health clubs, veterinarians, public schools and private schools. Outdoor storage, gasoline service stations, car washes, dormitories (*), motor vehicle dealerships, fast-food restaurants, commercial animal exhibits, regional theatres, public transportation terminals, airports, lumberyards or building material establishments, taxi stations, racetracks or exhibition tracks, commercial boat storage, commercial shipyards or boat repair yards, ferry terminals, boardinghouses (*), lodging houses (*), marinas, marine wharfs, farmers' markets, psychiatric clinics, kennels, and bars are permitted by special permit from the Town Board. Billiard halls, vehicle repair shops, convenience markets, outdoor seating, restaurants other than fast-food restaurants, game rooms, universities, assembly halls, dance halls, walk-up counters, taxi offices, bank drive-through windows and spray booths are permitted by special permit from the Planning Board. Gambling vessels are permitted by special exception from the Zoning Board of Appeals.[438]

Additionally, Islip has a wetlands management overlay district, which applies to all lands designated as wetlands by the New York State Department of Environmental Conservation, plus a 100-foot buffer around such lands. This district applies to some lands on Fire Island and also to properties on the mainland. It does not have use regulations but does apply far more restrictive bulk standards than the underlying zoning.

In Brookhaven, all of the districts applicable to the area within the Seashore are mapped only on Fire Island and not anywhere on the mainland, and are more clearly parallel with the federal regulations than the Islip districts. The Brookhaven zones follow (again, an asterisk (*) denotes uses that are clearly contrary to the federal standards). In addition to the principal uses described below, these districts also permit accessory uses.

- The Residential District (RD) includes most of the lands within the developed communities. This district permits single-family detached dwellings and municipal parks and recreation facilities. Public utilities, community buildings, places of worship and historical or memorial monuments are permitted by special permit.[439]
- The Commercial District (CD) includes scattered properties in Seaview, Ocean Bay Park, Point O' Woods, Cherry Grove, Fire Island Pines, and Davis Park. The district permits any use allowed in the Residential District, stores, professional offices, churches, schools, libraries, community buildings, utilities, offices, banks, theatres, restaurants, dance halls, discotheques, workshops, ferry slips, boat docks, transportation terminals, art galleries, exhibit halls, artists' and photographers'

[438] Islip Code § 68-301 et seq.
[439] Brookhaven Code § 85-167.

studios, and historical or memorial monuments. Two-family dwellings, apartments, multiple dwellings, condominiums, showers, lockers, changing rooms, bathhouses, guesthouses, boardinghouses, lodging houses, hotels, stores above the ground floor, and manufacturing or industrial uses are explicitly prohibited.[440]

- The Oceanfront Dune District (OFD) is an overlay district that corresponds precisely to the federal dune district. It permits only dune crossings, vehicular crossings (*), snow fences, and reconstruction and repair of existing dwellings.[441]

A comparison of the bulk requirements in each of the districts, both in Islip and Brookhaven, is provided in Table 3.1 (below). The bulk requirements in the federal standards are repeated in the table for comparison.

As is apparent from the table, the primary residential zones in both Islip (AAAB and BAA) and Brookhaven (RD and OFD) meet the federal standards in terms of bulk regulation. However, the other zones do not. In Islip, the CAA, BD, B1 and B3 zones allow buildings to be higher than the federal zoning standards, and they do not include any restrictions on lot occupancy despite the reliance of the federal standards on precisely this measure. In Islip, the CD zone allows lot occupancy 15 percentage points higher than permitted by the federal standards. These discrepancies are less important than they might seem, primarily because applications in the CAA, BD, B1, B3 and CD districts are relatively rare.

The Islip wetlands overlay district, not included in the table, has a minimum lot area of 80,000 square feet, but the other bulk requirements are the same as the underlying zoning.

[440] Brookhaven Code § 85-169.
[441] Brookhaven Code § 85-168.

## Table 3.1: Comparison of Bulk Requirements

| | NPS | ISLIP | | | | | | BROOKHAVEN | |
|---|---|---|---|---|---|---|---|---|---|
| | **36 CFR 28.12** | **AAAB** | **BAA** | **CAA** | **BD** | **B1** | **B3** | **RD / OFD** | **CD** |
| Min. lot area for sub-division (sq. ft.)[442] | **4,000** | 6,000 | 6,000 | 15,000 | 7,500 | 7,500 | 7,500 | 7,500 | 7,500 |
| Min. lot area for con-struction (sq. ft.) | **4,000** | 6,000 | 6,000 | 15,000 | 7,500 | 7,500 | 7,500 | 4,000 | 4,000 |
| Min. lot frontage for subdivision (ft.) | **NS** | NS | NS | NS | NS | NS | NS | 75 | 75 |
| Min. lot frontage for construction (ft.) | **NS** | NS | NS | NS | NS | NS | NS | 40 | 40 |
| Min. lot width (ft.) | **NS** | 60 | 60 | 75 | 65 | 65 | 65 | NS | NS |
| Min. front yard (ft.) [442] | **NS** | 25 | 25 | 25 | 25 | 25 | 25 | 20 | 15 |
| Min. width of both side yards (ft.) | **NS** | 25 | 25 | 35 | NR | NS | NS | 30 | 10 |
| Min. width of each side yard (ft.) | **NS** | 10 | 10 | NS | NR | 10 | 10 | 12 | 5 |
| Min. rear yard for principal buildings (ft.) | **NS** | 25 | 25 | 25 | 10 | 10 | 10 | 20 | 20 |
| Min. rear yard for accessory buildings (ft.) | **NS** | 10 | 10 | 4 | NS | 10 | 10 | NS | NS |
| Max. lot occupancy for principal buildings (percent) | **35 total** | 25 | 25 | NS(*) | NS(*) | NS(*) | NS(*) | 35 total | 50 total(*) |
| Max. lot occupancy for accessory buildings (percent) | | 5 | 5 | 15 | NS(*) | NS(*) | 25 | | |
| Max. height (ft.) | **28** | 28 | 28 | 35(*) | 35(*) | 35(*) | 35(*) | 28 | 28 |
| Max. height (stories) | **NS** | 2 | 2 | 2.5 | 2.5 | NS | NS | 2.5 | 2.5 |
| Max. floor area ratio | **NS** | 0.30 | 0.30 | 0.25 | 0.60 | 0.40 | 0.25 | NS | NS |

NS = not specified; NR = not required.

### Applications and Objection Letters: Summary Evidence from the Seashore's Records

Out of the 877 applications located in NPS files, 34 were in Brookhaven's CD zone, one was in Islip's B1 zone, one was in Islip's B3 zone, and none were in the CAA or BD zones. The vast majority of the applications were in the BAA, AAAB and RD zones, with nearly three quarters in Brookhaven's RD zone alone. The number of applications in each zone is summarized in Table 3.2 (below).

[442] The Islip code has varying lot size, width and yard requirements depending on the use. The requirements shown in this table are for the main intended use in the district—single family homes, in the case of residence districts, and retail stores and offices, in the case of business districts. In both Islip and Brookhaven, there are varying front and side yard requirements for unusually sized lots or for lots in areas where the existing built pattern is different from the standard; the requirements for lots of standard dimensions are shown here.

**Table 3.2: Summary of Applications in the Park Service's Files by Zone, 1991-2006**

| Zone | # of applications | # of objection letters | % of applications resulting in objection |
|---|---|---|---|
| AAAB | 67 | 20 | 30% |
| BAA | 153 | 42 | 27% |
| CAA | 0 | 0 | N/A |
| BD | 0 | 0 | N/A |
| B1 | 1 | 0 | 0% |
| B3 | 1 | 0 | 0% |
| RD | 621 | 99 | 16% |
| CD | 34 | 8 | 24% |
| OFD * | 103 | 28 | 27% |
| **Total** | 877 | 169 | 19% |

* Because the OFD district is an overlay zone, this figure includes properties also counted in the totals for the underlying RD and CD districts.

There are two reasons for the larger number of applications in the Brookhaven residential and commercial zones as opposed to the Islip zones. The most obvious reason is that there is more land area in Brookhaven on which to build; the total Atlantic Ocean frontage of the developed communities in Brookhaven is more than twice that of the developed communities (excluding the incorporated villages of Saltaire and Ocean Beach) in Islip. This advantage, however, is mitigated somewhat by the fact that lot sizes in Brookhaven tend to be larger than in Islip. The second reason is that the Town of Brookhaven forwards more types of applications to FINS than does the Town of Islip.

The federal standards require that the following types of applications be forwarded to FINS:[443]

- Variances
- Exceptions
- Special permits
- Permits for commercial and industrial uses

However, it is not clear to what extent these rules are being followed. When the applications from each town are reviewed by NPS, a distinct pattern emerges: During the sample period, 133 out of 655 Brookhaven applications, or 20 percent, resulted in an objection letter or were located in commercial zones, while 64 out of 222 Islip applications,

[443] 36 CFR 28.13.

or 29 percent, resulted in an objection letter or were in commercial zones. The reason for combining the data for applications that resulted in objection letters and applications in commercial zones is that, by the federal regulations, all commercial applications are to be referred to NPS, but only those residential applications that violate the federal standards are to be referred NPS; since the Park Service is essentially required to issue an objection letter to applications that violate the standards, the number of residential applications that result in an objection letter should be a good proxy for the number of residential applications that violate the standards.[444] The findings for each municipality are summarized in Table 3.3 (below).

**Table 3.3: Summary of Applications in the Park Service's Files by Municipality 1991-2006**

| Municipality | # of applications | # of objection letters | % of applications resulting in objection | # of applications in commercial districts | % of applications in commercial districts |
|---|---|---|---|---|---|
| Brookhaven | 655 | 107 | 16% | 34 * | 5% |
| Islip | 222 | 62 | 28% | 2 | 1% |
| **Total** | 877 | 169 | 19% | 36 | 4% |

* Eight commercial district applications in Brookhaven resulted in objection letters and are also included in the objection letter total.

The discrepancy between the two municipalities, as well as the relatively low percentage of submitted applications that generate objection letters, suggests three possibilities:

- First, it is possible that there is simply a difference in the quality of the applications in Islip and Brookhaven. This is the simplest explanation for the discrepancy and would be the most likely were it not for certain peculiarities in the regulations and the data, described below.
- Second, it is possible that in one municipality or the other, or both, there is a large number of special permit or special exception applications, and/or a large number of commercial/industrial applications outside commercial zones, which are triggering referrals but not generating objections. This is highly improbable in either town given the paucity of nonresidential and special permit or special exception uses on the island.

[444] The Park Service may also issue an objection letter if the application is found to be likely to cause significant harm to the natural resources of the Seashore, but this is rare because it requires more detailed review.

- Third, there are two peculiarities that may be responsible for both the relatively large number of applications that did not result in an objection letter and the observed difference in the proportion of objection letters issued for applications in the two towns. In Islip, it appears that the Town is referring applications that request variances from the Town standards, thereby requiring referral to NPS, but not from the federal standards, thereby resulting in no objection letter. There, the lot occupancy limit (25 percent for principal structures plus 5 percent for accessory structures) is far below the federal standard of 35 percent, and furthermore, a maximum floor area ratio of 0.30 applies in most areas. By contrast, Brookhaven appears to be referring large numbers of applications that do not require review under the standards. The Brookhaven records are full of applications that either involve lot occupancies below the federal and local standard of 35 percent, or have lot occupancies above 35 percent but are apparently legal nonconforming uses on which unrelated work that does not involve an expansion is being done. This explains why the number of applications referred in Brookhaven is so much greater than in Islip and why the percentage of applications resulting in an objection letter is lower in Brookhaven than in Islip.

Both towns in their own way, therefore, create excess work for NPS. In Islip's case, the significantly lower lot occupancy threshold, coupled with a maximum floor area ratio requirement, results in the referral of many applications that would not require variances if Islip adopted the federal standard. As for Brookhaven, which has a zoning ordinance that is much closer in conformity to the federal standards, it simply appears to be indiscriminately sending applications to NPS.

**Approvals Sought and the Park Service's Response: Detailed Evidence from the Seashore's Records**

The preceding analysis provides a broad outline of the records found in NPS files. To examine some of these records in more detail, samples were taken of the records for Brookhaven and Islip in the Seashore's records. Our findings with regard to the samples are summarized in Tables 3.4 and 3.5 (below).

NPS objected to approximately 70 applications, and in Islip's case, a random sample of 34 of these were examined. In addition, 15 applications which did not result in an objection (out of an approximate 150) were selected because the files included enough information to facilitate a meaningful review.

**Table 3.4: Sample of Objection Applications in the Park Service's Files, 1991-2006**

| Reason for objection letter | # of objection applications in Islip | % of objection applications in Islip | # of objection applications in Brookhaven | % of objection applications in Brookhaven * |
|---|---|---|---|---|
| Greater than permitted lot occupancy | 22 | 65% | 36 | 56% |
| Construction in dune district | 11 | 32% | 20 | 31% |
| Greater than permitted height | 0 | 0% | 1 | 2% |
| Non-permitted use | 0 | 0% | 1 | 2% |
| Other / unknown | 1 | 3% | 7 | 11% |
| **Total** | 34 | | 64 | |

* Total does not add to 100 percent due to rounding.

**Table 3.5: Sample of Non-Objection Applications in the Park Service's Files, 1991-2006**

| Nature of application | # of non-objection applications in Islip | % of non-objection applications in Islip | # of non-objection applications in Brookhaven | % of non-objection applications in Brookhaven |
|---|---|---|---|---|
| Greater than permitted floor area ratio | 15 | 100% | N/A * | N/A * |
| Construction in dune district | 0 | 0% | 25 | 39% |
| Commercially zoned land | 0 | 0% | 6 | 9% |
| Other / unknown | 0 | 0% | 33 | 52% |
| **Total** | 15 | | 64 | |

* Brookhaven does not have a maximum floor area ratio limitation.

Of the Islip objection letters, 22 were issued due to greater than permitted lot occupancy; 11 were issued because the proposed construction was in the federal dune district; and 1 was issued because there was not time to determine the lot occupancy before the hearing, but (apparently) it was thought that the application might violate the standards. The excessive lot occupancies proposed ranged from 37 percent to 56 percent, with the average and the median both close to 44 percent—an increase of 9 percentage points compared with the maximum federal standard, and 19 percentage points compared with the more restrictive Islip standard. On a 4,000 square foot lot, a 9-percentage-point increase in occupancy would result in 360 additional square feet of building area or swimming pool area,

and since lot occupancy does not include walkways, the actual portion of the lot that is covered by surfaces could be much higher than indicated in these applications.

The sampled applications that did not result in objection letters in Islip all involved exceedences of Islip's floor area ratio maximum of 0.30, as did 10 of the applications that did result in objections. Of the non-objection applications, the average requested floor area ratio was 38.56 (a 28 percent increase over the maximum), while the median was 35.75 (a 19 percent increase). These increases are potentially significant; on a 4,000 square foot lot, an increase in floor area ratio equivalent to the median requested would result in 230 additional square feet—easily enough for an extra bedroom. If this floor area increase were added entirely to the second floor of a building, it would not trigger a lot occupancy variance, although the possibility for impacts from increased human occupation would be present.

In Brookhaven, the sample included 62 randomly chosen records that resulted in objection letters (approximately 40 percent of the total) and 64 records that did not result in objection letters (approximately 10 percent of the total). In the sample, the ratio of applications that resulted in objections to those that did not in Brookhaven was different than in Islip to reflect the greater number of non-objection applications forwarded to NPS in Brookhaven, and also to allow for an enhanced sample of the commercial applications that did not result in objection letters (as it turned out, the commercial applications were not of particular interest). Again, the 64 non-objection records chosen were not randomly chosen, but rather were selected because they contained enough information to make reviewing them worthwhile. In addition, one out of every two non-objection applications that involved construction in the dune district was selected, thereby weighting the sample toward those types of applications.

Of the Brookhaven sample, 36 of the applications that resulted in objection letters requested lot occupancy variances. The average lot occupancy requested was 48.5 percent, and the median was 45.8 percent, with the range extending from 36.3 percent to 83.9 percent. Both the average and the median are over ten percentage points higher than the federal maximum of 35 percent. Twenty of the applications resulted in objections because they were in the dune district, including four of the lot occupancy variance requests. Two of the remaining objectionable applications requested height variances, one involved a preexisting

illegal use as a two-family home, and the remaining seven applications were chosen for objections because the applications were unclear, or for other unknown reasons. It should be noted that several of the applications that resulted in objection letters had lot occupancies that already exceeded the maximum but did not appear to request a further increase in lot occupancy. Typically, an application that did not involve an expansion would not be subject to an objection letter, so they may have been seeking approvals for illegally constructed or expanded dwellings; alternatively, NPS may have found that the proposal was likely to cause significant harm to the natural resources of the seashore, a subjective judgment that requires a more detailed review than simply determining whether the application violates the standards.

Of the non-objection applications in the Brookhaven sample, 25 were in the dune district, but involved expansions up to less than 35 percent of lot area or the relocation of a dwelling. Six involved commercially zoned lands and the remainder appeared to be ordinary applications within the RD zone. There are two possible reasons why these last applications were referred to NPS: they may have involved variances other than lot occupancy, use or height, such as setbacks; or, as we suggested above, they may simply have been directed to FINS without regard for whether the federal regulations required it.

It is apparent from this analysis that applications that might merit an objection letter from the perspective of impacts on FINS (and, therefore, incompatibility with legislative intent) are getting through without one because the regulations are so narrowly focused on lot occupancy. A number of applications in Brookhaven requested a significant increase in floor area ratio, but without an increase in lot occupancy, NPS did not issue an objection letter. In Brookhaven, a number of cases involved reconstruction or expansion in the dune district which was permitted by ordinance, and perhaps even consistent with the federal standards, but which was very likely to exacerbate erosion by restricting dune formation. Again, no objection letter could be issued, and the number of these cases is probably understated because the dune district has literally drifted out to sea over the years without being remapped, so that some building within the community development district is actually taking place on the dune. There were also cases in both municipalities where pre-existing buildings that exceeded lot occupancy, sometimes significantly, were not issued objection

letters—again, likely because of the nonconforming use provisions in the federal standards. At the same time, it appears that in both Brookhaven and Islip, the Seashore's resources were partly misdirected toward the review of applications that were not objectionable, either because the towns failed to follow the required procedures for referring applications to NPS or had zoning standards that varied significantly from the federal standards.

The next section of this report will follow a selection of applications in Brookhaven and Islip to the conclusion of the municipal review process in order to determine the extent to which the approving boards were willing to say no to the excessive variances that have been routinely requested on the island.

**Building Permits Granted: Detailed Evidence from Local Records**

As has been described earlier in this chapter, researching the local agency decisions on the development applications found in the Seashore's files has been difficult. Until the early part of this decade, Brookhaven did not have a practical system for filing permit records. Application and approval records were filed not by date, lot number or street address, but by a peculiar so-called "metes and bounds" system that involved ascertaining the nearest intersection to the subject site and counting the number of feet from that intersection to the site. The use of this convoluted and error-prone filing system has unfortunately rendered much of the Town's development permit archive inaccessible for systematic research. Islip's archives were until recently stored on microfilm; while the Town has begun digitizing the old records, the process is not yet complete, and the microfilm files are not easily accessible. In both municipalities, local records from the sample of properties taken from NPS files were examined.

Building department records for 31 out of the sample 49 records were located in Islip's digitized archive, including cases back to 1995. In most instances the decision of the Zoning Board of Appeals were studied, and in others the records of the actual building permits granted were used.

Although Zoning Board of Appeals decisions were not available for Brookhaven, 46 building permit approvals, a majority of the sample records from 2001 to 2005 were available for inspection.

The records we examined in both towns are summarized in Table 3.6 below. The table indicates the number of approvals for each type of construction project—new buildings, building and outbuilding additions, deck additions, attempts to legitimize previous unpermitted construction, and other construction such as fences and walks—and the number of approvals granted of each type. It also divides the approvals into those to which the Seashore had objected at the application stage, and those to which it had not objected.

**Table 3.6: Approvals Located in Local Government Files from Sample**

| Nature of approval | # of non-objection applications in Islip | # of objection applications in Islip | # of non-objection applications in Brookhaven | # of objection applications in Brookhaven |
|---|---|---|---|---|
| New building | 0 | 5 | 5 | 1 |
| Building addition or construction of out-building | 6 | 2 | 8 | 10 |
| Deck addition only | 2 | 3 | 8 | 4 |
| Retain buildings or decks constructed without prior approval | 3 | 6 | 3 | 8 |
| Other (e.g., fence or walk construction) | 0 | 0 | 2 | 0 |
| Application denied | 0 | 4 | N/A * | N/A * |
| **Total** | 11 | 20 | 26 | 23 |

* Access to denied applications was not available in Brookhaven.

As is apparent from the table, these statistics are derived from a relatively small sample size (less than 10 percent of the total applications), and are not entirely random. However, even with this small number of applications, two points can be made.

First, a number of approvals legitimized construction that had previously taken place illegally. These approvals were connected to applications for new work that had not yet been constructed, or they were submitted without any reference to additional new construction; both types of approvals have been grouped together. Note that several applications objected to by NPS fell into this category. For cultural reasons, it is difficult for a volunteer board in a mainland town to order removal of construction built by small property owners on Fire Island. Fire Island historically had not been subject to many rules, and the remoteness of the island has created a strong temptation to build without regard for legal requirements.

Second, there were only a few denials. Partly, this is due to the difficulty in obtaining records (particularly in Brookhaven where records of denied applications were unavailable), but it is still significant that many applications objected to by NPS were approved. In at least one case, the local government's file included a memorandum acknowledging the NPS objection but stated that since FINS was unwilling to back up its objection with condemnation proceedings, the project would be approved.[445]

Third, almost all of the sample approvals dealt with new buildings, additions to buildings and deck additions, rather than such matters as the construction of walks and fences, or changes in use, in addition to the fact that the sampling procedure led to greater consideration of larger applications. There are two reasons to support this result. First, most fence and walk construction takes place outside the bounds of the land use regulatory system, as do changes in use, i.e., the barely acknowledged conversion of single-family dwellings into guest houses. This is a problem in itself, since both fences and walks are self-evidently artificial structures that interfere with natural processes such as wildlife movement and dune formation, and they should be subject to scrutiny. The second reason is at the root of the land use conflict on Fire Island; nature has dictated that the island is subject to constant erosion, yet the real estate market has dictated that houses on the island are subject to pressures for endless expansion. Descriptions of a few of the approvals granted are listed below:

- 4x24 deck with stairs; shower stall; hot tub; 1-story addition (closet); fireplace
- 1-story guest house with enclosure under house; access walk, decks
- 2 story residence with wraparound deck; roof deck; 6 bedrooms max. per Suffolk Dept of Health
- New 1 family 2 story residence with decks, walks, porch, shower, steps in 2003; 1st floor additions, 2nd floor additions, etc., in 2004
- 793 square foot 2nd floor addition; 478 square foot 1st floor deck addition; 516 square foot 2nd floor deck addition; storage shed renovated to outdoor shower
- Subdivide into 3 parcels, construct 2 2-story dwellings; lot size variance required from wetlands overlay district (minimum 80,000 sq. ft. is permitted, where 9,000 sq. ft. is proposed).

With the exception of the subdivision in the Islip wetlands overlay district, these are not atypical projects. Looking back to Chapter One, a question arises: How do any of these

[445] Islip Department of Planning and Development Interoffice Memorandum from Thomas A. Isles to Ruth Desart regarding Building Permit Application 0500-497-02-018, May 6, 1999.

projects square with the legislators' and bill drafters' apparent belief at the time the Seashore was established that they could protect Fire Island from growth and retain compatibility between the developed communities and surrounding public lands? Obviously none of them do. In light of this examination of the mechanisms of the land use regulatory system in place on Fire Island, the fact that these types of projects are approved on a routine basis is a strong indication that the system contains too many conflicting demands to be able to implement the intent of the legislation for the developed communities; or, to simplify, the system fundamentally does not work in the public interest.

Before turning to possible solutions to this problem, we will briefly describe four ancillary land use approval processes that contribute to development outcomes on Fire Island, but are nowhere acknowledged in the federal regulations.

**Suffolk County Septic Regulations**

In states like New York, where all lands are within organized municipalities that at least theoretically have their own planning and zoning powers, the county occupies an uneasy position in land use control. Although it may conduct planning, the county has little or no sway over the municipalities within it. As a result, some states have moved to abolish counties; Connecticut, for example, no longer has any county governments. New York, however, continues to assign some functions to counties which may include specific health and safety related regulations and additional support to municipalities; Nassau County, for example, manages an extensive array of Geographic Information Systems data for all the municipalities in its purview.

In Suffolk County, although some development applications are referred to the County Planning Commission for opinions, it is actually the county's Health Department that has the potential say over land use on Fire Island. Because Fire Island does not have centralized sewer systems, the residences on the island rely on individual subsurface septic disposal systems for waste disposal. These systems require a permit from the Suffolk County Health Department prior to installation, and the County has a set of regulations that govern them. A septic system is a holding tank designed to separate the biological components of human waste allowing them to filter into the surrounding soil. If too many septic tanks are

installed within a given area, the ability of the soil to absorb the discharged waste is at risk; additionally, groundwater contamination may result, which is a problem in areas of Fire Island that utilize groundwater as their water supply. The specific location and density requirements for septic tanks are typically a function of soil type; however, a common rule of thumb for land use planning in areas served by individual septic systems is that a minimum of 1 to 1.5 acres is required for each single-family dwelling. Depending on soil type, the minimum threshold may actually be much higher; for example, a model commonly used in New Jersey, known as a nitrate dilution model, predicts minimum lot size needed to protect groundwater based on recharge rate: at slower recharge rates, minimum lot sizes as high as 20 acres may be needed.[446] This model is less applicable to Fire Island, where drinking water is drawn from great depth, but septic discharges into the island's soils pose environmental threats to its ecosystem from nutrients and toxic chemicals, since these materials will eventually reach the waters of the bay.

The Suffolk County Health Department's regulations allow individual septic systems to be installed only in areas with a minimum lot size of 20,000 square feet (approximately 1/2 acre) or, in certain areas, 40,000 square feet.[447] This requirement, although less stringent than the planners' rule of thumb discussed above, would appear to preclude the use of septic systems in Fire Island's developed communities. However, the code includes a process to obtain a variance from the standards, as well as a blanket waiver for parcels that were shown as being separately assessed on a tax map as of January 1, 1981.[448] Additionally, the Health Department has special guidelines for treating pre-existing dwellings[449] and the rebuilding of septic systems destroyed in a coastal storm,[450] both of which are favorable to property owners. As a result, septic systems on lots far smaller than the County's minimum standards are routinely approved. If the County's standards were applied more restrictively, most lots on Fire Island would not be buildable.

[446] New Jersey Department of Environmental Protection, "Technical Guidance: A Recharge-Based Nitrate-Dilution Model for New Jersey," July 2001, p. 21.
[447] Suffolk County Sanitary Code, Article 6, §760-606.
[448] Suffolk County Sanitary Code, Article 6, §760-609.
[449] Suffolk County Department of Health Services General Guidance Memorandum #12, June 8, 2000.
[450] Suffolk County Department of Health Services General Guidance Memorandum #11, February 14, 2000.

While that outcome might be unreasonable, one might question why Suffolk County has not developed a special set of standards for the island that acknowledges its unique environment and strongly seasonal patterns of dense habitation. Many development applications reviewed involve the construction of additional bathrooms and outdoor showers used heavily in the summer by property owners and their guests, and scarcely used other times of the year. The effect this intense seasonal usage has on the island's groundwater, soils and the biological health of the bay is not reflected in the regulations, which are designed for mainland properties used year-round in a much different physical environment. In 2004, the United States Geological Survey and NPS began studying the island's groundwater system, in part to determine the flow of contaminants;[451] this study may hold promise for the development of new septic regulations.

**State Land Use Regulations**

FINS was designated at a time in history just prior to the large scale enactment of environmental regulation throughout the country. Within the two decades following the Seashore's establishment, landmark federal environmental laws such as the Coastal Zone Management Act (CZMA) and NEPA, along with their state counterparts, had begun a shift from largely local control over land use policy-making to an enhanced state and federal role in setting policy direction.[452] While responsibility for implementing these acts was typically handed to local governments, the policies themselves were created at higher levels.

None of these laws were in place in 1964, and the act creating FINS was therefore crafted under the old model of land use policies that were set exclusively by local governments. This model had been significantly weakened by the 1980s, when the Act's current version was put in place, but the Act was not changed to acknowledge the new reality. As a result, the effect of these new federal and state environmental laws has been to create an additional, completely separate layer of regulation on top of the Seashore's regulations and the local regulations.

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[451] "Simulation of the Shallow Ground-Water Flow System at Fire Island National Seashore, Long Island, New York." http://ny.cf.er.usgs.gov/nyprojectsearch/projects/2457-BUF-1.html, retrieved November 21, 2007.
[452] The Coastal Zone Management Act, adopted in 1972, significantly expanded the federal role in coastal regulation. See Timothy J. Beatley, David J. Brower and Anna K. Schwab, *An Introduction to Coastal Zone Management*, 2nd ed., Washington: Island Press, 2002.

Three state environmental laws are of interest on Fire Island: the Coastal Erosion Hazard Areas Act, the Tidal Wetlands Act and the State Environmental Quality Review Act. The Coastal Erosion Hazard Areas (CEHA) Act was enacted in 1981 as part of New York's implementation of the federal CZMA although the line was not fully mapped on Fire Island until 1998 and not implemented until 2001.[453] The CEHA Act provided for the Department of Environmental Conservation (DEC) to map "coastal erosion hazard areas," which include shoreline lands likely to be subject to erosion over a 40-year period, as well as lands which constitute natural protective features, "the alteration of which might reduce or destroy the protection afforded other lands against erosion, or lower the reserves of sand or other natural materials available to replenish storm losses through natural processes."[454] Under the terms of this legislation, a coastal erosion hazard area has been designated on Fire Island including the beach, the primary dune, and the area 25 feet landward of the landward toe of the primary dune. The landward boundary of the CEHA is referred to as the CEHA line. The regulations implementing the CEHA Act prohibit most development on the beach and on the primary dune, and require that a permit be obtained for new construction on the secondary dune.[455] The regulations also contain a variance procedure.[456] Enforcement of the CEHA line within Islip rests with the DEC, but has been delegated to the local government in Brookhaven.

The designation of the CEHA line and the approval process by which it has been implemented has had an interesting effect on the enforcement of the federal regulations. Because the federal dune district line is now located seaward of the actual dunes, the CEHA line has become effectively a de facto dune district boundary. NPS objections sometimes refer to a property's location seaward of the CEHA line,[457] even though the federal regulations make no mention of this line. Unfortunately, like the dune district line, the CEHA line has not been remapped despite shifts in the dune line, meaning that it, too, will likely become obsolete in the future.[458]

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[453] E-mail communication from Diane Abell, July 15, 2008.
[454] New York State Environmental Conservation Law, Article 34, Section 34-0103.
[455] 6 NYCRR §505.8.
[456] 6 NYCRR §505.13.
[457] See, for example, correspondence L-415 from FINS Superintendent Mark Reynolds to Marvin Colson, Chairman of the Brookhaven Board of Zoning Appeals, regarding the application of David Sloan, December 7, 2005.
[458] Conversation with Diane Abell, Park Planner, February 21, 2006.

The Tidal Wetlands Act was enacted by New York State in 1973 to "preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the state."[459] The regulations implementing the Act provided that tidal wetlands be inventoried and mapped, and that most development activities be prohibited on tidal wetlands or within buffers extending 75 feet landward of a tidal wetland.[460] As with the CEHA Act, a variance procedure is included. The Tidal Wetlands Act affects parts of Fire Island with tidal wetlands mapped by the DEC, generally near the bay side of the island.

The State Environmental Quality Review Act (SEQRA) is the third state land use act that has significant bearing on Fire Island. This act is patterned after the NEPA which requires that environmental impact assessments be undertaken for most federal projects, but covers a much broader range of projects including much private development. The rules for assessment are set in state law and regulation,[461] but implementation is the responsibility of everyone who carries out and approves projects.

SEQRA is a very complex act, and its workings are largely outside the focus of this report. However, it merits a brief discussion here because some projects on Fire Island are subject to it. For projects larger than a single-family or two-family house, which, along with other minor projects, are excluded from SEQRA review, SEQRA has become as important as local planning and zoning in assisting municipalities in making decisions about land use.

Despite the exclusion of one- and two-family houses from SEQRA, the act is relevant in certain aspects of development on Fire Island. Projects, including one- and two-family homes, which are adjacent to publicly owned parkland or open space, are listed as "Type I" actions in the SEQRA regulations, which means that they are prejudged as being likely to have a significant environmental impact and require heightened scrutiny.[462] In addition, municipalities may designate additional types of projects as Type I actions. Brookhaven has determined that projects within designated critical environmental areas require SEQRA

[459] New York State Environmental Conservation Law, Article 25, Section 25-0102.
[460] 6 NYCRR §661. Islip subsequently adopted a tidal wetlands overlay zone that provided for a 100-foot buffer.
[461] 6 NYCRR §617 et seq.
[462] 6 NYCRR §617.4(a).

review; however, Fire Island is explicitly excluded from the list of critical environmental areas, which includes Brookhaven's other coastal areas.[463]

Thus, certain projects on Fire Island are subject to SEQRA. These projects require significantly more investigation into their environmental impacts than projects not subject to SEQRA, providing opportunity for environmental analysis not afforded by the federal/local zoning system. NPS has submitted opinions and analysis advocating for its positions in projects subject to SEQRA.[464]

**Federal Flood Insurance Program**

In any coastal area, the cost and availability of flood insurance are influential in affecting land use patterns. As Platt, Scherf and O'Donnell have found,[465] the National Flood Insurance Program (NFIP) in 1994 had assumed $1.2 billion in liability within the towns of Islip and Brookhaven, including both Fire Island and the mainland. Platt has found that the NFIP lost $1.1 billion between 1986 and 1997; the NFIP has also been criticized for failing to account for long-term erosion[466] which has resulted in a systematic underestimation of risks. Platt, Scherf and O'Donnell have detailed how, in the early 1990s, Congress resisted reforming the program to reduce its liability, in part due to lobbying by Fire Island property owners.[467] As a result, the flood insurance program continued to assess risk using the same methodologies, contributing to building and rebuilding on Fire Island and other coastal communities, that might not have occurred under a more solvent insurance program.

[463] Brookhaven code, Chapter 80, Appendix A.
[464] See, for example, correspondence L-1415, cited above, on p. 18 of which the Superintendent argues that the Brookhaven Town Board is obliged to require an EIS under SEQRA for the issuance of a development permit.
[465] Rutherford H. Platt, David Scherf and K. Beth O'Donnell, "Fire Island: The Politics of Coastal Erosion," *Disasters and Democracy*, Washington: Island Press, 1999, p. 189.
[466] Beatley, Brower and Schab, p. 125.
[467] Platt, Scherf and O'Donnell, p. 197.

# Figures to Chapter Three

**Figure 3-1**: A dune in an undeveloped portion of Fire Island, showing the topography that results from natural dune formation.

**Figure 3-2:** Oceanfront houses on Fire Island atop the area where the dune should be. The presence of the buildings has prevented the dune from forming and leaves them exposed to severe damage in the next storm.

**Figure 3-3:** A nonconforming building being constructed on Fire Island atop the dune line, amid storm damage. The scoured beach directly in front of the house is evidence of a recent storm.

**Figure 3-4:** The expansion of balconies and decks on Fire Island is a common reason for variance requests. The owners of this property have expanded their balcony skyward, thereby obtaining a superior view and avoiding increasing lot occupancy.

**Figure 3-5:** As homes on Fire Island have become more luxurious, demands upon the lot outside the home increase. This property boasts a negative-edge swimming pool overlooking the beach. The dune, however, is absent in this location.

# CONCLUSIONS AND RECOMMENDATIONS

The discussion in this report has focused predominately on the combined federal and local zoning system in place on Fire Island; tracing its evolution over the years leading to the establishment of the Park. Data was compiled from Seashore and local government records in order to get a flavor of how the process actually works. Finally, land use regulations and procedures implemented by the county and state levels of government were presented, all of which affect development on Fire Island.

It is not the purpose of this report to make detailed recommendations for changes to the land use regime on Fire Island. Considering the deeply rooted conflicts and problems, it would be negligent not to recommend that significant, structural changes be made. Several alternatives will be presented as part of the on-going General Management Plan process.

## Summary of Findings

Before setting forth some proposed directions, it will be helpful to review and summarize the two key findings of this report.

**Finding 1. The federal zoning standards, and the local regulations that purport to implement them, do not embody the objectives of Congress for the developed communities.**

As described at the conclusion of Chapter One of this report, the intent of the legislators who enacted the Act was to maintain the developed communities in a condition as close to stasis as possible. Regardless of whether this condition was desirable or even possible, it must be acknowledged that the land use regulatory system established under the auspices of the Act was woefully inadequate to the task. The federal standards espouse a remarkably unsophisticated view of land use regulation in a highly complex environment dominated by extreme weather and extreme real estate pressures.

An analogy can describe it best: the federal zoning standards may be thought of as a three-legged stool from which all of the legs, weak to begin with, have been sawed off. One leg is the dune district, which should have created a line protecting the dunes and the beach

from development. This line has never been remapped despite the island's erosion, so this leg has literally been washed out to sea.

The second leg represents the regulations for the community development district. Unfortunately, this leg is hollow, because it relies entirely on the simplistic measure of lot occupancy—that is, land coverage by buildings. Other structures such as walks and fences are ignored by federal standards regardless of their environmental effects, as are the expansions of building and deck areas onto upper stories, which increase population density on the island just as much as ground-floor expansions do. Septic systems have potentially significant environmental effects on the island, however, construction of them is very weakly regulated by the County and not addressed at all by the federal lot-occupancy standard.

The final leg is the power of land acquisition, which theoretically threatens any property not in compliance with the zoning; this leg was removed decades ago when Congress stopped appropriating funds to acquire properties.

Even if the stool were still standing, it would hardly be adequate to confront the challenges that face the barrier island. The unsophisticated model of zoning that informs the federal standards was already obsolete when FINS was established; it is good at protecting residential areas from commercial intrusion and not much else, and was never designed as a means of regulating land use in a fragile environment.

The weakness of the federal/local zoning system is underscored by the importance of New York State's CEHA and SEQRA Acts, which are nowhere referenced in the federal standards in assisting NPS fight inappropriate development. The state CEHA line has essentially replaced the federal dune district line, and where SEQRA applies, it provides a significant opportunity to document potential environmental impacts so that more informed decisions can be made.

**Finding 2. Review of the zoning history and data shows that even if the federal and local zoning standards were appropriate for the task, the local governments themselves have proven incapable of implementing the congressional intent.**

Notwithstanding recent efforts by both Brookhaven and Islip to cooperate more fully with NPS—for example, Islip now, for the first time, has a system in place to notify Fire Island applicants that their properties are subject to heightened scrutiny—this study has

shown that, on the whole, the assignment of zoning and building code enforcement to Brookhaven and Islip has significantly hindered implementation of the legislation. It took Brookhaven 20 years to adopt zoning standards that were somewhat consistent with the federal standards, while Islip has never done so. Over time, application after application for expansion of houses and construction on the dunes has been approved regardless of NPS objections. The towns' failure to comply with the federal standards for referrals to the Seashore has created excess paperwork that has drained the Park's limited resources for application review. Too often, the Seashore has been put in the position of begging the local governments to enforce the rules.

For their part, Brookhaven and Islip are massive, sprawling jurisdictions that undeniably have more pressing concerns than regulating the construction of resort houses on an inaccessible barrier island used three months of the year. The isolation of the island makes inspections difficult, and much construction is done surreptitiously in the off-season; many of the zoning applications approved by both towns were simply to legitimize construction that had already taken place without a permit. The well-known culture of corruption in the area has undoubtedly contributed to these problems.

## Recommendations

The Park is currently preparing a new GMP, which is an opportunity to consider alternative structures for the land use regulatory system for the developed communities within FINS. There is no doubt that the system adopted in the 1960s is broken beyond repair, but fortunately the field of land-use regulation has evolved significantly in the past four decades, and today we can suggest several specific substantive and procedural regulatory changes that we believe would help solve the problems we have identified in this report.

The following substantive changes to the federal zoning standards should be considered:

- The dune district boundary should be made identical to the Coastal Erosion Hazard Area (CEHA) line, provided that the CEHA statute is modified to state that an artificial manipulation of the dune line (for example, a dune fill project) does not

constitute a change in the primary dune line.[468] This would eliminate overlapping regulations and facilitate remapping. Naturally, the CEHA line also needs to be enforced rigorously by approval authorities. No regulation is effective without enforcement. The other problem with the CEHA line—that it has not been remapped—will be addressed in the procedural recommendations to follow.

- The current zoning system should be replaced by a more sophisticated performance-based approach that ties approvals to environmental impacts. Standards should be adopted for all aspects of development with the potential to create impacts, including maximum lot coverage by buildings, walks and other structures; maximum floor area ratio for buildings alone; maximum floor area ratio for buildings plus decks; and the installation and expansion of septic systems. This approach would set targets for the performance of these critical measures of development intensity based on the carrying capacity of the island to support growth. It is recommended that planning be carried out to determine that capacity and the specific standards that could be allowed. While this planning process is underway, it is recommended that interim controls be established to prevent the situation from deteriorating.
- Applicants should be required to document and provide more information about natural resources when submitting plans for development. On a barrier island, each storm potentially reshapes the natural system, yet lines drawn on maps by bureaucracies can never be redrawn quickly enough. There should be an island-wide checklist of natural resource information—dunes, wetlands, woodlands, habitat—that must be provided by each applicant.

These proposed substantive regulations, if implemented, would begin to replace the current collapsing three-legged stool with a firmer four-legged chair: one leg, the CEHA line; the second leg, a performance-based zoning system with a set of interlocking regulations that address all of the complex problems that exist in the island's developed communities; the third, a uniform, island-wide checklist of information to be provided with applications, which would ensure that development proposals receive adequate, consistent scrutiny; and the fourth leg of this new chair would be a new administrative structure for the island's approval and permitting processes.

We conclude with recommended structural changes to the land-use procedures. At the time of the establishment of FINS, there was a dearth of models for regulating private lands within a park—hence the adoption of the Cape Cod model for Fire Island—but today, that is happily no longer the case. In fact, within a few hours' drive of Fire Island, there are three

[468] This change would ensure that an artificial dune fill project could not result in the line being remapped seaward inappropriately.

significant examples of regulatory systems for private land within a public park or reserve, one of which is practically in Fire Island's backyard. These examples include the following:

- The Central Pine Barrens Commission on Long Island, part of which occupies the northeastern section of Brookhaven. This area was designated a forested and wetlands reserve in 1993 and is governed by a commission consisting of representatives of the governor, the towns within its boundaries, and Suffolk County. There is also an advisory committee consisting of various stakeholders in the region. The commission has developed a comprehensive plan for its jurisdiction and established a transfer of development rights program. It manages a development permitting program for projects that meet specified criteria.
- The Adirondack Park Agency in upstate New York, created in 1971, manages a vast forested park encompassing several counties and extensive private landholdings. This agency has a board appointed by the governor which develops a long-term plan for the park. NPS also administers the park's land-use regulatory system.
- The Pinelands Commission in New Jersey, similar to the Adirondack Park Agency, manages a very large forested reserve with extensive private landholdings. The Pinelands Commission was created as part of a partnership between the federal and state governments. The federal government in 1978 designated the Pinelands as a National Reserve and subsequently worked with the state to establish a commission to manage the reserve. The commission is largely state-controlled; it has seven members appointed by the governor; seven members appointed by the counties within its jurisdiction; and one member appointed by the Secretary of the Interior. It prepares a comprehensive management plan for the Pinelands and manages an extensive land use planning and regulatory program including a transfer of development rights scheme. There is also a municipal council for municipalities within the Pinelands area.

**It is suggested that the State constitute a commission for Fire Island along the lines of that used by Adirondack Park or the New Jersey Pinelands.**

Because Fire Island has a diverse group of stakeholders that do not necessarily have close ties to Islip and Brookhaven, a significant number of gubernatorial appointments to such a commission would help ensure adequate representation from all groups—something that is sorely lacking in the current system. The Seashore itself should have guaranteed appointments on the commission, while other seats could be reserved for appointees from various constituencies—for example, representatives of the towns and villages, representatives of property owners who live away from the island, year-round residents of the island, and so on.

**It is further recommended that such a commission be fully responsible for land use planning, zoning, permitting and enforcement on the island, with the possible exception of the two incorporated villages.**

Islip and Brookhaven, whatever their intentions, have been given ample opportunity and have shown that they are not able to manage land-use effectively or in the public interest on Fire Island. A commission with adequate representation by all stakeholders, including property owners and the Seashore itself, would be in a much better position to create plans and zoning regulations consistent with federal objectives; undertake needed studies such as remapping the CEHA line; evaluate development applications or appoint a zoning board to do so; and manage permitting and enforcement. The planning system would require external funding, but the application and permitting system could potentially be self-financing through application and permitting fees. Ocean Beach and Saltaire could continue to maintain their current systems or be subsumed into the new system.

If necessary, an advisory committee similar to that established for the Central Pine Barrens could also be established. Such a committee could perform a watchdog role for the commission, and give voice to groups that might not be fully represented on the commission.

# BIBLIOGRAPHY

## Major Sources and Collections for Chapters One and Two

The major source collections consulted were government files and repositories. Files before 1991 at the Seashore offices are stored in the Annex building and are poorly preserved and poorly organized. The library possesses an extensive set of binders containing newspaper clippings from 1962 to 1982 and 1996 through 2002. The Washington office of the NPS contains two important series of files: Park History and Park Planning. A complete copy of the House subcommittee hearings was obtained courtesy of the Department of Special Collections at the library of SUNY Stony Brook, while the unpublished House transcripts were obtained from the main branch of the National Archive in Washington, D.C. Other Congressional documents, more widely available, were consulted at the law library of Columbia University.

Within each section, sources are listed in chronological order. Short form citations used in footnotes are indicated in square brackets.

**Legislation**

All Fire Island acts, and the relevant portions of omnibus acts, are reprinted in "Legislative History of Fire Island National Seashore," a brochure produced by Fire Island National Seashore (nd).

[P.L. 88-587]
"An Act to Establish the Fire Island National Seashore, and for Other Purposes," Public Law 88-587, 88th Congress, September 11, 1964

[P.L. 89-244]
"An Act to authorize the Secretary of the Interior to accept a donation of property in the county of Suffolk, State of New York, known as the William Floyd Estate, for addition to the Fire Island National Seashore, and for other purposes," Public Law 89-244, 89th Congress, October 9, 1965

[P.L. 94-578]
"An Act to provide for increases in appropriation ceilings and boundary changes in certain units of the National Park System, and for other purposes," Public Law 94-578, 94th Congress, October 21, 1976

[P.L. 95-625]
Public Law 95-625, 95th Congress, November 10, 1978 (short title: "National Parks and Recreation Act of 1978")

[P.L. 96-585]
"An Act to designate certain lands of the Fire Island National Seashore as the 'Otis Pike Fire Island High Dune Wilderness,' and for other purposes," Public Law 96-585, 96th Congress, December 23, 1980

[P.L 98-482]
"An Act to modify federal land acquisition and disposal policies carried out with respect to Fire Island National Seashore, and for other purposes," Public Law 98-482, 98th Congress, October 17, 1984

**Congressional Documents**

[Senate Hearing]
*Hearing before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, United States Senate, Eighty-eighth Congress, First Session, on S. 1365, A Bill to Establish the Fire Island National Seashore, and for Other Purposes, December 11, 1963,* U.S. Government Printing Office, 1964

[House Hearings]
*Hearings before the Subcommittee on National Parks of the Committee on Interior and Insular Affairs, House of Representatives, Eighty-Eighth Congress, on H.R. 3693, H.R. 4999, H.R. 6111, H.R. 6213, H.R. 6934, H.R. 6936, H.R. 7107, H.R. 7297, H.R. 7359, and H.R. 7512, Bills to Establish the Fire Island National Seashore in the State of New York, September 30, 1963 – Islip, N.Y., April 10, 1964 – Washington, D.C.,* (Serial No. 21), U.S. Government Printing Office, Washington, 1964 [Dept. Of Special Collections, SUNY Library, Stony Brook, NY]

[House Subcommittee Transcript, May 12, 1964]
"Transcript of Proceedings: House of Representatives, Committee on Interior and Insular Affairs, Subcommittee on National Parks, Executive Session, H.R. 7107, Washington, D.C. , May 12, 1964," typescript, Washington, D.C., (Pages 1 thru 71), Veley Reporting Company (Unrevised and Unedited, Not for Quotation or Duplicated [sic] in any Form"

[House Subcommittee Transcript, June 30, 1964]
"Transcript of Proceedings, House of Representatives, Committee on Interior and Insular Affairs, Subcommittee on National Parks, H.R. 7107: Executive Session, Fire Island National Seashore, June 30, 1964," typescript [pp. 72-109], Veley Reporting Company "Unrevised and Unedited, Not for Quotation or Duplicated [sic] in any Form"

[House Committee Transcript, July 22, 1964]
"Transcript of Proceedings, House of Representatives, Committee on Interior and Insular Affairs, H.R. 7107: Executive Session, Fire Island National Seashore, Washington, D.C., July 22, 1964," typescript (Pages 1 thru 25), Washington, D.C., Veley Reporting Company, "Unrevised and Unedited, Not for Quotation or Duplicated [sic] in any Form"

[House Committee Transcript, July 28, 1964]
"House of Representatives, Hearings before the Committee on Interior and Insular Affairs, H.R. 7107, To provide the establishment of Fire Island National Seashore....," Official Reporters to Committees [July 28, 1964]

[USGAO Report]
U.S. General Accounting Office, "Report to the Honorable Daniel P. Moynihan, United States Senate: The National Park Service Should Improve Its Land Acquisition and Management at the Fire Island National Seashore," U.S. General Accounting Office, May 8, 1981 [NPS-WASO, Planning Files]

[Report 1984]
U.S. House of Representatives, Committee on Interior and Insular Affairs, Report [To accompany H.R. 3697], September 24, 1984 (House of Representatives, 98th Congress, 2nd Session, Report 98-1065)

**Documents Prepared by or for the Department of the Interior and National Park Service**

[Circular, 1963]
Recreation Advisory Council, "Federal Executive Branch Policy Governing the Selection, Establishment, and Administration of National Recreation Areas: Circular No. 1," March 26, 1963; reprinted in Dilsaver, pp. 263-268

[Proposal]
Fire Island National Seashore: A Proposal. A Report on the Fire Island National Seashore, U.S. Department of the Interior, Bureau of Outdoor Recreation and National Park Service, March, 1964 (NPS-WASO, Planning Files)

[Proposed Zoning Standards]
Fire Island National Seashore, Proposed Zoning Standards, *Federal Register*, vol. 30, no. 207, October 26, 1965, pp. 13678-13580

[Statement for Witness]
"Statement for Witness for Department of the Interior Before the Subcommittee on Parks and Recreation, Senate Committee on Interior and Insular Affairs, Concerning S. 867, A Bill "To Amend the Act Establishing the Fire Island National Seashore," November, 1975 [NPS-WASO, Planning Files, fol. FINS 1965-75]

[Babcock]
Richard F. Babcock, Esq., and Richard J. Roddewig, Esq. (for Ross, Hardies, O'Keefe, Babcock & Parsons), "Report to National Park Service on Fire Island National Seashore," December 1, 1975 [copy provided by park]

[Model Zoning]
Ross, Hardies, O'Keefe, Babcock & Parsons (Chicago), "Report to the National Park Service: Outline of Key Standards for Model Zoning Ordinance for Fire Island Communities," November 29, 1976 [copy provided by park]

[Summary]
"Summary: Fire Island Community Land Use Control Problems, June 1976 NPS Draft Proposals for Land Use Controls, Public Comments, Planning Team Recommendations for Final GMP," attached to Briefing Statement for Director, December 14, 1976: [NPS-WASO, Planning Files, fol. FINS 1965-75]

[GMP, 1977]
National Park Service, *General Management Plan: Fire Island National Seashore*, 1977

[Stewart and Ritenour]
J.W. Stewart and J. Ritenour, "Draft Staff Report on Land Acquisition Review, Fire Island National Seashore," September 14, 1979 (with covering memo, Fire Island Land Acquisition Review Task Force" to Stan Albright (Chairman, NPS Land Acquisition Policy Review), September 19, 1979 [NPS-WASO, Planning Files: fol: Fire Island Land Acquisition]

[Land Acquisition Plan]
"Land Acquisition Plan for Fire Island National Seashore," p. [1] annot. "DRAFT 6/28/79," attached to memo, Superintendent (Richard W. Marks) to Regional Director, NAR, August 14, 1979

[Draft Staff Report, 1979]
"Draft Staff Report on Land Acquisition Review, Fire Island National Seashore," September 19, 1979 [a document with the same title as the above but containing, according to the title page, a "compilation of comments received from persons interviewed…."] [NPS-WASO, Planning Files: fol Fire Island Land Acquisition]

[Wilderness Study]
*Fire Island National Seashore, NY: Wilderness Study/Preliminary Wilderness Proposal*, NPS, North Atlantic Regional Office, January, 1980. Bound with: "Draft Supplement to the Final Environmental Statement, General Management Plan: Wilderness Study/Preliminary Wilderness Proposal," North Atlantic Regional Office, NPS, January, 1980 (approved by regional director, March 26, 1980). [NPS-WASO, Planning Files]

[Final Rule, Jan. 1980]
"Fire Island National Seashore, New York; Zoning Standards" (Final Rule), *Federal Register*, vol. 45, no. 12, January 17, 1980, pp. 3261-3270

[Final Rule, Sept. 1980]
"Fire Island National Seashore, New York; Zoning Regulations" (Final Rule with additional public comments and revisions), *Federal Register*, vol. 45, no. 17, September 10, 1980, pp. 59569 ff.

[Land Protection Plan]
"Fire Island National Seashore: Land Protection Plan," August, 1984 (approved by regional director, September 21, 1984)

[Proposed Rule, Oct. 1987]
"Fire Island National Seashore, New York; Federal Zoning Regulations," Proposed Rule, *Federal Register*, vol. 52, no. 194, October 7, 1987, pp. 37586-37592.

[Final Rule, Aug. 1991]
"Fire Island National Seashore, New York; Federal Zoning Regulations," *Federal Register*, vol. 56, no. 168, August 29, 1991, p.42788-42795

**Other Government Documents and Court Papers**

[Executive Order 12630]
Executive Order 12630, "Governmental Actions and Interference with Civil Constitutionally Protected Property Rights," March 15, 1988.

[*Biderman v. Secretary of the Interior*]
George Biderman, et al, v. Secretary of the Interior, et al.: Memorandum Incorporating Findings of Fact and Order, United States District Court, Eastern District of New York, September 18, 1973

**Press Coverage**

All references to news articles are drawn from clippings contained in binders in the library at the Seashore offices in Patchogue, Long Island.

**Secondary Sources**

[Dilsaver]
Larry M. Dilsaver, ed., *America's National Park System: The Critical Documents*, London, Rowman & Littlefield, 1994

[Koppelman and Forman]
Lee Koppelman and Seth Forman. *Fire Island National Seashore, 1964-2004*. Draft Administrative History, June, 2004.

## Major Sources and Collections for Chapter Three

### Cases, Regulations, and Statutes

New York State Department of Environmental Conservation. "6 NYCRR 505: Coastal Erosion Management." New York Codes, Rules and Regulations. Retrieved October 5, 2007 from http://www.dec.ny.gov/regs/.

New York State Department of Environmental Conservation. "6 NYCRR 617: State Environmental Quality Review." New York Codes, Rules and Regulations. Revised through June 26, 2000.

New York State Department of Environmental Conservation. "6 NYCRR 661: Tidal Wetlands Land Use Regulations." New York Codes, Rules and Regulations. Retrieved October 5, 2007 from http://www.dec.ny.gov/regs/.

New York State Department of Health. "10 NYCRR Part 75: Standards for Individual Water Supply and Individual Sewage Treatment Systems." New York Codes, Rules and Regulations. Retrieved October 5, 2007 from http://www.health.state.ny.us/nysdoh/phforum/nycrr10.htm.

State of New York. "Article 8: Environmental Quality Review"; "Article 25: Tidal Wetlands"; "Article 34: Coastal Erosion Hazard Areas." Environmental Conservation Law, Consolidated Laws of New York. Retrieved October 5, 2007, from http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS.

Suffolk County Department of Health Services forms and regulations. http://www.co.suffolk.ny.us/webtemp3.cfm?dept=6&id=982. Retrieved October 5, 2007.

Suffolk County. "Article 6: Realty Subdivisions, Developments and Other Construction Projects." Suffolk County Sanitary Code. Retrieved from http://www.co.suffolk.ny.us/webtemp3.cfm?dept=6&id=982 on October 5, 2007.

*Town of Bedford v. Village of Mount Kisco*, 33 NY2d 178, 188 (1973).

Town of Brookhaven. "Chapter 76: Coastal Erosion Hazard Areas"; "Chapter 80: Critical Environmental Areas; SEQR Implementation"; "Chapter 81: Wetlands and Waterways"; "Chapter 85: Zoning." Code of the Town of Brookhaven, New York. Retrieved from http://www.generalcode.com/webcode2.html on October 5, 2007.

Town of Islip. "Chapter 13B: Environmental Quality Review"; "Chapter 67: Wetlands and Watercourses"; "Chapter 68: Zoning." Code of the Town of Islip, New York. Retrieved from http://www.generalcode.com/webcode2.html on October 5, 2007.

United States Government Printing Office. “Fire Island National Seashore: Zoning Standards.” Code of Federal Regulations Title 36, Part 28. Retrieved from http://ecfr.gpoaccess.gov on October 29, 2007.

**Personal Interviews**

Diane Abell and Robin Lepore (NPS) and Rutherford Platt (University of Massachusetts: October 28, 2005); Diane Abell and Robin Lepore (December 15, 2005); Diane Abell (January 9, February 21, February 28, October 6, 2006); Diane Abell, Robin Lepore, and Ellen Carlson (NPS: June 12, 2006); Bob Spencer (property owner: October 30, 2006): Erica Fried and Jerry Feder (property owners: November 2, 2006): Alan Svoboda and Tom Carrano (Town of Brookhaven: November 21, 2006); Dave Geneway (Town of Islip: June 20, 2007).

**Publications and Reports**

Babcock, Richard, and Richard J. Roddewig. “Report to National Park Service on Fire Island National Seashore.” Ross, Hardies, O’Keefe, Babcock & Parsons, December 1975.

Babcock, Richard. *The Zoning Game: Municipal Practices and Policies*. Madison: University of Wisconsin Press, 1966.

Beatley, Timothy J., David J. Brower and Anna K. Schwab. *An Introduction to Coastal Zone Management*. 2nd ed. Washington: Island Press, 2002.

Castillo, Alfonso A., “Town inspector gets probation, short jail stay,” *Newsday*, March 6, 2007.

Gerckens, Larry. “American Zoning and the Physical Isolation of Uses.” *Planning Commissioners Journal* Reprint Article #573.

Leatherman, Stephen P. *Barrier Island Handbook*. College Park: University of Maryland Laboratory for Coastal Research, 1988.

Mandelker, Daniel R., Roger A. Cunningham and John M. Payne. *Planning and Control of Land Development: Cases and Materials*, Fourth Edition. Charlottesville, Va.: Michie, 1995.

Mead, Julia C. and Vivian S. Toy, “A G.O.P. Stalwart Quits Islip Post, Then Pleads Guilty,” *The New York Times*, March 10, 2006.

New Jersey Department of Environmental Protection. “Technical Guidance: A Recharge-Based Nitrate-Dilution Model for New Jersey,” July 2001.

New York State Department of State, Division of Local Government Resources. *State of New York Local Government Handbook*, Fifth Edition, 2000.

New York State Department of State, Division of Local Government Resources. “Guide to Planning and Zoning Laws of New York State.” James A. Coon Local Government Technical Series, January 2006. This publication includes the complete text of all state laws enabling local land use planning, zoning and capital programming in New York. The Town Law and the General Municipal Law are pertinent to the issues discussed in this report.

New York State Department of State, Division of Local Government Resources. “Zoning and the Comprehensive Plan.” James A. Coon Local Government Technical Series, December 1999.

*Newsday*. “Previous Coverage of Brookhaven Corruption.” Retrieved from www.newsday.com/news/local/longisland/ny-brookhaven-sg,0,1391648.storygallery on November 21, 2007.

Petersen, Jon A. *The Birth of City Planning in the United States, 1840-1917*. Baltimore: Johns Hopkins University Press, 2003.

Platt, Rutherford H., ed. *Disasters and Democracy*, Washington: Island Press, 1999.

Psuty, Norbert B., Michele Grace and Jeffery P. Pace. “The Coastal Geomorphology of Fire Island: A Portrait of Continuity and Change.” Boston: U.S. Department of the Interior, National Park Service, 2005.

Reps, John. *The Making of Urban America*. Princeton, N.J.: Princeton University Press, 1955.

Scherf, David J. “Reconstruction of Shorefront Structures at Fair Harbor and Ocean Bay Park, Fire Island, New York: Case Studies of Land Use Control in the Dynamic Coastal Fringe.” Master’s Thesis. University of Massachusetts Department of Geology and Geography. May 1995.

United States Geological Survey. “Simulation of the Shallow Ground-Water Flow System at Fire Island National Seashore, Long Island, New York.” http://ny.cf.er.usgs.gov/nyprojectsearch/projects/2457-BUF-1.html. Retrieved November 21, 2007.

Wagoner, Nicolette. “Exclusionary Access and the Role of the Public Trust Doctrine on Fire Island, New York.” Master’s Thesis. Columbia University Faculty of Architecture and Planning. May 1999.

Wilson, William H. *The City Beautiful Movement*. Baltimore: Johns Hopkins University Press, 1989.

**Records and Data**

Fire Island National Seashore. Paper files containing development applications and permits referred from Brookhaven, Islip, Ocean Beach and Saltaire from 1991 to 2005. Retrieved March and April 2006.

Fire Island National Seashore. Paper file regarding the application of David Sloan, Wetlands and Waterways Permit #2005-2649-04; Suffolk County Tax # 0200-98700-0200-054002. Retrieved April 2006.

Town of Brookhaven. Electronic files containing building permit records for 2001 to 2005. Retrieved on May 15, 2007.

Town of Islip. Electronic files containing building permit records, change of zone records and Zoning Board of Appeals decisions for 1995 to 2007. Retrieved on June 28, 2007.

United States Census Bureau. http://www.census.gov.

**Site Visit**

Site Visit to Fire Island National Seashore. October 28, 2005.