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18 Feb

BY THE 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**

The National Park Service's zoning standards at Fire Island National Seashore are too restrictive and permit land to be acquired that is not needed to achieve the purposes of the Fire Island National Seashore Act. The National Park Service should revise its zoning standards, establish criteria for acquiring properties, and sell back to private citizens land it acquired but does not need.



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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

COMMUNITY AND ECONOMIC
DEVELOPMENT DIVISION

B-199379

The Honorable Daniel P. Moynihan
United States Senate

Dear Senator Moynihan:

As you requested, this report discusses National Park Service zoning standards and property acquisition practices at the Fire Island National Seashore. It also recommends that the Department of the Interior revise existing standards and practices, provide more complete information to the Congress, and dispose of unneeded property.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 10 days from the date of the report. At that time, we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

A handwritten signature in cursive script that reads "Henry Eschwege".

Henry Eschwege
Director

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

D I G E S T

The National Park Service's zoning standards at Fire Island National Seashore are more restrictive than necessary to meet the requirements of Public Law 88-587, and the Park Service is unnecessarily acquiring private lands at Fire Island. GAO believes that the Park Service should revise its zoning standards to comply more closely with the Congress' intent and should sell back to private citizens lands it has acquired but does not need.

GAO reviewed these issues at the request of Senator Daniel P. Moynihan and former Senator Jacob K. Javits.

ZONING STANDARDS UNNECESSARILY
RESTRICT PROPERTY OWNERS' RIGHTS

The Park Service issued zoning standards for Fire Island in September 1980 that were to be followed by local communities. The act protects property owners in existing developed communities from the threat of condemnation and undue intervention by the Federal Government. However, GAO believes that parts of the standards are more restrictive than necessary to meet the requirements of the Fire Island National Seashore Act.

The Park Service's zoning standards are particularly restrictive about homes that have to be rebuilt after being damaged or destroyed by a catastrophe. According to the standards, homes rebuilt after 1963 have to be rebuilt in accordance with local ordinances. Local authorities, however, allow variances to their ordinances if, in their judgment, the variances will not cause harm to Fire Island's natural resources. The Park Service's zoning standards find variances to be unacceptable and, if variances are

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management. The plan simply cites variances or exceptions to local zoning ordinances as acquisition criteria. As a result, property owners are uncertain and confused about the kinds of uses which will subject their homes to possible acquisition. (See p. 16.)

PARK SERVICE SHOULD
SELL UNNEEDED LAND

The Service should sell properties previously acquired that are compatible with the purposes of Fire Island. The Service should first offer the property back to the previous owner at the highest bid price (right of first refusal), unless it can demonstrate that the last owner's use of the property harmed Fire Island's natural resources. If the previous owner does not want the property, the Park Service should sell it to the highest bidder.

The Land and Water Conservation Fund Act of 1965, as amended, limits the right of first refusal to 2 years after the property to be conveyed is acquired by the Park Service. Since many properties on Fire Island were acquired more than 2 years ago, GAO believes that the Congress should exempt land acquired pursuant to the act from the 2-year limitation. This exemption would assure that private landowners whose lands were condemned by the Park Service would have first opportunity to reacquire the property at the highest bid price. (See p. 17.)

RECOMMENDATIONS TO THE
SECRETARY OF THE INTERIOR

GAO recommends that the Secretary of the Interior require the Director, National Park Service, to:

- Revise the Fire Island zoning standards so that homes reconstructed or improved in accordance with locally approved variances to local zoning ordinances will not be condemned unless the variances adversely affect Fire Island's natural resources.

--The Secretary of the Interior sell back to the the highest bidder, including previous owners or other private individuals, all lands that are compatible with the recreation area.

--The Congress exempt land acquired from the 2-year limitation stipulated in the Land and Water Conservation Fund Act, as amended.

GAO believes these recommendations also apply to Fire Island and possibly to other areas and that the Secretary of the Interior therefore should have general authority to sell back lands to previous owners without a time restriction. (See p. 19.)

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CHAPTER 1

INTRODUCTION

At the request of Senator Daniel P. Moynihan and former Senator Jacob K. Javits, we reviewed the National Park Service's land acquisition and management policies and practices for the Fire Island National Seashore in New York. 1/ In particular the Senators wanted us to determine whether the Park Service was exceeding its condemnation authority. Furthermore, many Fire Island residents have complained about the Park Service's land acquisition and management practices.

We found that the Park Service's zoning standards are more restrictive than necessary to meet the applicable legislative requirements and that some Fire Island residents are understandably concerned that these zoning standards put many homes in jeopardy of condemnation without valid cause.

LEGISLATIVE HISTORY

The Fire Island National Seashore (see maps in apps. I and II) was established by the Congress in 1964 (Public Law 88-587, as amended, 16 U.S.C. 459e (1976)) for the purpose of:

"* * * conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features within Suffolk County, New York, 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 * * *."
(Emphasis added.)

This act was designed for the Park Service and local communities to share administrative jurisdiction within the park.

The act grants the Park Service, through the Secretary of the Interior, limited powers of condemnation; that is, powers to convert private land to public-use land. The Secretary of the Interior can acquire by condemnation improved property 2/ needed for public access to the beach and improved property

1/For purposes of this report, Fire Island refers to the Fire Island National Seashore.

2/The act defines improved property as structures for which construction was begun before July 1, 1963.

manner, but even this power has been limited by congressional appropriations for land acquisitions.

Fire Island contains 17 small communities in which development is allowed. The act limits the Secretary's power to condemn developed property in these communities and indicates the Congress' desire to minimize Federal intervention in these exempt communities. (see app. III.)

In 1978 Public Law 95-625 was passed, granting the Secretary power to condemn certain "undeveloped property" in the dune district 1/ of Fire Island if the owner fails to maintain the property in its natural state. The Park Service believes that preventing development in the dune district will limit erosion of the dunes. Property developed in the dune district before 1978 is protected from condemnation under this act.

NATIONAL PARK SERVICE LAND ACQUISITION POLICY

In 1969 the Park Service began acquiring all lands within park boundaries except where satisfactory zoning on land uses was in effect. On April 26, 1979, the Service revised its land acquisition policy to state that it will acquire land and water in fee simple 2/, or less-than-fee interest, consistent with the enabling legislation, to protect resources and provide for visitor use. Each park area with an active land acquisition program must have a plan which establishes acquisition priorities; defines compatible and incompatible uses; clarifies the criteria for condemnation; and identifies the reasons for fee-simple acquisition versus alternative land protection and management strategies, such as easements, zoning, cooperative planning and management, access limitations, and rights-of-way.

The purpose of a park area land acquisition plan is to inform the park staff, land acquisition personnel, affected landowners, and the general public of the Park Service's land acquisition program for the area. The plan, developed

1/The dune district is a 40-foot-wide area spanning the entire length of Fire Island. It has fixed boundaries and is defined on a map approved by the Congress. The area primarily consists of a ridge of sand built up naturally over the years by the wind.

2/The absolute ownership of land with unrestricted rights of disposition.

Drive to Acquire Private Lands Should Be Reassessed" (CED-80-14), which focused on the land management and acquisition programs of the Forest Service (Department of Agriculture) and the Fish and Wildlife Service and the National Park Service (Department of the Interior). The report stated that generally the three agencies had been acquiring as much private land as possible regardless of need, alternative land control methods, and impact on private landowners. We recommended that the Secretaries of Agriculture and the Interior

- jointly establish a policy on when lands should be purchased or when other protection alternatives, such as easements, zoning, and Federal control, should be used;
- critically evaluate the need to purchase additional lands in existing projects; and
- prepare plans identifying lands needed to achieve project purposes and objectives at every new project before acquiring land.

The Departments of Agriculture and the Interior took several actions on our recommendations. Interior's Land and Water Conservation Fund Policy Group was directed to review land managing agencies' policies and guidelines concerning acquisition and alternate protection strategies. A proposed policy statement to consider a full range of alternatives to fee-simple acquisition for new areas and for major additions to existing areas was published in the Federal Register in December 1979.

On May 22, 1978, we issued a report entitled "Federal Protection and Preservation of Wild and Scenic Rivers Is Slow and Costly" (CED-78-96). We pointed out that, to preserve wild, scenic, and recreational rivers, most Federal agencies either buy riverway land or buy the right to control the use of the land. This practice is unnecessarily costly and was not intended by the Congress. For example, our review showed that Federal agencies estimated that it would cost \$93 million--2-1/2 times the original estimate--to acquire control over 15 federally administered rivers.

Less costly alternatives are available to protect wild and scenic rivers. The one most promising and called for in the Wild and Scenic Rivers Act is for the Federal Government to work with State and local governments to provide the necessary land use controls over development. Coordinating Federal management with State and local zoning ordinances would not only reduce costs, but would allow private owners to continue using their lands. Agencies in Agriculture and Interior are using this strategy in programs to protect national recreational and other areas from adverse development.

CHAPTER 2

PARK SERVICE ZONING STANDARDS SHOULD BE MORE REASONABLE TOWARD FIRE ISLAND PROPERTY OWNERS

The Park Service's zoning standards appear to unnecessarily restrict some Fire Island property owners from reconstructing or improving their homes. We found four instances in which the zoning standards were more restrictive than needed to fulfill the requirements of Public Law 88-587. According to the Park Service's land acquisition policy, Fire Island property should be acquired only when necessary to protect natural resources and provide for public use. However, the Park Service's zoning standards permit property condemnation even where development would cause no harm to natural resources.

The Park Service needs to clearly define what kinds of use will result in private property being condemned. The Park Service also needs to develop a plan for selling back to private citizens land it has acquired but does not need to fulfill its statutory responsibilities on Fire Island.

ZONING STANDARDS UNNECESSARILY RESTRICT SOME PROPERTY OWNERS FROM REBUILDING OR IMPROVING THEIR HOMES

To limit development on Fire Island, building new homes is permitted only in certain sections. The map and photos on the following pages show Fire Island's three administrative areas:

- The exempt communities, where construction is permitted.
- The seashore district, where construction is restricted.
- The dune district, which runs through the other two areas, where development may be allowed in some portions but not in others.

Park Service zoning standards have unnecessarily restricted seashore district property owners' rights, and the Park Service has been acquiring lands which, if developed, would not have interfered with Fire Island's natural resources or public use.

Rebuilding in the exempt communities

Park Service zoning standards permit the Park Service to condemn properties in the exempt communities even when planned



AN EXEMPT COMMUNITY--DEVELOPMENT IS PERMITTED



THE SEASHORE DISTRICT--DEVELOPMENT IS NOT PERMITTED

development would not have harmed natural resources. For example, after 1963 some property owners built homes in the exempt area that did not comply with approved local zoning ordinances. These people received approval from local zoning authorities to construct their homes with variances. However, in most cases the Park Service automatically objected to these variances.

If a catastrophic storm destroys these property owners' homes, many would have difficulty rebuilding them to original size. Under the Park Service's zoning standards, their homes would have to be rebuilt to comply with current local zoning standards. (See 36 CFR 28.5 (c)(1)(iii) in app. IV.) According to the Park Service's zoning standards, reconstructed homes built at variance to approved local zoning ordinances remain subject to condemnation even if the variances do not adversely affect Fire Island's natural resources. (See 36 CFR 28.5 (c)(2)(iii) in app. IV.) Furthermore, the Park Service does not have to justify its objections to the variances granted by the local zoning authorities to condemn this type of property.

Rebuilding pre-1963
dune district homes

The Park Service's zoning standards (see 36 CFR 28.5 (c) (2)(i) in app. IV) permit exempt community and seashore district property owners with homes built before 1963 to rebuild their homes to previous dimensions, regardless of whether the homes were originally built with a variance. However, if the homes also lie within the dune district, the zoning standards require them to be rebuilt to current zoning standards if they were originally built at variance with local zoning ordinances. (See 36 CFR 28.5(c)(2)(ii) in app. IV.)

The Fire Island act does not distinguish between pre-1963 dune district and nondune district homes. We believe the zoning 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.

According to Park Service officials, dune district homes built before 1963 can be rebuilt under the same conditions as in the exempt communities. This interpretation conflicts with the zoning standards. Consequently, we believe the zoning standards should be amended to make them consistent with the Park Service's interpretation.

We reviewed the act and found that no distinction was made between the property rights of the two groups. Consequently, owners of improved property in the seashore district should be allowed full use of their property if the use complies with local zoning ordinances and the Park Service zoning standards should be amended accordingly.

THE PARK SERVICE HAS NEEDLESSLY
ACQUIRED SOME FIRE ISLAND PROPERTIES

We found that the Park Service acquired several exempt community properties either by condemnation or declaration of taking 1/ because of variances that do not appear to conflict with the Park Service's overall mandate on Fire Island.

The Park Service routinely objects to almost all variances granted to Fire Island residents, apparently so that it can condemn the properties at some future date. While the act per-mits the Park Service to acquire by condemnation properties developed with variances, it does not require that all such properties be acquired. The Park Service does not document how the variances harm the natural resources of Fire Island, and many of the variances do not appear to conflict with the Park Service's overall mandate on Fire Island. Because the law permits the Park Service to condemn properties with variances that may not affect Fire Island's natural resources, many residents feel threatened that their properties may be condemned.

The Park Service's policy is to object to all variances granted by local municipalities. Park Service officials are informed of all local zoning meetings when Fire Island variances are considered and routinely object to all acreage, frontage, and setback variances that are granted (except perhaps when the building permit has an insignificant variance of several inches). Consequently, these properties lose their exempt status and become subject to condemnation.

The Park Service believes that the town of Brookhaven, which has not had its zoning code approved as of March 19, 1981, grants variances without considering the consequences to Fire Island. The assistant town attorney of Brookhaven disagrees. He claims that variance applications are not "rubber stamped" and are considered in light of the act's purpose. This official also said that Park Service representatives object to all variances without explaining how they conflict with Park Service objectives on Fire Island and that they do so to retain the option of taking the property at a later date, if funding becomes available.

1/A process which vests property in the United States immediately upon filing papers in the court and the deposit of an estimate of just compensation.



FOREGROUND: PROPERTY ACQUIRED BY THE PARK SERVICE
BACKGROUND: HOUSE CONSTRUCTED ON ADJOINING LOT WITHOUT VARIANCE



OWNER CONSTRUCTED HOME ON LOT BEHIND THE LOT ACQUIRED BY THE PARK SERVICE

Properties acquired in exempt communities
should be sold

Before 1974 the Park Service acquired only two tracts within the exempt communities. Since then, however, it has acquired 29 properties--of which 9 are completely in the dune district, 15 are partially in the dune district, and the remaining 5 are outside the dune district. Those properties that are compatible with the purposes of Fire Island should be offered back to the previous owner at the highest bid price. If the previous owner does not want the property, or if the previous owner's use of the property harmed Fire Island's natural resources, the Park Service should sell the property to the highest bidder.

Fire Island officials informed us that the Park Service is investigating a plan to dispose of property in the exempt communities. They also said that houses in the dune district will be moved and the property will be retained. It is unclear, however, what will be done with property adjacent to or partially within the dune district.

The Land and Water Conservation Fund Act of 1965, as amended, limits the right of first refusal to 2 years after the property to be conveyed is acquired by the Park Service. Since many Fire Island properties were acquired more than 2 years ago, the Congress should allow land acquired pursuant to Public Law 88-587 to be exempted from the 2-year limitation so that the previous landowners will have the first opportunity to reacquire property taken without good cause by the Park Service.

The Park Service could attach scenic or developmental restrictions to the deeds before the properties are resold to assure that their use will be consistent with the purposes of the enabling legislation. The proceeds would be credited to the Land and Water Conservation Fund in the Treasury of the United States.

CONCLUSIONS

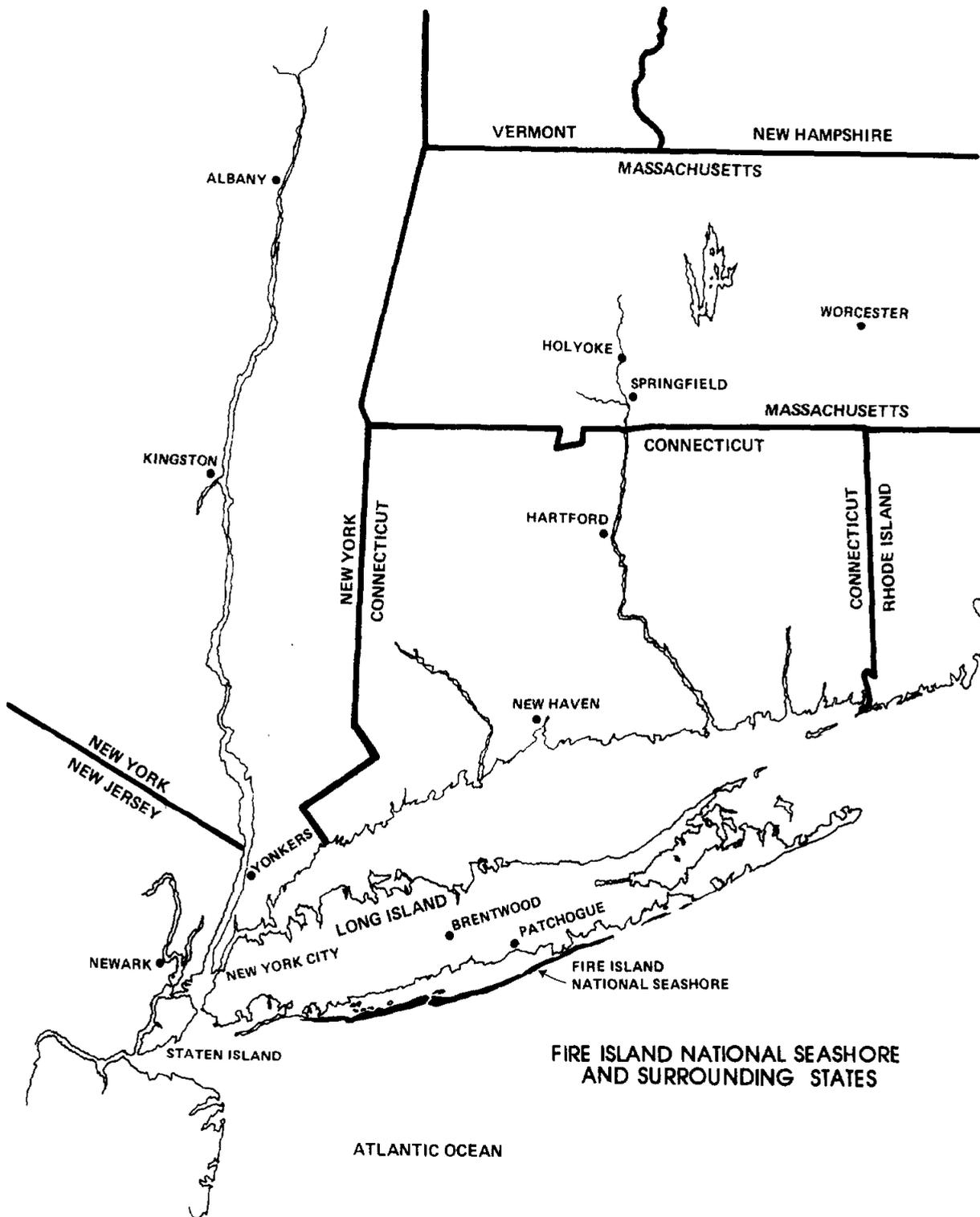
The Park Service's zoning standards are more restrictive than necessary to meet the requirements of Public Law 88-587. The zoning standards unduly restrict the rights of some property owners to rebuild after catastrophic destruction and unnecessarily restrict the property rights of seashore district residents.

The Park Service restricts the rights of property owners to rebuild their homes when the properties were originally developed with variances. The Park Service routinely objects to most variances. As a result, many property owners who built their homes

- Revise the Fire Island zoning standards to make it clear that homes rebuilt or improved in accordance with approved variances to local zoning ordinances will not be subject to condemnation unless the variances adversely affect Fire Island's natural resources.
- Stop routinely objecting to variances, unless the Park Service specifically shows why the variances would harm Fire Island's natural resources, and revise the zoning standards accordingly.
- Explain in its letters to the Senate Committee on Energy and Natural Resources requesting declarations of taking specifically why variances would adversely affect Fire Island's natural resources.
- Revise the Fire Island land acquisition plan to state (1) more specifically the circumstances under which properties will be acquired and (2) that all properties will not be acquired just because they were rebuilt at variance with a local ordinance.
- Sell to the highest bidder all acquired lands in exempt communities that are compatible with the purposes of Fire Island. The previous owner should be offered first opportunity to reacquire the property at the highest bid price unless the Park Service can demonstrate that the last owner's use of the property adversely affected Fire Island's natural resources. The Park Service could attach scenic or developmental restrictions to the deeds before selling the properties to assure that their use will be consistent with the enabling legislation.

PREVIOUS RECOMMENDATIONS TO THE CONGRESS
ALSO APPLY TO FIRE ISLAND

In our January 22, 1981, report entitled "Lands in the Lake Chelan National Recreation Area Should Be Returned to Private Ownership" (CED-81-10), we recommended that the Secretary of the Interior sell back to the highest bidder, including previous owners or other private individuals, all lands compatible with the recreation area. We also recommended that the Congress exempt land acquired from the 2-year limitation stipulated in the Land and Water Conservation Fund Act, as amended. The purpose of this recommendation was to give the last owner(s) in the recreation area the right to match the highest bid price and reacquire property sold to the National Park Service. This recommendation would also apply to Fire Island and possibly to other areas. Therefore, the Secretary of the Interior should



LEGISLATIVE HISTORY

The legislative history of Public Law 88-587 indicates the Congress' strong desire to protect property owners in existing developed communities on Fire Island from the threat of condemnation and undue intervention by the Federal Government. The Senate report on the Fire Island legislation sets forth the basic limitation on the Secretary's power to condemn private property in the exempt communities:

"The bill further provides that private property, both improved and unimproved, may be retained by its owner, within certain designated communities, as long as it is maintained in accordance with approved local zoning requirements, except that the Secretary may acquire within such designated communities any beach or waters together with so much of the land adjoining them as he deems necessary for public access." S. Rept. 1300 (88th Cong. 2d sess. 3-4(1964)).

During the House debate, Representative Otis Pike, a major supporter of the legislation, stated that the bill's language limited the Secretary's power to condemn homes within these communities:

"Under the language of the bill as it is now before you, the Secretary can in a certain limited area condemn houses. He can condemn those houses in that area which were built subsequent to July 1, 1963."

* * * * *

"There is only an 8-mile stretch in the entire bill in which any homes can be condemned. People can continue to build homes subject to reasonable zoning ordinances in the developed communities." (110 Congressional Record 20642 (1964)). (Emphasis added.)

During the same House debate, other statements emphasized the importance of limiting the Secretary's condemnation authority in the exempt communities. Representative Morris in expressing the amount of land to be acquired by the Federal Government on Fire Island stated that "We [the Federal Government] are not going to acquire any property that is not necessary for the administration of the park." (110 Congressional Record 20639 (1964)).

Mr. Barbash:

"Senator Allott asked about the fellow who bought a piece of property and wanted to build a house there. To my knowledge this would occur mostly in the highly developed communities. Most of the undeveloped land is in larger parcels than someone would own if he just wanted to build a little house there. It would seem to me if I may point this out, sir, that when it comes to these 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. It serves not the park nor the individual property owner. So instead of allowing it to lie in limbo, I suggest that you delineate the area and permit continued building."

Senator Bible:

"I think there is a lot of merit in the suggestion. I might say we did exactly that in our Cape Cod legislation where we carved out three villages. Of course, in carving out those three villages we did not envision the taking of a vacant lot right in the middle of the town which is what you are saying." (Emphasis added.)

Mr. Barbash:

"That is exactly correct, sir. In this legislation the villages are all included within the boundaries of the national seashore. In the Cape Cod they were excluded. Therein lies the difference. If you wish to include them they should be set aside in a separate zone. I think you have a pending seashore bill in the hopper now which provides a similar condition."

* * * * *

Senator Bible:

"There is a lot of merit in what you say and it does not make good common sense to prevent something being done with a vacant lot that lies between two,

EXCERPTS FROM FIRE ISLAND NATIONAL SEASHOREZONING STANDARDS36 CFR 28.4(c)(1)(i):

The Seashore District.

Permitted Uses of Privately-held Property: Residential use and maintenance of "improved property" may be continued. New development on "improved property" or the alteration or movement of "improved property" may be permitted if consistent with Section 28.6 and does not increase lot coverage. "Unimproved property" which has been developed may be maintained but may not be altered or moved. General recreation, environmental and historic education, and natural resource protection uses and facilities are permitted if consistent with the uses and facilities appropriate with each zone as set forth in the General Management Plan and Final Environmental Impact Statement. Section 28.4(a)(1)(ii) shall apply in the Seashore District. (Emphasis added.)

36 CFR 28.5(c)(1):

General Rules.

The following general rules shall apply to all nonconforming uses:

(iii) If the nonconforming building can be brought into conformity with current standards, then it shall be reconstructed as to conform to current standards. If the building can conform to all standards of this regulation, except for minimum lot sizes or setback requirements, then it may be reconstructed, subject to the specific rules of section 28.5 (c)(2).

36 CFR 28.5(c)(2):

Specific Rules.

No nonconforming use shall be reconstructed without compliance with the appropriate specific rule as follows:

(i) "Improved property" in the Community Development District or in the Seashore District may be reconstructed



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 19 1981

Mr. Henry Eschwege
Director, Community and Economic
Development Division
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Eschwege:

This is in response to your letter of January 27 in which you requested comments on a draft GAO report concerning Fire Island National Seashore. The draft report contains one primary and four secondary recommendations. Each recommendation is briefly restated followed by the National Park Service's response.

GAO Recommendation No. 1:

Revise the zoning standards.

National Park Service Response:

The September 1980 standards, which are the subject of the draft report, are actually a revision of standards set in 1966. The revision began in 1974. In developing the revised standards, the National Park Service engaged in an intensive public involvement process. Seven formal public hearings were held from 1974 to 1978. Copies of the General Management Plan, which called for the development of a model zoning ordinance, were sent to 2,000 individuals in September 1978. Copies of the proposed standards were sent to the Fire Island Association; officials of the four affected zoning authorities, and Federal, State, and local elected officials. Additional public hearings were held involving an estimated 4,500 people. Proposals were then amended as the result of public input and were published in the Federal Register in January 1980. Further modifications were made following additional public comment. The final zoning standards were published in September 1980.

During the time that hearings were being held by the National Park Service on the zoning issue, legislation was introduced and passed to increase the acquisition authorization by \$2 million.

In November 1976, a National Park Service "activation memorandum" pertaining to P.L. 94-578 interpreted the amended legislation to mean that acquisition priority should be given to those properties undergoing or liable to undergo variances from zoning ordinances.

Responses to GAO's specific questions on reconstruction, expansion of existing structures, and waiver of condemnation authority for variances are developed below.

Reconstruction of Non-Conforming Uses:

Congress recognized that landowners who already had houses on Fire Island when the Seashore was created might find that their structures would not conform to the zoning standards. Therefore, Congress "grand-fathered" such pre-existing structures. Title 16, U.S.C. §459e-1(f) sets forth the criteria for "improved property". "Improved property" means a building, the construction of which was begun before July 1, 1963, and a certain amount of land on which it is situated. These pre-existing structures could be maintained as long as they were not made the subject of a variance or other non-conforming use.

This legislative scheme is consistent with basic zoning law. Under most municipal ordinances, if existing uses are rendered non-conforming by some change in zoning laws, there frequently is some sort of provision for such uses. Sometimes there is a five- or ten-year period over which pre-existing uses may be revised to come into conformity before being required to cease operation. Under other ordinances non-conforming uses may be continued in perpetuity, as here, but if the non-conforming structure is destroyed or altered, the replacement structure or changed structure must conform to the new standards. The purpose of such provisions is to eventually eliminate non-conforming uses, without undue hardship to landowners who initiated their use according to previous standards. As long as the new ordinance is a reasonable use of the police power, there is no inherent right in the landowner to be able to enlarge, alter or reconstruct a non-conforming use without conforming to current standards.

The Fire Island statute and regulations are entirely consistent with these basic principles of zoning law. In fact, the zoning standards are more liberal, as a matter of policy, than they need be under law. Section 28.5 of the regulations allows non-conforming uses to be continued in perpetuity. If the landowner seeks to enlarge or reconstruct a non-conforming use, then the structure must conform to current standards. Even here there are several exceptions. If the property is in the Community Development District or the Seashore District and it was "improved property" conforming to the local zoning standards or had a variance when originally built, then it may be rebuilt to its original dimensions. If it was in the Community Development District and was "unimproved property" (i.e. it doesn't qualify as "improved property", usually post-1963 structures) then it may be rebuilt if it conformed to existing standards when it was built. If it was originally built in violation of the standards, then it must conform to current standards. Likewise "improved property" in the Dune District may be rebuilt if it had been built in conformity with local zoning or had a variance when it was originally built. Similarly, "unimproved property" in the Dune District portion of the communities may be rebuilt to current standards if it had originally been built to conform to the zoning standards in effect at the time.

Expansion of Existing Structures:

As explained above, the Act allows owners of "improved property" (usually pre-1963 structures) to retain their homes, even in the Seashore District where no new development is allowed. The Seashore District is gradually being returned to its natural state as use-and-occupancy agreements expire and landowners voluntarily sell their property to the Government. The remaining private owners find themselves in the enviable position of owning houses surrounded by open space, free from the risks of further development on neighboring parcels. The revised zoning standards provide that permitted uses in the Seashore District include residential use, and maintenance, and alteration of "improved properties", provided there is no increase in lot coverage. This provision would allow a landowner to remodel the interior of his home or to expand it vertically, but it would not permit horizontal additions.

This standard is based on the underlying notion that landowners pre-dating 1963 should be able to retain the property as it was at the passage of the Act. The requirement that they cannot expand is in part based upon problems at Cape Cod National Seashore where alterations were permitted and landowners then asserted that the conversion of a one-room shack with no utilities into a four-bedroom house could still qualify as mere "alteration". While the limitation to pre-1963 dimensions is a policy choice and not a legal requirement, the provision is not contrary to basic zoning law nor is it inconsistent with the legislative history.

[GAO COMMENT: The Park Service acknowledged that the limitation to pre-1963 structures is a policy choice and not a legal requirement. The Park Service's policy, which is designed to protect against the conversion of a shack into a 4-bedroom house, also prohibits minor improvements, such as expanding a boardwalk, which we cite in the report. The possibility of the first example occurring on Fire Island is highly unlikely, while the hardship caused by the second example is pronounced. We believe the Park Service should allow homeowners in the Seashore District to expand their structures as long as they receive a variance from the local municipality and the variance will not cause harm.]

[GAO COMMENT: According to the land acquisition plan for Fire Island, the Park Service plans to acquire all properties built at variance with local zoning ordinances. The plan does not explain why certain kinds of variances cause harm and thus the need for the Park Service to acquire such property. The plan further reinforces our belief that the Park Service intends to acquire all land with variances without showing whether the variance will or will not cause harm. The Acting Chief of the Land Acquisition Division of the Park Service's North Atlantic Region advised us in late March 1981 that the draft plan has been revised but the revision had not yet been approved. Unless the revision addresses the problems we have discussed in our report, the problems are likely to continue. We believe that the Park Service needs to explain what kinds of incompatible uses will subject Fire Island property to possible acquisition by the Service.]

GAO Recommendation No. 3:

Discontinue the practice of routinely objecting to zoning variances.

National Park Service Response:

With respect to the Park Service's policy of objecting to variances, it should be recalled that the Secretary's condemnation authority is automatically reinstated when a variance is issued. While the Park Service is not legally bound to object to every variance issued by the towns, this practice is supported on policy grounds because it is a way of informing those landowners, who may not understand the restrictions, that they run a risk of condemnation if they choose to build a non-conforming structure. The Park Service informs the landowners so as to provide them the opportunity to reconsider and erect a conforming structure.

Clearly, not every non-conforming structure is condemned. As the draft Land Acquisition Plan shows, a non-conforming structure in the Community Development District, which is not in the Dune District, not a commercial or industrial use, and not in a wetland, is last on the priority list for acquisition. Therefore, the landowner may choose to run the risk of condemnation by building a structure constituting a variance.

The potential exists for developing a procedure (informally, not legally binding) for "approving" variances and exceptions once the four zoning authorities on Fire Island have submitted approvable ordinances to the Secretary of the Interior. If these submissions meet the standards established in 1980, a means of recognizing unique hardships or other non-standard applications can be jointly developed between the municipalities and the Park Service. At that time, criteria which maintain low-density development, establish maximum lot coverage and assure no conflict with other community uses may be considered, even though they are variances or exceptions to approved zoning ordinances. Persons whose structures were built with a variance prior to approval of the ordinances could reapply under the same terms and criteria and have the objection waived or removed, if appropriate. This represents a suggestion rather than a present administrative procedure and will be more fully explored.

District, however, where it is the intent of the National Park Service to leave the land in its natural state.

[GAO COMMENT: Although the Park Service said that all purchases have been made to preserve the value for which the Seashore was established, it did not comment on the examples of unnecessary acquisitions we discussed in our report. However, the Park Service could carry out our recommendation by selling or leasing back unnecessarily acquired properties.]

Conclusion:

In past reports, the General Accounting Office has been critical of the National Park Service for acquiring land when, in GAO's opinion, zoning would have provided sufficient protection for park resources. In this latest draft report, however, GAO is critical of the Service's reliance on zoning. Clearly Congress intended that zoning should be employed at Fire Island. In fact, GAO personnel, at a meeting with Department of the Interior employees on June 13, 1979, cited Fire Island as a place where zoning works. Now GAO would have the new zoning standards relaxed, but it does not say how far the relaxation should go. In the Service's view, and in the view of the majority of the thousands who took part in the public hearings, weaker standards would be largely ineffective in protecting the values for which Fire Island National Seashore was established.

[GAO COMMENT: We are not critical of the Park Service's reliance on zoning; we are critical of the Park Service's application of the zoning standards. Without relaxing the standards, the Park Service could make them flexible enough to allow variances when no harm will be done to Fire Island. We believed in June 1979 and continue to believe that prudent use of zoning restrictions is a workable alternative to fee-simple acquisition for preserving Fire Island's natural resources. However, zoning should be an alternative to, not a means of, fee-simple acquisition. In some instances the Service's goal appears to have been to assure that structures comply with local zoning ordinances even though no evidence exists that the variance would cause harm. We believe that zoning standards should be restrictive enough to protect the natural resources, but not so restrictive as to prevent building which would not harm the natural resources.]

The standards established by the Service are merely a foundation on which local governments base their zoning ordinances. As of March 10, 1980, the town of Islip had submitted a zoning ordinance, which conforms to the new standards and which has been approved. The other communities involved--the incorporated villages of Saltaire and Ocean Beach and the town of Brookhaven--have made significant progress in developing zoning ordinances and have submitted them for approval. The ordinances are being reviewed at this time and it appears that acceptable ordinances will be developed in the near future. These actions illustrate the spirit of cooperation between the Service and the communities and validate the balanced approach of the new zoning standards.

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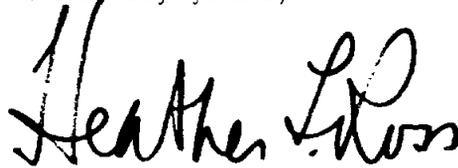
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The National Park Service realizes that the effectiveness of approved local zoning may be diminished by numerous variances, which collectively would detract from the area's values. The enforcement of the zoning ordinances, of course, is the province of the local communities. The Federal Government's acquisition authority is viewed as the final resolution in cases where local action, clearly, could not effectively deal with land uses incompatible with established standards and local controls.

[GAO COMMENT: The Park Service's realization "* * * that the effectiveness of approved local zoning may be diminished by numerous variances, which collectively could detract from the area's values" is not, in our opinion, based on evidence the Park Service presented to us during our review or in its comments on our draft report. The Service notes that enforcement of zoning ordinances is the province of the local communities. Enforcement also includes granting reasonable variances. Such variances do not necessarily harm Fire Island's natural resources--a point the Park Service seems reluctant to acknowledge.]

We appreciate the opportunity to comment on the draft report. We would be pleased to discuss the various issues further before issuance of a final report if GAO so desires.

Sincerely yours,



Assistant Secretary for
Policy, Budget and Administration

(140100)

[GAO COMMENT: Unless the Park Service specifically shows how a variance will cause harm, the landowner will not have a basis for reconsidering whether to build a nonconforming structure. All the landowner knows is that the variance received from the local municipality is not acceptable to the Park Service. If the Park Service sincerely wants to help the landowners reconsider, it needs to do more than just tell them that their property is at variance with the zoning ordinances.

The Park Service states that every nonconforming property is placed on the acquisition list regardless of harm, if any, the property causes. We believe that only property whose use will harm Fire Island's natural resources should be placed on the list. We further believe the Park Service should show specifically how each property placed on the list will harm Fire Island.

We agree with the Park Service's suggestion to more fully explore a procedure for "approving" variances to local ordinances. Furthermore, specific criteria on what variances are allowable should permit landowners to build without worrying about whether their homes will be condemned.]

GAO Recommendation No. 4:

When seeking concurrence in a declaration of taking, explain to the Senate Committee on Energy and Natural Resources specifically why variances would adversely affect the natural resources of Fire Island.

National Park Service Response:

The National Park Service can better explain to the Committee how a variance, if allowed, would impact upon Fire Island National Seashore, and the Service will strive to do so in the future. It should be noted that the letters criticized by GAO were written between 1977 and early 1980 and related to violations of the 1966 standards, not the 1980 standards that are the subject of GAO's draft report. There have been no condemnations under the 1980 standards.

[GAO COMMENT: We believe this action will carry out our recommendation.]

GAO Recommendation No. 5:

Sell unnecessary land.

National Park Service Response:

The recommendation presupposes that the National Park Service has purchased unnecessary land. All purchases have been made to preserve the value for which Fire Island National Seashore was established. Nevertheless, the sellback and leaseback of acquired properties, after the imposition of restrictions, are under consideration. This practice would be impractical in the Dune

Waiver of Condemnation Authority for Variances:

The Act does not create a variance process that would permit the Park Service to certify if a non-conforming structure might harm the resource or not. The Secretary's authority to suspend condemnation is not discretionary. If a structure does not conform to an approved local ordinance, then it is subject to condemnation. Section 3 (e) of P.L. 88-587 (16 U.S.C. §459e-2(e) provides that if "any improved property...is made the subject of a variance under...such zoning ordinance...suspension [of condemnation authority] shall automatically cease". Thus the Park Service cannot adopt GAO's recommendation in this regard. The Park Service cannot state that structures that do not conform to the standards will not be subject to condemnation when the law provides that they are. The best that the Park Service can do, and has been doing, is to say that such structures are lowest on the acquisition priority list and to concentrate limited resources on structures which clearly do cause damage to the resource, such as houses on the dunes. In other words, while he can adopt GAO's recommendation to not condemn as a matter of informal policy discretion, the Secretary could not issue regulations or a certificate guaranteeing that future Administrations would not condemn a property with a variance.

[GAO COMMENT: We agree with the Park Service that it cannot suspend its condemnation power even if the variance may not cause harm. We believe, however, that the act has enough latitude for the Park Service to notify landowners that it does not plan to condemn their property even though by law the Congress has given it the power to condemn any property with a variance.]

GAO Recommendation No. 2:

Establish criteria for acquisition by revising the land acquisition plan.

National Park Service Response:

The Park Service agrees with GAO's assessment of the first draft Land Acquisition Plan. Because of many of the very same deficiencies noted by GAO, the Service commenced a revision several months ago. Public meetings on the zoning standards necessarily included many comments on land acquisition, thus causing a delay in completing the Plan. Five hundred copies of the draft were mailed to individuals and organizations. Since then meetings have been held with at least four groups and several individuals.

The revised draft plan lists criteria for acquisition of lands outside the Seashore District and within the boundaries of Fire Island National Seashore. There is a list of those undeveloped lots within the Dune District that could potentially be acquired through condemnation should the owners of these lots seek to develop them. The list is available for review at the Seashore Headquarters. However, there is no feasible way to identify in advance which, if any, future acquisition actions may result from violation of approved zoning ordinances within the Community Development District.

As indicated above, the Park Service would legally be able to be far more restrictive concerning reconstruction of non-conforming uses that it has chosen to be. While these rules may excite controversy, we have found that the majority of people who are criticizing these rules are people who built their homes after 1963 contrary to the standards in effect at the time. It is primarily the landowners who are non-conforming by choice, and not by changes in the law, who are now criticizing the new standards.

[GAO COMMENT: The Park Service believes that if an existing structure is rendered nonconforming by a change to a local zoning ordinance, the structure, if rebuilt, must conform to current zoning ordinances. However, we believe that nothing in the legislation prevents a person from rebuilding a non-conforming structure if the local municipality grants a variance. Under its current zoning standards, the Park Service can condemn numerous properties in the exempt communities if the property owners cannot rebuild to the current zoning ordinances. We believe that only property for which variances would harm Fire Island's natural resources should be condemned.]

The Park Service blames the controversy about what types of structures can be rebuilt on people who built their homes after 1963 contrary to the standards in effect at the time. Many of these people built their homes with variances granted by the local zoning authorities who made judgments that the variances would not harm Fire Island's natural resources. We believe the Park Service should allow people to rebuild their homes as they were originally if the rebuilding does not harm Fire Island's natural resources and the local community grants the variance. Also, we see no reason why the Park Service should apply different rebuilding standards to dune district property in the exempt communities.]

In the case of Biderman v. Morton, which GAO also cites, the Court stated:

It is estimated, on the basis of aerial surveys, that a 32-percent increase in building has occurred from 1964 through 1973. The affidavits demonstrate that such intensification of use, and the corresponding expansion of commercial uses, in the opinion of eminently qualified experts, has materially increased the ecological effect on the island's limited water resources and has increased the risk if not the actuality of water contamination from septic tank run-off and sea water intrusions...

The Appellate Court in 1974 urged that the Government get on with the "business of saving this charming and fragile outpost of nature before the encroachments of haphazard development irrevocably despoil it". Senator Javits quoted the above court statements when seeking to increase the land acquisition authorization for the Seashore.

We believe that the zoning standards not only comply with the legislation, legislative history, and desires of the public, but also with the court's statement on the matter. The standards balance natural resource preservation against landowners' rights to develop their property.

[GAO COMMENT: The Park Service's belief that the standards balance natural resource preservation against landowners' rights seems inconsistent with its Fire Island land acquisition practices. The Park Service has routinely objected to local zoning ordinance variances (landowners' rights) without showing how such variances adversely affect Fire Island's natural resources (preservation). We believe the zoning standards restrict landowners' rights beyond what is necessary to protect Fire Island's natural resources. The standards prevent building without showing how such activity will harm Fire Island's natural resources. Further, the act does not require the Park Service to condemn property which does not harm Fire Island's natural resources. As stated in the report, the Congress carefully avoided interfering with the municipalities' power to grant zoning variances. Routinely objecting to variances tends to create the impression in others that the Park Service is interfering with the municipalities' power to grant variances.]

to its previous dimensions provided the building conformed to minimum lot sizes and setback requirements or had a variance or exception issued by the zoning authority at time of original construction.

(ii) "Improved property" in the Dune District portions of the Community Development District and the Seashore District may be reconstructed only if it can conform to all current zoning standards and provided the building conformed to minimum lot sizes and setback requirements or had a variance or exception issued by the zoning authority at the time of original construction.

(iii) "Unimproved property" in the Community Development District may be reconstructed to its previous dimensions provided the building conformed to minimum lot sizes and setback requirements at the time of original construction. "Unimproved property" in the Dune District portion of the Community Development District may be reconstructed if it can conform to all current zoning standards and provided the building conformed to minimum lot sizes and setback requirements at the time of original construction. If such "unimproved property" was built pursuant to a variance or exception issued by the zoning authority, the owner may apply to the zoning authority for a special permit to reconstruct to previous dimensions under local law. However, such structures are not eligible for a Certificate of Suspension of Authority to Acquire Property by Condemnation. The Secretary may object to the issuance of the special permit or take other measures as appropriate under these regulations or local law.

(iv) "Unimproved property" in the Seashore District and "unimproved property" in the Dune District portion of the Seashore District may not be rebuilt.

you are saying. I am sure we can work out something along that direction. We will know more about it when we make our on-site inspection." (Id. at 43.) (Emphasis added.)

Representative Lindsay, another sponsor of the legislation, also emphasized that the bill was not designed to disturb the existing local communities on Fire Island:

"This bill, I am pleased to say, is designed to fit in with and not disturb existing local conditions. For example, the bill exempts from condemnation most of the land within a number of small communities in the western part of the island, as long as the owners conform to approved and valid local zoning ordinances." (Id. at 20637.)

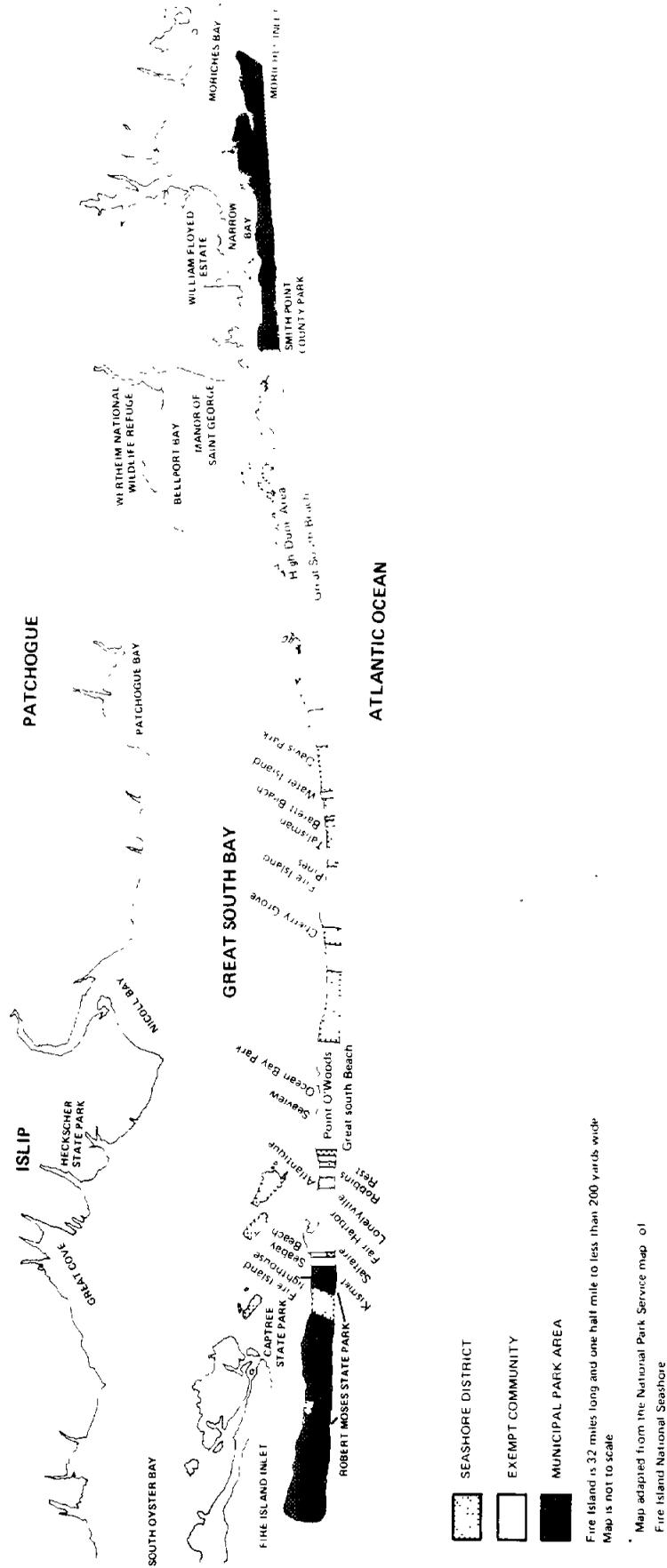
During Senate hearings on the Fire Island legislation, Senator Javits, one of the main sponsors of the bill, emphasized the protection of Fire Island property owners:

"I might point out that the scheme of the legislation is contained in section 2, and though it does not expressly spell out the formula it does so by exclusion, because it provides only that the seashore shall consist of property acquired by the Secretary and property transferred to the Secretary, thereby excluding property which is privately owned and which he can neither acquire, unless he had some power of eminent domain, which we don't give him, or which was conveyed to him by any of the other governmental echelons or by gift or device or in some other way.

"I certainly, for myself, couldn't agree more with the Chair. There is enough here which is available to make a magnificent Fire Island National Seashore Park in the interests of the Nation. It is unnecessary to move in and kind of mow down those who have established their homes and places in this whole area. As I say, I know it personally so I speak with great feeling on that subject." Hearings Before the Subcommittee on Public Lands of the Senate Interior and Insular Affairs Committee on Fire Island National Seashore S.1365 (Dec. 11, 1963, 88th Cong. 1st sess. 13.)

During this same hearing the following colloquy between Senator Bible and Mr. Maurice Barbash, head of a Fire Island citizens committee, shed light on the intent of the legislation:

Fire Island National Seashore



have general authority to sell lands to previous owners without a time restriction.

AGENCY COMMENTS AND OUR EVALUATION

The Park Service believes (see app. V) that its Fire Island zoning standards comply with the legislation, legislative history, and desires of the public. While we believe there is nothing illegal with what the Park Service is doing, we believe the zoning standards unnecessarily restrict homeowners' rights beyond what is needed to protect Fire Island's natural resources. Furthermore, we believe it is not necessary to achieve the act's purpose to condemn property unless the property is adversely affecting the Island's natural resources.

The Park Service agreed that criteria for acquiring property should be incorporated in the land acquisition plan. Our evaluation of the revised draft land acquisition plan now being reviewed by the Park Service indicates, however, that the Park Service plans to acquire all properties subject to a zoning variance if funds become available.

The Park Service said regarding its routinely objecting to variances that it has authority to condemn when a variance is issued. The Park Service said that by policy it objects to variances to inform landowners that they risk condemnation if they build a nonconforming structure. We do not dispute the Service's authority to acquire property by condemnation. We believe that if the Park Service wants to help the landowners reconsider their decision on rebuilding with a variance, it should explain why the variance will harm Fire Island's natural resources. We are concerned that the Service routinely objects to variances without showing how the variances will harm Fire Island's natural resources.

The Park Service agreed that it can better explain to the Senate Committee on Energy and Natural Resources how a variance, if allowed, would impact on the Fire Island National Seashore.

The Park Service generally agreed with our recommendation that it sell unnecessary land although it did not specifically acknowledge that it had unnecessarily acquired such land.

with approved variances that do not affect Fire Island's resources live under the threat of condemnation. We recognize that in some instances the Park Service may have to condemn property to protect Fire Island's natural resources. Our review showed, however, 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.

We believe that it is contrary to the act's purposes to condemn property not interfering with the Park Service's mandate to protect Fire Island's natural resources. The Park Service should condemn developed property with a variance only when the variance harms Fire Island's natural resources. All other owners of property developed with variances that do not affect the natural resources should be notified that the Park Service does not plan to condemn their property even though by law the Park Service retains the right to condemn.

Because the Park Service routinely objects to almost all variances, it has acquired more land than needed to meet the act's requirements. In addition, Park Service letters to the Senate Committee on Energy and Natural Resources requesting authority to take Fire Island properties do not specify the reasons for acquisition. The Fire Island draft land acquisition plan is inadequate because it does not clearly state the Park Service's reasons for deciding which properties will be acquired.

We believe the residents' concerns expressed at the town meeting are reasonable. The Park Service's zoning standards potentially place large numbers of Fire Island homes in jeopardy of condemnation. If the Park Service clarifies its land acquisition plan, revises and clarifies its zoning standards, and subjects to condemnation only those properties with variances that result in resource damage, many of the residents' fears will be alleviated.

Properties previously acquired by the Park Service in exempt communities but which are compatible with the purposes of the Fire Island National Seashore should be sold to the highest bidder. Furthermore, the last owner should be offered first opportunity to reacquire the property, unless the Park Service can demonstrate that the last owner's use of the property adversely affected Fire Island's natural resources.

RECOMMENDATIONS TO THE SECRETARY OF THE INTERIOR

We recommend that the Secretary of the Interior require the Director, National Park Service, to:

information before authorizing the taking of his property. The Park Service letter to the Senate committee stated that the property was located within the dune district and that the construction of the house violated the law prohibiting development in the dune district. The owner contended, however, that although his property was partially located in the dune district, the portion on which he was building was not. He also contended that, because construction began before the dune district law went into effect, the law did not apply to him. The owner believed that the Park Service deliberately misled the committee in its attempt to acquire his property.

THE PARK SERVICE NEEDS BETTER LAND ACQUISITION
CRITERIA AND SHOULD SELL UNNEEDED PROPERTIES

The Park Service can improve its management of Fire Island.

--It should clearly explain what kinds of use will subject Fire Island property to possible acquisition.

--It should sell back to original owners or private citizens properties it has acquired within the exempt communities, if these properties are suitable for development and the development will not adversely affect Fire Island's natural resources.

A more specific land acquisition plan
is needed for Fire Island

The Park Service's land acquisition policy guidelines require each park to justify its plans for acquiring property according to clear criteria that specify why some properties will be acquired while others will not. These plans are to comply with policy guidelines published in the Federal Register on April 26, 1979. However, the Park Service's draft land acquisition plan for Fire Island does not meet these requirements.

The draft plan does not specify which properties will be acquired nor set forth the basis for acquiring properties in the exempt communities. Criteria such as legislative mandate, incompatible use, public need, resource management, and public or administrative use are not mentioned as acquisition criteria--only variances or exceptions to local zoning ordinances. However, even these criteria do not specify what types of variances could subject a property to condemnation, so owners with variances do not know whether or not they will lose their properties.

The land acquisition plan, which was to be completed and approved by April 26, 1980, had not been finalized as of March 19, 1981.

The following example describes how the Park Service acquired a property which, in our opinion, did not need to be taken. On December 12, 1978, the Park Service acquired a property partially within the dune district by a declaration of taking. The Park Service acquired the property after objecting to a variance regarding the frontage needed for a walkway. The walkway was away from the dune district area and the variance granted would not, in our opinion, have harmed Fire Island's natural resources. The owner believed that the Park Service wanted his property because he was building too close to the dune district. However, construction was permitted on an adjoining lot as close to the dune district as the neighboring condemned property. (See photos on following page.) The adjoining property was not acquired because a variance was not needed for construction. As a result, the Park Service needlessly acquired private property in an exempt community that was zoned for development. This property should be resold for private use.

BETTER EXPLANATIONS ARE NEEDED ON REQUESTS
FOR CONGRESSIONAL APPROVAL TO TAKE PROPERTY

We examined five Park Service requests to the Senate Committee on Energy and Natural Resources concerning declarations of taking of Fire Island properties from January 1, 1977, through June 17, 1980. The committee formally approves Park Service requests to take property. The declaration of taking letters all revealed similar circumstances. The properties were located in exempt communities and were close to environmentally fragile areas (either the dunes or wetlands areas). All were subject to acquisition by condemnation because of variances granted by local municipalities. These variances would not have damaged Fire Island's natural resources.

All five requests cite the same reason for authority to take the properties. In general, they state:

"Construction has begun on the property which violates the standards established by the Secretary of the Interior for new development * * * and is a variance of zoning and development restrictions established in accordance with those standards."

The letters do not state the nature of the variances or the adverse effect they would cause. Many properties on Fire Island are developed with variances but not all are acquired. The declaration of taking letters should explicitly state the nature of the variance and how it would harm Fire Island.

The following example describes a situation in which an owner believes the committee did not receive accurate

Rebuilding post-1963 dune district homes

Property owners who built their homes after 1963 in the exempt communities and whose properties also lie within the dune district are treated even more unfairly in the reconstruction provisions of the zoning standards than similar property owners who built their homes before 1963.

The zoning standards require that owners of homes built after 1963 with variances approved by local zoning authorities are to either rebuild to current zoning standards or apply to the local zoning authorities for a special permit to reconstruct their homes to their original size. (See 36 CFR 28.5(c)(2)(iii) in app. IV.) However, the Park Service may oppose these special permits. If rebuilt, these homes will always be subject to possible condemnation by the Park Service--an unfair and unnecessary burden on the property owners. For example, even if a home was originally built in conformance with local zoning ordinances, current zoning ordinances may prevent its rebuilding if the new zoning ordinances require larger lots for development. Consequently, this property would always be subject to condemnation even though the Park Service may not be able to show how the reconstruction harms Fire Island's natural resources.

Improving homes in the seashore district

The Park Service's zoning standards unduly restrict the rights of seashore district residents who have improved their properties. The zoning standards prohibit these owners from increasing the lot coverage on their properties even if it would not violate local zoning ordinances. (See 36 CFR 28.4(c)(1)(i) in app. IV.) For example, the zoning standards prohibited a seashore district property owner from expanding his boardwalk width by 2 feet. The existing boardwalk (100 ft. by 2 ft.) was 20 years old and needed repair. The owner said that the minor 2-foot expansion is compatible with the local Brookhaven zoning ordinances but that the Park Service zoning standards do not permit increases in lot coverage on seashore district properties.

At the town meeting we held, residents argued that owners of improved property in the seashore district should have the same protection from condemnation as owners of improved property in the exempt communities. They indicated that the act did not distinguish between the development rights of owners of improved property in exempt communities and in the seashore district.

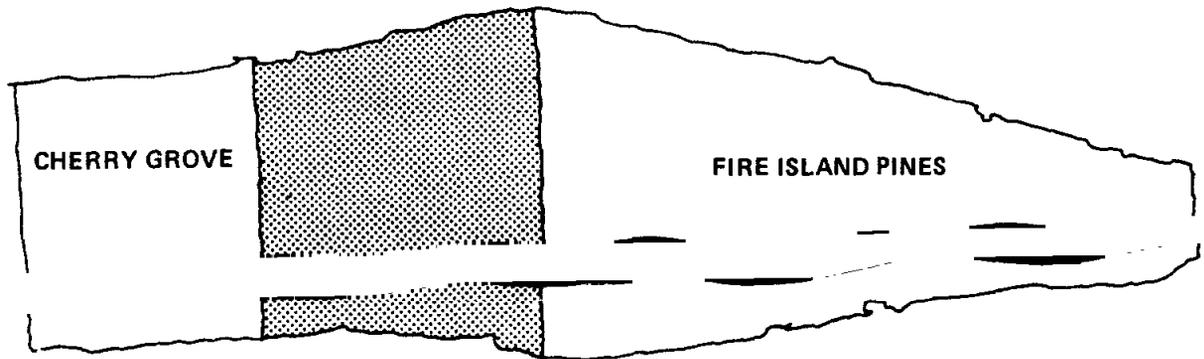


DUNE DISTRICT IN AN EXEMPT COMMUNITY



DUNE DISTRICT IN THE SEASHORE DISTRICT

SEGMENT OF FIRE ISLAND SHOWING DIFFERENT TYPES OF DISTRICTS



ATLANTIC OCEAN

-  SEASHORE DISTRICT
-  EXEMPT COMMUNITY
-  DUNE DISTRICT

We recommended that the Secretaries of Agriculture and the Interior require the heads of their services and bureaus to work with State and local governments to minimize land acquisitions by coordinating Federal management with local zoning to preserve existing and proposed wild and scenic rivers. Buying lands and easements should be used only if local governments grant permits for noncompatible use and for the acquisition of appropriate public access sites.

As a result of our recommendation, Interior officials said they will work more closely with State and local governments to minimize land acquisition and river protection costs.

by the park area superintendent or manager and approved by the appropriate regional director, should be clearly understandable and developed with public participation. Each plan was to be completed by April 26, 1980.

SCOPE, OBJECTIVES, AND METHODOLOGY

Senator Moynihan and former Senator Javits asked us to review the Federal management of Fire Island and determine whether the Park Service's final zoning regulations, issued on January 17, 1980, may have broadened the Secretary's condemnation authority and thus violated the intent of the Congress. We reviewed the enabling and subsequent legislation, legislative history, and Fire Island area plans to determine if land acquisitions and management practices were consistent with congressional intent. We also reviewed the Park Service's January 17, 1980, zoning standards 1/ to determine whether they were consistent with the intent of the Seashore Act. In addition, we reviewed September and October 1980 revisions to the zoning standards. We conducted a town meeting on June 23, 1980, in Patchogue, New York, to hear Fire Island residents' complaints about the Park Service's land acquisition and management practices on Fire Island. Twelve persons spoke at the meeting and 14 submitted written responses.

We also held discussions with Fire Island officials and representatives of the major property owners organizations on Fire Island. We analyzed information received from the zoning officials in the towns of Islip and Brookhaven, New York, which represent a majority of Fire Island's population, and talked to officials from the Park Service's regional solicitor's office and the land acquisition office regarding the Park Service's zoning standards and land acquisition practices. We did not address all of the residents' concerns, such as whether the Park Service was unfairly restricting travel on Fire Island and whether Park Service employees should be living in previously condemned houses.

PRIOR GAO REPORTS

We have issued other reports pointing out that some Federal agencies have unnecessarily acquired land or have used more costly acquisition methods than necessary. For example, on December 14, 1979, we issued a report entitled "The Federal

1/The regulations were later changed to Park Service standards. (45 F.R. 65575 (1980)).

that is subject to a variance 1/ under approved local zoning ordinances.

Except for an area extending about 8 miles beyond the the easterly boundary of Davis Park (see app. II), the Secretary is not permitted to acquire any privately owned, improved property (homes built before 1963) or interests therein within the boundaries of Fire Island, unless needed for public access to the beach, so long as the appropriate local zoning agency has in force a duly adopted, valid zoning ordinance that is satisfactory to the Secretary.

The Secretary is to issue regulations, which may be amended from time to time, specifying standards for local zoning ordinances that are consistent with the purposes of the act. The local zoning ordinances must be approved by the Secretary for improved property owners to be protected from condemnation. However, the act provides that the Secretary of the Interior may condemn property if it is at variance with local zoning ordinances.

The United States Court of Appeals, Second Circuit, stated:

"Congress carefully avoided interfering with the power of the municipalities on the Seashore to enact zoning ordinances or grant zoning variances. Federal oversight was restricted to condemnation upon the Secretary's post-implementation disapproval of a duly adopted, valid, zoning ordinance, or variance."
Biderman v. Morton, 497 F.2d 1141 (1974).

Furthermore, the court held that:

"* * * the federal government does not have what we characterize as 'go-ahead' power over the zoning decisions of the Seashore municipalities. The validity - the operative effect - of the local zoning ordinances, variances and amendments does not depend on the prior approval of the Secretary of the Interior."

The court went on to say that the Secretary can acquire by condemnation improved property not zoned in an approved

1/Refers to a legal action by a local government that permits an individual to build a home contrary to local zoning ordinances. This procedure is usually used to alleviate hardships caused by zoning ordinances.

APPENDIX

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- Stop routinely objecting to variances, unless the Park Service specifically justifies why the variances would harm Fire Island's natural resources, and revise the zoning standards accordingly.
- Specify in its requests to the Senate Committee on Energy and Natural Resources how variances would adversely affect Fire Island's natural resources.
- Revise the Fire Island land acquisition plan to state more specifically the circumstances under which properties will be acquired.
- Sell back to the highest bidder all acquired lands that are compatible with the purposes of Fire Island in communities where the Congress allowed development. The property should be offered first to the previous owner at the highest bid price unless the Park Service can demonstrate that the previous owner's use of the property harmed Fire Island's natural resources. The Service could attach scenic or developmental restrictions to the deeds before the properties are resold to assure that their use will be consistent with the enabling legislation. (See pp. 18 and 19.)

AGENCY COMMENTS AND GAO'S EVALUATION

The National Park Service disagreed with some of GAO's recommendations. The main disagreement concerns the Park Service's belief that its zoning standards balance natural resource preservation against landowners' rights. GAO believes the standards should be more flexible to allow homeowners to rebuild their homes at variance with local zoning ordinances as long as the variances do not harm Fire Island's natural resources. (See app. V.)

PREVIOUS GAO RECOMMENDATIONS ALSO APPLY TO FIRE ISLAND

In a January 1981 report entitled "Lands in the Lake Chelan National Recreational Area Should Be Returned to Private Ownership" (CED-81-10), GAO recommended that:

granted by the local authorities, provide that such property can then be condemned.

In addition, the Park Service's zoning standards restrict some property owners from increasing the size of their homes. GAO believes that the act permits these property owners to increase their home size and that the standards should be changed accordingly. (See pp. 7 to 13.)

PARK SERVICE IS ACQUIRING UNNEEDED LANDS

The Park Service acquired a number of properties on which the owners had built at variance with the local community's zoning ordinances. Many of these variances do not appear to harm Fire Island's natural resources. The act allows but does not require the Park Service to condemn properties with variances. However, the Park Service routinely objects to almost all variances granted by the local communities apparently to be in a position to condemn the properties when funding is available.

Further, the Park Service does not adequately show how variances harm Fire Island's natural resources. Before the Park Service condemns property because of a variance, it requests approval from the Senate Committee on Energy and Natural Resources. GAO's review of the five requests sent to the committee from January 1, 1977, through June 17, 1980, showed that the Park Service did not state either the nature of the variance or the adverse effect the variance would have on Fire Island's natural resources. (See pp. 13 to 14.)

THE PARK SERVICE NEEDS BETTER LAND ACQUISITION CRITERIA

The draft land acquisition plan for Fire Island was inconsistent with the Park Service's Land Acquisition Policy of April 26, 1979. The draft plan should, but does not, identify which properties will be acquired or specify why they should be acquired. The plan should list the reasons for purchase or condemnation, such as public need, incompatible use, or resource

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