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AFFORDABLE TWENTY-FOUR HOUR COASTAL ACCESS: CAN WE SAVE A WORKING STIFF'S PLACE IN PARADISE?

Robert Thompson

I. INTRODUCTION

While not all Americans enjoy going to the beach, millions and millions of people do. Beaches offer the possibility of providing so many satisfying experiences that they are the most popular vacation destination in the United States.¹ While many authors place the start of this passion for coastal visitation at the beginning of the nineteenth century when developments in transportation technologies and rising incomes made vacationing popular,² attractive beaches have actually been used for recreation and inspiration by the local population for much longer.³ Clearly, though, beach visitation and beach cottage ownership mushroomed with the rapid growth of automobile ownership and middleclass incomes in the 1920s, and then again in the post-World War II years.⁴ But in the 1960s

1. See James R. Houston, *The Economic Value of Beaches-A 2002 Update*, 70(1) SHORE & BEACH 9, 10 (2002) and sources cited therein.

2. See KARL F. NORDSTROM, BEACHES AND DUNES OF DEVELOPED COASTS 8 (2000); CINDY S. ARON, WORKING AT PLAY: A HISTORY OF VACATIONS IN THE UNITED STATES 3 (1999); John Davenport & Julia Davenport, *The Impact of Tourism and Personal Leisure Transport on Coastal Environments: A Review*, 67 ESTUARINE, COASTAL AND SHELF SCIENCE 280 (2006).

3. For example, see Roy P. Fairfield, *The Old Orchard 'Set-Off,'* 27 THE NEW ENGLAND QUARTERLY 229 (1954), for a description of the local use of Old Orchard Beach in Maine by local settlers: "Old Orchard had been a bathing mecca for years before it achieved renown as a summer resort. According to tradition the early settlers made an annual trip to the purifying ocean waters on June 24, John the Baptist's Day." *Id.* The use of ocean beaches for recreation and vacationing by the Romans is well documented. See LENA LENČEK & GIDEON BOSKER, THE BEACH: THE HISTORY OF PARADISE ON EARTH (1998); see also TONY PERROTTET, PAGAN HOLIDAY: ON THE TRAIL OF ANCIENT ROMAN TOURISTS (2003).

4. See, e.g., NORDSTROM, *supra* note 2, at 8-13.

and 1970s, as the coastlines were built up and became more crowded, beaches also started to get increasingly closed off.⁵ This closing off of beaches to the general public led to the beach access movement, which has tried to protect and expand the public's ability to gain physical access to the shoreline.

This Article argues that the beach access movement has an overly limited conception of access. To fully access the numerous experiential values offered by the beach, the public needs twenty-four hour access. While one does not need to literally stay awake for twenty-four hours, one needs to be able to see the sun rise, to watch the changing of the tides, to see the sun set, to marvel at the bright stars over the dark ocean, and to hear and smell the ocean while lying in bed. To fully access the shoreline's experiential values, one needs to have the time to explore and soak up experiences. The general public is losing this twenty-four hour access as rents on overnight accommodation rapidly increase, and the prices paid for formerly affordable ownership options are driven ever higher by wealthier Americans and foreign tourists. At first glance, one might think that this type of overnight access is nice, but not of enough importance to require government attention. However, Part II, Section C of this Article presents multiple arguments as to why this access must be protected in order to promote the public welfare and to recapture public benefits.

This Article argues that affordable twenty-four hour access to the experiential values of coastal areas should be protected and preserved, and that state and local government need to take steps to ensure that twenty-four hour access to the coast, a cherished public resource, is available to as many Americans as possible, not just to the wealthy. To make this argument, this Article briefly recounts the modern history of recreational coastal use: the growth of coastal visitation and access from the first half of the nineteenth century up through the 1960s, the closing of beaches in the 1960s and 1970s in reaction to growing crowds, the development of the beach access movement and coastal access case law, and the continuing loss of affordable accommodations on or near the beach. The Article then puts forth a three-part argument as to why the government should intervene in the market to protect and preserve affordable twenty-four hour access. The first part deals with the government's obligation to promote the general welfare and uses

5. Mark Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 775 (1996); JOSEPH T. KELLEY, ALICE R. KELLEY & ORRIN H. PILKEY, SR., *LIVING WITH THE COAST OF MAINE* 11 (1989); ORRIN H. PILKEY, ET AL., *THE NORTH CAROLINA SHORE AND ITS BARRIER ISLANDS: RESTLESS RIBBONS OF SAND* 15 (1998).

recent work on the biophilia hypothesis to show how twenty-four hour coastal access promotes the public good. The second part of this argument shows how the value of coastal property is actually attributable to positive externalities that emanate from a public resource, that is, the ocean. The third part argues that government should regulate coastal property in a manner that redirects the benefits of these positive externalities to the broader public.

Still, even if one believes that the government should regulate property to preserve affordable twenty-four hour access, one must also determine whether attempts by the government to preserve this access can withstand legal challenges. Thus, the Article looks at how the law concerning rent control, eviction controls, price controls, and takings would apply to state statutes or local ordinances that attempt to protect or promote twenty-four hour coastal access using these legal tools.

While this Article is concerned with the affordability of overnight coastal accommodations throughout the United States, it utilizes the history and circumstances of Roy Carpenter's Beach (Carpenter's Beach) in Rhode Island to provide a detailed examination of this problem. In many ways, Carpenter's Beach represents a high point of affordable twenty-four hour access. Carpenter's Beach consists of 426, tightly packed "cottages" of approximately 400 square feet each that rest on a low-lying, glacial outwash plain that has been slowly washing into the Block Island Sound since the end of the last ice age.⁶ This beachside community started in the 1930s as a place where a family could rent a plot of land for the summer to pitch a tent. As will be discussed more fully below, tents slowly evolved into modest cottages. What I want to stress here, though, is that any family with access to a car, enough money to pay a meager land rent, a tent or enough scrap lumber to build a cottage, and perhaps a high tolerance for crowded quarters, could have a home at the beach for the entire summer. This type of working stiff's paradise, however, appears to have been a fleeting moment in the sun. As retirees and second home buyers have flocked to the coast (particularly in the last twenty years), real estate prices have skyrocketed, and cute cottages and ramshackle shacks alike have been replaced by typically larger and more luxurious houses. The surging value of real estate threatens to put an end to the affordable, beachside cottage camp and trailer park.

6. See CHET RAYMO & MAUREEN E. RAYMO, *WRITTEN IN STONE: A GEOLOGICAL HISTORY OF THE NORTHEASTERN UNITED STATES* 139-144 (2d ed. 2001).



Figure 1: Cottages at Roy Carpenter's Beach (Thompson).

Many local residents and visitors might be glad to see these collections of humble hovels go because they can be viewed as seaside eye sores or because residents might expect the community to derive more economic benefit from the wealthier residents and vacationers who would replace modest communities. While local governments might prefer the increased property tax revenue that comes with soaring coastal property values, local governments should not be allowed to ignore, or even promote, the loss of affordable beach access, because this would allow local governments to appropriate an unjust portion of the value of a public resource for itself by excluding a portion of the general public, that is, the less affluent.

Even though Carpenter's Beach will receive special attention, I want to stress that the affordability problem is neither confined to formerly inexpensive ownership options, like mobile homes and tiny cottages, nor to New England. For example, the California Coastal Act not only defines "public access" to include access to overnight accommodations, but states that "[l]ower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided."⁷ However, the California Coastal Commission is specifically prohibited from setting room rates for

7. CAL. PUB. RES. CODE § 30213 (West 2006).

coastal accommodations,⁸ and the California Coastal Act, as presently structured, has allowed the prices of overnight coastal accommodations to skyrocket.⁹ Indeed, affordable coastal accommodations in California are already scarce. According to the California Coastal Commission, barely ten percent of coastal accommodations cost less than \$100 per night; thus, out of the 1600 RV parks, campsites, and hotels, the Commission only considers 134 to be low-cost.¹⁰

II. DISCUSSION

A. *The Expanding Use of the Coast*

1. Trains, Steamships, and Coastal Resorts

While today over 180 million Americans choose to visit the coast annually,¹¹ the early days of coastal visitation began slowly. Initially, roads were scarce and wagons slow, so beaches were relatively local attractions. For example, the early settlers near Old Orchard Beach, Maine, would make “an annual trip to the purifying ocean waters By the early decades of the nineteenth century, people from miles around piled into their wagons and trotted off to the shore to initiate the new season.”¹² As transportation improved, America’s coastal areas started to become a regional tourist destination and the crowds grew markedly. For instance, in Oregon:

“Summer people” began coming to the coast as early as the 1860s, arriving either by boat or by wagon on muddy roads that crossed

8. *Id.*

9. See Steve Scholl, *Can You Afford a Night on the Coast?*, 19 CALIFORNIA COAST & OCEAN 1-7 (2003), for a discussion of the failure of the California Coastal Act to maintain affordable accommodations.

10. Noaki Schwartz, *‘Condo Hotels’ Controversy along Calif. Beaches: Sierra Club Takes on Developers over Access to Coast*, THE ASSOCIATED PRESS, Aug. 26, 2006, available at <http://www.msnbc.msn.com/id/14555226/from/ET/>. Schwartz’s article describes how the affordability problem has heated up recently, in part due to a number of “hotel condo” proposals. For example, in the town of Encinitas, California, on land that is designated for public use, a developer has applied for permits to build a project that will include 100 condominiums, which will sell for \$1.5 million each, and thirty hotel rooms, which will rent for \$600 a night. *Id.* Sierra Club lawyer, Mark Massara, argues that these developments are simply a legal loophole that blocks access to average families and further privatizes access by pricing the vast majority of the public out. *Id.*

11. TIMOTHY BEATLEY, DAVID J. BROWER & ANNA K. SCHWAB, AN INTRODUCTION TO COASTAL ZONE MANAGEMENT 2 (2d ed. 2002).

12. Fairfield, *supra* note 3, at 229.

the Coast Range. Like tourist today, they were drawn to the ocean beaches, where they set up tents and stayed for much of the summer Completion of the railroad between Corvallis and Yaquina City in 1885, with ferry service to Newport, greatly increased the numbers of summer people.¹³

Similarly, in Old Orchard Beach, Maine, hotel development started in earnest in the 1850s when the new railroad came within four miles of the beach.¹⁴ When the railroad was extended to the town itself in 1873, “the floodgates were opened,” and the number of hotels increased from six to seventeen during the decade.¹⁵

Overall, numerous changes occurred in the second half of the nineteenth century that encouraged greater numbers of people to visit and vacation at the beach. These changes included the rapid expansion for railroads and steamship services, a reduction in the number of hours in the work week, a reduction in the amount of time devoted to religious practices, and the rise of an urban middle class. All of these changes made possible the beginning of relatively large-scale coastal tourism and the development of seaside resorts in many locations.¹⁶ Railroads and steamships were central to the development of such coastal resorts as Newport, Rhode Island, Cape May and Atlantic City in New Jersey, and Coney Island in New York¹⁷ and the establishment of such well-known coastal religious camps as Wesleyan Grove on Martha’s Vineyard, Massachusetts, Ocean Grove in New Jersey, and Old Orchard Beach in Maine.¹⁸

When the railroads and steamships arrived carrying many more visitors, with more money and more time, the tents and rustic camping typically

13. PAUL D. KOMAR, *THE PACIFIC NORTHWEST COAST: LIVING WITH THE SHORES OF OREGON AND WASHINGTON* 69 (1998).

14. Fairfield, *supra* note 3, at 230.

15. *Id.*

16. NORDSTROM, *supra* note 2, at 8-13. Railroad mileage increased from twenty-three miles in 1830 to approximately 30,000 in 1860 and to 166,000 in 1890. JON STERNGASS, *FIRST RESORTS: PURSUING PLEASURE AT SARATOGA SPRINGS, NEWPORT & CONEY ISLAND* 17 (2001).

17. See STERNGASS, *supra* note 16, at 17-18, 50-51, 76-82; see also LENČEK & BOSKER, *supra* note 3.

18. For a specific discussion of Wesleyan Grove, see DONA BROWN, *INVENTING NEW ENGLAND: REGIONAL TOURISM IN THE NINETEENTH CENTURY* 76-104 (1995). For a more general discussion of Ocean Grove, Wesleyan Grove, and other religious camps, see ARON, *supra* note 2, at 101-26. Of course, these are just some of the longest lasting and best known camp meeting sites; there were many others throughout the country. For instance, Thoreau discusses a camp meeting at Millennium Grove in Eastham, Massachusetts, that was attended by as many as 150 ministers and 5000 “hearers.” HENRY DAVID THOREAU, *CAPE COD* 56 (Bramhall House 1951) (1865).

began to give way to more permanent structures and more amenities. For example, on the Oregon coast, “[t]he tents at Nye Beach gave way to cottages and cabins, and stores were constructed to serve the growing community.”¹⁹ Of course, in the more fashionable destinations such as Newport, fancy hotels and then extravagant houses were built.²⁰

Yet even in the Spartan and spiritual tent camps such as Methodist Wesleyan Grove, permanent and evermore ornate structures eventually became the norm. The first camp meeting was held at Wesleyan Grove in 1835, and by 1857 250 tents covered the site. The first cottage was built in 1859 (by a Providence architect) and, during the early 1860s, cottages began to replace tents.²¹ “In 1864, there were forty cottages in the Grove (scattered among more than 450 private tents); by 1869, there were more than 200 cottages (and more than 600 tents and cottages together).”²² Because the visitors were people of relatively modest means, the cottages were not much bigger than the tents that preceded them.²³ Not only were the cottages small, they were often built for more than one family and hence very crowded. As Dana Brown explains,

Pictures of the cottages and their occupants in the 1860s and 1870s reveal a startlingly large number of people in each cottage, and estimates of the population and number of tents and cottages indicate that six or seven people per cottage—and perhaps more—must have been normal during camp meeting week.²⁴

Though small and crowded, many of these cottages were built with “taste and elegance.”²⁵

The “improving” of the built environment by replacing tents with cottages not only changed the look of Wesleyan Grove and other ocean side tent cities, it reduced their affordability. For example, in the 1870s, a tent with a wood floor and a small kitchen could be rented for a \$2.50 a week at Ocean Grove.²⁶ Considering that staying at a small summer boarding house might cost \$5 per person per week, the Ocean Grove tents were an

19. KOMAR, *supra* note 13, at 71.

20. STERNGASS, *supra* note 16, at 46-54, 183.

21. ARON, *supra* note 2, at 104; BROWN, *supra* note 18, at 78.

22. BROWN, *supra* note 18, at 78.

23. *Id.* While these people were not factory workers, many were employed as shopkeepers, blacksmiths, tanners, bookkeepers, watchmakers, and clerks. *Id.* at 82. Brown further describes these vacationers as “poised at the edge of middle class.” *Id.* at 84.

24. *Id.* at 87.

25. *Id.* at 78.

26. ARON, *supra* note 2, at 105.

affordable option for families of modest means.²⁷ But as the wealth and expectations of the vacationers grew, tents were removed so that cottages and houses could be built and the affordability ultimately decreased. While there were once over 700 tent sites, the New York Times reported a few years ago that only 114 remain and that there is a seven year waiting list to rent any of these.²⁸ If one cannot wait seven years to vacation in Ocean Grove, one of the houses that replaced some tents—a three-bedroom Victorian that was fully rented during the 2006 season—is available for the 2007 season running from Memorial Day to Labor Day for \$15,000 a month.²⁹

The growth, however, was not limited to the fancy society hotels or the Methodist church camps; other tourist developments and attractions sprang up around these destinations, taking advantage of their good reputations and transportation connections. For example, by 1889, Asbury Park on Ocean Grove's northern border had 30,000 summer visitors staying at almost 200 hotels and boarding houses or one of the nearly 800 private residences.³⁰ Similarly, Oak Bluffs sprang up next to Wesleyan Grove as a related but more (though not *too much* more) secular and wealthy neighbor. Through the end of the nineteenth century oceanfront resorts grew rapidly, yet due to a dependence on trains and ferries, coastal tourism was heavily concentrated in a relatively small number of places. However, once an affordable automobile became available, much more of the coast opened up for a larger number of vacationers.

27. *Id.*

28. Sandra Hurtes, *Havens: Weekender Ocean Grove, N.J.*, N.Y. TIMES, June 14, 2002, at F8.

29. Our Town Rentals, <http://www.ourtownrentals.com/index/listings/page472.htm> (last visited Oct. 5, 2006). While buildings were replacing tents in coastal tourist destinations in the second half of the nineteenth century, tents continued to play a role in housing the public, albeit a steadily decreasing role. For instance, even as Old Orchard Beach, Maine rapidly built new hotels and boarding houses, tents were still also being used for accommodations: "During the late seventies people flocked to the campgrounds from all over New England, many housing their horses in central stables and tenting out for weeks." Fairfield, *supra* note 3, at 27. On the other hand, in 1867, when Oak Bluffs began developing next to Wesleyan Grove, the deeds explicitly prohibited the erection of tents. BROWN, *supra* note 18, at 96-101.

30. ARON, *supra* note 2, at 106. For a discussion of the tension between Ocean Grove and its non-religious neighbors, see *id.* For a discussion of the anxiety that Wesleyan's organizers felt concerning neighboring development, see BROWN, *supra* note 18, at 96-101. For a discussion of the tension between a religious camp and the rest of the tourist attractions developing around Old Orchard Beach, Maine, see Fairfield, *supra* note 3, at 27.

2. Opening Up the Coast: Affordable Automobiles and Affordable Accommodations

One of the primary reasons that the car has been so popular is that it allows individuals far more control over where they can go and when they can go there. Before the automobile became a middle class mainstay, people were largely restricted to the routes and schedules of the trains and steamships.³¹ One way to think about the limited reach of railroads is that trains ran along about 300,000 miles of set rails at the beginning of the twentieth century.³² Automobiles, on the other hand, had almost 3,000,000 miles of road available to them.³³ Even though most of these miles were dirt and many of them were difficult, once one had an automobile, one could reach places along the coast that were previously inaccessible. By the end of the nineteenth century, the spreading ownership of cars increasingly allowed summer cottages, boardinghouses, and farms to compete with traditional resort hotels.³⁴

Tourism had long been pursued as an economic development strategy within certain coastal communities. For example, as early as 1729, West Indian and South Carolinian planters began summering in Newport, Rhode Island.³⁵ However, tourism declined so drastically during the American Revolution, that by 1828, Adam Hodgson reported that he had seldom seen “a more desolate place . . . or one which exhibited more evident symptoms of decay.”³⁶ But starting in the 1830s, tourists started to come back and the city vigorously pursued the tourist trade during the 1840s and 1850s.³⁷ By 1852, it was reported in a guidebook that Newport had “become a favorite resort for rank, fashion, and beauty, from all parts of the Union, it has wonderfully smartened up.”³⁸ However, that type of economic development could not occur in places that were beyond the reach of the railroad and steamship. These areas needed to await the development of the mass produced automobile and the building of better roads before they could develop their tourist trade.

31. WARREN JAMES BELASCO, *AMERICANS ON THE ROAD: FROM AUTOCAMP TO MOTEL, 1910-1945* 23 (1979).

32. *Id.* at 23.

33. *Id.*

34. *Id.* at 27-28; *see also* BROWN, *supra* note 18, at 207.

35. Lawrence W. Chidester, *The Importance of Recreation as a Land Use in New England*, 10 J. LAND & PUB. UTIL. ECON. 202 (1934).

36. STERNGASS, *supra* note 16, at 40.

37. *Id.* at 42-54.

38. *Id.* at 47.

Cape Cod, Massachusetts, provides an excellent example of using road building to develop a tourist industry. As early as 1860, rather typical resorts were established at either end of the Cape (at Sandwich and Falmouth in the west where the railroad stopped and at Provincetown in the east where the steamboat landed). Yet, the sixty-five miles in between was difficult to access and sparsely developed.³⁹ For example, in 1849, Thoreau described his stagecoach trip to Orleans, on the outer Cape, as slow, rough, and crowded; a trip that is suitable only for local residents and the truly adventurous.⁴⁰ The Commonwealth of Massachusetts, though, recognized the importance of automobile tourism for local economic development. Consequently, by 1915, the Commonwealth had converted Thoreau's bumpy stagecoach ride into a comfortable automobile ride on paved and well-marked modern roads.⁴¹ And the tourists did come. On a Sunday in 1936, state police counted 55,000 automobiles crossing just one of the bridges over the Cape Cod Canal.⁴² By 1951, "over 200,000 tourists were visiting Cape Cod at one time, jamming the highways, overnight cabins, and restaurants."⁴³ And these cottages, overnight cabins, tourist homes, and restaurants developed all over the Cape, changing completely the way visitors consumed Cape Cod.⁴⁴

3. Affordable Ownership: A Working Stiff's Place in Paradise

The automobile brought a more dispersed pattern of development to many coastal areas. Concentrated resorts were replaced or at least joined by relatively low density development that stretched along the coast. This pattern accelerated with post-World War II prosperity. As Karl Nordstrom explained:

Mass tourism occurred after World War II, due to a general increase in national incomes and its distribution to different social levels, combined with increased free time. The diffusion of tourism

39. Lewis M. Alexander, *The Impact of Tourism on the Economy of Cape Cod, Massachusetts*, 29 *ECONOMIC GEOGRAPHY* 322 (1953); see also BROWN, *supra* note 18, at 207.

40. THOREAU, *supra* note 18, at 28-39.

41. See BROWN, *supra* note 18, at 208. For a discussion of how the automobile generally freed American tourists from the negative aspects of large resorts and railroad travel, see BELASCO, *supra* note 31, at 19-69.

42. BROWN, *supra* note 18, at 209.

43. Alexander, *supra* note 39, at 323. Of course, the cars full of tourists have never stopped coming and now Cape Cod is notorious for its "mammoth traffic jams on every summer weekend." BROWN, *supra* note 18, at 209.

44. Alexander, *supra* note 39, at 322-23.

has turned many ports and fishing villages into resorts. Automobile access has been the primary stimulus for development in many areas, extending the zone of development beyond centers of mass transit.⁴⁵

The extending of the area of development not only changed where coastal tourists stayed, it enabled an enormous number of Americans to own a piece of the coast—however humble it might be—for the first time. This was simple land economics. Because the automobile freed people from the land near rail stations and ferry landings, the supply of accessible coastal property expanded tremendously; and when supply increases dramatically, prices decrease dramatically. Of course, demand also increased along with post-War prosperity and car ownership. Still, there was initially a lot of land out there with a wide range of desirability, so that lots that were more distant, less scenic, simply tiny, or some combination of the three, remained affordable. What followed during the 1920s was a building boom along the coast that has periodically stalled, but has never stopped. When Patton and Kent describe the Connecticut coastal construction experience, they are describing a process that other coastal states have either gone through or are currently going through:

In the 1920s, the emerging middle class with its paid vacations began a dramatic reconstruction of the coast; shorefront bungalows were built shoulder to shoulder on any open space not already claimed by the wealthy, who had beaten the middle class to the beach and built castles at the end of the 19th century. The building boom of the 1920s rolled over the dunes, slapping up frame houses as close to the water's edge as possible, sometimes on stilts literally in the water. Construction stalled during the Depression and war years but resumed with the prosperous 1950s. By the 1970s, waterfront housing development had reached saturation. Undeveloped lots were a thing of the past.⁴⁶

Even though living along the coast eventually became quite expensive in many areas, initially there were some truly affordable options. For instance, the development model at Carpenter's Beach, Rhode Island, which was followed in many coastal locations, allowed even people who weren't quite middle class to secure their own little place in paradise. Initially, the

45. NORDSTROM, *supra* note 2, at 8 (citations omitted). For the importance of the automobile in transforming coastal tourism, see LENČEK & BOSKER, *supra* note 3, at 223-27.

46. PETER C. PATTON & JAMES M. KENT, A MOVEABLE SHORE: THE FATE OF THE CONNECTICUT COAST 119 (1992).

tenants at Carpenter's Beach could rent a piece of land for the summer to erect a tent. Typically, residents built wooden platforms for the tents and slowly tents evolved into permanent, but very modest, cottages. As long as the tenants paid the yearly lease and did not cause trouble, the cottage could stay on the same spot year after year. I have met some families that have been on the same spot for over seventy years. So while the ownership interest has been in personal property, the expectation concerning the real property has been strong and long-lasting.

Carpenter's Beach, not by accident, was founded on land between and distant to the coastal rail and ferry stops in Westerly and Narragansett, Rhode Island. This was land that was too far from either resort area to be developed in the nineteenth century. Moreover, Carpenter's Beach is not one of the better beaches. It is not wide and the sediment is coarse and, in places, rocky. Consequently, the land remained as potato fields well into the twentieth century. In fact, one current tenant told me that when his grandparents bought a cottage in Carpenter's Beach in the 1930s, "people laughed at them; 'Who wants to be down there?' they said."⁴⁷

Even though Carpenter's Beach started as a campground of sorts, this humble form of housing had its rituals and charms that built community. A man, whose parents had been longtime tenants and who spent his summers there as child, told me how in the early years a group of men would build tent platforms at the beginning of the season. When evening came, they would turn on a car radio, put the lights on the platform, and have a dance on the platform so that it would settle into the sand. The next morning, they would erect the canvas walls and roof. He also recalled how his parents eventually built one of the small 400-foot cottages out of rather meager materials. In fact, the original footings on which the cottage's floor rested were crates for bottles of Narragansett Beer and he fondly recalled seeing the "Have a Gansett, friend" slogan every time he entered the cottage. Eventually, all of the tents disappeared to be replaced by 426 tightly packed cottages.

In many ways, Roy Carpenter's Beach represents a high point of affordable twenty-four hour access. This beachside community and others like it were a place where any family with access to a car, enough money to pay a meager land rent, a tent or enough scrap lumber to build a tiny cottage, and tolerance for crowded quarters, could have a home at the beach for the entire summer. The family could have their own little version of the good life because they could have twenty-four hour access for the summer

47. Conversation with an unidentified resident (Apr. 22, 2006).

to the ocean that belonged to all Americans and not just the wealthy vacationers at Newport, Cape May, or Mount Desert Island.

In the 1950s, travel trailers and trailer homes began to appear in new developments that were based upon the same property arrangement: the property owner leased land for the summer or the year and the lessee owned the trailer. When owners modified their trailers, the trailers often took on a hybrid quality as lean-to porches and rooms were added to the trailer's sides (see Figure 2, trailers at Mary Carpenter's Beach). In milder coastal climates such as Florida, mobile home parks quickly developed in coastal communities as an affordable option for retirees.



Figure 2: Trailers at Mary Carpenter's Beach (Thompson).

B. Closing Off Access to the Coast

1. The Coastal Access Backlash

As more people used automobiles and the growing highway system to escape from the cities to get to the beach, beach communities started to attempt to restrict access in the 1970s. Not surprisingly, this growing attempt to close out the public was perhaps felt earliest and most intensely in states like Connecticut, New York, and New Jersey, where the coastline

was heavily developed and residents from large nearby cities would flock to the coast on hot summer days. As Mark Poirier explains:

The advent of the automobile and an increasing number of vacation travelers have put pressure on New Jersey beaches since the 1950s. Municipal beaches traditionally had been open to all, but beachfront municipalities began to take steps to address the congestion by restricting the use of the beach and by charging fees.⁴⁸

However, the problem has not been restricted to these states. In fact, the loss of traditional public access when development increases is a theme that has been noted by many authors in many states and that continues to this day.⁴⁹ For instance, recent battles over access in Malibu have attracted national attention. The battles between billionaire David Geffen and local surfers have been extensively covered in the press⁵⁰ and parodied in *Doonesbury*. Additionally, the California Coastal Commission also recently ordered Malibu residents to remove “no trespassing” signs, stop employing private security guards, and cease using bulldozers to push sand from below the high tide line to build “huge sand walls.”⁵¹

2. Public Coastal Access as Primarily a State Issue

The increasing development of the shoreline and increasing conflicts over access led to a rapid increase in legislation, court cases, and legal

48. Poirier, *supra* note 5, at 775. Poirier provides a thorough discussion of New Jersey and Connecticut beach access and many references to New York access conflicts.

49. For a view from Maine, see KELLEY ET AL., *supra* note 5, at 11:

Private development on the coast inevitably reduces public access to the beach or scenic rocky overlooks. Yet the shoreline, particularly the beach, has traditionally been an area for all the public to enjoy In southern Maine, beachfront homeowners are seeking to exclude the public who do reach the beach from crossing in front of their properties.

Id.

According to Orrin Pilkey, et al., the experience in North Carolina has been very similar:

Private development inevitably reduces beach access to the public that foots the bills for beach repairs. In North Carolina, free access to the beach often is prohibited to all but adjacent property owners; others must pay access charges. Entire islands have been “gated,” cutting off land routes to the public domain of the beach.

PILKEY, ET AL., *supra* note 5, at 15.

50. Kasindorf, M., *Malibu's Rich and Famous Fight to Keep Beach Private: State Draws a Line in the Sand for Public Access*, USA TODAY, May 4, 2002, at A1.

51. Stephanie Showalter, *Coast to Coast and Everything in Between*, THE SANDBAR, July 2005, at 23.

theories dealing with public access.⁵² While there were some efforts to deal with the public access issue on a national basis, the access issue has been almost exclusively dealt with at the state level.⁵³ For example, the National Open Beaches Act was introduced by Representative Robert Eckhardt of Texas during several sessions of Congress from 1969 through 1975 and Senator Henry Jackson of Washington introduced similar bills in the Senate.⁵⁴

The bills' approaches were to declare that the beaches of the United States required separate consideration and were impressed with a national interest; to prohibit anyone from creating any obstruction to access to common or public beaches, broadly defined; to authorize the Attorney General and U.S. district attorneys to proceed in federal court to protect public access, to determine title and control of beaches and condemn easements; and to provide Federal joint funding for state planning and acquisition of property related to public beach access and related transportation facilities.⁵⁵

None of these bills, however, ever made it out of committee.

Even though the federal government failed to get directly involved in protecting public access, portions of the federal Coastal Zone Management Act (CZMA) have been aimed at encouraging coastal states to protect access.⁵⁶ While the original CZMA of 1972 funded the development of coastal management policies, administrative procedures, and planning processes, it did not mandate that states take affirmative actions to either protect or expand public access to the shoreline. Instead, it simply suggested that these goals could be part of a state's coastal management plan.⁵⁷ In 1976, Congress amended the CZMA by adding Section 315, which was entitled Estuarine Sanctuaries and Beach Access. Section 315 (b) provided for a fifty percent match to states to "acquir[e] lands to provide for access

52. For an exhaustive bibliography containing scores of articles on public access to the shoreline, see Deborah Mongeau, *Public Beach Access: An Annotated Bibliography*, 95 LAW LIBRARY J. 515 (2003).

53. The Surfrider Foundation is one organization that continues to try to make public access a national issue, but that primarily fights for access through its state and regional chapters. For the organization's assessment of each coastal states' public access programs, see *Surfrider Foundation: State of the Beach 2006*, <http://surfrider.org/stateofthebeach/home.asp> (last visited July 31, 2006). For a discussion of failed national efforts, see Poirier, *supra* note 5, at 753.

54. See Poirier, *supra* note 5, at n.79, for a full list of the bills introduced in Congress.

55. *Id.* at 749 (footnotes omitted).

56. 16 U.S.C. §§ 1451-1465 (2000).

57. See Poirier, *supra* note 5, at 752.

to public beaches and other public coastal areas”⁵⁸ Again in 1980, the CZMA was amended by adding Section 306A, which provided some funding to the states to provide public access to the coast for recreational purposes.⁵⁹ Finally, in 1990, Congress created the Coastal Zone Enhancement Grants program under Section 309 of the CZMA. One of the priority areas of the Section 309 program is public access.⁶⁰ Overall, the federal government has shown some willingness to fund public access, but not to use the legislative power to protect public access.

Protecting public access to the coast has been largely a matter of state law, and there have been notable victories in the state courts. For example, the Supreme Court of New Jersey has developed a modern interpretation of the Public Trust Doctrine that expansively protects public access to beaches. In *Borough of Neptune City v. Borough of Avon-by-the-Sea*, the court held that under the Public Trust Doctrine, the public had rights in tidal lands “to recreational uses, including bathing, swimming and other shore activities.”⁶¹ In *Matthews v. Bay Head Improvement Ass’n*, the court held that the public’s interest included the right to cross privately owned beaches to gain access to the foreshore and the right to sunbathe and generally enjoy recreational activities on the dry sand.⁶² Recently, the Supreme Court of New Jersey in *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club*⁶³ reaffirmed that the private beach club could not exclude the public from the beach and, moreover, could not charge the public a fee to access it.⁶⁴ However, the court did rule that the beach club could charge a fee for lifeguards, restrooms, and other services, but provided that the state’s Department of Environmental Protection would determine what a reasonable fee would be based in part on the experience at state beaches.⁶⁵

In Oregon, the state supreme court has looked to customary practice to protect extensive public access rights. In *State ex rel. Thornton v. Hay*,⁶⁶ the Oregon Supreme Court found that:

58. See S. REP. NO. 277, 94th Cong. 2d Sess. 29-30 (1976); H.R. REP. NO. 878, 94th Cong., 2d Sess. 63 (1976); Poirier, *supra* note 5, at 753.

59. Pamela Pogue & Virginia Lee, *Providing Public Access to the Shore: The Role of Coastal Zone Management Programs*, 27 COASTAL MGMT. 219, 223 (1999).

60. *Id.*

61. 294 A.2d 47, 54 (1972).

62. 471 A.2d 355, 363 (1984).

63. 879 A.2d 112 (2005).

64. *Id.* at 124.

65. *Id.* at 125.

66. 462 P.2d 671 (Or. 1969).

The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history [F]rom the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.⁶⁷

Consequently, the court ruled that as a matter of customary practice, the public had a right to utilize both the wet and dry sand along the entire Oregon Coast.⁶⁸

Connecticut provides yet another interesting example of a state court developing the law of coastal access. In *Leydon v. Town of Greenwich*,⁶⁹ the Supreme Court of Connecticut held that portions of a town ordinance that limited the use of a town park, including a beach area, to town residents and their guest, violated the First Amendment of the United States Constitution and the Connecticut Constitution.⁷⁰ Interestingly, the Court found that the ordinance violated Mr. Leydon's right to free speech and expression.⁷¹

3. Affordability as a Public Access Issue

Beach access problems for the most part have not been understood in terms of affordability and exclusion of the less affluent. Poirier showed how class and race were motivating factors in the coastal access debates in New Jersey, New York, and Connecticut in the 1970s, but how they were only a sizable part of the open political debate in Connecticut. Yet, even in Connecticut, environmental justice, i.e., class and race issues, did not remain a major factor in the public debate over beach access.⁷² In fact,

67. *Id.* at 673.

68. *Id.* at 678; *see also* *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 903 P.2d 1246, 1272 (Haw. 1995) (where the court held that traditional and customary rights of native Hawaiians could be practiced on public and private land that was either undeveloped or less than fully developed).

69. 777 A.2d 552 (2001).

70. *Id.* at 573.

71. See Robert George, *The 'Public Access Doctrine': Our Constitutional Right to Sun, Surf, and Sand*, 11 OCEAN & COASTAL L. J. 73 (2006), for a discussion of the case and its potential implications.

72. See Poirier, *supra* note 5, at 798-811.

living by or visiting the coast is becoming less affordable; thus, access—particularly twenty-four-hour access—of the publicly owned coastline is being increasingly restricted to wealthier Americans.

No coastal state seems immune to the phenomenon of small cottages being torn down and replaced with much bigger houses.⁷³ Indeed, the entire controversy in *Nollan v. California Coastal Commission*⁷⁴ began because the Nollans needed a permit from the California Coastal Commission to tear down their 521 square foot bungalow and build a 1674 square foot house and 790 square foot garage.⁷⁵

No level of government—federal, state, or local—seems terribly interested in tackling this growing affordability problem. The federal government arguably is subsidizing the replacement of relatively affordable dwellings with trophy homes through the National Flood Insurance Program. As the Science Editor for the New York Times, Cornelia Dean explains:

Until the advent of federal flood insurance, it was practically impossible to insure beachfront and nearby structures against flood damage, except through state insurance pools (where they existed) or underwriters such as Lloyds of London. This meant, among other things, that most aspiring beachfront property owners had to pay cash for their property, because most bankers would not issue mortgages for structures they could not insure. *It also meant that*

73. See Michael Mello, *Rooms with a View: Rising Land Values and Rhode Island's Relative Affordability Spur a Coastal Building Boom*, THE PROVIDENCE JOURNAL, June 11, 2006, at B1, available at http://www.projo.com/business/content/projo_20060611_mwater.7e8ff61.html.

The two-story home's large, rectangular windows and modern design are nods to the future of a neighborhood that, like other coastal areas in the state, is undergoing a facelift. Cottages and other one time summer homes are giving way to multistory structures, as longtime residents and out-of-state buyers alike scramble to build on increasingly valuable—and scarce—waterfront lots.

Id.

See also, *Big Homes Replacing Cottages on Quaint Island*, THE BEAUFORT GAZETTE, July 17, 2006, available at http://www.beaufortgazette.com/state_news/regional/v-print/story/5956119p-5242391 (where the town building official of a South Carolina Island that is experiencing numerous tear downs remarks on the rapid change in his community: "We see the character of Folly [Island] changing rapidly," Hall said. "Before we had little cottages that if they blew away, we basically replaced them. Now, nobody is building anything under half a million dollars."). *Id.*

74. 483 U.S. 825 (1987).

75. *Id.* at 856.

*most houses on the beach were modest affairs. If they washed away, so be it.*⁷⁶

The local communities often encouraged the trading of cottages for mansions because it improves the town's tax base. For example, the building inspector for South Kingstown, Rhode Island, was quoted as being very supportive of the building boom along the state's ocean coast:

Brown, the building inspector, laments the increased workload associated with inspections for the coastal properties. But he says the development is only good news for the community, particularly when the owners live part of the year out of state. 'Any town would welcome people who are building a large house and living here only six months a year,' he said. 'They don't have kids in the schools, so it's all [tax] income.'⁷⁷

But this is really a case of the town capturing part of the value of a resource that belongs to the entire public. In other words, the town should be working to protect the entire public's right to access the coastline rather than managing that resource solely for the treasury and benefit of its own citizens.

Moreover, this willingness to allow small cottages to be torn down to be replaced by trophy homes might be due in part to a belief that they, the towns, will not have to pay for debris removal and rebuilding if a major coastal storm does strike. Raymond Burby, a professor of Urban Planning, contends that federal relief programs foster increased and excessive exposure to risk:

Because it subsidizes people and firms occupying hazardous areas, relief can produce complacency. If they believe someone else will pick up the tab, individuals and communities may not be willing to take the steps necessary to reduce their own vulnerability, even when such steps are feasible and proven to be cost-effective.⁷⁸

76. CORNELIA DEAN, *AGAINST THE TIDE: THE BATTLE FOR AMERICA'S BEACHES* 190 (1999) (emphasis added).

77. Mello, *supra* note 73; *see also*, Daniel P. McMillen, *Teardowns: Costs, Benefits, and Public Policy*, 18(3) *LAND LINES* 2, 4 (2006) (explaining that communities throughout the United States with rapidly increasing land values welcome teardowns because the newer, bigger houses produce higher property taxes).

78. Raymond J. Burby, *Natural Hazards and Land Use: An Introduction*, in *COOPERATING WITH NATURE: CONFRONTING NATURAL HAZARDS WITH LAND-USE PLANNING FOR SUSTAINABLE COMMUNITIES* 6 (Raymond Burby ed., 1998).

Teardowns, however, are not the only threat to affordable twenty-four hour access. Quite often in the years before zoning, landowners built a number of one or two bedroom cottages on a single lot. Even single family cottages were sometimes very small and squeezed onto tiny lots that are now sometimes referred to as “beach blanket” lots. Because these cottages were built before zoning codes were adopted, they do not meet current minimum lot sizes. Often communities “grandfather” such nonconforming uses and allow them to stay, but prohibit the expansion of the structure.⁷⁹ Because the small cottages cannot be torn down to build larger homes, developers have taken a different route to going upscale: simple shacks are being remodeled with top of the line designers, materials, and gadgets, turning funky vacation hovels into bejeweled vacation shrines. For example, less than a mile east of Roy Carpenter’s Beach, a real estate broker advertised a 400 square foot condominium as follows:

Oceanfront condo/cottage on Matunuck Beach. Walk out of your private cottage and onto the sandy beach! Gorgeous waterfront condominiums on the white sand of Matunuck Beach. Plasma TVs, surround sound, security system, granite kitchens, custom tile work, hardwood flooring are just the beginning of the amenities offered at this exclusive resort style condominium. The inside of the units have been artfully decorated by a renowned Rhode Island designer.⁸⁰

Four hundred square feet of luxury for a mere \$738,000.⁸¹ This is clearly a case of the coast becoming less affordable. In the summer of 2005, one could have rented these formerly funky shacks for between \$76 to \$150 a night.⁸²

79. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 135 (2003). Almost all zoning ordinances allow a preexisting use to continue that would be unlawful if it had been established after the passage of the zoning ordinance. This includes nonconforming buildings. As a general rule, a nonconforming use cannot be expanded. *Id.* at 138.

80. Lila Delman Real Estate, <http://www.Liladelman.com/printable.asp?id=1381> (last visited Oct. 5, 2006) and on file with author [hereinafter Lila Delman].

81. *Id.*

82. These rental rates are based upon a website that has not yet taken the former rentals off of the site. The original room rates were supplied to the website by the owners of the cottages. Resorts and Lodges, <http://www.resortsandlodges.com/lodging/usa/rhode-island/south-county-2.html> (last visited Oct. 18, 2006).

*C. Twenty-four Hour Access: Promoting the Public Welfare &
Recapturing the Public Benefit*

It is one thing to argue that finding a place at the coast to spend the night (either as a renter or an owner) used to be more affordable, but quite another to argue that the government can or should do something to protect and promote this type of twenty-four hour, affordable access. In this Article, I will make two arguments as to why the government should protect and promote this type of access. First, this type of access promotes the health and welfare of the public. Thus, using the police power to promote this access is completely proper. Second, the government should try to recapture from the market the benefits of a positive externality that emanates from a public resource: namely, the ocean.

1. Twenty-four Hour Access and Promoting the Public Health and Welfare

City and regional planners have believed since the mid-1800s that public access to picturesque open space promotes the general welfare.⁸³ For example, Frederick Law Olmsted believed that his parks contributed to the physical and moral well-being of the urban working class.⁸⁴ While this belief was probably based upon Olmsted's personal experience and observations, there is a growing body of literature that demonstrates that interacting with nature does promote one's psychological and physical well-being. An extensive body of research demonstrates that leisure activities in a natural setting can help people cope with stress. The relaxation benefits are reported to be particularly strong when the natural experience is associated with a water feature.⁸⁵ A number of studies have even shown that hospital patients who were randomly assigned rooms with a view of nature had better outcomes than patients who were not.⁸⁶

Moreover, a group of scholars that includes E. O. Wilson and Stephen R. Kellert have identified a probable evolutionary basis for this human need to interact with nature and they have developed what they call the "biophilia

83. Government may use its inherent police power to impose burdens on private property to promote the health, safety, morals, and general welfare of the community. See, e.g., Robert R. Wright & Morton Gitelman, *LAND USE IN A NUTSHELL* (St. Paul: West Group 2000) (4th ed. 1982).

84. Rutherford H. Platt, *From Commons to Commons: Evolving Concepts of Open Space in North American Cities*, in *THE ECOLOGICAL CITY: PRESERVING AND RESTORING URBAN BIODIVERSITY* 21, 27 (Rutherford H. Platt et al. eds., 1994).

85. Roger S. Ulrich, *Biophilia, Biophobia, and Natural Landscapes*, in *THE BIOPHILIA HYPOTHESIS* 73, 100-02 (Stephen R. Kellert & Edward O. Wilson eds., 1993).

86. *Id.* at 106-08.

hypothesis.”⁸⁷ According to Kellert, “[the biophilia] hypothesis purports that the human need for varied interaction with the diversity of life is an evolutionary expression of our dependence on nature not just for material sustenance and survival, but also for a wider range of emotional, intellectual, aesthetic and ethical needs as well.”⁸⁸ In short, we need contact with nature to be healthy.

But not all natural settings are of equal value for promoting human well-being. As Kellert explains, the coastal environment’s richness is particularly well suited to promote human well-being.

What has made the coastal context a remarkably attractive site for human habitation is its special blend of opportunities for intimate relationship with nature across a wide spectrum of utilitarian, ecological, aesthetic, psychological, intellectual and ethical dimensions. In short, the coastal environment is a peculiarly capable carrier of human values toward the natural world.⁸⁹

Kellert is particularly eloquent when speaking specifically about the aesthetic value of human interaction with the coastal environment:

The basis for the aesthetic appeal of the coast is difficult to define with precision, yet one can assume that important elements of vista, prospect, diversity, contrast, light, color, texture, movement, lushness and more are all involved. Psychologically, few would dispute the important emotional benefits derived from this aesthetic experience, including feelings of harmony, order, grace, a measure of tranquility and relaxation, and even an overwhelming sense of well-being and security.⁹⁰

Anyone who has experienced the beach from sunrise to the full splendor of the starry night sky, or who has laid in bed listening to the waves and

87. See generally THE BIOPHILIA HYPOTHESIS (Stephen R. Kellert & Edward O. Wilson eds., 1993) (collection of essays regarding the biophilia hypothesis).

88. Stephen R. Kellert, *Coastal Values and a Sense of Place*, in AMERICA’S CHANGING COASTS: PRIVATE RIGHTS AND PUBLIC TRUST 12, 14 (Diana M. Whitelaw & Gerald R. Visgilio eds., 2005). For a fuller introduction to the biophilia hypothesis, see Edward O. Wilson, *Biophilia and the Conservation Ethic*, in THE BIOPHILIA HYPOTHESIS 31 (Stephen R. Kellert & Edward O. Wilson eds., 1993); see also Stephen R. Kellert, *The Biological Basis for Human Values of Nature*, in THE BIOPHILIA HYPOTHESIS 42 (Stephen R. Kellert & Edward O. Wilson eds., 1993). For a short review of the literature challenging and defending the biophilia hypothesis, see PETER H. KAHN, JR., THE HUMAN RELATIONSHIP WITH NATURE: DEVELOPMENT AND CULTURE 25-43 (1999).

89. Kellert, *supra* note 88, at 12.

90. *Id.* at 16.

smelling and feeling the cool ocean breeze come in through the window, knows that the elements that Kellert describes change throughout a twenty-four hour day and that this continual change adds to the richness of the experience.

It is also worth quoting Kellert again at length when he discusses the “naturalistic” value of the coast:

A closely related value of the coast is the satisfaction derived from direct contact and physical immersion in its many features and habitats. Vast numbers of Americans engage in walking and exploring beaches, shores and wetlands. The mental and physical benefits associated with heightened awareness and contact with the coast may be among the most ancient outdoor recreational activities known. The naturalist appeal of the coast is probably due to the abundant opportunities this environment provides for exploration and discovery. . . . The coastal environment is an unrivaled habitat for exploring, discovering and engaging feelings of wonder and mystery, in an almost childlike manner independent of age.⁹¹

Once again, the exploration and discovery are enhanced when people can experience the coast during a greater variety of circumstances.

Of course, it is the rich diversity of experience that can help to make literature about the coast so compelling. For example, Thoreau seemed particularly interested in exploring density and richness of experience that the seashore offers. The first chapter of *Cape Cod* is packed with numerous and seemingly conflicting experiences. Thoreau begins by contemplating the views and thrill that he will experience while walking twenty-eight miles of unbroken beach, but immediately makes a detour to Cohasset where an emigrant ship was wrecked a few days earlier by a violent October storm, killing 145 people. Thoreau and his traveling companion encountered a scene of seeming horror down on the rocky beach where bodies were laid in boxes, ship debris and personal belongings littered the shore, and the search for bodies continued. Yet amongst this human catastrophe, Thoreau takes time to appreciate the power of the ocean as compared to the creations of men: “I was even more surprised at the power of the waves The largest timbers and iron braces were broken superfluously, and I saw that no material could withstand the power of the waves.”⁹² But while Thoreau can stop to ponder the ocean, he encounters

91. *Id.* at 17.

92. THOREAU, *supra* at note 18, at 18.

men who must concentrate only on the work of gathering the riches of the sea before the sea takes them back:

In the very midst of the crowd about this wreck, there were men with carts busily collecting the seaweed which the storm had cast up, and conveying it beyond the reach of the tide, though they were often obliged to separate fragments of clothing from it, and they might at any moment have found a human body under it. Drown who might, they did not forget that this weed was a valuable manure.⁹³

Before the chapter ends, Thoreau tells of returning to the scene on a later summer day and having a very different experience.

The sea-bathing at Cohasset Rocks was perfect. The water was purer and more transparent than any I had ever seen. There was not a particle of mud or slime about it. The bottom being sandy, I could see the sea-perch swimming about. The smooth and fantastically worn rocks, and the perfectly clean and tress-like rock-weeds falling over you, and attached so firmly to the rocks that you could pull yourself up by them, greatly enhanced the luxury of the bath. The stripe of barnacles just above the weeds reminded me of some vegetable growth—the buds, and petals, and seed-vessels of flowers.⁹⁴

Thoreau ends by reporting that “[n]ot a vestige of a wreck was visible, nor could I believe that the bones of many a shipwrecked man were buried in that pure sand.”⁹⁵ In two visits to Cohasset, Thoreau had a wide range of powerful and enriching experiences.

2. The Economic Evidence of the Value of Twenty-four Hour Access

Real estate prices indicate that the values derived from twenty-four hour access are immense. In Malibu a mobile home with a view of the Pacific Ocean can currently fetch around a million dollars.⁹⁶ Certainly a mobile home elsewhere in Los Angeles County well away from the sound, smell, and beauty of the ocean would sell for a fraction of the price. Indeed, mobile homes without a view in that same Malibu mobile home park were

93. *Id.*

94. *Id.* at 25.

95. *Id.* at 27.

96. T.J. Sullivan, *Sold: \$1,000,000; From Newport to Ventura, Oceanfront Mobile Homes are Fetching Breathtaking Prices*, LOS ANGELES TIMES, Feb. 13, 2005, at K1.

reported to sell for a mere \$500,000.⁹⁷ Similarly, if one were to buy the condominium behind the \$738,000 one mentioned above at the Matunuck Breakers, the price would drop to \$498,000.⁹⁸ Even though it is an identical unit and perhaps only thirty feet further from the beach, it is not beachfront and, hence, the price is approximately thirty-three percent lower.

While these price comparisons demonstrate the high value placed on the experience of immediate and full, twenty-four hour access to the shoreline, one should not fail to appreciate the high price being paid to gain twenty-four hour, near and partial access to the coast. The median priced condominium in the United States in 2005 sold for \$228,200⁹⁹ and the median priced condominium in Rhode Island for the second quarter of 2006 sold for \$236,000.¹⁰⁰ So even the cheaper condominium at Matunuck Breakers costs twice as much as the medium-priced condominium in Rhode Island, despite the fact that the median square footage of condominiums in Rhode Island must certainly exceed the Matunuck condominium's meager 400 square feet.

But perhaps one of the strongest pieces of evidence of the value of the twenty-four hour beach experience come from Roy Carpenter's Beach itself, where 400 square-foot beachfront cottages are selling for around \$200,000.¹⁰¹ One needs to fully understand the property right that approximately \$200,000 buys to appreciate what an extraordinary price this is. At Carpenter's Beach one is buying personal property and not real property. One buys the physical building, but no on-going rights to the underlying land. The buyer is not buying into a condominium association or even a long term lease. The lease on the land is for one summer with no guarantee that the lease will be renewed the following year. Furthermore, the Carpenter's Beach cottages do not even have plumbed toilets, but instead all of the residents share a single bathroom and shower facility. Lastly, Roy Carpenter's Beach sits on a quickly eroding coastal outwash

97. *Id.*

98. Lila Delman, *supra* note 80.

99. Les Christie, *Condo Prices Showed Solid Gains in 2005: The Average Condo Price Climbed by Double Digits in 2005, How Did Your Metro Area Do?*, Feb. 15, 2006, available at http://money.cnn.com/2006/02/15/real_estate/NAR_condo_prices/index.htm.

100. Lynn Arditi, *Condo Saturation but Prices yet to Drop in R.I.*, THE PROVIDENCE JOURNAL, Aug. 3, 2006.

101. RILIVING, SINGLE FAMILY PROPERTY SEARCH, <http://www.riliving.com/PropSearch/sfformdetails.asp> (last visited Oct. 21, 2006). I personally called to inquire about one cottage that was for sale and the owner told me that he already had a \$250,000 offer for the ocean front cottage. I gave him my number and asked him to call me back if the sale fell through. He never called. Another beachfront cottage at Roy Carpenter's Beach was on the market during the writing of this article for \$191,000.

plain. These front row cottages could easily be destroyed in a large winter storm or a large hurricane swell; and they could not be rebuilt, because the land will be gone. (See figure 1).

3. Recapturing for the Public the Value of an Externality

Clearly twenty-four hour access to the natural values offered by the coastline can fetch a high price. However, it is important to not only point out its value, but to also ask how this value should be allocated. In other words, should only the market determine who has twenty-four hour access to coastal values? Should the values inherent in twenty-four hour access be solely available to the highest bidder? When answering these questions, one needs to consider from where the market value emanates.

Coastal land values are high due to what are known as positive or beneficial externalities.¹⁰² No parcel of land or expanse of water is isolated from its surroundings; it will have an affect on surrounding parcels. This affect can be either harmful or beneficial to surrounding parcels.¹⁰³ Coastal property is so remarkably valuable because it receives a phenomenal positive externality from the ocean, which, of course, belongs to the public. To get the full benefit of the positive externality, one must have twenty-four hour access. So through the market, wealthier Americans have been buying up the coastline to capture the positive externalities emanating from a public resource. The government should take steps to ensure that these values are broadly available to as many Americans as possible. The idea that the value and benefits of great natural beauty should not be placed on the market to get bought up by the highest bidder, but should instead be preserved for the use and pleasure of the greater public has deep roots in America: this idea is at the very foundation of our National Park system.¹⁰⁴

102. RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY* 39-41 (2004).

103. *Id.*

104. ALFRED RUNTE, *NATIONAL PARKS: THE AMERICAN EXPERIENCE* 41 (3rd ed. 1997). Historian Runte draws from the recollections of Nathaniel P. Langford to recount a particular significant discussion amongst the members of the Washburn Expedition, which explored the Yellowstone region, during which the concept of public ownership of magnificent landscapes prevailed over a proposal for private ownership:

Last night, and also this morning in camp, the entire party had a rather unusual discussion. The proposition was made by some member that we utilize the result of our exploration by taking up quarter sections of land at the most prominent points of interest . . . [specifically, those that] would eventually become a source of great profit to the owners.

Id.

D. Is It Legally and Politically Possible to Protect and Promote Twenty-four Hour Access?

The remainder of this article will explore the legality and feasibility of three tools for preserving the affordability of twenty-four hour access: rent regulations, conversion controls, and price controls. While each of these will be discussed separately and in the order listed above, affordability can only be protected and promoted if all three are used together.

1. Regulating Rents on Coastal Accommodations

In an increasing number of coastal areas, average Americans cannot afford to rent accommodations. As was mentioned earlier, only about ten percent of the coastal accommodations in California in 2004 were considered affordable, i.e., costing less than \$100 per night.¹⁰⁵ To really appreciate this number, however, one needs to consider some additional facts: first, the analysis includes RV parks and campgrounds; second, affordable units are disproportionately located in the much more isolated north coast region; and, third, the unaffordable units can be extraordinarily unaffordable, running several hundred and even thousands of dollars per night.¹⁰⁶

The most direct approach to controlling the price of coastal accommodations would be to impose rent controls on hotel rooms, vacation homes, RV parks, campgrounds, and ground leases in places like Carpenter's Beach. While the constitutionality of a government's ability to regulate rents and rental units was established eighty-five years ago in *Block v. Hirsh*,¹⁰⁷ there have been scores of federal and state cases in which landlords have asserted that specific state statutes and city ordinances regulating rents violate the takings clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.¹⁰⁸

Following this suggestion, however, and others of a similar bent, Cornelius Hedges declared: that he did not approve of any of these plans—that there ought to be no private ownership of any portion of that region, but that the whole of it ought to be set aside as a great National Park, and that each of us ought to make an effort to have this accomplished.

Id.

105. Schwartz, *supra* note 10.

106. *Id.*; see also Scholl, *supra* note 9, at 2-4.

107. 256 U.S. 135 (1921) (upholding a District of Columbia rent law that was intended to maintain affordable housing for workers during the First World War).

108. ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 298 (1999). Robert Meltz et al., distinguish

A state or municipality could craft legislation to control rents on places like Carpenter's Beach that could survive a takings challenge. Pursuant to the three-part test laid out in *Penn Central Transportation Co. v. New York City*,¹⁰⁹ a court would look at: (1) the economic impact of the regulation on the owner; (2) the extent to which the regulation interferes with the distinct and reasonable investment-backed expectations of the owner; and (3) the character of the government action.¹¹⁰ Statutes or ordinances regulating rents have to have a rational method for setting rents.¹¹¹

But assuming that a fair process for setting rents exists, would such a law survive an as-applied takings challenge at Carpenter's Beach or similar properties? While one cannot make a definitive determination as to whether a regulatory taking would occur in the absence of an actual statute or ordinance, one can nonetheless gain useful insights from hypothetical scenarios. If, for example, rents for land leases at Carpenter's Beach were frozen and then tied to the consumer price index, the owners experience no immediate economic impact. The owners of the property, however, would lose future income because the rationale justifying the legislation was that rents would potentially increase markedly if rent control was not implemented. Moreover, the future resale value of the property could diminish due to its reduced ability to generate rent. Still, in the case of Carpenter's Beach, the property would continue to generate over \$800,000 gross in land leases alone.¹¹² Moreover, the Carpenters' expenses should be relatively low because the landlord provides very little to the tenants other than electricity, water, and the bath houses. If this was all the tenants received, then they would be willing to pay very little in rent. But, of course, what they are really paying for is access to the beach and ocean.

between rent control and rent stabilization: "Properties subject to rent control are generally limited to the maximum rent stated by a rent control board, regardless of any previously signed lease. In contrast, rent stabilization contemplates a current written lease and allows a percentage increase in rent based in part on market conditions." *Id.*

109. 438 U.S. 104 (1978).

110. *Id.* at 124. The takings test laid out in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), does not apply because this would not be an instance where the property owner is left with no economically beneficial use for the property.

111. See *Richardson v. City and County of Honolulu*, 759 F. Supp. 1477 (D. Haw. 1991) (holding that the enactment of an ordinance controlling rents only on residential condominiums was a regulatory taking because rent ceiling "arbitrary," and the ordinance "does not provide any mechanism to ensure that its formula will yield a fair rate of return.") *Id.* at 1492.

112. Because there are no public records detailing the rents paid at Carpenter's Beach (indeed, the tenants do not even have written leases), the figure given here is based upon interviews with tenants who claimed to have paid between \$1,600 and \$2,000 for the summer. The Carpenters also have a store on the site that generates additional revenue.

In the case of Carpenter's Beach, the second part of the *Penn Central* test, the extent to which the regulation interferes with the owner's distinct and reasonable investment-backed expectations, also seems to be an easy hurdle. The property has been in the family for a very long time. More importantly, when the Carpenters started the camp community, this land was worth very little. As one long-time tenant put it, "[w]hen my family bought a cottage down here [in the 1930s], this was just potato fields that nobody wanted."¹¹³ Of course, if another property owner purchased their property recently or if the rent regulation rolled back rents to a lower level, the second part of the *Penn Central* test could not be dispensed with so easily.

The third part of the *Penn Central* test, the character of the government action, initially does not seem to present a formidable hurdle. The United States Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails."¹¹⁴ Still, one might question whether protecting the affordability of twenty-four hour coastal access rises to the same level of importance as the social concerns found in other rent regulation cases and, hence, whether it is deserving of the same level of deference. For example, in *Block v. Hirsch*, the Court noted that there was a wartime housing shortage emergency in Washington, D.C.¹¹⁵ Cities such as New York, Berkeley, and San Jose had extraordinarily low occupancy rates and thus unreasonable rents were a reason stated for using rent regulations to intervene in the market.¹¹⁶ While rents on vacation rentals in coastal destinations have gone up dramatically and are astronomical in places like Martha's Vineyard, Malibu, and Southampton, these are not people's primary residence and, thus, the need for regulating rents seems less urgent.

Carpenter's Beach, however, presents a situation where the cottage owners are particularly vulnerable as are tenants in mobile home parks.

113. FORD RUNGE, ET AL., PUBLIC SECTOR CONTRIBUTIONS TO PRIVATE LAND VALUE: LOOKING AT THE LEDGER, PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 49-53 (2000). Indeed, much of the increase in the value of property in the Matunuck Area is clearly attributable to federal highway projects that have made this formerly isolated stretch of coast easily accessible to millions of people. *Id.*

114. *Yee v. City of Escondido*, 503 U.S. 519, 528-29 (1992) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

115. 256 U.S. at 139.

116. *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 593 (2d Cir. 1993); *City of Berkeley v. City of Berkeley Rent Stabilization Bd.*, 27 Cal. App. 4th 951, 956 (1994); *Pennell v. City of San Jose*, 485 U.S. 1, 4-5 (1988).

Several states have recognized the need to closely regulate contractual relationships between landlords and tenants in mobile home parks because they create a situation of unequal bargaining power.¹¹⁷ For example, in the Mobilehome Residency Law, which was challenged in *Yee v. City of Escondido*, the California legislature found that:

[B]ecause of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.¹¹⁸

Constructive eviction would occur when the rents become so unaffordable for the mobile home owner that the owner would have to leave.

The cottage owners at Carpenter's Beach are more vulnerable to potential rent gouging than typical mobile home owners for two reasons: first, their cottages are even less mobile than a modern mobile home, and, second, even if a new, affordable site was found for their cottages, the site would certainly be further from the coast, which means the cottage owners will have lost a huge part, if not most, of their investment. The more recent purchasers of cottages could face losses of 100 to 200 thousand dollars. Some might argue that the government should not protect these cottage owners because it was entirely unreasonable for them to invest so much money in a mere expectation that renewed summer leases would continue indefinitely at a reasonable rate. While the rationality of the owner's decision will be discussed more thoroughly below when considering eviction controls, for now, let us use this willingness to invest heavily in an uncertain future as evidence of the incredibly high value that people place on twenty-four hour access to the coast.

Admittedly, the cottage situation at Carpenter's Beach, while not unique, is also not the norm. Of course, there are still trailer and mobile home parks along the coast that are similar to Carpenter's Beach. There are also, though, many more camp sites, houses, cottages, motels, and hotels that are rented by the night, week, or month where the lessor owns everything and the visitor can come and go easily. No special vulnerability exists as it does in the earlier example. Could rents be regulated for these accommodations as well? The case of *Tirolerland, Inc. v. Lake Placid* 1980

117. See generally Jay M. Zitter, Annotation, *Validity, Construction, and Application of Mobile Home Eviction Statutes*, 43 A.L.R. 5th 706 (1996).

118. 503 U.S. at 524 (quoting the California statute).

*Olympic Games, Inc.*¹¹⁹ provides a useful comparison and suggests that coastal vacation rentals could be regulated. The *Tirolerland* case deals with the regulation of accommodations during the Winter Olympic Games in Lake Placid, New York. Because the Village of Lake Placid and the surrounding communities had a limited supply of rental rooms compared to the demand that the Olympic Games would create, the New York legislature passed a statute that created the Olympic Accommodations Control Corporation (OACC) and empowered the OACC to, among other things, set room rates.¹²⁰ The owners of two motels claimed that a New York statute constituted an unconstitutional takings, in part because it set room rates for their hotels at \$65 per night when they asserted that they could have received \$150 per night.¹²¹ The court was highly unsympathetic to the plaintiffs' complaint: "In reality, plaintiffs' true dissatisfaction stems from their disappointment in not being able to price-gouge Olympic patrons who sought motel accommodations."¹²² The court held the regulation helped to avoid "pricing the general public completely out of the market" and accomplished a legitimate public purpose.¹²³

Although it is true that the *Tirolerland* court made note of the limited duration of the price regulations (three weeks), there is no indication that court would have found for the motel owners if the regulations had been permanent provided that there was an ongoing need to prevent price gouging.¹²⁴ Still, in *Block v. Hirsh*, the Court also noted that the rent regulations were limited in duration,¹²⁵ and Justice Rehnquist in *Fresh Pond Shopping Center, Inc. v. Callahan* opined that the question of whether permanent rent control regulations were constitutional had not been adjudicated by the Supreme Court.¹²⁶ However, to date, courts have had no difficulty upholding rent regulations that were by all appearances intended to be in place indefinitely.¹²⁷

The *Tirolerland* court also makes some observations about just compensation and the source of value that are useful for thinking about rental property on or near the shoreline. When discussing just compensation requirements, the court noted that "the cases establish 'the general principle that the Government as condemnor may not be required to

119. 592 F. Supp. 304 (1984).

120. *Id.* at 308-09.

121. *Id.* at 309-10, 317 n.12.

122. *Id.* at 311.

123. *Id.* at 312.

124. *See id.* at 315.

125. 256 U.S. 135, 157 (1921).

126. 464 U.S. 875, 878 (1983) (Rehnquist, J., dissenting).

127. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519 (1992).

compensate a condemnee for elements of value that the Government has created”¹²⁸ The court goes on to state that it was:

beyond any doubt that the defendants herein were themselves responsible for bringing the Olympics to Lake Placid and creating the increased value of plaintiffs’ property. . . . Just compensation here must necessarily be measured therefore in terms of a market value which existed prior to the onset of the state’s enhancement actions.¹²⁹

Now certainly neither the federal nor state government created the ocean that creates the extraordinary value of coastal rental property, but they do hold the ocean in trust and they did build the highways that allow the rest of the nation to reach the property. It seems odd to suggest that the government should have to pay compensation for lost property value when that value is overwhelmingly attributable to the existence of, and access to, a public resource.

A recent New Jersey Supreme Court case provides further insight into how we should think about this problem of regulating coastal rental property. In *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club*, the New Jersey Supreme Court reaffirmed the public’s right to utilize privately owned beaches both below and above the mean high tide.¹³⁰ Even though the *Raleigh* court reaffirmed that a private beach club could not exclude the public from the beach or charge them an entrance fee, the court did state that the beach club could charge a fee for lifeguards, restrooms, and other services.¹³¹ However, the prices charged by private clubs would be set by the State’s Department of Environmental Protection based upon what the agency’s experiences had been at state beaches.¹³² In other words, private beach owners in New Jersey will not be able to use limited access to a public resource as an opportunity to engage in price gouging. If private beach clubs can be stopped from price gouging, then the owners of rental property near beaches should be as well.

128. *Tirolerand Inc. v. Lake Placid*, 592 F. Supp. 314, 317 n.12 (quoting *U.S. v. Fuller*, 409 U.S. 488, 492 (1973)).

129. *Id.* (citation omitted).

130. 879 A.2d 112 (N.J. 2005).

131. *Id.* at 125.

132. *Id.*

2. Evictions Controls and the Issue of Permanent Physical Occupations

Even if land rents are regulated at beachfront mobile home parks or places like Carpenter's Beach, regulating the amount that land owners can charge for ground leases will not protect either affordability or the renter's property expectations if land owners can evict the tenants without cause or convert the property to a different use. Many states have enacted statutes that only allow mobile home residents to be evicted for statutorily specified reasons,¹³³ and many state cases have held that the restrictions are not unconstitutional.¹³⁴ There is, though, one issue that has yet to be fully resolved: the reoccurring argument that the three-part *Penn Central* test for regulatory taking challenges is the wrong test because these laws regulating evictions are analogous to a permanent physical occupancy; and, consequently, the *per se* rule laid out in *Loretto v. Teleprompter Manhattan CATV Corp.*¹³⁵ should apply. In that case, Mrs. Loretto purchased an apartment building in New York City and then challenged a state law that gave a cable company the right to permanently install a one eighth of a cubic foot cable box on her building. Despite the minor degree of the intrusion and the great benefit of a citywide cable system, the *Loretto* Court concluded:

[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.¹³⁶

The Court later stated: "[P]hysical *invasion* cases are special and . . . [prior cases] have not repudiated the rule that any permanent physical *occupation* is a taking."¹³⁷

Despite the absolute tone of *Loretto*, many courts have upheld rent regulations based upon distinctions that roughly fall under the question of "how permanent is permanent." In *FCC v. Florida Power Corp.*,¹³⁸ owners of utility poles cited *Loretto* when they challenged a federal statute that limited the rent they could charge other companies for space on the poles.

133. See generally Zitter, *supra* note 117.

134. See, e.g., *Kingstown Mobile Home Park v. Strashnick*, 774 A.2d 847, 853-54 (R.I. 2001) (upholding Rhode Island's eviction control statute and discussing similar decisions from Florida and Vermont).

135. 458 U.S. 419 (1982).

136. *Id.* at 426.

137. *Id.* at 432.

138. 480 U.S. 245 (1987).

After describing the holding in *Loretto* as “very narrow,”¹³⁹ the Supreme Court distinguished the case because the utility pole owners had voluntarily submitted to the occupation: “But it is the invitation [by the pole owner], not the rent, that makes the difference. The line which separates [this] case[] from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.”¹⁴⁰

Notwithstanding the Court’s focus on the initial voluntary nature of the occupation, the Court did not specifically state that the *Loretto per se* rule would apply if the FCC forced the utility pole companies to allow cable companies access to their poles: “We do not decide today what the application of *Loretto v. Teleprompter Manhattan CATV Corp.* would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.”¹⁴¹

In *Troy Ltd. v. Renna*,¹⁴² the Third Circuit similarly refused to treat restrictions on evictions as permanent physical invasions subject to the *per se* takings rule. In that case, the Tenancy Act of New Jersey protected specified lessees, including disabled persons, from evictions from residential buildings.¹⁴³ The *Troy* court held that there was no permanent physical occupation *because tenants eventually die* and, at which time, they will vacate the premises.¹⁴⁴

The controlling case when it comes to mobile homes is *Yee v. City of Escondido*.¹⁴⁵ In *Yee*, the owner of a mobile home park challenged both California’s Mobilehome Residency Law, which limited the bases upon which a park owner could terminate a lessee’s tenancy, and a rent control ordinance that was approved by voters in the City of Escondido. The park owner argued that, combined together, the two laws resulted in the permanent physical occupation of their property in violation of the Takings Clause.¹⁴⁶ In *Yee*, the Court again pointed to the voluntary nature of the occupancy to reject the takings claim:

[T]he Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such [permanent physical invasion]. Petitioners voluntarily rented their land to mobile home owners. At least on the

139. *Id.* at 251 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 441).

140. *Id.* at 252-53.

141. *Id.* at 251-52 n.6 (citation omitted).

142. 727 F.2d 287, 301 (3d Cir. 1984).

143. *Id.* at 290.

144. *Id.* at 301.

145. 503 U.S. 519 (1992).

146. *Id.* at 524-25.

face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so.¹⁴⁷

The Court, however, emphasized in dicta that the outcome could have been different if either law required the park owner to rent the property in perpetuity, noting, “[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.”¹⁴⁸

Despite all of this talk about there not being a taking because a landowner can choose to exit the rental business, a number of other courts have upheld laws that have forced landowners to stay unwillingly in the rental business. For example, in *Griffin Dev. Co. v. City of Oxnard*,¹⁴⁹ the owner needed a special use permit before converting an apartment building into condominiums. Even though the owner could not meet the standards for the permit, the California Supreme Court held that he could continue to rent his property, which was a reasonable use, and thus no taking had occurred.¹⁵⁰ In *Fresh Pond Shopping Center, Inc. v. Callahan*, the owner of a six-unit apartment building wanted to tear it down to build a parking lot. Pursuant to a Cambridge city ordinance, the owner had to get permits from the Cambridge Rent Control Board to evict the last remaining tenant and demolish the building. The Rent Control Board denied the permits and the Massachusetts Supreme Judicial Court upheld the Board’s decision. Even though the Cambridge ordinance as applied clearly kept the appellant involuntarily in the apartment building business, the U.S. Supreme Court dismissed an appeal for want of a substantial federal question.¹⁵¹

147. *Id.* at 527-28.

148. *Id.* at 528 (citing *FCC v. Florida Power*, 480 U.S. 245, 251-52 n.6). The Rhode Island Supreme Court similarly found that a state statute regulating evictions from mobile home parks did not violate the Takings Clause due to the ability of the park owner to leave the business: “Although the Rhode Island mobile home act limits the circumstances under which a tenant can be evicted, a landowner cannot be compelled to use his land as a mobile home park, nor is he precluded from changing the use of his land, if appropriate steps are followed.” *Kingstown Mobile Home Park v. Strashnick*, 774 A.2d at 855.

149. 703 P.2d 339 (Cal. 1985).

150. *Id.* at 345. Overall, challenges to condominium conversion restrictions have not done well; see generally Note, *The Validity of Ordinances Limiting Condominium Conversion*, 78 MICH. L. REV. 124, 132-35 (1979).

151. *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. at 876.

3. The Right to Profit and Not the Right to Exclude is the Real Issue

If one simply rephrases the question to better highlight the property rights that really are and are not being regulated, then these quasi-physical occupation claims within the realm of rent regulation appear to lack merit. In other words, if one recognizes that the primary concern in permanent physical occupation cases should be that the owner loses the right to exclude others, then one can begin to see that eviction restrictions do not typically interfere with this particular property right. Repeatedly, courts in rent regulation cases have pointed out that the owners of the property have voluntarily allowed people onto their property for a price.¹⁵² Moreover, frequently laws regulating evictions allow tenants to be evicted if the owner or a member of the owner's family wishes to occupy the building or unit. This was the case with the Cambridge ordinance in *Fresh Pond*. Such exceptions for owners and family members recognize the desire to *personally* and permanently reoccupy property and then to exclude others (e.g., to no longer voluntarily rent it to others). But in cases where the rental property will be removed from the rental market and sold to others, there is absolutely no desire to exclude others. Instead, the desire is to engage in a particular economic transaction. For example, the owners of the apartment building in *Fresh Pond* did not want to exclude others from the property; they wanted to lease the property out as a parking lot, thereby allowing people and their cars onto the property. Similarly, if Rhode Island had a coastal rental cottage conversion regulation, the owners of the Matunuck Breakers would be allowed to sell a single property with eight rental cottages on it but would be prohibited from selling condominiums.

In the *Fresh Pond* or the Matunuck Breakers examples, excluding others is not really the owner's concern at all; the owners simply want to put the property to its most profitable use. It is axiomatic, though, that property owners do not have a right to put their property to its most profitable use. Instead, laws prohibiting the most profitable use must be judged in accordance with the three-part *Penn Central* analysis. This is certainly the proper analysis for conversion restrictions that do not involve the

152. The *Yee* Court forcefully made this point:

Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government. [Citation omitted]. While the 'right to exclude' is doubtless, as petitioners assert, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' *Kiasser Aetna v. United States*, 444 U.S. 164, 176 (1979), we do not find that right to have been taken from petitioners on the mere face of the Escondido ordinance.

Yee v. City of Escondido, 503 U.S. at 528.

reoccupying of property by either the owner or the owner's family members.

4. Price Controls on Personal Property

Unfortunately, even if rents and evictions can be controlled, mobile home and cottage parks will not stay affordable. As was mentioned earlier, mobile homes on the California coast have sold for a million dollars. A buyer would certainly be reckless to pay such a large sum if the buyer might be evicted at the end of a yearly lease. But because California has rent and eviction controls for mobile homes, the purchaser of a mobile home is really buying the right to occupy the ocean front property in perpetuity at below market rates. In fact, the owners of the mobile home park in *Yee* argued that this transfer of wealth from the land owner to the seller of the mobile home amounted to a physical invasion of property and, hence, an unconstitutional taking.¹⁵³ While the *Yee* Court rejected the physical occupation argument, it seems irrefutable that regulating the rents on ground leases in mobile home parks or cottage camps will not maintain affordability if the mobile home or cottage owner can simply sell his or her home at a premium that reflects the right of perpetual occupation at below market rents. Thus, price controls will have to be placed on the resale of mobile homes and cottages.

The maximum resale value of a mobile home or cottage could be set at a fair rate of return on the original purchase price plus the value of improvements. Such a system of price controls could easily survive a takings challenge. Again, the pertinent three-part test is found in *Penn Central Transportation Co. v. New York City*.¹⁵⁴ A court should look at: (1) the

153. The *Yee* Court did not deny that the rent regulations and eviction controls operating together transferred wealth from the property owner to the lessor. Instead, the Court pointed out that many forms of land regulation transfer wealth from the regulated owner to others:

Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords' income and the tenants' monthly payments, although it does not cause a one-time transfer of value as occurs with mobile homes. Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise. The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more *visible* than in the ordinary case, see Epstein, Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L. Rev. 741, 758-759 (1988), but the existence of the transfer in itself does not convert regulation into physical invasion.

Id. at 529-30.

154. 438 U.S. 104, 124 (1978).

economic impact of the regulation on the owner; (2) the distinct and reasonable investment backed expectations of the owner; and (3) the character of the government action.¹⁵⁵

The economic impact on the owner could be severe if he or she purchased the mobile home or cottage many years ago. The value of coastal property has increased much more rapidly than other investments in the last two decades. In the absence of rent regulations and eviction controls, however, that increase in value would go to the owner of the land and not to the owner of the mobile home or cottage. Thus, these mobile home and cottage owners can hardly assert that the government is violating constitutional notions of fairness by prohibiting them from capturing a windfall that government regulations created in the first place.¹⁵⁶

When looking at the mobile home or cottage owner's distinct and reasonable investment backed expectations, an interesting problem will certainly arise where the owner's investment was unreasonably large given the true nature of the property right that they purchased. In other words, the owners of these structures have at times paid tens and even hundreds of thousands of dollars with the expectation that they could occupy that structure, on that land, for as long as they wanted, and then resell that right. However, prior to the passage of legal eviction controls, the owner is investing merely in wishful thinking and not in a legally protected property right. In such cases, the government arguably does not even have an obligation to allow for a reasonable rate of return on the full purchase price, because that investment (the purchase price) was so unreasonable.

Finally, this article has extensively argued that protecting and promoting the affordability of twenty-four hour coastal access is an important and proper government activity. If resale prices are not controlled for mobile homes and cottages, this important governmental objective will be thwarted.

E. The Problem of Political Feasibility

Even if rents and prices could be legally controlled, this type of regulatory activity typically falls within the jurisdiction of local government using its delegated authority over land use. But, as we have already seen, local governments are benefiting from the growing unaffordable cost of the coast. Local governments are the beneficiaries of increased property taxes

155. *Id.*

156. In *Tirolerland v. Lake Placid 1980 Olympic Games*, the court clearly explained, "the cases establish 'the general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created . . .'" 592 F. Supp. 304, 317 n.12 (quoting *United States v. Fuller*, 409 U.S. 488, 492 (1973)).

and transient occupancy taxes. An article covering the lack of affordable accommodations in California nicely summarized the problem:

Hotels bring in money. They are economic engines for coastal communities, generating jobs, sales taxes, and income from transient occupancy taxes—9 to 10 percent of room receipts in most coastal counties (14 percent in San Francisco). That tax is one of the few sources of unrestricted funds available to local governments. A large hotel with \$300 to \$400 rooms brings in much more, of course, than a more modest one with lower-priced rooms.¹⁵⁷

Overall, it is highly unlikely that local government will take the lead in protecting or promoting affordable twenty-four hour access.

States delegate land use authority to local government; consequently states have the ability to limit and control that authority. Traditionally, however, local government has been deemed to be the appropriate level of government for regulating local land use. Moreover, there has been a reluctance to reallocate land use control to either state or regional government.¹⁵⁸ In the last three decades, however, there has been a marked increase in state and regional governments exercising some level of control over land use planning and regulation.¹⁵⁹ Moreover, numerous states have now either mandated that local governments address specific coastal matters in their land use plans or have assigned decision making authority over certain land uses in coastal areas to a form of regional government.¹⁶⁰ Thus, it would seem that affordable twenty-four hour access, which is a matter of greater than local concern, could quite properly be elevated to a matter of state or regional regulatory control. However, evidence of the political difficulty of implementing the type of accommodation regulations discussed in this article can be found in California. Even though the California legislature allows local communities to regulate rents and evictions, and even though the legislature requires the California Coastal Commission (a regional agency) to protect and encourage lower cost visitor facilities in

157. Scholl, *supra* note 9.

158. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 882 (1983).

159. ROBERT R. WRIGHT & MORTON GITELMAN, WEST NUTSHELL SERIES: LAND 60-64 (4th ed. West Group 2000).

160. See, e.g., Richard K. Norton, *More and Better Local Planning: State-Mandated Local Planning in Coastal North Carolina*, 71 J. AM. PLAN. ASS'N, 55, 55 (2005); Michael Neuman, *A New Approach to Planning and Governing: The Jersey Shore Experience*, 42 OCEAN & COASTAL MGMT., 815 (1999).

coastal areas,¹⁶¹ the California legislature nonetheless explicitly prohibited the Coastal Commission from setting room rates for coastal accommodations.¹⁶²

F. The Problem of Distribution

One last problem has to be acknowledged: if the affordability in overnight accommodations is achieved, it seems likely the demand will outstrip supply. Indeed, as was mentioned earlier, there is a seven year waiting list to rent a tent at Ocean Grove, New Jersey. Many communities already face supply problems when it comes to publicly owned coastal resources: waiting lists for beach cabanas or public moorings can be very long and the methods for allocating them controversial. Should the same person be allowed to hold on to a public resource for years while others wait? Should a mooring or a cabana be passed from one family member to the next like a family legacy? Similarly, if a rent controlled, price controlled cottage at a place like Roy Carpenter's Beach came up for sale how should it be allocated? How should a short supply of affordable rooms be allocated?

The government already deals with these problems when allocating scarce accommodations that are located within picturesque parts of the public domain. The cottages at Crystal Cove State Park in California provide an interesting example. While much smaller than Carpenter's Beach, this small enclave of forty-six cottages has a similar history: It started as a campground in the 1920s with campsites slowly evolving into an eclectic collection of cottages on ground leases that rarely changed hands.¹⁶³ The state bought the property and, after initially proposing to lease the property for a luxury hotel, instead responded to public pressure to renovate the cottages and to rent them out at affordable rates. In April 2006, the public could go online to book lodging reservations at the cottages.¹⁶⁴ According to one reporter:

The hottest tickets on sale the last week of April were not for Bruce Springsteen at the Greek or Madonna's extra show at the Forum. They were for the beach cottages at Orange County's Crystal Cove State Park. Up and online at the very hour reservations opened, I

161. Pub. Res. Code, ch. 3 California Coastal Act, Cal. § 30213 (2006).

162. *Id.*

163. Robin Rauzi, *With the Beach at Your Doorstep; The Renovated Cottages at Crystal Cove have Opened to High Demand, with Modest Prices and an Idyllic Setting*, THE LOS ANGELES TIMES, July 23, 2006, (Travel) at 4.

164. California State Parks, *Historic District Preservation and Public Use Plan*, http://www.parks.ca.gov/default.asp?page_id=21553 (last visited Oct. 19, 2006).

clicked and clicked until I got a cabin. Well, a room. With bunk beds. Facing Pacific Coast Highway, not the ocean. Still, I felt lucky. About 16,000 users were trying to secure one of the 13 cottages that morning, according to ReserveAmerica, the park's booking service.¹⁶⁵

Whether this means of allocation is fair or not, it is certainly common. Still, not all such resources are always allocated on a first come, first serve (or first one to get through the busy signal) basis. For instance, the summit of Mt. Whitney is a very popular but fragile destination. Consequently, only sixty overnight campers per night are allowed along the trail to the summit between May 1st and November 1st. These precious spots are allocated through a lottery.¹⁶⁶ While a typical reservations system would probably suffice for renting most accommodations, a lottery seems the only option in cases like the one mentioned above where a rent controlled, price controlled accommodation is put up for sale.

III. CONCLUSION

There do not seem to be insurmountable legal barriers to creating state laws or local ordinances that could protect places like Carpenter's Beach or regulate the rents on coastal accommodations generally. Instead, the more profound barriers would probably be political. As was pointed out above, local beach communities have a financial interest in allowing and even encouraging high room rates and the tearing down of humble cottages to build mini mansions in their place.

Perhaps more importantly, it seems unlikely that enough broad political support can be generated among non-local, average citizens to demand legislation that would protect and promote twenty-four hour access. Multiple factors probably contribute to this lack of political support. Generally, Americans are neither familiar nor comfortable with price controls. But even more importantly, while there has been a growing acceptance that harmful environmental conditions should not be dis-

165. Rauzi, *supra* note 163, at 4.

166. USDA Forest Service, *Inyo National Forest*, <http://www.fs.fed.us/r5/inyo/recreation/wild/whitneylottery.shtml> (last visited Oct. 19, 2006). The National Forest Service starts accepting applications at the start of February and the lottery begins on February 15th. The lottery can allocate approximately 11,000 people per night. USDA Forest Service, *Recreational Activities-Trailhead Quotas*, <http://www.fs.fed.us/r5/inyo/recreation/wild/quotas.shtml> (last visited Oct. 19, 2006). However, most people opt for two nights on the trail, so the actual number of people spending the night on the mountain slopes is much smaller. Moreover, hikers during the colder months are sparse.

proportionately placed upon lower income residents simply because they have fewer resources, the idea that lower income residents should not be deprived of environmental goods simply because they have fewer resources is very new and not widely taken into consideration.¹⁶⁷ If this viewpoint becomes more widely shared, then the political barrier will become less formidable.

Still, probably the biggest problem is that Americans do not seem to confidently think of the values emanating from the ocean and shoreline as values to which they should have a right of access. Instead they seem frequently (but not always and at times grudgingly) to accept that these are values that must be bought and sold on the open market. Nonetheless, Americans think about coastal property differently than property further from the shore and have conflicting and ambiguous feelings about it.¹⁶⁸ Of course the ocean belongs to the public; moreover, pursuant to the Public Trust Doctrine or custom, the public has some right to access the shore ranging from the area below the mean low tide line to the entire sandy beach.¹⁶⁹ However, most Americans likely know little or nothing about public trust law. Americans instead seem to sense that in some way everyone should have access to the values derived from the shore, but they do not confidently know what they should have access to and why;¹⁷⁰ therefore, they do not confidently demand greater access, such as affordable twenty-four hour access. Thus, those of us who believe in and care about access need to work to demonstrate and clearly articulate what the public's access rights should be and, furthermore, to work with potentially interested groups to build support for needed legislation.

167. See Myron F. Floyd & Cassandra Y. Johnson, *Coming to Terms with Environmental Justice in Outdoor Recreation: A Conceptual Discussion with Research Implications*, 24 LEISURE SCIENCES 59, 60 (2002); Gary T. Green, Michael A. Tarrant, Uttiyo Raychaudhuri & Yangjian Jhang, *Wilderness in Whose Backyard?*, 11 INTERNATIONAL JOURNAL OF WILDERNESS 31, 37-38 (2005).

168. See Robert Thompson, *Cultural Models and Shoreline Social Conflict*, 35 COASTAL MANAGEMENT (forthcoming 2007) [hereinafter Thompson I]; Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground to Stand On*, 11 OCEAN AND COASTAL L. J. 47 (2006) [hereinafter Thompson II].

169. GEORGE COLE, WATER BOUNDARIES 4-5 (1997); see also Thompson I, *supra* note 168.

170. Thompson II, *supra* note 168 (private ownership of the beach cannot be justified pursuant to the main theories used to justify private property).