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CONFRONTATION ON SANDY NECK: PUBLIC ROAD ACCESS RIGHTS, ENDANGERED SPECIES PROTECTIONS, AND MUNICIPAL LIABILITY

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Abstract: Sandy Neck's barrier beach in Barnstable, Massachusetts provides critical habitats for piping plovers and other threatened species listed by the Endangered Species Act (ESA) and the Massachusetts Endangered Species Act (MESA). To protect the species, the Town must regulate vehicle access to the beach and the nearby cottages. The cottage owners assert that the regulations amount to a regulatory taking of their access rights to the cottages. This Note proposes alternatives for the Town to protect the threatened species, without working a taking of the cottage owners' access rights, recommending that the Town apply for an incidental take permit under ESA, eliminate restrictions on guest access, and hire additional pilots to guide cottage owners around piping plovers on the trails leading to the cottages.

INTRODUCTION

Sandy Neck is a small peninsula that projects out from the Town of Barnstable on Cape Cod, Massachusetts.¹ There are several summer cottages on Sandy Neck, many located at the end of the peninsula.² Piping plovers and diamondback terrapins, which are protected by both the federal and state governments as threatened species,³ live along the main access routes of Sandy Neck.⁴

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¹ For a description of Sandy Neck, see WOODS HOLE GROUP & WATERSHED INST. AT BOSTON COL, LONG RANGE NATURAL RESOURCE MANAGEMENT PLAN FOR SANDY NECK BARRIER BEACH 4 (2003), available at http://www.town.barnstable.ma.us/SandyNeck/MP-outline_formatted.pdf. [hereinafter WOODS HOLE GROUP]

² Memorandum from Alexander Yuan, Envtl. Seminar Intern, to Aaron Toffler, Attorney, Watershed Inst., Preventing Further Suburbanization of the Sandy Neck Area of Critical Environmental Concern 1 (2001) (on file with author).

³ 321 MASS. CODE REGS. 10.90 (2005).

⁴ See WOODS HOLE GROUP, *supra* note 1, at 20–22.

The Town of Barnstable (Town)—pursuant to the federal Endangered Species Act (ESA)⁵ and the Massachusetts Endangered Species Act (MESA)⁶—is responsible for protecting the threatened species that live on the town-owned access trails of Sandy Neck. To protect these species adequately, the Town must regulate vehicle use on the trails.⁷ However, in regulating vehicle use, the Town restricts the ability of cottage owners to access their cottages.⁸ This Note describes the difficult predicament of the Town, suggesting options to avoid one type of taking while preventing another.

Part I of this Note describes the layout of Sandy Neck, and the methods of access available to those who own cottages on the peninsula. Part II reviews ESA and MESA, describes the threatened species living on Sandy Neck, and examines efforts to protect those species through vehicle use limitations. Part III reviews case law concerning the Takings Clause of the Fifth Amendment as it relates to regulatory takings and access restrictions. Finally, Part IV examines the Town of Barnstable's liability under ESA, MESA, and the Takings Clause. Part IV also provides suggestions for how the Town can limit this liability.

I. SANDY NECK

A. *Layout*

Sandy Neck Beach is a six-mile long peninsula, extending eastward from the Town of Barnstable, on the north shore of Cape Cod, Massachusetts.⁹ The peninsula, which varies in width from about two hundred feet to a half-mile, shelters Barnstable Harbor from Cape Cod Bay.¹⁰ This formation has allowed various types of soils and natural communities to develop, “including migrating sand dunes, fresh and saltwater marshes, bogs and both deciduous and coniferous forests.”¹¹ The Nature Conservancy considers Sandy Neck one of the best

⁵ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

⁶ Massachusetts Endangered Species Act, MASS. GEN. LAWS ch. 131A, §§ 1–7 (2004).

⁷ See discussion *infra* Part II.D.

⁸ *Alger v. Conservation Comm'n*, No. 99-437, slip op. at ¶ 39 (Mass. Dist. Ct. filed Aug. 11, 1999); letter from John R. Alger, P.C., Resident, Sandy Neck, and Attorney, Sandy Neck Colony Ass'n to the Mass. Dep't of Env'tl. Prot., Div. of Wetlands & Waterways 2–3 (Apr. 9, 2001) [hereinafter Alger, letter] (on file with author).

⁹ WOODS HOLE GROUP, *supra* note 1, at 4.

¹⁰ *Id.*

¹¹ *Id.*

barrier beach systems in the northeast eco-region.¹² Consequently, the Massachusetts Executive Office of Environmental Affairs designated Sandy Neck as an Area of Critical Environmental Concern.¹³ Sandy Neck's undisturbed ecology supports wide biodiversity, including at least eight species considered either threatened or of special concern by the Massachusetts Division of Fisheries and Wildlife (Mass. Wildlife).¹⁴ Two of these species are also considered threatened by the United States Fish and Wildlife Service (FWS).¹⁵

There are fifty-eight cottages on Sandy Neck.¹⁶ About thirty of the cottages are located on the eastern tip of the peninsula, which is commonly known as the "cottage colony."¹⁷ Most of the cottages are suitable for use in warm weather only;¹⁸ however, some cottage owners have installed insulation and heating to permit year-long use.¹⁹

Twenty-seven of the cottages are on privately owned land, while the other twenty-three are on land owned by the Town of Barnstable and leased to cottage owners.²⁰ These twenty-three lots were leased on twenty-year terms, which expired in 2002.²¹ Rather than negotiating new ground leases, the Town considered converting some of the land to other uses, such as ecotourism.²² However, the Town lacked sufficient resources to change the use at that time.²³ Thus, existing leaseholders were granted new leases for five-year terms.²⁴ The Town may

¹² The Nature Conservancy, Massachusetts Chapter, Sandy Neck Preserve, <http://nature.org/wherework/northamerica/states/massachusetts/preserves/art5331.html> (last visited Nov. 7, 2005).

¹³ Mass. Executive Office of Env'tl. Affairs, Designation of Sandy Neck Barrier Beach System as an Area of Critical Concern and Supporting Findings 1 (Dec. 15, 1978), available at http://www.mass.gov/dcr/stewardship/acec/acecs/designations/sn_des.pdf.

¹⁴ WOODS HOLE GROUP, *supra* note 1, at 12. These species include: bristly foxtail (*Setaria geniculata*), coastal heathland cutworm (*Abagrotis crumbi benjamani*), common tern (*Sterna hirundo*), diamondback terrapin (*Malaclemys terrapin*), eastern spadefoot toad (*Scaphiopus holbrookii*), least tern (*Sterna antillarum*), piping plover (*Charadrius melodus*), plymouth gentian (*Sebatia kennedyana*), and thread-leaved sundew (*Drosera filiformis*). *Id.*; 321 MASS. CODE REGS. 10.90 (2005).

¹⁵ See 50 C.F.R. § 17.11 (2004). These species include least tern (*Sterna antillarum*), and piping plover (*Charadrius melodus*). *Id.*

¹⁶ Yuan, *supra* note 2, at 1.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ *Id.*

²⁰ WOODS HOLE GROUP, *supra* note 1, at 45.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

opt to renew the leases for additional five-year terms in 2007.²⁵ Pursuant to the lease terms, if a ground lease terminates or expires, the lessee must remove the cottage from the land within 180 days.²⁶

B. Boat and Trail Access to the Cottages

As a narrow peninsula, Sandy Neck can be reached by motorboat.²⁷ However, most boating around Sandy Neck is recreational, and is not a primary means of transport.²⁸ Dock space is limited on both Sandy Neck and Barnstable Harbor; that which is available is in high demand.²⁹ Consequently, boaters are not guaranteed to find dock space when traveling to and from Sandy Neck.³⁰ In addition, daily tides can raise and lower water levels several feet, making boat storage difficult.³¹

The most common way of accessing Sandy Neck is the trail system, which provides pedestrian and Off Road Vehicle (ORV) access to the beach and cottages.³² The cottages are not accessible by car, though they may be reached by sport-utility vehicles with off-road capabilities.³³ The trail system contains two primary east-west trails.³⁴ The Beach Trail runs east-west along the beach on the northern side of Sandy Neck.³⁵ The Marsh Trail—an unimproved trail³⁶—runs along the south side of the beach, but north of the Great Marsh.³⁷ The Beach Trail and the Marsh Trail are connected by four north-south trails: One, Two, Four,

²⁵ *Id.*

²⁶ WOODS HOLE GROUP, *supra* note 1, at 45.

²⁷ *See id.* at 42.

²⁸ *See* Ellen Gallagher & Angela Yingling, A Study and Analysis of the Management of Sandy Neck Beach, Barnstable, Massachusetts 23 (May 10, 2001) (unpublished manuscript, on file with author).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 23–24.

³² *See* WOODS HOLE GROUP, *supra* note 1, at 32. The trail map has been included as Appendix 1.

³³ *See id.*

³⁴ BARNSTABLE CONSERVATION COMM'N, SANDY NECK BARRIER BEACH ECOSYSTEM TRAIL MAP, available at <http://www.town.barnstable.ma.us/Conservation/TrailGuides/Sandy.pdf> (last visited Nov. 8, 2005).

³⁵ *Id.*

³⁶ WOODS HOLE GROUP, *supra* note 1, at 32–33. Unimproved trails and roads are ungraded and have dirt surfaces. *See* MATTHEW L. BROOKS & BRIDGET LAIR, U.S. GEOLOGICAL SURVEY, ECOLOGICAL EFFECTS OF VEHICULAR ROUTES IN A DESERT ECOSYSTEM 4 (2005), available at http://www.dmg.gov/documents/Desert_Road_Ecology_report.pdf.

³⁷ BARNSTABLE CONSERVATION COMM'N, *supra* note 34.

and Five.³⁸ Trail One is the westernmost connecting trail, followed by Trails Two, Four, and Five.³⁹ Trail Six extends from the eastern end of the Beach Trail approximately one half-mile to the southeast,⁴⁰ providing ORV access to the cottage colony.⁴¹ In 2001, the Town created a new trail connecting Trails Five and Six.⁴² ORV users can use the new trail to reach Trail Six and the cottage colony without traveling on the Beach Trail.⁴³ The Horse Trail runs east to west along the interior of the peninsula, and connects Trails Four and Five.⁴⁴ Use of the Horse Trail is limited to horseback riders and pedestrians.⁴⁵ Although other interior trails exist, they are used so infrequently by vehicles⁴⁶ that they do not appear on the Town's trail guide.⁴⁷

The trails are subject to alteration from physical conditions.⁴⁸ Consequently, trail access for ORVs is inconsistent.⁴⁹ High tides and storms can alter the width and extent of trails on a seasonal, or even daily, basis.⁵⁰ The Beach Trail and the Marsh Trail—which provide the only means of reaching the cottage colony from Cape Cod's mainland⁵¹—are frequently closed due to tidal flooding.⁵² In addition, ice creates dangerous driving conditions in the winter that limit trail access.⁵³ An Order of Conditions (Order) issued by the Massachusetts Department of Environmental Protection (DEP) regulates vehicle use on Sandy

³⁸ *Id.* Trail Three was closed in the early 1980s. WOODS HOLE GROUP, *supra* note 1, at 33.

³⁹ BARNSTABLE CONSERVATION COMM'N, *supra* note 34.

⁴⁰ *Id.*

⁴¹ WOODS HOLE GROUP, *supra* note 1, at 33.

⁴² *Id.* The connecting trail was created pursuant to a settlement agreement regarding vehicle access between Sandy Neck cottage owners and the town. Sandy Neck Settlement Agreement 2 (June 2, 2000) (on file with author).

⁴³ WOODS HOLE GROUP, *supra* note 1, at 33. To reach the cottage colony without using the Beach Trail, ORV users could travel east on the Marsh Trail, north on Trail Five, east on the new connecting trail, and then southeast on Trail Six. *See* BARNSTABLE CONSERVATION COMM'N, *supra* note 34.

⁴⁴ BARNSTABLE CONSERVATION COMM'N, *supra* note 34.

⁴⁵ *See* WOODS HOLE GROUP, *supra* note 1, at 33.

⁴⁶ *Id.*

⁴⁷ *See* BARNSTABLE CONSERVATION COMM'N, *supra* note 34.

⁴⁸ WOODS HOLE GROUP, *supra* note 1, at 32.

⁴⁹ *See id.*

⁵⁰ *Id.*

⁵¹ BARNSTABLE CONSERVATION COMM'N, *supra* note 34.

⁵² WOODS HOLE GROUP, *supra* note 1, at 37.

⁵³ *See id.*

Neck.⁵⁴ The Order restricts vehicle access to the trail system to prevent adverse effects to the habitats of threatened and endangered wildlife.⁵⁵

II. ENDANGERED SPECIES PROTECTION

A. Federal Endangered Species Act

In 1973, Congress enacted the Endangered Species Act (ESA) to address species extinction caused by “economic growth and development untempered by adequate concern for conservation.”⁵⁶ ESA provides for the protection and restoration of endangered and threatened species.⁵⁷ More important, ESA also provides a means to conserve the ecosystems that sustain endangered species.⁵⁸ A species is considered endangered if it “is in danger of extinction throughout all or a significant portion of its range.”⁵⁹ A species is threatened if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁶⁰ The Secretary of the Interior (Secretary) must periodically, and at least every five years, revise and publish in the Federal Register a list of all endangered and threatened species.⁶¹ Endangered and threatened species are thus commonly called “listed species.”⁶² The United States Fish and Wildlife Service (FWS) administers ESA under the Secretary, and is responsible for protecting over ninety-five percent of the listed species.⁶³

ESA prohibits the killing or “taking” of a listed species.⁶⁴ A “taking” includes harm to a listed species.⁶⁵ FWS defines harm to include acts which cause “significant habitat modification or degradation where [the act] actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or shelter-

⁵⁴ Mass. Dep’t of Env’tl. Prot., Order of Conditions for Vehicle Management on Sandy-Neck. File No. SE3-3792 (Mar. 30, 2001) [hereinafter DEP, Order].

⁵⁵ See *id.*; discussion *infra* text accompanying notes 127–56.

⁵⁶ Endangered Species Act of 1973, 16 U.S.C. § 1531 (2000).

⁵⁷ See *id.*

⁵⁸ *Id.*

⁵⁹ *Id.* § 1532(6).

⁶⁰ *Id.* § 1532(20).

⁶¹ *Id.* § 1533(c).

⁶² See, e.g., Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 33 NAT. RESOURCES J. 1027, 1037 (1993).

⁶³ U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO/RCED92131BR, ENDANGERED SPECIES ACT: TYPES AND NUMBER OF IMPLEMENTING ACTIONS 19 (1992). The remaining five percent is administered by the National Marines Fisheries Service. See *id.*

⁶⁴ 16 U.S.C. § 1538(a) (1).

⁶⁵ *Id.* § 1532(19).

ing.”⁶⁶ Relying on congressional intent in the legislative history of ESA, the Supreme Court has upheld FWS’s inclusion of habitat modification in the definition of harm.⁶⁷

Although ESA does not prohibit the taking of threatened species,⁶⁸ it requires the Secretary to “issue such regulations as he deems necessary and advisable to provide for the conservation of [threatened] species.”⁶⁹ The Secretary has the authority to elevate the protection of threatened species such that it meets the level of protection mandated for endangered species.⁷⁰ Pursuant to this authority, the Secretary has issued a regulation which, with some exceptions, protects threatened species against takings.⁷¹

ESA allows states and private parties to apply for incidental take permits.⁷² These permits shield permittees from sanctions should they harm a species incidentally in the course of their lawful activity.⁷³ Fines can be as high as twenty-five thousand dollars for civil violations of ESA, and fifty thousand dollars for criminal violations.⁷⁴ An applicant for an incidental take permit must first submit a Habitat Conservation Plan (HCP) to the Secretary, detailing the effects of the applicant’s taking, efforts to mitigate those effects, and funding available to implement mitigation efforts.⁷⁵ The applicant’s HCP must also include alternative actions considered, as well as the applicant’s reasons for rejecting those alternatives.⁷⁶ After a public comment period, the Secretary may grant the incidental take permit if the Secretary finds that “the taking will not

⁶⁶ 50 C.F.R. § 17.3 (2004).

⁶⁷ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 707 (1995) (citing H.R. REP. No. 97-567, at 31 (1982); H.R. REP. No. 97-835, at 30–32 (1982)).

⁶⁸ See 16 U.S.C. § 1538(a).

⁶⁹ *Id.* § 1533(d).

⁷⁰ *Id.*

⁷¹ 50 C.F.R. § 17.31(a). FWS has “established a regime in which the prohibitions established for endangered species are extended automatically to all threatened species by a blanket rule and then withdrawn as appropriate, by special rule for particular species and by permit in particular situations.” *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 1 F.3d 1, 5 (D.C. Cir. 1993), *rev’d on other grounds*, 515 U.S. 687 (1995). This process was upheld against claims that ESA requires FWS “to extend the prohibitions to threatened species on a species-by-species basis and to do so only after making a specific finding that each such extension was ‘necessary and advisable.’” *Id.* at 3.

⁷² 16 U.S.C. § 1539(a).

⁷³ See *id.*

⁷⁴ *Id.* § 1540.

⁷⁵ *Id.* § 1539(a)(2)(A).

⁷⁶ *Id.*

appreciably reduce the likelihood of the survival and recovery of the species in the wild.”⁷⁷

B. *Massachusetts Endangered Species Act*

MESA is largely similar to its federal counterpart, providing that “no person may take . . . any plant or animal species listed as endangered, threatened or of special concern or listed under the Federal Endangered Species Act.”⁷⁸ MESA, like ESA,⁷⁹ applies to state and local government entities, as well as individuals.⁸⁰ Mass. Wildlife, which administers the MESA,⁸¹ defines the taking of an animal to mean “to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct.”⁸² The regulations promulgated by Mass. Wildlife provide that any species which regularly occurs within Massachusetts and is “listed as endangered or threatened under the provisions of the Federal Endangered Species Act shall be listed in an equivalent category on the state list.”⁸³ However, species federally listed as threatened may be listed as endangered under MESA.⁸⁴

MESA designates three classes of protected species: endangered, threatened and of special concerns.⁸⁵ Endangered species are those in danger of extinction throughout all or a significant portion of their global or Massachusetts range, as documented by biological research and inventory.⁸⁶ Threatened species under MESA are those likely to become endangered “within the foreseeable future throughout all or a significant portion of [their] range and . . . [those] declining or rare as determined by biological research and inventory.”⁸⁷ Species of special concern under the MESA are those which have “been documented by biological research and inventory to have suffered a decline that could

⁷⁷ *Id.* § 1539(a)(2)(B).

⁷⁸ Massachusetts Endangered Species Act, MASS. GEN. LAWS ch. 131A, § 2 (2004).

⁷⁹ 16 U.S.C. §§ 1532(13), 1538(a). The ESA also applies to “any officer, employee, agent, department, or instrumentality of the Federal Government.” *Id.* § 1532(13).

⁸⁰ MASS. GEN. LAWS ch. 131A, § 1.

⁸¹ *Id.*

⁸² 321 MASS. CODE REGS. 10.02 (2005).

⁸³ *Id.* at 10.03(4).

⁸⁴ *Id.* at 10.03(4).

⁸⁵ *See id.* at 10.03(6).

⁸⁶ *Id.* at 10.03(6)(a).

⁸⁷ *Id.* at 10.03(6)(b).

threaten the species if allowed to continue unchecked,”⁸⁸ and those that occur “in such small numbers or with such a restricted distribution or specialized habitat requirements that [they] could easily become threatened within Massachusetts.”⁸⁹

C. *Species of Special Concern and Threatened Status on Sandy Neck*

Sandy Neck’s “large size, isolation and relatively pristine ecology provide some of the most important habitats for rare and endangered species anywhere in Massachusetts.”⁹⁰ Among the threatened species living on Sandy Neck are the piping plover (*Charadrius melodus*) and the diamondback terrapin (*Malaclemys terrapin*).⁹¹

FWS has listed the piping plover living on the Atlantic coastline as a threatened species.⁹² Mass. Wildlife also lists the piping plover as threatened.⁹³ Consequently, both ESA and MESA prohibit any harming or habitat modification of piping plovers on Sandy Neck.⁹⁴ Although FWS does not list the diamondback terrapin as a protected species under ESA,⁹⁵ Mass. Wildlife lists the species as threatened under MESA.⁹⁶ Thus, the diamondback terrapin is also protected from harm and habitat alteration under MESA.⁹⁷

Piping plovers are small shorebirds that nest on coastal beaches.⁹⁸ The birds are sand-colored; they make their nests, which consist of sand, gravel, and shells, on open sand or in sparse vegetation.⁹⁹ Most piping plover nests on Sandy Neck are built near the Beach Trail, east of Trail Two, and particularly east of Trail Five.¹⁰⁰ Piping plovers build nests in Massachusetts from mid-March through May, and nest “from

⁸⁸ 321 MASS. CODE REGS. 10.03(6)(c).

⁸⁹ *Id.*

⁹⁰ WOODS HOLE GROUP, *supra* note 1, at 12.

⁹¹ *Id.*

⁹² 50 C.F.R. § 17.11 (2004). FWS listed the piping plover as endangered in the Great Lakes Watershed and as threatened “in the remainder of its range: . . . [including the] Atlantic Coast (Quebec, Newfoundland, Maritime Provinces and States from Maine to Florida); . . . and anywhere else found in the wild except where listed as endangered.” Endangered and Threatened Wildlife and Plants, 50 Fed. Reg. 50,726, 50,726 (Dec. 11, 1985) (codified at 50 C.F.R. pt. 17).

⁹³ 321 MASS. CODE REGS. 10.90.

⁹⁴ See Endangered Species Act of 1973, 16 U.S.C. §§ 1538(a)(1), 1532(19) (2000); MASS. GEN. LAWS ch. 131A, § 2 (2004).

⁹⁵ See 50 C.F.R. § 17.11.

⁹⁶ 321 MASS. CODE REGS. 10.90.

⁹⁷ See MASS. GEN. LAWS ch. 131A, § 2.

⁹⁸ *United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 83 (D. Mass. 1998).

⁹⁹ *Id.*

¹⁰⁰ WOODS HOLE GROUP, *supra* note 1, at 20–22.

mid-April through late July.”¹⁰¹ Chicks weigh less than 0.5 ounces and are about 2.5 inches tall.¹⁰² They leave their nests within twenty-four hours of hatching and fledge after twenty-five to thirty-five days.¹⁰³ Although most chicks that hatch in Massachusetts fledge by early August, some do not fledge until mid-August.¹⁰⁴ Thus, the population of unfledged piping plovers on Sandy Neck peaks during June and July.¹⁰⁵

Diamondback terrapins are turtles with deep, diamond-shaped growth rings in their carapaces.¹⁰⁶ From June to July, terrapins nest in coastal salt marshes and dunes, including those on the southern side of Sandy Neck.¹⁰⁷ Females deposit eggs in nest cavities four to eight inches deep; the eggs hatch nine to fifteen weeks later.¹⁰⁸ Hatchlings—measuring between 1 and 1.25 inches in length—may remain in their nests until the following April.¹⁰⁹ About eighty-five percent of terrapin nesting activity on Sandy Neck occurs west of Trail Two, near the Marsh Road.¹¹⁰

D. Trail Restrictions on Sandy Neck to Protect Species of Special Concern and Threatened Status

The Town of Barnstable owns the trails on Sandy Neck,¹¹¹ and is therefore responsible for preventing any harm to piping plovers and diamondback terrapins caused by use of the trails.¹¹² Because the piping plovers and terrapins live and nest along the Beach and Marsh Trails, the Town must take measures to decrease the use of motor vehicles on those trails to protect the species. ORVs can harm piping plovers in several ways. Piping plover chicks “stand in, walk and run along tire ruts, and sometimes have difficulty crossing or climbing out of

¹⁰¹ *Town of Plymouth*, 6 F. Supp. 2d at 83.

¹⁰² *Id.*

¹⁰³ *Id.* “Fledge” refers to a bird’s ability to fly. *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See* WOODS HOLE GROUP, *supra* note 1, at 38.

¹⁰⁶ CONN. DEP’T OF ENVTL. PROT., WILDLIFE IN CONNECTICUT INFORMATIONAL SERIES, NORTHERN DIAMONDBACK TERRAPIN, <http://dep.state.ct.us/burnatr/wildlife/factshts/dm-1terp.htm> (last visited Nov. 10, 2005) hereinafter CONN. DEP]. A carapace refers to a turtle’s top shell. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ WOODS HOLE GROUP, *supra* note 1, at 20.

¹¹¹ *See* BARNSTABLE CONSERVATION COMM’N, *supra* note 34.

¹¹² *See* Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1) (2000); Massachusetts Endangered Species Act, MASS. GEN. LAWS ch. 131A, § 2 (2004).

deep, steep-sided ruts.”¹¹³ Consequently, unfledged chicks can be trapped in tire tracks, unable to reach food or to move out of the way of oncoming traffic.¹¹⁴ Moreover, some chicks stand motionless as ORVs approach, attempting to blend into the sand.¹¹⁵ In addition, ORVs disturb the piping plovers’ habitats, interrupting feeding, courtship, and nesting.¹¹⁶ ORVs are also dangerous to terrapins. Female terrapins attempting to nest are often killed on coastal roads.¹¹⁷ Therefore, adequate measures to protect these threatened species would require a restriction in access to the trails, and thus a restriction in access to the property abutting the trails.

In a situation similar to that on Sandy Neck, FWS received a preliminary injunction to prohibit the Town of Plymouth, Massachusetts, from allowing ORVs to travel on a beach where piping plovers were nesting.¹¹⁸ The district court found that the Town’s persistent refusal to take adequate precautionary measures to protect plovers created a likelihood that the birds would be killed, and that their nesting and feeding habitats would be adversely modified.¹¹⁹

In 2000, Mass. Wildlife applied to FWS for an ESA incidental take permit to limit liability for activities on Massachusetts beaches, including Sandy Neck, that could potentially harm piping plovers.¹²⁰ The proposed activities included beach use by pedestrians and motorized recreationists, as well as beach access by vehicles deemed essential for law enforcement, public safety, property maintenance, private property access, and rare species monitoring and management.¹²¹ FWS denied the permit application, and Mass. Wildlife has indicated that it will not reapply.¹²² However, Mass. Wildlife offered the Town of Barnstable support should the Town choose to apply directly to FWS for its own incidental take permit.¹²³ The permit would limit the Town’s liability for harm done to piping plovers on the Sandy Neck trails.¹²⁴

¹¹³ United States v. Town of Plymouth, 6 F. Supp. 2d 81, 84 (D. Mass. 1998).

¹¹⁴ See *id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ CONN. DEP, *supra* note 106.

¹¹⁸ *Town of Plymouth*, 6 F. Supp. 2d at 82.

¹¹⁹ *Id.* at 91.

¹²⁰ Mass. Div. of Fisheries and Wildlife, Draft Environmental Assessment for the Issuance of an Incidental Take Permit under Section 10(a)(1)(B) of the Endangered Species Act: A Conservation Plan for Piping Plovers in Massachusetts (Mar. 30, 2000).

¹²¹ *Id.* at 1.

¹²² WOODS HOLE GROUP, *supra* note 1, at 71 n.1.

¹²³ *Id.*

¹²⁴ See *supra* notes 72–77 and accompanying text.

Therefore, the Town of Barnstable is aware that it must take measures to protect piping plovers and terrapins in order to satisfy federal and state endangered species regulations.¹²⁵ Just as the Town of Plymouth needed to limit ORV use near piping plover breeding grounds,¹²⁶ the Town of Barnstable must also limit ORV use on Sandy Neck to protect the listed species.¹²⁷ Currently, the Barnstable Conservation Commission enforces a Department of Environmental Protection (DEP) Order regulating vehicle use on Sandy Neck.¹²⁸ The Order incorporates ESA and MESA guidelines for preventing harm to listed species.¹²⁹ Pursuant to the Order, when unfledged piping plovers are present on a section of the Beach Trail, that section is temporarily closed to all vehicles not deemed essential.¹³⁰ As a result, the closings prevent recreational beach users and guests of cottage owners from driving ORVs along the Beach Trail.¹³¹

Furthermore, during temporary closings, essential vehicles are allowed on closed sections of the beach only when travel is necessary.¹³² In addition, except for emergencies, travel can occur only during daylight hours, and vehicles must be escorted through the closed areas by a qualified pilot.¹³³ The Town provides pilots, who are aware of the location of unfledged piping plovers, to guide ORVs away from the piping plovers.¹³⁴ Essential vehicles are defined as those necessary for law enforcement, maintenance of public property, monitoring of rare species, vehicles operated by cottage owners, spouses and immediate family of cottage owners, lessees of cottage owners, and contractors providing necessary repairs.¹³⁵ While vehicle passes are available for the guests of owners and lessees, these passes are limited to one guest vehicle roundtrip per cottage per week.¹³⁶ Access to the Marsh Trail is also restricted to protect the terrapin nests.¹³⁷ Essential and guest vehicles

¹²⁵ See WOODS HOLE GROUP, *supra* note 1, at 71.

¹²⁶ See *supra* notes 118–20 and accompanying text.

¹²⁷ See WOODS HOLE GROUP, *supra* note 1, at 71.

¹²⁸ DEP, Order, *supra* note 54.

¹²⁹ *Id.* pt. B, Findings, at para. 3.

¹³⁰ *Id.* pt. B, Special Conditions of Approval, at para. 3.

¹³¹ See *id.*

¹³² *Id.* at para. 6.

¹³³ *Id.*

¹³⁴ See DEP, Order, *supra* note 54, pt. B, Special Conditions of Approval, at para. 6.

¹³⁵ *Id.* at para. 6.1.1.

¹³⁶ *Id.* at para. 6.1.2.

¹³⁷ *Id.* at para. 6.2.1.

traveling east of Trail Two must access the Marsh Trail by Trail Two, and not via Trail One.¹³⁸

Cottage owners and lessees, in appealing an earlier version of this Order,¹³⁹ asserted easement rights over the trails for access to the cottages.¹⁴⁰ They further asserted that the restrictions were onerous, describing situations in which families with small children were forced to sleep overnight in their cars; residents were unable to attend evening functions outside of Sandy Neck, including Barnstable Conservation Commission meetings; elderly and ailing residents were unable to coordinate doctor appointments with pilot schedules; and a resident running errands had to wait almost five hours to return home.¹⁴¹

Following this appeal in 1999, several stakeholders met with the Massachusetts Office of Dispute Resolution in an effort to reach a settlement agreement.¹⁴² The terms of this settlement were to be included in an Order of Conditions issued by the Barnstable Conservation Commission to regulate vehicle use on Sandy Neck.¹⁴³ The final settlement provided for regularly scheduled pilot escorts and less stringent language with regard to essential vehicle access.¹⁴⁴ In addition, the settlement provided for the construction of the connecting trail between Trails Five and Six to increase access to the eastern tip of the peninsula during peak times when unfledged piping plovers are present.¹⁴⁵ Residents were permitted to drive on this connecting trail unescorted, provided a passenger walked in front of the vehicle to act as a “monitor,” if traveling before eight o’clock in the morning.¹⁴⁶ The parties to the settlement agreed to work cooperatively to develop a long-range management plan for Sandy Neck.¹⁴⁷

Sandy Neck residents, through the Sandy Neck Colony Association, assert that the Barnstable Conservation Commission did not incorporate all of the settlement terms into the Order of Conditions.¹⁴⁸ Specifically, the residents assert that the Barnstable Conservation

¹³⁸ *Id.*

¹³⁹ See Mass. Dep’t Envtl. Prot., Order of Conditions for Vehicle Management on Sandy Neck. File No. SE33469 (June 24, 1999).

¹⁴⁰ *Alger v. Conservation Comm’n*, No. 99-37 ¶¶ 18, 19 (Mass. Dist. Ct. filed Aug. 11, 1999).

¹⁴¹ *Id.* ¶¶ 38, 41, 44–46, 49.

¹⁴² See Sandy Neck Settlement Agreement, *supra* note 42.

¹⁴³ See Alger, letter, *supra* note 8, at 1.

¹⁴⁴ See Sandy Neck Settlement Agreement, *supra* note 42.

¹⁴⁵ See *id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Alger, letter, *supra* note 8, at 2–3.

Commission's Order denies access between Trails One and Two to all but the owners of the cottages located between those trails.¹⁴⁹ In addition, the residents assert that all provisions which were agreed to read "should apply" were changed to "shall apply" in the Order.¹⁵⁰ They believe the altered language places stricter limits on essential vehicle access than was agreed to in the settlement.¹⁵¹

The residents have thus appealed the Order to DEP, requesting cancellation or amendment of the Order with a superseding order.¹⁵² They are again asserting a right-of-way for all purposes over the Beach Trail or, in the alternative, over the Marsh Trail.¹⁵³ They are arguing that access restrictions, specifically those at night, amount to a taking of both their right-of-way and right of access to their property.¹⁵⁴ In addition, the residents assert that it is beyond the scope of the Barnstable Conservation Commission to require cottage owners, lessees, and their spouses to travel with monitors, and to limit the number of guests who may travel to the cottages.¹⁵⁵ Whether such restrictions constitute a compensable property taking is, like most regulatory takings, a "question of degree."¹⁵⁶

III. RESTRICTION OF ACCESS RIGHTS AS A PROPERTY TAKING

A. *Takings Generally*

The Fifth Amendment provides that "private property [may not] be taken for public use, without just compensation."¹⁵⁷ The Supreme Court of the United States "has recognized that the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"¹⁵⁸ Permanent physical occupations of property—authorized by the government—are tak-

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 3

¹⁵² *Id.* at 1.

¹⁵³ *Id.* at 3.

¹⁵⁴ Alger, letter, *supra* note 8, at 3.

¹⁵⁵ *Id.* at 4.

¹⁵⁶ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Brandeis, J., dissenting).

¹⁵⁷ U.S. CONST. amend. V.

¹⁵⁸ *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 123 (1978) (alteration in original) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

ings of property, regardless of the public interest served by the physical occupation.¹⁵⁹ Thus, physical occupations require compensation.¹⁶⁰

B. *Regulatory Takings*

Government regulation can also be a taking if it “goes too far.”¹⁶¹ Regulatory takings occur when the regulation deprives a landowner of all economically viable use of his property, or does not substantially advance a legitimate governmental interest.¹⁶² When a court determines that a regulation amounts to a taking, the government has three options for adequately compensating the regulated landowner: maintain the regulation and compensate the owner for a permanent taking; invalidate the regulation and compensate the owner for the taking which occurred while the regulation was in place; or exercise its eminent domain power.¹⁶³ Thus, a court’s finding that a regulation creates a taking does not invalidate the regulation; the government has the option of maintaining the regulation, but must compensate the owner.¹⁶⁴

When a regulation destroys only a portion of the beneficial use of property, a court may find that the government has worked only a partial taking.¹⁶⁵ Generally, the government need not compensate a landowner for a partial taking because some economically viable use of the property remains.¹⁶⁶ In *Keystone Bituminous Coal Ass’n v. DeBenedictis*, the Supreme Court would not vertically sever a piece of land by separating mining from other beneficial uses available to the owner.¹⁶⁷ Similarly, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court rejected the concept of temporal severance.¹⁶⁸ In *Tahoe-Sierra*, landowners brought a takings claim against the regional planning agency, asserting that a two-year moratoria on development effected a regulatory taking.¹⁶⁹ The Court refused to find a temporary taking.¹⁷⁰

¹⁵⁹ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

¹⁶⁰ *Id.*

¹⁶¹ *Pa. Coal Co.*, 260 U.S. at 415.

¹⁶² *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

¹⁶³ *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 321 (1987).

¹⁶⁴ See *id.* at 315.

¹⁶⁵ See James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 15 (2002).

¹⁶⁶ See *id.* at 15 & n.75.

¹⁶⁷ 480 U.S. 470, 480–81 (1987).

¹⁶⁸ 535 U.S. 302, 331 (2002).

¹⁶⁹ *Id.* at 320.

¹⁷⁰ *Id.* at 331.

As with a partial taking, the government need not compensate a landowner if the regulation that affects the landowner's property substantially advances a legitimate governmental interest.¹⁷¹ Legitimate governmental interests include protecting the health, safety and welfare of the community.¹⁷² The Supreme Court has found that the plain language and broad scope of ESA indicate "beyond doubt that Congress intended endangered species to be afforded the highest of priorities."¹⁷³ Very few cases find "a taking as a result of the impact from the Endangered Species Act."¹⁷⁴

C. *Restriction of Access as a Taking*

Ownership of land abutting a public road includes an appurtenant right of access to the public road.¹⁷⁵ Restrictions on a landowner's ability to access the public road may amount to a taking of this appurtenant right.¹⁷⁶ Generally, a landowner is entitled to compensation for a limitation on this access right only if the limitation substantially interferes with the landowner's means of ingress and egress.¹⁷⁷ Therefore, where a landowner retains a reasonable means of accessing public ways from the property, a limitation of access is not a compensable taking.¹⁷⁸

There is little precedent in Massachusetts for takings claims arising from restricted access and loss of convenience. *LaCroix v. Commonwealth* provides some authority.¹⁷⁹ *LaCroix*, a landowner, sought compensation for a limitation on access created by the Commonwealth's construction of Route 495.¹⁸⁰ Prior to construction of Route 495, King Road was *LaCroix's* primary east-west public way.¹⁸¹ *LaCroix* had been able to access King Road by traveling about 1250 feet south on Howard Road, which ran perpendicular from *LaCroix's* property line to King

¹⁷¹ See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

¹⁷² See *id.*

¹⁷³ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

¹⁷⁴ *Burling*, *supra* note 165, at 19.

¹⁷⁵ *Gen. Hosp. Corp. v. Mass. Bay Transp. Auth.*, 672 N.E.2d 521, 527 (Mass. 1996) (citing *Wenton v. Commonwealth*, 138 N.E.2d 609 (Mass. 1956); *Anzalone v. Metro. Dist. Comm'n*, 153 N.E. 325, 327 (Mass. 1926)).

¹⁷⁶ James D. Masterman & Mark J.T. Caggiano, *Partial Takings and Severance Damages*, in *EMINENT DOMAIN AND LAND VALUATION LITIGATION* 97, 113 (American Law Inst. 1997) (citing *State Dep't of Highways v. Davis*, 626 P.2d 661, 664 (Colo. 1981)).

¹⁷⁷ *Id.* (citing *State Dep't of Highways v. Davis*, 626 P.2d at 664).

¹⁷⁸ *Id.* (citing *Magliochetti v. State*, 647 A.2d 1386, 1392 (N.J. 1994)).

¹⁷⁹ 205 N.E.2d 228, 232 (Mass. 1965).

¹⁸⁰ *Id.* at 229–30.

¹⁸¹ *Id.* Route 495 is a limited-access highway running parallel to King Road. *Id.*

Road.¹⁸² Route 495 crosses Howard Road south of LaCroix's land and north of King Road.¹⁸³ However, Route 495, as a limited-access highway, does not permit access to or from Howard Road.¹⁸⁴ Consequently, Route 495 created a barrier preventing LaCroix from reaching King Road via Howard Road.¹⁸⁵ Although LaCroix retained access to King Road from his property via an alternate route, it was circuitous and several miles long.¹⁸⁶ The court found that "a landowner is not entitled to compensation merely because his access to the public highway system is rendered less convenient, if he still has reasonable and appropriate access to that system after the taking."¹⁸⁷ The court based this ruling, in part, on the finding that LaCroix "suffered . . . no 'taking of or injury to . . . [his] easements of access to such public way.'"¹⁸⁸

Similarly, in *Nichols v. Inhabitants of Richmond*, a landowner was not entitled to compensation where the destruction of an old road that she used continuously was demolished and replaced with a longer, less convenient route.¹⁸⁹ However, *Wine v. Commonwealth* held that where access becomes physically impossible during public improvement "such interference is an injury special and peculiar to the use of the premises, and direct and proximate, for which the abutting owner, or others in special cases, is entitled to recover."¹⁹⁰

IV. BARNSTABLE'S LOSE-LOSE PREDICAMENT: LIABILITY FOR COMPENSABLE TAKING OF ACCESS RIGHTS VS. LIABILITY FOR THE TAKING OF THREATENED SPECIES

Pursuant to ESA and the corresponding MESA requirements, the Town of Barnstable must protect the piping plovers and diamondback terrapins on the Sandy Neck trails from harm.¹⁹¹ To this end, the Town currently enforces a DEP order regulating ORV use on the Sandy Neck trails, as modified by a settlement agreement between the

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 230.

¹⁸⁵ *LaCroix*, 205 N.E.2d at 230.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 232.

¹⁸⁸ *Id.* (second and third alteration in original) (quoting MASS. GEN. LAWS ch. 81, § 7C (1957)); see also MASS. GEN. LAWS ch. 81, § 7C (2004).

¹⁸⁹ 38 N.E. 501, 502 (Mass. 1894).

¹⁹⁰ 17 N.E.2d 545, 548-49 (Mass. 1938).

¹⁹¹ Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1) (2000); Massachusetts Endangered Species Act, MASS. GEN. LAWS ch. 131A, § 2 (2004).

Town, Sandy Neck residents, and other stakeholders.¹⁹² However, pursuant to the settlement agreement, the parties must cooperatively develop a long-term management plan to protect the threatened species on Sandy Neck.¹⁹³

The residents of Sandy Neck have challenged the current management plan, asserting that the restrictions on their ability to reach their cottages amount to a taking of access rights.¹⁹⁴ However, if the Town permits increased ORV use along the trails where the threatened species breed, the Town will increase the risk that the species will be harmed in violation of ESA and MESA.¹⁹⁵ Thus, the Town must balance potential liability for the taking of access rights against the potential liability for the taking of a threatened species.

A. *Are the Trail Restrictions on Sandy Neck a Compensable Taking?*

The issue for the residents of Sandy Neck is whether the Town's access restrictions are a compensable taking. To be compensable, the restrictions must: deprive the cottage owners of all economically viable use of their remaining property;¹⁹⁶ not advance a compelling governmental interest;¹⁹⁷ or unreasonably restrict the cottage owners' access to their cottages.¹⁹⁸

I. Do the Restrictions Deprive the Cottage Owners of All Economically Viable Use of Their Remaining Property?

During daylight hours, when piping plovers are found on the trails, ORV access may be inconvenient, but is still possible.¹⁹⁹ The ban on trail access occurs only during a few months of the year for part of each day.²⁰⁰ These limitations are similar to limitations on trail access caused by ice, high tides, and storms.²⁰¹ In addition, residents are permitted to use the trails at any time for emergencies.²⁰² In short,

¹⁹² See *supra* notes 125–56 and accompanying text..

¹⁹³ Sandy Neck Settlement Agreement, *supra* note 42.

¹⁹⁴ See Alger, letter, *supra* note 8.

¹⁹⁵ Cf. *United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 91 (D. Mass. 1998) (holding that the Town took inadequate measures to protect endangered species).

¹⁹⁶ See *Burling*, *supra* note 165, at 15.

¹⁹⁷ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

¹⁹⁸ See *LaCroix v. Commonwealth*, 205 N.E.2d 228, 232 (Mass. 1965); *Nichols v. Inhabitants of Richmond*, 38 N.E. 501, 502 (Mass. 1894).

¹⁹⁹ See DEP, Order, *supra* note 54, pt. B, Special Conditions of Approval, at paras. 4, 6.

²⁰⁰ See *id.* at para. 4.

²⁰¹ See *supra* notes 48–53 and accompanying text.

²⁰² See DEP, Order, *supra* note 54, pt. B, Special Conditions of Approval, at para. 6.

the restrictions which limit access are themselves limited in scope. As such, the restrictions do not deprive cottage owners of all economic value of their property, and thus do not amount to a taking.²⁰³

The temporal nature of these restrictions is similar to that in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, in which the Supreme Court of the United States held that a two-year moratorium on building was not a taking.²⁰⁴ However, the moratorium in *Tahoe-Sierra* had an end date, after which the restrictions would cease.²⁰⁵ The restrictions on Sandy Neck residents, in contrast, are temporal on a daily basis, but this daily restricted access will occur for an indefinite period.²⁰⁶

Given that cottage owners can access their cottages during the daytime and have not been deprived of all economic value of their property, the cottage owners' likelihood of success on a takings claim against the Town is diminished.²⁰⁷ The Supreme Court declined to sever two years' worth of continuous economic harm in *Tahoe-Sierra*; thus, it is unlikely that a court will sever partial days' worth of restricted access from the cottage owners' overall access.²⁰⁸ Consequently, the restrictions are only a partial taking and do not merit compensation as a complete taking of access rights.²⁰⁹

2. Do the Restrictions Advance a Compelling Governmental Interest?

The Town enforces these restrictions to comply with federal and state requirements under ESA and MESA, respectively.²¹⁰ The restrictions are intended to protect the threatened piping plovers and diamondback terrapins on Sandy Neck.²¹¹ Thus, the Town is advancing two compelling governmental interests: first, as a landowner, the Town is complying with federal and state laws; second, the Town is protecting

²⁰³ See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

²⁰⁴ 535 U.S. 302, 341–42 (2002).

²⁰⁵ *Id.* at 312.

²⁰⁶ Under the long term management plan, which the Town and the cottage owners must develop pursuant to their 2000 settlement agreement, the Town will still need to restrict access to some extent. See Sandy Neck Settlement Agreement, *supra* note 42. Consequently, cottage owners on Sandy Neck are likely to challenge the plan as an impermissible form of a temporal taking.

²⁰⁷ See *Tahoe-Sierra*, 535 U.S. at 321; *Agins*, 477 U.S. at 260.

²⁰⁸ See *Tahoe-Sierra*, 535 U.S. at 321.

²⁰⁹ See *Agins*, 477 U.S. at 260.

²¹⁰ Endangered Species Act of 1973, 16 U.S.C. § 1532(19) (2004); Massachusetts Endangered Species Act, MASS. GEN. LAWS ch. 131A, § 1 (2004).

²¹¹ See discussion *supra* Part II.D.

a threatened species.²¹² Consequently, the cottage owners are not likely to succeed in asserting that the restrictions do not advance a compelling governmental interest and therefore amount to a compensable taking.²¹³

3. Do the Restrictions Unreasonably Restrict the Cottage Owners' Access to Their Cottages?

In both *LaCroix* and *Nichols*, the landowners' access to their property became less convenient.²¹⁴ However, their access remained available at all times.²¹⁵ In contrast, Sandy Neck residents are completely restricted from ingress to and egress from their property for several hours at a time, on a daily basis.²¹⁶ The restrictions occur during the summer months, when most cottage owners and renters use their property.²¹⁷ In addition, the restrictions occur during non-daylight hours.²¹⁸

Most cottage owners and renters do not use their cottages as permanent residences.²¹⁹ Rather, they use the cottages as vacation and weekend homes.²²⁰ Some cottage owners cannot travel to Sandy Neck from their primary homes or places of business before dusk on Friday nights; they are effectively prevented from using their cottages during one of their two weekend nights.²²¹ All residents using their cottages

²¹² Congress, in stating its concern about the rapid decline of species, pursuant to the ESA, indicated that the preservation of threatened and endangered species is a compelling interest for the Federal Government. *See* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). The Commonwealth of Massachusetts, in adopting the MESA, which is largely similar to ESA, also indicated that the preservation of threatened and endangered species is a compelling interest for the Commonwealth. *See* MASS. GEN. LAWS ch. 131A, § 2. The Town of Barnstable, as a political subunit of the Commonwealth, is appropriately serving this compelling interest of the Commonwealth by attempting to protect both the piping plovers and diamondback terrapins on Sandy Neck. *See* DEP, Order, *supra* 54 note at pt. B, Findings, at para. 3.1.

²¹³ *See* *Agins*, 447 U.S. at 260.

²¹⁴ *See* *LaCroix v. Commonwealth*, 205 N.E.2d 228, 229–30 (Mass. 1965); *Nichols v. Inhabitants of Richmond*, 38 N.E. 501, 502 (Mass. 1894).

²¹⁵ *LaCroix*, 205 N.E.2d at 229–30; *Nichols*, 38 N.E. at 502.

²¹⁶ Sandy Neck Settlement Agreement, *supra* note 42.

²¹⁷ *See* Memorandum from Alexander Yuan, to Aaron Toffler, *supra* note 2, at 2.

²¹⁸ DEP, Order, *supra* note 54 pt. B, Special Conditions, at para. 6.

²¹⁹ *See* Memorandum from Alexander Yuan, to Aaron Toffler, *supra* note 2, at 1.

²²⁰ *See* *Alger v. Conservation Comm'n*, No. 99-437 ¶ 15 (Mass. Dist. Ct. filed Aug. 11, 1999).

²²¹ *See id.* at ¶ 41. The cottage owners assert that for an out-of-state cottage user to travel to Sandy Neck in time for the last scheduled pilot escort, the cottage user must begin traveling to Sandy Neck “in the middle of the night.” *Id.*

during summer evenings are also effectively prevented from attending evening events off of Sandy Neck, such as movies and town meetings.²²² The restrictions do not merely create an inconvenience by increasing the length and distance of residents' trips;²²³ rather, the restrictions impermissibly render access physically impossible for several hours at time.²²⁴

The limits on guest access also indicate a taking of property rights.²²⁵ A corollary to the right to exclude someone from your property is the right to invite that person onto your property.²²⁶ By limiting the ability of cottage owners to invite guests to their homes, the restrictions limit the owners' ability to use and enjoy their homes.

In theory, cottage owners have alternative means of access through pedestrian and boat transportation.²²⁷ However, boat access is unreliable,²²⁸ and pedestrian access would require several residents to walk six miles to reach their cottages.²²⁹ Consequently, neither is a reasonable and appropriate alternative to ORV access.²³⁰

The restrictions on the cottage owners' ability to travel to and from their cottages effectively prevents the owners and their guests from reasonably and appropriately accessing their cottages. Therefore, the cottage owners have a strong argument for compensation based on a taking of access rights.²³¹

In short, the cottage owners are unlikely to succeed on assertions that the regulation of ORV use on the Sandy Neck trails deprives them of all economically viable use of their property, or that it lacks a

²²² *Id.* at ¶ 45.

²²³ See *LaCroix v. Commonwealth*, 205 N.E.2d 228, 232 (Mass. 1965); *Nichols v. Inhabitants of Richmond*, 38 N.E. 501, 502 (Mass. 1894).

²²⁴ See *Wine v. Commonwealth*, 17 N.E.2d 545, 548–49 (Mass. 1938).

²²⁵ The restriction is also illogical. Under this restriction, cottage owners who wish to have more than one visitor in one week can instruct an additional visitor to park in the parking lot at the west end of Sandy Neck. Cottage owners can then drive from their cottage to pick up the visitors and later drive the visitor back to the parking lot. The two round trips for visitor pick up and drop off are permissible, as the cottage owner is the driver each time. However, if the visitor had been permitted to drive to the cottage, only one round trip would be necessary.

²²⁶ Thomas W. Merrill, Essay, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 742–43 (1998).

²²⁷ See discussion *supra* Part I.B.

²²⁸ See *supra* notes 27–31 and accompanying text.

²²⁹ See BARNSTABLE CONSERVATION COMM'N, *supra* note 34.

²³⁰ See *LaCroix v. Commonwealth*, 205 N.E.2d 228, 232 (Mass. 1965) (holding that a landowner has not suffered a compensable taking of access if a reasonable and appropriate alternative exists).

²³¹ See *id.*

compelling governmental interest.²³² However, the cottage owners may successfully assert that the regulations go too far in restricting their right of access to their property.²³³ Consequently, the Town will either have to compensate the cottage owners for a permanent taking, or increase the cottage owners' trail access and compensate them for a temporary taking.²³⁴

B. *Liability Under the Endangered Species Act and the Massachusetts Endangered Species Act*

The Town is responsible for the protection of the piping plovers and diamondback terrapins that live and breed on the Sandy Neck trails and surrounding land.²³⁵ If the cottage owners successfully decrease the restrictions on trail access during the piping plovers' breeding season, the plovers are more likely to be harmed or killed.²³⁶ The Town could be fined as much as twenty-five thousand dollars if a piping plover is harmed.²³⁷ Moreover, FWS and Mass. Wildlife can each bring enforcement proceedings against the Town if the threatened species are not adequately protected.²³⁸

C. *Proposals for the Long-Range Management Plan of Sandy Neck*

Understandably, the Town of Barnstable would like to avoid liability under ESA and MESA, as well as from a regulatory takings claim by the cottage owners and lessees. Likewise, the cottage owners and renters would prefer increased access to their cottages, rather than monetary compensation for reduced access. Consequently, all parties involved would benefit from a plan that protects the listed species, while allowing cottage owners and renters reasonable access to the trails. The following are proposals for the long-term management of Sandy Neck in light of these goals.

²³² See *supra* Part IV.A.1-2.

²³³ See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

²³⁴ See *supra* notes 163-64 and accompanying text.

²³⁵ See Endangered Species Act of 1973, 16 U.S.C. § 1532(19) (2000); Massachusetts Endangered Species Act, MASS. GEN. LAWS ch. 131A, § 1 (2004).

²³⁶ See DEP, Order, *supra* note 54, pt. B, Findings, at paras. 1-5.

²³⁷ See 16 U.S.C. § 1540.

²³⁸ See, e.g., *United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 82 (D. Mass. 1998).

1. Increased Permissible Access

The residents have a strong basis to assert that the current trail access scheme amounts to a compensable taking by unreasonably restricting ingress to and egress from their property.²³⁹ To limit liability for such a taking, the Town could increase the residents' ability to use the trails such that any remaining restrictions are not unreasonable.²⁴⁰ However, the Town must continue to adequately protect the piping plovers and diamondback terrapins.²⁴¹

To avoid liability from either a takings claim or a violation of ESA and MESA, the Town could hire additional pilots to escort essential vehicles during the months when piping plovers typically cause road closures.²⁴² Enough pilots should be hired such that cottage owners can travel to or depart from their cottages within a reasonable amount of time after scheduling a trip.²⁴³ In addition, pilots should be available for non-daylight hour trips. Although access will still be restricted, the inconvenience to cottage owners will be reasonable, and therefore will not amount to a compensable taking.²⁴⁴ The cost of hiring additional pilots may offset the costs associated with compensation of cottage owners for a taking, or fines under ESA, and MESA for harm to piping plovers. The Town may also consider increasing the permissible number of guest visitors, or removing guest limitations altogether, as the limitations may unwittingly increase trail use by cottage owners.²⁴⁵

²³⁹ See discussion *supra* Part IV.A.

²⁴⁰ See discussion *supra* Part IV.A.

²⁴¹ See 16 U.S.C. § 1532(19); Massachusetts Endangered Species Act, MASS. GEN. LAWS ch. 131A, § 1 (2004).

²⁴² In *United States v. Town of Plymouth*, the District Court of Massachusetts found the Town of Plymouth in violation of ESA because it had not taken adequate measures to protect piping plover hatchlings from ORV traffic. 6 F. Supp. 2d at 90–91. The Town of Plymouth had one wildlife specialist to protect the piping plovers on a three-mile barrier beach, similar to Sandy Neck; however, the specialist's attempts to protect plovers were repeatedly rebuffed by town officials, who did not want to restrict ORV access to the beach. *Id.* at 91. By hiring several pilots to protect piping plovers from increased ORV traffic, the Town of Barnstable can demonstrate its continuing commitment to protecting plovers, even as it permits increased ORV access.

²⁴³ The definition of a reasonable amount of time in this context can be negotiated by the Town and the cottage owners as part of the long-term management plan.

²⁴⁴ *LaCroix v. Commonwealth*, 205 N.E.2d 228, 229–30 (Mass. 1965).

²⁴⁵ See *supra* note 225.

2. Town Application for an Incidental Take Permit

In 2000, FWS denied Mass. Wildlife's application for an incidental take permit for harm to piping plovers in Massachusetts.²⁴⁶ The permit would have allowed the incidental taking of piping plovers on Massachusetts beaches, including Sandy Neck.²⁴⁷ Despite the denial of the statewide permit, Mass. Wildlife has offered assistance to the Town of Barnstable should the Town apply directly to FWS for an incidental take permit for piping plovers on Sandy Neck.²⁴⁸ The Town should accept the state agency's aid and apply for a permit.

An incidental take permit would limit the Town's liability for harm to piping plovers on Sandy Neck.²⁴⁹ Although incidental take permit applications have stringent requirements for proposed impact and alternative outcome studies,²⁵⁰ Mass. Wildlife completed much of this work pursuant to its own application.²⁵¹ Moreover, the Town—pursuant to the 2000 settlement agreement with the Sandy Neck residents—is already required to participate in the drafting of a long-term management plan.²⁵² Ideally, any management plan accepted by the stakeholders on Sandy Neck would include an evaluation of the plan's impact on the piping plovers and diamondback terrapins. Therefore, the Town could easily adapt the management plan for use in an incidental take permit application. Given that the Town already has access to, or is otherwise required to develop, the bulk of the necessary information for a permit application, and would gain substantial protection from liability if FWS granted the permit, the Town should apply for an incidental take permit.

3. Transfer of Road Ownership to the Cottage Owners and Renters

The Town could avoid liability for takings compensation, as well as liability under ESA and MESA, by transferring ownership of the trails to the cottage owners, while reserving an easement for public access. The cottage owners, as the owners of the trails, would then assume responsibility for the protection of the piping plovers on the

²⁴⁶ Mass. Div. of Fisheries and Wildlife, *supra* note 120.

²⁴⁷ DEP, Order, *supra* note 54.

²⁴⁸ *Id.*; WOODS HOLE GROUP, *supra* note 1, at 71 n.1.

²⁴⁹ See Smith et al., *supra* note 62, at 1039.

²⁵⁰ Endangered Species Act of 1973, 16 U.S.C. § 1539 (2000).

²⁵¹ See Mass. Div. of Fisheries and Wildlife, *supra* note 120.

²⁵² Sandy Neck Settlement Agreement, *supra* note 42.

trails.²⁵³ The viability of this option depends on the cottage owners' willingness to accept the transfer of trail ownership. If the cottage owners believe that the Town's access limitations are more stringent than necessary to adequately protect the listed species on Sandy Neck, they may accept the transfer. If they do so, the cottage owners would need to bring any regulatory takings claims related to threatened species protection against the state and federal government rather than against the Town. However, the cottage owners may be averse to the risk of assuming direct liability for harm to the piping plovers and diamondback terrapins, and may therefore refuse to accept trail ownership. In addition, the transfer may change the status of the trails from public ways to private ways, thereby eliminating the cottage owners' right of reasonable access to their property.²⁵⁴

CONCLUSION

If the Town of Barnstable limits access to the trails on Sandy Neck, the owners of the Sandy Neck cottages are likely to succeed in a takings claim against the Town based on the restriction of their means of access to and from their cottages. However, if the Town does not take measures to protect the threatened species on Sandy Neck, FWS, as well as Mass. Wildlife will likely succeed in enforcement actions requiring the Town to implement protective measures. FWS and Mass. Wildlife can also fine the Town for any harmed piping plovers or diamondback terrapins. To limit liability to the cottage owners, the Town should hire additional pilots to escort cottage owners on the trails when piping plovers are present. To limit liability under the federal and state endangered species acts, the Town should work with Mass. Wildlife in applying for an incidental take permit from FWS.

²⁵³ See 16 U.S.C. § 1532(19); Massachusetts Endangered Species Act, MASS. GEN. LAWS ch. 131A, § 1 (2004).

²⁵⁴ See Masterman & Caggiano, *supra* note 176, at 113 (citing State Dep't of Highways v. Davis, 626 P.2d 661, 664 (Colo. 1981)).

APPENDIX 1

