

## Court ruling may point the way to reclaim corridors

A recent ruling by the Superior Court in Rutherford County may point the way to reclaim rail beds in North Carolina long thought to having been abandoned and lost.

A prior decision issued in June of 2003 found that the Thermal Belt Rail-Trail was properly federally railbanked and the right-of-way did not revert to the adjoining landowners when railroad operations stopped and the rail bed was converted into a trail.

Federal rail banking protects the continuation of the right of way regardless of the kind of ownership that a railroad has when it files to discontinue rail service on a particular rail bed. This decision was reported in the Summer 2003 issue of *Little Toot*, page 3.

Left open in this earlier decision was the issue of who owned the subsurface rights. The plaintiffs argued that even if there was proper railbanking, they were entitled to a declaratory judgment which would give them ownership of revenues derived for any fiber optic cables placed in the rail bed and damages for utility, sewage and other encroachments which allegedly had been wrongfully permitted by the trail owners and former railroad companies.

Rutherford County Superior Court Judge Laura J. Bridges held June 28, 2005, that the predecessors to the defendant Bechtler Corporation, nonprofit operators of the trail, owned the rail bed outright and not just by easement. The original title obtained in 1855 provided that the railroad owned the property "so long as" it was used for purposes of the railroad.

NC statutes in 1973 voided such remote limitations unless the adjoining landowners



## A walk in the woods

**Opening day hikers take in nature along the state's newest rail-trail May 14. The 1.3-mile South Fork Catawba River Rail-Trail is on the Rhyne Nature Preserve south of Lincolnton in the historic Laboratory community. The preserve is managed by the Catawba Lands Conservancy.**

timely file notice to preserve such limitations. There was no such filing by the plaintiffs. In effect it was held that the ownership of the railroad was not merely an easement but outright in fee. The plaintiffs disagree and are appealing to the NC Court of Appeals.

The importance of this ruling is that it is similar to rulings in other states which hold that a limitation in a deed to "railroad purposes" or the like does not create a mere easement but essentially full ownership by the railroad.

**Court order (cont. Page 2)**

## Funding in place to complete ATT

Funding to assure completion of the American Tobacco Trail came with the long-awaited passage of the federal surface transportation bill. When combined with previous funding from the omnibus federal budget, plans can move forward to bridge I-40 in south Durham, plus complete undeveloped sections in south Durham and Chatham counties.

Wake County officially opened Phase 2, a 1.75-mile section, this summer, adding to the previously opened 3.75-mile Phase 1 section. Wake's Phase 3 is a one-mile segment that will be opened when the Chatham County portion nears completion.

The I-40 bridge in Durham and improvements to two railroad bridges in Chatham County are the remaining major tasks. Triangle Rails-to-Trails Conservancy and other volunteers have cleared the right-of-

## NC DOT bike/ped sees Raleigh-Durham route taking shape. See Page 3

way and improved the natural surface in south Durham and Chatham counties in anticipation of final developments.

Congressman David Price's support has been essential to acquiring funding for the ATT project. Just under \$1 million was secured in the omnibus spending bill and \$1.6 million in the transportation bill.

When the 23-mile ATT project is completed it will connect downtown Durham to New Hill in Wake County. The cities of Durham, Cary, Apex and Chapel Hill have plans for greenway connectors to form a 100-mile Triangle trail network.

<http://www.NCRail-Trails.org>

## Trailbuilder Notebook

### Tips on Searching and Evaluating Railroad Deeds and Titles

By Michael Domonkos, JD

One of the first steps in determining the feasibility of a rail-trail on an unused rail bed is to determine whether the railroad owns (or owned) the rail bed as an easement or owns it outright (in legalese "fee simple" ownership.)

If the railroad's ownership is in the form of an easement, the general rule is that the easement reverts to the adjoining land owners when it is abandoned.

What is an abandonment is very technical. However, mere relinquishing or terminating the federal operating permit, which is often called an abandonment, does not per se cause a reversion. There must be an abandonment under state law. This varies from state to state. Happily, a growing number of state courts have been holding that converting a rail easement to a multiuse trail, is not an abandonment. All transportation uses are contemplated within the original easement. This permitted shifting transportation use is known as the Public Highway Doctrine. Also, even in states where an abandonment and reversion might be found upon conversion to a trail, the reversion can be prevented. A timely application must be filed when the railroad files to terminate or "abandon" the operating permit at the Federal Surface Transportation Board. This preservation is called federal railbanking.

The question is sometimes wrongfully posed as... "Does the railroad own the property or does it merely have a "right of way?" In North Carolina as in many states, it has been held that use of the words "right-of-way" in a deed or statute merely denotes its use and is neutral as to whether the right-of-way ownership is outright in fee or is by way of easement.

There is another misconception. It is often assumed that if the deed provides for ownership of the right of way or land "so long as it is used for railroad purposes" or as long as the railroad is in operation or similar limiting language, that this means there is an easement as a reversion is

expressed or implied. Some courts simply characterized these transactions as causing easements.

However, the "so long as" language may likely create what is called a "fee simple determinable." Up until 1974, it did not make any difference whether the right-of-way ownership was in easement or fee simple determinable. There was a reversion when the conditional use ended. However, legislation in most states requires that adjoining landowners comply with periodic filing requirements in order to preserve their "possibility of reverter" Otherwise the possibility of reverter is extinguished. North Carolina has a 30-year period, after which the reversion interest is extinguished unless a timely filing preserves it. In cases where the 30 years had passed before the 1974 statute, the adjoining land owners had until 1977 to file. Doubtless few filed. This statute, called the Marketable Title Act, may save many a transportation corridor in this state, as it has in many other states.

In short, do not jump to the conclusion that the right of way is an easement merely because the deed (or acquisition under an early railroad charter) seems to provide for reversion or purports to limit the use of the property forever under penalty of forfeiture.

### Court order (cont. from Page 1)

It is believed by the attorneys for the trail owner that in North Carolina, a significant number of rail corridors thought to having been in easement and having been reverted to adjoining landowners may actually still be viable rail beds for bike and hiking trails.

It has been held in North Carolina that if the railroad owns the property in fee, no adverse possession or encroachment by adjoining land owners or others will divest the railroad of ownership, no matter how long the absence of railroad use and the railroad's failure to police its property.

Also held that railroads still operating under this kind of ownership will be entitled to royalties for permitting fiber optic placement on their rail beds.

## NCRT to operators: railbanking good business move

NCRT and the Aberdeen & Rockfish Railroad carried a message to the Railway Association of North Carolina: Railroad companies can benefit from the tax advantages of federal railbanking inactive lines while making a charitable donation to a land trust.

With help from RANC Pres. Scott Saylor, the issue was placed on the agenda and presented at the RANC annual meeting in Asheville. Al Capehart of NCRT and A&R Pres. Ed Lewis related how their cooperative efforts resulted in the Dunn-Erwin Rail-Trail. Lewis spoke to the bottom line benefit of donating the railway. It gave A&R a substantial tax benefit for its charitable contribution while creating a community-connecting rail-trail that is estimated to generate \$50,000 in local recreational dollars for Harnett County in the trail's brief history.

Harnett County has since received a Transportation Enhancement contract to purchase the rail-trail from NCRT. County ownership will make the trail eligible for Transportation Enhancement development funding and bring the trail to its full potential as a tourist destination and source of community pride.

Lewis in his March 2000 farewell letter to the adjacent property owners and the community said, "It is our hope that the community comes to appreciate and enjoy what we are leaving behind, the foundation for the Dunn-Erwin Trail."

The headliner for the RANC meeting was David Goode, Norfolk Southern president. Goode's remarks were encouraging for freight rail service. When approached about federal railbanking, he said, "Yes, we should get on a rail-trail." Capehart suggested the American Tobacco Trail, a former NS corridor acquired by the NC DOT Rail Division and leased to local governments.

Follow-up correspondence and conversation has led to a discussion of NS's evaluating the Virginia Southern line from south of Clarksville, VA, to Oxford, NC, for possible railbanking.



## Bridging the problem

While following waterways, greenways often are faced with the problem of crossing under rail lines. The situation raises safety concerns voiced by railroad operators. The solution reached with Norfolk Southern on the Cape Fear River Trail in Fayetteville is this stoutly-built covered bridge.

The trail parallels an active rail line for about one-half mile before crossing under.

The four-mile greenway is the first phase of a trail which will provide future links to other trails and the Fayetteville Botanical Gardens.

The Fayetteville trail is designated as part of the Maine-to-Florida East Coast Greenway route.

## Railroad takes North Durham off table

Visions of extending the American Tobacco Trail 25 miles from downtown Durham north to Timberlake in Person County went off track when Norfolk Southern abruptly pulled 21 miles of the Lynchburg & Durham line off the market. The Duke Beltline right-of-way around downtown Durham remained on the table.

The NS withdrawal came as funding was coming together for the reported \$6 million asking price. The city council agreed to back a planned bond package to set aside \$1.5 million to buy the corridors. County commissioners approved a capital improvement plan that included an additional \$1.5 million. Rep. David Price had secured \$2 million for the acquisition in the federal surface transportation bill.

The NC DOT was negotiating to acquire the corridor, then lease it to Durham for

interim trail use. The state ultimately hoped a light rail system could run along the corridor from downtown Durham to the 5,300-acre Treyburn community in northern Durham County.

NC DOT officials have continued talking with NS about buying the Duke Beltline.

"[Norfolk Southern] is continually reviewing and evaluating our branch line network based on changes in the marketplace. Several years ago we were more aggressive in disposing of assets in order to raise cash," the railroad said in a released statement. "Recent business developments, such as the current rail renaissance with more freight traffic and potentially more commuter operations, have resulted in a more conservative retention of our assets which we believe may be of value to the corporation in the future."

## NC DOT bike/ped sees Raleigh connections to ATT and Durham

An NC DOT official has said that a bike trail from Raleigh to Durham could be a possibility within the next five years.

The trail, stretching 30 miles, would begin in Raleigh at Meredith College, cross over I-440 to the North Carolina Museum of Art. Next, it would run through Umstead State Park, across I-40 and hook into Cary's greenway system. Then, a link with the American Tobacco Trail would take the rail-trail into Durham.

Tom Norman of the bike/ped division said there are many missing links to the trail. One will be filled-in when engineers add bike lanes to Cornwallis Road from Highway 55 to Miami Boulevard this summer.



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### Showing rail style

One of several improvements added to Troutman's new rail-trail is this railroad station-style gazebo. The town has also added lighting and plantings to the one-mile trail.

### Greensboro planning central loop trail

Greensboro developers are proposing an ambitious four-mile greenway to loop around the downtown to serve as a hub for other connecting greenways. The Downtown Greenway is projected to take 10 years and at least \$20 million to complete.

The proposed launching point is a railroad corridor which currently serves one customer. The company has said it has indefinite plans to relocate. Part of the rail corridor, from Pisgah Church Road northwest to BurMil Park, is now the Lake Brandt Greenway trail.

The recently-passed federal surface transportation bill includes \$800,000 for the rail-trail section.

### NCRT Fall Meeting

10:30 am Saturday, Oct. 8. Community Room, Woodcroft Professional Center, Fayetteville Road and Woodcroft Parkway in Durham. Site is adjacent to American Tobacco Trail.

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