APPENDIX C — Legal Principles Affecting the Ownership of Rail Trails and the Liability of Trail Managers in North Carolina**

I. Background Framework for Evaluating Railroad Ownership Issues

Where a railroad corridor cannot be railbanked under federal law (16 U.S.C. § 1247(d)), the ability to convert a railroad corridor into a trail depends on the interpretation of the applicable deeds under state law, and the public policy (either statutory or common law) of the state concerning preservation of rail corridors. In general, in determining whether a rail corridor can be converted to trail use under state law, there are three basic questions that must be addressed: First, a determination must be made about the nature of the railroad's ownership interest (fee versus easement). If easement, the next question is whether the easement has been abandoned, and third, whether the terms of the easement permit trail use.

If the railroad acquired title in fee simple, then the railroad may transfer the corridor for any purpose, including trail use. The railroad's fee interest may also be construed as a defeasible fee interest or fee simple determinable (i.e., a fee estate subject to a retained future interest by the grantor), that provides for a right of reentry or reverter if the corridor ceases to be used for railroad purposes. In the case of such a defeasible fee, the question is whether such a right of re-entry has been extinguished by a marketable title law – a statute enacted by many states that extinguishes rights of reverter that are not recorded after a specified period of time in order to promote the policy that property should be made freely alienable and marketable.

If the railroad acquired only an easement interest, the ability to convert the easement to a trail depends on whether the railroad has abandoned the easement, and whether the language of the easement, interpreted in light of the applicable public policy of state, is broad enough to encompass trail use, or whether the state has adopted a "shifting public use" policy that would permit railroad easements to be used for trail purposes.

Trail interests may also be protected if the corridor was acquired by the railroad through federal land grants. If the federal government originally granted the right of way, then federal law will, in most instances, govern the disposition of the interest acquired. See 43 U.S.C. §§ 912-13; see also 16 U.S.C. § 1248(c). However, there is some uncertainty as to whether these laws apply to grants under the General Railroad Right-of-Way Act of 1875. See Brown v. Northern Hills Regional R.R. Authority, 732 N.W.2d 732 (SD 2007) (lower court erred in applying 43 U.S.C. § 912 to determine question of abandonment of 1875 Act corridors where underlying interest had passed to homesteaders) versus State of Idaho v. Oregon Short Line R.R., 617 F. Supp. 207 (D. Idaho 1985) (Section 912 governs the disposition of lands granted to railroads under the 1875 Act). This issue is currently before the U.S. Court of Appeals in Ellamae Phillips Co. v .U.S.A, No. 04-1544L, 2007 U.S. Claims LEXIS 213 (Fed. Cl., July 3, 2007), interlocutory appeal granted, Case No. 08-5042 (Fed. Cir., docketed Feb. 19, 2008).

**This memorandum was prepared by Andrea Ferster, general counsel to the Rails to Trails Conservancy. The author is not licensed to practice law in North Carolina. This memorandum should not be construed as providing legal advice, legal representation, or a legal opinion on any matter concerning North Carolina law. Readers are advised to seek advice from local counsel in specific rails to trails projects.

II. North Carolina State Law Affecting Ownership of Rail Corridors

A. Nature of Interest Acquired by Railroad

1. Authority of Railroad to Acquire Property

In North Carolina, "a railroad corporation is without power to acquire and hold real estate except by statutory authority, either expressly conferred or necessarily implied from the powers contained in the charter or arising to it under the General Laws." N. C. State Highway Commission v. Farm Equipment Co. 281 N.C. 459, 471 189 S.E.2d 272, 279 (1972). General statutes authorize railroads to acquire property by voluntary grant, by purchase, or by eminent domain. NC GEN STAT. § 136-190 (listing powers of railroad company to acquire land by condemnation). Id. § 40A-3(4).

When a railroad acquires property by purchase, it can acquire fee simple title. See Craig v. Southern Ry Co., 262 N.C. 538, 138 S.E.2d 35 (1964). However, when a private railroad corporation obtains land in condemnation proceedings, it procures merely an easement to be used only for railroad purposes. N. C. State Highway Commission, 281 NC at 471, 189 S.E.2d at 279; Blue v. Aberdeen & West End Railroad, 117 NC 644, 649, 23 S.E. 275, 276-77 (1895).

In North Carolina, many railroads in the 19th century were assembled through state-granted exercises of eminent domain, granted when the railroads were chartered. Bandini, Jeffrey, "The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis," 72 NC Law Review 1989, 2009 (1997). These charters may also place limitations on the corporation's powers or control the nature of the property interest acquired by the railroad Id. at 1010, 2017 (1997).

2. General Principles of Deed Construction

In North Carolina, deeds are subject to the statutory presumption that a conveyance shall be construed to be a conveyance in fee unless "such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity." NC GEN. STAT. § 39-1.

The construction of a deed is a question of law for the court. Id. In construing a deed, the use of the term "right of way" has been held to not necessarily limit the interest conveyed, because the term has a "two-fold meaning" which may refer to an easement, or which "may be used as descriptive of . . . the purpose to which the strip of land is put," and that "[i]t is a matter of common knowledge that the strip of land over which railroad tracks run is often referred to as the 'right of way,' with the term being employed as merely descriptive of the purpose for which the property is used, without reference to the quality of the estate or interest the railroad company may have in the strip of land." McCotter v. Barnes, 247 N.C. 480, 485-6, 101 S.E.2d 330, 334-5 (1958).

3. Construction of Deed As Fee versus Easement.

In McCotter, the court held that a fee simple is conveyed where the granting clause in a deed said that the grantor does "hereby give, grant bargain and sell unto the party of the second part, its successors and assigns, a tract or parcel of land 100 feet in width . . .'". The Court also particularly noted the statutory presumption favoring a fee simple construction. Id., 247 N.C. at 485, 101 S.E.2d at 334. See also Craig v. Southern Ry. Co., 262 N.C. 538, 138 S.E.2d 35 (1964)) (holding held that a railroad acquired fee simple absolute where the deed providing for conveyance to railroad company of described tract "to have and to hold . . . for railroad purposes in fee simple forever.")

Likewise, in King Associates v. Bechtel Development Corp. 179 NC App. 83, 632 S.E.2d 243 (2006), the Court followed McCotter in refusing to hold that the reference to "right of way" in a deed signified an easement interest, holding instead that the granting clause of a deed granting "Railroad Company a right of way in, over and upon any land or lands owned by the grantor, and making other references to "parcels of land," and references in the habendum clause referencing "the aforesaid lands, rights and privileges" conveyed a fee interest. The court explained that while the deed "deed does not expressly grant a 'parcel of land' as expressed in the deed in McCotter . . ., the term 'right of way' can be harmonized with the other clauses of the deed referring to a parcel of land." Id. 179 NC App. at 94, 632 S.E.2d at 247-8

In another case, however, the Court held that a deed conveying only the "right and privilege" to the railroad to enter upon the lands of the grantor and "to lay out, use, occupy and possess such portions of said lands contiguous to said Rail Road" conveyed only an easement. International Paper Co. v Hufham, 81 N.C. App. 606, 609, 345 S.E.2d 231, 233 (1986). The Court in King Associates distinguished this case on the grounds that the deed in that case granted to the railroad only "'the right and privilege' ... to enter upon each and every tract or parcel of land belonging to or held by [the grantor]," and "no land was conveyed." King Associates v. Bechtel Development Corp. 179 NC App. at 93, 632 S.E.2d at 247.

. If a deed that is construed as conveying a fee interest also includes limiting language, the deed will be construed as a fee simple determinable, but only if the limiting language is in either habendum or granting clause of the deed. King Associates v. Bechtel Development Corp. 179 NC App. at 94, 632 S.E.2d at 248 (holding that "conditional language 'so long as' restricting the use of the land for railroad purposes is sufficient to create a fee simple determinable with the grantor retaining a possibility of reverter.")

4. Nature of Interest Acquired by Adverse Possession/Without a Deed.

A railroad can acquire its right of way "by implied grant or by operation of law," where the railroad occupies the property "without obtaining a deed for the right of way or paying the assessed or appraised value of the land taken for the purpose." Carolina & N.W. R.R. v. Piedmont Wagon & Mfg. Co.,229 N.C. 695, 698-9, 51 S.E.2d 301, 304-5 (1949). Such an implied grant results where a railroad "enters upon land and builds a railroad, without grant or condemnation of the right of way, and no action or proceeding is commenced within the statutory period for recovering compensation." Id. 229 N.C. at 699, 51 S.E.2d at 305. Under those circumstances, there is "a presumption or grant or conveyance arises from the concurrence of these circum-

stances, and the presumption extends to the limits which the railroad company might have taken by condemnation and for which the landowner could have recovered compensation had he brought his action within the prescribed period of time . . ." Id

In many cases, disputes as to the railroad's right with respect to the right-of-way are resolved by reference to the railroad's charter issued by the legislature. For example, in Keziah v. Seaboard Air Line Railroad Company, 272 N.C. 299, 158 S.E.2d 539 (1968), the railroad's charter granted it the right to construct a railroad, and that in the absence of any contract, it will be presumed that the railroad's rights extend to 100 feet on either side of the centerline of the right of way. The court held that the railroad's rights are presumed to extend to those limits where the railroad (1) constructs the road, and (2) the owner fails to prosecute an action for the period fixed in the charter. Id. 158 S.E.2d at 545.

The North Carolina code bars any person from claiming rights to any railroad corridor by adverse possession. See NC GEN. STAT. § 1-44 ("No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right of way, depot, station house or place of landing, by any statute of limitation or by occupation of the same by any person whatever."). This provision has been construed to protect railroads from adverse claims of others rather than limit the railroad's own rights to the corridor. For example, the North Carolina Court of Appeals has held that a railroad does not forfeit its right to avail itself of this protection even if it has never used the property for railroad purposes. . McLaurin v. Winston-Salem Southbound Ry. 323 NC 609, 612, 374 S.E.2d 265, 267 (1972). See also R.R. v. McCaskil, 94 N.C. 746, 754 (1886) "A permissive use of part of [the railroad's land] by another, when no present inconvenience results to the company, is not a surrender of rights of property, and, indeed, to expel an occupant under such circumstances, would be a needless and uncalled for injury.")

B. Limitations on Future Interests

North Carolina's Marketable Title Act of 1973 extinguishes nonpossessory interests in real property where no "notice of any claim of interest" has been filed during a 30 year period, under which an owner can demonstrate an unbroken chain of title. NC GEN STAT. § 47B-1 et seq. This "marketable title" law operates to extinguish any right of reverter held by an adjacent property owner in a corridor in which the railroad had a fee simple determinable interest if the property owner fails to file a notice of the property interest within 30 years of receiving title, unless the property interest was exempt from the Act.

There are a number exceptions to this marketable title law, including one for "[r]ights of way of any railroad company (irrespective of nature of its title or interest therein whether fee, easement, or other quality)." Id. § 47B-3(6). However, in King Associates v. Bechtel Development Corp., the Court applied the Marketable Title Act to extinguish a landowner's possibility of reverter, and held that this exception "does not by its plain language extend to property interests of landowners adjacent to the railroad's right of way who hold a possibility of reverter in the right of way." Id. 179 NC App. at 96, 632 S.E.2d at 249. Easement interests are also excepted from the Marketable Title Act. NC Gen. Stat. § 47B-3(8).

C. Abandonment

The North Carolina Supreme Court has held that a claimant has the burden of proving abandonment by demonstrating that (1) the railroad harbored an intent to abandon; and (2) the railroad manifested that intent through outward acts inconsistent with any claim of title." Raleigh, Charlotte & Southern Railway v. McGuire, 171 NC 277, 281, 88 S.E. 337, 339 (1916). The intention must exist concurrently with actual relinquishment of the property, and the external acts must be positive and unequivocal. Id.

The North Carolina Courts have noted, albeit in dicta, that a railroad company's easement terminated "when its tracks were removed and the railroad was abandoned." McCotter v. Barnes, 247 N.C. 480, 483, 100 S.E.2d 330, 331 (1958). See also International Paper Co. v Hufham, 81 N.C. App. 606, 609, 345 S.E.2d 231, 233 (1986) (where deed conveyed only an easement, said easement "terminated when [the railroad] ceased rail traffic and removed its tracks.") However, a 1955 statute creates a presumption of abandonment only if a railroad does not use a right-of-way for seven years after removing its tracks from the corridor or fails replace the tracks within seven years. NC GEN.STAT. § 1-44.1. This statutory presumption applies only to rights of way held as easements. McLaurin v. Winston-Salem Southbound Ry. 323 NC at 612, 374 S.E.2d at 267 (1972).

Whether an abandonment has occurred, while a question of law, is based on factual determinations. Faw v. Whittington, 72 NC 321, 324 (1875). For example, in Allen v. Martin Marietta Corporation, 26 N.C. A pp. 700, 217 S.E.2d 112, 116 (1975), the court noted that "it is well-established that leases of a right of way to private businesses do not constitute an abandonment where the leases reserve a right to terminate if the land is needed for railroad purposes." In that case, the court held that a lease of a railroad right of way to a quarry operator for the operation of the quarry operator's locomotive did not constitute abandonment of the right of way by the railroad. By contrast, in Sparrow v. Dixie Leaf Tobacco Co., 232 N.C. 589, 61 S.E.2d 700 (1950), the court held that a lease by a railroad of a portion of its right of way to a tobacco company for warehouse purposes resulted in an abandonment, since the use was not a "railroad use." The Court held that "[w]hen the use by a third parties "is primarily for the benefit of the railroad as a common carrier, then it is for railroad purposes even though incidental benefits flow to the private use," whereas if the railroad is only "incidentally benefited" by the private use, the use is not a "railroad use."

The courts have held that the owner of the land underlying a railroad easement has the right to use and occupy the land "in any manner not inconsistent with the easement acquired" until such time as the right of way is needed for railroad purposes." Carolina & N.W. R.R. v. Piedmont Wagon & Mfg. Co., 229 N.C. at 701, 51 S.E.2d at 306. While this case did not address the issue of abandonment, it indicates that mere non-use of an easement by the railroad is unlikely to constitute an abandonment of the easement.

While North Carolina courts have not addressed this issue, it is generally the case that issuance of abandonment authorization by the Surface Transportation Board ("STB"), alone, is not sufficient to demonstrate abandonment of the corridor, although the railroad's application to the STB for permission to abandon a corridor may be some evidence of an intent to abandon. Bandini, Jeffrey, "The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis," 72 NC Law Review at 2021 n. 189. However, use of the right-of-way by

the underlying fee owner is not evidence of abandonment to the extent that such use does not interfere with railroad operations, since that use is permissive. Raleigh & Augusta Air Line R.R v. Sturgeon, 120 N.C. 225, 228-29, 26 S.E. 779, 780 (1897).

Under the North Carolina Code, "[w]henever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituted the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned public road right-of-way . . ." NC GEN.STAT. § 1-44.2.

D. Use/Transferability of Railroad Easements for Non-Railroad or Trail Purposes.

"[A] railroad has the power to sell property which has been acquired for railroad purposes." McLaurin v. Winston-Salem Southbound Ry. 323 NC at 613, 374 S.E.2d at 268. Whether the railroad has the right to "extend its user of the right of way for legitimate purposes is a matter resting in its sound business judgment." Carolina & N.W. R.R. v. Piedmont Wagon & Mfg. Co., 229 N.C. at 701, 51 S.E.2d at 306. (court issued mandatory injunction requiring adjacent landowner to remove fences from area adjacent to right of way which was within the width of the area that the railroad was authorized to acquire by the general law in effect at the time of the railroad's construction, even though the railroad had not developed this area as part of its railroad.)

While there are no cases in North Carolina explicitly holding that trail use is within the scope of a railroad easement, such an interpretation would arguably further North Carolina public policy. In 1989, North Carolina passed legislation establishing a policy that "programs for railway corridor preservation which assure the availability of such corridors in the future are vital to the continued growth and prosperity of the State and serve the public purpose." NC GEN. STAT. § 136-44.35. This legislation empowers the North Carolina Department of Transportation (:DoT") to preserve rail corridors through the federal railbanking statute (16 U.S.C. § 1247(d)), and authorizes the DoT to acquire inactive rail corridors in order to preserve them. NC GEN. STAT. §§ 136-44.36A, 136-44.36B. The Act also authorizes the DoT to lease any portions of rail corridors held in fee simple absolute "for interim public recreation use," provided specified conditions are met. Id. § 136-44 36D.

III. Liability of Trail Managers under North Carolina Law

Under the common law of most states, the liability of owners and occupiers of land is defined by the extent to which one person owes a "duty of care" to the person who sustained an injury. Trail managers, as a particular class of landowners, receive special protection from liability by state-enacted Recreational Use Statutes (RUS). Recreational Use Statutes, which are in effect in some form in all 50 states, alter common law tort principles regarding landowner liability of invitees, licensees, and trespassers by narrowing or obviating the owner's duty of care toward recreational users. Instead, RUS' limit the liability of certain landowners who allow the public free use of their land for recreational purposes.

North Carolina has a general Recreational Use Statute that limits the liability of private landowners who make land and water areas available to the public at no cost for educational and recreational purposes. NC GEN State., § 38A-1 et seq. In addition, North Carolina has a specific limitation on liability applicable to trails, which provides that "Any person, as an owner, lessee, occupant, or otherwise in control of land, who allows without compensation another person to use the land for designated trail or other public trail purposes or to construct, maintain, or cause to be constructed or maintained a designated trail or other public trail owes the person the same duty of care he owes a trespasser.," and "(b) Any person who without compensation has constructed, maintained, or caused to be constructed or maintained a designated trail or other public trail pursuant to a written agreement with any person who is an owner, lessee, occupant, or otherwise in control of land on which a trail is located shall owe a person using the trail the same duty of care owed a trespasser." NC GEN STAT., § 113A-95.