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James Lilly

University of Baltimore School of Law

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RAIL-TO-TRAIL CONVERSIONS: HOW COMMUNITIES ARE RAILROADING THEIR WAY OUT OF RECESSION TOWARDS HEALTHY LIVING

James Lilly

I. Introduction

At the height of the railroad industry, more than 270,000 miles of track blanketed the continental United States.¹ However, with the advent of the trucking industry and cheaper methods of transportation, railroad use quickly fell into decline through the twentieth century resulting in the bankruptcy of major carriers and the full-scale abandonment of hundreds of thousands of miles of railroad corridors. Beginning in the late 1970s, advocates started to call for the conversion of these unused rail corridors into recreational trails, resulting in new policy declarations, statutes, and precedents from both the federal and state governments nationwide.²

Presently, there are more than 20,000 miles of rail trails in more than 1,600 pathways created since the 1980s.³ These conversions helped both rural and urban communities create greater ties, spurred economic growth, and fostered healthier lifestyles.⁴

However, rail trails bring up critical questions of property law that touch on the scope of easements, government takings, and federalism.⁵ Landowners negatively affected by rail trails often spend years and hundreds of thousands of dollars trying to recover some compensation for their losses.⁶

Notwithstanding these issues, rail trails have been shown to be almost universally popular throughout the United States.⁷ Despite the costs to private landowners in particular cases, the conversion of unused rail corridors into nature trails has brought many economic, social, and environmental benefits to communities throughout the country; instead of letting a railroad lie in disrepair or disuse, govern-

1. See Andrea C. Ferster, Commentary, *Rails-to-Trails Conversions: A Review of Legal Issues*, 58 PLAN. & ENVTL. L. 3 (2006).

2. *Id.*

3. *About Rails-to-Trails Conservancy*, RAILS-TO-TRAILS CONSERVANCY, <http://www.railstotrails.org/aboutUs/index.html> (last visited Apr. 2, 2013).

4. *Infra* Part III.

5. *Infra* Part II.

6. *Infra* Part III.B.

7. RAILS-TO-TRAILS CONSERVANCY, 2011 ANNUAL REPORT 9 (2012), http://www.railstotrails.org/resources/documents/aboutus/annualreports/annualreport_2011_final.pdf.

ments can turn a seemingly worthless relic of our past into a flourishing new center of economy.⁸

II. Background

A. *Rails-to-Trails and Railbanking*

In 1983, Congress amended the National Trails Systems Act ("NTSA") to include new provisions, often called the "Trails Act", or "Rails-to-Trails Act."⁹ This new legislation created the "railbanking" system, which preserved abandoned rail corridors for potential train use in the future.¹⁰ If a line is unprofitable, the railroad can transfer management to a private or public agency, known as an interim trail manager, without having to legally abandon the property.¹¹ Since 1991, the Dept. of Transportation's (DOT) Surface Transportation Board (STB) has regulated the railbanking process. Once the railroad and the interim trail manager have agreed to negotiate a transfer, the STB issues a notice or Notice of Interim Trail Use (NITU), which provides 180 days for the parties to negotiate terms of the transfer and an opportunity to remove the tracks, ties, and other materials from the corridor. Once the parties reach an agreement, they notify the STB and the board adds the corridor to the national railbank, where it remains as long as the trail is in use, or until it is needed for rail service once again.¹² If, however, the parties do not reach an agreement, the railroad may abandon the line entirely, allowing the property to revert back to the original landowners per the applicable easements and state law.¹³ Once a corridor is railbanked, there is no legal abandonment of railroad right of way privileges "for the purposes of any [state] law or rule of law."¹⁴

B. *The Preseault Saga: 1981-2002*

In litigation that spanned from 1980 until 2002, the Court of Appeals for the Federal Circuit decided in 1996 that certain original easements granted in 1899 to a railroad company lasted only as long as the land was used for "railroad purposes" and that recreational trails were not within the scope of the easement in question.¹⁵ The court could not find any support in Vermont case law endorsing the "shifting public use" doctrine espoused by both the United States and

8. *Infra* Part III.

9. National Trails System Act, 16 U.S.C. § 1247(d) (2006).

10. Ferster, *supra* note 1, at 5.

11. *Id.* at 5.

12. *Id.*

13. *Id.* at 7.

14. § 1247(d).

15. *Preseault v. United States*, 100 F.3d 1525, 1530 (Fed. Cir. 1996) (plurality opinion).

Vermont.¹⁶ The decision asked if it “could [] be said that the parties contemplated that a century later the easements would be used for recreational hiking and biking trails [?] . . . [w]e think not.”¹⁷ The court clarified that the concept of “shifting public use” must be “anchored in established precedent, or it becomes little more than speculation about what a hypothetical Vermont court in 1996 might do.”¹⁸

Though the *Preseault* holding was a plurality, it provided practitioners the three “determinative issues” for deciding whether rail conversions amount to government takings:

(1) who owned the strips of land involved, specifically did the Railroad by the . . . transfers acquire only easements, or did it obtain fee simple estates; (2) if the Railroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails; and (3) even if the grants of the Railroad’s easements were broad enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements.¹⁹

Because of the limited and precise scope of the original easements in *Preseault*, the conversion of the railroad corridor into a public trail amounted to a taking which required just compensation.²⁰ The court clarified that not all conversions under the Rails-to-Trails Act are *per se* compensable takings. On the contrary, if the easement is “broad enough under then-existing state law to encompass trail use, the servient estate holder would not be in a position to complain about the use of the easement for a permitted purpose.”²¹

This alternate scenario played out in an important Maryland case, *Chevy Chase Land Co. v. United States*.²² In that case, a 1911 easement granted to a railroad did not have the explicit limitation of “railroad purposes” that the deed in *Preseault* contained.²³ The original property owners deeded the railroad “a free and perpetual right of way,” which the Maryland Court of Appeals discovered could have encompassed recreational trails in 1911.²⁴ Finding this determination of Ma-

16. *Id.* at 1541.

17. *Id.* at 1542.

18. *Id.* at 1544.

19. *Id.* at 1533.

20. *Id.* at 1552.

21. *Id.*

22. *See generally* *Chevy Chase Land Co. v. United States*, 733 A.2d 1055 (Md. 1999).

23. *Id.* at 1060.

24. *Id.* at 1059.

ryland law sufficient, the Federal Court subsequently denied the plaintiff's claim for compensation.²⁵

The rules from both *Preseault* and *Chevy Chase* are often used to determine the scope of easements along with whether a conversion is a compensable taking under the Fifth Amendment.²⁶

III. Analysis

A. *The Economic Benefits of Rail Conversions*

Statistical data has shown that there are tangible economic benefits resulting from rail conversions, in both urban and rural areas.²⁷ By their nature, rail trails offer distinct economic advantages over trails arbitrarily created.²⁸ For one thing, railroad lines are already part of a network of intersecting paths which often lead to a community's business centers.²⁹ Moreover, rail trails themselves are shown to be creating new centers of business.³⁰

Atlanta's ongoing \$2.8 billion project, the BeltLine, is the conversion of the 22-mile rail corridor surrounding the city into an expansive network consisting of trails, housing, and streetcar lines.³¹ Since 2005, \$775 million has been privately invested in the project which led to large numbers of jobs in all sectors, especially construction. New apartment and condominium complexes have sprung up within a half mile from the trail, which has resulted in an influx of young professionals. Sales have risen 20% at the New York Butcher Shoppe on the Eastside trail. The Atlanta project drew from examples already in place in New York City, where the High Line train in the West Side of

25. *Chevy Chase Land Co. v. United States*, 158 F.3d 574 (Fed. Cir. 1998), *cert. denied*, 531 U.S. 957 (2000).

26. *See e.g. Toews v. United States*, 376 F.3d 1371, 1380 (Fed. Cir. 2004).

27. *See infra* Part III.A.

28. RAILS-TO-TRAILS CONSERVANCY, ECONOMIC BENEFITS OF TRAILS AND GREENWAYS 2 (2004), http://www.railstotrails.org/resources/documents/resource_docs/tgc_economic.pdf.

29. *See e.g.* RAILS-TO-TRAILS CONSERVANCY, FROM TRAIL TOWNS TO TROD: TRAILS AND ECONOMIC 2 (Aug. 2007) ("Through careful planning, communities are realizing the full economic potential of linking trails and local businesses. In Cumberland, Md., for example, local businesses, in partnership with elected officials, have crafted a well organized Trail Town model that helps link bicycle tourists to downtown businesses. Cumberland Mayor Lee Fiedler points to the importance of this model for economic revitalization when he states that: 'The revival of the city is driven, in part, by the trail. . . .No one thought people with bikes would spend money, but they were wrong. Business is spreading back from the trail.' "), http://www.railstotrails.org/resources/documents/whatwedo/TrailLink%2007%20program_Economic%20Develop.pdf.

30. RAILS-TO-TRAILS CONSERVANCY, ECONOMIC BENEFITS OF TRAILS AND GREENWAYS, *supra* note 28, at 2.

31. Norman Gomlack, *New Trail Spurs Interest in Ex-Atlanta Route*, ASSOCIATED PRESS (Nov. 24, 2012, 6:56 PM), <http://bigstory.ap.org/article/new-trail-ex-atlanta-rail-corridor-draws-crowds>.

Manhattan was converted into an above ground park, drawing two million visitors a year. The conversion cost \$150 million to construct, but has spurred \$2 billion in nearby construction projects.³² In Dallas, there is a 25% premium for properties located next to the converted Katy Trail.³³ A study of towns near two Massachusetts's rail trails found that homes close to these trails sold at 99.3% of the list price, compared to 98.1% for other homes in these towns.³⁴ The most striking aspect to the study found that these homes were on the market for an average of 29 days where other homes stayed on the market for more than 50 days.³⁵

Rural communities also experienced the economic benefits of rail conversions.³⁶ For example, in Leadville, Colorado, sales tax revenues increased 19% in just the few months after the Mineral Belt Trail opened.³⁷ Likewise, tourists flooded to the Great Allegheny Passage which stretches 150-miles from Pittsburgh, Pennsylvania to Cumberland, Maryland.³⁸ Studies show that the trail welcomes more than 350,000 visitors per year who typically spend \$12 to \$15 on soft goods, with rental equipment revenue topping \$9 million.³⁹ Annually, there is an economic impact of \$14.3 million to \$26.5 million. Entire new businesses have sprung up around the trail revitalizing small towns such as Confluence, Pennsylvania.⁴⁰

B. *The Economic and Legal Costs of Rail-to-Trail Conversions*

The costs of trail conversions are most apparent from lawsuits where private landowners, like the Preseaults, either want compensation for the use of their land or want their land back outright.⁴¹ To recover, landowners have the U.S. Constitution and the Tucker Act as tools for obtaining compensation.⁴² Landowners can utilize the

32. *Id.*

33. RAILS-TO-TRAILS CONSERVANCY, FROM TRAIL TOWNS TO TROD: TRAILS AND ECONOMIC, *supra* note 29.

34. Craig Della Penna, *Home Sales near Two Massachusetts Rail Trails*, NAT'L TRAILS TRAINING P'SHIP, <http://www.americantrails.org/resources/adjacent/dellapennasales.html> (last updated March 29, 2009).

35. *Id.*

36. *See generally* RAILS-TO-TRAILS CONSERVANCY, ECONOMIC BENEFITS OF TRAILS AND GREENWAYS, *supra* note 25.

37. *Id.* at 2.

38. *See generally* RAILS-TO-TRAILS CONSERVANCY, A GUIDE TO TRANSPORTATION ENHANCEMENTS: GREAT ALLEGHENY PASSAGE 16 (Dec. 2004), http://www.railstotrails.org/resources/documents/resource_docs/GreatAlleghenyPassage.pdf.

39. *Id.* at 17.

40. *Id.*

41. *See generally* Susie Rogers, *Rails To Trails: Are Landowners Railroaded?*, NAT'L TRAILS TRAINING P'SHIP (last updated March 17, 2007), <http://www.americantrails.org/resources/railtrails/antirail.html>.

42. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

Tucker Act to sue the federal government for compensation in the Court of Federal Claims.⁴³ While such remedies exist for aggrieved landowners, the government's limitless resources, money and time, truly make it a one-sided battle, weighing heavily in the government's favor and discouraging to those with a real case.⁴⁴ Because landowners might have had noisy trains and unseemly tracks crisscrossing their property at a certain point, would not a publicly beneficial nature trail be a welcome improvement? However, as one author put it, does the government expect, in the name of public recreation, for a single landowner to fund a public resource?⁴⁵

In *Preseault*, the Court summarized aspects to nature trails that can cause heartache for private landowners:

It is one thing to have occasional railroad trains crossing one's land. Noisy though they may be, they are limited in location, in number, and in frequency of occurrence. . . . When used for public recreational purposes. . . the burden imposed by the use of the easement is at the whim of many individuals, and, has been impossible to contain in numbers or to keep strictly within the parameters of the easement. . . to allow this change would permit 'a substantial variance in the mode of or extent of user or enjoyment of the easement so as to throw a greater burden on the servient tenement.'⁴⁶

Especially in rural areas during depressed economic times, it is likely the goal of every farmer to maximize the economic potential of their land. Because of a rural rail trail, it is likely that a farmer is missing out on a sizeable portion of arable land. In a similar situation, a Michigan hotel owner filed suit against Kent County to recover the property (not only compensation) of a rail trail because of hikers' cars filling up his parking lot and "making excessive use" of his restroom facilities.⁴⁷

public use, without just compensation."); *see also* Tucker Act, 28 U.S.C. § 1491 (2006) ("The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against . . . including a dispute concerning . . . rights in tangible or intangible property. . ."). "To maintain an action under the Tucker Act, an actual taking must be established, and it is not enough to show only that consequential damages were sustained. Furthermore, in order to have a viable Tucker Act claim, the plaintiff must seek compensation, not merely a declaration of present title." 27 AM. JUR. 2D *Eminent Domain* § 759 (2013).

43. 27 AM. JUR. 2D *Eminent Domain*, *supra* note 42, at § 759.

44. Jeffrey Sharp, *Rails-to-Trails, Rational Governments, and a Constitutional Shortcut: The Perils of Preseault*, 29 REAL ESTATE L.J. 299 (2001).

45. *Id.* at 300.

46. *Preseault v. United States*, 100 F.3d 1525, 1543 (1996) (citing *Bernards v. Link*, 248 P.2d 341, 347 (Or. 1952)).

47. *Rogers*, *supra* note 41.

As both the hotel owner and the *Preseault* Court alluded, hikers might actually begin trespassing onto a landowner's property, perhaps causing litter or damage, diminishing the economic potential.⁴⁸ One unique study of a Seattle rail trail found that owners of property directly adjacent to the Burke-Gilman trail viewed the trail "more negatively" than those only near the trail, and experienced no noticeable benefit when trying to sell their homes.⁴⁹ Houses near, but not directly adjacent to, the same trail did see a noticeable bump in sales price.⁵⁰ Those "close" houses did not experience the nuisances that adjacent landowners might have suffered.⁵¹ The Preseaults recovered "nearly half a million dollars for damage to the *remainder* of his property due to severance that destroyed its development value."⁵²

Inevitably, quiet title litigation arising from rail trails could account for an immense cost for all parties involved whether they be private land owners, trail managers, governments, or, especially, taxpayers.⁵³ For example, the *Preseault* litigation lasted more than sixteen years (twenty-two years including the final awards decision) reaching the highest levels of both state and federal courts.⁵⁴ Finally, in 2002, the Court awarded the Preseaults almost \$900 thousand from the federal government in just attorney's fees.⁵⁵ In a more recent case, a court awarded more than \$400 thousand (only one third of what the plaintiffs had requested) to a class of plaintiffs just for attorney's fees that encompassed litigation lasting more than ten years and required over 2,200 billable hours for plaintiffs.⁵⁶ Trail managers must be aware of these potential costs.

Likewise, practitioners must master the determinative issues laid out in *Preseault* and have open, continuous discussions with all parties involved, including addressing and mitigating landowners' concerns.⁵⁷

48. Rogers deemed this real phenomenon "recreational trespass." *Id.*; *Preseault* 100 F.3d at 1543.

49. OFFICE OF PLANNING, SEATTLE ENGINEERING DEPT, BURKE-GILMAN TRAIL'S EFFECT ON PROPERTY VALUES AND CRIME 1-2 (May 1987), available at <http://www.brucefreemanrailtrail.org/pdf/Burke-Gilman.pdf>.

50. *Id.*

51. *Id.*

52. *Rails to Trails Attorneys: Review Our Record of Success*, ACKERSON, KAUFFMAN, FEX (emphasis added), <http://www.ackersonlaw.com/Property-Rights/Rails-to-Trails.shtml> (last visited Apr. 24, 2013).

53. Ferster, *supra* note 1, at 6.

54. *Id.* see also generally Sharp, *supra* note 44.

55. *Preseault v. United States*, 52 Fed. Cl. 667, 684 (2002).

56. *Bywaters v. United States*, No. 6:99-CV-451, 2010 WL 3212124, at *1 (E.D. Tx., Aug. 12, 2010).

57. Rails-to-Trails has provided a step by step approach to dealing with opposing landowners. Most critical to this is that advocates must not trivialize landowners' concerns about the consequences of a rail trail. *Tips for Working with Adjacent Landowners and Opposition*, RAILS-TO-TRAILS CONSERVANCY, http://www.railstotrails.org/ourwork/trailbuilding/toolbox/information_summaries/opposition_adjacents.html (last visited Apr. 24, 2013); see also *supra* note 54 and accompanying text.

One positive aspect of this short-term litigation is that both federal and state courts will eventually have to clarify the relevant easement and “shifting public use” doctrines, which should result in an overall decrease of litigation and money spent in the long-term.⁵⁸ For the present time however, paying a landowner a few hundred thousand dollars for the property outright, instead of hoping the railroad easement might encompass nature trails, could save millions down the road.

C. *The Social Benefits of Rail Trails*

Rail-to-Trail conversions have brought three substantial social benefits to communities nationwide: 1) healthier, more active, lifestyles for travelers; 2) closer social and historical ties created among the communities along the trail, both rural and urban; and 3) a positive impact on the environment.⁵⁹

As previously discussed, rail trails are often networked in such a way that paths lead to many different centers of business.⁶⁰ As the Atlanta BeltLine has demonstrated, citizens have been creating healthier lifestyles by walking or biking down these corridors, instead of driving automobiles.⁶¹ Ten-feet wide on each side, the “Bicycle Freeway” has created large biking paths to and from the center of downtown Atlanta which helps to unclog traffic jams and curb harmful emissions.⁶² Rail Trails help encourage exercise with “natural, scenic areas that cause people to actually want to be outside and physically active.”⁶³

Along Virginia’s Civil War Trails, travelers follow the routes of various Civil War campaigns that occurred in the region.⁶⁴ Many of these

58. *But see* Danaya C. Wright, *Private Rights and Public Ways: Property Disputes and Rails-to-Trails in Indiana*, 30 IND. L. REV. 723, 760 (1997). Professor Wright’s chief complaint was that Indiana’s Supreme Court neglected to clarify certain aspects of the state’s easement termination law. Though writing from an unambiguously pro-“shifting public use” perspective, Wright put forth various suggestions to alleviate landowner’s legitimate concerns including “signs requesting that trail patrons respect the privacy rights of the adjoining landowners and a monitoring system to insure compliance with appropriate laws and regulations.” Moreover, “[t]rail conversions also should provide adequate parking and access points for patrons who wish to use the trails so they do not inadvertently trespass on the goodwill of their neighbors.” *Id.*

59. *See infra* Part III.C.

60. *Supra* Part III.A.

61. Gomlack, *supra* note 31.

62. *Id.*

63. RAILS-TO-TRAILS CONSERVANCY, HEALTHY PLACES FOR HEALTHY PEOPLE: ACTIVE TRANSPORTATION AND HEALTH 3 (Aug. 2007), http://www.railstotrails.org/resources/documents/whatwedo/TrailLink%2007%20Program_Active%20Transportation%20and%20Health.pdf.

64. RAILS-TO-TRAILS CONSERVANCY, GUIDE TO TRANSPORTATION ENHANCEMENTS: VIRGINIA CIVIL WAR TRAILS 1 (Dec. 2004), http://www.railstotrails.org/resources/documents/resource_docs/VACivilWarTrails.pdf.

routes have been created by rail-to-trail conversions, but people can also drive along certain pathways as well. Eighty percent of the trails go through rural settings opening up these low-key areas to tourists. "The popularity of these trails has helped build community pride and support for local preservation efforts."⁶⁵ Likewise along the Allegheny Trail, travelers experience firsthand the extensive history of the region, "often at the exact spot where the history occurred."⁶⁶ Communities on the trail often create large hiking/biking events designed to encourage community fellowship.⁶⁷ In Atlanta, the BeltLine trail has connected numerous neighborhoods to Atlanta's past and future.⁶⁸ Visitors on the trail can walk easily to the old spot of the Ponce De Leon Baseball Park where one of Atlanta's minor league teams used to play. Though a shopping plaza now occupies the location, visitors are clued in on the historical significance. Conversely, the BeltLine has been used to showcase public contemporary art displays, including one which encouraged travelers to leave personal notes on the piece.⁶⁹

Lastly, there has been a clear benefit to the environment after trail conversions.⁷⁰ Trails help preserve, or create new natural landscapes and offer opportunities to protect wildlife.⁷¹ Even in urban Atlanta, hundreds of trees have been planted along the BeltLine Trail.⁷² Likewise, rail trails have encouraged commuters to avoid automobile transportation, which creates increased savings due to avoiding gasoline and fewer emissions causing less healthcare problems.⁷³ Thirty-seven percent of the cyclists and 7% of the pedestrians on the Burke-Gilman Trail were using the corridor to commute to work.⁷⁴ A study showed that in 1997, nearly one third of those surveyed used the Iron Horse Regional Trail in California for commuting to work and school.⁷⁵

65. *Id.*

66. *A Passage Through Time and the Mountains*, GREAT ALLEGHENY PASSAGE, <http://www.atatrail.org/au/page1.cfm> (last visited Apr. 24, 2013).

67. See e.g., *Local Events & Festivals*, GREAT ALLEGHENY PASSAGE, <http://www.atatrail.org/ne/rides.cfm> (last visited Apr. 24, 2013).

68. Gomlack, *supra* note 31.

69. *Id.*

70. *Benefits of Rail-Trails*, RAILS-TO-TRAILS CONSERVANCY, <http://www.railstotrails.org/ourWork/trailBasics/benefits.html> (last visited Apr. 24, 2013).

71. *Id.*

72. Gomlack, *supra* note 31.

73. For an in-depth look at the potential savings, see THOMAS GOTSCHI & KEVIN MILLS, RAILS-TO-TRAILS CONSERVANCY, ACTIVE TRANSPORTATION FOR AMERICA: THE CASE FOR INCREASED FEDERAL INVESTMENT IN BICYCLING AND WALKING 22-35 (2008), http://www.railstotrails.org/resources/documents/whatwedo/atfa/ATFA_20081020.pdf.

74. RAILS-TO-TRAILS CONSERVANCY, ENHANCING THE ENVIRONMENT WITH TRAILS AND GREENWAYS 3 (Dec. 2004), http://www.railstotrails.org/resources/documents/resource_docs/tgc_conenv.pdf.

75. *Id.*

Health and monetary savings surface when travelers are spending thousands of dollars less each year on fuel costs.⁷⁶

IV. Conclusion

The benefits resulting from rail-to-trail conversions clearly outweigh the negatives that may arise from costly litigation.⁷⁷ However, this litigation is important for property law because it has reinforced both the relevance of our antique easement system and the notion that the government must properly compensate landowners for what they take from them.⁷⁸ It is important that potential trail managers discuss all of the property issues with landowners affected by a trail conversion.⁷⁹

As shown above, rail trails have had a positive impact on economies, communities, and the environment.⁸⁰ Communities are becoming wealthier, healthier, and cleaner.⁸¹ During these uncertain economic years, rail trails are a great tool that states and local communities can utilize to spur economic development.⁸²

76. GOTSCHI & MILLS, *supra* note 73, at 22.

77. *See generally supra* Part III.

78. *See generally supra* Parts II.B and III.B.

79. *Supra* Part III.B.

80. *See supra* Part III.

81. *See supra* Part III.

82. *Supra* Part III.A.