

**A Study on the  
Feasibility, Benefits,  
and  
Implementation of a Strategy for a  
Rails To Trails Program  
Throughout the Commonwealth**

**PURSUANT TO  
1998 HOUSE CONCURRENT RESOLUTION 77**

**Research Memorandum No. 486**

August 31, 1999



**Special Task Force  
on  
Feasibility of Rails to Trails  
(1998 HCR 77)**

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## **Foreword**

Recognizing the abundance of abandoned and unused railroad corridors in the Commonwealth of Kentucky, and the benefits associated with converting these abandoned railroad corridors into hiking and biking trails, the 1998 General Assembly passed House Concurrent Resolution 77, which directed the Legislative Research Commission “to establish a special interim study committee to study the feasibility, benefits, and implementation strategy for a Rails to Trails Program throughout the Commonwealth of Kentucky”. The study committee, or special task force, consisted of fifteen legislators, including the Chair of the Senate Economic Development and Labor Committee, and the Chairs of both the House Economic Development Committee, and the House Tourism Development and Energy Committee.

This research report, the product of that study, concludes that a rails to trails program in the Commonwealth is feasible and that there are mechanisms already in place that are conducive to a successful rails to trails program, if the mechanisms can be coordinated. The task force adopted twelve recommendations that, if implemented, will facilitate a rails to trails program in the Commonwealth.

Ellen Benzing, Jonathan Grate, and Mac Lewis collaborated in the preparation of this report.

Bobby Sherman  
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The Capitol  
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November, 1999



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# Introduction

Twentieth century economic and transportation changes, such as increased reliance on trucks and airplanes, have led to a major contraction in the nation's railroad infrastructure, with a resultant increase in the number of abandoned railroad corridors. Governments at the state and national level have thus been faced with the question of whether government should utilize or preserve these corridors in some way. One option has been the development of railtrails; i.e. the conversion of abandoned or unused railroad corridors into public multi-use trails or greenways.

At the national level, Congress has taken the trail idea and fused it with a desire to preserve a transportation infrastructure for future use, should the need ever arise. To promote this policy, Congress amended the National Trails System Act in 1983 to allow an abandoned railroad corridor to be preserved by "banking" that corridor for future transportation use, and using that corridor in the interim for a recreational trail use.

While some railtrail conversions were effected prior to 1983, the power to bank an abandoned corridor has greatly facilitated the conversion of these corridors into railtrails. States, local governments, and public and private interest groups have transformed thousands of miles of corridors into multi-use trails or linear parks for public enjoyment. In light of the present Rails-to-Trails movement and the efforts of adjoining states in promoting railtrails, such as West Virginia and Ohio with 376 and 374 respective miles, the 1998 Regular Session of the Kentucky General Assembly adopted House Concurrent Resolution 77, which directed the Legislative Research Commission to establish a special interim study committee to study the benefits, feasibility and implementation strategy for a Rails-to-Trails Program in the Commonwealth of Kentucky.

When the Task Force first met, Kentucky ranked 47<sup>th</sup> among the states, with only 4 miles of developed railtrails. The questions thus before the Task Force centered on what efforts, if any, should be undertaken in the railtrail area. Beginning in January of 1999, the Task Force met for a total of seven meetings, concluding in August of 1999. Appearing before the Task Force were representatives from interested parties, including the Rails-to-Trails Conservancy, the Kentucky Rails-to-Trails Council, railroad companies, the Farm Bureau Federation, grass roots organizations, executive branch agencies, and a West Virginia Department of Transportation official.

This report reviews the background information presented to the Task Force as well as its own examination of the feasibility of a railtrail program in the Commonwealth. It begins with a general overview of the Rails-to-Trails movement in the United States, taking particular note of the efforts of two adjoining states, Ohio and West Virginia. The report then turns to railtrail efforts in Kentucky, identifying trails both completed and under way, as well as the efforts of interested private and governmental entities and the role played by these entities in the railtrail process. The next section of the report addresses issues specific to the feasibility of a railtrail program, examining issues associated with railroad corridor acquisition, costs

associated with railtrail development, and attendant liability issues. Finally, the report sets out the recommendations of the Task Force in regard to the question of Rails-to-Trails in the Commonwealth of Kentucky.

# **Overview of the Rails-to-Trails Movement in the United States**

## ***Federal Response to Economic Hardships of Modern Railroads***

At the early part of the 20<sup>th</sup> century, nearly every American town and city had a railroad corridor passing through. Trains were used to transport freight and people faster and more efficiently than any other contemporary mode of transportation. Railroads reached their peak in total mileage around World War I, with about 270,000 miles of track. However, this abundance of rail miles did not last into the latter part of the century. By the mid-1970's the railroads were in a severe economic crisis. The financial strain on railroad companies was due largely to increased competition from other modes of transportation, such as trucking, buses, and private automobiles; rising labor costs; fuel and maintenance expenses; and regulation. The railroad system since WW I has shrunk to the current total of 105,000 miles.<sup>1</sup>

In response to the economic difficulties faced by railroads, Congress passed the Staggers Rail Act of 1980. This act allowed railroads greater flexibility in setting prices and determining service levels. One consequence of the act was an increase in the number of corridor abandonments, as the act allowed railroads to reduce service to sparsely populated areas and eliminate routes no longer economically viable.

## ***The Rails-to-Trails Movement and Railbanking***

Simultaneous with the proliferation of abandoned railroad corridors came the rails-to-trails movement. Congress facilitated this movement with its passage of the 1983 amendments to the National Trails System Act. The amendments allowed groups and governments to preserve the abandoned and unused rail corridors for future transportation use by converting the corridors into trails and linear parks for public use, a concept now known as "railbanking." Should the parties agree to railbank a corridor, the federal government will allow the railroad to transfer its interest in the corridor to the purchaser and release the railroad from future involvement with the corridor. The purchaser takes the corridor, subject to the provision that should a railroad later wish to restore rail service over the corridor, the railroad may, after paying to the trail-owning entity the fair market value for the corridor and improvements, use that corridor for rail service. However, until that occurs, the entity originally taking the corridor from the railroad may construct, maintain, and operate a public use trail over that corridor.

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<sup>1</sup> Della Penna, Craig. 24 Great Rail-Trails of New Jersey: The Essential Guide to the Garden State's Best Multi-use Recreational Trails Built on Abandoned Railroad Grates, New England Cartographics, 1999, page 15.

"Overview: Abandonments and Alternative to Abandonments", Office of Public Services, Surface Transportation Board, Washington, D.C., page 3, April, 1997.

## ***Railtrail Experience Nationwide***

Since the advent of railbanking and the federal government's policy of preserving greenspace and creating trails, many miles of railtrails have been developed across the nation. The Rails-to-Trails Conservancy ("RTC"), a Washington, D.C. non-profit membership and lobbying group, exists to educate the public on the benefits of linear parks and to monitor impending railroad corridor abandonments so that local groups and states can secure ownership. According to the RTC, there are currently 1,000 railtrails in 49 states, totaling 10,275 miles, with an additional 1,237 miles underway. The RTC supports the claim that railroad corridors make good trails because they follow the natural grade of the land and often traverse scenic lands. States such as New Jersey and West Virginia attribute growth in tourism and economic development to railtrails. New Jersey and West Virginia have published guides for railtrails and commercial atlases depicting businesses along railtrails in their states. Some banks in communities with railtrails have offered 1% above the average interest rate for loans for railtrail-related economic development and improvements to railtrail-related businesses, such as bed-and-breakfasts.

State by state, railtrail programs differ from one another. A particular railtrail program does not contribute one way or another to the number of railtrail miles a state has. State railtrail mileage ranges from 1,251 miles in Wisconsin to three miles in Alaska. State railtrail legislation ranges from comprehensive statutory schemes to little if any mention of a railtrail program. A similar range exists for actual railtrail programs, with little correlation between the breadth of a state's legislation and its railtrail program. Few states have their own railbanking statutes, relying instead upon the federal railbanking system.

The Task Force heard from representatives of two states adjoining Kentucky with successful railtrail programs, West Virginia and Ohio. Their experience is outlined below.

## ***Railtrail Experience in West Virginia***

West Virginia has a specific statute establishing a Rails-to-Trails Program within the Tourism and Parks Department. The purpose of the program is to assist local communities with the acquisition and development of abandoned railroads for interim use as recreational trails. The Commissioner of the West Virginia Tourism and Parks Department is given broad authority to enter into agreements to acquire interests in abandoned railroad rights-of-way; develop and maintain any trail created pursuant to the Act; assist others in acquiring interests in abandoned railroad rights-of-way; and evaluate existing and potential railroad rights-of-way for future use. West Virginia also has its own railbanking statute. A railroad maintenance authority was created to hold title to the land and to issue a rail bank certificate for each abandoned railroad right-of-way.

Even though West Virginia has a comprehensive Rails-to-Trails Program statute, the railtrails are not considered state projects. The role of the state is that of information clearinghouse and technical expert. It is up to the local communities to

gather interest and support in the railtrails and then come to the state for technical expertise in acquisition, design, development, signage and funding sources.

### ***Railtrail Experience in Ohio***

Unlike West Virginia, Ohio does not have a specific railtrail program per se, or statute. Instead, Ohio has developed its 374 miles of railtrails through the efforts of the private non-profit organization, Rails-to-Trails Conservancy (“RTC”), which has one of its five field offices in Ohio. The RTC Ohio field office works as a liaison between private and public interests to facilitate railtrail development. The director of the RTC Ohio field office works with the public components of railtrail development, such as the Ohio Department of Transportation, the Ohio Department of Natural Resources, the Ohio Department of Tourism and Economic Development, metropolitan planning organizations, county commissioners, and city parks and recreation departments, as well as other public organizations. The RTC Ohio field office also works with such private organizations as Friends of the Trail Development Group, Trail Design and Engineering Company, civic organizations, foundations, and private citizens, as well as other groups. The RTC Ohio field office provides information and technical assistance and guidance for local trail projects.



# **Railtrails in Kentucky**

## ***Kentucky Ranks 47<sup>th</sup> in Railtrails***

Kentucky currently has 4 miles of developed railtrails, two miles in Cadiz and two miles at the Riverwalk in Louisville. However, there are approximately 10 miles of recently acquired railroad corridors in Muhlenburg, Fayette, Hopkins and Rowan counties in the railtrail development phases. In Kentucky, railtrail development depends upon both local interest and local support and inter-agency efforts at the state government level. The Transportation Cabinet, the Department for Local Government, the Department of Parks and the Heritage Council all have a role or potential role in the railtrail development process.

## ***Kentucky Transportation Cabinet***

The Kentucky Transportation Cabinet plays a key role in railtrail development. The Cabinet is charged with keeping a record of abandoned railroads in Kentucky. When the Surface Transportation Board (“STB”) grants permission to abandon a railroad corridor in Kentucky, the STB notifies 12 parties, including the Kentucky Transportation Cabinet. The Transportation Cabinet, in turn, per KRS 148.690, is to forward the notices of abandonment to the Kentucky Department of Parks, so that the Department can evaluate the abandoned corridors for possible inclusion in the Kentucky Trails System Act.

The Kentucky Transportation Cabinet also administers the federal Transportation Enhancements Program under the Transportation Efficiency Act for the 21<sup>st</sup> Century, or TEA-21. Like many other states, Kentucky does not provide state funding for railtrails; rather Kentucky has relied upon securing federal money through TEA-21’s predecessor, the Intermodal Surface Transportation Efficiency Act of 1991 (“ISTEA”). ISTEA authorized innovative federal transportation spending by recognizing that bicycle and pedestrian travel are modes of transportation. The Act encourages states’ Departments of Transportation to spend a portion of their federal transportation dollars, known as “enhancement funds”, on bicycle and pedestrian facilities. Railtrails, canal trails and other pathways and greenway projects are specifically identified in the law as being eligible for funding. The Transportation Enhancements Program is a reimbursement program, rather than a grant. Enhancement projects must provide for a 20% match. Nationwide, the Transportation Enhancement Program is one of the main sources of funding for railtrail development.

There are 12 activities that qualify for Transportation Enhancement funds. The activities are:

- 1) provision of facilities for pedestrians and bicycles;
- 2) provision of safety and educational activities for pedestrians and bicyclists;
- 3) acquisition of scenic easements and scenic or historic sites;

- 4) scenic or historic highway programs (including the provision of tourist and welcome center facilities);
- 5) landscaping and other scenic beautification;
- 6) historic preservation;
- 7) rehabilitation and operation of historic transportation buildings, structures or facilities (including historic railroad facilities and canals);
- 8) preservation of abandoned railway corridors, including conversion for use as bicycle or pedestrian trails;
- 9) control and removal of outdoor advertising;
- 10) archaeological planning and research;
- 11) mitigation of water pollution due to highway runoff or reductions of vehicle caused wildlife mortality while maintaining habitat connectivity; and
- 12) establishment of transportation museums.

Because there are 12 broad categories eligible for funding, there are many enhancement project applicants and there is competition for funding. This fiscal year (1999-2000), there were eight railtrail projects in Kentucky, totaling \$2.8 million, competing against other enhancement projects totaling \$61 million. In May of 1999, the Governor awarded approximately \$6.5 million for enhancement projects, including five railtrail projects totaling \$994,756. The railtrail projects that received funding were: a portion of the "Lexington/Big Sandy Rail Trail" in Fayette County; the White Plains railtrail in Hopkins County; a railtrail in Benton; the Muhlenberg railtrail from Central City to Powderly, and a portion of the "Lexington/Big Sandy Rail Trail" in Rowan County.

### ***Kentucky Department of Local Government***

In addition to the Transportation Enhancement Funding Program, there is another funding program under TEA-21, the Recreational Trails Program, administered by the Department for Local Government. In 1996, 1997, and 1998, the Recreational Trails Program received \$500,000 from the federal grant. Funding is based on a 50/50 match. Since the Recreational Trails Program's inception in 1993, funding has been granted to 74 projects, including four railtrails. Like the Transportation Enhancement Program with its advisory council that makes recommendations for funding to the Governor, the Recreational Trails Program has an advisory committee that makes recommendations to the Commissioner of Local Government.

### ***Kentucky Department of Parks and HB 643***

House Bill 643, codified as KRS 148.690(1) and (2), amended the Kentucky Trails System Act to include abandoned railroad corridors as trails. The Department of Parks is charged with the duty to view abandoned railroad corridors for their possible inclusion in the trails system. The Kentucky Trails System Act provides, in part:

The department (of Parks) shall review all formal declarations of railroad right-of-way abandonments by the Surface Transportation Board or other agency with jurisdiction and may review former corridors for possible inclusion in the state trails system....The commissioner is authorized to develop effective procedures to assure that, wherever practicable, utility rights-of-way, abandoned railroad corridors, or similar properties having value for trail purposes may be made available for such uses; however, the commissioner shall take into consideration the rights of adjacent property owners in the development of any such procedures.

The Department of Parks states that, due to lack of funds and manpower and its not having received notices of abandonment from the Transportation Cabinet, the Department of Parks has not yet been able to include railtrails in the Kentucky Trails system.

### ***Kentucky Heritage Council***

Like the Kentucky Transportation Cabinet, the Kentucky Heritage Council is also notified of abandoned railroad corridors in Kentucky. The Heritage Council is charged with the duty to implement the "Section 106 process" of the National Historic Preservation Act to determine whether abandoned corridors have historical or cultural value for preservation, or whether there are historical structures, such as depots, along the corridors. The Heritage Council documents the structures, collects data, and sends artifacts to museums. The State Historic Preservation Officer stated that there is an opportunity to combine railtrail efforts and the efforts of the Heritage Council. There are 99 depots in Kentucky and 35 other rail-related structures. These depots and railroad structures could potentially be areas of attraction along railtrails.

### ***Kentucky Bicycle and Bikeways Commission***

The Kentucky Bicycle and Bikeway Commission (KBBC), a creation of the 1992 General Assembly, advocates and promotes bicycling as a legitimate part of the transportation system and economy; seeks to improve riding conditions and safety; and provides a voice for all cyclists in Kentucky. Administratively, the KBBC is attached to the Transportation Cabinet, whom it advises on bicycling issues as they relate to transportation programs. The volunteer KBBC board members have also sought to have the KBBC undertake a promotional role in bicycle tourism and to formulate a statewide bicycle plan. The KBBC believes that railtrails are an important part of a state's bicycling efforts, relieving some burden on overtaxed roads, in addition to providing recreational opportunities. Moreover, the KBBC believes that their knowledge in design, planning, and promotion, in addition to their established network of contacts, can well serve the state's railtrail efforts.

### ***Kentucky Rails-to-Trails Council, Inc.***

Besides Kentucky state agencies, there are private, or non-government, railtrail efforts in Kentucky. The Kentucky Rails-to-Trails Council, Inc. ("KRTC") is a not-for-profit corporation fully staffed by volunteers with a membership of approximately 200 people from all over Kentucky. The KRTC works with local organizations to develop greenways and trails. The KRTC acts as a source of information and technical expertise on project funding, design, public information and greenway or railtrail management. The KRTC is working with local government and interest groups on seven proposed railtrails. These seven railtrails are: Lexington/Big Sandy Rail Trail; Burnside to Daniel Boone National Forest Railtrail; Frankfort Railtrail; Lawrenceburg to Tyrone Railtrail; Madison County Wetlands Railtrail; Elizabethtown Railtrail; and the Central City to Greenville Railtrail.

# **Acquisition Issues Associated with Railtrails**

An entity wishing to convert an abandoned railroad into a railtrail must at some point address the question of acquiring the right to do so. There are a number of available options, and the method chosen may be tailored to the entity's specific situation.

## ***Who Owns the Corridor***

Railroads acquired the right to lay track over a corridor in a number of different ways. In Kentucky, those two methods essentially came down to an outright purchase of the land by the railroad, so that the railroad owned absolute title to the land, or a purchase by the railroad of an easement or right to lay track on the land, without actually taking absolute title to the land. In Kentucky, absolute title to land will not lapse, but an easement may be extinguished. As a federally regulated entity, railroad corridor title is also addressed under federal law.

If federal jurisdiction over the corridor still exists, a trail entity may take title to the corridor by railbanking the corridor. If the corridor has been abandoned but the railroad purchased absolute title to the land, the trail entity may still purchase the corridor from the railroad. If the railroad purchased the corridor as an easement and that easement has been extinguished, then the trail entity must deal directly with the owners of the land over which the corridor runs to purchase the corridor or obtain permission for the construction of a trail.

## ***Abandonments and Acquisition under the Federal System***

The federal government, acting pursuant to the interstate commerce clause of the United States Constitution, regulates railroads and corridor abandonments through the Surface Transportation Board. Today, a railroad may choose to pursue abandonment through the traditional abandonment process, which involves extended notice, investigation, comment, and hearing periods. It may also petition to proceed under an abbreviated exemption process, if certain criteria are met. The most commonly used exemption pertains to lines where no local traffic has originated within the past two years. Both traditional and exempted abandonment procedures call for notice to be published in the Federal Register, and for notice to be given to local newspapers and selected governmental officials.

During the abandonment process, a party interested in a corridor for use as a trail may request relief from the government to pursue the trail option. The first type of relief is referred to as a public use condition and prohibits the railroad from disposing of the property for up to 180 days while the party negotiates with the railroad to sell the property for a public use. While a public use condition may be imposed upon a non-consenting railroad, the initial 180-day limitation period may not be extended, nor may the railroad ultimately be required to sell the property for a

public use. The second type of relief asks the government to preserve the corridor for future railroad use while allowing trail use in the interim, a concept popularly known as “railbanking”. Unlike the imposition of a public use condition, the condition prohibiting the railroad from disposing of the property while negotiations are ongoing may not be imposed upon a railroad without its consent. However, an initial prohibition period may be extended by agreement of the parties.

Should the parties agree to purchase of the corridor, the federal government will allow the railroad to transfer its interest in the corridor to the purchaser and release the railroad from future involvement with the corridor. The purchaser takes the corridor, subject to the provision that should a railroad later wish to restore rail service over that corridor, the railroad may, after paying to the trail-owning entity the fair market value for the corridor and improvements, use that corridor for rail service. However, unless than repurchase occurs, the entity originally taking the corridor from the railroad may construct, maintain, and operate a public use trail over that corridor.

It should be noted that while a corridor is railbanked, federal law preempts the operation of any state property laws that would otherwise destroy the corridor, such as those providing that railroad use easement be extinguished upon abandonment. Without the utilization of this federal preservation mechanism, a trail group would face the prospect of losing all legal interest in the corridor once the railroad use ceased. Similarly, should the subsequent trail use cease, the trail entity must notify the Surface Transportation Board of this fact. The Board will then allow the abandonment to be completed and allow any state property interests to assert themselves at that point.

### ***Abandonments and Acquisition under State Law***

Some states with successful railtrail programs, such as West Virginia, have railbanking provisions similar to federal law. Other successful states, such as Ohio, do not. Currently, Kentucky does not have a state railbanking law. Where federal jurisdiction over a corridor has ceased, a trail entity must ascertain whether the railroad owned the corridor absolutely or whether title was held through an easement for railroad use.

Where the corridor is still owned by the railroad with absolute title, the trail entity may deal with the railroad as it would deal with any other land owner. The entity may purchase title outright from the railroad, or may obtain the right to construct a trail through some other legal mechanism. The possibility of a long-term lease might be explored, or the purchase of an easement for trail purposes. There is no legal impediment to a railroad’s voluntarily granting permission to a trail entity to construct a trail across the railroad’s land.

Should the corridor have been held by the railroad as an easement, the trail entity would need to deal directly with the owners of the land adjoining the corridor. As with dealing with the railroad, the entity may explore the possibility of purchase,

lease, easement, or simple permission. Although infrequently used, government entities also possess the power of eminent domain. Also, as the railroad may not have fully abandoned its easement, the trail entity would need to ascertain the status of that easement before proceeding.



# **Costs Associated with Railtrails**

## ***Acquisition Costs***

The first and often the largest cost of developing a railtrail is the cost of acquiring the corridor. Many factors will determine the cost of the rail corridor, such as length, location, and whether the corridor is owned in segments by individual property owners or is railbanked. Generally, it will be less expensive to purchase a railroad corridor from one owner, the railroad company, if the corridor is banked, rather than a series of owners who each own a segment of the railroad corridor, if the railroad corridor has not been banked. Also, it is easier to negotiate with just one owner, a railroad company or state agency holding title to the railroad corridor, rather than a series of owners along a railroad corridor.

As an example of the acquisition cost of a railtrail, Muhlenburg county paid \$100,000 for 6.1 miles of abandoned rail corridor in March of 1999. The County Judge Executive, on behalf of the Kentucky Rails-to-Trails Council (“KRTC”), submitted a letter to Paducah and Louisville Railway (“P and L”) requesting interim trail use, or railbanking. P and L indicated that it was willing to negotiate with the county and KRTC pursuant to the National Trails System Act for use of the right-of-way for interim trail purposes. The Surface Transportation Board granted P and L authority to abandon the 6.1 miles. The decision stipulated that P and L and the KRTC should complete a negotiated agreement to purchase the corridor within 180 days, which is the period of time allotted by the federal process for completing negotiations in railbanking proceedings.

## ***Mitigation of Costs***

There is gravel 12 inches deep on the railroad corridor in Muhlenburg county. The county is selling 6 inches of the gravel to recoup some of the acquisition cost. The opportunity to salvage materials left on the corridor is often used to mitigate costs. Such materials as ballast, ties and rails can also be sold. Revenue generated from the sale of these items varies widely. Depending on the local markets, the length of the corridor, and the quality of salvageable materials, salvage can produce up to \$10,000 per mile.<sup>2</sup> However, it is often the case that materials have been sold before public ownership. Leasing the corridor for utility uses, such as fiber optics, is also a revenue-generating tactic that will mitigate railtrail costs.

The Cadiz railtrail cost nothing. The Cadiz Railroad donated the two-mile corridor to the City of Cadiz. In-kind services are one way communities make up the 20% match of the federal enhancement funds. It can not be estimated accurately what it cost per mile to purchase a railroad corridor. However, there are railroad appraising companies which specialize in appraising railroad corridors.

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<sup>2</sup> Ryan, Karen-Lee and Winterich, Julie A., *Successful Strategies of Rail-Trails, An Acquisition and Organizing Manual for Converting Rails into Trails*. p. 107, 1993.

## ***Development Costs***

As with acquisition costs, it is difficult to estimate the costs associated with developing a railtrail. Costs will vary, according to a variety of factors, such as the corridor's location and physical condition and the desired trail surfacing material. In regard to surfacing, there are a number of options, including crushed limestone or ballast, wood chips, brick, sand, asphalt, or concrete. Costs vary widely, from \$10,000 a mile for a wood chip path, \$100,000 a mile for 5-inch thick asphalt path, to as much as \$200,000 a mile for a path of five inch concrete.<sup>3</sup>

The amenities located on the railtrail also help determine costs. A railtrail may be a woodchip railtrail with no amenities, or it may be an asphalt railtrail that has interpretive structures, bicycle racks, benches, picnic tables, and restroom facilities. Another consideration for development costs of railtrails will be such design costs as employing an engineer or consultant. But a really basic railtrail can cost very little to develop.

## ***Maintenance Costs***

There will be ongoing costs once a railtrail is in place. Trail management requires significant resources, including special equipment, trained staff, and a source of funds. The following are some of the routine maintenance tasks that should be part of a maintenance schedule for safe and long-lasting railtrails: trail repair, trail replacement, trash removal, weed control, trail drainage control, trail signage, mowing, pruning and planting of vegetation. Included in the appendix is a chart of maintenance costs per mile associated with various railtrails across the country, compiled by the Rails-to-Trails Conservancy.

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<sup>3</sup> "The Cowboy Master Plan", Prepared for the Nebraska Game and Parks Commission in cooperation with the U.S. Department of Transportation, Federal Highway Administration.

## **Liability Issues Associated with Railtrails**

As with many other facets of modern life, liability issues arise in the railtrail context. Generally, under Kentucky law, liability refers to a person's breaching a legal duty and causing an injury to another. The Kentucky Supreme Court described this duty in Grayson Fraternal Order of Eagles v. Claywell, Ky., 736 S.W.2d 328 at 332 (1987), stating, "The rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." In the railtrail context, this standard can be applied to topics ranging from improper and negligent design, construction, or maintenance, to a failure to properly warn of dangerous conditions. This general duty may be modified, based upon a number of factors, such as the legal status of the person injured. Moreover, the status of the person charged with causing the injury may come into play. These circumstances are discussed below.

### ***Land User's Status***

The legal status of a land user can be used to describe the duty owed to the user by the land owner. Historically, there have been three types of land users: invitees, licensees, and trespassers. An invitee is a person invited onto the land for the benefit of the landowner, such as a customer in a store. Landowners must keep their premises in a reasonably safe condition and warn others of any dangers. Licensees enter upon the premises for their own purposes but with the permission of the landowner. The landowner owes the licensee a duty to warn of known but hidden dangers. A trespasser is one who comes onto the land without any legal right to do so. By statute, the landowner is only liable for intentional injuries. An important exception to the rule regarding trespassers is known as the attractive nuisance doctrine. The doctrine balances the utility of maintaining an artificial condition on land (such as an un-fenced swimming pool) against the potential harm to trespassing children and imposes a higher standard of care on the landowner.

In an attempt to encourage landowners to make their land available to the public for recreational purposes, the General Assembly passed a recreational use statute, which gives additional protection to landowners who allow public recreational use of their land. The statute is broad in scope, applying not only to private landowners, but to governments as well. However, the statute does not protect an owner, "For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." Moreover, where a charge is made for admittance to the land, the statute likewise does not apply. The fee provision is very important in the railtrail context, as a trail group may consider imposing a usage fee to defray the cost of trail maintenance.

## ***Liability of Federal, State, and Local Governments***

Frequently, a unit of government will own a railtrail. The federal government, while possessing sovereign immunity, has chosen to waive that immunity and allow itself to be held liable through the Federal Tort Claims Act (28 USC § 2674), "... in the same manner and to the same extent as a private individual under similar circumstances." In Kentucky, the United States may, when allowing recreational use of its land, avail itself of the protection of Kentucky's recreational use statute.

The Commonwealth also has sovereign immunity, based on § 231 of the Kentucky Constitution. The Commonwealth has abrogated this immunity to some extent by allowing recovery in a statutorily created court system known as the Court of Claims. (See KRS 44.070 to 44.160.) While relief is available, the enabling statutes place a cap on the maximum amount of the recovery.

The law as it applies to local governments is somewhat less clear. What is certain is that county governments do have immunity. Cullinan v. Jefferson County, Ky., 418 S.W.2d 407 (1967). Immunity for city governments and other municipal corporations appears to attach where the city is engaged in an integral operation of government. Whether operating a railtrail is a function integral to the operation of government is an open question.

## ***Liability Concerns of Other Groups***

There are certain liability concerns which are specific to those who acquire, design, construct, maintain, operate and own a railtrail. Given the broad nature of the general duty in Kentucky law to exercise ordinary care, the duty can apply to the wide range of activities with which these entities are involved. In response, groups have taken various steps to minimize their exposure. One focus stresses that the actions of the group be taken with care appropriate in the circumstances. Another focuses on adoption of risk management strategies, regularly assessing potential problems and working to correct them. Specific considerations may be adapted to the group's focus. For example, with design, one might ask whether the design meets any applicable governmental or industry design criteria, particularly in light of the trail's expected use. As to maintenance, one might look for a program to keep the trail in good repair and free from defects, or at least warning users of existing defects. Another approach is to lessen the applicable standard of care by using the protection of the recreational use statute. Many groups forego imposing a user fee, since the imposition of the fee would remove the trail from the protections of the recreational use statute.

Abutting landowners' concerns arise from the belief that some trail users will stray from the trail onto abutting land. While any parcel of land is subject to potential trespass, the presence of a railtrail will increase the number of people, and thus potential trespassers, going by a piece of property. Moreover, an abutting landowner might point out that a trail user walking or riding by would be more likely to trespass than a passing motorist. While persons straying from the trail such an instance would be properly characterized as trespassers and thus owed a low standard of care,

liability exposure would still be a concern, particularly with child trespassers. To minimize exposure, the landowner may attempt to eliminate potential hazards on the land, allow recreational use of the land, or erect barriers to entry from the trail, such as fencing or shrubbery.

Finally, many railroads hold the right to the railroad corridor as an easement over the land of someone else. The land over which the easement lies is referred to as the servient estate. When a trail is in place this railroad easement (as would occur in a railbanking situation), the owner of the servient estate may have some concern as to liability. However, since the servient estate owner has no control over the trail or land itself or any actions taken on the land, there would not be any act or omission to which liability might attach.



## ***Conclusions and Recommendations***

At its final meeting in August, 1999, the Task Force examined the testimony that had been presented in previous meetings and reviewed suggestions submitted by members relative to the issue of Rails to Trails in the Commonwealth of Kentucky. The result of the meeting and discussion was the approval of the following twelve recommendations, which the Task Force submitted to the Legislative Research Commission pursuant to 1998 House Concurrent Resolution 77.

- 1) Have one central person in an appropriate state agency who is responsible for the dissemination of railtrail information, including accepting notices of railroad abandonments and alerting interested local governments, state agencies, and private groups, providing information about available funding options (including TEA-21 applications), and who is familiar with inter-agency collaboration on railtrail efforts.
- 2) Reauthorize the Task Force, perhaps including representatives from interested railtrail entities, such as state government agencies and/or private interest groups. The focus could be on working with any physical assessment of corridors which might be done and creating a statewide plan for creating railtrails.
- 3) In addition to other efforts, work with the mechanisms already in place which provide for inclusion of railtrails in the Kentucky Trails System.
- 4) Have the Department of Parks comply with KRS 148.690(1) and (2), which provide the Department of Parks shall review all formal declarations of railroad rights-of-way abandonments by the Surface Transportation Board for possible inclusion in the Kentucky Trails System.
- 5) Have the Transportation Cabinet notify the Department of Parks of railroad abandonments.
- 6) Have the Transportation Cabinet keep a record of abandoned railroads in Kentucky.
- 7) Require that state agencies which receive abandonment notices (such as the Public Service Commission and the Historic Preservation Office) immediately forward those notices to the trail coordinator in the Kentucky Department of Parks.
- 8) Require the trails coordinator in the Kentucky Department of Parks to send letters to the Area Development Districts, local historical societies, local Chambers of Commerce, reauthorized task force members, the Kentucky Association of Counties, and any other pertinent local government organizations, notifying them of the potential for railtrail development in the Commonwealth.

- 9) Cause a complete assessment of the abandoned railroad corridors in Kentucky to be done (much like in WV), including an on the ground assessment of the corridor's physical condition and feasibility of conversion to a railtrail. Recommend that the corridors be mapped electronically with data convertible to internet format, create a website setting out the data and linking to local tourism sites.
- 10) Have an appropriate agency, such as the Trails Coordinator in the Kentucky Department of Parks, develop a "how to manual" which explains the process for acquiring, funding, and developing a railtrail in Kentucky.
- 11) Recommend the enactment of a state railbanking law that provides for an increased time period for notices of railroad corridor abandonment, increases the number of entities notified of railroad corridor abandonments, allows for corridor preservation under Kentucky law, and excludes unsuitable properties from railtrail conversion.
- 12) Recommend legislation be created that specifies that the conversion of a corridor to a railtrail, with a provision for possible restoration of future service, is consistent with a railroad easement.

# Appendices

## **APPENDIX I**

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## **APPENDIX III**

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*Chart compiled by the Rails to Trails Conservancy*