

Legal Ownership Evaluation



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Overview

The Ecusta Rail Trail is proposed to be located in the Norfolk Southern Railway line corridor running between Brevard (Transylvania County) and Hendersonville (Henderson County), North Carolina. This section includes an examination of the corridor ownership, as well as a strategy to acquire the corridor for future use as a walking, bicycling, and equestrian trail.

This section begins with a brief examination of the establishment of railway corridors and a discussion regarding the original ownership during the operation of this railway line. The text continues with a discussion of railbanking and its requirements, since this is the most feasible and recommended method of acquisition. Both federal and state regulation of rail corridor ownership and preservation are described. Next, an examination of the current ownership of land along this rail corridor is described. Finally, strategies to obtain the right to construct a trail along the corridor are provided. A series of recommended next steps based on these strategies to allow future successful installation and operation of the trail are then laid out in the Implementation section at the end of this study. Additional detailed information on the topics of this section is included in Appendix A, including maps of corridor ownership, definitions

of legal terms related to land transactions, and documents related to trails in rail corridors.

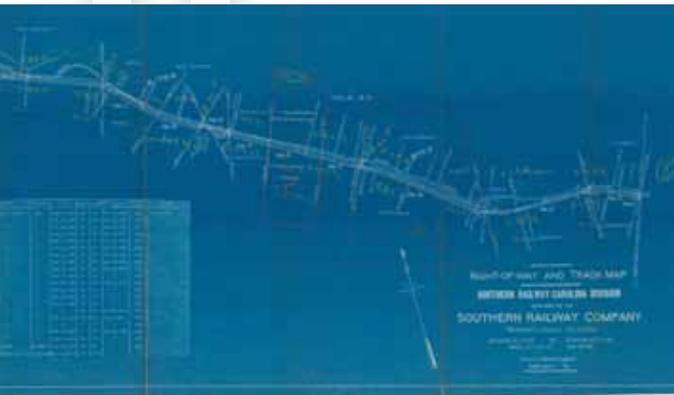
Establishment of the Rail Corridor

Original Railroad Corridor Ownership

Historically, there are a number of ways in which railroads obtained rights to use property to operate railroad systems. Thus, typically there are several types of ownership of rail corridors today. The original types of railroad property ownership included:

- Fee simple (absolute, determinable or subject to conditions)
- Easement (general or limited)
- License

An examination of the original information assists in determining the type of original ownership - whether the railroad owned the land itself or only had a right to use it for railroad purposes. It is important to know what type of ownership a railroad company originally had of a corridor to assist in determining what rights exist to use the property as a trail today. Fee simple is the most complete type of property ownership. Easements



The Interstate Commerce Commission's 1916 Valuation Maps provide information on the acquisition instruments used along the corridor.

grant the right to use the land for a specific purpose. A license may just grant the right to enter the property.

Determining the Original and Subsequent Land Transactions

Records for a rail corridor transaction may be one hundred or more years old and written in ambiguous terms. In many cases it can be unclear what was originally intended or whether subsequent actions have impaired the rights originally granted.

One way to determine the nature of the original land transaction is to request the information from Norfolk Southern Railway, the most recent operator of the rail system on this corridor. The original company that assembled the land for this line was the Hendersonville and Brevard Railway, Telegraph and Telephone Company. The corridor was purchased several years later by the Transylvania Railroad Company, and it was taken over soon after by the Southern Railway. Southern Railway was placed under the Norfolk Southern Corporation in 1982, and it became known as Norfolk Southern Railway in 1990. All of the historical ownership information should be now contained in the Norfolk Southern Railway files, even though they were not the original owners. Norfolk Southern was approached as part of this project, but declined to participate.

According to a variety of sources, it seems to be generally accepted that the Southern Railway acquired the Transylvania Railroad in 1906 - and the right of way with it.¹ However, from a review of the records, it appears that in 1906 Transylvania simply leased the railroad and right of way to Southern for a term of 50 years.² We have not located any references to any conveyance

document from Transylvania to Southern of the underlying fee title or right of way easements. A 1938 court decision states that, at least as of 1932, Transylvania continued to exist as a separate entity, owned the right of way, and received payments from Southern under the terms of the 1906 lease.³

Another source of information regarding the original transactions is the 'valuation maps' produced by the Interstate Commerce Commission (ICC) for all U.S. railroads between 1915 and 1920. Also known as 'detailed land maps', they contain information on land acquisitions (grantor and grantee information), corridor width, and engineering details, such as the layout of track and the locations of roads, buildings, and bridges. These maps are available and easily accessible to the public in the cartographic section of the National Archives in College Park, Maryland and they have been obtained for this corridor.

Valuation Maps (1916)

Copies of the valuation maps for this corridor were acquired from the National Archives and are available for viewing. The maps are a reproduction of the complete set of drawings prepared by the ICC in 1916, and they show an outline and owner for each property adjacent to the railroad corridor. The maps also show the rail corridor width adjacent to each property and include a list of ownership types for that segment of the corridor.

Each map contains a summary table that lists information (e.g. grantor, grantee, instrument) for the properties shown on that sheet. The column listing 'instrument' contains the information about how the property was obtained. For almost all properties, the summary table lists either 'deed'

or ‘agreement’. While this gives an idea of the nature of the original transaction, it is not a sufficiently detailed description to supply definitive information about ownership for each property. It is likely reasonable to assume that ‘deed’ implies a ‘fee simple’ transaction and ‘agreement’ implies an ‘easement’. Further analysis of the designations ‘deed’ and ‘agreement’ is recommended during future discussions with Norfolk Southern or other partners. Refer to Table 4.1 for a compilation of the property ownership acquisition information along the corridor as reported on the 1916 maps.

Use of the Rail Corridor

Railbanking of the Corridor

Congress passed a law in 1980 that allowed rail companies to abandon unprofitable lines with relative ease; but with abandonment came the disappearance of valuable rights-of-ways (ROWs) associated with the rail line. As carriers began abandoning rail lines at an alarming rate, it became apparent that it was necessary to create a method of preserving the nation’s rail corridors for future transportation use. In 1983, Congress amended Section 8(d) of the National Trails System Act to create a program to preserve rail corridors.

‘Railbanking’ is a voluntary agreement between a railroad and an entity pursuing interim use of the corridor, which preserves the integrity of the corridor until rail service can be restored. Either a public agency or organization may request to railbank a trail by sending a request to the Surface Transportation Board (STB). A statement of willingness to assume financial and legal responsibility must accompany the request.

Railbanking preserves ROWs, including easements

4.1 – Summary of Parcel Data from Valuation Maps

STARTING POINT	ENDING POINT	INSTRUMENT			TOTAL
		DEED	AGREEMENT	MISSING	
Hendersonville	Jordan St	6			6
Jordan St	Kanuga St	10	1	1	12
Kanuga St	Woodridge	9	1		10
Woodridge	Horseshoe Bend	18	1		19
Horseshoe Bend	County Line	12			12
County Line	Enon Rd	25		1	26
Enon Rd	Trail End	21			21
		101	3	2	106
				Percent Deed	95%

that would revert back to adjacent landowners, while relieving the railroad operating entity of maintenance responsibility and tax liability. The railbanking statute allows a railroad company to remove all of its equipment (with the exception of bridges, tunnels and culverts) from a corridor and turn that corridor over to a public or private entity that has stated a willingness to assume responsibility for the corridor.

This voluntary property transfer, from railroad operating entity to public/private entity, precludes rail ‘abandonment’ status. Railroad lines with ‘out-of-service’ status are available for temporary or permanent conversion from railway into other uses including trails. A railroad operating entity can legally transfer all forms of its ownership, including easements, to an interim trail sponsor. While the STB has jurisdiction only over freight rail service, railbanking ensures that railroad corridors remain intact for light rail and passenger rail service as well, hence railbanked corridors can serve multiple uses.

Engaging in the railbanking process requires a clear understanding of the status and ownership of the rail corridor and adjacent landowners. Railbanking requests can only be filed on rail facilities that are still under the STB's authority, in other words, not in 'abandoned' status. Once the rail corridor is in abandoned status, adjacent land owners have the opportunity to reclaim the ROW that the railroad once held. The railroad loses control of all parcels of land within the corridor to which it merely held an easement. Railbanking, if conducted prior to abandonment, preserves rail corridor ROWs before converting to alternative land uses.

A rail corridor is considered active regardless of frequency of use. An 'inactive' corridor may still be under railroad company ownership and may still have tracks and ties in place, but there are no longer any trains in operation on a regular basis. This is also considered an 'out-of-service' railway. Railways do not change status without coming before STB for review. An 'inactive corridor with abandonment authorization' defines a railway that may have already received abandonment authorization from the STB, but has not yet followed through with the abandonment and removed tracks and ties. Finally, a rail corridor is considered 'abandoned' when the railroad company/owner has applied to the STB for abandonment authorization, the STB has issued an order authorizing abandonment of the line, and the railroad has notified the STB that it has consummated the abandonment authorization.

A railbanked line is subject to possible future restoration of rail service. The railroad company maintains the right to apply to the STB to resume rail service on a railbanked corridor which will then vacate the trail use ordinance. The terms and conditions of a transfer back to rail service must

be negotiated with the trail manager in the initial contract with the railroad.

A transportation corridor does not function if one small segment falls out of ownership. Often, railroad easements contain 'reversionary' clauses that state that rights of rail use will extinguish after a certain period of non-use. Consequently, threats of loss of even one or a few segments of corridor back to landowners can mean loss of use of the corridor for any purpose. Railbanking preserves those easements.

Status of the Ecusta Corridor

Operation of the railroad line under consideration in this study ceased in 2002. Upon further research, it does not appear the corridor has been officially abandoned. 'Abandonment' of the railway line is a process which takes place through the Surface Transportation Board (STB), and a line is generally officially abandoned only after the following:

- The railroad has applied to the STB for abandonment authorization.
- The STB has issued an order authorizing abandonment of the line.
- The railroad has notified the STB that it has consummated the abandonment authorization.

Most abandonment applications are filed by the rail carrier owning the track to be abandoned. The most frequent type of abandonment requests that the STB receives are from a railroad stating that the track has not been used for two years or more. To check on the status of this line, the STB's Rail Customer and Public Assistance Program was contacted. According to research by an STB staff attorney, Norfolk Southern filed an abandonment application in 1990 on a portion

of the corridor - a 2-mile segment from Brevard, Milepost TR 21-8 to Pisgah Forest, Milepost TR 19-8. Refer to Appendix A for a copy of the application. However, a consummation notice from Norfolk Southern conclusively stating that they exercised the abandonment authority granted by the ICC (the STB's predecessor) could not be located. Nonetheless, the STB attorney also noted that railroads were not required to file such notices in abandonment matters prior to 1997, and even if Norfolk Southern did not file a consummation notice, because this abandonment dates from 1990, the line may be abandoned. No abandonment application or decision was found on file for the remainder of the line from Pisgah Forest to Hendersonville.

According to information on the Rails-to-Trails Conservancy website, any corridor which no longer has tracks and ties in place has most likely been officially abandoned. However, as the above discussion shows, even the removal of tracks and ties does not automatically constitute abandonment. Tracks and ties remain in place on the Ecusta corridor.

North Carolina and Railroad Corridors

The Rail Corridor Preservation Act (1988) gave the North Carolina Department of Transportation (NCDOT) authority to purchase railroads and preserve rail corridors for “future rail use and interim compatible uses” through the federal railbanking process. Subsequent amendments to the act also declared it a public purpose for the NCDOT to reassemble critically important, lost portions of rail corridors by condemnation. The option of preserving rail corridors through purchase by a state DOT is often called ‘state railbanking.’

In 1988, the NCDOT started purchasing former rail lines around the state, and it now holds title to more than 100 miles of rail to be preserved for future use in North Carolina. Of those 100 miles, 22 miles have been leased for rail-trail development, all part of the American Tobacco Trail⁴.

On the NCDOT site, the map titled ‘North Carolina Railroad System’ shows the Hendersonville to Brevard line, and the map legend indicates that this segment of railway is ‘Preserved rail corridor/Out of service’. Steve Head, the Corridor and Property Manager for the NCDOT rail lines, revealed that this rail line is not one of the corridors that NCDOT manages. Further information from the NCDOT Environmental and Planning Branch regarding the current status of the line with NCDOT and the exact meaning of this designation was not available at the time of this report.

The NCDOT Rail division has worked to “develop a systematic approach to oversee requests to use the right of way in lieu of the return of the corridor to active rail or other transportation uses.” The NCDOT Rail Corridor Preservation Policy (1998) states the following:

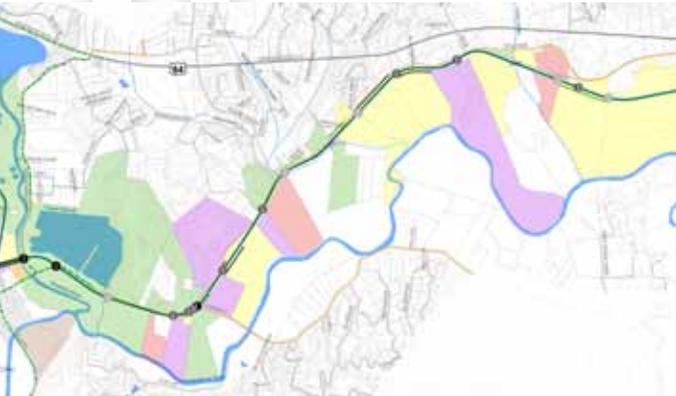
NCDOT will allow interim compatible trails on suitable inactive rail corridors. All interim rail trails on preserved corridors must follow the requirements of N.C.G.S. 136.44.36.⁵

Several key requirements of N.C.G.S. 136.44.36 are listed below:

- Before requesting trail use, a public hearing must be held and all owners of parcels abutting the corridor must be notified. A transcript of



The NCDOT's rail division works actively to preserve rail corridors throughout the state, as summarized on their North Carolina Rail Map.



Deed descriptions for properties along the corridor were categorized and presented visually on the maps in Appendix A.

public comments must then be provided to the NCDOT.

- Adjacent property owners must be offered broad voting representation in the membership of the organization responsible for development and management of the rail trail.
- The portion of the corridors leased must be held in fee simple absolute by the NCDOT.

These requirements indicate that state railbanking is more difficult than federal railbanking done through a local or state agency. The full language of this statute is available in Appendix A.

Current Property Information along the Corridor

This step of the project examined the current recorded ownership information for each parcel adjoining the rail corridor in both Henderson and Transylvania Counties. This information is useful for two reasons. First, the nature of the current ownership affects the value of the corridor, and can therefore influence its purchasing price if the corridor is purchased in its entirety through the process of railbanking. Second, the status of ownership has implications for the ability of the North Carolina Department of Transportation to act as a partner in preservation of the corridor. An examination of current property deeds furthers the understanding of the ownership status of the corridor gleaned from the valuation maps.

Obtaining Property Information

Documents concerning titles and conveyances of land are a matter of public record. The process to perform this examination included identification

of the legal descriptions available for current ownership for each property online. Those deeds that were not readily available online were researched at the local courthouse.

The search was performed primarily to determine the answers to the following questions:

- Who are the current owners on record for properties adjacent to the railway corridor?
- Where is the boundary of the existing or former rail corridor in relation to that property?

The nature of the property search was not exhaustive as it was limited to the public information on record and is, thus, for informational purposes only. Property law is a very complex topic, and even after a search of the available public information, there may still be uncertainty regarding ownership that can only be addressed through a legal investigation or by the courts. For more complete property ownership information, a title company or attorney would have to be engaged to conduct a title search. They could trace the deed back to ensure that the public information is accurate. These searches are labor and time intensive and can be expensive.

However, the information collected for the parcels along the former rail track provides a good current picture of the status of ownership along the corridor.

Inventory and Analysis of Property Information

Deed descriptions for properties adjacent to the rail corridor in Henderson County were compiled and organized into ownership categories before this study began. For consistency with that information, deed descriptions gathered for adjacent properties in Transylvania County

were coded according to the same system. The ownership information for each parcel along the entire corridor length is described by one of the following categories:

- Property description includes entire railroad corridor (red)
- Property description is to center of railroad corridor (yellow)
- Property description includes part of the railroad corridor (purple)
- Property description does not include railroad corridor (green)

A visual representation of the results of this categorization is presented on maps in Appendix A. Red properties, whose description includes the entire corridor, have the highest stake in the corridor. Green properties, whose description does not include the railroad corridor, have the least stake, and likely no ownership claim over the corridor running past their property. Property ownership is summarized in Table 4.2. This information, in conjunction with the valuation maps, provides a picture of current ownership based on available documentation.

For further confirmation on this data, this information should be taken to a title attorney to obtain an ‘opinion of title’. Based on the results of the attorney’s investigation, the information could then go to a title insurance company to insure title.

Table 4.2 – Summary of Property Ownership along the Railroad Corridor from parcel deeds

DEED DESCRIPTION	TRANSYLVANIA COUNTY		HENDERSON COUNTY		TOTAL	
	PARCELS	PERCENT	PARCELS	PERCENT	PARCELS	PERCENT
Description includes entire RR	14	9%	29	8%	43	8%
Described to center of RR	64	40%	150	40%	214	40%
Description includes part of RR ROW	19	12%	11	3%	30	6%
Description does not include RR	36	23%	187	50%	223	42%
No description of RR	27	17%			27	5%
Total	160		377		537	

Land Acquisition Strategy and Costs

Methods of Acquisition

One of the most challenging phases of a trail project is the acquisition of the corridor for building the trail. The goal of future land acquisition is to obtain the legal right to build the trail along the rail corridor. The ultimate objective is to preserve an interconnected corridor of land on which to construct and operate a trail for public access. The right-of-way of the Norfolk Southern Rail provides the backbone of the future Ecusta Rail Trail. Potential properties to be acquired beyond this right-of-way may include access points for the general public and other needs, such as maintenance and emergency access.

As previously described, railbanking is the recommended and most feasible method to acquire the right of trail construction along the Ecusta corridor. If the railroad is abandoned without railbanking, the acquisition of the many

parcel segments that make up the corridor from individual property owners will be extremely difficult. In this scenario, one unwilling property owner can halt the trail's progress.

Given this recommendation, the two methods of acquiring land for use of the trail through the railbanking process are donation and purchase. Either way, Norfolk Southern must agree to the abandonment of the corridor for railbanking to occur. If this agreement is reached, the major decision to be addressed is what agency should acquire, maintain, and operate the trail. If the approach of state railbanking is chosen, several restrictions will make the railbanking of the corridor more challenging. This analysis suggests that the majority of the corridor is held in fee simple, but that a few sections were acquired by easement. Those sections governed by easement cannot be leased by NCDOT for use as a trail at this time, and will thus create some gaps in the trail if the state railbanking approach is used.

Conversely, if federal railbanking is pursued by another local or private agency, the entire corridor may be preserved without exception. Close to 17 miles have successfully been preserved with

this approach in North Carolina to date. These include: The Dunn-Erwin Trail in Harnett County, the Thermal Belt Trail in Rutherford County and the Highlands Trail in Gastonia⁶.

Further study is necessary to fully confirm the results of the ownership found through this analysis. Next steps are provided in the Implementation Section of this study.

Estimating Acquisition Cost

If railbanking is successfully used to preserve the corridor through purchase, a corridor cost must be negotiated with Norfolk Southern. The land acquisition cost for the proposed Ecusta Rail Trail is highly uncertain; however, a baseline for these negotiations is useful.

The Rails-to-Trails Conservancy suggests three appraisal methods to determine rail corridor value. The first method is the across-the-fence approach, which determines the market value of adjoining land. While this method accounts for local market conditions, it does not account for the fact that adjacent land values are based on uses that are not feasible on the rail corridor. The second method is the comparable sales approach, which examines past rail corridor transactions. This approach is limited by the varying market conditions in which different rail corridors are located. The third method is called the income approach, which estimates value based on the land's ability to generate income. This method is rarely used with rail corridor acquisition because of the difficulty of obtaining income generation estimates. Finally, most likely the railroad pays local real estate taxes and complies with other local ordinances. This information is a matter of public record and may provide clues as to how the local tax assessor's office values the corridor.

Table 4.3 – Land Values in in the Ecusta Region

LOCATION	AREA (ACRES)	PRICE (\$)	PRICE PER ACRE (\$)	NOTES
Etowah	9.5	385,000	40,526	Residential
Fletcher	50.9	1,300,000	25,545	Recreational/ Residential
Hendersonville	70.0	2,950,000	42,143	Commercial/ Industrial
Hendersonville	34.2	2,562,000	74,912	Residential
Horse Shoe	49.9	1,599,000	32,070	Residential
Pisgah Forest	26.3	1,800,000	68,545	Commercial

Source: Real estate listings were obtained from www.weichert.com and www.LandandFarm.com

The first two valuation methods were applied to the Ecusta corridor. Real estate listings for undeveloped land, both residential and commercial, were examined and compiled. A sampling of properties and their associated price per acre is presented in Table 4.3.

While there is significant variation in the cost of land contingent on location and amenities, cost per acre in the region varies from about \$25,000 to \$75,000 per acre. Assuming a 30 foot right of way is desired for the 20 mile long Ecusta corridor, the expected acquisition cost could range from \$1.8 million to \$5.5 million, with a mid-range value of \$3.7 million based on this approach.

Acquisition costs for several comparable rail corridors were obtained in order to conduct the comparable sales approach. Table 4.4 summarizes the results.

Costs were obtained from a variety of sources, including the Rail Division of the North Carolina DOT, the Greensboro DOT, the Path Foundation, and the Rails to Trails Conservancy website. The broad range in cost per foot paid for land along these trails reinforces the uncertainty inherent in rail corridor land acquisition. The Battleground Rail Trail, the most expensive segment shown in this table, was a short segment requiring negotiation with many property owners. Other sections of the Atlantic & Yadkin Greenway, of which the Battleground Rail Trail is a part, were obtained at almost no cost thanks to negotiations with businesses and residences along the corridor. The American Tobacco Trail and Silver Comet Trail are both long corridors acquired following abandonment of rail corridors with the help of regional partnerships and state railbanking. These corridors were purchased through state DOT

Table 4.4 -- Acquisition Costs of Comparable Rail Trails

TRAIL NAME	LOCATION	LENGTH ACQUIRED	YEAR ACQUIRED	ACQUISITION COST (2011\$)	COST PER FOOT (2011\$)
American Tobacco Trail	Durham, NC	22	1995/1998	4,856,400	42
Battleground Rail Trail	Greensboro, NC	1	2009	1,694,752	321
Silver Comet Trail	Smyrna, GA	36	1992	11,284,000	59
Meadow River Rail Trail	Russellville, WV	17	2008	134,948	2
Tweetsie Line	Johnson City, TN	10	2011	600,000	11

agencies. The Meadow River Rail Trail and Tweetsie Line were each acquired by a local agency through federal railbanking. Their local markets may account for their lower cost.

The number of owners along the corridor, the railroad's interest in it, the acquisition method used, and local market conditions may all influence the cost of corridor acquisition. Of the corridors examined in Table 4.4, the Ecusta Corridor is most similar to the American Tobacco Trail and the Tweetsie Line, given its length and regional location. If cost per foot is therefore assumed to range between \$11 and \$42, the acquisition cost of the Ecusta corridor would range from \$1.2 to \$4.5 million. This range includes the \$3.7 million value found based on local real estate costs. Since it is expected that the value of the corridor would be significantly less than real estate value of a comparable area of land, given the limited potential use of the corridor, it is likely that the cost may be negotiated at the lower end of this range.

Notes

1. Cary Franklin Poole, *A History of Railroading in Western North Carolina* (Johnson City: The Overmountain Press, 1995),
2. Fourth Annual Report of the State Corporation Commission of Virginia for year ending December 31, 1906.
3. *Transylvania R. Co. v. Commissioner of Internal Revenue*, October 4, 1938.
4. "North Carolina Rail Trails." www.ncrailtrails.org.
5. North Carolina General Statutes § 136-44.36D Recreational leasing requirements: <http://law.onecle.com/north-carolina/136-roads-and-highways/136-44.36d.html>.
6. "North Carolina Rail Trails."