The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis

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COMMENTS

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I. INTRODUCTION

As the twentieth century winds down, the fate of hundreds of rail corridors across the country remains uncertain as railroads discontinue unprofitable services and abandon underutilized rights of way.[1] Since railroading historically has been a speculative enterprise, once lucrative lines may no longer warrant continued investment by railroad corporations as revenues produced by these routes decline.[2] Furthermore, competition from trucks operating on heavily subsidized, publicly owned roads has contributed to the need for increased consolidation of routes.[3] In response to these economic

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1. Of the 5522 miles of North Carolina rail corridors active in 1920, only 3655 remained intact in 1993. *See* N.C. DEP'T OF TRANSP., NORTH CAROLINA'S RAIL SYSTEM: 1993 AND BEYOND 22 (1994) [hereinafter 1993 AND BEYOND]. Of those, fewer than 2144 miles were subject to sale, lease, service change, or loss in 1993. *See id.* Nationwide, only 141,000 miles of rail corridors remained in 1990, down from a peak mileage in 1920 of 272,000. *See* Theodore G. Phillips, Note, *Beyond 16 U.S.C. § 1247(d): The Scope of Congress's Power to Preserve Railroad Rights-of-Way*, 18 HASTINGS CONST. L.Q. 907, 907 (1991) (citing Preseault v. ICC, 494 U.S. 1, 5 (1990)). Nationally, it has been estimated that about 3000 miles of additional right of way will be lost irretrievably every year until the year 2000. *See id.*

2. *See* Steven R. Wild, *A History of Railroad Abandonments*, 23 TRANSP. L.J. 1, 1-2 (1995); *see also* MICHAEL CONANT, RAILROAD MERGERS AND ABANDONMENTS 18-24 (1964) (explaining the historical causes and effects of railroad overinvestment in route capacity). Although exploring the economic forces driving railroad investment and disinvestment reach beyond the scope of this Comment, the fiscal determinants of rail line abandonments can best be summarized as follows:

> Excess capacity and overinvestment in railroad lines and terminals waste economic resources in two ways. The first is the original cost of underused lines and terminals which, of course, cannot be recovered. The second economic waste is the cost of maintaining and servicing this excess capacity, which is reflected in unnecessarily high railroad rates. This can be remedied only by consolidations or coordinated joint use of facilities.

CONANT, *supra*, at 21.

3. *See* Charles H. Montange, *Conserving Rail Corridors*, 10 TEMP. ENVTL. L. & TECH. J. 139, 140 (1991); Wild, *supra* note 2, at 6-7; *see also* CONANT, *supra* note 2, at 115-18 (discussing other factors contributing to rail line abandonments). The subsidization of roads and highways occurs at many levels:

forces, a railroad will usually discontinue service over a line, cut back maintenance, and remove and sell the rails and other equipment from the right of way.[4] By abandoning a corridor, the railroad will shed local property tax liability[5] and avoid the risk of incurring tort liability for accidents that may occur on unused rights of way.[6] An abandonment saves a railroad between $18,000 and $24,000 per mile per year.[7]

It is difficult to overemphasize the importance of unused railroad rights of way to planning organizations nationwide. An intact, contiguous corridor is ideal for future intercity and intracity rail passenger services, roads, highways, power and telecommunications lines, and recreational trails.[8] When originally acquired, many of these rights of way ran through undeveloped,

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> As to maintenance-of-way expenses, railroads ordinarily are responsible for maintenance of rail lines from revenue derived from shippers and must pay taxes on their rights-of-way. In contrast, trucks and other road vehicles are generally believed to pay only a portion of their share of roadway costs, and that portion is paid only indirectly through fuel taxes, rather than user fees. Further, roadways are publicly owned and are not subject to tax.

Montange, *supra*, at 140 n.8.

4. *See* Wild, *supra* note 2, at 2. The larger railroads in the country have turned to corporate mergers since 1960 to achieve greater economic efficiencies and to lower costs. *See* CONANT, *supra* note 2, at 69-90; Michael W. Blaszak, *Megamergers to the Far Horizon*, TRAINS, Apr. 1997, at 36, 37-39, 41. Often, these mergers lead to route consolidations and abandonments, especially where parallel lines are merged. *See* CONANT, *supra* note 2, at 69. Increased merger activity in recent years has increased the likelihood of further corridor abandonments. *See generally* THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 36-38 (1983) (providing a historical background of the federal government's regulation of railroad mergers); Blaszak, *supra*, at 36-46 (discussing recent and potential railroad mergers); *Railroad Monopoly Might End*, NEWS AND OBSERVER (Raleigh, N.C.), Mar. 2, 1997, at A2 (reporting on the impending division of Conrail between CSX Corporation and Norfolk Southern Corporation).

5. *See* Wild, *supra* note 2, at 2; Phillips, *supra* note 1, at 908. *But see* Memorandum from Jeff Bandini, Rail Division, North Carolina Department of Transportation ("NCDOT"), to Grayson Kelley, Deputy Attorney General, Transportation Section, North Carolina Department of Justice ("NCDOJ") (June 12, 1996) (on file with Rail Division, NCDOT) (noting that property taxation is a very minor factor in railroads' abandonment decisions in North Carolina).

6. *See* Wild, *supra* note 2, at 2; Phillips, *supra* note 1, at 908.

7. *See* Wild, *supra* note 2, at 2. For an interesting discussion of the political and regulatory obstacles to railroad abandonments in general, see *id.* at 1-10.

8. *See* JOSEPH VRANICH, SUPERTRAINS 149 (1991) (discussing planned use of existing Florida rail line for future Supertrain project); Montange, *supra* note 3, at 139; Samuel H. Morgan, *Rails to Trails: On the Right Track*, PROB. & PROP., Oct. 8, 1994, at 10, 10; Wild, *supra* note 2, at 11. *See generally* F. Kaid Benfield, *Running on Empty: The Case for a Sustainable National Transportation System*, 25 ENVTL. L. 651 (1995) (discussing and recommending solutions to the economic, social, and environmental costs of the transportation system in the United States today).

rural areas.[9] Partly because of the regional economic prosperity spurred by the construction of the railroads, these lines now traverse some of the most costly real estate in urban America.[10] To replicate today in a newly established corridor the access to population densities and industries enjoyed by long-established railroad rights of way would likely be cost-prohibitive.[11] Recognizing this reality, state and local transportation planners have sought to acquire old corridors when their integrity appears threatened by potential abandonment.[12] On the other hand, property rights advocates are also hard at work, representing landowners who claim interests in unused rights of way.[13] Often caught in the middle, railroads may not necessarily side with the public interest, especially when adjacent property owners block the alternative uses of intact corridors by outbidding preservation groups vying to purchase inactive lines.[14]

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9. *See* Wild, *supra* note 2, at 2; Phillips, *supra* note 1, at 925.

10. *See id.*; FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., THE TRANSIT CAPITAL COST PRICE INDEX STUDY § 4-14, Exhibit 5.11 (1995) [hereinafter PRICE INDEX STUDY] (on file with Rail Division, NCDOT) (estimating the cost of new right of way acquisition for heavy rail systems in the United States to increase by 50% between the years 1994 and 2003).

11. *See* Wild, *supra* note 2, at 2; Phillips, *supra* note 1, at 925 ("The cost of purchasing rights-of-way, especially through developed areas, would be so immense that preserving existing rights-of-way may be the only economically feasible way in which the government can meet future mass transportation needs."); PRICE INDEX STUDY, *supra* note 10, § 4-14, Exhibit 5.11; *see also* VRANICH, *supra* note 8, at 149 (discussing economic value of existing railroad rights of way for development of future high-speed trains in Florida). Judicial recognition of the potential importance of railroad rights of way in the future appeared as early as 1973:

> To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.

Reed v. Meserve, 487 F.2d 646, 649-50 (5th Cir. 1973). As the nation's population becomes increasingly concentrated in densely developed urban areas, not only will demand for renewed rail services grow, but the economic and practical feasibility of offering these services will also improve significantly. *See* VRANICH, *supra* note 8, at 10 (discussing the potential benefits associated with developing high-speed rail systems in the United States).

12. *See* Morgan, *supra* note 8, at 10; Wild, *supra* note 2, at 11-13. Considering that only about 15-20% of all railroad corridors threatened with abandonment are being preserved, it is easy to recognize the urgent attention this issue demands. *See* Montange, *supra* note 3, at 167.

13. *See* Morgan, *supra* note 8, at 10; Karen Ann Coburn, *Trails on Trial*, GOVERNING, Aug. 1996, at 43, 43-44.

14. *See* Montange, *supra* note 3, at 17 ("Some railroads, unfortunately, do not share the public's desire to facilitate such alternative uses as recreational trail uses."). Noting

Faced with these competing interests, legislators and courts struggle to fashion fair and equitable solutions to this vexing problem.

This Comment will focus on the legal issues related to rail corridor preservation in North Carolina. Part II will explore the facts of a potentially litigious situation in southeastern North Carolina to provide some context for the remainder of the discussion.[15] Part III of this Comment will briefly outline the interaction between state and federal laws as they relate to right of way abandonment and preservation.[16] In Part IV, the discussion will focus on what property interests a railroad may take for its right of way, devoting special attention to the historical development of modern principles in this area of the law.[17] Part V will review the law of abandonment in North Carolina and attempt to clarify what acts constitute abandonment in light of unclear case law on the subject.[18] In Part VI, the Comment will turn to the state's constitutional power to alter or destroy reversionary interests in property.[19] This section will also examine the "public highway" doctrine, a common law precept empowering the state to preserve railroad easements for any future transportation purpose without compensating underlying fee owners. Part VII will conclude by illuminating the most important implications of the preceding analysis, particularly as they relate to the fact situation presented in Part II.[20]

II. WALLACE-CASTLE HAYNE CORRIDOR

A. *Facts*

Efforts to preserve railroad rights of way across the country

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the importance of the type of interest originally acquired by a railroad for its corridors, United States District Judge Malcolm J. Howard succinctly characterized the position of railroads in the property rights fervor surrounding right of way preservation:

> Of course, from the railroad's point of view either a fee or an easement would serve its purposes equally well. As long as it simply ran trains over the right-of-way it was protected by statute, and no party could have adversely possessed against whatever interest it held. Quite likely the railroad did not give any further thought to the precise interest that it held.

Love v. United States, 889 F. Supp. 1548, 1581 (E.D.N.C. 1994).

15. *See infra* notes 23-60 and accompanying text. Although, as of publication, no complaint has been filed in the southeastern North Carolina dispute, the potential for a lawsuit cannot be ignored.

16. *See infra* notes 61-110 and accompanying text.

17. *See infra* notes 111-62 and accompanying text.

18. *See infra* notes 163-225 and accompanying text.

19. *See infra* notes 226-346 and accompanying text.

20. *See infra* note 347 and accompanying text.

continue to flourish despite resistance from property rights groups and adverse landowners.[21] Growth pressures and a dwindling supply of available land have spurred intense preservation initiatives in rapidly urbanizing states such as North Carolina.[22] Congress and state legislatures have responded to these public interests by enacting statutes designed specifically to prevent the disappearance of vast right of way networks around the nation.[23] The Wallace-Castle Hayne corridor in southeastern North Carolina represents only a short link in this larger system. Still, the history of this corridor's formation, use, and deactivation sheds light on some of the legal issues that may arise from public attempts to save threatened rights of way.

Chartered by the North Carolina General Assembly in 1833,[24] the Wilmington & Raleigh Railroad was originally intended to connect Wilmington, North Carolina's busiest port city, with the state's capital in Raleigh.[25] When support for the venture failed to materialize among residents in Raleigh, the General Assembly amended the railroad charter in 1835 to allow the line to be built from Wilmington to Weldon, North Carolina, near the Virginia border.[26] The railroad was renamed the Wilmington & Weldon Railroad in 1855.[27] Construction on the 161.5 miles of rights of way and track structures between Wilmington and Weldon was

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21. *See supra* notes 12-13 and accompanying text; *infra* notes 93-97 and accompanying text.

22. *See infra* notes 95-96 and accompanying text (discussing rail corridor preservation efforts in North Carolina).

23. For a more thorough explanation of existing statutes, see *infra* notes 75-97 and accompanying text.

24. *See* An Act to Incorporate the Wilmington & Raleigh Rail Road Company, Priv. L., ch. 78 (1833); WILLIAM S. POWELL, NORTH CAROLINA THROUGH FOUR CENTURIES 286 (1989). *See generally* S. DAVID CARRIKER, NORTH CAROLINA RAILROADS: THE COMMON CARRIER RAILROADS OF NORTH CAROLINA (1989) (providing historical timeline for the formation and dissolution of railroad corporations in North Carolina).

25. *See* CHARLES KERNAN, RAILS TO WEEDS: SEARCHING OUT THE GHOST RAILROADS AROUND WILMINGTON 4 (1988); POWELL, *supra* note 24, at 286.

26. *See* An Act to Amend An Act Passed in Eighteen Hundred and Thirty Three, Entitled An Act to Incorporate the Wilmington & Raleigh Rail Road Company, Priv. L., ch. 30 (1835); CHARLES *Kernan,* Rails to Weeds: Searching OUT *the* Ghost Railroads AROUND WILMINGTON 4 (1988); POWELL, *supra* note 24, at 286.

27. *See* An Act Concerning the Wilmington & Raleigh Railroad Company, Priv. L., ch. 235, § 2 (1855); CARRIKER, *supra* note 24; CHARLES *Kernan,* Rails to Weeds: Searching OUT *the* Ghost Railroads AROUND WILMINGTON 4 (1988); POWELL, *supra* note 24, at 286. Hereinafter, for the sake of simplicity, this Comment will refer only to the Wilmington & Weldon Railroad, even when discussing the original Wilmington & Raleigh charter.

completed on March 7, 1840, making it the longest railroad in the world at that time.[28] By the latter part of the century, the railroad stretched from Weldon to Columbia, South Carolina.[29]

The Wilmington & Weldon acquired part of the land needed to build its railroad by exercising the power of eminent domain, which the state granted to the corporation in the railroad's legislative articles of incorporation.[30] Thus, the only recourse for private landowners unwilling to part with their land along the proposed route was to seek fair and just compensation in court for the taking of their property for public use.[31] As with the condemnation power

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28. *See* KERNAN, *supra* note 25, at 4; CHARLES *Kernan,* Rails to WEEDS: SEARCHING OUT THE GHOST RAILROADS AROUND WILMINGTON 4 (1988); POWELL, *supra* note 24, at 287.

29. *See* KERNAN, *supra* note 25, at 4; *see also* CECIL K. BROWN, A STATE MOVEMENT IN RAILROAD DEVELOPMENT: THE STORY OF NORTH CAROLINA'S FIRST EFFORT TO ESTABLISH AN EAST AND WEST TRUNK LINE RAILROAD 31-44 (1928) (providing a detailed history of the Wilmington & Weldon Railroad).

30. *See* An Act to Incorporate the Wilmington & Raleigh Rail Road Company, Priv. L., ch. 78, arts. 14, 18 (1833) (granting and describing the power of eminent domain). The charter also enabled the railroad to take and hold land by purchase or agreement with landowners and by gift or devise. *See id.*, arts. 13, 15; *see also infra* notes 134-39 and accompanying text (discussing methods by which railroads may acquire property).

31. *See* An Act to Incorporate the Wilmington & Raleigh Rail Road Company, Priv. L., ch. 78, arts. 14, 18 (describing proceedings for valuing and paying for condemned land). Although the Fifth Amendment to the United States Constitution forbids the taking of private property for public use without just compensation to the landowner, *see* U.S. CONST. amend. V, this amendment was not applied to the states until the Fourteenth Amendment was enacted in 1868, *see* U.S. CONST. amend. XIV, § 1; Glen E. Summers, *Private Property Without* Lochner*: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 842 (1993). Similarly, the 1776 North Carolina Constitution contained no explicit protection for private property. *See* N.C. CONST. OF 1776, DECLARATION OF RTS. § 12 ("That no freeman ought to be taken, imprisoned or desiessed of his Freehold, Liberties or Privileges, or outlawed or exiled, or in any Manner destroyed or deprived of his Life Liberty or Property, but by the Law of the Land."); JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION WITH HISTORY AND COMMENTARY 55 (1995). Despite the absence of express application to the states, the precept embodied in the Fifth Amendment to the United States Constitution controlled the thinking of early nineteenth century jurists and legislators in North Carolina, as indicated in *Raleigh & Gaston Railroad v. Davis*, 19 N.C. (2 Dev. & Bat.) 431 (1837):

> If [the principle of just compensation] be not incorporated [in the North Carolina Constitution], the omission must be attributed to the belief of the founders of the government, that the legislature would never perpetrate so flagrant an act of gross oppression, or that it would not be tolerated by the people, but be redressed by the next representatives chosen.

Id. at 439. The court discussed at length just compensation and its absence from the North Carolina Constitution, *see id.* at 439-41, but refused to hold on the matter because a statute provided for compensation for property taken by the railroad, *see id.* at 441. *See also* Johnston v. Rankin, 70 N.C. 550, 555 (1874) ("Notwithstanding there is no clause in the

granted to most quasi-public[32] corporations such as railroads, the state placed certain restrictions on the enjoyment of the property so acquired by the Wilmington & Weldon to ensure that no private taking occurred devoid of a public purpose.[33] The railroad's original charter specifically delimited the corporation's powers, including implicitly the power of eminent domain, in its first article by requiring that the power be exercised only for "the purpose of effecting a communication by a rail road" between Wilmington and Raleigh.[34] Restrictions such as this could complicate attempts to use such rights of way for nonrailroad purposes.[35]

In 1989, CSX Transportation Corporation ("CSX"), the modern-day successor to the Wilmington & Weldon Railroad,[36] discontinued service and pulled up its tracks[37] on a portion of the

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Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation . . . , yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina."); ORTH, *supra*, at 58 (quoting the above statement by Justice Rodman in *Johnson v. Rankin*); Gerald Corbett Parker, Note, *Eminent Domain in North Carolina—A Case Study*, 35 N.C. L. REV. 296, 298-300 (1957) (discussing property owners' implied right to compensation under the Constitution of North Carolina).

32. Railroads and other private corporations providing public services have often been referred to as quasi-public entities. *See infra* notes 235-41 and accompanying text.

33. *See* N.C. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 468, 189 S.E.2d 272, 278 (1972) ("Any exercise of the power of eminent domain is subject to the constitutional prohibition against the taking of property for private uses."); Shields v. Norfolk & Carolina R.R., 129 N.C. 1, 7, 39 S.E. 582, 584 (1901) (holding that railroads may not use condemnation as "a means of acquiring property for the benefit of the corporation"); *see also* 1 ISAAC F. REDFIELD, THE LAW OF RAILWAYS § 61, at 234 n.4 (5th ed. 1873) (discussing possible limitation that a railroad may acquire land by agreement only for limited purposes and not for private use).

34. An Act to Incorporate the Wilmington & Raleigh Rail Road Company, Priv. L., ch. 78, art. 1 (1833).

35. *See infra* notes 323-36 and accompanying text.

36. The Wilmington & Weldon Railroad merged with other railroads in the region in 1900 to form the Atlantic Coast Line Railroad ("ACL"). *See* KERNAN, *supra* note 25, at 4. The ACL merged with the Seaboard Air Line in 1967 to form the Seaboard Coast Line ("SCL"). *See id.* The SCL eventually combined with the Chessie System in 1986 to create CSX. *See id.*; *see also* CARRIKER, *supra* note 24 (providing a historical timeline for the establishment of railroad corporations in North Carolina).

37. The term "abandonment" connotes the legal termination of a railroad's interest in property. *See generally* 1 JAMES A. WEBSTER, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 15-29 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994 & Supp. 1996) (discussing the law of abandonment in North Carolina); BLACK'S LAW DICTIONARY 3 (6th ed. 1990) (" 'Abandoned property' in a legal sense is that to which the owner has relinquished all right, title, claim, and possession, but without vesting it in any other person, and with intention of not reclaiming it or resuming its ownership, possession or enjoyment in the future."). "Abandonment" does not necessarily occur with the mere discontinuance of service or the removal of tracks from a railroad corridor. *See infra* notes 184-225 and accompanying text (discussing factors suggesting an intent to abandon). As

original Wilmington & Weldon line between Wallace and Castle Hayne, North Carolina, two towns located north of Wilmington.[38] No longer needing twenty-eight miles of the right of way,[39] CSX donated it to the North Carolina Department of Transportation ("NCDOT") in 1994.[40] The state's interest in the corridor lay in its potential for future intercity and intracity rail passenger service to and within the Wilmington metropolitan region.[41] The right of way would also provide a critical link between the state port in Wilmington and the proposed Global TransPark near Kinston.[42]

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such, "abandonment" will be used herein only in reference to a railroad's intentional relinquishment of its property rights.

38. Telephone Interview with Mark B. Sullivan, Planning Section Chief, Rail Division, NCDOT (Feb. 3, 1997) (on file with author).

39. Although the term "right of way" is generally used to refer to the right of one party to pass over the property of another, in railroad law "right of way" is used to describe the land upon which tracks and structures are built. *See* New Mexico v. United States Trust Co., 172 U.S. 171, 181-84 (1898) (discussing use of term "right of way" in general with regard to railroads); McCotter v. Barnes, 247 N.C. 480, 485, 101 S.E.2d 330, 334 (1958) (explaining that the term "right of way" may "designate an easement, and, apart from that, it may be used as descriptive of the use or purpose to which a strip of land is put"); BLACK'S LAW DICTIONARY, *supra* note 37, at 1326 (stating that "right of way," in the railroad context, refers to the land itself, not the right of passage over it). Railroad rights of way, therefore, may be held in fee or easement. For an interesting discussion of the use of the term "right of way" in deeds as conveying either an easement or fee simple estate, see City Motel, Inc. v. State, 336 P.2d 375, 377 (Nev. 1959) (citing authorities for both views). *See generally* An Act to Incorporate the Asheville and Tennessee Railroad Company, Priv. L., ch. 340, § 9 (1887) (using terms "right of way" and "land" to distinguish between taking of easements and fee simple estates); Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 534, 112 S.E.2d 111, 114 (1960) (noting the distinction between use of "land" and "easement" in municipal enabling statutes authorizing the power of eminent domain).

40. *See* Quitclaim Deed by CSX Transportation to North Carolina Department of Transportation (Aug. 4, 1994) (on file with Rail Division, NCDOT); *see also* Memorandum from Patrick B. Simmons, Director, Rail Division, NCDOT, to D.J. Bowers, Third Division Engineer, Planning and Environmental Branch, NCDOT (Aug. 3, 1995) [hereinafter Simmons Memo] (on file with Rail Division, NCDOT) (providing a general history of NCDOT's involvement in the Wallace-Castle Hayne corridor).

41. *See* Simmons Memo, *supra* note 40 (discussing potential uses for the Wallace-Castle Hayne Corridor); Memorandum from Mark B. Sullivan, Planner, Rail Program, NCDOT, to Larry Sams, NCDOT (Apr. 20, 1990) (on file with Rail Division, NCDOT) (discussing criteria and objectives for rail corridor acquisition by the state).

42. *See* Memorandum from James E. Brown, Director of Planning, North Carolina State Ports Authority, to Mark B. Sullivan, Planner, Rail Division, NCDOT (Nov. 15, 1993) (on file with Rail Division, NCDOT) (emphasizing the urgency of acquiring the Wallace-Castle Hayne Corridor for further development of the state port in Wilmington); Memorandum from James E. Brown, Director of Planning, North Carolina State Ports Authority, to Mark B. Sullivan, Planner, Rail Division, NCDOT (Oct. 27, 1993) (on file with Rail Division, NCDOT) (discussing the economic impact that the Wallace-Castle Hayne Corridor could have on Wilmington's port); Simmons Memo, *supra* note 40.

The Global TransPark represents a new concept in industrial design in which

Until increased demand warranted public investment in these services, NCDOT has considered the possibility of establishing interim recreational trail uses on the corridor.[43]

Soon after CSX removed its tracks from the corridor in 1989, property owners along the right of way began claiming ownership of the now vacant land.[44] In some cases, property owners openly possessed parts of the corridor, some building structures on the land and others removing tons of ballast from the inactive roadbed.[45]

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manufacturing plants and warehouses are integrated with air, rail, and highway facilities to maximize the international delivery of parts and goods in a timely fashion. *See* David Ranii, *A First Look at Global TransPark Plans*, NEWS AND OBSERVER (Raleigh, N.C.), May 13, 1993, at C6. To be located near Kinston, North Carolina, the 15,000-acre complex promises to generate nearly 50,000 jobs statewide within 20 years of its completion. *See Draft Plan for Cargo Airport and Industrial Park Released Kinston's Global TransPark*, NEWS AND OBSERVER (Raleigh, N.C.), Jan. 22, 1994, at B6; *see also* Dudley Price, *Delay of Global TransPark Study Stalls Progress*, NEWS AND OBSERVER (Raleigh, N.C.), Dec. 7, 1996, at D1 (reporting on delay of environmental study); Dudley Price, *Global TransPark: Little to Show for $15 Million*, NEWS AND OBSERVER (Raleigh, N.C.), Mar. 24, 1996, at A1 (questioning the legitimacy and fiscal management of the Global TransPark Authority). *See generally* N.C. GEN. STAT. §§ 63A-1 to -25 (1994) (creating the Global TransPark Authority).

43. *See* Simmons Memo, *supra* note 40; *see also infra* notes 75-97 and accompanying text (discussing relevant interim use legislation).

44. *See, e.g.*, Letter from landowner to Trice Lambert, Planner, Rail Division, NCDOT (circa 1995) (on file with Rail Division, NCDOT) (claiming to have used the corridor since 1990 for an access road); Letter from attorney to E. Burke Haywood, Assistant Attorney General, NCDOJ (Aug. 17, 1995) [hereinafter Letter from Attorney to Haywood] (on file with Rail Division, NCDOT) (requesting information for clients claiming ownership of the right of way).

45. Among other encroachments on the right of way, a paper company has removed timber from the corridor, hunting clubs have begun using the property as hunting preserves, and one adjacent landowner sold a parcel of the corridor to her daughter for $1.00. *See* Memorandum from Trice Lambert, Planner, Rail Division, NCDOT, to Patrick B. Simmons, Director, Rail Division, NCDOT (Oct. 19, 1995) [hereinafter Lambert Memo] (on file with Rail Division, NCDOT). Despite such acts, these individuals could never acquire title to the right of way by adverse possession if a court found the corridor still to be intact (i.e., not abandoned), regardless of whether the state or the railroad owned the right of way. *See* N.C. GEN. STAT. § 1-44 (1996) (barring adverse possession of railroad rights of way); *id.* § 1-45 (barring adverse possession of public ways); *see also* McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 612, 374 S.E.2d 265, 267 (1988) (holding that North Carolina General Statutes § 1-44's protection of railroads against adverse possession claims is not limited to situations where the railroad is using the property); *infra* notes 190-191 and accompanying text (discussing effect of adverse possession on the common-law abandonment determination). Still, for liability reasons and because of its interest in protecting the physical integrity of the right of way as well as any property on it, the state has actively discouraged trespassing and theft on the corridor. *See* Simmons Memo, *supra* note 40 (suggesting, among other things, the possibility that the NCDOT use portions of the right of way to store materials to provide a means of policing the corridor). *But see* Lambert Memo, *supra* (expressing doubt as to the effectiveness of the state's policing efforts).

These landowners presumed CSX had held the corridor in easement and that the easement terminated[46] upon discontinuance of service over the right of way.[47] However, when CSX quitclaimed the

46. Courts and commentators frequently refer to the termination of an easement as a "reversion" of the right of way to adjacent property owners. *See, e.g.*, Preseault v. ICC, 494 U.S. 1, 16 (1990); Fritsch v. ICC, 59 F.3d 248, 253 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1262 (1996); Love v. United States, 889 F. Supp. 1548, 1574 (E.D.N.C. 1994); McKinley v. Waterloo R.R., 368 N.W.2d 131, 134 (Iowa 1985); International Paper Co. v. Hufham, 81 N.C. App. 606, 607, 345 S.E.2d 231, 232 (1986); A.M. Swarthout, Annotation, *Who Entitled* [sic] *to Land upon its Abandonment for Railroad Purposes, Where Railroad's Original Interest or Title Was Less than Fee Simple Absolute*, 136 A.L.R. 296, 297 (1942). Technically, though, the term "reversion" applies only when a future interest attached to an estate reverts to the grantor or his successors in interest after the happening of some event. *See* 2 WEBSTER, *supra* note 37, § 24-22; BLACK'S LAW DICTIONARY, *supra* note 37, at 1320; *see also* Torrence v. City of Charlotte, 163 N.C. 562, 565, 80 S.E. 53, 54 (1913) (correcting the plaintiff's misuse of the term "reversion" in reference to the cessation of an easement).

47. *See* Letter from Attorney to Haywood, *supra* note 44; Letter from attorney to Trice Lambert, Planner, Rail Division, NCDOT (Dec. 20, 1995) [hereinafter Letter from Attorney to Lambert] (on file with Rail Division, NCDOT). Some landowners acted pursuant to North Carolina General Statutes § 1-44.2, which presumes ownership of abandoned railroad easements to the centerline of the right of way in adjacent property owners. *See* Letter from Attorney to Lambert, *supra*; *see also* N.C. GEN. STAT. § 1-44.2 (containing ownership presumption). The North Carolina Supreme Court found this statute unconstitutional to the extent that it bars claims of individuals holding record title in possession under the one-year statute of limitations contained in § 1-44.2. *See* McDonald's Corp. v. Dwyer, 338 N.C. 445, 451, 450 S.E.2d 888, 892 (1994) (holding that North Carolina General Statutes § 1-44.2(b) deprives some persons with legitimate claims of entitlement proper notice, thereby violating due process guarantees); *cf.* Congleton v. City of Asheboro, 8 N.C. App. 571, 574, 174 S.E.2d 870, 872 (1970) (" 'The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his rights by lapse of time.' " (quoting Shearin v. Lloyd, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957))). *But see Dwyer*, 338 N.C. at 451-52, 450 S.E.2d at 893-94 (Exum, C.J., dissenting) (arguing that the rebuttable presumption raised by § 1-44.2 destroys no vested rights, provides adequate notice to affected parties, and clearly falls within the legislature's authority to require periodic filings to preserve one's rights); *cf.* Texaco, Inc. v. Short, 454 U.S. 516, 526 (1982) (holding with regard to a similar limitations statute in Indiana that, "just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest"); *Shearin*, 246 N.C. at 370, 98 S.E.2d at 514 ("Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all."); Swarthout, *supra* note 46, at 301 (noting that the legislature may determine to whom a railroad right of way belongs upon its abandonment, and citing *Smith v. Hall*, 72 N.W. 427 (Iowa 1897)). The North Carolina statute, however, remains effective in establishing a presumption of ownership in adjacent landowners of abandoned easements. *See Dwyer*, 338 N.C. at 451, 450 S.E.2d at 892; *see also* 1 WEBSTER, *supra* note 37, § 15-29 (Supp. 1996) (discussing § 1-44.2 and *Dwyer*); *Abandoned Railroad Easements—Adjoining Landowners May Not Be The New Owners*, N.C. FARM BUREAU NEWS, May 1995, at 18, 18-19 (discussing implications of *Dwyer* for adjacent landowners).

corridor in 1994 to the state, the NCDOT assumed that the corridor had been held in fee simple absolute by the railroad, thus negating any claims by private landowners along the route.[48]

Upon acquiring the corridor in 1994, the NCDOT filed in each of the relevant county land records offices "intents to preserve"[49] the corridor and began posting "no trespassing" notices along the right of way.[50] It also contacted encroaching landowners to arrange either for their vacation of the property or payment to the state for any commercial use of the corridor.[51] Since that time, several affected landowners have sought legal representation challenging the state's right to claim the corridor.[52] Although no court has yet addressed the legitimacy of the state's interest in the right of way,[53] the outcome

48. *See* Memorandum from James C. Gulick, Special Deputy Attorney General, Consumer/Antitrust Section, NCDOJ, to Gene Smith, Senior Deputy Attorney General, Highway Section, NCDOJ (Dec. 7, 1990) (on file with Rail Division, NCDOT); Letter from E. Burke Haywood, Assistant Attorney General, NCDOJ, to attorney (Aug. 25, 1995) (on file with Rail Division, NCDOT). Uncertainty as to the title held by the railroad arises from the ambiguous language in the original Wilmington & Weldon charter. *See* An Act to Incorporate the Wilmington & Raleigh Rail Road Company, Priv. L., ch. 78, art. 14 (1833). The charter granted the railroad the authority to hold condemned land "as though [it] owned the fee simple therein." *Id.* Whether the railroad acquired the right of way in fee simple or in some lesser interest according to this language is unclear. The North Carolina Supreme Court addressed the matter in 1844, holding that the language of the charter conferred upon the railroad a fee simple absolute in land acquired by eminent domain. *See* State v. Rives, 27 N.C. (5 Ired.) 297, 305 (1844). If this precedent remains in force today, the NCDOT's claim to the corridor is sound.

49. *See* Declaration of Intent to Preserve Right of Way for Railroad Purposes by North Carolina Department of Transportation, Wake County (Oct. 9, 1995); Declaration of Intent to Preserve Right of Way for Railroad Purposes by North Carolina Department of Transportation, Duplin, Pender, and New Hanover Counties (Mar. 28, 1995). Although technically unnecessary for rights of way held in fee simple, filing an "intent to preserve" would help the state rebut any presumptions of abandonment should the state hold a lesser interest in the corridor. *See infra* notes 185-88 and accompanying text (addressing the presumption of abandonment raised by North Carolina General Statutes § 1-44.2).

50. *See* Memorandum from Trice Lambert, Planner, Rail Division, NCDOT, to J.B. Croom et al., Highway Maintenance Engineers, Division of Highways, NCDOT (May 16, 1995) (on file with Rail Division, NCDOT). The NCDOT also published notices and solicited articles in local newspapers to publicize its acquisition of the corridor. *See Notice*, PENDER POST (Pender County, N.C.), Nov. 22, 1995, at 13; Patrick Thomas, *Rail Corridor Squatters Need Permits from State, Says DOT Staff Member*, PENDER POST (Pender County, N.C.), Apr. 19, 1995, at 1; Simmons Memo, *supra* note 40.

51. The NCDOT offered encroaching landowners the opportunity to sign license agreements subject to termination at any time by the state. *See* Simmons Memo, *supra* note 40.

52. *See* Letter from Attorney to Haywood, *supra* note 44; Letter from Attorney to Lambert, *supra* note 47 ("I do not believe [the state's claim] to be on a sound legal basis.").

53. The state may have acquired the right of way by adverse possession under colorable title pursuant to North Carolina General Statutes § 1-38, which allows persons in

of such a case could have implications in this and other states where governmental agencies have attempted to acquire unused corridors for future public purposes.

B. *Issues*

The issues raised by the facts of the Wallace-Castle Hayne corridor dispute reflect the legal difficulties facing efforts to preserve and utilize unused corridors. The first issue concerns the state of the title acquired by the Wilmington & Weldon Railroad when it condemned and purchased the right of way in the early 1800s.[54] If the railroad acquired a fee simple title, then the corridor exists in perpetuity subject to no restrictions on its use.[55] If a lesser interest was taken, then it is necessary to determine whether the right of way has been legally abandoned.[56] The outcome of this latter issue relies heavily on the fact-finder's determination as to what the railroad intended by deactivating the right of way.[57] If the railroad abandoned the corridor, then the right of way terminated, leaving an unencumbered property interest to underlying or adjacent landowners.[58]

Assuming the railroad had not abandoned the right of way, the traditional analysis might next consider whether the proposed use for the corridor places enough of an additional burden on servient or reversionary interests to warrant compensation under the Fifth

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possession and having colorable title to bar entry after seven years. *See* N.C. GEN. STAT. § 1-38 (1996). CSX quitclaimed the corridor to the state in August 1989, *see supra* note 40 and accompanying text, at which time the NCDOT initiated efforts to notify the public of the state's claim. *See supra* notes 49-51 and accompanying text. By August 1996, the state's colorable title claim may have ripened under § 1-38. *See* N.C. GEN. STAT. § 1-38(a). This Comment does not purport to explore the adverse possession argument thoroughly; it is raised here only as one example of the variety of legal arguments available to potential litigants.

54. The most common approach taken by courts in disputes between property owners and successors in interest to railroad rights of way is initially to examine the state of the title originally acquired by the railroad. *See, e.g.*, McCotter v. Barnes, 247 N.C. 480, 484-86, 101 S.E.2d 330, 334-35 (1958) (holding that a railroad had acquired a fee simple estate in a corridor); State v. Rives, 27 N.C. (5 Ired.) 297, 305 (1844) (construing a charter to determine whether a railroad had acquired a fee simple by condemnation); International Paper Co. v. Hufham, 81 N.C. App. 606, 609-11, 345 S.E.2d 231, 233-34 (1986) (finding an easement in railroad right of way); *see also* City Motel, Inc. v. State, 336 P.2d 375, 376-78 (Nev. 1959) (construing a deed a to railroad to decide whether an easement or fee simple estate was conveyed).

55. *See infra* notes 165-66 and accompanying text.

56. *See infra* note 164 and accompanying text.

57. *See infra* notes 174-83 and accompanying text.

58. *See infra* note 168 and accompanying text.

Amendment to the United States Constitution.[59] Addressing this problem in North Carolina leads to an investigation of the state's power to preserve or alter inactive railroad corridors to serve *any* purpose without compensating underlying fee owners or holders of reversionary property interests. Where rights of way exist only in easement, the "public highway" doctrine may prove invaluable to preservation efforts in North Carolina such as the one underway on the Wallace-Castle Hayne corridor.[60] The following discussion addresses these and related issues in more depth to illuminate the pitfalls and subtleties hidden in this somewhat confusing area of the law.

III. INTERACTION OF STATE AND FEDERAL LAW: ABANDONMENT AND PRESERVATION

A. Background

To understand the legal issues associated with rail corridor preservation efforts, one must first appreciate the interrelationship between state and federal laws governing right of way abandonment and preservation. Until recently, the Interstate Commerce Commission (the "ICC") was the federal agency responsible for overseeing most railroad abandonments.[61] In 1996, Congress shifted this duty to the newly created Surface Transportation Board (the "STB") within the United States Department of Transportation.[62] The transfer of responsibilities generally did not affect a substantive

59. *See* U.S. CONST. amend. V; *infra* notes 98-110 and accompanying text (discussing a recent Takings Clause challenge to a federal interim use statute).

60. *See infra* notes 226-346 and accompanying text (discussing the destructibility of reversionary interests and the "public highway" doctrine).

61. Congress established the Interstate Commerce Commission ("ICC") in 1887 as the first federal attempt to regulate railroads, focusing specifically on rate structures and rate discrimination. *See* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (repealed 1967); ARI HOOGENBOOM & OLIVE HOOGENBOOM, A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE 13-18 (1976) (discussing the Progressive Movement's tendency to instill a negative public attitude towards railroads, which led to the creation of the ICC). The power of the ICC increased with time, and by 1920, jurisdiction over the establishment and abandonment of rail routes shifted from state chartering mechanisms to the ICC. *See* KEELER, *supra* note 4, at 24-25; *see also* CONANT, *supra* note 2, at 113-31 (providing a history of the ICC's regulation of abandonments between 1946 and 1962). *See generally* KEELER, *supra* note 4, at 19-42 (sketching the history of railroad regulation in the United States).

62. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 803, 804-52 (codified as amended at 49 U.S.C. §§ 10101-11901 (Supp. I 1995)); *id.* § 201(a), 109 Stat. at 932-40 (codified as amended at 49 U.S.C. §§ 701-706, 721-727 (Supp. I 1995)).

change in the federal regulation of railroads.[63] In particular, the STB has retained its predecessor's authority over railroad right-of-way abandonments and interim use statutes.[64]

B. *Regulation of Abandonments*

Although state law determines when a common law property abandonment has occurred, a right of way will not come under a state's legislative or judicial jurisdiction until the STB approves a regulatory abandonment request.[65] The STB maintains exclusive and plenary regulatory authority over railroads, which preempts local and state control over most railroad corridors.[66] Except for some spurs, sidetracks, and railyards, a railroad may not abandon a corridor without prior authorization from the STB.[67] The procedures to be followed to acquire an abandonment order are contained in 49 U.S.C. §§ 10903 to 10907.[68]

Confusion often arises among courts and commentators addressing rail corridor abandonments because a railroad may obtain a regulatory abandonment order, but have no accompanying intention to relinquish its property interest in a right of way.[69]

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63. *See* 49 U.S.C. § 702 (1994) (shifting functions of ICC to STB).

64. *See id.* §§ 10903-10906. *See generally* CONANT, *supra* note 2, at 119-31 (providing background information on ICC's regulatory authority over abandonments).

65. *See* Preseault v. ICC, 494 U.S. 1, 8 (1990) ("State law generally governs the disposition of reversionary interests, subject of course to the ICC's 'exclusive and plenary' jurisdiction to regulate abandonments and to impose conditions affecting postabandonment use of the property." (citations omitted)); Wild, *supra* note 2, at 2; Phillips, *supra* note 1, at 926-27; Roger M. Stahl, Comment, *Smoke Along the Tracks: The Constitutionality of Converting Rails-To-Trails Under 16 U.S.C § 1247(d)*, 16 WM. MITCHELL L. REV. 861, 885 n.135 (1990) (citing the court of appeals decision in Preseault v. ICC, 853 F.2d 145, 147 (2d Cir. 1988), *aff'd*, 494 U.S. 1 (1990)).

66. *See* U.S. CONST. art. VI, cl. 2 (giving supremacy to federal law); Montange, *supra* note 3, at 141.

67. *See* 49 U.S.C. § 10907; Montange, *supra* note 3, at 140-41.

68. *See* 49 U.S.C. §§ 10903-10906.

69. For example, to ensure that it is relieved of all liabilities associated with an unnecessary right of way, a railroad will often acquire an abandonment certificate when it sells a corridor to a public agency or private organization, whether the corridor was held in fee simple or easement. Telephone Interview with Mark B. Sullivan, Planning Section Chief, Rail Division, NCDOT (May 5, 1997) (on file with author). If a sale does not materialize, the railroad will maintain the corridor's integrity for future sale or use by simply refusing to exercise its regulatory abandonment privileges under the certificate. *See id.* Aside from corridor abandonment under § 10903(a)(1), a railroad may obtain a certificate from the STB for the discontinuance of *service* over a right of way under § 10903(a)(2). *See* 49 U.S.C. § 10903(a). The procedure for obtaining a discontinuance order is the same as that for securing an abandonment certificate. *See id.* §§ 10903-10905. By requesting permission only to discontinue service, however, a railroad implicitly

Similarly, while an abandonment certificate suggests an intent to abandon,[70] it may not trigger corridor dissolution under a state's statutory and common law rules for abandonment.[71] For instance, North Carolina General Statutes § 1-44.1 presumes abandonment of railroad easements seven years after the removal of tracks and other structures from a right of way if the railroad does not utilize the corridor for railroad purposes during that time.[72] Because the STB's exclusive authority over rights of way preempts § 1-44.1 until an abandonment order is issued by the STB, expiration of the state's seven-year statute of limitations can have no effect on a right of way until the federal agency acts.[73] Thus, an abandonment at common law may not necessarily coincide with regulatory abandonment.[74]

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manifests an intent to preserve the underlying right of way for future use should economic conditions warrant reactivation of service over the line. *See generally* CONANT, *supra* note 2, at 132-65 (discussing the regulatory controls over the discontinuance of rail services). Unfortunately, this distinguishing characteristic of discontinuance of service orders may be easily overlooked despite its significant import in common law abandonment determinations, which rely heavily on the apparent intent of railroads to preserve or abandon corridors. *See infra* notes 174-83 and accompanying text (outlining the law of abandonment in North Carolina); *see, e.g.*, J. A. Connelly, Annotation, *What Constitutes Abandonment of a Railroad Right of Way*, 95 A.L.R.2d 468, 470 (1964) ("An application to the appropriate governmental agency regulating railroads for permission to discontinue service has . . . been considered as a factor indicating an intention to abandon . . . .").

70. *See* Connelly, *supra* note 69, at 470.

71. *See* Lacy v. East Broad Top R.R. & Coal Co., 77 A.2d 706, 710 (Pa. Super. Ct. 1951) (holding that the removal of tracks and the acquisition of an abandonment certificate from a regulatory board do not constitute abandonment); 74 C.J.S. *Railroads* § 117, at 542 (1951) (stating that abandonment occurs only if external acts show the intent to abandon was carried out, and that mere nonuse does not, of itself, establish abandonment); Montange, *supra* note 3, at 152-53, 162-63. *But see* Stahl, *supra* note 65, at 886 n.136 (noting that the need for 16 U.S.C. § 1247(d), which preserves rights of way for use as nature trails, arose because some states provided for the automatic termination of railroad easements on the discontinuance of service); *see also* Connelly, *supra* note 69, at 470 (suggesting that non-use coupled with an application to a regulatory agency may trigger an abandonment); *see, e.g.*, Fritsch v. ICC, 59 F.3d 248, 252-53 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1262 (1996) (finding, based on the actions and letters of the railroad evidencing abandonment, that the easement terminated at the expiration of the 180-day waiting period prescribed by 49 U.S.C. § 10906 (now recodified as § 10905)).

72. *See* N.C. GEN. STAT. § 1-44.1 (1996); *infra* notes 185-88 and accompanying text (quoting and discussing § 1-44.1).

73. *See supra* note 65 and accompanying text.

74. *See infra* notes 174-83 and accompanying text (discussing generally the law of abandonment in North Carolina). Note also that upon abandonment, state law will control the disposition of any property interests in an abolished right of way. *See* Preseault v. ICC, 494 U.S. 1, 8-9 (1990) (noting that the disposition of reversionary interests is controlled by state property law).

C. Preservation Legislation

Legislation concerning rail corridor preservation exists at both the federal and state levels. Most commentaries addressing alternative uses of corridors have focused on the constitutionality of federal efforts to protect rights of way for future public use under 16 U.S.C. § 1247(d).[75] In § 1247(d), however, Congress also has explicitly encouraged states to formulate their own corridor preservation initiatives.[76] Before examining such efforts in North Carolina, one must first understand the basic operation of § 1247(d).[77]

Under § 1247(d), the STB is directed to authorize states, municipalities, and private organizations to convert inactive corridors threatened by abandonment to interim recreational trail uses until such time as the right of way is again needed for railroad purposes ("railbanking").[78] The government agency or group may acquire the corridor outright or simply assume managerial, financial, and tort liability for the right of way without taking title to it.[79] Section 1247(d) provides that interim uses "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of

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75. *See* National Trails System Act Amendments of 1983 § 208, Pub. L. No. 98-11, 97 Stat. 43 (1983) (codified at 16 U.S.C. § 1247(d) (1994)); Richard Henick, *Rails-to-Trails: Everyone Benefits, Don't They?*, 10 TEMP. ENVTL. L. & TECH. J. 75, 81-90 (1991); Wild, *supra* note 2, at 2; Phillips, *supra* note 1, at 908-26; Stahl, *supra* note 65, at 868-96. Congress also has provided for corridor preservation in the STB's regulatory authority concerning right of way abandonments. Under 49 U.S.C. § 10905 (formerly § 10906), the STB may determine that a corridor under consideration for abandonment is suitable for public purposes other than railroad use. *See* 49 U.S.C. § 10905 (Supp. I 1995); KEELER, *supra* note 4, at 33-36 (discussing the major features of § 10905's predecessor statute (49 U.S.C. § 10906)). Upon making such a finding, the STB may delay issuing an abandonment order for 180 days to allow any interested government or private entity a right of first refusal in purchasing the right of way from the railroad. *See* 49 U.S.C. § 10905. The STB cannot, however, require a railroad to convey abandoned properties for future public use. *See* Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 483 (2d Cir. 1988). The failure of the ICC in the past to require the submission of these properties for sale at reasonable rates, however, has handicapped the purchasing power of interested groups unable to meet the sometimes exorbitant offers to sell tendered by the railroads. *See* Montange, *supra* note 3, at 151.

76. *See* 16 U.S.C. § 1247(d).

77. Section 1247(d), enacted as section 208 of the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 43 (1983), amended section 8(d) of the National Trails System Act of 1968, Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §§ 1241-1251), which formulated a program at the federal level to establish outdoor trails throughout the country. *See* Henick, *supra* note 75, at 78-79 (providing general background to § 1247(d)).

78. *See* 16 U.S.C. § 1247(d); Henick, *supra* note 75, at 79.

79. *See* 16 U.S.C. § 1247(d); Henick, *supra* note 75, at 79.

such rights-of-way for railroad purposes."[80] By retaining the STB's jurisdiction over corridors, § 1247(d) prevents inactive rights of way from terminating under state statutory and common law rules of abandonment.[81] Parties attempting to railbank a right of way must negotiate a satisfactory agreement with owner-railroads within 180 days of the STB granting an interim trail use order.[82] The success of establishing interim uses under § 1247(d) depends largely upon railroads' consent to interim use agreements,[83] a willingness which may not always be forthcoming.[84]

In response to this federal initiative, the North Carolina General Assembly has enacted a series of statutes to foster the preservation of railroad rights of way in the state.[85] The NCDOT may assume § 1247(d) responsibility of railroad rights of way for "compatible interim uses" by virtue of North Carolina General Statutes § 136-44.36A.[86] Also, North Carolina General Statutes § 136-44.36B authorizes the NCDOT to acquire new or inactive corridors by purchase, donation, or condemnation.[87] Under § 136-44.36D, private groups may lease rights of way held by the department in fee simple for "interim public recreation use" provided that the organization satisfies certain conditions designed to ensure local public

80. 16 U.S.C. § 1247(d).

81. *See id.* One of the motivations underlying § 1247(d) arose because some states provided for the automatic termination of railroad easements upon discontinuance of service over the right of way. *See* Montange, *supra* note 3, at 152-54; Stahl, *supra* note 65, at 886 n.136; *see also, e.g.*, Fritsch v. ICC, 59 F.3d 248, 253 (D.C. Cir. 1995) (finding, based on the actions and letters of the railroad, that the easement terminated at the expiration of the 180-day waiting period prescribed by § 10906), *cert. denied*, 116 S. Ct. 1262 (1996).

82. *See* 49 C.F.R. § 1152.29(c)(1), (d)(1) (1996); Montange, *supra* note 3, at 154-55.

83. *See* 16 U.S.C. § 1247(d); Morgan, *supra* note 8, at 17.

84. *See* Morgan, *supra* note 8, at 17.

85. *See* N.C. GEN. STAT. §§ 136-44.36A to -44.36D (1993); *see also id.* § 136-44.35 (stating that railroad corridor preservation "serve[s] the public purpose"); 1993 AND BEYOND, *supra* note 1, at 22 (outlining the importance of preserving unused corridors for future transportation use); N.C. RAIL TASK FORCE, REPORT OF THE GOVERNOR'S RAIL TASK FORCE TO GOVERNOR JAMES G. MARTIN 22 (1993) (recommending the acquisition and preservation of inactive railroad corridors).

86. N.C. GEN. STAT. § 136-44.36A. This section reads: "The North Carolina Department of Transportation is authorized, pursuant to 16 U.S.C.A. § 1247(d), to preserve rail transportation corridors and permit compatible interim uses of such corridors." *Id.*

87. *See id.* § 136-44.36B. Section 136-44.36B, however, specifically prohibits the NCDOT from condemning "existing, active railroad line[s]." *Id.* In this respect, § 136-44.36B is similar to § 1247(d) in that the department must secure the consent of a railroad even if it intends to acquire the property outright from the corporation. *See supra* notes 82-84 and accompanying text.

participation in the conversion process.[88] Section 136-44.36D makes no provision, however, for the establishment of interim uses on easements acquired by the department,[89] even though the state may have the power to do so under the "public highway" doctrine.[90] Since many railroads acquired a hodgepodge of interests in single corridors,[91] the legislature's failure to include such a provision may impede efforts to establish cost-effective interim uses requiring contiguous, uninterrupted corridors.[92]

The national Rails-to-Trails Conservancy and local affiliations advocate the best-known and most controversial proposed interim uses for idle rights of way.[93] These groups try to acquire inactive corridors on which to establish temporary or permanent recreational trails.[94] Depending on local sentiments and political leanings, the efforts of rails-to-trails organizations have produced mixed results around the country.[95] In North Carolina, proposals to convert unused corridors into temporary recreational trails have sparked controversy among adjacent landowners who oppose the prospect of

88. *See* N.C. GEN. STAT. § 136-44.36D. One requirement is that the group must secure a local government as a sponsor of the project. *See id.* § 136-44.36D(2). The local government also must hold a public hearing on the proposed recreational use, notifying all adjacent landowners by first-class mail. *See id.* § 136-44.36D(1).

89. *See id.* § 136-44.36D.

90. *See infra* notes 318-46 and accompanying text (discussing the North Carolina "public highway" doctrine).

91. *See* Montange, *supra* note 3, at 152; *infra* notes 122-33 and accompanying text (discussing types of interests acquired by railroads).

92. If a corridor traverses costly urban land and the NCDOT owns one parcel in less than fee simple interest, the cost of completing the corridor by acquiring the requisite interest under § 136-44.36D by condemnation or otherwise may prove too extraordinary to justify for interim use purposes. *See supra* notes 10-11 and accompanying text (discussing high costs of acquiring new corridors in urban areas).

93. The non-profit Rails-to-Trails Conservancy boasts a membership of 70,000 and has helped convert nearly 8000 miles of abandoned corridors into more than 800 rail-trails in 48 states. *See* Coburn, *supra* note 13, at 43.

94. *See id.* at 43-44.

95. *See id. See generally* Beverly Brown, *From Rail to Trail*, NEWS AND OBSERVER (Raleigh, N.C.), Mar. 18, 1994, at 26 (discussing a successful trail in Carrboro-Chapel Hill, North Carolina, and discussing other proposed trails for North Carolina); Mark Alan Hudson, *Rails to Trails: A Ribbon of a Hiking Path Winds Through Southwestern Virginia*, CHARLOTTE OBSERVER, Apr. 18, 1993, at F12 (discussing the New River trail in Virginia); Tim Means, *Rails, Trails Compact Killed*, PITT. POST-GAZETTE, Oct. 17, 1996, at E1 (revealing the effect that local politics can have on rail-to-trail proposals); James Eli Shiffer, *Enthusiasts Push Dream of American Tobacco Trail*, NEWS AND OBSERVER (Raleigh, N.C.), Dec. 26, 1996, at B1 (reporting on the anticipated ground-breaking of a trail in Durham, North Carolina); Tim Simmons, *Trail Groups Join Forces*, NEWS AND OBSERVER (Raleigh, N.C.), Feb. 9, 1997, at B1 (discussing efforts in Raleigh-Durham, North Carolina, to garner support for more recreational trails in the region).

pedestrian and biking trails traversing their backyards.[96] Generally, landowners have begun questioning the constitutionality of allowing these types of interim uses on former railroad rights of way.[97]

D. *Interaction of State and Federal Law*

Preseault v. ICC[98] is an illustrative case demonstrating the interaction of state and federal jurisdiction over corridor abandonment and preservation. *Preseault* reached the United States Supreme Court in 1990.[99] The case began when the claimants initiated a quiet-title action in state court for an inactive easement abutting their property, arguing that the corridor had been abandoned by the railroad.[100] Because the ICC had not issued an abandonment order for the right of way, the trial court dismissed the action for lack of jurisdiction, and the Supreme Court of Vermont affirmed.[101] The landowners then petitioned the ICC for an abandonment certificate to perfect their claim.[102] The ICC refused to grant the request when the State of Vermont intervened and asked that the right of way be transferred to the City of Burlington for interim use as a trail under 16 U.S.C. § 1247(d).[103] The ICC honored

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96. For example, a rail-to-trail conversion proposed in Stokes County, North Carolina, between Rural Hall and Brook Cove met with heavy resistance from local residents and was ultimately defeated by the county commissioners in November 1995. *See Citizens Oppose Proposed Public Trail*, DANBURY REPORTER, Oct. 5, 1995, at 1; G.I. Wooding III, *Stokes Commissioners Nix Rail-Trail*, WEEKLY INDEP. (Rural Hall, N.C.), Nov. 9, 1995, at 1; G.I. Wooding III, *Give Rail-Trail Idea a Chance, Backer Says*, WEEKLY INDEP. (Rural Hall, N.C.), Nov. 2, 1995, at 1; G.I. Wooding III, *Neighbors Organize to Oppose Rail-Trail*, WEEKLY INDEP, (Rural Hall, N.C.), Sept. 28, 1995, at 1; *see also* Joe Marusak, *Lincoln Landowners Want Land Back; Vow To Fight Bikeways and Trails*, GASTON OBSERVER (Gastonia, N.C.), Sept. 1, 1989, at A3 (citing opposition in Lincolnton, North Carolina to proposed trail uses on soon-to-be abandoned corridor).

97. *See* Coburn, *supra* note 13, at 43 (discussing the impact of the rails-to-trails controversy on local governments' efforts to take advantage of the recreational and natural development opportunities offered by inactive corridors). *See generally* Stuart Leavenworth, *State Landowners Challenging Laws: N.C. Follows "Property Rights" Trend*, NEWS AND OBSERVER (Raleigh, N.C.), Apr. 9, 1995, at A1 (discussing the property rights movement in North Carolina, particularly with respect to challenges to environmental regulation).

98. 494 U.S. 1 (1990).

99. *See id.*

100. *See id.* at 9 ("Vermont Railway stopped using the route more than a decade ago and has since removed all railroad equipment, including switches, bridges, and track, from the portion of the right of way claimed by petitioners.").

101. *See* Trustees of the Diocese of Vermont v. State, 496 A.2d 151, 154 (Vt. 1985), *aff'd sub nom.* Presault v. ICC, 494 U.S. 1 (1990).

102. *See Preseault*, 494 U.S. at 9.

103. *See id.*

the state's petition and refused the claimants a rehearing.[104] On appeal, the United States Court of Appeals for the Second Circuit rejected the claimants' contentions that the ICC's action violated the Takings Clause of the Fifth Amendment to the United States Constitution[105] and extended beyond the reach of Congress's Commerce Clause Power under Article I, section 8, clause 3 of the Constitution.[106] The Supreme Court affirmed, refusing to find a valid takings claim because the petitioners had not exhausted all of the remedies available to them under federal laws dealing with takings claims against the federal government.[107] The Court also rejected the claimants' Commerce Clause argument based on a "traditional rationality standard of review" of Congress's regulatory authority over railroad easements.[108]

Preseault did not determine whether § 1247(d) requires the federal government to provide compensation to fee owners underlying railroad easements dedicated to nonrailroad purposes.[109] As Justice O'Connor's concurring opinion in *Preseault* emphasized, however, state law will play an important role in the Court's determination as to which property interests will warrant protection under the Fifth Amendment.[110] Thus, clarifying state statutory and common law principles in this area not only benefits litigators at the federal level, but also helps legislators to fashion responsible and

104. *See id.*

105. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

106. *See id.* art. I, § 8, cl. 3 ("The Congress shall have Power ... (3) [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); Preseault v. ICC, 853 F.2d 145, 149, 150-51 (2d Cir. 1988), *aff'd*, 494 U.S. 1 (1990).

107. *See Preseault*, 494 U.S. at 17. Specifically, the claimants failed to seek redress under the Tucker Act. *See id.* at 11-17. The Tucker Act provides claimants an initial forum in United States Claims Court to determine damages for disputes brought against the federal government based on constitutional, statutory, regulatory, or contractual grounds. *See* 28 U.S.C. § 1491(a)(1) (1994); Henick, *supra* note 75, at 89-90 (discussing the Tucker Act with regard to *Preseault*). By holding that the landowners' claim had not ripened in *Preseault*, the Court avoided the question of whether § 1247(d) affected a taking requiring compensation under the Fifth Amendment. *See Preseault*, 494 U.S. at 17.

108. *Preseault*, 494 U.S. at 17; Wild, *supra* note 2, at 2; Phillips, *supra* note 1, at 927 (discussing Justice O'Connor's concurrence in *Preseault*); Stahl, *supra* note 65, at 885-96 (discussing *Preseault* generally). For the disposition of the Preseaults' subsequent Tucker Act claim, see *Preseault v. ICC*, 100 F.3d 1525 (2d Cir. 1996).

109. *See Preseault*, 494 U.S. at 17.

110. *See id.* at 20 (O'Connor, J., concurring) ("I join the Court's opinion, but write separately to express my view that state law determines what property interest petitioners possess....").

effective corridor preservation statutes that would withstand constitutional attacks such as those brought against § 1247(d). Such initiatives might better address local concerns and would also lessen the need for states to rely on federal legislation.

IV. ACQUIRING RAILROAD RIGHTS OF WAY

A. *Corporate Powers and Statutory Authority*

Untangling the web of property interests acquired by railroad corporations over the past century and a half in North Carolina requires a brief historical overview of corporate formation in the state. During the nineteenth century the state legislature chartered many corporations by special legislative acts.[111] These acts outlined in detail corporate rights, duties, and powers.[112] The increasing economic activity spawned by the industrial revolution eventually rendered this method of incorporation too cumbersome and time-consuming to continue.[113] A limited constitutional prohibition on private acts of incorporation first appeared in 1868[114] and was amended in 1917 to forbid most special acts of incorporation.[115]

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111. *See* ORTH, *supra* note 31, at 142; RUSSELL M. ROBINSON, II, ROBINSON ON NORTH CAROLINA CORPORATION LAW § 1-1, at 1 (5th ed. 1995); *see also* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 12, at 26 (3d ed. 1983) (providing general history of development of American corporation law).

112. *See, e.g.*, An Act to Incorporate the Wilmington & Raleigh Rail Road Company, Priv. L., ch. 78 (1833) (providing in detail the various aspects of the railroad's corporate existence).

113. *See* ORTH, *supra* note 31, at 142. Incorporation by private legislative act also proved susceptible to political bribery and corruption, further expediting its eventual demise. *See* HENN & ALEXANDER, *supra* note 111, § 12, at 25; ORTH, *supra* note 31, at 142; ROBINSON, *supra* note 111, § 1-1, at 1-2.

114. *See* N.C. CONST. art. VIII, § 1 (1868); HENN & ALEXANDER, supra note 111, § 12, at 25; ORTH, *supra* note 31, at 142; ROBINSON, *supra* note 111, § 1-1, at 2. The qualification to this restriction, however, allowed the legislature to incorporate by special act when, in its judgment, the purposes of the corporation could not be served by incorporating under general statutes. *See* ROBINSON, *supra* note 111, § 1-1, at 2. The legislature continued to charter railroads by special act after 1868. *See, e.g.*, An Act to Incorporate the Asheville and Tennessee Railroad Company, Priv. L., ch. 340 (1887). The first general incorporation act for railroads appeared in 1872. *See* An Act to Authorize the Formation of Railroad Companies and to Regulate the Same, Pub. L., ch. 138 (1872).

115. *See* N.C. CONST. art. VIII, § 1 (1917); ORTH, *supra* note 31, at 142; HENN & ALEXANDER, supra note 111, § 12, at 25; ORTH, *supra* note 31, at 142; ROBINSON, *supra* note 111, § 1-1. The 1917 amendment forbade incorporation by special act, except for organizations serving charitable, educational, penal, or reformatory purposes. *See* N.C. CONST. art. VIII, § 1 (1917); HENN & ALEXANDER, supra note 111, § 12, at 25; ORTH, *supra* note 31, at 142; ROBINSON, *supra* note 111, § 1-1, at 2.

Today, the North Carolina Business Corporation Act governs the formation and dissolution of corporations in the state.[116]

Reflective of their quasi-public nature,[117] railroad corporations are granted specific powers under North Carolina General Statutes § 62-220.[118] As creatures of the state, railroads may hold property only pursuant to statutory authorization.[119] While modern statutes govern contemporary property acquisitions by railroads, many of the existing rights of way in North Carolina were originally established under private legislative charters of nineteenth century vintage.[120] Although superseded in many respects by corporate mergers and subsequent legislation, these old charters still play a vital role in determining the extent of property interests held by modern railroad corporations.[121]

B. Interests Taken: Fee Simple, Qualified Fee, and Easements

Generally speaking, a railroad may take any property interest authorized by statute.[122] Rights of way are usually held in fee simple

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116. *See* N.C. GEN. STAT. §§ 55-1-01 to -17-05 (1990 & Supp. 1996); HENN & ALEXANDER, supra note 111, § 12, at 25; ORTH, *supra* note 31, at 142; ROBINSON, *supra* note 111, § 1-2 (providing a legislative history of the North Carolina Business Corporation Act).

117. *See infra* notes 235-41 and accompanying text.

118. *See* N.C. GEN. STAT. § 62-220 (1989).

119. *See* N.C. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 471, 189 S.E.2d 272, 279 (1972) (citing Wallace v. Moore, 178 N.C. 114, 115, 100 S.E. 237, 238 (1919)); 74 C.J.S. *Railroads* § 16, at 365 (1951); 1 REDFIELD, *supra* note 33, § 17, at 55-61. Although a railroad cannot acquire property except as authorized by statute, such authority may be implied to the extent reasonably necessary for the company to perform its corporate functions. *See* 1 BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF RAILROADS §§ 451-452, at 686-87 (3d ed. 1921). A railroad may not exercise any greater power than that granted by its charter, but if a general statute conflicts with the charter, the statute will prevail. *See* 74 C.J.S. *Railroads* § 16, at 365. This preemption occurs most often when a statute restricts a broad grant of authority to a railroad in its articles of incorporation. *See id.* at 365-66. The authority of the STB may preempt regulatory provisions contained in either a general statute or a specific charter. *See* KEELER, *supra* note 4, at 21 ("Unless overruled by the Interstate Commerce Commission, these charters are still legally binding on the railroads."); *supra* notes 65-68 and accompanying text (discussing authority of the STB).

120. *See* CARRIKER, *supra* note 24.

121. This Comment will not directly examine the problems associated with construing language in deeds and legislative charters to determine whether a railroad has acquired a fee simple or lesser interest. For a discussion of deed construction, see generally *City Motel, Inc. v. State*, 336 P.2d 375, 377-78 (Nev. 1959), and A. E. Korpela, Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3d 973 (1966). For a specific construction of a legislative charter, see *State v. Rives*, 27 N.C. (5 Ired.) 297, 303-05 (1844).

122. *See Farm Equipment*, 281 N.C. at 471, 189 S.E.2d at 279 (citing *Wallace*, 178 N.C.

absolute ("fee simple"), qualified fee, or easement.[123] If held in fee simple, the railroad may use the property as it pleases, the corridor never being subject to abandonment.[124] As a more restrictive interest, a qualified fee may be held only so long as the railroad satisfies some stipulation identified at the time of acquisition.[125] That condition may be designated in the instrument conveying title to the railroad.[126] Such conditions most often require that the right of way be used for railroad purposes—upon abandonment of such use, the property will revert to the grantor or his successors in interest.[127] Both types of fee interests are alienable, but qualified fee restrictions remain attached to the property subsequent to any transfer.[128]

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at 115, 100 S.E. at 238); Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 533-35, 112 S.E.2d 111, 113-14 (1960); 2 ELLIOTT & ELLIOTT, *supra* note 119, §§ 1158, 1222. The types of interests that railroads may acquire have varied from state to state over the last 150 years. *See* 1 REDFIELD, *supra* note 33, § 69, at 270-71.

123. *See* Swarthout, *supra* note 46, at 307. A railroad may generally hold either a fee simple determinable or a fee simple subject to condition subsequent in its right of way. *See id.* (listing types of qualified estates). The technical distinctions between these contingent estates affect primarily when and to whom the estate will vest upon reversion for condition satisfied or broken. *See id.*; 1 WEBSTER, *supra* note 37, § 4-13; 28 AM. JUR. 2D *Estates* §§ 28-29 (1966). Because this Comment will not directly address the disposition of property interests upon abandonment of a right of way, the general term "qualified fee" will be used to denote an estate held in less than fee simple, but greater than an easement or a license. *See generally* Swarthout, *supra* note 46, at 296-324 (discussing disposition of contingent interests upon abandonment of railroad rights of way).

124. *See infra* notes 164-66 and accompanying text.

125. *See* Swarthout, *supra* note 46, at 307.

126. *See* 1 WEBSTER, *supra* note 37, § 4-13, at 71.

127. *See* Swarthout, *supra* note 46, at 297.

128. *See* McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 613, 374 S.E.2d 265, 268 (1988); State v. Rives, 27 N.C. (5 Ired.) 297, 304 (1844) (holding that the railroad held condemned land in fee, but stating in dicta that "[a]n estate upon condition is not necessarily exempted from sale by execution"); *see also* 1 REDFIELD, *supra* note 33, § 69, at 270 (citing *Rives* for the proposition that a railroad may hold a fee simple for purposes of alienation, but only a determinable fee for purposes of enjoyment). The facts of *State v. Rives* involved a debtor-creditor action. *See Rives*, 27 N.C. (5 Ired.) at 302-03. The issue presented concerned the creditor's right to execute a sale of condemned property for debt unpaid. *See id.* Inasmuch as the issue was left unresolved by the ultimate holding in the case, the holder of a reversionary interest in a qualified fee estate may still have an action against a purchaser who fails to perform the necessary condition. *See id.* But the final disposition of the property is of no consequence to the creditor who desires only to be paid. *See id. But cf.* Barcello v. Hapgood, 118 N.C. 712, 730, 24 S.E. 124, 126-27 (1896) (noting that the right of public or quasi-public corporations to alienate property is not unqualified because of the duty such corporations owe to the public). As for the alienability of property held in fee simple, only the state may challenge such transfers based on the doctrine of *ultra vires*, which provides that an action may be void as beyond the power granted by the state: "[R]ailroads have been recognized as having the power to sell land held in fee, even if it is for a non-railroad purpose. Furthermore, even if a particular action of a railroad in disposing of such property were *ultra vires*, only the State would have standing to object." Love v. United States, 889 F. Supp. 1548, 1580 (E.D.N.C. 1994)

Property held in easement by a railroad is considered to be commercial in nature and therefore is alienable.[129] Since an easement gives the railroad only a right to use the property and is a nonpossessory interest,[130] the underlying fee owner may use the right of way "for purposes not inconsistent with its use for railroad purposes."[131] Upon abandonment of the railroad use, the easement terminates, and the servient estate is freed from any encumbrances.[132] As with rights of way held in qualified fee, the restrictive language conditioning the existence of the easement may be contained in the conveying instrument and may be more or less qualifying, depending on the specific words of limitation.[133]

C. *Effect of Acquisition Method on Interest Taken*

Railroads may acquire property interests by voluntary grant or agreement, purchase, or condemnation.[134] Exercise of each of these methods must be authorized by statute.[135] In the case of eminent domain, the statute under which the condemnation proceedings were

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(citation omitted).

129. *See* RESTATEMENT OF PROPERTY § 491 cmt. b (1936); 1 WEBSTER, *supra* note 37, § 15-1. Note, however, that any conditions attached to the easement will remain in place after the transfer. *See* McKinley v. Waterloo R.R., 368 N.W.2d 131, 134 (Iowa 1985).

130. *See* 1 WEBSTER, *supra* note 37, § 15-1.

131. N.C. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 472, 189 S.E.2d 272, 280 (1972); *see also infra* notes 233-34 and accompanying text (addressing the scope of railroad easements).

132. *See* 1 WEBSTER, *supra* note 37, § 15-29.

133. *See* Swaim v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786-87 (1995), *aff'd mem.*, 343 N.C. 298, 469 S.E.2d 553 (1996); 1 WEBSTER, *supra* note 37, § 15-21 (discussing judicial methods for determining the scope of easements).

134. *See* N.C. GEN. STAT. §§ 62-220(2), (3), (4) (1989); *see also* 74 C.J.S. *Railroads* § 75, at 453 (1951) (discussing methods by which railroad corporations may acquire property). Railroads may also take land by adverse possession or prescription, but only an easement may be acquired by these means. *See* 74 C.J.S. *Railroads* § 75, at 454; 1 ELLIOTT & ELLIOTT, *supra* note 11, § 462, at 698-699. Unlike the situation at common law, a railroad does not have to attempt first to acquire property by gift or purchase before initiating condemnation proceedings. *See* N.C. GEN. STAT. § 40A-4 (1984) (providing that no prior offer to purchase is required); 2 WEBSTER, *supra* note 37, § 19-5; *cf.* Parker, *supra* note 31, at 297-98 (explaining the old common law requirement that the landowner first be given the opportunity to sell her property voluntarily). When a railroad builds its right of way in the absence of an express grant, sale, or condemnation proceeding, the landowner's acquiescence may ripen title in the corporation if he fails to seek compensation within any applicable statutory or charter limitations. *See* Barker v. Southern Ry., 137 N.C. 214, 222-23, 49 S.E. 115, 118 (1904); Parker, *supra* note 31, at 309-10, 313.

135. *See* N.C. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 471, 189 S.E.2d 272, 279 (1972) (citing Wallace v. Moore, 178 N.C. 114, 115, 100 S.E. 237, 238 (1919)); 74 C.J.S. *Railroads* § 75, at 453; Parker, *supra* note 31, at 297.

administered controls the type of interest acquired.[136] The language of the enabling legislation usually specifies the interest obtainable by each method, and where ambiguity exists, the courts must step in to interpret the statutory language.[137] The modern statutory provisions authorizing railroads to acquire property are contained in North Carolina General Statutes § 62-220.[138] The provisions contained in Chapter 40A of the General Statutes focus specifically on the procedures to be followed in condemnation actions.[139]

Section 62-220(3) states that "real estate received by voluntary grant shall be held and used *for the purposes of such grant only.*"[140] This language implies that a railroad may not acquire a fee simple interest in land obtained by voluntary grant.[141] Imposing such a restriction is clearly within the discretion of the General Assembly.[142]

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136. *See* 2 ELLIOTT & ELLIOTT, *supra* note 11, § 1222, at 760 (noting that "[a] railroad can not condemn a less interest in land taken than that required and prescribed by the legislature"); 2 WEBSTER, *supra* note 37, §§ 19-1, -4; Parker, *supra* note 31, at 298; Swarthout, supra note 46, at 320;.

137. *See* 1 REDFIELD, *supra* note 33, § 64, at 253 (concluding that any doubts of power of eminent domain should be resolved against the exercise of such power); 2 WEBSTER, *supra* note 37, § 19-1, at 804 ("Statutes which authorize the exercise of the power of eminent domain must be strictly construed.").

138. *See* N.C. GEN. STAT. § 62-220 (1989).

139. *See* N.C. GEN. STAT. §§ 40A-1 to -13 (1984) (containing general provisions for the exercise of eminent domain); *id.* §§ 40A-19 to -34 (pertaining specifically to private condemnors); *id.* §§ 40A-62 to -69 (addressing compensation issues in condemnation proceedings); *see also* 2 WEBSTER, *supra* note 37, §§ 19-5, -10 (elaborating on condemnation proceedings in North Carolina); Parker, *supra* note 31, *passim* (discussing the law of eminent domain in North Carolina).

140. N.C. GEN. STAT. § 62-220(3) (emphasis added).

141. *See* N.C. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 472, 189 S.E.2d 272, 279 (1972). Any restrictions on an interest acquired under § 62-220(3) should be defined in the grant itself. *See supra* notes 122-33 and accompanying text. In the absence of express conditions in the grant, it is unclear what interest a railroad could take under *Farm Equipment* as the court did not elaborate upon the point. *See Farm Equipment*, 281 N.C. at 472, 189 S.E.2d at 279.

142. *See supra* note 119 and accompanying text. Such a restrictive approach is not foreign to railroad law. In fact, it comports with one popular view that a railroad's right to acquire lands is implicitly, if not expressly, limited to the necessities of the railroad and may never be used for private purposes unless the grantor consents. *See* 2 ELLIOTT & ELLIOTT, *supra* note 11, § 1158, at 627-29; 1 REDFIELD, *supra* note 33, § 61, at 234 & n.4. The Nevada Supreme Court applied this doctrine in *City Motel, Inc. v. State*, 336 P.2d 375 (Nev. 1959):

> A railroad ordinarily does not hold in fee the land over which its right of way is constructed and maintained but merely an easement for such right of way whether such land is acquired by eminent domain or otherwise; that it might hold more than an easement is never presumed.

Id. at 377. *But see* McCotter v. Barnes, 247 N.C. 480, 486-88, 101 S.E.2d 330, 335-36 (1958) (casting as non-binding dictum the doctrine announced in *Shepard v. Suffolk &*

Section 62-220(4) allows a railroad "[t]o purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, the stations and other accommodations necessary to accomplish the object of its incorporation."[143] In *N.C. State Highway Commission v. Farm Equipment Co.*, the North Carolina Supreme Court construed § 62-220 as allowing railroads to hold property in fee if acquired by purchase under § 62-220(4).[144] When a railroad exercises its power of eminent domain under § 62-220(2),[145] however, it may acquire only an easement for railroad purposes, extinguishable should the railroad abandon the use.[146] This rule prevents the involuntary taking of private land for other than public purposes, which would be inimical to the principle that condemnation must only serve public ends.[147] The historical antecedent of this rule can be traced to *Blue v. Aberdeen & West End Railroad.*[148]

Carolina R.R., 140 N.C. 391, 393, 53 S.E. 137, 138 (1901), that railroads can acquire rights of way only in easement).

143. N.C. GEN. STAT. § 62-220(4).

144. *See Farm Equipment*, 281 N.C. at 472, 189 S.E.2d at 279.

145. *See* N.C. GEN. STAT. § 62-220(2) ("To Condemn Land under Eminent Domain.—To appropriate land and rights therein by condemnation, as provided in the Chapter Eminent Domain.").

146. *See Farm Equipment*, 281 N.C. at 472, 189 S.E.2d at 280; *see also* 1 WEBSTER, *supra* note 37, § 15-18 (noting that only an easement passes to a railroad condemning for right of way).

147. *See Farm Equipment*, 281 N.C. at 472, 189 S.E.2d at 280; Shields v. Norfolk & Carolina R.R., 129 N.C. 1, 7, 39 S.E. 582, 584 (1901); 2 WEBSTER, *supra* note 37, § 19-1(a); Parker, *supra* note 31, at 302; *see also* 1 REDFIELD, *supra* note 33, § 69, at 264 (stating that a railroad may take only an easement by condemnation, just as condemnation for roads and highways may be similarly limited). Although the judiciary will defer to the legislature in most cases as to what constitutes a "public purpose," the issue ultimately is one of law for the courts to decide. *See* 2 WEBSTER, *supra* note 37, § 19-1(a); *see also* Raleigh & Gaston R.R. v. Davis, 19 N.C. (2 Dev. & Bat.) 451, 469-70 (1837) (equating a railroad purpose with a public purpose).

148. 117 N.C. 644, 23 S.E. 275 (1895). The court in *Blue* held:

> The right of way of railway companies is, by judgment of condemnation made subject to occupation where and only where the corporation finds it necessary to take actual possession in furtherance of the ends for which the company was created. The damages are not assessed upon the idea of a proposed actual dominion, occupation, and perception of the profits of the whole right of way by the corporation; but the calculation is based upon the principle that possession and exclusive control will be asserted only over so much of the condemned territory as may be necessary for corporate purposes . . . .

Id. at 649, 23 S.E. at 276-77. Two years later in *Beach v. Wilmington & Weldon Railroad*, 120 N.C. 498, 26 S.E. 703 (1897), the North Carolina Supreme Court interpreted *Blue* to conclude that a railroad could acquire only an easement by condemnation. *See Beach*, 120 N.C. at 503, 26 S.E. at 704. A series of subsequent cases at the turn of the century affirmed the holdings in *Blue* and *Beach*. *See Shields*, 129 N.C. at 4-5, 39 S.E. at 583; Geer

The precedent established in *Blue* was codified in chapter 61, §§ 2566 and 2587 of North Carolina's Revised Statutes of 1905.[149] Section 2566 applied the provisions of chapter 61 "not inconsistent with their charters" to all existing railroad corporations.[150] Section 2587 stated that "all persons who have been made parties to the [condemnation] proceedings shall be divested and barred of all right, estate and interest *in such easement* in such real estate during the corporate existence of the company aforesaid."[151] This was not the first general statute addressing the powers of railroad corporations. In 1872, the General Assembly passed a general act under which railroads could incorporate, providing an alternative to the traditional method of drafting special charters for consideration by the legislature.[152] The statute included modified versions of many of the standard provisions found in earlier private charters.[153] Most importantly for present purposes, § 2587 of the 1905 Revisal contained the same language as the 1872 act, except that the phrase "in such easement" was absent from the 1872 version.[154]

Limiting railroads by allowing them to condemn only easements may undermine the broader public transportation purposes that railroad corridors could serve.[155] This criticism finds support in the fact that many of the railroad and canal company charters written throughout the nineteenth century in North Carolina authorized

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v. Durham Water Co., 127 N.C. 349, 354, 37 S.E. 474, 476 (1900); Lassiter v. Norfolk & Carolina R.R., 126 N.C. 509, 512, 36 S.E. 48, 49 (1900); Raleigh & Augusta Air-Line R.R. v. Sturgeon, 120 N.C. 225, 228-29, 26 S.E. 779, 780 (1897).

149. *See* Revisal of 1905 of North Carolina, ch. 61, § 2566 (1905); *id.* § 2587.

150. *Id.* § 2566 (1905). The North Carolina Supreme Court in 1919 noted that a charter may control when chapter 61 conflicts with the charter provisions as prescribed specifically in the *exception* to § 2566. *See* Wallace v. Moore, 178 N.C. 114, 116, 100 S.E. 237, 238 (1919).

151. Revisal of 1905 of North Carolina, ch. 61, § 2587 (emphasis added).

152. *See* An Act to Authorize the Formation of Railroad Companies and to Regulate the Same, Pub. L., ch. 138 (1872).

153. *Compare id.* §§ 13-16 (outlining the procedures to be used by railroads in condemning property), *with* An Act to Incorporate the Raleigh and Gaston Rail Road Company, Priv. L., ch. 25, §§ 12-16 (1835) (outlining the procedures to be used by the Raleigh & Gaston Railroad in condemning property).

154. *Compare* An Act to Authorize the Formation of Railroad Companies and to Regulate the Same, Pub. L., ch. 138, § 16 ("[A]ll persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such real estate during the corporate existence of the company as aforesaid."), *with* Revisal of 1905 of North Carolina, ch. 61, § 2587 ("[A]ll persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the company aforesaid.").

155. *See supra* text accompanying note 8 (listing other transportation uses to which railroad rights of way could be dedicated).

these corporations to condemn land in fee.[156] Further, the absence of restrictive language in the 1872 general incorporation act indicates that even into the late nineteenth century, the legislature felt no need to constrain the condemnation powers of railroads.[157] As reflected in cases of the time, courts believed that railroad rights of way served transportation needs that were subject to evolution and change.[158] By establishing railroad corridors in perpetuity, the legislature fostered economic and social growth throughout the state.[159] The

156. *See* An Act to Incorporate the Raleigh and Columbia Rail Road Company, Pub. L., ch. 40, § 18 (1836) (providing that upon proper condemnation of land by the railroad, title "shall be vested in the Raleigh and Columbia Rail Road Company, and they shall be adjudged to hold the same in fee simple, in the same manner as if the proprietor had sold and conveyed it to them"); An Act to Incorporate the Raleigh and Gaston Rail Road Company, Priv. L., ch. 25, art. 16 (using the same language as the Raleigh and Columbia charter); *see also supra* note 48 (discussing the construction of language in the Wilmington & Weldon charter). For charters containing language similar to that in the Wilmington & Weldon charter, see An Act to Incorporate the Greensville and Roanoke Rail Road Company, Priv. L., ch. 74, art. 7 (1833), and An Act to Incorporate the Petersburg Rail Road Company, Priv. L., ch. 56, art. 3 (1830). *See also* State v. Rives, 27 N.C. (5 Ired.) 297, 304 (1844) ("Most of the railroad charters in this State give an estate in the land in fee."); Raleigh & Gaston R.R. v. Davis, 19 N.C. (2 Dev. & Bat.) 452, 467 (1837) (noting that the legislature can authorize the condemnation of a right of way in fee simple).

157. *See* An Act to Authorize the Formation of Railroad Companies and to Regulate the Same, Pub. L., ch. 138, § 15.

158. *See infra* notes 282-84, 326-28 and accompanying text; *see also* 1 REDFIELD, *supra* note 33, § 69, at 271 (explaining that some states allowed railroads to condemn rights of way in fee simple).

159. *See infra* note 326 and accompanying text; *see also* BROWN, *supra* note 29, at 5-14 (discussing the poor economic conditions in North Carolina during the early 1800s, which necessitated state-sponsored internal improvements, including the incorporation of canal and railroad companies); CHARLES *Kernan,* Rails to Weeds: Searching OUT *the* Ghost Railroads AROUND WILMINGTON 4 (1988); POWELL, *supra* note 24, at 288 (noting Governor Morehead's recommendation in 1842 to the legislature that it should build a network of railroads throughout the state to win North Carolina's economic independence from its northern and southern neighbors). *See generally* KEELER, *supra* note 4, at 21 ("American railroads received much aid in the form of land grants, and such grants, worth considerable sums of money, were made throughout the country."). The most visible and enduring commitment made by the state to railroad development occurred in 1849 when the North Carolina Railroad was chartered. *See* CHARLES *Kernan,* Rails to Weeds: Searching OUT *the* Ghost Railroads AROUND WILMINGTON 4 (1988); POWELL, *supra* note 24, at 288. The state subscribed to $2 million of the $3 million in capital necessary to build the railroad from Charlotte to Goldsboro through Raleigh. *See id.* The state still owns three-fourths of the stock in the North Carolina Railroad, which has leased its right of way to a private railroad since 1895. *See* Steve Adams, *North Carolina's Railroads: Which Track for the Future?*, NORTH CAROLINA INSIGHTS, June 1983, at 3, 3 (discussing the history and possible future of the North Carolina Railroad). *See generally* ALLEN W. TRELEASE, THE NORTH CAROLINA RAILROAD, 1849-1871 *passim* (1991) (providing a comprehensive history of the formation and early years of the North Carolina Railroad); Dudley Price, *Ruling on NCRR Lease Could Prove Costly*, NEWS AND OBSERVER (Raleigh, N.C.), July 31, 1996, at D1 (providing background on the North Carolina

disfavor into which railroads fell at the turn of the century may partly explain the new-found reluctance among the courts and the legislature to read into railroads' powers the ability to condemn in fee simple.[160]

By virtue of North Carolina General Statutes § 62-220 and modern case law, a railroad today cannot acquire more than an easement through condemnation, regardless of less restrictive language in any predecessor corporation's original charter.[161] If a railroad acquired property prior to the formulation of the contemporary rule in *Blue v. Aberdeen & West End Railroad*,[162] the charter should control the type of property interest acquired. Today, therefore, the successor of such a railroad may hold property in fee that was originally acquired by eminent domain. Presumably, a modern court addressing an appropriate case would recognize the validity of a fee simple title acquired in this way. Where a railroad acquired a less than fee simple interest, however, the court may have to delve into the law of abandonment to determine whether or not the right of way still exists.

V. ABANDONMENT

A. Elements of Abandonment

Over the years, courts have muddied the waters of railroad abandonment law in North Carolina.[163] The issue of abandonment arises with regard only to railroad rights of way held in easement or

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Railroad and its lease to the Norfolk Southern Corporation).

160. By the late 1800s, the railroad industry had fallen into ill repute for a variety of reasons, especially among farmers, merchants, and industrialists. *See* HOOGENBOOM & HOOGENBOOM, *supra* note 61, at 1-13, 39-46 (discussing how the Progressive Movement encouraged a negative public attitude towards railroads); *see also* ALBRO MARTIN, RAILROADS TRIUMPHANT: THE GROWTH, REJECTION, AND REBIRTH OF A VITAL AMERICAN FORCE 348-51 (1992) (discussing origins and effect of the Progressive Party on regulation of railroads at the turn of the century); DAVID MOUNTFIELD, THE RAILWAY BARONS 107-217 (1979) (providing a historical and biographical perspective on American railroad monopolies and their negative public image); *supra* note 61 and accompanying text (discussing the history of the ICC's regulation of railroads).

161. Thus, although the Wilmington & Weldon Railroad eventually became CSX railroad over 100 years of corporate mergers and acquisitions, *see supra* note 36 and accompanying text, CSX may condemn land only in easement pursuant to North Carolina General Statutes § 62-220 and contemporary common law.

162. 117 N.C. 644, 649, 23 S.E. 275, 276-77 (1895).

163. Webster best captures the essence of this confusion: "Abandonment of an easement serving as a right-of-way for a railroad can cause an academic headache." 1 WEBSTER, *supra* note 37, § 15-29, at 644.

qualified fee.[164] Corridors held in fee simple without qualification cannot be abandoned, even if dedicated to a nonrailroad use.[165] Thus, a court may avoid the abandonment issue altogether by finding that a railroad originally acquired a fee simple interest in the right of way.[166] When a determination of the matter cannot be avoided, the court must conduct a fact-specific analysis, applying the state's general law of abandonment to the circumstances of each particular case.[167] If the facts satisfy the elements of abandonment, the right of way will be extinguished and a court may have to decide who is entitled to any reversionary or other interests attached to the former railroad property.[168]

An abandonment may arise either by operation of state common law or statute,[169] or through the activation of termination clauses in individual property agreements between the railroad and landowners.[170] In North Carolina, an abandonment may be presumed by statute after seven years,[171] but where an agreement provides for termination of an easement or a reversion of interest, the instrument's terms should control the fate of the right of way.[172]

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164. *See* 74 C.J.S. *Railroads* § 117 (1951).

165. *See id.* Even if a railroad acquired a fee simple interest in a corridor through condemnation, the right of way may still be conveyed for nonrailroad purposes. *See id.*

166. When the issue of abandonment arises, the courts often comment on the matter incompletely. *See infra* notes 205-23 and accompanying text (discussing the unclear case law concerning the law of abandonment in North Carolina).

167. *See infra* note 182 and accompanying text (discussing the fact-specific analysis used by the courts).

168. *See* Preseault v. ICC, 494 U.S. 1, 8 (1990) (holding that disposition of reversionary interests is controlled by state property law); Pollnow v. State Dep't of Natural Resources, 276 N.W.2d 738, 744 (Wis. 1979) (noting the common law rule that easements extinguish upon abandonment); Swarthout, *supra* note 46, at 307. Generally, reversionary interests associated with a qualified fee will revert to the grantor or his successors in interest. *See infra* notes 254-57 and accompanying text (discussing reversionary interests in general). Addressing the disposition of interests upon abandonment of easements is beyond the scope of this Comment. For a comprehensive treatment of both of these issues, see generally Swarthout, *supra* note 46, *passim*. For a detailed and interesting account of the disposition of reversionary interests in the context of federal land grants, see Sharon J. Bell, Note, *Osages, Iron Horses and Reversionary Interests: The Impact of* United States v. Atterbury *on Railroad Abandonments*, 20 TULSA L.J. 255 (1984); *see also* Swarthout, *supra* note 46, at 315 (discussing reversion of right of way interests acquired by federal land grants). In North Carolina, General Statutes § 1-44.2 partially addresses this issue by presuming ownership of abandoned railroad easements in adjacent property owners. *See* N.C. GEN. STAT. § 1-44.2 (1996).

169. *See* Wild, *supra* note 2, at 11.

170. *See* Swarthout, *supra* note 46, at 298.

171. *See* N.C. GEN. STAT. § 1-44.1 (1996).

172. *See* Swarthout, *supra* note 46, at 298; *supra* notes 125-33 and accompanying text (discussing limitations on property acquired by railroads).

In the absence of clear provisions in the original conveyance, a court will have to intervene to construe the instrument. Similarly, corridors acquired by condemnation in less than fee simple interest will be controlled by limitations in the charter or statute under which the eminent domain proceedings took place.[173] Again, ambiguity in the legislative language will require a court to decide whether the conditions of the enabling legislation have been breached.

The law of abandonment in North Carolina conforms generally with the common law principles of other states.[174] The North Carolina Supreme Court addressed the doctrine most precisely with regard to railroads in *Raleigh, Charlotte & Southern Railway v. McGuire*.[175] The court held that to prove that a right of way has been abandoned, a claimant bears the burden[176] of showing that (1) the railroad harbored an intent to abandon; and (2) the railroad manifested that intent through outward acts inconsistent with any claim of title.[177] The intention must exist concurrently with actual relinquishment of the property, and the external acts must be positive and unequivocal.[178] The facts must be strong and convincing to establish abandonment.[179] Because claimants can seldom prove an intent to abandon, the outcome of most cases may necessarily depend largely upon the railroad's outward acts with regard to the right of way.[180] No single factor, though, can conclusively establish

173. *See supra* notes 144 and accompanying text.

174. *See generally* 1 WEBSTER, *supra* note 37, § 15-29 (discussing the general law of abandonment in North Carolina); Connelly, *supra* note 69, at 470-99 (providing general background on the law of abandonment in the railroad context).

175. 171 N.C. 277, 88 S.E. 337 (1916). In *McGuire*, the defendant landowner constructed a fence across plaintiff railroad's right of way, claiming that the railroad had permanently abandoned the right of way when it redirected its main line 300 or 400 feet north of defendant's property to connect with a passenger station in Fuquay Springs. *See id.* at 279-80, 88 S.E. at 338. Despite the relocation of its main line, the railroad continued to use the original right of way as a spur track for handling cars and freight. *See id.* at 279, 88 S.E. at 338. The North Carolina Supreme Court held that the relocation did not affect an abandonment. *See id.* at 281-82, 88 S.E. at 339-40.

176. *See id.* at 281, 88 S.E. at 339; 1 WEBSTER, *supra* note 37, § 15-29, at 644.

177. *See McGuire*, 171 N.C. at 281, 88 S.E. at 339; Allen v. Martin Marietta Corp., 26 N.C. App. 700, 706, 217 S.E.2d 112, 116 (1975); 1 WEBSTER, *supra* note 37, § 15-29, at 643; *see also* 2 ELLIOTT & ELLIOTT, *supra* note 11, § 1142, at 603 (stating that abandonment "is largely a question of intent"); Connelly, *supra* note 69, at 470-99 (summarizing the law of abandonment with regard to railroads).

178. *See McGuire*, 171 N.C. at 281, 88 S.E. at 339; 1 WEBSTER, *supra* note 37, § 15-29, at 643.

179. *See* 74 C.J.S. *Railroads* § 117, at 542 (1951).

180. *See* 1 WEBSTER, *supra* note 37, § 15-29; Connelly, *supra* note 69, at 470.

that an abandonment has occurred.[181] The question of abandonment must be considered in light of the circumstances of individual cases.[182] Also, non-user or the mere lapse of time will not be enough to constitute an abandonment without further acts suggesting an intent to abandon.[183]

B. Factors Suggesting Abandonment

1. General Considerations

Courts have identified a variety of factors evidencing an intent to abandon.[184] Especially important in North Carolina is the statutory presumption of abandonment embodied in North Carolina General Statutes § 1-44.1.[185] If a railroad does not use a right of way

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181. *See* Connelly, *supra* note 69, at 470.

182. *See* Carolina Tenn. Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 680, 96 S.E. 99, 104 (1918); Faw v. Whittington, 72 N.C. 321, 324 (1875) (noting that the definition of abandonment is a question of law, but the factual determination is to be made by the jury); *see also* 2 ELLIOTT & ELLIOTT, *supra* note 11, § 1142, at 603 ("No general rule of law, applicable to all cases, can be laid down as to what constitutes abandonment ... but the question whether abandonment exists in a given case must be determined by the particular circumstances of that case."); 1 WEBSTER, *supra* note 37, § 15-29, at 644 ("[T]he intention to abandon may be proved by an infinite variety of acts and is a question for the jury to determine."); 74 C.J.S. *Railroads* § 117 (noting that the issue of abandonment is generally a question of fact); Connelly, *supra* note 69, at 470 ("[T]he issue in most cases is reduced to the question of what factors or circumstances are sufficient to justify an inference that there existed an intent to abandon.").

183. *See Carolina Tennessee Power Co.*, 175 N.C. at 680, 96 S.E. at 104; *McGuire*, 171 N.C. at 281, 88 S.E. at 339; 1 WEBSTER, *supra* note 37, § 15-29; *see also Faw*, 72 N.C. at 324 ("The mere lapse of time or other delay in asserting his claim, unaccompanied by acts inconsistent with his rights, will not amount to a waiver or abandonment."); 2 ELLIOTT & ELLIOTT, *supra* note 11, § 1142, at 603 ("[M]ere nonuser does not of itself constitute an abandonment where there is no intent to abandon."); 74 C.J.S. *Railroads* § 117 (discussing the general law of abandonment); Connelly, *supra* note 69, at 470 (noting that "mere nonuser is not sufficient to constitute abandonment of a right of way"). Non-user, however, may constitute abandonment in some cases:

> As a practical matter, however, this rule [that non-user does not cause abandonment] has a somewhat limited application, since the evidence in most cases is not confined to the mere fact of nonuser and it has been held that an abandonment exists where the inference arising from proof of nonuser is reinforced by various other circumstances.

Connelly, *supra* note 69, at 470.

184. *See generally* Connelly, *supra* note 69, at 470 (listing briefly general circumstances suggesting an intent to abandon).

185. *See* N.C. GEN. STAT. § 1-44.1 (1996). Section 1-44.1 reads:

> Any railroad which has removed its tracks from a right-of-way and has not replaced them in whole or in part within a period of seven (7) years after such removal and which has not made any railroad use of any part of such right-of-way after such removal of tracks for a period of seven (7) years after such removal,

for railroad purposes for seven years after removing its tracks from the corridor, § 1-44.1 imposes a statutory presumption that the right of way has been abandoned.[186] The North Carolina Supreme Court, however, has held that the statute applies only to rights of way held in easement.[187] It is important to reiterate that the statute raises only a *presumption* of abandonment, leaving open the possibility that a railroad or assignee thereof may rebut the presumption with evidence of an intent to preserve.[188]

Application to the STB for permission to abandon a corridor may support a finding of an intent to abandon, but regulatory abandonment alone should not trigger the dissolution of a right of way.[189] Other factors pertinent to a court's analysis of an abandonment claim include the adverse possession by owners of property adjacent to a right of way.[190] Adverse possession in North Carolina could not lead to any acquisition of title, but it might suggest intent on the part of a railroad to relinquish control of the corridor.[191] Statements made by railroad officials indicating an intent

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shall be presumed to have abandoned the railroad right-of-way.

Id.

186. *See id.*

187. *See* McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 612, 374 S.E.2d 265, 267 (1988). Whether § 1-44.1 applies also to rights of way held in qualified fee remains unclear because no case has raised the issue and the *McLaurin* court did not address the matter. *See id.* at 612-13, 374 S.E.2d at 267. Contemporary courts in North Carolina tend to discuss railroad right of way property interests in terms of "fee" interests and "easements," without distinguishing between fee simple absolute and lesser fee estates. *See id.*; N.C. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 472, 189 S.E.2d 272, 279-80 (1972). This ambiguity contributes to the uncertainty surrounding the scope of § 1-44.1.

188. *See McLaurin*, 323 N.C. at 612, 374 S.E.2d at 267.

189. *See supra* notes 69-74 and accompanying text; *see also* Lacy v. East Broad Top R.R. & Coal Co., 77 A.2d 706, 710 (Pa. Super. Ct. 1951) (holding that the removal of tracks and the acquisition of an abandonment certificate from a regulatory board did not give rise to abandonment); 74 C.J.S. *Railroads* § 117, at 542 (1951) (stating that abandonment does not occur merely because of nonuse; actual abandonment is necessary); Connelly, *supra* note 69, at 470. *But see* Stahl, *supra* note 65, at 886 n.136 (noting that the need for 16 U.S.C. § 1247(d) arose because some states provided for the automatic termination of railroad easements on discontinuance of service); Connelly, *supra* note 69, at 470 (suggesting that non-user coupled with an application to a regulatory agency may trigger an abandonment); *cf.* Fritsch v. ICC, 59 F.3d 248, 253 (D.C. Cir. 1995) (finding that, based on the actions and letters of the railroad, the easement terminated at the expiration of the 180-day waiting period prescribed by 49 U.S.C. § 10906), *cert. denied*, 116 S. Ct. 1262 (1996).

190. *See* Connelly, *supra* note 69, at 470.

191. *See id.* Adverse possession may be of relatively little importance in North Carolina due to the statutory treatment of the matter in North Carolina General Statutes § 1-44. *See* N.C. GEN. STAT. § 1-44 (1996); *supra* note 45 (noting prohibition on adverse possession of railroad rights of way in North Carolina). Also, the North Carolina Supreme

to abandon will also support a claimant's argument.[192] Other acts by a railroad, such as the acquisition or use of alternate routes[193] and the use of rights of way for nonrailroad purposes, also might imply an intent to abandon.[194]

2. Lease or Sale of Right of Way

Courts generally have refused to find an abandonment when a railroad leased or sold a right of way for uses not inconsistent with railroad purposes.[195] In a North Carolina case, *Allen v. Martin Marietta Corp.*,[196] a railroad leased a spur track to a private company on condition that the lease would terminate if the railroad needed the land for railroad use.[197] The lessee, a mining company, used the

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Court has held that railroad easements may be utilized by underlying fee owners to such an extent as the right of way is not needed for railroad purposes: " 'A permissive use of a right of way by another, when no present inconvenience results to the company, is not a surrender of rights of property, and, indeed, to expel an occupant under such circumstances would be a needless and uncalled for injury.' " Raleigh, Charlotte & S. Ry. v. McGuire, 171 N.C. 277, 282, 88 S.E. 337, 340 (1916) (quoting Carolina Cent. R.R. v. McCaskill, 94 N.C. 746, 754 (1886)); *see also* Raleigh & Augusta Air Line R.R. v. Sturgeon, 120 N.C. 225, 228-29, 26 S.E. 779, 780 (1897) (noting that adjacent landowners may use rights of way to such an extent as not to interfere with their use for railroad purposes); 74 C.J.S. *Railroads* § 117 (stating that a right of way used for purposes not inconsistent with railroad purposes is not abandoned).

192. *See* Connelly, *supra* note 69, at 470. A court, however, may not weigh official statements suggesting an intent to *preserve* a right of way as it would statements indicating an intent to abandon. *See id.* Thus, the measure of intent in abandonment cases tends to be objective in nature. *See* Wild, *supra* note 2, at 11.

193. *See* Connelly, *supra* note 69, at 470. The conversion of a track from a main line to a spur, however, will not trigger an abandonment. *See McGuire*, 171 N.C. at 281-82, 88 S.E. at 339-40.

194. *See* Connelly, *supra* note 69, at 470. Conversely, a railroad may allow its right of way to be occupied and used by others to facilitate the railroad's business. *See McGuire*, 171 N.C. at 282, 88 S.E. at 340 ("[A] railroad company may permit its customers to erect elevators, corncribs, etc., which facilitate its business."). Also, in *McGuire* the Supreme Court noted:

> It is well settled that a railroad company does not abandon the land on which it has constructed its tracks so as to entitle the owner to revoke its license by ceasing to operate freight or passenger trains over it, where it continues to use it for purposes incident to and connected with its business in operating the road.

Id. at 281-82, 88 S.E. at 339. Although the court decided *McGuire* prior to the Transportation Act of 1920, ch. 91, Pub. L. No. 91-152, 41 Stat. 456 (1920) (codified as amended in scattered sections of 49 U.S.C.), which granted the ICC exclusive jurisdiction over railroad abandonments, *see* Wild, *supra* note 2, at 4-5, the quoted excerpt suggests that discontinuance of service (pursuant to a regulatory abandonment order) will not automatically trigger an abandonment under state law. *See McGuire*, 171 N.C. at 281-82, 88 S.E. at 339.

195. *See* Connelly, *supra* note 69, at 498.

196. 26 N.C. App. 700, 217 S.E.2d 112 (1975).

197. *See id.* at 703, 217 S.E.2d at 114.

track to transfer ore from its mine to a distribution point connecting with the railroad.[198] Although the North Carolina Court of Appeals recognized that the lessee's use of the land served a purely private purpose, the court nonetheless refused to find that the easement had been abandoned because the lease reserved the railroad's right to retake the right of way if necessary for future railroad use and "[t]he use of the right-of-way [was] a legitimate use of railroad property for railroad purposes."[199] On the other hand, if the railroad had attempted to convey or sell a fee simple interest in the right of way where it held only an easement, this action might have demonstrated an intent to relinquish control of the corridor for railroad purposes permanently,[200] in which case the easement would likely have terminated unless sold in anticipation of further railroad use.[201]

3. Removal of Tracks

The removal of tracks represents one of the most visible acts suggesting an intent on the part of a railroad to abandon a right of way. Coupled with nonuse for railroad purposes over a period of time, such removal will likely result in abandonment.[202] Taking up tracks from a corridor, however, should not result in an immediate termination of the right of way.[203] In North Carolina, § 1-44.1 of the General Statutes supports this conclusion by incorporating the

198. *See id.* at 702, 217 S.E.2d at 114. Private industries that utilize railroad equipment do not fall within the scope of federal STB jurisdiction and are not considered quasi-public corporations under state common law. *See* Montange, *supra* note 3, at 156.

199. *Allen*, 26 N.C. App. at 706, 217 S.E.2d at 116. The railroad originally had acquired the land by condemnation, which implicitly limited the use of the land to public purposes. *See id.* at 705, 217 S.E.2d at 116; *see also supra* notes 140-48 and accompanying text (discussing limitations imposed on property acquired through condemnation). *Allen* introduces the notion that railroad easements may exist indefinitely so long as they are used for railroad purposes.

200. *See* Connelly, *supra* note 69, at 499 (citing Barton v. Jarvis, 291 S.W. 38 (Ky. 1927)).

201. *See id.*; 74 C.J.S. *Railroads* § 117 (1951); *see also* 1 REDFIELD, *supra* note 33, § 61, at 236 (noting that abandonment may not occur on the sale of a right of way for future railroad use). In *City Motel, Inc. v. State*, 336 P.2d 375 (Nev. 1959), the Nevada Supreme Court held that an easement had terminated when a railroad attempted to convey it to the State Department of Highways, which intended to use the right of way for a road. *See id.* at 378-79. Despite so holding, the court suggested that the state might have preserved the easement had it intended "to use the property for railroad purposes." *Id.* at 378; *cf.* Faus v. City of Los Angeles, 431 P.2d 849, 854, 858 (Cal. 1967) (holding that substitution of bus service for rail service over easements acquired for railroad purposes does not constitute an abandonment).

202. *See* Connelly, *supra* note 69, at 470.

203. *See id. But see* Wild, *supra* note 2, at 11 (suggesting that removal of tracks will trigger a reversion of interest).

element of time (seven years) into the formula for presuming abandonment after tracks are removed from a right of way.[204] Despite this apparently sound analysis, case law in North Carolina implies that an abandonment may occur immediately upon the removal of tracks from a corridor.

In 1958, the North Carolina Supreme Court stated in *McCotter v. Barnes*[205] that a railroad company's easement terminated "when its tracks were removed and the railroad was *abandoned.*"[206] Unfortunately, the court failed to clarify the definition of abandonment beyond this ambiguous declaration.[207] The oversight bore no consequence in the case, however, since abandonment was not at issue.[208] Instead, the question presented to the court involved only the interpretation of the original deed to a railroad and whether that instrument conveyed an easement or fee simple interest to the corporation.[209] Neither party[210] disputed the fact that the right of way had been abandoned in 1952 when the railroad removed its tracks and stopped using the corridor for railroad purposes.[211] Thus, on these limited facts, the court's definition of abandonment sufficed.

In 1986, the North Carolina Court of Appeals revived and distorted the *McCotter* characterization of abandonment in *International Paper Co. v. Hufham.*[212] Once again, neither party in the case contested the issue of abandonment, and the court of appeals needed to decide only whether the original conveyance to the predecessor railroad passed an easement or fee simple interest in the right of way in question.[213] Citing *McCotter*, the court of appeals stated that if only an easement existed in the corridor, it "ceased and terminated when its tracks were removed and the railroad was

204. *See* N.C. GEN. STAT. § 1-44.1 (1996).

205. 247 N.C. 480, 101 S.E.2d 330 (1958).

206. *Id.* at 484, 101 S.E.2d at 333 (emphasis added).

207. *See id.* The ambiguity stems from the court's noting that the track removal and abandonment coincided without stating whether the latter depended on the former. *See id.*

208. *See id.*

209. *See id.*

210. The plaintiffs in the suit argued that they owned the fee simple interest in the strip of land as successors in interest to the original corporation. *See id.* at 481, 101 S.E.2d at 331. The defendants in the suit claimed to own the right of way as successors in interest to the grantors who allegedly owned the fee simple interest to the land underlying the abandoned railroad easement. *See id.* at 484, 101 S.E.2d at 333.

211. *See id.* at 483, 101 S.E.2d at 331. Both parties agreed "[t]hat on or about the 31st day of December, 1952, the railroad ... was abandoned by the railroad company and the tracks removed, and it is no longer being used for railroad purposes." *Id.*

212. 81 N.C. App. 606, 345 S.E.2d 231 (1986).

213. *See id.* at 609, 345 S.E.2d at 233.

abandoned."[214] The court of appeals subsequently held that the easement terminated and that the extinct right of way belonged to International Paper Co., the successor in interest to the original underlying fee owners.[215] Had the court of appeals stopped here, it would not have upset the limited effect of *McCotter*.[216] In the last paragraph of its opinion, however, the court noted that "the estate of [the railroad] ceased and terminated when it ceased rail traffic and removed its tracks."[217] Despite being couched in obiter dicta,[218] this statement might further confuse the law of abandonment among unwary readers by reducing the proper circumstantial analysis to an oversimplified inquiry as to when a railroad removed its tracks from a right of way.

Misstatements as to the law of abandonment have not been confined to North Carolina state courts. In *Love v. United States*,[219] the United States District Court for the Eastern District of North Carolina ventured to define abandonment as occurring "[u]pon abandonment of railroad service."[220] As in *McCotter* and *Hufham*, neither party in *Love* apparently contested the issue of abandonment.[221] Among other issues, the complex facts of the case raised a question as to whether the original railroad had obtained an easement or fee simple interest in the contested right of way.[222] As in

214. *Id.* (citing *McCotter*, 247 N.C. at 484, 101 S.E.2d at 333).

215. *See id.* at 611, 345 S.E.2d at 234.

216. That is, the facts of the case did not require the court to elaborate any further on the law of abandonment. The court could have resolved the dispute with no more than a cursory treatment of abandonment, thereby avoiding potential confusion by delving further into this relatively complex doctrine.

217. *Id.*

218. Since neither party contested the issue, *see id.* at 609, 345 S.E.2d at 233, the court of appeals had no need to comment beyond stating that the corridor had been "abandoned," as the North Carolina Supreme Court had done in *McCotter*, *see McCotter*, 247 N.C. at 484, 101 S.E.2d at 333.

219. 889 F. Supp. 1548 (E.D.N.C. 1994).

220. *Id.* at 1581. In its explication of the facts, the district court noted that the railroad had removed its tracks from the right of way after abandoning service on the corridor pursuant to an ICC order. *See id.* at 1550-51. When it found that the railroad had held only an easement, however, the district court characterized abandonment as dependent on "abandonment of railroad service," without reference to the removal of tracks. *See id.* at 1581. If the opinion is read literally, the district court would find an abandonment even before the tracks were removed from a right of way. *See id.* More likely, though, this oversight simply reflected the inattention paid to the specifics of the issue by the district court and the parties in the case.

221. *See id.* at 1550-51, 1581. The issue of abandonment did arise in the case with regard to the type of interest acquired by the railroad. *See id.* at 1573-74.

222. *See id.* at 1581. Generally, the case involved a state condemnation action by the North Carolina Department of Transportation over an abandoned railroad right of way

McCotter and *Hufham*, the district court in *Love* only needed to address abandonment in a most cursory fashion because this issue bore no relation to the holding.[223]

These three cases demonstrate the potential for confusion in the law of abandonment. Abandonment may occur where no interested parties with standing contest the matter. Also, the circumstances in these cases established without doubt that the railroads had no plans to preserve the corridors for future railroad use.[224] The unclear definitions of abandonment applied in each case were sufficient for the limited fact situations presented. The North Carolina Supreme Court, however, has not overturned the more complete definition of abandonment provided in *McGuire*, which requires an intent to abandon and outward manifestations of this intent as demonstrated by external acts inconsistent with any claim of ownership.[225] The removal of tracks and the discontinuance of rail service may support an abandonment determination, but these factors alone should not trigger an abandonment because the requisite intent to abandon may be lacking. To hold otherwise would oversimplify the rule in *McGuire*, which comports with general principles of abandonment law elsewhere.

VI. REVERSIONARY INTERESTS AND THE "PUBLIC HIGHWAY" DOCTRINE

In its efforts to preserve railroad corridors that have not yet been abandoned, the state may have the authority to alter or destroy reversionary interests in qualified fee estates without compensating the holder of such expectancies.[226] The legislature may also have the power to change the use of railroad easements without paying

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bordering Pope Air Force Base in Cumberland County. *See id.* at 1550-53. Adjacent landowners contested the federal government's ownership of the extinct right of way. *See id.*

223. *Compare id.* at 1581 (stating that the easement terminated "[u]pon abandonment of railroad service"), *with* McCotter v. Barnes, 247 N.C. 480, 484, 101 S.E.2d 330, 333 (1958) (stating that the easement terminated "when its tracks were removed and the railroad was abandoned"), *and* International Paper Co. v. Hufham, 81 N.C. App. 606, 609, 345 S.E.2d 231, 233 (1986) (stating that the easement "ceased and terminated when its tracks were removed and the railroad was abandoned").

224. *See Love*, 889 F. Supp. at 1581; *McCotter*, 247 N.C. at 483-84, 101 S.E.2d at 333; *Hufham*, 81 N.C. App. at 609, 345 S.E.2d at 233. The factual patterns in these cases underscore another obvious point: the combination of factors inferring an intent to abandon may be so compelling as to obviate the need to address the issue except in passing.

225. *See supra* notes 174-83 and accompanying text.

226. *See infra* notes 248-58 and accompanying text.

underlying fee owners for the conversion pursuant to a condemnation action.[227] North Carolina is one of a handful of states that has adopted the "public highway" doctrine, which allows the state to alter quasi-public easements on the theory that they were established to serve broader public transportation purposes beyond those anticipated at the time of acquisition.[228] As long as the public places no greater burden on the easements than previously imposed by the railroad use, the state need not compensate landowners for the change.[229] The "public highway" doctrine in North Carolina appears to have emerged at the turn of the century from principles relating to the destructibility of reversionary interests. This Part will focus on the historical development and practical implications of both the destructibility of reversionary interests and the "public highway" doctrine.

The "public highway" doctrine in the context presented here should not be confused with the separate but closely related question of whether a railroad may unilaterally sanction the use of its right of way for nonrailroad purposes without abandoning the corridor.[230] Depending on the jurisdiction's flexibility, a court could find that a railroad may lease its right of way for nonrailroad purposes without affecting the termination of an easement, but still hold that underlying fee owners are entitled to compensation for the additional burden imposed by the new use.[231] Under the "public highway" doctrine, the change in use would not trigger a valid takings claim because the state initiated the conversion to further future transportation purposes.[232] Whether a railroad may alter the use of its easements depends upon common law determinations as to what properly constitutes a "railroad purpose."[233] The objective of

227. *See infra* notes 259-68 and accompanying text.

228. *See* Montange, *supra* note 3, at 163-65; *infra* notes 269-317 and accompanying text.

229. *See infra* notes 266-67 and accompanying text.

230. *See* Montange, *supra* note 3, at 163-64.

231. *See* Buhl v. U.S. Sprint Communications Co., 840 S.W.2d 904, 912-13 (Tenn. 1992); Kristi Robbins Rezabek, Note, *Property Law*—Buhl v. U.S. Sprint Communications Co.*: Ascertaining the Rights of Fee Owners on Whose Land a Railroad Easement Exists*, 22 MEM. ST. U. L. REV. 843, 850-53 (1992); *see also* Query v. Postal Tel.-Cable Co., 178 N.C. 639, 640-41, 101 S.E. 390, 391 (1919) (holding that underlying fee owners are entitled to compensation when a railroad allows telegraph use of a railroad easement). *But see* Rezabek, *supra*, at 852-53 (criticizing the holding in *Buhl*).

232. *See infra* notes 326-31 and accompanying text.

233. A railroad acting on its own will be limited to using its right of way for only those purposes identified in the instrument or statute under which the corridor was acquired. *See supra* notes 125-33 and accompanying text. Although the scope of a railroad right of way is often limited to "railroad purposes," this term has been subject to varying judicial

the following discussion, however, is not to focus on the *scope* of railroad rights of way as defined by North Carolina statutory and case law.[234] Rather, this part will examine the ability of the legislature to *modify the scope* of railroad rights of way without compensating affected property owners.

A. Background

1. Quasi-public Corporations

It is important to note at the outset that railroads, canal companies, and similar corporations serving important public functions are often referred to as "quasi-public" entities.[235] This terminology does not relate to the legal structure of the company.[236] Except for the unique public benefits they provide, quasi-public corporations usually have been organized and incorporated as purely private enterprises.[237] Quasi-public corporations are not public

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constructions over time. *See* Rezabek, *supra* note 231, at 845-48. The North Carolina Supreme Court has adopted an "incidental use" standard to define "railroad purposes." *See* Raleigh, Charlotte & S. Ry. v. McGuire, 171 N.C. 277, 282-83, 88 S.E. 337, 339-40 (1916); *supra* note 194 and accompanying text (discussing and quoting *McGuire*); *see also* Wallace v. Moore, 178 N.C. 114, 116, 100 S.E. 237, 238 (1919) (noting that the purposes of constructing and operating a railroad are "restricted usually to a proper right of way and the necessary terminal facilities"). *See generally* 74 C.J.S. *Railroads* § 73, at 450-51 (1951) (discussing a railroad company's "power to acquire, hold, and use necessary real estate for the construction, maintenance, and operation of its road"); Rezabek, *supra* note 231, at 851-53 (discussing Tennessee's adoption of the "incidental use" doctrine). Also, the North Carolina legislature indirectly has defined the scope of railroad purposes in North Carolina General Statutes § 62-220, which categorizes the various powers granted to railroad corporations. *See* N.C. GEN. STAT. § 62-220 (1986).

234. For a general discussion of the scope of easements in North Carolina, see 1 WEBSTER, *supra* note 37, §§ 15-21, 15-23, and 7 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 60.04 (David A. Thomas ed., 1994) (outlining principles related to scope of easements in general). *See also* Swaim v. Simpson, 120 N.C. App. 863, 864-65, 463 S.E.2d 785, 786-87 (1995) (discussing the general law in North Carolina as to the scope of easements), *aff'd mem.*, 343 N.C. 298, 469 S.E.2d 553 (1996).

235. *See, e.g.*, State v. J.C. Penney Co., 292 N.C. 311, 326, 233 S.E.2d 895, 905 (1977); Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 514, 82 S.E.2d 771, 784 (1954); Torrence v. City of Charlotte, 163 N.C. 562, 567, 80 S.E. 53, 54 (1913); Geer v. Durham Water Co., 127 N.C. 349, 354, 37 S.E. 474, 476 (1900); Lassiter v. Norfolk & Carolina R.R., 126 N.C. 509, 511-12, 36 S.E. 48, 49 (1900); Barcello v. Hapgood, 118 N.C. 712, 729-30, 24 S.E. 124, 126 (1896); Bass v. Roanoke Navigation & Waterpower Co., 111 N.C. 439, 447, 16 S.E. 402, 404 (1892); Centre Dev. Co. v. County of Wilson, 44 N.C. App. 469, 471, 261 S.E.2d 275, 277 (1980); 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 63 (perm. ed. rev. vol. 1990); 2 WEBSTER, *supra* note 37, § 19-4 (discussing what parties are authorized to use the power of eminent domain).

236. *See* 1 FLETCHER ET AL., *supra* note 235, § 63, at 900-01.

237. *See id.* at 901 ("[A] corporation which has received no special privileges or

corporations,[238] but are defined "as private corporations which have accepted from the state the grant of franchise or contract involving the performance of public duties."[239] Because of their unique status, railroads traditionally have been limited in their ability to alienate property necessary to serve the public purposes for which the state authorized incorporation.[240] As will be demonstrated in the following sections,[241] the power of the state to preserve railroad rights of way for future public use stems partly from the legislature's inherent authority to oversee property transfers by quasi-public corporations.

2. Constitutionally Protected Property Rights

The Takings Clause of the Fifth Amendment to the United States Constitution requires the payment of just compensation for any "private property taken for public use."[242] While, on its own, the

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benefits of great value from the state is not a quasi-public corporation."); 1 REDFIELD, *supra* note 33, § 17, at 57 (referring to the private nature of railroad companies as meaning nothing more than that the "stock is owned by private persons").

238. *See* 1 FLETCHER ET AL., *supra* note 235, § 63; *see also* HENN & ALEXANDER, supra note 111, § 12, at 25; ORTH, *supra* note 31, at 142; ROBINSON, *supra* note 111, § 6-6, at 111 & n.23 (identifying characteristics that distinguish public and private corporations in North Carolina).

239. 1 FLETCHER ET AL., *supra* note 235, § 63, at 901. The government has always maintained some control over providers of transportation, or "common carriers":

> In short, the notion behind common carriage was that the government would grant the carrier certain powers and privileges, generally conferring an exclusive right to make a profit from transportation. In return for these privileges, the carrier was expected to assume certain obligations ....
>
> 1. The carrier may not refuse to serve.
> 2. The carrier must serve at a reasonable price.
> 3. The carrier must serve all equally.
> 4. The carrier is responsible for the safe delivery of the goods or persons committed to its care.

KEELER, *supra* note 4, at 20.

240. *See* 6A FLETCHER ET AL., *supra* note 235, § 2955 ("This principle [of lack of authority to transfer assets] applies to all corporations which are given the power of eminent domain or other special privileges, and which, in return, are under a special duty to serve the public ...."); 1 REDFIELD, *supra* note 33, § 17, at 58 n.7 (discussing the importance of the legislature's retention of control over railroads in light of the vast expenditures dedicated to railroad projects and the degree to which these corporations affect citizens' lives). A railroad, however, may dispose of property not needed to serve the public purpose. *See* 6A FLETCHER ET AL., *supra* note 235, § 2956. Otherwise, a railroad could never abandon unnecessary rights of way.

241. *See infra* notes 281-93 and accompanying text.

242. U.S. CONST. amend. V. The Takings Clause, found in the last clause of the Fifth Amendment, reads: "[N]or shall private property be taken for public use, without just compensation." *Id.*; *see also* Summers, *supra* note 31, at 837-38 (discussing generally the Takings Clause of the Fifth Amendment).

Fifth Amendment applies only to federal action, the Due Process Clause of the Fourteenth Amendment extends Fifth Amendment restrictions to state action.[243] Although the North Carolina Constitution contains no explicit Takings Clause, Article I, Section 19 implicitly provides protections identical to those contained in the Fifth Amendment.[244]

The government must compensate an individual only for the taking of constitutionally protected property interests defined by state common law.[245] To secure compensation for the change in use of a railroad easement by the state, for instance, an underlying fee owner would initiate an inverse condemnation action.[246] This remedy exists by virtue of North Carolina General Statutes § 40A-51(a), which allows the property owner to "seek compensation for a taking whenever his private property is taken for a public purpose by a municipality or other agency having the power of eminent domain under circumstances where a condemnor takes property for which no complaint containing a declaration of taking has been filed."[247]

A property owner must show an "actual interference" with a protected property right to recover damages for a taking.[248] North Carolina courts have defined constitutionally protected property

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243. *See* U.S. CONST. amend. XIV, § 1; Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 233-35 (1897); ORTH, *supra* note 31, at 57. For an interesting discussion of the historical relationship between the Due Process and Takings Clauses and the need to separate the two for purposes of analyzing takings claims, see Summers, *supra* note 31, *passim* (focusing on regulatory takings issues).

244. Article I, section 19 of the North Carolina Constitution provides:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. CONST. art. I, § 19; *see also* ORTH, *supra* note 31, at 55-60 (providing a historical and analytical framework of § 19); *supra* note 31 (discussing § 19 and North Carolina's takings jurisprudence). *See generally* ORTH, *supra* note 31, at 1-24 (recounting the historical development of North Carolina's constitution).

245. *See* Preseault v. ICC, 494 U.S. 1, 21 (O'Connor, J., concurring) ("Determining what interest petitioners would have enjoyed under Vermont law, in the absence of the ICC's recent actions, will establish whether petitioners possess the predicate property interest that must underlie any takings claim.").

246. *See* N.C. GEN. STAT. § 40A-51(a) (1984); 2 WEBSTER, *supra* note 37, §§ 19-2, -2(a) (discussing government actions which may give rise to valid inverse condemnation actions).

247. 2 WEBSTER, *supra* note 37, § 19-2; *see* N.C. GEN. STAT. § 40A-51(a).

248. *See* 2 WEBSTER, *supra* note 37, § 19-2, at 810; *see also* Parker, *supra* note 31, at 300-01 (discussing when compensation is required for a taking of property).

rights as those interests which have "vested."[249] In contrast, reversionary and "contingent" interests may warrant no such protection because they represent only "bare expectanc[ies]"[250] that a right may vest, and "more than a mere expectation"[251] is required to invoke constitutional safeguards.[252] The clarity of this distinction between vested and contingent interests leaves much to be desired, especially considering the confusion that could arise regarding contingent remainders and other future interests in third persons.[253]

Put more simply, reversionary interests retained by grantors of fee determinable and fee subject to condition subsequent estates may draw little or no constitutional protection because the fee may never revert.[254] North Carolina courts have characterized this indeterminate quality of reversionary interests by labeling them "bare expectancies."[255] These interests are alienable, however, under North Carolina General Statutes § 39-6.3(a),[256] which implies that

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249. *See, e.g.*, McDonald's Corp. v. Dwyer, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994); Anderson v. Wilkins, 142 N.C. 154, 157-58, 55 S.E. 272, 273 (1906); Springs v. Scott, 132 N.C. 548, 560, 44 S.E. 116, 120 (1903); Lowe v. Harris, 112 N.C. 473, 480-86, 17 S.E. 539, 540-44 (1893); Bass v. Roanoke Navigation & Water Co., 111 N.C. 439, 448-49, 16 S.E. 402, 405 (1892); De Lotbiniere v. Wachovia Bank & Trust Co., 2 N.C. App. 252, 261, 163 S.E.2d 59, 65 (1968).

250. *Bass*, 111 N.C. at 448-49, 16 S.E. at 405.

251. *Dwyer*, 338 N.C. at 447, 450 S.E.2d at 890.

252. *See id.*; *Anderson*, 142 N.C. at 158, 55 S.E. at 273; *Springs*, 132 N.C. at 560, 44 S.E. at 120; *Lowe*, 112 N.C. at 480-86, 17 S.E. at 540-44; *Bass*, 111 N.C. at 448-49, 16 S.E. at 405; *De Lotbiniere*, 2 N.C. App. at 260, 163 S.E.2d at 64-65.

253. *See, e.g.*, 1 WEBSTER, *supra* note 37, § 3-2, at 51 (distinguishing types of future interests in general). Webster distinguishes vested and contingent future estates in *third persons* as follows:

> A future interest is vested where it is given to a born and ascertainable person and the interest is subject to no condition precedent other than the natural expiration of the prior estate or estates. It is contingent where the transferee is an unborn or otherwise unascertained person or the interest is subject to a condition precedent. Contingent remainders are subject to the perplexing application of the Rule Against Perpetuities.

Id. at 51-52. The reversionary interests associated with fee determinable and fee subject to condition subsequent estates, however, are retained by the *grantor*. *See id.*

254. *See Bass*, 111 N.C. at 448-49, 16 S.E. at 405; 3 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY §§ 2112, 2116 (1924) (treating fee determinable and fee subject to condition subsequent estates similarly for purposes of general characterization of reversionary interests). Webster, however, suggests that a reversionary interest is a "presently protectable right to a future interest," but fails to cite any authority for the proposition. *See* 1 WEBSTER, *supra* note 37, § 3-2, at 51.

255. *See Bass*, 111 N.C. at 448-49, 16 S.E. at 405.

256. *See* N.C. GEN. STAT. § 39-6.3(a) (1984); *see also* N.C. GEN. STAT. § 29-2(2)(b) (including reversionary interests among the "estate" of a decedent for the purposes of

reversionary interests constitute more than "bare expectancies." This contradictory treatment of reversionary interests among the courts and the legislature raises a question as to whether the state may alter or destroy reversionary interests without compensation to the owner because she holds no enforceable property right.[257] When possible, courts might avoid this ambiguity by categorizing rights of way as either fee simple estates or easements, thereby avoiding the qualified fee designation altogether.[258]

An easement represents a right to use the property of another for a specific purpose.[259] The grantor of an easement retains title to the underlying estate[260] and, in the case of railroad rights of way, may use land underlying the easement to such an extent as not to impede the operations of the railroad.[261] The easement may terminate upon

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intestate succession); 1 WEBSTER, *supra* note 37, § 4-13(a) (discussing reversionary interests). The alienability of reversionary interests may be treated differently in other jurisdictions. *See* 3 THOMPSON, *supra* note 254, § 2112 (stating that reversionary interests are not alienable). Reversionary interests generally are not subject to the Rule Against Perpetuities. *See id.* § 2119; 1 WEBSTER, *supra* note 37, § 4-14, at 80.

257. *See* Torrence v. City of Charlotte, 163 N.C. 562, 565-66, 80 S.E. 53, 54 (1913); *Bass*, 111 N.C. at 448-49, 16 S.E. at 405; 3 THOMPSON, *supra* note 254, § 2112. Thompson describes reversionary interests retained by the grantor in fee estates as follows:

> The possibility of a reverter, after the termination of a fee conditional, being a mere possibility, is not an estate, and may be defeated by statutory enactment. It is not an estate in land, and until the contingency of the condition happens the whole title is in the grantee, and the grantor has nothing he can convey. It is neither a present nor a future right, but a mere possibility that a right may arise on the happening of a contingency .... This possibility of reverter, however, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition ... and if so released vests an absolute and indefeasible title thereto.

3 THOMPSON, *supra* note 254, § 2112 (footnotes omitted). This characterization closely matches that adopted by the North Carolina Supreme Court in *Bass*, except that Thompson suggests that a reversionary interest is vested in the grantor, *see id.*, whereas the court in *Bass* held that it is not so vested, *see Bass*, 111 N.C. at 448-49, 16 S.E. at 405. Webster would likely attribute such a discrepancy to jurisdictional variations on the use of terminology, *see* 1 WEBSTER, *supra* note 37, § 3-2, at 51, although the substance of Thompson's description falls squarely in line with the North Carolina Supreme Court's perspective on the broader issue of destructibility.

258. *See, e.g.*, N.C. State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 472, 189 S.E.2d 272, 279-80 (1972) (discussing railroad rights of way exclusively in terms of fee simple estates or easements). Of course, this option may not be available if the conveying instrument explicitly creates a qualified fee estate. *See supra* notes 125-28 and accompanying text.

259. *See* 1 WEBSTER, *supra* note 37, § 15-1, at 593 & n.4 (describing characteristics of easements in general) (citing RESTATEMENT OF PROPERTY § 450 (1944)).

260. *See id.* § 15-1.

261. *See supra* notes 130-31 and accompanying text.

abandonment or misuse by its owner.[262] The grantor may alienate the underlying fee, but the estate will remain subject to the easement.[263] North Carolina courts have treated the servient estates underlying public and quasi-public easements as though the grantor retained only a "contingent" interest in the possible termination of the easement.[264] By this rationale, the legislature could modify the use of the easement as long as the state imposed no greater burden on the easement than that for which it was originally acquired.[265] Thus, a railroad easement could exist in perpetuity so long as the subsequent uses of the right of way were no more burdensome than the railroad use[266]—a likely circumstance.[267] This principle concerning the convertibility of easements is often referred to as the "public highway" doctrine.[268]

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262. *See* 1 WEBSTER, *supra* note 37, §§ 15-27, -29.

263. 1 THOMPSON, *supra* note 254, § 285, at 366; *supra* notes 129-33 and accompanying text.

264. *See* Parker, *supra* note 31, at 303 (citing Bass v. Roanoke Navigation & Waterpower Co., 111 N.C. 439, 16 S.E. 402 (1892)); *infra* notes 308-317 and accompanying text.

265. *See* Parker, *supra* note 31, at 303; *infra* notes 308-309 and accompanying text.

266. This conclusion may be unnecessarily narrow, however, especially with regard to public easements. In *Frink v. North Carolina Board of Transportation*, 41 N.C. App. 751, 255 S.E.2d 746 (1979), the North Carolina Court of Appeals rejected the landowner's inverse condemnation claim where the NCDOT built roads and bridges on rights of way originally acquired by the state for the Intracoastal Waterway. *See id.* at 751, 754-56, 255 S.E.2d at 747-49. The court held that "when the State acquired its interest in the property for the canal right-of-way, it also clearly acquired the inherent right to construct bridges and roadways across the property." *Id.* at 755, 255 S.E.2d at 748-49. The holding may be significant in the railroad context because it allows the accumulation of public burdens on an existing easement, originally condemned for a limited purpose, without providing additional compensation to the underlying fee owners. The United States Supreme Court extensively discussed Congress's power to authorize the placement of telegraph lines on railroad corridors in *Western Union Telegraph Co. v. Pennsylvania Railroad*, 195 U.S. 540 (1904). The dispute in *Western Union* concerned the right of telegraph companies to install lines on railroad rights of way pursuant to state and federal statutes providing for such use. *See id.* at 541-46. More pertinent to the present analysis, the Court implicitly recognized the power of Congress to appropriate railroad property for other than railroad purposes without affording underlying fee owners any compensation for the additional burden imposed by the telegraph use—the case addressed only the right of the *railroad* to compensation for use of its right of way by the telegraph company. *See id.* at 557-60, 569-70.

267. *See supra* notes 232-36 and accompanying text.

268. *See* Montange, *supra* note 3, at 163.

B. *Historical Foundations for Destructibility of Reversionary Interests and the "Public Highway" Doctrine*

1. *Bass v. Roanoke Navigation & Water Power Co.*

In 1892, the North Carolina Supreme Court first recognized that reversionary interests in railroad rights of way may enjoy no constitutional protection in *Bass v. Roanoke Navigation & Water Power Co.*[269] The plaintiff landowner in *Bass* sued the Roanoke Navigation & Water Power Co. to recover property condemned by a predecessor canal corporation.[270] The plaintiff claimed that the right of way reverted to her in the 1870s when the prior corporation dissolved, passing all rights and interests by sale to the defendant company.[271] The landowner grounded her argument on the fact that the legislature authorized the original corporation, the Roanoke Navigation Company, to condemn right of way for a canal for navigation purposes *only*.[272] However, the legislative charter creating the Roanoke Navigation & Water Power Company, the successor corporation, empowered the new corporation to use the right of way not only for navigation purposes, but also for " 'manufacturing, or other purposes.' "[273] The plaintiff contended that the company's change in use triggered a reversion.[274] She also challenged the constitutionality of the new corporation's charter on the grounds that the legislature purported to encumber her reversionary interest with additional uses not authorized at the time of the original condemnation around 1820.[275]

In *Bass*, the North Carolina Supreme Court focused primarily on the right of the state to modify or destroy contingent interests in property.[276] To understand the scope of the holding in *Bass*, a few preliminary issues must be noted. First, the opinion failed to clarify the type of interest originally condemned by the Roanoke

269. 111 N.C. 439, 16 S.E. 402 (1892).

270. *See id.* at 452-56, 16 S.E. at 406-07.

271. *See id.*

272. *See id.* at 449-53, 16 S.E. at 405-06; An Act for Improving the Navigation of Roanoke River, Pub. L., ch. 848, art. 12 (1812) (authorizing the corporation to purchase or condemn land where "it may be necessary to complete the navigation" of the Roanoke River).

273. *Bass*, 111 N.C. at 450, 16 S.E. at 406 (quoting An Act to Promote the Objects of the Roanoke Navigation and Water Power Company, Priv. L., ch. 57, § 1 (1885)).

274. *See id.* at 453, 16 S.E. at 406.

275. *See id.* at 448-49, 16 S.E. at 405.

276. *See id.* at 447-50, 16 S.E. at 404-05.

Navigation Company, but intimated that the Company had acquired a qualified fee in its right of way.[277] Although easements are not mentioned, the court's analysis implied that the state may modify the use of easements to ensure preservation of contiguous corridors for future public purposes.[278] Finally, the court suggested that its analysis applied not only to condemned property, but also to rights of way obtained by agreement.[279]

Rather than simply finding that reversionary interests in canal rights of way fell under the umbrella of constitutionally unprotected contingent interests, the court in *Bass* devoted considerable attention to the rationale underlying its ultimate conclusion.[280] First, the court expounded upon the special relationship existing between the state and quasi-public corporations such as canal and railroad companies.[281] In this case, the legislature conferred upon the canal

277. *See id.* at 447, 16 S.E. at 404. The charter under which the Roanoke Navigation Company had originally acquired a right of way for the canal allowed land taken by condemnation or sale to be "seised in fee [in the company] ... in the same manner as if conveyed to them by the owners, by legal conveyance." An Act for Improving the Navigation of Roanoke River, Pub. L., ch. 848, art. 12. This language suggests that the corporation acquired the fee simple to the land needed to build the canal. The court in *Bass* quoted article 8 of the charter to describe the property interests taken by the corporation, *see Bass*, 111 N.C. at 447, 16 S.E. at 404 (noting that land acquired by the corporation shall be " 'vested in the said proprietors, their heirs and assigns, forever, as tenants in common in proportion to their respective shares' "), but article 8 refers only to the "works" constructed by the corporation and not to land explicitly, *see* An Act for Improving the Navigation of Roanoke River, Pub. L., ch. 848, art. 8. Although the language in both articles 8 and 12 suggest that the corporation had acquired a fee simple in the property, the court later noted that the legislature had authorized the company to "hold lands in fee *for a particular purpose*." *Bass*, 111 N.C. at 447, 16 S.E. at 404 (emphasis added). This added restriction indicates an apparent belief by the court that the canal corporation had acquired only a qualified fee in its right of way, subject to reversion should the right of way be dedicated to another purpose. *But see* Parker, *supra* note 31, at 303 (assuming that the court in *Bass* found an easement in the right of way defeasible at the will of the state because the owners' "possibility of reverter is a contingent claim").

278. It is important to remember that most rights of way will be acquired by a variety of means, giving the railroad corporation several types of property interests in a corridor. *See supra* notes 122-33 and accompanying text. Although *Bass* may have addressed only reversionary interests associated with land held in qualified fee, the court would have undermined the reasoning it gives for preserving contiguous "channel[s] of commerce" had it not assumed that the state also could modify easements for continued public use. *See Bass*, 111 N.C. at 447, 16 S.E. at 404; *see also* Parker, *supra* note 31, at 303 (stating that the right of way in *Bass* was held in easement); *infra* notes 326-329 (discussing generally policy considerations regarding the holding in *Bass*).

279. *See Bass*, 111 N.C. at 447, 16 S.E. at 404; *see also infra* notes 326-29 and accompanying text (discussing generally policy considerations regarding the holding in *Bass*).

280. *See Bass*, 111 N.C. at 447-50, 16 S.E. at 404-05.

281. *See id.*

company broad powers necessary to establish a transportation corridor of potentially infinite duration.[282] As evidence of the important public purposes served by quasi-public corporations, the court noted that the legislature had granted the corporation the power of eminent domain, a property acquisition tool reserved only for public ends.[283]

The court explained that the public interest in a quasi-public corporation does not cease upon completion of the project at hand. Instead, the legislature maintains a stake in the continuing viability of such enterprises for the public benefit.[284] Thus, when a corporation fails to conform to the purposes identified in its charter or dissolves for some other reason, the legislature may exercise control over the resolution of its indebtedness and the disposition of its property.[285] The legislature manifested such authority in this case by chartering the Roanoke Navigation & Water Power Company in 1885, empowering it to succeed to all of the interests and rights of the former Roanoke Navigation Company.[286]

The court noted that the legislature may not disturb vested rights and contracts in enacting retroactive legislation.[287] Here, the new charter had a retroactive effect because it impacted obligations incurred prior to its passage.[288] Specifically, the new charter

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282. *See id.* at 447, 16 S.E. at 404.

283. *See id.* at 447, 16 S.E. at 404-05; An Act for Improving the Navigation of Roanoke River, Pub. L., ch. 848, art. 12 (1812).

284. *See Bass*, 111 N.C. at 448, 16 S.E. at 405. The court stated:

> The primary object in permitting the exercise of the sovereign power of eminent domain was to take the land for a public purpose, and the condition implied by the very creation of the corporation, was that ... it, or another similar agency, should subserve the end for which it was brought into existence; the power of the state being subject only to the limitations imposed by the constitutions, State and Federal.

Id. The constitutional limitations to which the court alluded are discussed *infra* at text accompanying notes 287-93.

285. *See Bass*, 111 N.C. at 447-48, 16 S.E. at 405; *see also* 1 REDFIELD, *supra* note 33, § 69, at 270 n.17 ("[B]y the repeal of a charter the lands do not revert to the former owner, but the franchises of the corporation are resumed by the state, and the railway remains public property, subject to the management and control of the state.").

286. *See* An Act to Promote the Objects of the Roanoke Navigation and Water Power Company, Priv. L., ch. 57, § 1 (1885); *Bass*, 111 N.C. at 449-50, 16 S.E. at 405-06. Before dissolution, the court appointed a receiver to the Roanoke Navigation Company and ordered the conveyance of all that corporation's property and rights to the new Roanoke Navigation & Water Power Company pursuant to the latter's charter. *See Bass*, 111 N.C. at 450, 16 S.E. at 405; *see also* N.C. GEN. STAT. §§ 62-290, -291 (1989) (containing provisions relevant to transfer of railroad property upon corporate dissolution).

287. *See Bass*, 111 N.C. at 448-49, 16 S.E. at 405.

288. *See id.*

indefinitely postponed the possibility of reverter held by landowners owning property contiguous to the canal right of way.[289] The court held that this action did not constitute a taking because these reversionary interests represented only "expectanc[ies] defeasible at the will of the state."[290] Such a conclusion drew support from the inherent authority of the state to supervise quasi-public corporations to ensure the existence of an entity to maintain transportation corridors for future public use.[291] Further, the court analogized the situation in *Bass* to other contexts in which the state affects reversionary interests, including the destruction of rights of survivorship by statutes converting joint tenancies into tenancies in common and the renaming of heir presumptives under intestate statutes.[292] In *Bass*, as in these latter cases, these "bare expectanc[ies] . . . may be modified or destroyed at the will of the lawmakers by statute."[293]

Upon reaching this conclusion, the court next addressed the change in use of the right of way as authorized by the new corporate charter.[294] The original Roanoke Navigation Company charter granted the corporation authority to build a canal for "navigation" of the Roanoke River.[295] The new charter empowered the Roanoke Navigation & Water Power Company to implement the same uses as its predecessor, including the right to use the canal for "manufacturing, or other purposes."[296] The court dismissed the argument that these additional burdens constituted an unconstitutional taking by emphasizing the authority of the

289. *See id.*

290. *Id.* at 449, 16 S.E. at 405.

291. *See id.* at 447-48, 16 S.E. at 405.

292. *See id.* at 449, 16 S.E. at 405. The court specifically noted the following:

> [A] bare expectancy, such as that of the heir presumptive under the canons of descent, the devisee named in a last will and testament executed by a person still living, the claim to rights by survivorship by a joint tenant, where a statute has made them tenants in common, the right to a forfeiture of interest reserved on a contract on account of usury, is not (as it has been held) protected as a vested right, but may be modified or destroyed at the will of the lawmakers by statute.

Id.

293. *Id.* (citations omitted).

294. *See id.* at 449-52, 16 S.E. at 406; An Act to Promote the Objects of the Roanoke Navigation and Water Power Company, Priv. L., ch. 57, § 1 (1885).

295. *See* An Act for Improving the Navigation of Roanoke River, Pub. L., ch. 848, art. 12 (1812); *Bass*, 111 N.C. at 449-51, 16 S.E. at 406.

296. An Act to Promote the Objects of the Roanoke Navigation and Water Power Company, Priv. L., ch. 57, § 1; *see also Bass*, 111 N.C. at 449-50, 16 S.E. at 406 (citing the new charter).

legislature to expand the powers of corporations after their formation so long as it did not interfere with vested rights.[297] Since a possibility of reverter constituted only a reversionary interest, the legislature did not affect a compensable taking in this case by merely modifying the contingent event that would trigger a reversion.[298]

2. *Torrence v. City of Charlotte*

The North Carolina Supreme Court subsequently affirmed that a bare expectancy is not a constitutionally protected vested right when it decided *Torrence v. City of Charlotte*.[299] In *Torrence*, the Charlotte Waterworks Company, a public corporation, attempted to convey nine acres of land to the Charlotte Park Commission for use as a public park.[300] The waterworks corporation originally condemned the property for "waterworks purposes."[301] Noting this restriction, the plaintiff landowners[302] brought an action against the park commission to recover the land when its use changed, arguing that the waterworks corporation had acquired only an easement by condemnation.[303] The city responded that it owned a fee simple interest in the property with no attendant residual interest in the plaintiffs.[304]

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297. *See Bass*, 111 N.C. at 452-53, 16 S.E. at 406. The court explained in no uncertain terms:

> Unless the power is specially reserved when the charter is granted, or under the Constitution or general laws, the Legislature cannot, as a general rule, modify the charter so as to take away any power which would enure to the profit of, or prove a protection to, a company from loss; but there is no restriction upon the right of the sovereign to enlarge its powers or extend its privileges, except that, in doing so, it must not infringe upon the vested rights of another. If there was no authority given to the old company, either in terms or by necessary implication, to erect manufacturing establishments, and use the water for running them and others owned by landowners in the vicinity, the Legislature unquestionably had the power to grant *de novo* all of the privileges enumerated [in the charter] if such action was in conflict with no right but only with the claim of the plaintiff . . . to the possibility of reverter . . . .

Id.

298. *See id.*

299. 163 N.C. 562, 565-66, 80 S.E. 53, 54 (1913).

300. *See id.* at 563-64, 80 S.E. at 53.

301. *Id.* at 564, 80 S.E. at 53. The term "waterworks" here referred to the use of the property for a city pumping station and reservoir, as distinguished from the "waterworks" in *Bass*, which included navigation and possibly manufacturing purposes. *See id.*; *supra* notes 295-96 and accompanying text.

302. The plaintiffs were the heirs and devisees of the original grantors of the land. *See Torrence*, 163 N.C. at 563, 80 S.E. at 53.

303. *See id.* at 564, 80 S.E. at 53.

304. *See id.*

Construing the eminent domain statute under which the waterworks corporation initiated condemnation proceedings,[305] the court concluded that the company had acquired an indefeasible fee in the property.[306] The court also debunked the old common law rule that upon dissolution of a private corporation, all real property of the corporation reverted to the original grantors or their heirs, regardless of the type of interest held by the corporation.[307] Conceding for the sake of argument that only an easement had been acquired, the court noted that the legislature clearly possessed the authority to change the public use of the land from "waterworks to that of a public park; the latter being not less advantageous or more burdensome to the contiguous landowners."[308] Although citing *Bass*

305. *See* N.C. Battle's Revisal, ch. 62, § 20 (1873) ("On the confirmation of the report, and payment to the owner or into the office of the court, of the damages assessed, the land assessed and condemned shall be vested in the company in fee simple.").

306. *See Torrence*, 163 N.C. at 564, 80 S.E. at 53-54.

307. *See id.* at 566-67, 80 S.E. at 54-55 (citing authorities). Henn & Alexander address this now defunct common law most succinctly:

> Under the early common law in North Carolina, the dissolution of a corporation so completely terminated its existence that title to the corporate real estate reverted to the original grantor, the personal property escheated to the State, and all debts both to and from the corporation immediately expired. This "barbarous rule of the common law" was soon abolished, both by court decision and by statute.

HENN & ALEXANDER, supra note 111, § 12, at 25; ORTH, *supra* note 31, at 142; ROBINSON, *supra* note 111, § 28-1, at 537-38 (footnotes omitted). The court stated the new rule as to reversion of fee interests upon dissolution of a corporation by citing *Wilson v. Leary*, 120 N.C. 90, 25 S.E. 630 (1897), which overruled *Fox v. Horah*, 36 N.C. 358 (1841), the prior case expounding the old common law rule. *See Torrence*, 163 N.C. at 566, 80 S.E. at 54. Citing *Wilson*, the court discussed the new rule:

> "Upon the dissolution or extinction of a corporation for any cause, real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the State, and this is so whether or not the corporation was limited by its charter or general statute."

Id. at 566, 80 S.E. at 54 (quoting *Wilson*, 120 N.C. at 93, 25 S.E. at 631, but making a number of word changes). The court continued:

> [I]t is said that a reverter applies only to a restricted class of corporations; as, for instance, where a railroad company acquired a right of way as an easement, and, on the cessation of such easement the land is relieved of that burden. Land taken for waterworks is for a "public use." That taken for a railroad is taken for a "*quasi*-public use" only.

Id. at 566-67, 80 S.E. at 54. The court's comparison between public and quasi-public easements is ambiguous with regard to the dissolution of corporations. Taken in context of the discussion in *Torrence*, the opinion appears to suggest that public easements will not extinguish on dissolution of public corporations, regardless of whether the legislature authorized their transfer and preservation. Quasi-public easements, on the other hand, apparently would terminate unless saved by legislative action.

308. *Torrence*, 163 N.C. at 565, 80 S.E. at 54.

to support this proposition, the *Torrence* court expressly qualified the broad legislative discretion propounded in *Bass* by restricting the modification of easements to new uses which were not "less advantageous or more burdensome" than prior uses.[309]

Such a limitation on the legislature's authority to alter the use of easements exists in other states as well.[310] For instance, in *Torrence* the court cited *Malone v. Toledo*,[311] an Ohio case where a landowner brought a quiet title action to prevent the city of Toledo from converting an abandoned canal into a highway and public utility right of way.[312] The Ohio Supreme Court refused to determine the extent of the interest originally obtained by the state for the canal.[313] Rather, the court focused on the authority of the legislature to alter the use of qualified fee estates or easements from one public purpose to another.[314] Like the North Carolina Supreme Court's decision in

309. *Id.*; *see also* Parker, *supra* note 31, at 303 ("It is generally held that the owner should be compensated for takings where additional servitudes which cause additional damages are placed on the land.").

310. *See, e.g.*, Fritsch v. ICC, 59 F.3d 248, 253 (D.C. Cir. 1995) (raising the issue, but not resolving it on the given facts), *cert. denied*, 116 S. Ct. 1262 (1996); Faus v. City of Los Angeles, 431 P.2d 849, 856 (Cal. 1967) (holding that a trolley line may be upgraded to a busway); McKinley v. Waterloo R.R., 368 N.W.2d 131, 134-35 (Iowa 1985) (citing authorities, but not holding on the issue); Pollnow v. State Dep't of Natural Resources, 276 N.W.2d 738, 746 (Wis. 1979) (reserving judgment on whether the state can preserve existing railroad rights of way for multiple public uses).

311. 28 Ohio St. 643 (1876).

312. *See id.* at 653-54. The state had originally condemned the land for the canal around 1836. *See id.* at 653. This case is distinguishable from *Bass* in that Ohio formed a public board of canal commissioners to oversee and operate the canal, whereas in *Bass* the canal companies were quasi-public corporations. *See id.*; Bass v. Roanoke Navigation & Water Power Co., 111 N.C. 439, 447, 449-50, 16 S.E. 402, 404, 405 (1892). In *Malone*, the legislature had conveyed the right of way to the city in 1864 and authorized that the use be changed from canal purposes to those requested by the city. *See Malone*, 28 Ohio St. at 653-54. The landowner argued that the state had acquired only a qualified fee in the corridor, contingent on its use for canal purposes only. *See id.* at 655. The state contended that it had condemned the land in fee simple absolute as was authorized by the statute under which the state had acted. *See id.*

313. *See Malone*, 28 Ohio St. at 655-56.

314. *See id.* at 656-57. The court explained:

> [W]hatever the estate is, or however denominated, whether fee or easement, as to all property appropriated, under the exercise of the law of eminent domain, we think this proposition may be established. When real estate is so appropriated, for one particular public purpose, the fact that it is by legislative authority applied to another public purpose is not necessarily an abandonment, nor is it a forfeiture of the public interest.

Id. at 656. The court did not explicitly differentiate between public and quasi-public corporations. *See id.* at 656-57. In fact, it implied, by including railroad examples in its discussion of other public uses, that the legislature's authority clearly extended to both types of corporate entities. *See id.* at 656. After positing the rule as to the legislature's

Torrence, *Malone* expressly restricted the ability of the state to impose more burdensome uses on preexisting public easements without providing compensation.[315] The court adopted a "like kind" standard to determine whether two uses were so different as to warrant the payment of compensation to adjoining landowners.[316] Applying this principle to the facts in *Malone*, the court held that the change in use of the right of way from canal purposes to highway and utility purposes did not constitute an additional servitude requiring compensation.[317]

C. *Implications of the North Carolina "Public Highway" Doctrine*

The North Carolina legislature has not yet explicitly invoked the "public highway" doctrine in its statutory efforts to preserve railroad

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authority to change the use of public easements, the court cited numerous examples demonstrating the common usage of this power:

> Instances are abundant in the legislation of the state where land has been taken for one purpose and used for another, without objection or complaint from any one. Railroads cross highways, and no one has ever supposed that this was such an abandonment of the highway as that the soil reverted to the original owner. So canals have been allowed to use a portion of turnpikes .... [A]n ordinary road was converted into a plankroad .... [A] canal was converted into a railroad, but it was held that this did not work a reversion of the canal bed to the original proprietor. It is now every day's experience that streets are used by railroads ....
>
> All these are instances where property was appropriated to one particular use, and afterward, by legislative consent, applied to another of a like kind.

Id. (citations omitted); *cf.* N.C. GEN. STAT. § 62-220(6), (7) (1986) (authorizing railroad rights of way to cross other railroad rights of way and public highways). The facts of the case and the court's discussion may have limited *Malone's* applicability to condemned property, although arguably the case's holding should apply with equal force to all public or quasi-public property regardless of the manner of acquisition. *See Malone*, 28 Ohio St. at 656-60; *infra* notes 326-45 and accompanying text (discussing why the "public highway" doctrine should apply to property acquired by any means).

315. *See Malone*, 28 Ohio St. at 657-61. The Ohio Supreme Court, however, suggested that only *adjoining landowners* would be entitled to additional compensation under these circumstances for the additional inconvenience created by the new use. *See id.* at 657-58. If this reading is correct, holders of residual interests could not claim a taking unless the remainder of their present estate lay adjacent to the land in which they held an interest. *See id.*

316. *See id.* at 656. The court offered some clarification of this standard in a subsequent passage: "[P]ublic property may be applied to different uses, if they are substantially alike, and the legislature allow." *Id.* at 658.

317. *See id.* at 660-61. The court stated:

> "The general purposes to which the easement was and is applied, are the same, to wit, the purposes of a public way, to facilitate the transportation of persons and property. Means and appliances are different, but the objects are similar, and the legislation of the state has always favored both."

Id. at 660 (quoting Hatch v. Cincinnati & Indiana Ry., 18 Ohio St. 92, 121-22 (1868)).

easements. Although the NCDOT may act pursuant to 16 U.S.C. § 1247(d) to permit interim uses on preserved easements,[318] it has no express, independent authority to do so under state statute.[319] Also, the NCDOT may allow recreational trail uses only on corridors owned by the state in *fee simple* under North Carolina General Statutes § 136-44.36D.[320] According to *Bass* and *Torrence*, however, the state could permit nonrailroad transportation uses on railroad easements without affording underlying fee owners compensation for the change in public use.[321] Such authority would likely have to derive from legislative action.[322]

Although property owners might concede the state's power to destroy or modify reversionary interests in railroad rights of way,[323] they would likely object to the state's authority to alter easements to serve nonrailroad purposes.[324] Landowners could rely on the traditional law of easements to argue that railroads compensated grantors of such interests based on the use of the property for railroad uses only. Thus, according to the general common law on the subject, any change in use would terminate the easement or require additional compensation from the grantee or its successors in

318. *See* N.C. GEN. STAT. § 136-44.36A (1993); 16 U.S.C. § 1247(d) (1994).

319. *See supra* notes 88-89 and accompanying text.

320. *See* N.C. GEN. STAT. § 136-44.36D (1993).

321. *See* Torrence v. City of Charlotte, 163 N.C. 562, 565, 80 S.E. 53, 54 (1913); Bass v. Roanoke Navigation & Water Co., 111 N.C. 439, 447-50, 16 S.E. 402, 404-05 (1892). If the NCDOT did not acquire an easement outright under North Carolina General Statutes § 136-44.36B, some provision would have to be included to secure the consent of the railroad to avoid a taking of corporate property without just compensation. *See* N.C. GEN. STAT. § 136-44.36B (1993); Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 284-85 (1989) (O'Connor, J., concurring in part and dissenting in part) (noting that a corporation may not have property taken for public use without affording just compensation); *see also* Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540, 573 (1904) (noting that although states may subject railroad rights of way to certain restrictions, a state may not take railroad property for public use without providing just compensation to the company).

322. Although the court in *Bass* suggests that reversionary interests are defeasible at the will of the "Legislature or . . . the *Executive Department* of the state," *Bass*, 111 N.C. at 449, 16 S.E. at 405 (emphasis added), the facts of both *Bass* and *Torrence* involved state legislative action condoning the change in use. *See Torrence*, 163 N.C. at 564, 80 S.E. at 53-54; *Bass*, 111 N.C. at 449, 16 S.E. at 405; Parker, *supra* note 31, at 303; *supra* notes 269-75 and accompanying text; *supra* notes 299-309 and accompanying text.

323. Whether or not valid today, this rule has been upheld in a variety of contexts since *Bass*. *See* Anderson v. Wilkins, 142 N.C. 154, 157-58, 55 S.E. 272, 273 (1906); Springs v. Scott, 132 N.C. 548, 560, 44 S.E. 116, 120 (1903); Hodges v. Libscomb, 133 N.C. 199, 204, 45 S.E. 556, 558 (1903); *supra* notes 254-57 and accompanying text.

324. *Cf.* Montange, *supra* note 3, at 164 (noting that some states reject the "public highway" doctrine).

interest.[325]

Based on the "public highway" doctrine, however, the North Carolina legislature originally empowered railroads to condemn land to foster the development of transportation infrastructure within the state.[326] To justify granting railroads the power of eminent domain, the legislature had to recognize "railroad purposes" as "public purposes."[327] Providing transportation for the public is one of the most fundamental public purposes of the state.[328] Although specifically designated as "railroad" easements, these rights of way are in fact transportation easements.[329] Since the state maintains a

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325. *See generally* 1 WEBSTER, *supra* note 37, § 15-1 (discussing the law of easements in North Carolina).

326. *See supra* notes 284-86 and accompanying text. The court in *Bass* noted:

> In creating such a *quasi* public corporation for the purpose of opening a channel for commerce, the parties and juries who determined values of land acquired are deemed to have acted upon the idea then evidently controlling the Legislature, that a great public highway would be prepared for permanent use, and that in case one set of proprietors should forfeit their rights for misuser or nonuser, the law-making power of the State would see that the property necessary to subserve this important end should pass to another similar public agency or be subject to the control of the sovereign power which had authorized it to purchase and hold lands in fee for a particular purpose.

Bass, 111 N.C. at 447, 16 S.E. at 404; *see also* Raleigh & Gaston R.R. v. Davis, 19 N.C. (2 Dev. & Bat.) 451, 467 (1837) (discussing the permanent nature of the Raleigh & Gaston Railroad: "From the great cost of this road, from its nature and supposed utility, it seems to be contemplated to preserve it perpetually, or for a great and indefinite period."). The court in *Bass* likely extracted the phrase "public highway" from language contained in the original Roanoke Navigation Company charter: "[T]he navigation and works of the said company, done in pursuance of this act, when completed, shall be forever thereafter considered as public highways, free for the transportation of all goods, wares, commodities or produce whatsoever . . . ." An Act for Improving the Navigation of Roanoke River, Pub. L., ch. 848, art. 11 (1812).

327. *See supra* notes 33, 144-47, 284 and accompanying text.

328. *See* Montange, *supra* note 3, at 163-64.

329. *See id.* at 163; *see also* N.C. GEN. STAT. § 136-44.36A (1993) (suggesting a broader scope of railroad corridor uses by labeling them "rail transportation corridors"). In *Western Union Telegraph Co. v. Pennsylvania Railroad*, 195 U.S. 540 (1904), however, the United States Supreme Court proved reluctant to accept wholeheartedly the complete conceptual interchangeability of railroad rights of way and other public ways:

> It is contended by the Telegraph company that the charters under which the several railway companies constituting the system of the Railroad Company were organized expressly created them "public highways," and that in the acquisition of land for their purposes they were public agents, "and the land was taken by the Government, and in the eye of the law as completely subject to public uses as though it had been taken by the state itself,"—that is to say . . . have become highways in the full sense of that word. And counsel further say the difference between them and ordinary highways "is not a legal difference, but is the difference of the kind of use to which the highway is subject,—in the one case, wheel vehicles drawn by horses; in the other, to steam vehicles drawn by

continuing interest in ensuring the integrity of transportation easements for future use, traditional principles of easement law should not apply to quasi-public rights of way.[330] In effect, the public should not have to pay again for a corridor originally acquired, for all practical purposes, in perpetuity to serve transportation needs.[331]

Even accepting the "public highway" doctrine, landowners would still challenge the claim that recreational trails genuinely serve transportation purposes, especially when trail conversions provide patrons primarily with exercise and relaxation opportunities.[332]

> locomotives along and upon iron rails." They are subject, therefore, it is urged, as ordinary highways and streets of a city are subject, to the control of Congress ....
>
> Counsel in advancing the argument exhibits a consciousness of taking an extreme position. It would seem, certainly if considered with other parts of their argument, to make a railroad right of way public property. To that extreme we cannot go....

Id. at 593. Although partially rejecting the telegraph company's argument in holding for the railroad's right to compensation for use of its right of way, the Court nonetheless recognized railroads as public highways: "The right of way of a railroad is property devoted to a public use, and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control, and for this many cases may be cited." *Id.*

330. The United States Supreme Court has also recognized the distinction between private property and railroad rights of way and the unique nature of the latter:

> A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than a mere easement .... [I]f a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." And we drew support for this from a New Jersey case .... "Unlike the use of a private way—that is, discontinuous—the use of land condemned by a railroad company is perpetual and continuous."

Western Union Tel., 195 U.S. at 570 (quoting, respectively, *New Mexico v. United States Trust Co.*, 172 U.S. 171, 183 (1898), and *New York, Susquehanna & Western Railroad v. Trimmer*, 53 N.J.L. 1, 3 (1890)).

331. *See* Parker, *supra* note 31, at 298 (noting that condemnors usually acquire "perpetual easement[s]" rather than fee simple interests). It is interesting to recognize that when a condemnor acquires an easement, damages are measured as though a fee simple interest were being taken:

> [S]ince the condemnor acquiring a perpetual easement acquires the right to occupy and use the entire surface of the land for all time to the exclusion of the landowner, for all practical purposes the bare fee is of no value and the damages should be the same as if the fee were acquired. The possibility of abandonment by the taker is so remote and improbable that it is not allowed to be taken into consideration in determining the value of the easement.

Id. at 308. Similarly, an individual purchasing property overlain by a railroad easement would take into account the perpetual nature of the servitude in negotiating a purchase price. Thus, upon the termination of an easement, the underlying fee owner realizes somewhat of an economic windfall as the "perpetual" property interest ceases to exist.

332. *See* Montange, *supra* note 3, at 163-64. Recreational trails arguably serve transportation purposes, especially in urban areas where walking and biking trails provide effective alternatives to the automobile in linking various trip origins and destinations.

Although encouraging good public health might fall within the ambit of the state's duties, railroad easements clearly were not acquired to serve this end. This argument is quite convincing, especially when the likelihood that an easement will return to railroad use is very remote.[333] Conversely, railroad easements represent one of the most burdensome uses that could be placed upon servient estates,[334] and compensation awards to grantors were originally calculated accordingly.[335] Thus, most replacement uses, especially trails, would relieve underlying fee owners of significant practical encumbrances.[336]

The most persuasive argument in favor of the "public highway" doctrine originates not from rail corridor preservation legislation, but from North Carolina General Statutes § 40A-10.[337] Section 40A-10 reads: "When any property condemned by the condemnor is no longer needed for the purpose for which it was condemned, it may be used for any other public purpose or may be sold or disposed of in the manner prescribed by law for the sale and disposition of surplus property."[338] According to § 40A-10, a railroad could authorize any public use on its right of way without compensating the owners of servient estates *or* reversionary interests.[339] Presumably, the

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Adjacent property owners, however, may have stronger takings claims for those trail conversions intended to provide patrons primarily with exercise and relaxation opportunities and not transportation alternatives for getting from one point to another. *See id.* at 164-65.

333. The "interim" trail use may be practically permanent in nature. *See id.*; Henick, *supra* note 75, at 80. Section 1247(d) of the National Trails Act, for instance, places no time limit on interim uses. *See* 16 U.S.C. § 1247(d) (1994).

334. *See* Montange, *supra* note 3, at 164.

335. *See* Bass v. Roanoke Navigation & Water Power Co., 111 N.C. 439, 447, 16 S.E. 402, 404 (1892); Montange, *supra* note 3, at 164.

336. Besides the noise and negative aesthetic qualities of railroads in general, these rights of way limit landowners' access to areas across the tracks. *See* Montange, *supra* note 3, at 164. Of course, much may depend on how a court defines "burden" in this type of analysis. If a court adopts a narrow interpretation of "burden" as including *any change in use*, then a trail conversion would likely fail the "burden" test. If a court perceives a "burden" instead as relating to the physical encumbrances placed upon a property, then trail advocates should prevail. *Compare* Swaim v. Simpson, 120 N.C. App. 863, 864-65, 463 S.E.2d 785, 787 (1995) (holding that placement of utility lines on an easement granted only for ingress and egress to a residence constitutes an additional burden on the servient estate), *aff'd mem.*, 343 N.C. 298, 469 S.E.2d 553 (1996), *with id.* at 865, 463 S.E.2d at 787 (Johnson, J., dissenting) (arguing that utility lines would not impose an additional burden on the servient estate where residential lot owners acquired the easement for access to property).

337. *See* N.C. GEN. STAT. § 40A-10 (1984).

338. *Id.*

339. Railroads fall within the scope of § 40A-10 by virtue of North Carolina General Statutes §§ 40A-2(2), 40A-3(a)(4), which identify railroads as "condemnors" governed by

NCDOT, as a successor in interest to railroad property[340] and condemnor in its own right,[341] could also change the use of an easement or qualified fee estate to serve any public purpose. Although the NCDOT may have no express authority to implement recreational uses on railroad easements, § 40A-10 may implicitly grant the department the power it needs to do so, at least with regard to condemned easements.

Whether a rail line came into being by virtue of eminent domain or agreement, however, should not matter in determining the scope of the legislature's power to modify the use of a right of way.[342] To conclude otherwise would result in a patchwork of broken corridors incapable of serving any useful transportation purpose. Applying the holdings in *Bass* and *Torrence* only to condemned rights of way would leave gaps in corridors where a railroad acquired property by means other than eminent domain.[343] This result would defeat the legislature's policy objective, as identified in *Bass*, of preserving contiguous transportation corridors for future transportation use.[344] Such an outcome would also undermine the unstated objective in § 40A-10 of preserving public and quasi-public property for future public use.[345] The state can not rely on railroad corporations to achieve these public goals. After all, although railroads may be quasi-public corporations, the private motive for profit will inexorably lead to right of way abandonments beneficial to the "bottom line,"[346] but harmful to the present or future public interest.

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the eminent domain procedures contained in Chapter 40A. *See id.* §§ 40A-2(2), -3(a)(4); *see also id.* § 40A-1 (stating that Chapter 40A contains exclusive provisions for eminent domain as among identified condemnors).

340. The NCDOT may acquire railroad property. *See* N.C. GEN. STAT. § 136-44.36B (1993).

341. The NCDOT may acquire property by condemnation for a variety of purposes. *See, e.g., id.* § 136-18(2), (3), (16) (1993 & Supp. 1996) (authorizing condemnation to acquire rights of way for roads and highways and the materials necessary to build them); *id.* § 136-89.52 (authorizing condemnation to acquire right of way for limited access highways).

342. *Cf.* Bass v. Roanoke Navigation & Water Power Co., 111 N.C. 439, 447, 16 S.E. 402, 404 (1892) (discussing the legislature's authority as to rights of way whether acquired by agreement or condemnation).

343. *See supra* notes 122-33 and accompanying text (noting the various property interests acquired by railroads in establishing their rights of way).

344. *See Bass*, 111 N.C. at 447-49, 16 S.E. at 404-05; *supra* note 326 (quoting *Bass*).

345. *See* N.C. GEN. STAT. § 40A-10 (1994).

346. *See supra* notes 1-7 and accompanying text (discussing fiscal factors motivating railroads' decisions to abandon corridors).

VII. CONCLUSION

Principles of law affecting railroad rights of way have evolved significantly since the first steam locomotives appeared on the American landscape over 160 years ago. Even today, this area of the law stands on the brink of change as contemporary transportation problems promise to reawaken doctrines of property and railroad law that have lain dormant since the early part of this century. In North Carolina, particularly, the "public highway" doctrine may offer legislators and planners an opportunity to save railroad easements for future transportation use without compensating underlying fee owners for the alteration of the easements or the indefinite postponement of their termination. Of course, issues of title and abandonment will likely arise in any right of way case determining the extent and integrity of the railroad's property interest.

The controversy surrounding the Wallace-Castle Hayne rail corridor illuminates these and other issues as they pertain to the public's efforts to preserve rail corridors for interim and future uses. The Wilmington & Weldon, for instance, acquired its right of way in an era when broad legislative grants of authority allowed railroads to condemn corridors in fee simple. Whereas the corporate successor to the Wilmington & Weldon can only take easements by eminent domain, a court today may find a fee simple interest in any condemned portions of the Wallace-Castle Hayne corridor in a contemporary legal setting generally opposed to such a result. Questions of abandonment may also surface in any Wallace-Castle Hayne litigation. The removal of tracks from the corridor, the NCDOT's efforts to establish an intent to preserve the right of way, and the fact that the railroad conveyed the corridor for future railroad use represent general considerations that would prove relevant in any abandonment analysis.

If the NCDOT holds the Wallace-Castle Hayne corridor intact in qualified fee or easement, the destructibility of reversionary interests and the "public highway" doctrine may provide the state constitutional justifications to preserve the line for future transportation use. Whether recreational trails fall under the ambit of permissible transportation purposes remains to be seen. In any case, under existing statutes the state has chosen not to exercise explicitly its apparent authority to dedicate railroad easements to nonrailroad uses. Thus, the NCDOT could sanction an interim trail use on the Wallace-Castle Hayne corridor only if the railroad originally acquired a fee simple interest in the right of way. The

scarcity of modern case law addressing the "public highway" doctrine leaves many unanswered questions about the applicability of the principle to contemporary disputes surrounding corridor preservation efforts.

In light of these uncertainties, modern legislators and courts should attempt to reconcile the policy objectives of transportation planners with the constitutional rights of landowners sharing their borders with long-established railroad rights of way. To accomplish this formidable task, jurists and legislators will have to merge legal concepts emanating from different areas of the law rich in history and tradition. Fortunately, in North Carolina, this balancing process began over a hundred years ago. Although much has changed in the ways we live and travel, the need for transportation still remains. While unused railroad corridors offer potential for supplementing the demands of today's highway-traveling public, their future use will require flexible legal doctrines to accommodate changing transportation priorities and technologies.[347]

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347. The timeless quality of this necessity is reflected in an 1876 opinion written by Ohio Supreme Court Justice Wright: "[Rights of way] can not be confined solely to the uses to which they were adapted in the primitive state of mankind." Malone v. City of Toledo, 28 Ohio St. 643, 661 (1876).