Railroads

Statutory Update: Exhibit 'A'

Historical Background: Exhibit 'B'

Title Examination

Examining title to land that at any time was subject to the rights of a railroad company can be extremely difficult and fraught with danger. For title insurance underwriters in the state, it is equally difficult to decide whether to insure such title and equally dangerous.

The title by abandonment scenario.

The location of railroads, particularly in metropolitan centers or developing areas often make them extremely valuable either as free standing tracts or as necessary components to multi tract development where the lands must be aggregated.

Notwithstanding the fact that many rail lines fell into disuse with the shifting economics of the 20th century, the railroad's rights are not subject to claims of adverse possession NCGS 1-44.1

Nevertheless, with respect to land subject to a right of way, and not land owned in fee, the railroad is subject to a presumption that it has abandoned it rights to the easement if it has caused the tracks to be removed and no other use for railroad purposes has occurred for a period of seven (7) years. Nothing else appearing, under the general law of easements, title to area of the abandoned easement would remain vested in the original owners of the fee their heirs, successors or assigns.

In as much as many railroad rights of way were established in the early or mid 19th century, the title examiner would be faced with the daunting task of establishing a source of title more than 150 years old and potentially reconstructing a family tree comprising of many generations.

Perhaps to address the difficulty presented by the above described situation and to return a valuable resource to commerce the General Assembly enacted NCGS § 1-44.2 in 1987.

> **§ 1-44.2. Presumptive ownership of abandoned railroad easements.**
>
> (a) Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement. In

cases where the railroad easement adjoins a public road right-of-way, the adjacent property owner's right, title and interest in the abandoned railroad easement shall extend to the nearest edge of the public road right-of-way.

The side boundaries of each parcel so presumptively vested in the adjacent property owner shall be determined by extending the side property lines of the adjacent parcels to the centerline of the abandoned easement, or as the case may be, the nearest edge of the public road right-of-way. In the event the side property lines of two adjacent property owners intersect before they meet the centerline or nearest edge of the public road right-of-way, as the case may be, such side property lines shall join and run together from the point of intersection to the centerline of the easement or nearest edge of the public road right-of-way, as the case may be, perpendicular to said centerline or edge.

(b) Persons claiming ownership contrary to the presumption established in this section shall have a period of one year from the date of enactment of this statute or the abandonment of such easement, whichever later occurs, in which to bring any action to establish their ownership. The presumption established by this section is rebuttable by showing that a party has good and valid title to the land.

(c) Repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1071, s. 6. (1987, c. 433, s. 1; 1987 (Reg. Sess., 1988), c. 1071, s. 6.)

The statute sounded like a quick fix but it very soon was subject to challenge and the result in McDonald's Corp. v. Dwyer, 111 N.C. App. 127, 482 S.E.2d 165, aff'd, 338 N.C. 445, S.E. 2d 888 (1994) essentially gutted the reliability of the presumption in that the court found the one year limitation in subsection (b) to be unconstitutional. The General Assembly subsequently repealed the offending portion of subsection (b). This effectively puts the examiner back in the position to track the heirs or assigns of the original owners as under NCGS § 1-44.1.

Railroads Exhibit 'A'

Statutory Update

Proposed Legislation - This is dated material. The draft bill attached was pending on July 1, 2008.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

U D

BILL DRAFT 2007-RWz-11 [v.8] (04/04)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
5/2/2008 6:23:37 PM

Short Title: Railroad Corridor Management. (Public)

Sponsors: .

Referred to:

DRAFT

A BILL TO BE ENTITLED

AN ACT CONCERNING MANAGEMENT AND PROTECTION OF RAILROAD CORRIDORS, AS RECOMMENDED BY THE HOUSE SELECT COMMITTEE ON A COMPREHENSIVE RAIL SERVICE PLAN FOR NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1-44.1 reads as rewritten:

"**§ 1-44.1. Presumption of abandonment of railroad right-of-way.**

(a) 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, shall be presumed to have abandoned the railroad right-of-way

(b) Notwithstanding the provisions of subsection (a) of this section if a State-owned railroad company acquires new land on or after January 1, 2009 in order to expand its existing railroad corridor, the State-owned railroad company shall not be presumed to have abandoned any portion of its previously existing right-of-way, whether held by easement, express grant, presumptive grant or otherwise, regardless of whether it relocates its tracks within the expanded corridor. A State-owned railroad company shall not abandon its right-of-way under G.S. 1-44.1 unless the Board of Directors of the State-owned railroad company approves the abandonment of the right-of-way and the State-owned railroad company records an abandonment certificate in the county where the right-of-way is located."

SECTION 2. G.S. 1-44.2 reads as rewritten:

"**§ 1-44.2. Presumptive ownership of abandoned railroad easements.**

(a) Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement. In cases where the railroad easement adjoins a public road right-of-way, the adjacent property owner's right, title and interest in the abandoned railroad easement shall extend to the nearest edge of the public road right-of-way.

The side boundaries of each parcel so presumptively vested in the adjacent property owner shall be determined by extending the side property lines of the adjacent parcels to the centerline of the abandoned easement, or as the case may be, the nearest edge of the public road right-of-way. In the event the side property lines of two adjacent property owners intersect before they meet the centerline or nearest edge of the public road right-of-way, as the case may be, such side property lines shall join and run together from the point of intersection to the centerline of the easement or nearest edge of the public road right-of-way, as the case may be, perpendicular to said centerline or edge.

(b) The presumption established by this section is rebuttable by showing that a party has good and valid title to the land.

(c) Repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1071, s. 6.

(d) Notwithstanding the provisions of subsection (a) of this section, if a State-owned railroad company acquires new land on or after January 1, 2009 in order to expand its existing railroad corridor, the State-owned railroad company shall not be presumed to have abandoned any portion of its previously existing right-of-way, whether held by easement, express grant, presumptive grant or otherwise, regardless of whether it relocates its tracks within the expanded corridor. A State-owned railroad company shall not abandon its easement under this section unless the Board of Directors of the State-owned railroad company approves the abandonment of the easement and the State-owned railroad company records an abandonment certificate in the county where the easement is located."

SECTION 3. Chapter 136 of the General Statutes is amended by adding a new section to read:

"**§ 136-44.13. Consent of State-owned railroad required.**

The Department of Transportation shall not establish or accept for dedication any new public road or highway, bridge, crossing or other way of public passage within a State-owned railroad company railroad corridor without first obtaining the written consent of the State-owned railroad company pursuant to a written agreement under G.S. 124-12(1). For purposes of this section, the Department of Transportation shall seek written consent of the State-owned railroad company by contacting the State-owned railroad company, in writing, through its current registered agent at the address on file with the North Carolina Secretary of State's Office. The State-owned railroad company shall have 30 days from receipt of a request for written consent made under this section to approve, deny or respond with its requirements. For purposes of this section, "State-owned railroad company railroad corridor" means any State-owned

railroad company property on which tracks are located, including any related land that is subject to a railroad right-of-way, whether held by fee simple, easement, presumptive grant, express grant, or otherwise."

SECTION 4. Chapter 136 of the General Statutes is amended by adding a new section to read:

"**§ 136-89.199. Consent of State-owned railroad required.**

The Authority shall not establish or accept for dedication any new public road or highway, bridge, crossing or other way of public passage within a State-owned railroad company railroad corridor without first obtaining the written consent of the State-owned railroad company pursuant to a written agreement under G.S. 124-12(1). For purposes of this section, the Authority shall seek written consent of the State-owned railroad company by contacting the State-owned railroad company, in writing, through its current registered agent at the address on file with the North Carolina Secretary of State's Office. The State-owned railroad company shall have 30 days from receipt of a request for written consent made under this section to approve, deny or respond with its requirements. For purposes of this section, "State-owned railroad company railroad corridor" means any State-owned railroad company property on which tracks are located, including any related land that is subject to a railroad right-of-way, whether held by fee simple, easement, presumptive grant, express grant, or otherwise."

SECTION 5. G.S. 153A-1 reads as rewritten:

§ 153A-1. Definitions.

Unless otherwise specifically provided, or unless otherwise clearly required by the context, the words and phrases defined in this section have the meaning indicated when used in this Chapter.

(1) "City" means a city as defined by G.S. 160A-1(2), except that it does not include a city that, without regard to its date of incorporation, would be disqualified from receiving gasoline tax allocations by G.S. 136-41.2(a).

(2) "Clerk" means the clerk to the board of commissioners.

(3) "County" means any one of the counties listed in G.S. 153A- 10.

(4) "General law" means an act of the General Assembly that applies to all units of local government, to all counties, to all counties within a class defined by population or other criteria, to all cities, or to all cities within a class defined by population or other criteria, including a law that meets the foregoing standards but contains a clause or section exempting from its effect one or more counties, cities, or counties and cities.

(5) "Local act" means an act of the General Assembly that applies to one or more specific counties, cities, or counties and cities by name. "Local act" is interchangeable with the terms "special act," "special law," "public-local act," and "private act," is used throughout this Chapter in preference to those terms, and means a local act as defined in this subdivision without regard to the terminology employed in local acts or other portions of the General Statutes.

(6) "Publish," "publication," and other forms of the verb "to publish" mean insertion in a newspaper qualified under G.S. 1- 597 to publish legal advertisements in the county.

(7) "Railroad corridor" means any railroad property on which tracks are located, including any related land that is subject to a railroad right of way, whether held by fee simple, easement, presumptive grant, express grant or otherwise.

(8) "State-owned railroad company" means a railroad company, as defined in G.S. 124-11.

(9) "State-owned railroad company railroad corridor" means any State-owned railroad company property on which tracks are located, including any related land that is subject to a railroad right-of-way, whether held by fee simple, easement, presumptive grant, express grant, or otherwise."

SECTION 6. Chapter 153 of the General Statutes is amended by adding a new section to read:

"**§ 153A-327. Boundary of State-owned railroad company railroad corridor.**

For purposes of any planning and regulation of development by a county under this Article, the boundary line of any State-owned railroad company railroad corridor shall be treated the same as any other boundary line by the county and any planning boards or commissions established by a county."

SECTION 7. G.S. 153A-331 is amended by adding a new subsection to read:

"(a1) A subdivision control ordinance shall not allow the dedication or reservation of recreation areas serving residents of the immediate neighborhood of the subdivision, or of any other dedication or reservation of open spaces or open areas, where the land dedicated or reserved is within a railroad corridor without first obtaining the written consent of the railroad company. For purposes of this subsection, the county planning board, commission or other department with jurisdiction over development plans shall seek written consent of the railroad company by contacting the railroad company, in writing, through its current registered agent at the address on file with the North Carolina Secretary of State's Office. The railroad company shall have 30 days from receipt of a request for written consent made under this section to approve, deny or respond with its requirements."

SECTION 8. Chapter 153A of the General Statutes is amended by adding a new section to read:

"**§ 153A-336. Access to development within a State-owned railroad corridor.**

A county shall not approve any development plan where the sole means of ingress to and egress from the property being developed is located within a State-owned railroad company railroad corridor without first obtaining the written consent of the State-owned railroad company pursuant to a written agreement under G.S. 124-12(1). For purposes of this section, the county planning board, commission or other department with jurisdiction over development plans shall seek written consent of the State-owned railroad company by contacting the State-owned railroad company, in writing, through its current registered agent at the address on file with the North Carolina Secretary of

State's Office. The State-owned railroad company shall have 30 days from receipt of a request for written consent made under this section to approve, deny or respond with its requirements."

SECTION 9. Chapter 153A of the General Statutes is amended by adding a new section to read:

"**§ 153A-337. Minimum setback from railroad corridor.**

To preserve and protect railroad corridors for future development, each county that adopts planning and regulation of development ordinances may require a minimum setback of 25 feet from the outside boundary of any railroad corridor. A minimum setback from the railroad corridor furthers the goals set forth in G.S. 136-44.35, G.S. 136-44.36A, G.S. 136-190, and G.S. 124-12(1)."

SECTION 10. G.S. 153A-340 is amended by adding a new subsection to read:

"(j) A county shall not permit any land located within a railroad corridor to be dedicated or reserved as open space or open area without first obtaining the written consent of railroad company. For purposes of this subsection, the county planning board, commission or other department with jurisdiction over development plans shall seek written consent of the railroad company by contacting the railroad company, in writing, through its current registered agent at the address on file with the North Carolina Secretary of State's Office. The railroad company shall have 30 days from receipt of a request for written consent made under this section to approve, deny or respond with its requirements."

SECTION 11. G.S. 153A-357 reads as rewritten:

"**§ 153A-357. Permits.**

(a) No person may commence or proceed with:

(1) The construction, reconstruction, alteration, repair, movement to another site, removal, or demolition of any building;

(2) The installation, extension, or general repair of any plumbing system;

(3) The installation, extension, alteration, or general repair of any heating or cooling equipment system; or

(4) The installation, extension, alteration, or general repair of any electrical wiring, devices, appliances, or equipment

without first securing from the inspection department with jurisdiction over the site of the work each permit required by the State Building Code and any other State or local law or local ordinance or regulation applicable to the work. A permit shall be in writing and shall contain a provision that the work done shall comply with the State Building Code and all other applicable State and local laws and local ordinances and regulations. Nothing in this section shall require a county to review and approve residential building plans submitted to the county pursuant to Section R-110 of Volume VII of the North Carolina State Building Code; provided that the county may review and approve such residential building plans as it deems necessary. No permit may be issued unless the plans and specifications are identified by the name and address of the author thereof; and if the General Statutes of North Carolina require that plans for certain types of work be prepared only by a registered architect or registered engineer, no permit may be

issued unless the plans and specifications bear the North Carolina seal of a registered architect or of a registered engineer. If a provision of the General Statutes of North Carolina or of any ordinance requires that work be done by a licensed specialty contractor of any kind, no permit for the work may be issued unless the work is to be performed by such a duly licensed contractor. No permit issued under Articles 9 or 9C of G.S. Chapter 143 shall be required for any construction, installation, repair, replacement, or alteration costing five thousand dollars ($5,000) or less in any single-family residence or farm building unless the work involves: the addition, repair or replacement of load bearing structures; the addition (excluding replacement of same size and capacity) or change in the design of plumbing; the addition, replacement or change in the design of heating, air conditioning, or electrical wiring, devices, appliances, or equipment; the use of materials not permitted by the North Carolina Uniform Residential Building Code; or the addition (excluding replacement of like grade of fire resistance) of roofing. Violation of this section constitutes a Class 1 misdemeanor.

(b) No permit shall be issued pursuant to subsection (a) for any land-disturbing activity, as defined in G.S. 113A-52(6), for any activity covered by G.S. 113A-57, unless an erosion and sedimentation control plan has been approved by the Sedimentation Pollution Control Commission pursuant to G.S. 113A-54(d)(4) or by a local government pursuant to G.S. 113A-61 for the site of the activity or a tract of land including the site of the activity.

(c) No permit shall be issued pursuant to subsection (a) of this section for activity within a State-owned railroad company railroad corridor before the inspection department with jurisdiction over the site of the activity has provided written notice to a State-owned railroad company as provided in this subsection.

(1) For those permit applications for activity within a State-owned railroad company railroad corridor, the inspection department with jurisdiction over the site of the activity shall notify the State-owned railroad company, in writing, of the application for the permit. Notice must be given to the State-owned railroad company through its current registered agent at the address on file with the North Carolina Secretary of State's Office.

(2) The State-owned railroad company shall have thirty (30) days from receipt of the written notice to submit any objections to the permit application on the grounds that the proposed activity is inconsistent with a State-owned railroad company's ownership rights or its right to use the property for railroad purposes.

(3) A State-owned railroad company is a party aggrieved for the purpose of appealing any permitting decision by a county that is inconsistent with the State-owned railroad company's ownership rights or its right to use the property for railroad purposes."

SECTION 12. G.S. 160A-1 reads as rewritten:

§ 160A-1. Application and meaning of terms.

Unless otherwise specifically provided, or unless otherwise clearly required by the context, the words and phrases defined in this section shall have the meaning indicated when used in this Chapter.

(1) "Charter" means the entire body of local acts currently in force applicable to a particular city, including articles of incorporation issued to a city by an administrative agency of the State, and any amendments thereto adopted pursuant to 1917 Public Laws, Chapter 136, Subchapter 16, Part VIII, sections 1 and 2, or Article 5, Part 4, of this Chapter.

(2) "City" means a municipal corporation organized under the laws of this State for the better government of the people within its jurisdiction and having the powers, duties, privileges, and immunities conferred by law on cities, towns, and villages. The term "city" does not include counties or municipal corporations organized for a special purpose. "City" is interchangeable with the terms "town" and "village," is used throughout this Chapter in preference to those terms, and shall mean any city as defined in this subdivision without regard to the terminology employed in charters, local acts, other portions of the General Statutes, or local customary usage. The terms "city" or "incorporated municipality" do not include a municipal corporation that, without regard to its date of incorporation, would be disqualified from receiving gasoline tax allocations by G.S. 136-41.2(a), except that the end of status as a city under this sentence shall not affect the levy or collection of any tax or assessment, or any criminal or civil liability, and shall not serve to escheat any property until five years after the end of such status as a city, or until September 1, 1991, whichever comes later.

(3) "Council" means the governing board of a city. "Council" is interchangeable with the terms "board of aldermen" and "board of commissioners," is used throughout this Chapter in preference to those terms, and shall mean any city council as defined in this subdivision without regard to the terminology employed in charters, local acts, other portions of the General Statutes, or local customary usage.

(4) "General law" means an act of the General Assembly applying to all units of local government, to all cities, or to all cities within a class defined by population or other criteria, including a law that meets the foregoing standards but contains a clause or section exempting from its effect one or more cities or all cities in one or more counties.

(5) "Local act" means an act of the General Assembly applying to one or more specific cities by name, or to all cities within one or more specifically named counties. "Local act" is interchangeable with the terms "special act," "public-local act," and "private act," is used throughout this Chapter in preference to those terms, and shall mean a local act as defined in this subdivision without regard to the

terminology employed in charters, local acts, or other portions of the General Statutes.

(6) "Mayor" means the chief executive officer of a city by whatever title known.

(7) "Publish," "publication," and other forms of the verb "to publish" mean insertion in a newspaper qualified under G.S. 1-597 to publish legal advertisements in the county or counties in which the city is located.

(7a) "Railroad corridor" means any railroad property on which tracks are located, including any related land that is subject to a railroad right-of-way, whether held by fee simple, easement, presumptive grant, express grant or otherwise.

(8) "Rural Fire Department" means, for the purpose of Articles 4A or 14 of this Chapter, a bona fide department which, as determined by the Commissioner of Insurance, is classified as not less than class "9" in accordance with rating methods, schedules, classifications, underwriting rules, bylaws or regulations effective or applied with respect to the establishment of rates or premiums used or charged pursuant to Article 36 or Article 40 of Chapter 58 of the General Statutes, and which operates fire apparatus and equipment of the value of five thousand dollars ($5,000) or more; but it does not include a municipal fire department.

(9) "State-owned railroad company" means a railroad company, as defined in G.S.124-11.

(10) "State-owned railroad company railroad corridor" means any State-owned railroad company property on which tracks are located, including any related land that is subject to a railroad right-of-way, whether held by fee simple, easement, presumptive grant, express grant, or otherwise."

SECTION 13. G.S. 160A-296 reads as rewritten:

§ 160A-296. Establishment and control of streets; center and edge lines.

(a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to all of the following:

(1) The duty to keep the public streets, sidewalks, alleys, and bridges in proper repair.

(2) The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions.

(3) The power to open new streets and alleys, and to widen, extend, pave, clean, and otherwise improve existing streets, sidewalks, alleys, and bridges, and to acquire the necessary land therefor by dedication and acceptance, purchase, or eminent domain.

(4) The power to close any street or alley either permanently or temporarily.

(5) The power to regulate the use of the public streets, sidewalks, alleys, and bridges.

(6) The power to regulate, license, and prohibit digging in the streets, sidewalks, or alleys, or placing therein or thereon any pipes, poles, wires, fixtures, or appliances of any kind either on, above, or below the surface. To the extent a municipality is authorized under applicable law to impose a fee or charge with respect to activities conducted in its rights-of-way, the fee or charge must apply uniformly and on a competitively neutral and nondiscriminatory basis to all comparable activities by similarly situated users of the rights-of-way.

(7) The power to provide for lighting the streets, alleys, and bridges of the city.

(8) The power to grant easements in street rights-of-way as permitted by G.S. 160A-273.

(a1) A city with a population of 250,000 or over according to the most recent decennial federal census may also exercise the power granted by subdivision (a)(3) of this section within its extraterritorial planning jurisdiction. Before a city makes improvements under this subsection, it shall enter into a memorandum of understanding with the Department of Transportation to provide for maintenance.

(b) Repealed by Session Laws 1991, c. 530, s. 6, effective January 1, 1992.

(c) In exercising the power granted under subsection (a) of this section, a city shall not establish or accept for dedication any new public street, sidewalk, alley, bridge, crossing or other way of public passage within a State-owned railroad company railroad corridor without first obtaining the written consent of the State-owned railroad company pursuant to a written agreement under G.S. 124-12(1). For purposes of this subsection, the city inspection department with jurisdiction over the establishment and control of streets shall seek written consent of the State-owned railroad company by contacting the State-owned railroad company, in writing, through its current registered agent at the address on file with the North Carolina Secretary of State's Office. The State-owned railroad company shall have 30 days from receipt of a request for written consent made under this section to approve, deny or respond with its requirements."

SECTION 14. G.S. 160A-306 reads as rewritten:

"**§ 160A-306. Building setback lines.**

(a) A city shall have authority to (i) classify all or a portion of the streets in the city according to their size, present and anticipated traffic loads, and other characteristics relevant to the achievement of the purposes of this section, and (ii) establish by ordinance minimum distances that buildings and other permanent structures or improvements constructed along each class or type of street shall be set back from the right-of-way line or the center line of an existing or proposed street. Portions of any street may be classified in a manner different from other portions of the same street where the characteristics of the portions differ.

(a1) Any city that establishes or has established setback ordinances pursuant to this Statute, may establish minimum setback distances of at least 25 feet from the outside boundary of all railroad corridors. A minimum setback from railroad corridors furthers the goals set forth in G.S. 136-44.35, G.S.136-44.36A, G.S. 136-190, and G.S. 124-12(1).

(b) Any setback line shall be designed

(1) To promote the public safety by providing adequate sight distances for persons using the street and its sidewalks, providing safe distances of buildings and improvements from railroad corridors, lessening congestion in the street and sidewalks, facilitating the safe movement of vehicular and pedestrian traffic on the street and sidewalks and providing adequate fire lanes between buildings, and

(2) To protect the public health by keeping dwellings and other structures an adequate distance from the dust, noise, and fumes created by traffic on the street or by railroads and by insuring an adequate supply of light and air.

(c) A setback-line ordinance shall permit affected property owners to appeal to the council for variance or modification of setback requirements as they apply to a particular piece of property. The council may vary or modify the requirements upon a showing that

(1) The peculiar nature of the property results in practical difficulties or unnecessary hardships that impede carrying out the strict letter of the requirement,

(2) The property will not yield a reasonable return or cannot be put to reasonable use unless relief is granted, and

(3) Balancing the public interest in enforcing the setback requirements and the interest of the owner, the grant of relief is required by considerations of justice and equity.

In granting relief, the council may impose reasonable and appropriate conditions and safeguards to protect the interest of neighboring properties. The council may delegate authority to hear appeals under setback-line ordinances to any authorized body to hear appeals under zoning ordinances. If this is done, appeal to the council from the board shall be governed by the same laws and rules as appeals from decisions granting or denying variances or modifications under the zoning ordinance."

SECTION 15. Chapter 160A of the General Statutes is amended by adding a new section to read:

"**§ 160A-367. Boundary of State-owned railroad company corridor.**

For purposes of any planning and regulation of development by a city under this Article, the boundary line of any State-owned railroad company railroad corridor shall be treated the same as any other boundary line by the city and any planning boards or commissions established by a city."

SECTION 16. Chapter 160A of the General Statutes is amended by adding a new section to read:

"**§ 160A-368. Access to development within a State-owned railroad corridor.**

A city shall not approve any development plan where the sole means of ingress to and egress from the property being developed is located within a State-owned railroad company railroad corridor without first obtaining the written consent of the State-owned railroad company pursuant to a written agreement under G.S. 124-12(1). For purposes of this section, the city planning board, commission or other department with jurisdiction over development plans shall seek written consent of the State-owned railroad company by contacting the State-owned railroad company, in writing, through its current registered agent at the address on file with the North Carolina Secretary of State's Office. The State-owned railroad company shall have 30 days from receipt of a request for written consent made under this section to approve, deny or respond with its requirements."

SECTION 17. Chapter 160A of the General Statutes is amended by adding a new section to read:

"**§ 160A-369. Minimum setback from railroad corridor.**

To preserve and protect railroad corridors for future development, each city that adopts planning and regulation of development ordinances may require a minimum setback of 25 feet from the outside boundary of any railroad corridor. A minimum setback from the railroad corridor furthers the goals set forth in G.S.136-44.35, G.S.136-44.36A, G.S. 136-190, and G.S. 124-12(1)."

SECTION 18. G.S. 160A-372 is amended by adding a new subsection to read:

"(a1) A subdivision control ordinance shall not allow the dedication or reservation of recreation areas serving residents of the immediate neighborhood of the subdivision, or of any other dedication or reservation of open spaces or open areas, where the land dedicated or reserved is within a railroad corridor, without first obtaining the written consent of the railroad company. For purposes of this subsection, the city planning board, commission or other department with jurisdiction over development plans shall seek written consent of the railroad company by contacting the railroad company, in writing, through its current registered agent at the address on file with the North Carolina Secretary of State's Office. The railroad company shall have 30 days from receipt of a request for written consent made under this section to approve, deny or respond with its requirements."

SECTION 19. G.S. 160A-381 is amended by adding a new subsection to read:

"(g) A city shall not permit any land located within a railroad corridor to be dedicated or reserved as open space or open area without first obtaining the written consent of the railroad company. For purposes of this subsection, the city planning board, commission or other department with jurisdiction over development plans shall seek written consent of the railroad company by contacting the railroad company, in writing, through its current registered agent at the address on file with the North Carolina Secretary of State's Office. The railroad company shall have 30 days from receipt of a request for written consent made under this section to approve, deny or respond with its requirements."

SECTION 20. G.S. 160A-407 reads as rewritten:

"§ 160A-407. Definitions.

(a) For the purpose of this Part an "open space" or "open area" is any space or area (i) characterized by great natural scenic beauty or (ii) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

(b) For the purposes of this Part "open space" or "open area" and the "public use and enjoyment" of interests or rights in real property shall also include open space land and open space uses. The term "open space land" means any undeveloped or predominantly undeveloped land in an urban area that has value for one or more of the following purposes: (i) park and recreational purposes, (ii) conservation of land and other natural resources, or (iii) historic or scenic purposes. The term "open space uses" means any use of open space land for (i) park and recreational purposes, (ii) conservation of land and other natural resources, or (iii) historic or scenic purposes.

(c) For purposes of this Part, "open space" or "open area" shall not include any land that is located within a railroad corridor."

SECTION 21. G.S. 160A-417 reads as rewritten:

"§ 160A-417. Permits.

(a) No person shall commence or proceed with:

(1) The construction, reconstruction, alteration, repair, movement to another site, removal, or demolition of any building or structure,

(2) The installation, extension, or general repair of any plumbing system,

(3) The installation, extension, alteration, or general repair of any heating or cooling equipment system, or

(4) The installation, extension, alteration, or general repair of any electrical wiring, devices, appliances, or equipment,

without first securing from the inspection department with jurisdiction over the site of the work any and all permits required by the State Building Code and any other State or local laws applicable to the work. A permit shall be in writing and shall contain a provision that the work done shall comply with the State Building Code and all other applicable State and local laws. Nothing in this section shall require a city to review and approve residential building plans submitted to the city pursuant to Section R-110 of Volume VII of the North Carolina State Building Code; provided that the city may review and approve such residential building plans as it deems necessary. No permits shall be issued unless the plans and specifications are identified by the name and address of the author thereof, and if the General Statutes of North Carolina require that plans for certain types of work be prepared only by a registered architect or registered engineer, no permit shall be issued unless the plans and specifications bear the North Carolina seal of a registered architect or of a registered engineer. When any provision of the General Statutes of North Carolina or of any ordinance requires that work be done by a licensed specialty contractor of any kind, no permit for the work shall be issued unless the work is to be performed by such a duly licensed contractor. No permit issued under Articles 9 or 9C of Chapter 143 shall be required for any construction, installation, repair, replacement, or alteration costing five thousand dollars ($5,000) or

less in any single family residence or farm building unless the work involves: the addition, repair or replacement of load bearing structures; the addition (excluding replacement of same size and capacity) or change in the design of plumbing; the addition, replacement or change in the design of heating, air conditioning, or electrical wiring, devices, appliances, or equipment; the use of materials not permitted by the North Carolina Uniform Residential Building Code; or the addition (excluding replacement of like grade of fire resistance) of roofing. Violation of this section shall constitute a Class 1 misdemeanor.

(b) No permit shall be issued pursuant to subsection (a) for any land-disturbing activity, as defined in G.S. 113A-52(6), for any activity covered by G.S. 113A-57, unless an erosion and sedimentation control plan has been approved by the Sedimentation Pollution Control Commission pursuant to G.S. 113A-54(d)(4) or by a local government pursuant to G.S. 113A-61 for the site of the activity or a tract of land including the site of the activity

(c) Notice to State-owned Railroad Company required. No permit shall be issued pursuant to subsection (a) of this section for activity within a State-owned Railroad Company railroad corridor before the inspection department with jurisdiction over the site of the activity has provided written notice to a State-owned Railroad Company as provided in this subsection.

(1) For those permit applications for activity within a State-owned railroad company railroad corridor, the inspection department with jurisdiction over the site of the activity shall notify the State-owned railroad company, in writing, of the application for the permit. Notice must be given to the State-owned railroad company through its current registered agent at the address on file with the North Carolina Secretary of State's Office.

(2) The State-owned railroad company shall have 30 days from receipt of the written notice to submit any objections to the permit application on the grounds that the proposed activity is inconsistent with a State-owned railroad company's ownership rights or its right to use the property for railroad purposes.

(3) A State-owned railroad company is a party aggrieved for the purpose of appealing any permitting decision by a city that is inconsistent with the State-owned railroad company's ownership rights or its right to use the property for railroad purposes."

SECTION 22. This act becomes effective on October 1, 2008. Sections 1 and 2 of this act become effective January 1, 2009. Sections 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, and 21 of this act apply to actions taken by city, county or State entities on or after October 1, 2008.

Railroads Exhibit 'B'

Historical Background

A BRIEF HISTORY OF AND CURRENT ISSUES INVOLVING RAILROADS IN NORTH CAROLINA
A Two-Part Series
By Michael Aiken
(Published November 2, 1998 in *North Carolina Lawyers Weekly*)

As we explored in the first article of this two part series, railroads in North Carolina have a long and interesting past. However, as today's real estate attorney will attest, they can pose trouble for the otherwise routine property transaction. This second article will outline current issues associated with real estate upon which a railroad right of way was or is located.

Railroad rights of way can be interests in fee, or merely easements, and can range from as little as 50 feet to more than 200 feet in width. Both the estate and width of the rights of way held by the railroad are determined by the method in which the railroad acquired the rights of way. For the real estate attorney handling a transaction in real property that is burdened by or adjoins either an existing or abandoned right of way, two issues must be considered: what estate the railroad company holds, and where the right of way is located.

Beginning the Search

To determine the extent of the right of way, the location of the existing or abandoned right of way must first be established. This can be done by looking at old surveys, obtaining a new survey, or by contacting the current or former railroad company that operates or operated the line. If it can be shown that the right of way is not on or within 200 feet of the subject property, the general rule of thumb is that the subject property will not be encumbered by the right of way. If, however, the subject property is burdened by or lies within 200 feet of a right of way, the attorney should determine the exact width and estate involved.

As mentioned, the method of acquisition used by the railroad company will usually control both the width of the right of way and the estate created in the railroad company. The three most common methods by which the railroad companies acquired property for rights of way are condemnation, purchase under contract, and by operation of law arising from the construction of the actual rail line. Typically, the estates created are fee simple absolute, defeasible fees and easements. The most common width for a right of way is 200 feet, being 100 feet on either side of the centerline. If the railroad company holds the right of way in fee, then it may do as it chooses and the right of way is not subject to

abandonment.[1] Defeasible fees limit the right of way use and failure to use it in the prescribed manner can result in a reversion to the grantor, his successors or assigns. Should the railroad company hold only an easement, the rights of way will revert to the adjacent landowners upon abandonment.[2]

The Exercise of Eminent Domain

Most, if not all, of the railroads incorporated in North Carolina have been given the power to condemn property. Many of the original charters for railroads in this State provided authority for the railroad to exercise the power of eminent domain. This power also exists in § 62-220(2) of the North Carolina General Statutes.

If a railroad exercises its power of eminent domain, then the estate in land that they acquire may have a limited use and the statutes under which the condemnation took place will control the interest acquired. [3] Early railroad charters allowed the railroad to condemn property in fee simple. For example, the Raleigh and Columbia Rail Road Company charter provided 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."[4] In *Beach v. Wilmington & Weldon Railroad*, however, the North Carolina Supreme Court held that a railroad could acquire only an easement by condemnation.[5] If, for example, the railroad exercised its eminent domain powers under § 62-220 of the Session Laws of North Carolina, the railroad may only acquire an easement for railroad purposes, which would be extinguished upon abandonment.[6] By virtue of this statute and modern case law, a railroad may now only acquire an easement regardless of the provisions in its charter which allow for a taking in fee simple. This section of the statutes still controls and limits the modern railroads to the acquisition of only an easement.

Acquisition by Contract

Many railroad rights of way in North Carolina were acquired through direct negotiations with the landowner. In these instances, the estate granted and the width of the right of way will be controlled by a specific recorded instrument or group of instruments. N.C. Gen. Stat. § 62-220(3) provides "the real estate received by voluntary grant shall be held and used for the purposes of such grant." The difficult part in determining the interest held may be finding the initial instrument which conveyed the interest to the railroad. In many cases, these instruments date well over 100 years old and may no longer be in existence. Instruments will be difficult if not impossible to locate. Some that are located

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[1] *McLaurin v. Winston-Salem Southbound Ry. Co.* 374 S.E.2d 265, 267, 323 N.C. 609, 612 (1988).

[2] G.S. § 1-44.2 (NOTE: A right of way will not come under a state's legislative or judicial jurisdiction until the United States Surface Transportation Board has approved the regulatory abandonment request.)

[3] Comment, The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis, 97 N.C.L. Rev 1999.

[4] An Act to Incorporate the Raleigh and Columbia Rail Road Company, Pub. L., ch 40, § 18 (1836).

[5] *Beach v. Wilmington & Weldon Railroad*, 120 N.C. 498, 503, 263 S.E. 703, 704 (1897).

[6] *N.C. State Highway Comm. v. Farm Equipment Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

will not be legible. It is this author's understanding that many early documents recorded throughout North Carolina were destroyed during the Civil War years.

Once the instrument is located, the specific language controls the conveyance. Many of these instruments have been and continue to be the source of much litigation. Often the conveyance creates merely an easement; in others, the estate created will be in fee simple. Several factors influence the interest being conveyed. For example, a phrase in the deed, which reads "have given, granted, bargained and sold and by these present do hereby give, grant, bargain and sell," indicates a conveyance in fee, as does the use of covenants of seizin and warranty. If, on the other hand, the instrument uses a phrase such as "right and privilege to enter upon the lands and construct a railroad," this may indicate that only an easement was granted.

The presumption of fee simple conveyance is found in *McCotter v. Barnes*, where the North Carolina Supreme Court stated:

> A conveyance of land for use as a railroad right of way by deed in regular form of bargain and sale, reciting a valuable consideration, is presumptively a deed of purchase within the meaning of this section[7] and must be interpreted as an ordinary deed, so that when the granting clause is sufficient in form to convey the fee simple and the habendum clause and warranties are in harmony therewith, it conveys the fee and not a mere easement.[8]

The attorney should determine whether the presumption contained in N.C. Gen. Stat. § 39-1 applies to the deed at issue. N.C. Gen. Stat. § 39-1 reads:

> When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, unless such conveyance is plain and express words shows, or it is plainly intended by the conveyance of some part thereof that the grantor meant to convey an estate of less dignity.

The presumption in N.C. Gen. Stat. § 39-1 is rebuttable and there is an extensive amount of case law interpreting this provision.

Presumption of Conveyance

Many of the original charters authorizing railroad companies to acquire property for use as a right of way include a "presumption of conveyance" provision in favor of the railroad.[9] This presumption was enacted to allow an efficient method of acquisition by the railroad companies; it is not an exercise of eminent domain, but is based purely on

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[7] NOTE: The section referenced was at the time of the execution of the deed involved, Chapter 138, Public Laws of 1871-1872. The pertinent parts of this Act, then codified as Sections 1957(2) and (3) of the Code of 1883, are now codified as G.S. § 60-220(3)(4).

[8] *McCotter v. Barnes*, 247 N.C. 480, 101 S.E.2d 330 (1904).

[9] *Keziah v. Seaboard Air Line Railroad Co.*, 158 S.E.2d 539, 272 N.C. 299 (1968).

statutory presumption. Two conditions are necessary: first, the railroad must enter and construct its road. Second, the owner of the burdened land must fail to prosecute an action for compensation within two years of the completion of the road. If no action is taken and two years elapse, the statute provides that the railroad acquires the easement described in the charter, being "100 feet on each side of the center of the road,... and shall have, hold, and enjoy the same as long as the same be used for the purposes of said road, and no longer..." [10] Since this method of acquisition occurs only in the absence of a contract between the land owner and the railroad, a search of the record will disclose no instruments by which to determine the railroad's interest.

Use of a Right of way

Given the variation in right of way width, many adjoining landowners mistakenly believe that they are entitled to occupy and use any unused portion of the rights of way. Their occupancy is at the pleasure of the railroad. Since the railroad has the ability to allow a use of the property only if it is consistent with its chartered rights and duties,[11] and because the railroads are not required to occupy and direct the use of every foot of the condemned area, the rights of way will be preserved for the company so long as the road runs over the land and is operated by the company.[12] The Supreme Court in *McCaskill* states its this way:

> A permissive use of part of it 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. This may suspend, but does not abridge the right of the company to demand restoration, when the interests of the road may require its use.[13]

Additionally, many of the adjoining landowners along these rights of way assume that the railroad owns only an easement and once the line is abandoned they become the owners of the railroad property. A recent, and as yet undecided, example of this occurred when CSX Transportation Corporation, successor in interest to the Wilmington & Weldon Railroad, in 1989, abandoned a portion of its line between Wallace and Castle Hayne, North Carolina. In 1994, CSX donated its property to the North Carolina Department of Transportation. Adjoining landowners began to encroach on the rights of way and openly possess parts of the corridor. The State, presuming that CSX held fee simple title, objected and required the encroaching landowners to pay compensation or vacate the property. Several of the adjoining landowners have sought legal representation to challenge the State's ownership.[14] The outcome of these challenges will be based on

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[10] Section 29 in the Act of 1848-1849, Chapter 82, incorporating the North Carolina Railroad Company.

[11] *Atlantic Coast Line Railroad Co. v. Bunting*, 168 N.C. 579, 581 (1915).
[12] *The Carolina Central Railroad Co. v. McCaskill*, 94 N.C. 746 (1886).
[13] Id. at 752.
[14] Id.

what interest the Wilmington & Weldon Railroad acquired in the 19th or early 20th century.

The North Carolina Railroad Company has a fairly extensive archive of maps, deeds, and correspondence. The best source of information that I have found for determining ownership of rights of way is "The North Carolina Railroad Map" with explanatory text by S. David Carriker, editor (1991). The map and accompanying text show current and past rights of way along with an easy-to-follow chart identifying the track owner, date of incorporation, the year(s) built, period of operation and current status. The Internet also has a vast amount of resources to link you to individual railroad companies, historic societies, and rail enthusiasts.

Conclusion

When today's real property attorney finds himself involved in a transaction which includes a right of way or a has client who wants to acquire fee simple title to an existing or abandoned railroad right of way, the attorney must trace a chain of title to this property through public records, railroad records, surveys or other evidence. He must then ascertain how the railroad acquired its interest and what interest the railroad possesses. Determining the estate created, as well as the width of the rights of way, will take time and research, then the attorney must advise his client how to proceed.