

**Report of the Interim Joint Committee on
Economic Development and Tourism:
A Committee Study of the
Lexington/Big Sandy Railtrail
(2004 House Concurrent Resolution 8)**

**Prepared by
John Buckner, Ph.D.**
Committee Staff Administrator

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lrc.ky.gov

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Introduction

A railtrail is the term used to describe an abandoned railroad corridor that has been converted to a recreational trail for public use. Railtrails are restricted to nonmotorized forms of recreation, such as walking, bicycling, or horseback riding. Railtrails can vary in length, from less than one-half mile to hundreds of miles. Railtrail surfaces also vary from rough paths covered by wood chips or gravel to more elaborate trails made of concrete or asphalt and having public amenities such as restrooms and benches adjacent to the trail. With continued interest in tourism development and a renewed interest by many states in promoting an increase in the public's recreational physical activity, some states and communities are examining the development of railtrails.

During the 2004 Regular Session, the Kentucky General Assembly passed House Concurrent Resolution 8 that directs the Interim Joint Committee on Economic Development and Tourism to examine the development of the Lexington/Big Sandy railtrail and to suggest a strategy for its completion. Specifically, the committee was charged with proposing solutions to overcome barriers to the trail's development; to look for potential funding sources to complete the trail; to set a projected date for the trail's completion; and to offer recommendations on entities best suited to implement a strategy to complete the trail and for the trail's administration. See Appendix 1 for the full text of 2004 HCR 8.

The Interim Joint Committee on Economic Development and Tourism met July 21 and November 18, 2004, to examine this issue. The committee invited and received testimony from representatives of the Railtrail Development Office in the Department of Local Government; the University of Kentucky Transportation Center; CSX Transportation's Real Estate Division; the Kentucky RailTrail Council; the Department of Parks; the Kentucky Heritage Council; the Transportation Cabinet's Bicycle and Bikeway Commission; and staff from the Legislative Research Commission's Judiciary Committee. Other comments and information were elicited from specific persons and groups that had expressed an interest in the topic but were unable to attend the committee meetings in which railtrail development was discussed.

Background

Railroad transportation reached its zenith in the United States in the early part of the 20th century, with more than 250,000 miles of railroad lines crisscrossing the nation. Because of speed and cost efficiency, railroads were largely responsible for transporting people and freight between distant locations. However, with the rise of automobile and truck transportation and a better highway system, both passenger and freight railroad traffic declined. By the end of the century, railroad track mileage had decreased to 122,000 miles (United States).

This changed landscape in mass transit resulted in financial crisis for many railroad companies. As a result, Congress passed the Staggers Railroad Act in 1980, which served

to deregulate railroad companies by allowing for greater flexibility in price-setting, mergers, and corridor abandonment. The act permitted railroad companies to abandon unproductive lines, particularly what are known as "branch lines" that serve to connect smaller communities to larger "trunk lines" that are major corridors for railroad traffic (Law).

In 1968, Congress passed the National Trails System Act that authorized the creation of a national trail system to be comprised of three types of trails: recreation trails, scenic trails, and historic trails. Scenic and historic trails may only be designated by an act of Congress, but recreation trails may be designated by either the Secretary of the Interior or the Secretary of Agriculture to recognize exemplary trails of local significance. As of 2000, more than 800 trails, some of which are railtrails, have received National Recreational Trail designation (American Trails). Other types of trails include hiking trails, bicycle trails, horseback trails, and scuba or snorkeling trails. Some of the benefits associated with this designation include promotion, technical assistance, and access to federal funding. This Act was amended in 1983 to allow for a process known as "railbanking" (National Trails).

Railbanking allows a state, local government, or a private group to develop and utilize an abandoned railroad corridor for a recreational trail. A railroad corridor is the linear path composed of the railroad track and the right-of-way on each side of the track. If a corridor is railbanked, it is legally regarded as if it has not been abandoned--the railroad company retains ownership and any reversionary contracts between a railroad company and a private landowner are suspended. The group that acquires a railbanked corridor is allowed to convert the section to a recreational trail; however, if the railroad company later determines that the line is again needed for railroad transportation, the railroad is allowed to reclaim the section by reimbursing the group or groups for the costs they incurred in transitioning the section into a recreational trail. Nationally, more than 11,000 miles of abandoned railroad corridors have been transformed into recreational railtrails. There also are more than 2,000 projected trails in excess of 30,000 miles of trail in various stages of development (Rails-to-Trails). Some of these railtrails were created through a railbanking process, while others used different methods such as direct purchase from a landowner or obtaining an easement in exchange for tax credits.

At the June 21, 2004, meeting of the committee, a staff attorney of the Kentucky General Assembly's Judiciary Committee discussed some of the legal issues and statutes pertaining to railtrails. The development of railtrails is not without controversy. Concerns tend to fall into three general categories. First, some opponents find that the process of railbanking may constitute an illegal taking of private property. Railroad companies often developed corridors by having an easement granted so that a track could pass through private property. These easements frequently have a reversionary clause stating that the land upon which the track is developed reverts back to the property owner if the track is abandoned. Some landowners argue that railbanking may be an illegal taking because property owners are not compensated for land "taken" through the process. However, a 1990 Supreme Court decision upheld railbanking as an appropriate use of Congressional power (*Preseault v. ICC*, 494 U.S. 1 (1990)). Second, some landowners express concerns

about nuisance issues such as trespassing, trash, hunting, and vandalism that may take place on a developed railtrail. Some opponents argue that the difficulties of policing a linear trail may exacerbate such problems. Finally, some opponents have expressed concern over possible civil liability that landowners may face if a railtrail crosses or is adjacent to their land.

In Kentucky, there are approximately 1,200 miles of abandoned railroad corridors. Of these, less than 1 percent (approximately four miles) has been transformed into railtrails. Currently there are six abandoned corridors that have been railbanked for possible use as a railtrail (Shafer).

The proposed Lexington/Big Sandy railtrail is approximately 109 miles long and crosses seven counties: Fayette, Clark, Montgomery, Bath, Rowan, Carter, and Boyd. According to testimony from the director of the Real Estate Division of CSX Transportation, the company currently owns approximately 30 noncontiguous miles of the corridor; the remaining sections are held by numerous private citizens, businesses, local governments, and the federal government. Because a railbanking procedure must begin within 30 days from the date a railroad company files an Application to Abandon, railbanking the Lexington/Big Sandy corridor, which was abandoned in 1985, is inapplicable. Only the 30 miles originally purchased outright by the railroad company can still be acquired directly from the railroad. The remaining miles can be placed on the original corridor only with a landowner's permission.

Kentucky General Assembly Actions Pertaining to Railtrails

In 1998, House Concurrent Resolution 77 established an interim task force to study the feasibility of a railtrail program in Kentucky. The task force found that while there were mechanisms in place for railtrail development, the overall success of a railtrail program would depend heavily on the coordination of these mechanisms. The full study is included in Appendix 2. The task force made 12 specific recommendations:

1. Have one central person in an appropriate state agency that is responsible for the dissemination of railtrail information, including accepting notices of railroad abandonment and alerting interested local governments, state agencies, and private groups, providing information about available funding options (including TEA-21 applications), and that is familiar with inter-agency collaboration on railtrail efforts.
2. Reauthorize the Task Force, perhaps including representatives from interested railtrail entities, such as state government agencies and private interest groups. The focus could be on working with any physical assessment of corridors which might be done and creating a statewide plan for creating railtrails.
3. In addition to other efforts, work with the mechanisms already in place to provide for inclusion of railtrails in the Kentucky Trails System.

4. Have the Department of Parks comply with KRS 148.690(1) and (2), which provide that the Department of Parks shall review all formal declarations of railroad rights-of-way abandonment by the Surface Transportation Board for possible inclusion in the Kentucky Trails Systems.
5. Have the Transportation Cabinet notify the Department of Parks of railroad abandonment.
6. Have the Transportation Cabinet keep a record of abandoned railroads in Kentucky.
7. Require state agencies that receive abandonment notices (such as the Public Service Commission and the Historic Preservation Office) immediately forward those notices to the trail coordinator in the Kentucky Department of Parks.
8. Require the trails coordinator in the Kentucky Department of Parks to send letters to Area Development District offices, local historical societies, local Chambers of Commerce, reauthorized task force members, the Kentucky Association of Counties, and any other pertinent local government organizations, notifying them of the potential for railtrail development in the Commonwealth.
9. Cause a complete assessment of the abandoned railroad corridors in Kentucky to be done, including an on the ground assessment of the corridor's physical condition and feasibility of conversion to a railtrail. Recommend that the corridors be mapped electronically with data convertible to internet format, create a website setting out the data and linking to local tourism sites.
10. Have an appropriate agency, such as the Trails Coordinator in the Kentucky Department of Parks, develop a "how to manual" which explains the process for acquiring, funding, and developing a railtrail in Kentucky.
11. Recommend the enactment of a state railbanking law that provides for an increased time period for notices of railroad corridor abandonment, increases the number of entities notified of railroad corridor abandonment, allows for corridor preservation under Kentucky law, and excludes unsuitable properties from railtrail conversion.
12. Recommend legislation be created that specifies that the conversion of a corridor to a railtrail, with a provision for possible restoration of future service, is consistent with a railroad easement.

In 2000, the General Assembly used the recommendations of the task force as the basis for House Bill 221. With the exception of recommendation 10, all of the recommendations were addressed and incorporated in House Bill 221 (see Appendix 3 for 2000 Acts ch. 338). In addition, the bill went further by amending various statutes

relating to general criminal trespass provisions and the obligations of owners to persons using land for recreation to give greater protections to landowners whose property adjoins a railtrail or allow a trail to be placed across their land.

2002 Senate Concurrent Resolution 92 directed the Legislative Research Commission to establish a special interim task force to examine the development of the Lexington/Big Sandy Railtrail and to suggest a strategy for its completion. The task force did not meet.

2004 Committee Action and Findings

Based upon the testimony and information received, the committee issues the following findings.

1. The Special Task Force on Feasibility of Rails to Trails, created by 1998 HCR 77, conducted a thorough and complete study of the subject and issued recommendations that were reasonable and necessary to facilitate the development of railtrails in the Commonwealth. This committee commends the work of the Special Task Force on Feasibility of Rails to Trails. In the absence of changed circumstances or new developments directly related to railroad corridor abandonment in the Commonwealth, the committee finds that no further study of this subject is required by legislative committee.
2. The 1998 Special Task Force on Feasibility of Rails to Trails issued 12 recommendations concerning the development of railtrails. This committee finds that these recommendations were both reasonable and necessary to facilitate the development of railtrails and to help private groups and local governments obtain information about corridor abandonment.
3. The committee finds that 2000 HB 221, which was based upon the recommendations of the 1998 Special Task Force on Feasibility of Rails to Trails, provided necessary and appropriate statutory authority and mechanisms to identify abandoned railroad corridors; to provide notice to state agencies, local governments, and interested private groups of corridor abandonment; and to evaluate the potential of abandoned corridors by appropriate state agencies for railtrail development.
4. The committee finds that 2000 HB 221 adequately addresses liability concerns expressed by owners of property through which a railtrail passes.
5. The committee finds that 2000 HB 221 enacted a railbanking law that provides an adequate time in which notices of abandonment are sent to state agencies, local governments, and interested private groups.
6. The committee finds that the development and dissemination of a "how-to manual" by the Railtrail Development Office of the Department of Local Government is a necessary step to help local governments and private groups learn about state railbanking statutes

and the process to be followed when developing a railtrail. The committee recommends that the General Assembly consider legislation to require the development and dissemination of this manual in a timely manner.

7. The committee finds that local governments and private groups frequently express concerns and voice questions regarding how to fund the development of a railtrail. The committee strongly encourages the Railtrail Development Office to explore potential funding sources that may be used and to publish this information in a how-to manual. The committee was particularly impressed with the work of the Rails-to-Trails Conservancy, which published *Secrets of Successful Rail-Trails: An Acquisition and Organizing Manual for Converting Rails into Trails*. This manual discusses the federal Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, the Transportation Equity Act of the 21st Century (TEA-21), the Public Lands Highways Discretionary Fund, the Land and Water Conservation Fund, Brownfields Redevelopment initiatives, and the Community Development Block Grant Program in terms of potential funds that may be available for railtrail development. The manual also discusses novel ways to fund railtrail development, such as selling the railroad ties and gravel bed on a corridor, encouraging tax relief for property owners who grant an easement or donate land, and developing partnerships between local governments and private groups.

8. The committee finds that there is a general lack of understanding of state railbanking laws and the railtrail development process among local governments and interested private groups. To address this problem, the committee encourages the Railtrail Development Office to better publicize its program through meetings with local governments and interested private groups. These meetings should contain information concerning the possible use of interlocal agreements (KRS 65.245) between local governments to facilitate the development of railtrails.

9. The committee finds that the duties and responsibilities of the Railtrail Development Office are extensive and require full-time staffing of the office by the Department of Local Government. The committee commends the Department of Local Government's renewed emphasis on local economic development and encourages the department to consider tourism development as an important component of economic development, particularly in rural communities. The committee finds that railtrails can be an important component of a local community's tourist attractions and that a railtrail can serve to generate tourist spending in the counties it traverses.

10. The committee finds that the appropriate mechanisms are in place to allow for the development of the Lexington/Big Sandy railtrail. The committee recommends that the Railtrail Development Office take a leadership role in the process by bringing together elected officials from each affected county, private groups that have an interest in the development of this trail, and representatives from state agencies that have statutory responsibility for various components of the Commonwealth's railtrail development program. The committee recommends that the Railtrail Development Office encourage collaborative efforts between all parties in an effort to facilitate better communication, coordination, and efficiency.

11. The committee finds the development of the Lexington/Big Sandy railtrail to be a meritorious project. The proposed trail is 109 miles in length, crosses seven counties, and offers a range of scenic vistas--from urban settings in Fayette County, to rural communities and the Appalachian Mountains in Carter County. If developed, the trail would be the longest railtrail in Kentucky and one of the longest in the South. The committee commends the Kentucky Rails-to-Trails conservancy and other interested groups for their efforts to develop the Lexington/Big Sandy railtrail and encourages all state agencies to provide assistance where possible.

12. The committee finds that the development of a statewide network of railtrails is a commendable endeavor. The committee received testimony from the secretary of the Commerce Cabinet and advocacy groups that demonstrated that railtrails serve as a magnet for hikers, bicyclists, and outdoor enthusiasts nationwide, and the tourism revenues generated by railtrails have a significant economic impact on nearby communities. The committee encourages private groups and local governments to explore the possibility and potential of converting abandoned railroad corridors into railtrails where practicable.

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Appendix 1:

2004 House Concurrent Resolution 8

04 RS HCR 8/EN

A CONCURRENT RESOLUTION directing the Interim Joint Committee on Economic Development and Tourism to conduct a study on the development of the Lexington/Big Sandy Rail Trail and to suggest a strategy for its completion.

WHEREAS, the conversion of abandoned or unused railroad trails for pedestrian and nonmotorized use has become national policy through the National Trails Systems Act; and

WHEREAS, Rails to Trails projects throughout the United States have been shown to strengthen local economies through tourism and job development, preserve cultural and historic areas, protect natural green spaces, create family and individual recreational opportunities, preserve transportation options, encourage healthy lifestyles, and enhance community prosperity; and

WHEREAS, over 10,000 miles of rail-trails have been created across the country, but Kentucky has approximately 50 rail-trail miles; and

WHEREAS, the Lexington/Big Sandy Rail Trail was designated a Community Millennium Trail and has the potential to improve the quality of life for Kentucky citizens and connect communities stretching 109 miles from Lexington to Ashland;

NOW, THEREFORE,

Be it resolved by the House of Representatives of the General Assembly of the Commonwealth of Kentucky, the Senate concurring therein:

1 Section 1. The Interim Joint Committee on Economic Development and Tourism,
2 or its logical successor, shall conduct a study focusing on the development of the
3 Lexington/Big Sandy Rail Trail and suggest a strategy for its completion.

4 Section 2. The committee shall report its findings and recommendations to the
5 Legislative Research Commission no later than December 17, 2004. The report shall
6 include at least the following:

- 7 (1) Solutions for overcoming existing barriers to the trail's development;
8 (2) Potential funding sources to complete the trail;

04 RS HCR 8/EN

- 1 (3) Projected date for completion of the trail;
- 2 (4) Recommendations on entities best suited to implement the strategy for the trail's
- 3 completion; and
- 4 (5) Recommendations on entities best suited to administer the trail, in both the short
- 5 and long term.

6 Section 3. Provisions of this resolution to the contrary notwithstanding, the
7 Legislative Research Commission shall have the authority to alternatively assign the
8 issues identified herein to an interim joint committee or subcommittee thereof, and to
9 designate a study completion date.

Appendix 2:

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

Legislative Research Commission
Research Memorandum No. 486

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

**PURSUANT TO
1998 HOUSE CONCURRENT RESOLUTION 77**

Research Memorandum No. 486

August 31, 1999

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

MEMBERSHIP

Senator Paul Herron
Senator Virgil Moore
Senator Richie Sanders
Senator Dan Seum
Representative Dwight Butler
Representative Perry Clark
Representative Tim Feeley
Representative Tom Kerr
Representative Ruth Ann Palumbo
Representative Frank Rasche
Representative Jon David Reinhardt
Representative John Will Stacy
Representative Mike Weaver

Senator Glenn Freeman, Co-chair
Representative Jodie Haydon, Co-chair

Foreword

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

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

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

Bobby Sherman
Director

The Capitol
Frankfort, Ky.
November, 1999

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Introduction

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

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

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

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

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

sets out the recommendations of the Task Force in regard to the question of Rails-to-Trails in the Commonwealth of Kentucky.

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

Federal Response to Economic Hardships of Modern Railroads

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

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

The Rails-to-Trails Movement and Railbanking

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

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

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

Railtrail Experience Nationwide

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

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

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

Railtrail Experience in West Virginia

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

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

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

Railtrail Experience in Ohio

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

Railtrails in Kentucky

Kentucky Ranks 47th in Railtrails

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

Kentucky Transportation Cabinet

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

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

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

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

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

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

Kentucky Department of Local Government

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

Kentucky Department of Parks and HB 643

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

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

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

Kentucky Heritage Council

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

Kentucky Bicycle and Bikeways Commission

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

Kentucky Rails-to-Trails Council, Inc.

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

Acquisition Issues Associated with Railtrails

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

Who Owns the Corridor

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

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

Abandonments and Acquisition under the Federal System

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

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

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

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

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

Abandonments and Acquisition under State Law

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

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

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

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

Costs Associated with Railtrails

Acquisition Costs

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

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

Mitigation of Costs

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

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

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

Development Costs

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

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

Maintenance Costs

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

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

Liability Issues Associated with Railtrails

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

Land User's Status

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

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

Liability of Federal, State, and Local Governments

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

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

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

Liability Concerns of Other Groups

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

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

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

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

Conclusions and Recommendations

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

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

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

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Chart compiled by the Rails to Trails Conservancy

Appendix 3:

Acts ch. 338 (HB 221)

CHAPTER 338

(HB 221)

AN ACT relating to a Rails to Trails Program.

WHEREAS, the 1998 Kentucky General Assembly directed the Legislative Research Commission to establish a special interim Rails to Trails Task Force to study the feasibility, benefits, and implementation of a strategy for a Rails to Trails Program throughout the Commonwealth; and

WHEREAS, the task force appointed by the Commission has reported its findings to the Commission and the General Assembly; and

WHEREAS, the task force has recommended that a Rails to Trails Program be pursued by the Commonwealth as promoting the health, safety, and welfare of the citizenry;

NOW, THEREFORE,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 147A IS CREATED TO READ AS FOLLOWS:

A Railtrail Development Office is hereby created within the Department for Local Government. The department shall insure that the office has the necessary expertise to carry out the requirements imposed upon it by this section. Among other railtrail functions and duties which may be assigned to it, the office shall carry on at least the following responsibilities:

- (1) The office shall monitor the proceedings of the United States Department of Transportation's Surface Transportation Board and shall disseminate to interested entities in Kentucky information regarding those proceedings of interest to railtrail conversion or policy in the Commonwealth. If a railroad applies to the Surface Transportation Board for authority to discontinue service over or abandon a railroad corridor in the Commonwealth, the office shall immediately notify those political subdivisions through which the corridor passes and any interested state agency of the proceedings and the potential for trail development of the corridor. Notice shall also be sent to the county judge/executive of each county through which the proposed abandonment passes, who shall distribute copies of the notice to each member of the chief legislative body of the county government at the next regularly scheduled meeting of that legislative body. The office shall also send a copy of the notice to each soil and water conservation district through which the abandonment passes. If time is of the essence and it appears that the corridor is a suitable candidate for conversion to a railtrail and that no other railtrail interested entity will be participating in the federal proceeding, the office shall take those steps necessary to cause a railbanking or public use condition to be imposed in the federal proceeding;***
- (2) The office shall assist any requesting political subdivision or agency of state government with assistance on any application to the Surface Transportation Board regarding an abandoned or about to be abandoned railroad corridor, including any requests for railbanking or imposition of public use conditions;***
- (3) The office shall coordinate and promote railtrail development efforts among the various agencies of state government, including the Department of Parks and the Transportation Cabinet. While this subsection does not confer upon the office any powers beyond those***

that it may ordinarily possess, every entity of state government shall cooperate with the office to the extent practicable under the circumstances;

- (4) The office shall furnish to requesting political subdivisions assistance in applying to available federal, state, or local funding sources for funds to be used for the process of converting railroad corridors into public use trails; and*
- (5) The office may apply for federal, state, or private grants or other forms of financial assistance to carry on its mission.*

SECTION 2. A NEW SECTION OF KRS CHAPTER 277 IS CREATED TO READ AS FOLLOWS:

- (1) Any organization recognized as exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code, agency of state government, or political subdivision or city of this state holding or acquiring a railroad corridor may preserve the corridor for future railroad use while utilizing the right-of-way in the interim for nonmotorized public recreational use by filing with the Secretary of State a “Declaration of State Railbanking”, concurrently serving a copy of the declaration on the Transportation Cabinet. The declaration shall contain the name and address of the filing entity, a textual description and map of the railroad corridor being railbanked, a statement that the entity accepts full responsibility for managing the corridor, for any legal liability arising out of the use of the corridor or, if the entity is immune from suit, that the entity agrees to indemnify the railroad for any liability arising out of the use of the corridor, and for the payment of all taxes which may validly be assessed against the corridor, and a declaration that the property is being railbanked in accordance with the provisions of Kentucky law in that the corridor is held open for future restoration of rail service and that this section only grants authority for the corridor to be utilized for nonmotorized public recreational use during the interim.*
- (2) Any property that is the subject of a declaration of state railbanking, including property held by easement, shall, during the period a declaration of state railbanking remains in force, be deemed to be held for a railroad use and shall not revert to any other form of ownership. Until rail service is restored over the corridor, the declaration of state railbanking shall only authorize the use of the corridor for public, nonmotorized recreational use, with associated infrastructure. However, a declaration of state railbanking shall not preclude any public utility usage of the corridor if that usage is otherwise permitted under other applicable law. For the specific purpose of allowing railbanking under this section, an easement for railroad use shall not be deemed abandoned until the person holding the easement conveys the easement to another person for a nonrailroad use, title to the easement and the underlying estate comes into the hands of the same owner by conveyance, the easement owner files a disclaimer in the office of the county clerk of the county where the property is situated disclaiming all interest in the corridor, or the easement is declared abandoned by judicial decree.*
- (3) After property is railbanked under this section, the property shall be held available for purchase by any bona fide purchaser for the restoration of rail service over the property. The following requirements shall apply to any transfer of property in contemplation of the restoration of railroad service:
 - (a) The entity that acquired the right to use the railroad corridor for a railtrail under this section or to whom that right had been subsequently transferred shall be compensated for the fair market value of the corridor together with any**

improvements erected thereon. Funds received by the entity under this paragraph shall be held in trust for the benefit of the public;

- (b) All required federal and state permits and authority to reactivate and operate a railroad over the corridor shall be obtained prior to the transfer of the property for the contemplated railroad service restoration;*
 - (c) Adequate bond with good surety shall be posted ensuring that the railroad will be constructed, with the bond being used to cover the cost of restoring the corridor to its physical condition prior to transfer of the railbanked corridor for the contemplated railroad service restoration; and*
 - (d) The physical infrastructure necessary to operate the railroad, including tracks, ties, frogs, signaling equipment, grade crossings, and the like, shall be in place one (1) year from the date of the transfer. Train service shall be in place and operating two (2) years, from the date of the transfer. If these timelines are not met, the corridor and all associate physical improvements thereon shall automatically forfeit to the ownership of the entity responsible for railbanking the corridor under this section.*
- (4) Any person aggrieved by the act of railbanking a railroad corridor under the provisions of this section shall bring their claims within one (1) year after the declaration of state railbanking has been filed with the Kentucky Secretary of State. Any entity against whom a claim is asserted may utilize as an offset or setoff to the amount of any recovery those amounts in state or local taxes, together with interest and penalties, that have not been paid on the value of the property through which the claimant asserts title.*
- (5) Any entity which caused a declaration of state railbanking to be filed shall cause the declaration to be vacated on the files of the Secretary of State upon the cessation of use of the corridor as a nonmotorized public use trail or the reactivation of railroad service over the corridor.*

SECTION 3. A NEW SECTION OF KRS CHAPTER 277 IS CREATED TO READ AS FOLLOWS:

- (1) It is the public policy of this state to preserve railroad corridors for future railroad use. Toward this end, the Commonwealth recognizes that the salvage of tracks, ties, signaling equipment, ballast, and other items may indicate an intent to maximize return on present investment and not an intent to abandon any underlying easement for railroad or other use and that the obtaining of federal authority to discontinue service over or abandon a corridor does not necessarily indicate an intent to relinquish any property interests under state law. In any civil action to determine the status of a railroad use easement, ambiguity as to intent shall be resolved in favor of continued preservation of the corridor.*
- (2) Any holder of a railroad corridor held by easement or otherwise may preserve that corridor by filing with the Secretary of State a "Preliminary Declaration of State Railbanking," concurrently serving a copy of the declaration on the Transportation Cabinet. The declaration shall state the name of the entity holding the corridor, a textual description and map of the land area encompassed by the corridor, and a statement that the entity does not intend to abandon the corridor described in the declaration. The entity filing the declaration may at any later time cause that declaration to be withdrawn from the Secretary of State's files. While a preliminary declaration of state railbanking is on file with the Secretary of State, the corridor set out in the declaration shall not, regardless of the status or conclusion of any federal regulatory proceeding or the salvage of track*

and other material from the corridor, be deemed abandoned and shall continue to exist under Kentucky law and the property encompassed by the corridor shall not revert to any other form of ownership.

SECTION 4. A NEW SECTION OF KRS CHAPTER 277 IS CREATED TO READ AS FOLLOWS:

In addition to any other legal right, any person having a legal interest in land adjoining a railtrail or in the land traversed by the railtrail itself may grant to the entity holding the right to maintain a railtrail over the property a conservation easement over all or a portion of the property in accordance with KRS 382.800 to 382.860. The entity holding the right to maintain a railtrail over the corridor may, if it finds the easement's terms acceptable, yearly designate for the tax purposes of the party conveying the easement that the entity is holding the corridor pursuant to the authority granted to that entity in the easement as opposed to authority granted in Section 2 of this Act or any similar law allowing railbanking under federal law. This designation shall not, however, affect in any way the legal right of that entity to hold the corridor pursuant to a federal or state railbanking law or the operation of those laws, and the right to maintain the railtrail on the land shall not lapse as the result of the extinguishment or modification of the easement. The easement, by its terms, may be limited in duration from year to year or for a set period of years, may extinguish itself upon the happening a defined contingent future event, or may last in perpetuity.

Section 5. KRS 148.690 is amended to read as follows:

- (1) The department shall review all formal declarations of railroad right-of-way abandonments by the Surface Transportation Board or other agency with jurisdiction and may review former railroad corridors for possible inclusion in the state trails system. The commissioner shall, within three (3) years after the route of a trail or trail segment included in the system has been located, determine the boundaries of the right-of-way to be associated with that trail. Such boundaries shall be established in such a manner that they protect the scenic value of the trail.
- (2) The commissioner is authorized to develop effective procedures to assure that, wherever practicable, utility rights-of-way, abandoned railroad corridors, or similar properties having value for trail purposes may be made available for such use; however, the commissioner shall take into consideration the rights of adjacent property owners in the development of any such procedures. Other departments of state government having jurisdiction, control over, or information concerning the use, abandonment, or disposition of rights-of-way, railroad corridors, and similar properties that may be suitable for trail purposes shall cooperate with the commissioner in the transfer of these rights for trail use. *These procedures shall include, at a minimum, that, for every railroad corridor that is the subject of a request for federal authority to discontinue service or for federal regulatory abandonment, the commissioner shall evaluate the potential of converting that corridor into a railtrail. The commissioner shall cause a preliminary review to be completed within thirty (30) days of the publication of the request for federal authority in the Federal Register. The commissioner shall cause a final review to be completed ninety (90) days after the publication of the request for federal authority in the Federal Register. The commissioner shall timely transmit copies of these reviews to the Legislative Research Commission and to the Commonwealth's Railtrail Development Office in the Department for Local Government as they are completed. If either review indicates the possibility of converting the corridor into a railtrail, the commissioner may participate in the federal*

proceeding to request that the corridor be railbanked in accordance with federal law or to request the imposition of a public use condition.

SECTION 6. A NEW SECTION OF KRS CHAPTER 174 IS CREATED TO READ AS FOLLOWS:

- (1) *The Transportation Cabinet, including any agency or other unit of government attached to the cabinet, shall immediately transmit to the Department of Parks and to the Commonwealth's Railtrail Development Office in the Department for Local Government any information received from a railroad or other person having an ownership interest in a railroad corridor pertaining to a proposed or pending action or proceeding to obtain federal authority for the regulatory abandonment of that railroad corridor.*
- (2) *The Transportation Cabinet shall keep a record of railroad lines in the Commonwealth of Kentucky, including both lines that have been abandoned through the federal government's regulatory abandonment process and those where any railroad property interest in the railroad corridor itself has been abandoned under Kentucky law. The cabinet shall annually publish an updated map showing the location and as much information as to the status of these lines as practicable. The record shall include, in as much as possible;*
 - (a) *A description of the line and its location;*
 - (b) *The current or last railroad owner of the line;*
 - (c) *The operator of the line;*
 - (d) *The addresses and phone numbers for the owners and operators of the lines;*
 - (e) *Whether the owner of the line has received authority from the Federal Government to discontinue service over the line;*
 - (f) *Whether the owner of the line has received authority from the Federal Government to abandon the line;*
 - (g) *Whether the owner of the line has consummated any authority granted by the Federal Government to discontinue service over the line or to abandon the line;*
 - (h) *Whether the line has been railbanked under either federal or state law; and*
 - (i) *Any other information the cabinet deems pertinent and useful to the public.*

SECTION 7. A NEW SECTION OF KRS CHAPTER 146 IS CREATED TO READ AS FOLLOWS:

The Natural Resources and Environmental Protection Cabinet, including any agency or other unit of government attached to the cabinet, shall immediately transmit to the Department of Parks and to the Commonwealth's Railtrail Development Office in the Department for Local Government any information received from a railroad or other person having an ownership interest in a railroad corridor pertaining to a proposed or pending action or proceeding to obtain federal authority for the regulatory abandonment of that railroad corridor.

Section 8. KRS 171.381 is amended to read as follows:

- (1) The heritage council shall be dedicated to the preservation and protection of all meaningful vestiges of Kentucky's heritage for succeeding generations, and in pursuit of this dedication it shall engage in and concern itself with worthy projects and other matters related to the conservation and continuing recognition of buildings, structures, sites, and other landmarks

associated with the archaeological, cultural, economic, military, natural, political, or social aspects of Kentucky's history.

- (2) The duties and functions of the council shall be to:
 - (a) Review and recommend appropriate projects and programs to insure the proper recognition, preservation, and protection of matters related to Kentucky's heritage, particularly those in the nature of or associated with real property;
 - (b) Advise, consult, and cooperate generally with state, local, and national officials and agencies to accomplish the purposes to which the council is dedicated, and specifically with the Kentucky Department of Parks and Historical Society in matters of common concern;
 - (c) Encourage, promote, and coordinate historic preservation programs being conducted in Kentucky by other agencies or groups, public and private; and
 - (d) Prepare and maintain an inventory or survey of Kentucky's resource of historic buildings, sites, structures, and other landmarks, and list in an official roll those such landmarks which possess statewide or national significance.
- (3) The council may:
 - (a) Accept grants or other funds or property from any available source, public or private;
 - (b) Employ, with the approval of the Governor, such staff as may be necessary. Any member of such staff shall be entitled to compensation under KRS Chapter 18A, and may be reimbursed for necessary and actual expenses in accordance with the provisions of KRS Chapters 44 and 45;
 - (c) Enter into such contractual relationships as may be necessary;
 - (d) Acquire real property, by gift or devise or by purchase pursuant to the provisions of KRS 45A.045, and hold the same in the name of the Commonwealth for the use and benefit of the council;
 - (e) Initiate its own projects of an appropriate nature, and undertake or otherwise engage in joint projects with other agencies or groups, public or private; and
 - (f) Adopt such rules and regulations as may be necessary and incidental to the performance of the council's duties and functions.
- (4) The receipt, control, and expenditure of funds shall be subject to the general provisions of the Kentucky Revised Statutes governing financial administration of all state agencies.
- (5) No provision of this section shall be construed as repealing any of the laws of the Commonwealth relating to the preservation, protection, and recognition of historical matters, but shall be held and construed as ancillary and supplemental thereto.
- (6) The council shall receive applications, interview and recommend to the Governor three (3) persons as nominees for appointment as the director of the Heritage Division, Education, Arts, and Humanities Cabinet. The director of the Heritage Division shall be the state historic preservation officer.
- (7) The responsibilities of the state historic preservation officer shall include:
 - (a) Development for the State Historic Preservation Program;

- (b) Direction of a comprehensive statewide survey of historic properties;
- (c) Nomination of historic properties to the National Register of Historic Places;
- (d) Cooperation in the development of effective working relationships with federal, state, and local agencies that participate in the management of historic properties and in project planning that may affect historic properties;
- (e) Cooperation in the integration of historic preservation planning with all levels of planning;
- (f) Cooperation in the development and maintenance of a review procedure for publicly funded, assisted, and licensed undertakings that may affect historic properties within the state;
- (g) Participation in the review of federal, federally assisted, and federally licensed undertakings that may affect historic properties included in or eligible for inclusion in the National Register under Section 106 of the National Historic Preservation Act and Executive Order 11593;
- (h) Assisting federal agencies in fulfilling their historic preservation responsibilities under federal law and regulations;
- (i) Liaison with organizations of professional archaeologists, historians, architects, architectural historians, planners, and others concerned with historic preservation;
- (j) Development and operation of a program of public information and education concerning the preservation program;
- (k) Administration of the grants program within the state;~~and~~
- (l) Preparation and maintenance of a comprehensive statewide historic preservation plan;
and
- (m) *The immediate transmittal to the Department of Parks and to the Commonwealth's Railtrail Development Office in the Department for Local Government of any information received from a railroad or other person having an ownership interest in a railroad corridor pertaining to a proposed or pending action or proceeding to obtain federal authority for the regulatory abandonment of that railroad corridor.*

SECTION 9. A NEW SECTION OF KRS CHAPTER 276 IS CREATED TO READ AS FOLLOWS:

The Railroad Commission shall immediately transmit to the Department of Parks and to the Commonwealth's Railtrail Development Office in the Department for Local Government any information received from a railroad or other person having an ownership interest in a railroad corridor pertaining to a proposed or pending action or proceeding to obtain federal authority for the regulatory abandonment of that railroad corridor.

SECTION 10. A NEW SECTION OF KRS CHAPTER 277 IS CREATED TO READ AS FOLLOWS:

Each railroad proposing to discontinue service over or to obtain federal authority for regulatory abandonment of a railroad corridor in the Commonwealth of Kentucky shall, in addition to those notification requirements set out in federal law, notify the Commonwealth's Railtrail Development Office in the Department for Local Government and the trails

coordinator in the Department of Parks that the railroad is attempting to obtain federal authority to do so.

SECTION 11. A NEW SECTION OF KRS CHAPTER 278 IS CREATED TO READ AS FOLLOWS:

The Public Service Commission shall immediately transmit to the Department of Parks and to the Commonwealth's Railtrail Development Office in the Department for Local Government any information received from a railroad or other person having an ownership interest in a railroad corridor pertaining to a proposed or pending action or proceeding to obtain federal authority for the regulatory abandonment of that railroad corridor.

Section 12. KRS 411.190 is amended to read as follows:

- (1) As used in this section:
 - (a) "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.
 - (b) "Owner" means the possessor of a fee, *reversionary, or easement* interest, a tenant, lessee, occupant, or person in control of the premises.
 - (c) "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, *bicycling, horseback riding*, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.
 - (d) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land but does not include fees for general use permits issued by a government agency for access to public lands if the permits are valid for a period of not less than thirty (30) days.
- (2) The purpose of this section is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.
- (3) Except as specifically recognized by or provided in subsection (6) of this section, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for such purposes.
- (4) Except as specifically recognized by or provided in subsection (6) of this section, an owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreation purposes does not thereby:
 - (a) Extend any assurance that the premises are safe for any purpose.
 - (b) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed.
 - (c) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of those persons.
- (5) Unless otherwise agreed in writing, the provisions of subsections (3) and (4) of this section shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision thereof for recreational purposes.

- (6) Nothing in this section limits in any way any liability which otherwise exists:
 - (a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.
 - (b) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section.
- (7) Nothing in this section shall be construed to:
 - (a) Create a duty of care or ground of liability for injury to persons or property.
 - (b) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this section to exercise care in his use of the land and in his activities thereon, or from the legal consequences of failure to employ such care.

Section 13. KRS 511.090 is amended to read as follows:

- (1) A person "enters or remains unlawfully" in or upon premises when he is not privileged or licensed to do so.
- (2) A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license or privilege unless he defies a lawful order not to enter or remain personally communicated to him by the owner of such premises or other authorized person.
- (3) A license or privilege to enter or remain in or upon premises which are only partly open to the public is not a license or privilege to enter or remain in or upon a part of the premises which is not open to the public.
- (4) A person who enters or remains upon unimproved and apparently unused land which is neither fenced nor otherwise enclosed does not commit criminal trespass unless notice against trespass is personally communicated to him by the owner of the land or some other authorized person or unless notice is given by posting in a conspicuous manner.
- (5) ***Private land adjoining a railtrail that is neither fenced nor otherwise enclosed shall be presumed to be land where notice against trespassing has been given by the owner of the land, and a person utilizing the railtrail shall be presumed to lack privilege or license to enter upon that land unless the person has permission from an adjoining landowner to do so.***

Section 14. The Department for Local Government shall inventory the Commonwealth's active and abandoned rail corridors and, for the abandoned corridors, analyze the suitability of each of those corridors for railtrail conversion. Corridors inventoried shall include both common carrier and private railroads, as well as railroads which may not have been attached to the interstate transportation system. Additionally, corridors over which service has been discontinued as well as corridors potentially subject to abandonment shall be analyzed as abandoned corridors. In conducting the inventory, the department shall, for each corridor, attempt to ascertain the legal ownership status of the corridor and the date rail service over the rail corridor ceased together with the dates of formal abandonment, and make an examination of the physical integrity of the corridor, including the presence or lack of tunnels, bridges, and culverts. The department shall make its report to the Legislative Research Commission no later than July 1, 2003. The

department may divide the state into regions, and complete assessments for individual regions prior to July 1, 2003. The report shall be provided in both printed and electronic format. The department may, through a request for proposals process, contract with a Kentucky public university for the performance of any of the responsibilities imposed upon the department by this section. The department may seek and utilize available state and federal grant money to fund the assessment.

Section 15. The Legislative Research Commission shall establish a Rails to Trails Program Task Force. The task force shall be composed of fifteen members, nine of whom shall be members of the Kentucky General Assembly with Senate and House co-chairs appointed by the Legislative Research Commission. The task force shall include among the nine legislative members the Chair of the Senate Economic Development and Labor Committee, and the Chairs of both the House Economic Development Committee and the House Tourism Development and Energy Committee. The remaining six members of the task force shall be:

1. The Governor of the Commonwealth of Kentucky, or his designee;
2. The Commissioner of the Department of Parks, or his designee;
3. The Secretary of the Tourism Cabinet, or his designee;
4. The commissioner of the Department for Local Government, or his designee;
5. A representative of the Kentucky Rails to Trails Council, to be designated by that organization; and
6. A representative of the Kentucky Farm Bureau, to be designated by that organization.

The task force shall continue to study railtrail issues, with particular emphasis on establishing actual trails within the Commonwealth. The Department for Local Government or the university to whom the assessment contract is awarded under Section 14 of this Act shall, upon request of the task force, update the task force on the progress of the work and allow task force members and staff access to records and meetings connected with the assessment. The task force shall report its findings and recommendations to the Legislative Research Commission by September 15, 2001.

Approved April 6, 2000

