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Re: Legacy Trail Update

I attended Monday's meeting when Nicole Rissler, Sarasota County's Director of Parks and Recreation, and Hayley Baldinelli of the County Attorney's Office presented Sarasota County's plan for the northern extension of the Legacy Trail. More than two hundred landowners attended the meeting. I sent you an email last week in anticipation of this meeting and I promised to follow-up after the meeting.

The topic of greatest interest was Sarasota County's demand that almost three hundred landowners demolish and remove (at the landowner's expense) existing improvements such as sheds, in-ground pools, fences, patios, septic fields, wells and other improvements from the one-hundred-foot-wide right-of-way land. These improvements were lawfully built and, where relevant, Sarasota County issued a permit authorizing the construction of the improvement. Sarasota County is sending letters by certified mail and hanging notices on owners' doors demanding the owner demolish or remove what Sarasota County now contends is an "encroachment" upon Sarasota County property.

The fundamental question is Sarasota County's authority to demand an owner demolish a lawfully built structure located upon the owner's private property. During Monday's meeting Ms. Baldinelli answered this question by claiming Sarasota County "owns" the property because Sarasota County "bought" the land from the railroad. But, as I explained in my last email and summarize below, Sarasota County does *not* own this property. The railroad had no interest in your land that the railroad could sell Sarasota County. You own the land. At the very most, Sarasota County was given an easement to use this property for a public recreational trail subject to the federal Surface Transportation Board's (the Board's) continuing jurisdiction

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and authority over the corridor. (I prefer to refer to the Surface Transportation Board as the "Board" rather than the "STB" because STB sounds like some sexually transmitted disease.).

When Sarasota County first demanded owners remove these improvements, I wrote the Sarasota County Commissioners on behalf of the more than two hundred landowners I represent. A copy of my letter is posted on my firm's website, www.truenorthlawgroup.com. Now, almost ten weeks later, no Commissioner has responded to my letter. Instead, Sarasota County continues to dun landowners with certified letters and threatening notices the County hangs on the front doors of owners' homes. (As an aside, why is it that Sarasota County thinks it can ignore the certified letters I sent on behalf of these owners while expecting landowners to respond to certified letters the County sends?)

A bureaucrat cannot go to a homeowner and say, "hey, get your pool off our park." The landowner would, rightly, say, "my swimming pool is on my land and has been there for fifteen years." The law supports you in this situation. If Sarasota County wants to claim it owns your land, Sarasota County must prove the County acquired title to the land from someone whose title or ownership interest is superior to your title (which the County cannot do) or the County must condemn your land under Florida state law (which the County has not done). Thus, apart from whatever right Sarasota County was given by the federal government under the federal Trails Act, Sarasota County has no right to use or occupy your land and Sarasota County has no right to demand that you remove any structure from your land. Said another way, Sarasota County's interest in that private property that was once used by the railroad for a railway line is defined by what the federal government took from the landowners when the Board issued an order invoking the federal Trails Act.

Sarasota County is laboring under the false notion that the County can simply issue a ukase demanding an owner

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demolish improvements on the owner's private property and the owner must comply with the County's edict or the County can enter the owner's land and remove the structure and send the owner a bill for the costs the County incurred doing so. The County cannot do this. This is not lawful or constitutional.

When pressed on this point during Monday's meeting, Ms. Baldinelli claimed Sarasota County could demand owners remove these improvements for two reasons. First, Ms. Baldinelli said, Sarasota County paid the railroad something like $30 million for a deed to the abandoned right-of-way. And, second, Ms. Baldinelli said Sarasota County passed an ordinance saying the County could demand owners remove improvements from that part of the owner's land and now is encumbered with the Legacy Trail easement.

Sarasota County is wrong for a number of reasons. First, the railroad had no interest in the *land* across which its abandoned railroad right-of-way *easement* once ran. The right-of-way easement the railroad once held terminated when the railroad stopped using the land for operation of a railway. Chief Justice Roberts explained, "[t]he essential features of easements — including, most important here, what happens when they cease to be used — are well settled as a matter of property law. An easement is a 'nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.' 'Unlike most possessory estates, easements…may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land." *Brandt Trust v. United States*, 572 U.S. 93, 104-105 (2014) (citations omitted). Thus, the railroad owned nothing and could convey nothing to anyone. Furthermore, the deed to Sarasota County was not from the railroad but was from the Trust for Public Land,

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which likewise had no ownership interest in the land under the abandoned railroad right-of-way.

The Alabama Supreme Court recently held in a Trails Act case that "the quitclaim deed conveyed nothing to the [county] because the railroad, at the time of conveyance, had nothing to transfer. In other words, the railroad's inaction in failing to use its right-of-way terminated the right-of-way, divesting it of any further interest in the property." *Monroe County Comm'n v. Nettles*, 2019 Ala. LEXIS 37, *14 (Ala. April 26, 2019). The trail-user, Monroe County, appealed to the United States Supreme Court, but the Supreme Court refused to hear Monroe County's appeal. (I personally think Chief Justice Parker, who dissented from the court's decision, had the better view. He agreed that the railroad owned nothing and could sell nothing, but he also recognized the federal government could preempt Alabama state law, but, in doing so, had to pay the owner.)

Second, passing an ordinance cannot take private property unless the Sarasota County first follows Florida law governing the exercise of eminent domain and pays the owner. Sarasota County has not done this. For Sarasota County to claim it owns your land because the County passed an ordinance declaring the County owns your land is not a legal justification – it is a tautology. Sarasota County is invoking the "because I'm the mommy" argument. Sarasota County cannot declare what was private property is now public property without compensating the owner. "States effect a taking if they recharacterize as public property what was previously private property." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713, (2010) (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-165 (1980)). Similarly, in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 23 (1990) (*Preseault I*), the Supreme Court held, "[A] sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation. ... This is the very kind of thing that the Taking Clause of the Fifth Amendment was

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meant to prevent…'" *Id.* (O'Connor, Scalia, and Kennedy, J.J., concurring) (quoting *Webb's Fabulous Pharmacies,* 449 U.S. at 164). The Supreme Court's decision in *Preseault I* is available at: https://www.oyez.org/cases/1989/88-1076.

The other important matter to resolve is the nature and physical dimensions of that property Sarasota County has a lawful right to control by reason of the Board's order invoking the federal Trails Act. Last December I asked Sarasota County to provide the surveys, appraisals, and design plans for the Legacy Trail as well as any emails, deeds, agreements, and correspondence between Sarasota County, the railroad, the Trust for Public for Land, and the Florida Department of Transportation. Sarasota County has provided some, but not all, of the documents I requested. I have reviewed the documents Sarasota County produced, and I am awaiting receipt of additional documents. I summarize below what I have learned so far, and, when I receive the remaining documents, I will send a supplemental email.

Before addressing Sarasota County's demand that you and other owners remove improvements from that portion of your private property which is now encumbered by this new federal rail-trail easement, I want to summarize the context in which this controversy arises. Some of this background will be familiar from the email I sent you last week. If you did not receive my earlier email, please let me or Megan Epperson know, and we will send it to you. Megan's email is mepperson@truenorthlawgroup.com.

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BACKGROUND

I. When the federal Surface Transportation Board invokes the National Trails Act it takes private property and must compensate the landowner.

A. The federal Trails Act.

In 1983 Congress amended the National Trails System Act of 1968 to add section 8(d), codified as 16 USC §1247(d). This provision provides that, after a railroad abandons a railroad right-of-way, the federal government (originally the Interstate Commerce Commission and now its successor-agency the Board) can issue an order creating a new easement across the owner's land. The new federally-created easement allows a non-railroad trail-user (such as Sarasota County) to use the land for a public recreational trail and preserve the corridor under the federal government's jurisdiction for a possible future railroad line.

In order for the Board to issue an order invoking this section of the Trails Act and create a new rail-trail corridor easement across the land, several things have to happen. *First,* the railroad must have not used of the right-of-way for more than two years. *Second,* the railroad must have petitioned the Board for authority to abandon the right-of-way and verify to the Board that there is no current or future use of the right-of-way for a railroad. *Finally*, the Board (and any shippers on the railway line) must agree that there is no current or future need for railroad service over this railway line. When these conditions are met, the Board will authorize the railroad to abandon the railway line, and the railroad may remove the tracks and ties, and the railroad has no further obligation to provide railroad service over this right-of-way. Once the Board issues an order granting the railroad's petition to abandon the railway line, the railroad has no further right or interest in the right-of-way. And, under state law and the terms of the original right-of-way easement, any interest the railroad once held to operate a railway across the

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land terminated, and the owners of the land across which the right-of-way was once located now hold unencumbered title to their land free of any easement.

In 1983 Congress became concerned that railroads were abandoning too many railroad rights-of-way, and Congress wanted to preserve these otherwise-abandoned railroad rights-of-way for a possible future railroad. So, Congress amended the Trails Act by adopting section 8(d), which provides, "interim use [of abandoned railroad right-of-way easements for public recreation] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."

The explicit text of section 8(d) of the federal Trails Act and the purpose for which it was adopted is to preempt a landowner's state-law right to use, possess, and exclude others from the owner's land and to impose a new easement upon the owner's land. The new easement authorizes a non-railroad, the trail-user, to use the owner's land for public recreation and preserves the federal government's jurisdiction and authority over the land, so that the Board can authorize a new railroad to build a new railway line across the owner's land without having to pay the owner. Importantly, the original railroad that petitioned the Board to abandon the railroad right-of-way is entirely out of the picture and retains no interest in the former right-of-way. The authority to authorize a railroad – any railroad (it need not be the railroad that abandoned the right-of-way) – to build a new railway line across the land lies entirely within the jurisdiction of the Board. In the interim (until a new railroad is built across the land), the Board authorizes the trail-user (here Sarasota County) to use the land for public recreation.

Two important points. *First*, neither the Board, nor the trail user, "own" the land; it is still an easement, and the owner still holds title to the fee estate. *Second*, the trail-user's rights to use the land are derived from (and defined by) the

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Board's exercise of federal eminent domain. The Board retains jurisdiction and authority over the land.

Ten years ago, the American Bar Association asked me to write an article explaining the Trails Act and how the Board's invocation of section 8(d) of the Trails Act is a taking of private property for which the Constitution requires the federal government to pay the landowner "just compensation." The article is available at: https://truenorthlawgroup.com/representing-landowners. This article provides a more in-depth discussion of the Trails Act and federal Takings Clause jurisprudence. There have been some significant court decisions since I wrote this article, but the article does provide a helpful understanding of the law shaping Trails Act taking cases. And the court decisions, especially those of the Supreme Court, issued since I wrote this article have further strengthened the landowners' constitutional right to their private property.

B. When the Surface Transportation Board invokes the Trails Act, it takes private property for which the federal government must pay "just compensation" to the landowner.

The Fifth Amendment to the United States Constitution provides, "No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This is one of the most important rights our Constitution secures. See Professor Jim Ely's highly regarded work, *The Guardian of Every Other Right* (3rd ed. 2008). "The Fifth Amendment Takings Clause was adopted to prevent the government from taking property from one owner for the benefit of society as a whole without fairly and justly compensating the owner whose property was taken. The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to

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bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The fact that the public purpose for which private property is taken is a popular public amenity is irrelevant to the government's obligation to justly compensate the owner.

"The Government has a *categorical duty* to pay just compensation when it takes your car, just as when it takes your home." *Horne v. Dept. of Agriculture* 135 S.Ct. 2419, 2426 (2015) (emphasis added). Imposing an easement upon an owner's land is a taking of private property for which the government must pay the owner. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982), the Supreme Court held that an easement for cable television cables on a private apartment building was a compensable taking of private property. The Court followed its prior precedent and explained,

> In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court held that the Government's imposition of a navigational servitude requiring public access to a pond was a taking where the landowner had reasonably relied on Government consent in connecting the pond to navigable water. The Court emphasized that the servitude took the land-owner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176. The Court explained:
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> "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina. … And even if the Government physically invades only an easement in property, it must nonetheless pay compensation. See *United States v. Causby*, 328 U.S.

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> 256, 265 (1946); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922)." *Id*. at 180 (emphasis added).
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> Although the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character.

Last term in *Knick v. Scott Township*, the Supreme Court held, "We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken." 139 S.Ct. 2170 (2010).

When the *federal government* takes private property, "[t]he Tucker Act, which provides the standard procedure for bringing such claims, gives the Court of Federal Claims jurisdiction to 'render judgment upon any claim against the United States founded either upon the Constitution' or any federal law or contract for damages 'in cases not sounding in tort.' 28 U. S. C. §1491(a)(1)." The Court continued, "We have held that '[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine.'" *United States v. Causby*, 328 U. S. 256, 267 (1946). And we have explained that 'the act of taking' is the "event which gives rise to the claim for compensation.' *United States v. Dow*, 357 U. S. 17, 22 (1958)." *Knick*, 139 S.Ct. at 2170. This is the basis for the two pending cases, *Cheshire Hunt v. United States*, and *4023 Sawyer Road I, LLC v. United States*.

When *a state or local government* (as opposed to the federal government) takes private property, the owner may bring an inverse condemnation suit vindicating the owner's constitutional right to compensation in federal district court under 42 U.S.C. §1983. This statute grants the federal district court the right to remedy civil rights violations and award the owner compensation. If a local government takes

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private property without paying for it, that government has violated the Fifth Amendment — just as the Takings Clause says — without regard to subsequent state court proceedings. And the property owner may sue the government at that time in federal court for the 'deprivation' of a right 'secured by the Constitution.' 42 U.S.C. §1983." *Knick*, 139 S.Ct. at 2170.

Some may ask why the Board's invocation of the Trails Act is a taking of private property. After all, some may argue, "you had a freight train running across your land and now you have people riding bikes across your land. What do you have to complain about?"

There are several answers to this question. First and foremost is the matter of property law. When you bought your property, you acquired the right to use your land and to exclude others from your land. At the time you bought your property, it was encumbered with an easement granting the Seaboard Air Line Railway a limited right to use a strip of your land for the operation of a railroad. But this easement was limited to allowing the Seaboard Air Line Railway (and its successor-railroads) to use of your land for this specific purpose – the operation of a railway – and when the railroad no longer operated, the easement terminated, and you regained unencumbered title to the land. See Chief Justice Roberts' explanation above.

The Supreme Court held, "[t]his Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-688 (1979).

The Law of Judicial Precedent is a law text edited by Bryan Garner, and the contributing authors include some of the nation's most famous and well-respected judges, including Supreme Court justices Neil Gorsuch and Brett Kavanaugh.

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Other authors are Eleventh Circuit Court of Appeals Judge William Pryor and court of appeals judges Alex Kozinski, Jeffery Sutton, and Diane Wood. *The Law of Judicial Precedent* notes the important legal principle that courts should give especial deference and respect to established property rights, stating, "A venerable legal principle stresses the importance of reliance interests when dealing with property rights." *Id.* at p. 421. The text continues,

> Stability in rules governing property interests is particularly important because those rules create strong reliance interests: individuals rely on rules governing their entitlements in entering into other commercial transactions. Judicial decisions overruling rules of property almost always interfere with those established interests and may implicate due-process concerns. As the Supreme Court explained in a mid-19th-Century case: "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be open. Such decisions become rules of property, and many titles may be injuriously affected by their change."
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> *Id.* at 422 (citing *Minnesota Mining Co. v. National Mining Co.*, 70 U.S. 332, 334 (1865)).

The point is that when property interests are defined and settled, courts may not and should not redefine existing property interest or the rules of law governing the property interests. *The Law of Judicial Precedent* explained,

> A classic example applying the rule-of-property doctrine came in a 1966 New York case. The petitioner, Heyert, held title to land that extended underneath the town road running over her property. She had presumptively granted the town an easement under the relevant highway law. When the town authorized a utility company to install gas pipes under the street, Heyert

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> brought a takings claim, arguing the town's easement did not include the right to install gas mains. The court first observed that a series of past decisions had held that easements for highway purposes were only "reservation[s] of a mere 'right of way' and, so, without more, "included only the right of passage over the surface of the land" and such improvements as directly or indirectly pertained to that right, such as street lighting and drainage sewers. Although the use of public streets had evolved, "thousands of deeds conveying rights of way … ha[d] been made on this rule, which ha[d] existed since the common law began in [New York], and which had just recently received yet another unequivocal expression by the high court. This "long succession of decisions … fits the classic definition of a rule of property."
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> *Id.* at 423-424 (citing *Heyert v. Orange & Rockland Utils., Inc.*, 218 N.E.2d 263).

The *Preseualt* cases feature prominently in Trails Act jurisprudence. The Board's predecessor, the Interstate Commerce Commission, issued an order invoking section 8(d) of the Trails Act and granted the State of Vermont the right to build and operate a recreational trail across the Preseault family's land. The Preseaults sued, and the case was appealed to the Supreme Court. *Preseault v. Interstate Commerce Commission,* 494 U.S. 1 (1990) (*Preseault I*). Justice Brennan wrote the majority opinion and explained,

> Section 8(d) of the amended Trails Act provides that HN5 interim trail use "shall not be treated, for any purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. §1247(d). This language gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these

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> easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations.
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> State law generally governs the disposition of reversionary interests, subject of course to the ICC's "exclusive and plenary" jurisdiction to regulate abandonments, *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981), and to impose conditions affecting post-abandonment use of the property. See *Hayfield Northern R. Co. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 633 (1984). By deeming interim trail use to be like discontinuance rather than abandonment…Congress prevented property interests from reverting under state law.
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> *Preseault I*, 494 U.S. at 8.

Justice O'Connor made the point that state law, not federal law, defines a landowner's property interest. She than noted,

> the scope of the Commission's authority to regulate abandonments, thereby delimiting the ambit of federal power, is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of petitioner's property. . . . The Commission's actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. Any other conclusion would convert the ICC's power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the

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> rights guaranteed by state property law, a result incompatible with the Fifth amendment.
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> *Preseault I*, 494 U.S. at 22 (citations omitted).

After the Preseault family won in the Supreme Court, the Supreme Court remanded the case back to the lower courts. The government appealed again. An appeal is normally heard by a panel of three judges. But when a matter is of particular national importance, all of the judges on the circuit court of appeals will sit *en banc* and hear the case. This is a rare event – like a judicial eclipse. Because the case was heard by all nine members of the court, not just a panel of three, an *en banc* decision provides much greater precedential weight than the decision of a panel of just three judges.

The majority opinion was written by Judge Plager, who is one of the most highly respected judges on the Federal Circuit. Before taking the bench, Judge Plager was Dean of the Indiana University Law School and had been a law professor at the University of Illinois and University of Florida law schools. Judge Rader wrote a concurring opinion in the *Preseault* case. Judge Rader was later appointed the Chief Judge of the Federal Circuit. Judge Plager explained,

> When the easements here were granted to the Preseaults' predecessors in title at the turn of the century, specifically for transportation of goods and persons via railroad, could it be said that the parties contemplated that a century later the easements would be used for recreational hiking and biking trails, or that it was necessary to so construe them in order to give the grantee railroad that for which it bargained? We think not. Although a public recreational trail could be described as a roadway for the transportation of persons, the nature of the usage is clearly different. In the one case, the grantee is a commercial enterprise using the easement in its business, the transport of

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goods and people for compensation. In the other, the easement belongs to the public, and is open for use for recreational purposes, which happens to involve people engaged in exercise or recreation on foot or on bicycles. It is difficult to imagine that either party to the original transfers had anything remotely in mind that would resemble a public recreational trail.

Furthermore, there are differences in the degree and nature of the burden imposed on the servient estate. It is one thing to have occasional railroad trains crossing one's land. Noisy though they may be, they are limited in location, in number, and in frequency of occurrence. Particularly is this so on a relatively remote spur. When used for public recreational purposes, however, in a region that is environmentally attractive, the burden imposed by the use of the easement is at the whim of many individuals, and, as the record attests, has been impossible to contain in numbers or to keep strictly within the parameters of the easement. As the Bruce & Ely treatise noted, "an easement created to serve a particular purpose ends when the underlying purpose no longer exists," and "when an easement for railway purposes is found, it is generally considered to end when it is no longer used for the stated purposes." *Id.* §1.06[2][d]. In the language of the old English courts, to allow this change would permit "a substantial variance in the mode of or extent of user or enjoyment of the easement so as to throw a greater burden on the servient tenement." *Bernards v. Link*, 248 P.2d at 347.

Most state courts that have been faced with the question of whether conversion to a nature trail falls within the scope of an original railroad easement have held that it does not. *Lawson v. State*, 107 Wash.2d 444, 730 P.2d 1308 (Wash. 1986) (*en banc*), is an example of a case practically on all fours with the case before us. The Burlington Northern Railroad Company petitioned the ICC for permission to discontinue rail service over a

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> certain right-of-way. King County requested the ICC to determine that the right-of-way was suitable as a public recreational trail, and to require that it be offered for sale for public purposes. The ICC did so under its Rails-To-Trails authority, and King County acquired the right-of-way from the Railroad. …
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> Accord *Schnabel v. County of DuPage*, 428 N.E.2d 671, (Ill. Ct. App. 1981); *Pollnow v. State Dep't of Natural Resources*, 276 N.W.2d 738 (Wis. 1979); see also *National Wildlife Fed'n v. ICC*, 850 F.2d 694 (D.C. Cir. 1988) (rejecting ICC argument that rails-to-trails conversions will never constitute a taking, and remanding for further consideration especially regarding easements limited to railroad use and when railroad restoration "not foreseeable").
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> *Preseault v. United States*, 100 F.3d 1525, 1544 (1996) (*en banc*) (*Preseault II*) (some citations omitted).

The majority opinion held, "[w]e conclude that the occupation of the Preseaults' property by the City of Burlington under the authority of the Federal Government constituted a taking of their property for which the Constitution requires that just compensation be paid." *Preseault I*, 100 F.3d at 1552.

In his concurrence, Judge Rader emphasized the point that "the Federal Government has the power to enact legislation that affects the Preseaults' right to freely use or possess land. But the Government cannot use this power for uncompensated, piecemeal usurpation of the rights of property owners, such that with each transfer of the property the purchaser loses sticks within the original bundle of rights yet remains without Constitutional recourse. Simply, when the Federal Government intrudes upon a property owner's right of use or possession of property, the Federal Government must pay just compensation." Judge Rader then explained, "[w]hile there is some dispute over the comparative

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burden of scheduled rumbling freight trains versus obnoxious in-line rollerskaters, the issue can be resolved on simpler terms. Realistically, nature trails are for recreation, not transportation. Thus, when the State sought to convert the easement into a recreational trail, it exceeded the scope of the original easement and caused a reversion." *Id.* at 1553.

After *Preseault II*, the Federal Circuit decided *Toews v. United States*. Judge Plager again wrote the decision. The Court held,

> It is elementary law that if the Government uses (or authorizes the use of – a point to be considered later) an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use. The consent of the railroad to the new use does not change the equation – the railroad cannot give what it does not have.
>
> And it appears beyond cavil that use of these easements for a recreational trail – for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway – is not the same use made by a railroad, involving tracks, depots, and the running of trains. The different uses create different burdens. In the one case there was an occasional train passing through (no depots or turntables or other appurtenances are involved on these rights of way). In the other, individuals or groups use the property, some passing along the trail, others pausing to engage in activities for short or long periods of time. In the one case, the landowner could make such uses of the property as were not inconsistent with the railroad's use, crossing over the tracks, putting a fruit stand on one edge of the property, or whatever. In the other, the government fenced the trail in such a way as to deny that access.

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> Some might think it better to have people strolling on one's property than to have a freight train rumbling through. But that is not the point. The landowner's grant authorized one set of uses, not the other. Under the law, it is the landowner's intention as expressed in the grant that defines the burden to which the land will be subject.
>
> *Toews v. United States*,
> 376 F.3d 1371, 1376-1377 (Fed. Cit. 2004).

Since *Preseault I*, *Preseault II*, and *Toews*, the Supreme Court has affirmed and strengthened even more its protection of property rights. See, for example, *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012), where the Supreme Court stated, "we have rejected the argument that government action must be permanent to qualify as a taking. Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.' *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987). See also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337 (2002) ("[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.").

The original 1910 easement from Adrian Honore provided "if at any time [following the construction of the railroad] the said [railroad] shall abandon said land for railroad purposes [,] the above described pieces and parcels of land shall ipso facto revert to and again become the property of the undersigned, his heirs, administrators and assigns." The easement Adrian Honore granted the Seaboard Air Line Railway defined the railroad's interest. The original conveyances from Honore, and most of the other original landowners in 1910 when the railroad right-of-way easement

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was established, similarly make clear that the interest granted the railroad was a limited right to use the strip of land for the operation of a railway line. When that use ended, the easement ended. Thus, the railroad's interest in the land terminated when the railroad stopped running trails and filed a petition with the Surface Transportation Board to abandon railroad service across the right-of-way. Any interest the railroad once had in the land across which it held a right-of-way easement to operate a railway line terminated and was extinguished long before the railroad signed any deed to Sarasota County. In short the deed Sarasota County obtained from the railroad isn't worth the paper it is written on.

The forgoing discussion demonstrates three propositions: (a) the federal government took your and these other Sarasota County landowners' property when it invoked the federal Trails Act and imposed a new and different easement across your and your neighbors' land; (b) the Fifth Amendment to our Constitution compels the federal government to justly compensate each landowner for that property the federal government took; and (c) what the Surface Transportation Board took was an easement, not title to the fee estate.

C. The scope of a rail-trail easement.

So, the question is: "What did the federal government take?" Property is frequently described using the metaphor a "bundle of sticks." The owner of the fee estate in the land holds all of the sticks in the bundle. The owner can than sell or lease individual sticks to others. For example, mineral rights, leasing the land for a set term, or granting an easement, are examples of the owner retaining his ownership of the bundle of sticks. But selling or leasing a stick in the bundle to someone else is different. With each stick the owner sells (or has taken from him), someone else acquires the right to use the owner's land for a specific purpose for a specific period of time. (The time period can be perpetual.)

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We know that what the federal government took is not title to the fee estate (the entire bundle of sticks), but is an easement. But what is the *scope* of this new rail-trail easement the federal government established across your land? By scope, I mean what rights the easement holder (Sarasota County and the Surface Transportation Board) acquired to use your land. In other words, what are the limits of the new easement the Board created?

In the parlance of property law, "land burdened by an easement is appropriately termed a servient tenement or the servient estate." The easement holder's interest is the "dominant tenement." Bruce and Ely, *The Law of Easements and Licenses in Land* §1:5. Bruce and Ely continue to explain that, "an easement is an interest in land, but it is not an estate." *Id.* §1:21. What professors Bruce and Ely say is that the easement-holder (here Sarasota County) has only a limited right to use your land for a specific purpose.

I know this sounds very technical and esoteric – I don't want this letter to sound like a second-year law school property law and federal civil procedure lecture, but I do want to provide you the legal context in which this very important question that concerns your property and your right to be compensated for that property taken from you arises. Simply put, we need to resolve the limits of Sarasota County's and the federal Surface Transportation Board's right to use your property. For example, can Sarasota County or the Surface Transportation Board allow a utility to install waterlines, sewer lines, fiberoptic cables, or above-ground or below-ground powerlines across your land?

Broadly speaking, there are two answers to the question of what rights the servient and dominant estates have in the land. One answer is that the dominant estate-holder of a Trails Act easement (here, the Board and Sarasota County) has only the right to use the land for operation of a public recreational trail and a possible future railroad corridor or other transportation line such as light-rail. This

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is the narrow view. The second view (which the Court of Federal Claims has adopted in past cases) is that the Board and the trail-user have essentially complete dominion of your land and you have no right to use this land any greater than that right the Board or Sarasota County allow the general public. In other words, under this broader view, you can hike and bike on your land subject to the same conditions Sarasota County establishes for the general public using the Legacy Trail.

Is the dominant estate (the rail-trail easement) defined by what: (a) the Justice Department lawyers claim the federal government took (which will be as little as possible so the government pays you as little as possible), (b) the Surface Transportation Board claims it has acquired which is complete and exclusive dominion and jurisdiction of your land; or, (c) what Sarasota County claims it got, which is "ownership" of the entire corridor and authority to demand you and other owners demolish or remove any existing structures or improvements on the land subject to the new federal rail-trail corridor easement.

Back to Sarasota County's position. During the meeting Monday afternoon, Ms. Baldinelli said Sarasota County claimed to "own" the entire right-of-way corridor. She said Sarasota claim the absolute right – indeed obligation – to demand every owner remove any "encroachment" from the land subject to the new rail-trail corridor. But if this is so, why? And, furthermore, if so, what are the physical dimensions of the land subject to Sarasota? We know the original easement granted to Seaboard Air Line Railway in 1910 was (for most owners' property) defined as fifty feet on either side of the centerline of the railroad right-of-way. Sarasota County has not yet provided any survey of the right-of-way. I have requested surveys from both Sarasota County and the railroad.

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II. How this dispute will be resolved and you will be compensated.

Why did Sarasota pay the railroad $30 million dollars for something the railroad didn't own and couldn't sell? $30 million dollars? As the Alabama Supreme Court held in the recent *Monroe County* Trails Act case, the railroad owned nothing and had nothing to sell. Monroe County appealed this to the United States Supreme Court. The Supreme Court refused to hear Monroe County's appeal, leaving in place the Alabama Supreme Court's decision. For more background see the law review article I wrote for the American Bar Association ten years ago. The article is posted on my firm's website at: https://truenorthlawgroup.com/representing-landowners.

So, why did Sarasota County pay, according to Ms. Baldinelli, $30 million for something the railroad had no legal right to sell? This is $3 million-per-mile. As I discuss above, Sarasota County does not "own" the land. You own your land. Your land is now subject to a new easement the federal government created for a public recreational trail and so-called "railbanking." The rights Sarasota County or any other trail-user has to use your land are governed by the Surface Transportation Board. (As I noted above, there are some small segments of the original railroad right-of-way to which the railroad may have acquired title to the fee estate. But this is the rare exception and this land was used for something more than a right-of-way for a railway line. An example is the land on which the railroad built the Venice depot.)

Sarasota County claims it is legally required to demand owners remove improvements from their private property because that was a "condition" in the deed from the railroad. This makes absolutely no sense. The railroad cannot require Sarasota County to demand owners remove improvements from the owner's private property as a condition of selling property the railroad didn't own. Sarasota

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County's argument is as specious as saying that, if I sold you a deed to the Brooklyn Bridge for $30 million and put a condition in the deed requiring you to allow only red cars to cross the bridge, you have to obey that condition.

Again, to the fundamental point, *the railroad had no ownership interest* in your property after the original railroad right-of-way easement terminated. Correspondingly, having no ownership interest in your property, the railroad cannot "sell" your property and impose a condition that Sarasota County as the "buyer" demand you remove all improvements from your land. Sarasota County's position that either the County's own ordinance or the deed from the railroad compels the County to demand that you remove existing improvement from your land is premised upon a profound misunderstanding of property law and a profound misunderstanding of the federal Trails Act.

I have requested all the documents concerning this transaction between Sarasota, the railroad, and the Board. I have received some of these documents, and when I receive the rest of these documents, I will share them with you or make them available on our firm's website. If Sarasota County actually paid the railroad $30 million for the right to build the Legacy Trail across this land, what the railroad sold was private property that you and the other owners own. *You and the other owners whose property was taken for the Legacy Trail should have been paid this money*.

Ms. Baldinelli told us several other interesting things. Ms. Baldinelli said the other reason Sarasota is demanding owners remove any improvement from the new rail-trail easement is that Sarasota County passed an ordinance that requires Sarasota County to require owners remove all property and other existing improvements from the entire one-hundred-foot-wide corridor. Sarasota County did not make a similar demand when it built the southern segment of the Legacy Trail. Ms. Baldinelli also said Sarasota County intended to use the entire one-hundred-foot width of the

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abandoned right-of-way and would not necessarily locate the trail in the same location as the railroad tracks had once been located.

If Sarasota County is trying to take something more than the federal Surface Transportation Board granted Sarasota County under the federal Trails Act, then Sarasota County must follow Florida law and separately condemn that interest in your property. Sarasota County has not done so. Sarasota County does possess the power of eminent domain. But Sarasota has not exercised any eminent domain authority, and Sarasota County has not followed Florida law to condemn any property for the Legacy Trail. Again, any right Sarasota County has to use your property is derivative of, and defined by, that interest the federal Surface Transportation Board took when the Board invoked the federal Trails Act.

This is the conundrum in which the federal government and Sarasota County have put you and the other Sarasota County landowners. In the Court of Federal Claims, the Justice Department lawyers who defend the Board and federal government try to minimize the compensation the federal government must pay landowners by arguing, "the federal government didn't really take that much of the owner's property and the owner still has rights under state law to use the land under the new rail-trail corridor." But the Board, in administrative rulings and other lawsuits, claims that it (the Board) has total dominion of the land subject to the new rail-trail corridor easement. See, for example, *Jie Ao & Xin Zhou – Petition for Declaratory Order*, Docket No. FD35539, 2012 STB LEXIS 206, *12 ("The agency's broad and exclusive jurisdiction over railroad operations and activities prevents application of state laws that would otherwise be available, including condemnation to take rail property for another use that would conflict with the rail use."). And now, along comes Sarasota County claiming it "owns" your land and can demand you and other owners

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remove all improvements from that portion of your land subject to the new rail-trail easement.

The federal government cannot run with the fox and hunt with the hounds. If the federal government took your property and gave Sarasota County the authority to demand you remove these existing improvements from your land, then the federal government must pay you for what it took. On the other hand, if the Board agrees that it did not grant Sarasota County complete dominion over your land, then you can continue to use your property for these improvements. But – and this is an extraordinary important point – if you may continue to use your existing improvements on that part of your land subject to the Board's new rail-trail easement, *both* the Board and Sarasota County must agree that you have a legally-enforceable right to do so and must grant you a perpetual license that is recorded in the chain-of-title, so that while you own your property and when you sell your property, you (and a future buyer of your property) have the legally-enforceable right to use your land in the manner it is currently used and that right has not been preempted by the federal Trails Act.

Ms. Baldinelli said that owners whose property has been taken for the Legacy Trail can "participate in a federal program to be paid compensation under the Trails Act." There is no such "federal program." There is, however, the Fifth Amendment to the United States Constitution, which, as quoted above, requires the government (federal, state, or municipal) to "justly compensate" an owner when the government takes private property. It is the *United States Constitution*, not some *federal program*, that guarantees you the right to be fully and justly compensated for what the government has taken from you. Indeed, the government's power to exercise the extraordinary power of eminent domain (taking private property for a public use) is dependent upon the government justly compensating the owner whose property the government has taken. For the government to take private property without paying the owner just

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compensation renders the government's action unconstitutional.

4023 Sawyer Road is the case brought by Sarasota County landowners whose property the federal government took for the Legacy Trail. Judge Wheeler will determine that compensation the federal government owes each owner of the more than two hundred properties participating in *4023 Sawyer Road* case.

Sarasota County is not a defendant in the *4023 Sawyer Road* case. The Court of Federal Claims has no jurisdiction over Sarasota County. Nor does the Court of Federal Claims have the right to resolve property boundaries or declare what authority Sarasota County may have to demand owners remove improvements from the right-of-way. The Court of Federal Claims is not an Article III court (a court created under Article III of the Constitution) with independent judges with lifetime tenure who are able to hear jury trials. The Court of Federal Claims is an Article I legislative tribunal in which the judges are appointed for fifteen-year terms and lack the separation-of-powers protections afforded federal judges on Article III courts. This is unfortunate. I won't go too far down in the weeds on the constitutional distinction between the Article I Court of Federal Claims (an administrative tribunal) and Article III judges, who are members of the independent judicial branch, other than to note that the Court of Federal Claims, while it can determine the compensation you are due and order the Treasury Department to pay you this compensation, cannot resolve the issues surrounding Sarasota County's and the Surface Transportation Board's property interest in your land; nor can the Court of Federal Claims decide whether Sarasota County has the legal authority to demand you remove existing improvements from your land.

But there is a solution. The solution is to have a federal district court, specifically the United States District Court for the Middle District of Florida, resolve these matters. The

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federal Quiet Title Act, 28 U.S.C. §2410, and the federal Declaratory Judgment Act, 28 U.S.C. §2201, allow a federal district court to decide what rights Sarasota County has to use your land under the Trails Act. I hope to resolve this by an agreement with the Board and Sarasota County. But, absent an agreement, a decree from the federal district court would resolve this matter and remove all uncertainty.

On one hand, the federal district court could rule that you still have your Florida state-law right to use your land, including the right to maintain the existing improvements located in the right-of-way. In my view, this would be the best outcome. You would be able to continue using your land as you are now without having to remove any existing improvements, and it would also reduce the cost to the federal government. On the other hand, the federal district court could find that, under federal law and by reason of the Surface Transportation Board's order, the federal government actually granted Sarasota County what is essentially total dominion of your land subject to the new rail-trail corridor easement. In the event the federal government actually granted Sarasota County the legal authority to demand you remove the existing improvements from your land, the federal government must compensate you for what it has taken, including all diminution in the value of your remaining property and any costs related to Sarasota County's demand that you remove these improvements.

The one thing I will not allow is Sarasota County claiming that it has essentially total dominion of your property and authority to compel you to remove existing improvements from your land while the federal government compensates you pretending it took a much lesser interest in your land and you still have state law right to use your land that Sarasota County does not recognize. In short, we need to get the federal Surface Transportation Board and Sarasota County in harmony as to what they (the federal government and Sarasota County) took and what rights they have to use your land. That is why I will ask a federal district court judge

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to review this matter and issue a decree defining: (a) exactly what the federal government took from you; (b) the property boundaries; and, (c) what rights Sarasota County has to use your land and to exclude you from your land.

The best way to resolve this conflict is for the Surface Transportation Board, Sarasota County, and each owner to reach an agreement specifying each party's rights to the land under the rail-trail corridor. This agreement can then be recorded in the Sarasota County Recorder's Office land records, which will protect you and assure that will be no issues when you sell your property.

I have been working with the Justice Department trying to reach such an agreement. But, so far, to no avail. Given Sarasota County's deadline of March 16, if we have not reached an agreement by then, I will also ask the federal district judge to issue a temporary restraining order preserving the status quo and enjoin Sarasota County from taking any further action until this matter is resolved. I will ask the court to order Sarasota County to not enter your property, remove any improvement from your property, or impose any fine for your failure to remove any improvement Sarasota County has demanded that you remove. In short, this lawsuit will ask the federal judge to issue an order preserving the status quo of every landowner until the court can resolve the respective interests of the federal Surface Transportation Board, Sarasota County, and the individual landowners.

Many landowners have called me and asked my advice about how to respond to Sarasota County's demand that they remove improvements from their land. I recommend that no landowner remove any existing improvements until we have a final determination of the respective parties' rights and interest in the land subject to the federal government's new rail-trail corridor easement. Acceding to Sarasota County's demand may be seen as a tacit or implicit acknowledgement of Sarasota County's claim to the owner's property. I

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recommend that you not remove any supposedly "encroaching" improvements until we have (by agreement or by court order) determined Sarasota County's legal authority to make this demand and established who (Sarasota County or the federal government) will pay you for the cost of removing the improvement and the attendant loss in the value of your property.

Warmest regards,

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