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Mitigating Trail Troubles:

An Analysis of the Virginia Recreational Land Use Statute

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About the Virginia Coastal Policy Center

The Virginia Coastal Policy Center (VCPC) at the College of William & Mary Law School provides science-based legal and policy analysis of ecological issues affecting the state's coastal resources, providing education and advice to a host of Virginia's decision-makers, from government officials and legal scholars to non-profit and business leaders.

With two nationally prominent science partners – the Virginia Institute of Marine Science and Virginia Sea Grant – VCPC works with scientists, local and state political figures, community leaders, the military, and others to integrate the latest science with legal and policy analysis to solve coastal resource management issues. VCPC activities are inherently interdisciplinary, drawing on scientific, economic, public policy, sociological, and other expertise from within the University and across the country. With access to internationally recognized scientists at VIMS, to Sea Grant's national network of legal and science scholars, and to elected and appointed officials across the nation, VCPC engages in a host of information exchanges and collaborative partnerships.

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VCPC grounds its pedagogical goals in the law school's philosophy of the citizen lawyer. VCPC students' highly diverse interactions beyond the borders of the legal community provide the framework for their efforts in solving the complex coastal resource management issues that currently face Virginia and the nation.

I. BACKGROUND/INTRODUCTION

Private land in Virginia is eligible for public recreational use status under state law. Generally speaking, Virginia's recreational land use statute allows landowners the right to limited liability in exchange for the public's recreational use of those otherwise private lands for activities like hiking. Alongside Virginia, nearly all states allow for this type of legal regime in some shape or form.

While the overall focus of this discussion is on the law of Virginia[1], it is often useful to look elsewhere for comparative purposes. This is especially important when it involves considering the future of Virginia's recreational land use statute. The overall objective of this discussion is to supplement Virginia's existing recreational land use legal regime by exploring specific issues related to Virginia's statutory scheme and identifying areas where further research may be needed.

Four issues involving recreational land use statutes are explored herein. First, the scope of recreational use statutes, namely in Virginia, is examined. This issue addresses the substance of these types of statutes and what these statutes convey in terms of legal rights and protections for both landowners and the public. Second, issues and questions involving admission fees and other types of landowner compensation are discussed in terms of how fees and compensation might incentive use of the recreational land use statute in Virginia. Third, public and private entity protection under these types of statutes is examined. Fourth and finally, general awareness of these statutes, namely in Virginia, is explored.

II. SCOPE OF "RECREATIONAL USE"

This section will explain how courts determine which activities are considered "recreational" for purposes of determining landowner immunity. First, this section will show why defining "recreational use" is important. Then, it will outline the four categories of definitions in which recreational use statutes fall. Finally, it will explain which test Virginia courts might use to determine whether a land user was engaged in "recreational use" at the time of an injury.

While every state has a recreational use statute, the amount of protection landowners receive under such statutes varies based on the exact language each state's legislative body chooses. For example, imagine a hiker is following a trail they found on Strava that is partially on public land and partially on private land when they notice an injured dog without a collar about ninety yards off the main trail. The hiker runs over to try to rescue the dog, trips over a stump, and

[1] *See* VA. CODE ANN. § 28.1-509 (1950) (codifying in Virginia law the duty of care and liability of landowners under Virginia's recreational land use statute).

seriously injures their ankle. Depending on which state's recreational use statute applies and how the court interprets that statute, the landowner on whose property the dog was on may be immune from the hiker's potential lawsuit or they may be fully exposed to liability.[2] The distinction turns on whether rescuing the dog while hiking constitutes a "recreational use" under the particular statute. In another example, one may think walking would always be considered recreational. However, imagine a person is walking on a trail typically used by hikers and mountain bikers. This particular person, though, is using the trail as a shortcut to get home from a friend's house.[3] If the walker is injured while using the trail as a shortcut, the landowner may be protected from liability, but it ultimately depends how the adjudicating court evaluates "recreational use."

Defining "recreational use" is important in the context of trail use because, while hiking and biking along trails likely count as recreational uses of the property, certain acts incidental to trail use may fall outside the protection of the recreational land use statute. The landowner may therefore be liable for injuries a trail user sustains while engaging in those incidental activities. Under recreational land use statutes, property owners–whether a not-for-profit, land trust organization, or a private landowner–are immune from liability for ordinary negligence only if the land user was engaged in a recreational pursuit.[4] Thus, defining "recreational use" is critical.

A. Four Categories of Landowner Protection

State recreational land use statutes fall into one of four categories in terms of landowner protection.[5] In other words, some courts are more willing to find that activities are "recreational" while others apply a narrow interpretation of what constitutes "recreational."[6] On the broadest end of the spectrum are states that use expansive language. These statutes define "recreational purpose" as, for example, "any activity undertaken for recreation, exercise, education, relaxation, refreshment, diversion, or pleasure" or "any recreational purpose."[7]

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[2] Feldman v. Salt Lake City Corp., 484 P.3d 1134, 1144 (Utah 2021) (holding a woman's estate was precluded from bringing suit against a park when the woman drowned trying to rescue her dogs from a creek when the woman's general purpose of walking her dogs on the park was "recreational"); Trevino v. Pacificorp., No. 26718-7-II, 2001 WL 1632557 at *2, *3 (Wash. App. Dec. 19, 2001) (holding a woman could not bring suit when she was injured after her children summoned her to help rescue a stray dog because the woman's general purpose was to allow her children to use the land for recreational activities like rafting). Comparatively, this exemplary case may come out different in a state like New York that only bars suits if the plaintiff was doing one of the activities specifically listed in the state's statute. N.Y. Gen. Oblig. § 9-103.

[3] These were the facts presented in Constantine v. City of Cambridge, 851 N.E.2d 1133 (Mass. App. Ct. 2006), wherein the court held the Massachusetts recreational use statute applied.

[4] Virginia's recreational land use statutes is typical of other states in that it does not protect landowners from liability in cases that arise from "gross negligence or willful or malicious failure to guard or warn against a dangerous condition, structure, or activity." VA. CODE. ANN. § 29.1-509 (D).

[5] *See* Sallee v. Stewart, 827 N.W.2d 128, 138 (Iowa Ct. App. 2013) (explaining the various categories under which recreational use statutes may fall).

[6] *Id.*

[7] *See, e.g.,* N.D. CENT. CODE §53-08-02 (2012); N.C. GEN. STAT. §38A-2(5)(2012); MD. CODE ANN., NAT. RES. § 5-1101(f) (LexisNexis 2012).

Statutes on the opposite end of the spectrum apply the narrowest interpretation of "recreational purpose." These statutes list recreational activities but do not include any expansive language.[8] Courts applying those statutes have held that the statute only applies to those activities specifically listed.[9]

The middle two categories of statutes explicitly list certain activities while leaving open the possibility of including more activities. Some statutes in this category use a term of enlargement, such as "includes but is not limited to," followed by a list of activities.[10] Others list activities then include a catchall provision, such as "and any other recreational activities."[11]

B. Virginia's Interpretation of Recreational Activities

Virginia's statute falls in the middle of the spectrum in terms of broadness because the statute lists certain protected activities followed by a catchall provision: "any other recreational purpose."[12] Virginia courts could therefore hold that an activity not listed in the statute is still included in the statute.[13] Some courts with similar catchall provisions require the activity at issue to be similar to the ones listed.[14] Virginia courts have not taken a similar approach, but the case law in this area is limited.

Although determining how far courts will extend the definition of "recreational purpose" is not always straightforward, Virginia courts have noted that the statute is "designed in large measure to encourage landowners to open up their lands for recreational use by limiting landowner liability."[15] If granting immunity to a landowner will further this purpose, a court in Virginia will likely be more willing to consider the activity a "recreational" one.[16]

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[8] N.Y. GEN. OBLIG. § 9-103 (McKinney's 2010); § 745 ILL. COMP. STAT. 65/3 (2005).
[9] *See, e.g.*, Bragg v. Genesee Cnty. Agric. Soc'y., 644 N.E.2d 1013, 1016 (N.Y. 1994) ("In effect, the statute grants landowners . . . immunity from liability based on ordinary negligence if a person engaged in a listed recreational activity is injured while using their land.")
[10] *See, e.g.*, ALA. CODE § 35-15-21(3) (LexisNexis 1991); FLA. STAT. ANN. § 375.251(5)(b) (West 2013); IDAHO CODE ANN. §36-1604(b)(4) (West 2011); W. VA. CODE ANN. § 19-25-5(5) (West 2007).
[11] COLO. REV. STAT. § 33-41-102(5) (West 2012); IND. CODE ANN. § 14-22-10-2(d) (LexisNexis 2003); MICH. COMP. LAWS ANN. § 324.73301 (West 2009); VA. CODE ANN. §29.1-509(B) (2011).
[12] VA. CODE ANN. §29.1-509(B) (1950).
[13] *See* Cunningham v. Bakker Produce, Inc., 712 N.E.2d 1002, 1006 (Ind. Ct. App. 1999) (interpreting a statute worded similarly to Virginia's statute).
[14] Drake *ex rel.* Drake v. Mitchell Cnty. Sch., 649 N.E.2d 1027, 1030 (Ind. 1995) (under a former, similarly worded version of Indiana's recreational use statute, "the phrase 'for any other purposes' includes only those activities consistent with the general class of behavior typified by hunting, fishing, swimming, trapping, camping, hiking, and sightseeing.").
[15] Harlan v. Norfolk Festevents, Ltd., 95 Va. Cir. 361, 361 (2017).
[16] *See id.*; Virginia Beach v. Flippen, 251 Va. 358, 361–62 (1996) (granting immunity to the city of Virginia Beach when a beachgoer fell on a path leading to beach access because the ruling generally promoted the statute's underlying purpose).

C. "Recreational Purpose" Test Used by Virginia Courts

As stated above, Virginia's statute includes a catchall provision.[17] Thus, even if a specific type of activity could generally be considered "recreational," landowners may still face another hurdle in proving their immunity–whether this subjective land user's intent was recreational. Recreational use statutes, including Virginia's, do not state whether this specific land user's purpose is what matters or, rather, what the general public would consider to be recreational. Therefore, courts in the various states have had to determine which perspective matters.[18]

Some courts look to a land user's overall purpose for being on property.[19] If their subjective purpose is recreational, then any acts taken in furtherance of that purpose will be protected by the statute.[20] In those states, acts like rescuing a dog[21] and taking a detour to a boat ramp while water skiing when the skier's boat malfunctioned[22] have been considered recreational. Conversely, some states weigh more heavily whether the land is generally used for recreational purposes.[23]

Unfortunately, Virginia courts have not heard many cases on this issue. However, the limited case law seems to state that the individual land user's reason for being on the land is what controls.[24] Thus, the fact that others have used the land for recreation in the past does not mean a landowner would be immune from liability if a person was injured on the land while carrying out a non-recreational purpose. Importantly, though, the one case on point relies heavily on precedent interpreting an older version of Virginia's statute.[25] Therefore, while it seems that Virginia courts

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[17] VA. CODE ANN. §29.1-509(B) (1950).
[18] *See, e.g.*, Feldman v. Salt Lake City Corp., 484 P.3d 1134, 1144 (Utah 2021); Lewis v. State Farm Fire & Cas. Co., 654 So. 2d 883, 885 (La. Ct. App. 1995).
[19] *See Feldman*, 484 P.3d at 1143 (beginning the recreational use statute analysis by identifying whether the specific injured party "was participating in an 'activity with a recreational purpose on the land'").
[20] *See Feldman*, 484 P.3d at 1143 ("These enumerated activities are broad categories that describe a recreator's general purpose for entering the land. And each broad category necessarily includes the subset of all activities a recreator takes in furtherance of that general purpose.").
[21] *See id.* at 1144.
[22] *See* Lewis v. State Farm Fire & Cas. Co., 654 So.2d at 886.
[23] *See* Dunn v. City of Boston, 915 N.E.2d 272, 276 (2009) ("To place the plaintiff in a separate category from the attendees of the event she was planning, simply because the plaintiff was being paid by a third party to be there and therefore subjectively viewed her activities as 'work,' would be antithetical to the Legislature's stated purpose of 'encouraging landowners to make land available to the public for recreational purposes.'"); Collins v. U.S., No. 10-10703-RGS, 2010 WL 3515792 at *1, *1 (D. Mass. 2010) ("It is determinative that the test is an objective one.").
[24] Harlan v. Norfolk Festevents, Ltd., 95 Va. Cir. 361, 361 (2017) (holding that a festival worker who was injured while working the festival was not on the premises for a recreational purpose as he was a worker who was not attending the festival for leisure). Compare this with a case in Massachusetts in which a police officer used a national park as a shortcut in responding to a call. There, the court held the recreational use still applied because the statute made no exception for police officers. Collins v. U.S., No. 10-10703-RGS, 2010 WL 3515792 at *1, *1 (D. Mass. 2010).
[25] *See Harlan*, 95 Va. Cir. at 361 (citing Hamilton v. U.S., 371 F. Supp. 230, 234 (E.D. Va. 1974)).

in the past have focused on the subjective intent of the land user, it is uncertain whether Virginia case law will continue to uphold such a standard.

III. COMPENSATION FOR LANDOWNERS

A. Incentives to Open Up Otherwise Private Land for Recreational Use

Because Virginia's recreational land use statute is inherently voluntary the prospect of compensation might motivate landowners to utilize the statute. For example, a revenue stream for landowners may allow for land maintenance costs to be covered all while making the public's use of that land safer and more enjoyable. As easy as it sounds, the key question is what types of compensation might or might not be permissible as a matter of law in Virginia.

For example, admission fees are likely impermissible under Virginia law so long as landowners wish to retain limited liability protection. This is because admission fees look more like a landowner conducting an active commercial enterprise rather than allowing for passive recreational activity on their land.[26] However, other sorts of more indirect compensation already exist that might incentivize landowners. For example, property tax credits and/or deductions exist in state and federal tax law. However, legal and budgetary restraints limit and/or prohibit the compensation of private landowners through tax advantages. As such, local and state law will vary greatly across jurisdictions.

All this said, property tax advantages serve a dual purpose. First, property tax deductions credited to landowners opening up their land would act as an easily accessible form of compensation for landowners. Second, even though local governments receive less revenue because of property tax deductions, it is also true that less money would need to be allocated for public recreation and the like in local budgets. This is because those private landowners that utilize property tax deductions are indirectly creating more recreational space in their communities without direct government investment. All this is to say that less direct local investment will be expended on recreational space because existing private land is being opened up to the public because landowners are attracted to property tax deductions.

[26] *See* Owens v. Grant, 569 So. 2d 707 (1990) (holding that a landowner charging an entrance fee to his private lake does not as a matter of law constitute operating "a commercial enterprise for profit" under Alabama law).

B. Existing Ways Landowners May Receive Compensation: Tax Credits and Land Use Assessment Alternatives

State and federal law already provides different ways for landowners to receive some sort of indirect compensation for opening up their land for recreational and conservation purposes. Examples discussed here include tax credits and land use assessment alternatives. That said, many of these advantages require certain conditions to be met. This is important to keep in mind in evaluating their applicability.

Under federal tax law, landowners who donate conservation easements on their land may be eligible for federal income tax deductions and/or federal estate tax exclusions.[27] One major condition on these particular benefits is that the easements must be made permanent if the landowner is to receive the tax advantage.[28] Moreover, under the federal tax code, some conservation easements are allowed to be treated as charitable gifts, which in turn allows for income tax deductions.[29]

In addition to federal tax advantages, there exist state tax options that may also be applicable. In Virginia, state law offers additional tax alternatives for landowners in addition to federal tax options. One such program is Virginia's Land Preservation Tax Credit.[30] This tax credit incentive was created by the Virginia Land Conservation Incentives Act.[31] One major condition for this tax credit is that a donation be made to a qualifying public or private conservation agency.[32] Thus, simply opening up one's land to the public is presumably not enough to earn this tax credit.[33]

Under the Land Preservation Tax Credit, a qualifying landowner may claim an income tax credit up to forty (40) percent of the value of land donated and/or conservation easement donated to a qualifying conservation agency.[34] A landowner may use up to fifty-thousand ($50,000) of this credit annually and the credit is usable for up to 10 years following the initial donation of the land and/or creation of the easement.[35] These tax credits are also transferrable depending on the

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[27] *See generally* 26 U.S.C. § 170 (codifying federal tax consequences for charitable contributions and gifts under federal law).
[28] VA. CODE ANN. § 58.1-512 (1950) (codifying land preservation tax credits under Virginia law).
[29] *See generally* VIRGINIA DEP'T OF CONSERVATION AND RECREATION, "Land Preservation Tax Credit," (last modified Dec. 15, 2022), https://www.dcr.virginia.gov/land-conservation/lp-taxcredit.
[30] *See* VA. CODE ANN. § 58.1-510-513 (2011) (codifying Virginia's Land Preservation Tax Credit).
[31] *See id.*
[32] *Id.* § 58.1-512(A)(1) (". . . there shall be allowed as a credit against the tax liability imposed . . . an amount equal to 50 percent of the fair market value of any land . . . conveyed for the purpose [recreational and conservation uses], as an unconditional donation by the landowner/taxpayers to a public or private conservation agency . . . .").
[33] *See id.*
[34] *Id.* § 58.1-512(C)(1) ("The amount of the credit that may be claimed by each taxpayer, including credit claimed by applying unused credits . . . shall not exceed $50,000 . . . .").
[35] *Id.* § 58.1-512(A)(1).

landowner's initial property tax burden.[36] For landowners entitled to less than one ($1) million under this tax credit, which is most landowners, the verifying agency is the Virginia Department of Taxation.[37]

Beside tax credits at the state level, there are other options available at the more local level by way of land use assessment alternatives.[38] Under a land use assessment alternative, conservation easements and the like (if qualifying) may lower the tax liability landowners carry.[39] Such an alternative assessment, depending on the use of the land in question, is typically substituted in lieu of the land's market value.[40] For example, in Hanover County, Virginia, assessment of one's land based on use value (instead of market value) is available for qualifying 'open space', which must be a minimum of five (5) acres of land.[41] 'Open space' land also includes those parcels or parts of parcels of land used for recreation or conservation purposes.[42]

C. Comparative Approach: Allowing for Admission Fees So Long As There is No Intent to Generate a Profit?

In Virginia, landowners cannot charge admission fees for use of their land while claiming limited liability under the state's recreational land use statute. At least one state outside of Virginia has approached the question of compensation vis a vis fees differently. In Alabama, the key question is whether there is an *intent* to generate a profit and/or operate a commercial enterprise in determining whether admission fees and limited liability may coexist together.[43]

Alabama explicitly allows for limitation on liability for owners allowing non-commercial public recreational use of their land.[44] Specifically, Alabama law defines commercial recreational use as "any use of land for the purpose of receiving consideration for opening such land to recreational use where such use or activity is profit-motivated."[45] In Owens v. Grant, a Alabama court grappled with whether the charging of fifty (50) dollars for permits in exchange for access to a private lake was profit-motivated in the context of a wrongful death suit.[46] That court, given

[36] *Id.* § 58.1-513(C)(1).
[37] *See id.* § 58.1-512(D)(1) ("The taxpayer shall apply for a credit after completing the donation by submitting a form or forms prescribed by the Department in consultation with the Department of Conservation and Recreation.").
[38] *See* VA. CODE ANN. §§ 58.1-2339–3244 (1950) (codifying the permissiveness of land use assessment alternatives under Virginia law).
[39] *Id.*
[40] *Id.*
[41] *See generally* Hanover County, Virginia, *Land Use*, https://www.hanovercounty.gov/260/Land-Use.
[42] *Id.*
[43] ALA. CODE § 35-15-21 (1975) (codifying Alabama's approach to a recreational use statute under Alabama law).
[44] *Id.*
[45] *Id.*
[46] *See* Owens v. Grant, 569 So. 2d 707, 710 (1990) (holding that a landowner charging an entrance fee to his private lake does not as a matter of law constitute operating "a commercial enterprise for profit" under Alabama law).

the facts of the case, thought it a material question of fact for a jury to decide.[47] That court decided that as a matter of law, such a permit-fee charge was not a per se commercial enterprise for profit and was an open question of fact to be decided at trial.[48] Again, one justification for this provision of Alabama law was to "encourage owners of land to allow non-commercial public recreational use of land which would not otherwise be open to the public, thereby reducing state expenditures needed to provide such areas."[49]

Whether such an approach is permissible in Virginia is unclear. But this (more flexible) approach in Alabama would potentially allow for landowners to charge admission fees so long as such a scheme is not in fact a profit-generating commercial enterprise. This would be a question of fact, which would result in more litigation and less clear lines regarding liability. This alone how its costs, but a more permissive legal regime may allow landowners more flexibility in covering costs they incur on their land.

IV. PROTECTION OF PUBLIC AND PRIVATE ENTITIES OTHER THAN INDIVIDUAL LANDOWNERS UNDER RECREATIONAL LAND USE STATUTES

While the majority of this discussion has thus far centered around private landowners the same questions arise when it comes to government and corporate entities. Oftentimes, government and corporate entities own large tracts of farm land or otherwise undeveloped or unused land.

One outstanding, unanswered question is whether non-person entities fall under the ambit of recreational land use statutes. And another question is to what extent public entities, like local or state governments, may place restrictions on access to public access in the interest of regulation and public safety while maintaining limited liability. For example, are public entities still afforded limited liability protection if they require a permit (for a fee) in order to access public land? The general consensus seems to be that such requirements are permissible. In Oregon, the case of *Stedman v. Oregon Dep't of Forestry* addressed this issue as recently as 2021.[50]

In *Stedman*, personal injury claims suffered on state land were brought by the operator of an ATV against the state of Oregon.[51] On this particular piece of state land, permits were required

[47] *Id.* at 712 ("Under the facts of this particular case, we believe that there is a material question of fact as to whether the appellant intended to derive a profit from the operation of [the lake].").
[48] *Id.*
[49] ALA. CODE § 35-15-20 (1975) (codifying Alabama's approach to a recreational use statute under Alabama law).
[50] Stedman v. Oregon Dep't of Forestry, 316 Or. App. 203, 214 (2021) (holding that a fee for ATV registration charged by a government entity did not constitute a situation where a fee is charged for permission to use land which would lead to the loss of limited liability).
[51] *Id.* at 204 ("Plaintiff appeals from a judgment dismissing his negligence claim for personal injuries on state land . . . . Plaintiff bought an ATV operating permit from the Oregon Parks and Recreation Department.").

for people wishing to operate ATVs.[52] The Oregon Parks and Recreation Department administered the issuance of those permits for ATV operators.[53] In this case, the plaintiff argued that because he was charged a fee in exchange for his permit the state of Oregon lost its recreational immunity under the theory that charging fees led to an automatic loss limited liability protection.[54] The holding in this case and the key distinction that court made was "that the fee charged for an [all-terrain vehicle] operating permit is not a charge for the use of the land where plaintiff was injured *but is instead in the nature of a vehicle registration fee*."[55] This case is a clear example of the distinction some jurisdictions may permissibly draw between admission fees and administrative regulatory fees made in the interest of public safety.

Contrast the *Stedman* case to the case of *Coleman v. Oregon Parks and Recreation Department* which reached the Oregon Supreme Court.[56] There, the plaintiff was injured in a state park while riding a bike on a park trail.[57] The plaintiff had paid a camping fee for access to the state park, but not a general access fee.[58] There, the *Coleman* court found that the access fee charged was in fact a land use fee and that the defendant had not met its burden in invoking recreational immunity protection.[59] Consequently, the state could not claim recreational immunity against plaintiff claims.[60]

This line of case law indicates that, at least in a state like Oregon, public entities, like local and state government, have more leeway in placing regulatory and administrative restrictions on the use of land for recreational purposes while maintaining the protection of limited liability statutes. In Virginia, the verdict as to this question is explicit in the state code. What would otherwise be understood as admission fees are excused if they are for licensure, insurance, handling, transaction, administrative, or similar types of fees.[61]

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[52] *Id.*
[53] *Id.*
[54] *Id.* at 205 (". . . the trial court considered the nature of the charge for an ATV operating permit and plaintiff's argument that it was a 'charge' within the meaning of the exception to the statute's provision for recreational immunity.").
[55] *Id.* ("We conclude that the fee for an ATV operating permit is not a charge for the use of the land where plaintiff was injured but is instead in the nature of a vehicle registration fee.").
[56] Coleman v. Oregon Parks and Recreation Dep't, 227 P.3d 815, 817 (Or. Ct. App. 2010) (holding that an access fee charged constituted a land use fee and thus the state could not claim recreational immunity under Oregon's recreational use statute).
[57] *Id.* ("Plaintiffs . . . were camping at [the] state park when [one plaintiff] rode his bike off the end of a bridge and suffered personal injuries.").
[58] *Id.* ("The public's access is apparently unfettered, even as to the areas designated for camping. Payment of a fee is required to engage in a specific activity in those area that is, camping oversight, and presumably to exclude others from a particular campsite.").
[59] *Id.* ("Because the state did not establish that it made 'no charge for permission to use" . . . it did not establish that it was entitled to recreational immunity . . . .").
[60] *Id.*
[61] *See* VA. CODE ANN. § 29.1-509 (1950) (codifying in Virginia law the duty of care and liability of landowners under Virginia's recreational land use statute).

V. PUBLIC AWARENESS OF RECREATIONAL LAND USE STATUTES

While the above sections have examined the mechanics of recreational use statutes, statutes are only effective if people know about them. Thus, this section will focus on the general lack of awareness surrounding Virginia's recreational use statute as well as the lack of awareness among trail users regarding the boundaries of private land. It will then briefly look to other states to see how they mitigate the issue of trail users wandering onto private land.

A. Lack of Awareness in Virginia of the State's Recreational Land Use Statute

Despite some room for improvement, current recreational land use statutes in Virginia and elsewhere at least provide some level of protection to landowners who open up their land for recreational use.[62] However, the statute cannot meet its goal of encouraging landowners to allow public access to their property if landowners are unaware of the protection the statute affords. In a survey of Virginia land trust literature, the Virginia recreational land use statute is seldom mentioned. The most explicit mention of the statute is in Virginia Department of Conservation and Recreation's How to Set Up a Trail Guidance Document.[63] The Guidance Document provides a brief yet informative overview of the statute, highlighting the fact that it protects both public entities that hold an easement or title and private landowners from liability in the cases of ordinary negligence.[64] Additionally, it notes that if a landowner grants an easement to a governmental agency or not-for-profit, the agency or not-for-profit is responsible for legal fees associated with any negligence suits that may arise.[65] Aside from this document, the bulk of potentially relevant land trust literature in the state focuses on conservative easements,[66] but most of them do not draw a connection between the use of easements and the immunity the Virginia recreational land use statute grants.[67]

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[62] *See id.*

[63] *How to Set Up a Trail,* VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION, https://www.dcr.virginia.gov/recreational-planning/document/grchpt04.pdf.

[64] *Id.* at 9.

[65] *Id.*

[66] For example, see *Elements of a Conservation Easement*, VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION (Feb. 26, 2021), https://www.dcr.virginia.gov/land-conservation/sample-easement; *Conservation Easements*, VIRGINIA DEPARTMENT OF FORESTRY (2021), https://dof.virginia.gov/forest-management-health/forestland-conservation/conservation-easements/#:~:text=Under%20a%20conservation%20easement%2C%20landowners,public%20access%20to%20their%20land.

[67] For the one source found that does draw a connection, see James C. Kozlowski, '*Hold harmless' Incentive in Recreational Use Statute*, PARKS & REC. (October 2016), https://www.nrpa.org/parks-recreation-magazine/2016/october/hold-harmless-incentive-in-recreational-use-statute/.

Moreover, many representatives from land trust organizations in Virginia stated they do not believe the general public or, in some cases, even those in the recreational land use arena are aware of the recreational land use statute. Superintendent of the James River Park Giles Garrison said she thinks there is very little awareness of this statute among park users.[68] According to her, commercial outfitters may be more aware of the statute because of their employers' insurance policies.[69] Aside from that group, many park employees may still not know about the existence of the statute.[70]

Landowners are often hesitant to open up their land without first entering into some sort of agreement with a not-for-profit organization. Ms. Garrison believes the "threat or fear of personal liability for park user injury" a major factor for private landowners in deciding whether to open their land for public use.[71] Additionally, both Ms. Garrison and Kelly McClary, Policy Planning Manager & Division Director for the Planning and Recreation Resources Division at the Department of Conservation & Recreation, pointed to the perceived lack of legal protection in the event of a lawsuit.[72] Specifically, landowners are concerned that, even though the statute grants them immunity, the statute does not prevent a land user from filing a lawsuit.[73]

Additional reasons for landowner apprehension include a fear of losing control over their land and a general distrust of organizations, according to Regional Trails Program Director at Friends of the Appomattox River Heather Barrar.[74] Educational efforts can hopefully mitigate some of these concerns. Also, Ms. Barrar said which land acquisition tool (e.g. land purchase, easement, etc.) her organization chooses to use in a particular circumstance is driven heavily by landowner concerns.[75] Jane Myers, Director of Conservation at Capital Region Land Conservancy, said landowners may be more comfortable allowing public access on their property if they enter into an agreement with an organization for a trail easement.[76] The recreational use statute may help

[68] Email response from Kathryn (Giles) Garrison on March 6, 2023, James River Park Superintendent, see Questionnaire in Appendix A.
[69] *Id.* ("Commercial outfitters (raft and kayak guides, recreational climbing companies) seem to be more aware of this due to the requirements that they are insured due to their experience with risk management. Even for parks staff, risks and injuries are managed by the City Attorney's Office – it's rare that front line staff or even park managers would encounter the statute.").
[70] *Id.*
[71] *Id.*
[72] *Id.;* Email response from Kelly McClary on March 8, 2023, Policy Planning Manager & Division Director for the Planning & Recreation Resources Division at the Department of Conservation & Recreation, see Questionnaire in Appendix A ("Most land owners are concerned that they may be legally accountable for users getting hurt on their land. A second concern comes up when a user wanders off of a trail and onto private property as well. Signage does not always protect against this concern, especially when the users intent is purposeful.").
[73] *See id.*
[74] Interview with Heather Barrar, Regional Trails Program Director, Friends of the Lower Appomattox River (March 23, 2023).
[75] *Id.*
[76] Email response from Jane Myers on March 16, 2023, Capital Region Land Conservancy Director, see Questionnaire in Appendix A.

land trust organizations adequately protect themselves and private landowners, but carefully choosing the most appropriate acquisition method is also important.

B. Lack of Awareness of Private Land Boundaries

In addition to a lack of general awareness of the Virginia recreational use statute, there also seems to be a lack of awareness among trail users as to whether they are on private land. According to Ms. Giles of the James River Park, there is some signage along the trails in that park system, but the trails may not be consistently marked.[77] Thus, it is possible one may enter the park without knowing they are doing so. She further stated that an abundance of "pirate trails," which are "informal networks of paths" that trail users make up or hear about from other users increase the risk that a trail user will cross private property.[78] Ms. McClary of the Department of Conservation and Recreation echoed Ms. Garrison. Ms. McClary said it is common for hikers and bikers to not realize they are on private property if the land is not marked as private.[79] Although Virginia has not enacted a statute specifically aimed at uniformly informing trail users of private property lines, other states have done so through what are called Purple Paint Laws.

1. Purple Paint Laws

Arkansas was the first state to enact a Purple Paint Law in 1989[80] and fifteen states have since followed suit.[81] The laws allow landowners to use stripes of purple paint on trees or fences on their properties in place of "no trespassing" signs.[82] If a land user sees purple paint, they are on notice that the land is private property and trespassing is not permitted.[83] The laws are primarily aimed at preventing trespassing, but, in the context of trails, the purple paint allows recreational users to know whether property is private and that they are not permitted to be on it.

[77] Email response from Kathryn (Giles) Garrison on March 6, 2023, James River Park Superintendent, see Questionnaire in Appendix A.
[78] Email response from Kathryn (Giles) Garrison on March 6, 2023, James River Park Superintendent, see Questionnaire in Appendix A. Ms. Giles said "[The park system] tr[ies] to close these paths, but the reality is that trail users, whether they are coming from their own back doors, or just meandering in the way they find most convenient, will vote with their feet for the trails they want." *Id.*
[79] Email response from Kelly McClary on March 8, 2023, Policy Planning Manager & Division Director for the Planning & Recreation Resources Division at the Department of Conservation & Recreation, see Questionnaire in Appendix A.
[80] Bob Frye, *Purple Paint Laws Expanding Across Country*, TRIB LIVE (Nov. 30, 2019), https://triblive.com/sports/purple-paint-laws-expanding-across-country/.
[81] Lauren Harkawik, *This Color Means 'No Trespassing' in 15 States But Not NY,* TIMES UNION (Sept. 13, 2021), https://triblive.com/sports/purple-paint-laws-expanding-across-country/.
[82] *Id.*
[83] *Id.*

A few states have enacted Purple Paint Laws in the last three years, and news outlets in those states have widely publicized the laws.[84] Similarly, the Pennsylvania Game Commission shared graphics and information online about the passage of the state's Purple Paint Law in 2020.[85]

Whether the Purple Paint Laws are good public policy is beyond the scope of this Paper. However, these laws at least make an effort to inform trail users while providing a level of comfort to landowners.[86] Moreover and important for purposes of this Paper, these laws and the corresponding attention they received[87] could implicate the general need for intentional publicity of landowner-related legal schemes in Virginia. A purposeful campaign to promote the state's recreational land use scheme could alleviate the concerns of landowners, trail users, and land trust organizations. Jane Myers, Director of Conservation at Capital Region Land Conservancy, said a public service campaign or general educational efforts may be beneficial.[88] The scheme to be promoted may be the current statutory scheme or a revised one building off the gaps identified in this Paper and subsequent research.

VI. CONCLUSION & AREAS FOR FURTHER RESEARCH

The purported purpose of recreational land use statutes is to encourage landowners to open up their lands for recreational use. This Paper has explored certain issues within these statutes that require more explanation than what the state codes offer. First, the definition of "recreational use" varies among states. If the statute does not make clear which activities fall under the protection of the statute, court opinions, if they exist, can provide clarity. In Virginia, although the courts have not clearly defined the standard for "recreational purpose," it appears that Virginia takes a somewhat expansive view of recreational use, but the individual land user's intent is what matters. Second, although Virginia's recreational land use statute conditions landowner protection on the absence of fees, land use assessments and tax credits may provide alternative methods of

[84] For example, see Michael Dot Scott, *If You See Purple Paint in the Woods, You Should Leave*, 97THEDAWG (March 16, 2023), https://973thedawg.com/if-you-see-purple-paint-in-the-woods-you-need-to-leave/.
[85] *Purple Paint Law*, PENNSYLVANIA GAME COMMISSION, https://www.pgc.pa.gov/HuntTrap/Law/Pages/Purple-Paint-Law.aspx.
[86] *See id.*
[87] *See, e.g.*, Alexandra Weaver, *What do purple fence posts mean in West Virginia?*, WNSTV (Oct. 24, 2022), https://www.wvnstv.com/news/west-virginia-news/what-do-purple-fence-posts-mean-in-west-virginia/#:~:text=The%20law%20outlines%20that%20the,permanent"%20object%20"no%20more%20than; Harkawik, *supra* note 39; Scott, *supra* note 42; Michigan Lawyers Weekly, *Negligence – Off-road Vehicle – Recreational Land Use Act* (March 17, 2023), https://milawyersweekly.com/news/2023/03/17/negligence-off-road-vehicle-recreational-land-use-act/; Peggy Kirk Hall, *Hunters on the Land? Recreational User's Statute Protects Landowners from Liability*, OHIO AGRICULTURAL LAW BLOG (Sept. 17, 2018), https://farmoffice.osu.edu/blog-tags/ohio-recreational-users-statute#:~:text=The%20law%20provides%20immunity%20for,a%20fee%20for%20the%20activity; *New Ariz Ct. App. Decision re Recreational Use Statut*e, SCHMIDT, SETHI & AKMAJIAN, https://www.azinjurylaw.com/MacKinney-v-City-of-Tucson.
[88] Email response from Jane Myers on March 16, 2023, Capital Region Land Conservancy Director, see Questionnaire in Appendix A.

compensation for landowners. Moreover, Virginia may be able to approve and implement a program like the one used in Alabama where fees are permitted under the statute so long as the fees are not aimed at generating a profit. Third, many states extend protection under these statutes to public entities so long as they meet the same requirements as private landowners. Fourth, one of the biggest impediments to landowners opening up their land for trail use is a lack of awareness surrounding the state's recreational land use statute.

A. Areas for Further Research

In addition to the issues this Paper explores, other areas and ideas should be researched before one can recommend revisions to the current law or propose new frameworks to encourage landowners to allow public use of their land for recreational purposes.

1. Data Collection

It appears that no person or entity has compiled data on how many people are straying off formal trails onto private land. While such wandering seems to be an issue anecdotally, obtaining concrete data could aid in coming up with solutions.

2. Indemnity Clauses

Many landowners are concerned about the cost of legal fees if a land user does bring a suit. Section (E) of Virginia's recreational land use statute may provide a solution; if landowners enter into agreements with land conservation organizations or other not-for-profits, those organizations will be responsible for bearing any legal costs.[89] It may be beneficial to review the language indemnity clauses not-for-profits use in agreements with landowners. Moreover, it is unclear how often such clauses actually protect a landowner from incurring legal expenses.

3. Marketing Strategies

The publicity campaigns for Purple Paint Laws may be studied to propose a program that notifies trail users when they are allowed to access land but they bear the risks associated with such use. The specific marketing tactics used may be applicable to a legal scheme in Virginia.

4. Amending Statutory Language

Virginia recreational use statute does not explicitly grant immunity to "not-for-profits" who own and manage land. While it provides protection for private landowners who partner with not-

[89] VA. CODE. ANN. § 29.1-509 (E) (1950).

for-profits,[90] perhaps amending the statute to expressly protect these entities may decrease some concerns of not-for-profit entities.[91]

5. Proactive Approaches to Trail Development

One interviewee noted that her organization partners with the locality to build trail development into the city's comprehensive plan and ordinances. Such a proactive approach could allow for more trail access and ensure that landowners and land trust organizations are represented as stakeholders in discussions on city development.

The goals of recreational trail users and landowners may conflict at times. However, many landowners may want to promote outdoor recreation, but they are concerned about the risks associated with allowing their land to be used for that purpose. While recreational land use statutes seek to mediate these competing interests, perhaps these statutory schemes can be amended and revised to ensure all interested parties are protected.

[90] *Id.* § 29.1-509(B).
[91] *See* Interview with Heather Barrar, Regional Trails Program Director, Friends of the Lower Appomattox River (March 23, 2023).

APPENDIX A: QUESTIONNAIRE

1. In your experience, what is the biggest obstacle for private landowners who decide to open up trails on their land for public use?

2. Is it common for landowners to be hesitant in allowing recreational land users onto private land for hiking and biking? If so, would the opportunity to enter into an agreement (e.g., conservation easement) with a non-profit organization alleviate their concerns?

3. Is it common for hikers and bikers to not realize they are on privately owned land?

4. From your experience, is there a general awareness of Virginia's statute? (https://law.lis.virginia.gov/vacode/title29.1/chapter5/section29.1-509/)

5. Is it feasible for landowners to receive compensation for keeping their land open for public use while maintaining limited liability protection?

6. If you are familiar with Virginia's recreational land use statute, do you have any suggested changes and/or general ideas about it worth sharing?

APPENDIX B: QUESTIONNAIRE RESPONSE LOG

Name	Organization	Title	Response Date and Method
Kelly McClary	Department of Conservation & Recreation	Policy Planning Manager & Division Director for the Planning & Recreation Resources Division	Email Response on March 8, 2023
Kathryn (Giles) Garrison	James River Park	Superintendent	Email Response on March 8, 2023
Jane Myers	Capital Region Land Conservancy	Director of Conservation	Email Response on March 16, 2023
Heather Barrar	Friends of the Lower Appomattox River	Regional Trails Program Director	Zoom Interview on March 23, 2023