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AN ANALYSIS OF THE CONTRACTION OF LIMITED TORT IMMUNITY FOR RECREATIONAL LIABILITY IN ILLINOIS

BY BARNETT P. RUTTENBERG AND THOMAS GIANTURCO*

Creating and preserving open space provides a wide range of social, economic, and environmental benefits to the residents of any community. Open land, whether large acreages within farms or smaller parcels in residential areas that merely provide connecting corridors for bike and hiking paths, can be used for a multitude of recreational activities and offers much needed relief from congestion and the negative effects of development and urban sprawl.

While the residents of any state benefit from this open space resource, it is a shrinking resource. This is particularly true for Illinois which ranks last in the Midwest in acres protected per capita, with only one percent of land protected by the state for recreational use.¹ Development throughout the state is rapidly depleting its natural areas. Illinois has already lost over ninety percent of its original wetlands and 99.9% of its prairies.² This loss affects the public's enjoyment of both open land and waterways. Of the 33,000 miles of streams that are at least twenty-feet wide in Illinois, only two percent are available for

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1. ILL. DEPT OF NATURAL RES., PUBLIC ATTITUDES ABOUT OPEN SPACE: THE UNMET DEMAND FOR OPEN SPACE IN ILLINOIS 3 (May 2003), *available at* http://dnr.state.il.us/orep/open_space_final_report.pdf.

2. CARL VOGEL, THE ILL. ENVTL. COUNCIL EDUC. FUND, ILL. STATE LAND CONSERVATION FUNDING 4-5 (Andrew DuMoulin, ed., Mar. 2007), *available at* http://www.ilenviro.org/publications/files/2007ISLCF_report.pdf.

public use.³

As the population of Illinois increases, and land development increases with it, the need to preserve the dwindling available open space in Illinois has become more critical. Despite these facts, during the past several years, the amount of state money dedicated to open space acquisition has dropped drastically as the state's fiscal crisis and debt issues have intensified.⁴ In 2006, Illinois spent sixty million dollars less on open space acquisition than it spent in 2002 despite increasing land costs.⁵ At the same time, other Midwest states have routinely outpaced Illinois in dollars spent for land preservation.⁶

Illinois, however, is not the only state whose population is experiencing a proportionate decrease in the amount of publicly owned land available for recreational use. As the population of the United States has steadily grown, the general public's need for access to recreational land has outpaced the ability of federal, state, and local governments to provide it. One vehicle used to augment the size of public lands available for recreational use is to rely on privately owned lands that are made available for this purpose. This preservation technique is often accomplished through the actions of private land owners, civic-minded corporations, and non-profit organizations that acquire open space specifically to make it available to the public.

Although government entities enjoy limited tort immunity, private landowners, whether they are individuals, business entities or non-profit organizations, historically were not given tort protection when allowing the public to use their property. To encourage more private landowners to open their property to the public, each state created its own version of what is known as a "recreational use statute." Illinois passed its original recreational use statute, the Recreational Use Act, in 1965.⁷ Although the

3. John Husar, *Canoeists Trying to Get More than Foot in the Water*, CHI. TRIB., Sept. 19, 1996, § 4 at 5.

4. VOGEL, *supra* note 2, at 5.

5. *Id.*

6. Wisconsin, a Midwest state comparable in size to Illinois, has protected four times more land than Illinois for the purposes of conservation and recreation, and continually spends nearly four times as much on open space programs. Moreover, "[i]n 1999, when Wisconsin's ten year capital land acquisition program expired, the legislature renewed it for another 10 years through 2010. In contrast, after Illinois approved capital funding for the Open Lands Trust in 1999, it ran out in 2003, and [Illinois] has never renewed it." *Environment Illinois*, <http://www.environmentillinois.org/issues/open-space/ispac> (last visited Nov. 21, 2008).

7. 1965 Ill. Laws, 2263 § 1. The statute's stated purpose was to "encourage owners of land to make land and water areas available to the public for recreational or conservation purposes by limiting their liability toward persons entering thereon for such purposes." It is interesting to note that the original Act only offered liability protection to landowners whose

different state statutes vary in scope and content, all of the statutes limit landowner liability for personal injuries when landowners allow the public to pursue recreational activities on their land without charging commercial fees.⁸ Without these statutes, landowners who allow the public to enter their land for bird watching, swimming, hiking, or other recreational uses, could be liable for failing to eliminate or warn the public of any potential hazardous or dangerous conditions on their property. Such liability would include injuries caused by natural conditions on the land, such as steep or slippery slopes, or by historic or man-made conditions such as artificial ponds and hiking trails. Rugged natural areas often attract recreational users because of their intrinsic beauty and opportunity for seclusion. If states fail to offer liability protection to landowners who grant the public access to their property, landowners will increasingly close their land to the public, denying individuals the opportunity of the benefits of a rewarding recreational experience that were formerly available to them.

Recreational use statutes allow state and local governments and land trusts to work with private landowners, business entities, land trusts and other non-governmental organizations to provide the public with access to valuable trail connections, waterways and natural areas. These statutes play an integral role in allowing the public to enjoy a greater breadth of recreational opportunities on more properties than the various governmental bodies can provide by themselves through their use of their limited public funds and limited public land ownership.

Since its enactment, the Illinois Recreational Use Act has been amended several times to reflect changing attitudes about recreational use of private lands. In 1988, as the suburban and urban populations of Illinois grew rapidly, the Act was amended to give protection to landowners of these types of property and not just to owners of rural land.⁹ The legislatures in Illinois and other states have attempted to balance two main competing interests: they desire to encourage landowners to open their property to the public for recreational purposes; however, they also want to continue to protect the public from exposure to harm through

property was "located outside the corporate limits of a city, village or incorporated town and not subdivided into blocks and lots." Recreational Use of Land and Water Areas Act, ILL. REV. STAT. ch. 70, §31-32 (1965) (current version at 745 ILL. COMP. STAT. 65/1-7 (2008)).

8. Like most states, Illinois' statute does not offer protection to private landowners who charge visitors a commercial fee to enter their lands. Recreational Use of Land and Water Areas Act, 745 ILL. COMP. STAT. 65/4 (2008).

9. 475 ILL. COMP. STAT. 62/22(a) (2007) ("Land' includes roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.").

maintaining the availability of a claim for damages based on certain tort liabilities. One example of the application of this latter interest arose in *Hall v. Henn*,¹⁰ a 2003 case in which the Illinois Supreme Court allowed an injured person a tort recovery and held that the Illinois Recreational Use Act only offers tort protection to landowners who open their property to the public at large and not just to select individuals.¹¹ The Illinois Supreme Court balanced the needs of the public with the importance of maintaining tort liability in the state by extending protections only to landowners who provide a public benefit. After this decision and in response to concerns raised by individuals who wanted to invite guests to hunt and shoot recreationally on their land without fear of liability, the Illinois General Assembly amended the Recreational Use Act in 2005. Although the apparent legislative intent of the 2005 amendment was to accommodate a specific private use that clearly was not covered after *Hall v. Henn*, the amendment resulted in the elimination of the general protections the statute was originally designed to offer.

This Article will address the Illinois Recreational Use Act, particularly in comparison to similar statutes in other states. It will next examine the *Hall v. Henn* decision and the Illinois General Assembly's subsequent amendments to the Act, which appear to directly conflict with both the intent of the Act and the decision in *Hall v. Henn*. Based on this analysis, we suggest possible changes to the current language of the Act that strike a balance missed by the General Assembly and the underlying principles behind a recreational use statute. The recommended changes would provide protections in line with the *Hall v. Henn* decision, while also allowing the public to benefit from private property made available to the public for recreation and conservation purposes. Reinstating protections formerly in place in Illinois and still in place in the vast majority of other states is necessary to prevent a chilling effect, whereby individual landowners, land trusts and local government agencies would increasingly choose to close off their land and water areas for public recreational activities because of the potential threat of tort liability.

10. *Hall v. Henn*, 802 N.E.2d 797 (Ill. 2003).

11. The *Hall* Court held that:

[T]he [Illinois Recreational Use] Act immunizes landowners from negligence liability with respect to any person who enters their property for recreational purposes, *provided that such property is open to the public*. Conversely, the Act's protections are *not* available to landowners who restrict the use of their property to invited guests only.

Id. at 799.

I. BALANCING ACT

Almost all recreational use statutes¹² incorporate various standards of culpability to limit landowner protection from tort liability. By imposing differing standards, the state legislatures have sought to balance the need for safety with the public's ability to enjoy outdoor recreational opportunities with the standard drafted to reflect policy considerations and political dynamics within the state. In particular, the vast majority of states do not protect landowners from liability for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity on private lands. A minority of only ten states¹³ employ an expanded standard that excludes a landowner from the statutory protection if a claim is founded on grossly negligent conduct. Under this standard, landowners are not protected if they had a reckless disregard of the consequences for the safety of another.¹⁴ Landowners in Illinois,¹⁵ Massachusetts, and Montana are held to an intermediate standard of culpability. Under this standard, private landowners are not accorded liability protection against claims for *willful and wanton* failure to guard against a dangerous condition, use, structure, or activity.

12. The Idaho and Ohio recreational use statutes do not exempt protection for malicious, willful or wanton acts by landowners.

13. Alaska, Arizona, Michigan, Missouri, South Carolina, South Dakota, Texas and Virginia employ the stricter standard of gross negligence.

14. See e.g., ALASKA STAT. § 09.65.200 (a) (2000) ("An owner of unimproved land is not liable in tort, except for an act or omission that constitutes gross negligence or intentional misconduct, for damages for the injury to or death of a person who enters onto or remains on the unimproved portion of land . . ."); ARIZ. REV. STAT. ANN. §33-1551(a) (2000) ("A public or private owner, easement holder, lessee or occupant of premises is not liable to a recreational or educational user except upon a showing that the owner, easement holder, lessee or occupant was guilty of willful, malicious or grossly negligent conduct which was a direct cause of the injury to the recreational or educational user"); VA. CODE ANN. § 29.1-509 (d) (1997) ("Nothing contained in this section, except as provided in subsection E, shall limit the liability of a landowner which may otherwise arise or exist by reason of his gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity"); MICH. COMP. LAWS ANN. § 324.73301 (West 1999) (stating:

A cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of entering or exiting from or using a Michigan trailway as designated under part 721 or other public trail, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.)

15. Private landowners in Illinois were held to this intermediate standard both before and after the passage of the 2005 Amendment to the Recreational Use Act.

In 1987, the Illinois General Assembly strengthened protections for the public under its Recreational Use Act by changing the standard of culpability from "willful or malicious failure" to "willful and wanton failure."¹⁶ Illinois courts have found that a person acts maliciously when he or she commits a wrongful act *intentionally* and without just cause.¹⁷ Willful and wanton conduct involves acts performed in conscious disregard of a known risk or having utter indifference to the consequences.¹⁸ Unlike "willful or malicious" conduct, however, willful and wanton conduct does not require an individual to act with intent. In deciding a case not involving a recreational use statute, one Illinois court described willful and wanton conduct as "a hybrid between acts considered negligent and behavior found to be intentionally tortious."¹⁹ For example, a government agency's failure to adequately warn about the danger of swimming in a rocky lake in a wildlife refuge was not found to be "willful or malicious," but was found to constitute "willful and wanton" conduct.²⁰ The current "willful and wanton" standard still accords a substantial measure of protection to recreational landowners, but recognizes the need to protect the public.

It is difficult to quantify the effects on landowners of the existence of different liability standards in recreational use statutes. If all landowners fully understood their state's recreational use statute, there should be a correlation between the number of owners who open their land to the public and the level

16. Recreational Use Act, Pub. Act 85-959, § 2 (1987), *amended by* Pub. Act 94-625, § 5 (2005).

17. *Gordon v. Oak Park Sch. Dist. No. 97*, 320 N.E.2d 389, 393 (Ill. App. Ct. 1974). In *Gordon*, the Illinois Appellate Court held that evidence of a single teacher's disciplinary measures were insufficient to prove that the school district's employees acted with willful and wanton conduct. The *Gordon* court stated that "[a]n act is willful and wanton if it is committed intentionally or under circumstances exhibiting a reckless disregard for the safety of others, such as failure, after a knowledge of impending danger, to exercise ordinary care to prevent injury, or failure to discover a danger through recklessness or carelessness." *Id.* at 135.

18. *Jerrick v. Norfolk & W. Ry. Co.*, 124 F. Supp.2d 1122, 1126 (N.D. Ill. 2000). "Willful and wanton conduct involves 'acts performed in conscious disregard of a known risk or with utter indifference to the consequences.'" *Id.* at 1126.

19. *Ziarko v. Soo Line R.R. Co.*, 641 N.E.2d 402, 406 (Ill. 1994). The *Ziarko* court noted that "decisions in this State have not limited willful and wantonness to instances where the conduct was intentional. Acts have been identified as willful and wanton where the defendant's conduct was intentional, but have also been found to arise where the defendant's actions were merely reckless." *Id.* at 405-06.

20. *Davis v. United States*, 716 F.2d 418, 427-29 (7th Cir. 1983). Judge Posner, writing for the Seventh Circuit, stated that "in Illinois law, these terms [willfulness and wantonness] do not have their usual English meaning; they merely denote a somewhat heightened form of negligence." *Id.* at 426.

of liability protection provided by the state's recreational use statute. However, it is unclear whether this correlation exists. The ideal standard is one that gives the greatest incentive to landowners to open their land to public users while still providing the public with an adequate level of safety. States differ as to which types of acts by landowners should warrant defenses against liability claims, in order to ensure an "adequate" level of safety for the public for actual or potential injury arising from public use of the landowner's land. From a policy perspective, all states should offer landowners greater liability protection to encourage greater use of private land. In particular though, it is important that those states that have very little public open space for recreational use offer at least as much liability protection to landowners as states that contain larger amounts of public open space, as the states with the least amount of public space have the greatest incentive to encourage private landowners to open their property for use by the public.

II. COMPENSATION

Almost all of the earliest recreational use statutes contained the qualification that landowners would only be protected from liability if they gratuitously allowed recreational users on their land.²¹ Although current recreational use statutes do not extend liability protection to commonly recognized commercial enterprises (such as ski resorts), most recreational use statutes have eliminated this early prohibition against protection for private landowners who charge an entrance or user fee. Arizona's statute, for example, allows public entities or nonprofit corporations to collect contributions from visitors to offset the cost of providing the public with educational or recreational premises and associated services.²² Virginia's recreational use statute allows landowners to collect fees from the public for the cutting and removal of timber and allows landowners to charge reasonable conservation fees to maintain or improve their land.²³ Wisconsin's statute gives

21. Terrence J. Sentner, *Revising State Recreational Use Statutes to Assist Private Property Owners and Providers of Outdoor Recreational Activities*, 9 BUFF. ENVTL. L.J. 1, 13 (2001).

22. ARIZ. REV. STAT. ANN. §33-1551 (1998). ("A nominal fee that is charged by a public entity or a nonprofit corporation to offset the cost of providing the educational or recreational premises and associated services does not constitute an admission fee or any other consideration as prescribed by this section."). *Id.*

23. VA. CODE ANN. § 29.1-509 (2007) (stating:

"Fee" means any payment or payments of money to a landowner for use of the premises or in order to engage in any activity described in subsections B and C of this section, but does not include rentals or similar fees received by a landowner from governmental sources or payments received by a landowner from incidental sales of forest

landowners a bevy of exceptions to the prohibition on landowners charging fees, including: the total revenue from access charges not exceeding \$2,000 annually, sharing of game killed on the property, a donation, an admission charge not exceeding five dollars, or a payment from a governmental body or non-profit organization.²⁴ The Texas statute provides an incentive to landowners to open their land to the public by allowing landowners to charge individuals admission fees provided that the annual revenue derived from the charges does not exceed twice the amount of the landowner's property taxes.²⁵

Under the Illinois statute, except as described below, landowners are prohibited from assessing fees or charges to be covered by the protections of the Recreational Use Act. The Act's definition of a "charge" is "an admission fee for permission to go upon the land."²⁶ However, this definition does not include "the sharing of game, fish or other products of recreational use; or benefits to or arising from the recreational use; or contributions in kind, services or cash made for the purpose of properly conserving

products to an individual for his personal use, or any action taken by another to improve the land or access to the land . . .).

24. WIS. STAT. ANN. § 895.52(6)(a) (2006).

Liability of a private property owner or of an employee or agent of a private property owner whose property is used for a recreational activity is not limited if "the private property owner collects money, goods or services in payment for the use of the owner's property for the recreational activity during which the death or injury occurs, and the aggregate value of all payments received by the owner for the use of the owner's property for recreational activities during the year in which the death or injury occurs exceeds \$2,000. The following do not constitute payment to a private property owner for the use of his or her property for a recreational activity: 1. A gift of wild animals or any other product resulting from the recreational activity. 2. An indirect nonpecuniary benefit to the private property owner or to the property that results from the recreational activity. 3. A donation of money, goods or services made for the management and conservation of the resources on the property. 4. A payment of not more than \$5 per person per day for permission to gather any product of nature on an owner's property. 5. A payment received from a governmental body. 6. A payment received from a nonprofit organization for a recreational agreement.

Id.

25. See TEX. CIV. PRAC. & REM. CODE ANN. § 4-75.001 (2007) (stating when landowners are protected under the Statute:

When total charges collected in the previous calendar year for all recreational use of the entire premises of the owner, lessee, or occupant are not more than: (A) twice the total amount of ad valorem taxes imposed on the premises for the previous calendar year; or (B) four times the total amount of ad valorem taxes imposed on the premises for the previous calendar year, in the case of agricultural land; or (3) has liability insurance coverage in effect on an act or omission described by Section 75.004(a) and in the amounts equal to or greater than those provided by that section.).

26. 745 ILL. COMP. STAT. 65/2(d) (2005).

the land.”²⁷ This provision was interpreted in *Hoye v. Illinois Power Co.*, in which an Illinois court granted a landowner a favorable expansion of the exception to the fee prohibition.²⁸ In *Hoye*, the plaintiff, who injured himself when he jumped off a pontoon boat, alleged that the defendant landowner, Illinois Power Company, did not qualify for the protection of the Act because it received a percentage of concessions and docking fees from a marina which was located on land that the defendant leased to the Illinois Department of Conservation.²⁹ The Court did not consider this a fee for admission, under the Illinois Recreational Use Act, because admission fees do not include incidental charges for refreshments or other services on the land, and it was still possible for an individual to dock a boat in the lake in the morning and take it out in the afternoon without paying a docking fee.³⁰ Thus, the Illinois Power Company qualified for the protection afforded by the Illinois Recreational Use Act because it had not charged the public an actual admission fee to enter its land. It just incidentally benefited from people who use the land and also bought certain concessions.³¹

There are many benefits to the recreational use statutes allowing private and governmental landowners to accept nominal fees for land conservation and educational purposes. For example, when landowners allow the public to use their land for recreational purposes, the increase in usage may necessitate maintenance to keep the property in safe, useable condition. If all forms of compensation for such maintenance are barred, landowners may be less likely to expend their own funds to maintain their property in a safe condition. Without a source of funds for maintenance or even to compensate for the owner for the increased administration of his property, landowners may refuse to open their land to the public at all. Although the Illinois statute currently allows landowners to receive charitable donations for the conservation of their land, for the reasons mentioned above, the Illinois General Assembly should follow the lead of other states by allowing landowners to charge a nominal fee for the use of their property to recuperate the cost of maintaining the land.

27. *Id.*

28. *Hoye v. Ill. Power Co.*, 646 N.E.2d 651, 654 (Ill. App. Ct. 1995).

29. *Id.* at 652.

30. *Id.* at 654.

31. *Id.*

III. *HALL V. HENN*

In late 2003, the Illinois Supreme Court interpreted the scope of the Recreational Use of Land and Water Areas Act in *Hall v. Henn*.³² The case involved a family that constructed and used a sled run in the backyard of their residence.³³ Although the run was not open to the general public, the family occasionally gave permission to friends and neighbors to use it.³⁴ On one occasion, the Henn's allowed a neighborhood family and their friends to use the sled run.³⁵ After taking several trips down the run, the plaintiff slipped, fractured her arm, and tore a knee ligament.³⁶

The plaintiff sued for money damages under a theory of negligence, and the defendants moved for summary judgment.³⁷ The defendants argued that because the plaintiff was using their property for a recreational activity, the Recreational Use Act protected them from negligence liability. The defendants believed that they were specifically protected by Section 4 of the Act, which protects owners of private land who invite guests to use their land free of charge.³⁸ Although the Recreational Use Act did not specifically protect landowners who invite select individuals to use their property, nevertheless several Illinois court decisions had been construed to provide such protection.³⁹

32. *Hall v. Henn (Hall II)*, 802 N.E.2d 797, 797 (Ill. 2003).

33. *Id.* at 327.

34. *See id.* (explaining that in addition to requiring friends and neighbors to ask for and receive permission to use the sled run, defendants opened the run only when they were present to supervise its use).

35. *Id.* at 328.

36. *Id.*

37. *Id.*

38. The Act specifically states that:

[A]n owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational or conservation purposes does not thereby: extend any assurance that the premises are safe for any purpose; confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed; assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such person or any other person who enters upon the land; assume responsibility for or incur liability for any injury to such person or property caused by any natural or artificial condition, structure or personal property on the premises.

745 ILL. COMP. STAT. 65/4 (2002).

39. *See Mitchell v. Wadell*, 544 N.E.2d 1261, 1264 (Ill. App. Ct. 1989) (holding that defendant was protected by the Recreational Use of Land and Water Areas Act when plaintiff was injured from falling into a hole after being personally invited to defendant's farm to collect insects); *Lane v. Titchenel*, 562 N.E.2d 1194, 1197 (Ill. App. Ct. 1990) (holding that defendant was protected by the Recreational Use of Land and Water Areas Act when plaintiff was injured after falling into a hole when attending a wiener roast and hayride at defendant's property).

The Illinois Supreme Court did not agree with the defendants' interpretation of the Act. In rendering its decision for the plaintiff, the Illinois Supreme Court held that landowners should only receive liability protection under the Act if they make their property available to the general public and not just to certain or specified individuals.⁴⁰ Specifically, the Court held that "the Act immunizes landowners from negligence liability with respect to any person who enters their property for recreational purposes, provided that such property is open to the public. Conversely, the Act's protections are not available to land owners who restrict the use of the property to invited guests only."⁴¹ Thus, the Illinois Supreme Court held that landowners do not receive liability protection when they open their property for recreation or conservation only to a select group of individuals, such as their neighbors or a local Boy Scout group. As the Court stressed, the statute's stated purpose was "to encourage owners of land to make land and water areas available to the public for recreational or conservation purposes."⁴² Because the statute specifically stated that it was intended to benefit the public, landowners opening their land only to invited guests were benefiting only a select group of people, not the public. As a result, these landowners did not deserve the protections of the statute. The Court's rationale for the decision touched on the fundamental balance of encouraging landowners to open private land and water areas to the public while still maintaining traditional landowner liability laws. The Court refused to extend protections to landowners who invited groups of individuals onto their property for private use; to hold otherwise would have effectively eliminated traditional tort liability in Illinois.

IV. THE AFTERMATH OF *HALL V. HENN*

In the wake of *Hall v. Henn*, many landowners understood that they were not covered by the liability relief offered under the Act when inviting guests onto their property for hunting and recreational shooting. These landowners expressed their concern to the Illinois General Assembly, which responded by amending the Recreational Use Act in 2005 in two important ways. First, the legislature broadened the scope of the statute to protect landowners who open their property only to select individuals. The purpose of the Act changed from encouraging "owners of land to make land and water areas available to *the public* for recreational or conservation purposes"⁴³ to encouraging "owners of

40. *Hall II*, 802 N.E.2d at 799-800.

41. *Id.* at 800.

42. 745 ILL. COMP. STAT. 65/1 (2002) (amended 2005).

43. *Id.* (emphasis added).

land to make land and water areas available to *any individual or members of the public* for recreational or conservation purposes.”⁴⁴ By adding the phrase “any individual or members of the public,” the General Assembly made it clear that landowners would receive liability protection if they merely open their property to even a limited group of invitees. Second, and most significant, the General Assembly eliminated protection for recreational and conservation uses of private land other than hunting and recreational shooting. It did so by altering and limiting the definitions of “land” and “recreational or conservation purpose” in Section 2 of the Act. This change does not logically flow from either the *Hall v. Henn* holding, which did not challenge the policy of limiting landowners’ tort liability, or from the Act’s historical and present purpose of encouraging landowners to open their lands to the public for a wide range of recreational and conservational purposes.

A. The Definition of “Recreational Use”

As discussed above, the General Assembly drastically changed the definition of “recreational or conservation purpose” from a broad scope of “*any activity undertaken for conservation, resource management, exercise, education, relaxation, or pleasure*” to a very narrow definition which includes only “*hunting or recreational shooting or a combination thereof*.”⁴⁵ This amendment stripped landowners of liability protection if they open their property for any reason other than to “hunt or recreationally shoot,” even if the land is open to the general public.⁴⁶ Illinois is the only state that restricts its definition of “recreational use” in such a narrow manner. Including only these two uses conflicts with the avowed purpose of the Act, which is “to encourage owners of land to make land and water areas available to any individual or members of the public for recreational or conservation purposes by limiting their liability toward persons entering thereon for such purposes.”⁴⁷ Because of this change, landowners are no longer given liability protection for the multitude of activities that the Act covered for forty years. The scope of the Act is now so limited that it no longer benefits either urban or suburban landowners in towns and cities throughout the state where hunting and shooting are not viable recreational activities. Nor does the Act benefit the many rural landowners who historically have opened their land for a variety of other activities such as fishing, horseback riding, and canoeing.

44. 745 ILL. COMP. STAT. 65/1 (2005) (emphasis added).

45. 745 ILL. COMP. STAT. 65/2(c) (2002); 745 ILL. COMP. STAT. 65/2(c) (2005).

46. 745 ILL. COMP. STAT. 65/2(c) (2005).

47. 745 ILL. COMP. STAT. 65/1 (2005).

Consistent with their intended purpose, the statutory definition of "recreational use" in most states includes such recreational activities as hiking, swimming, fishing, pleasure driving, and the study of nature. The provisions also often contain a catch-all phrase, such as "includes, but is not limited to" or "other recreational pursuits" to prevent a narrow interpretation of recreational use. Only five states—California, Oklahoma, New York, Montana, and New Hampshire—have even tried to define recreational use in their statutes with an exhaustive list of covered activities. Yet, even these lists are much more expansive than Illinois' limited inclusion of only two activities, hunting, and recreational shooting. For example, under California's statute, "recreational purpose" includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.⁴⁸ Just as California's list includes recreational activities such as sport parachuting or spelunking, other states with exhaustive lists (besides Illinois) also include activities that at first glance may not initially come to mind as a recreational use, but are consistent with the spirit of the Act to encourage landowners to open their land to the public for recreational uses.⁴⁹

A flexible definition of "recreational or conservation purpose" that is not limited to a specific list is more practical and beneficial to the public than an exclusive list because recreational activities change over time. The legislature likely will have to continuously amend the statute to include recreational activities that gained popularity over time or were not thought of at the time of the passage of the current law in order to assure that the purpose of such law was not frustrated. This is not only time consuming for the state legislatures, but can also lead to an increase in litigation concerning activities that are clearly recreational in nature, but may have only become popular after the law's enactment and so are not specified in the list. Defining recreational purpose with a list that offers flexibility or even a simple textual statement to include "any recreational pursuit"⁵⁰ or "any activity engaged in the purpose of exercise, relaxation, pleasure, or education"⁵¹, allows

48. CAL. CIV. CODE § 846 (West 2001).

49. The protection provided by the New York recreational use statute, for example, includes activities such as hang gliding, motorized vehicle operations, training of dogs, and activities designed to give warning to hazardous conditions. N.Y. GEN. OBLIG. LAW § 9-103.1.a (McKinney 2008).

50. MD. CODE ANN. NAT. RES. § 5-1101 (2000).

51. ND. CENT. CODE § 53-08-01 (1999).

courts to construe the recreational immunity statute in favor of property owners when the activity in question is not specifically listed in the statute as a "recreational activity," but is substantially similar to the activities listed in the statute, or alternatively when the activity is undertaken in circumstances substantially similar to those of a recreational activity.⁵²

Limiting the definition of "recreational or conservation purpose" to only a few activities directly undermines the very purpose of the Act, which is to promote opening land to the public. Currently, landowners in Illinois are discouraged from making their property available to the public for any recreational activity except hunting and shooting since they are not protected from tort liability for anything else under the Recreational Use Act. This very restrictive definition is likely to create a "chilling effect" in which many landowners will be reluctant, or even refuse, to allow the public to use their land out of fear of being sued. As a result, the public could lose access to countless acres of land and miles of trails. For example, businesses may decide not to continue to work with the Illinois Department of Natural Resources, park and forest preserve districts, non-governmental organizations, and other state and local government agencies to restore natural areas and allow the public to enjoy these private holdings. This could worsen the already severe problem of diminishing open space available to the public in Illinois.

B. The Definition of "Land"

The Illinois General Assembly made another change to the Recreational Use Act that was not driven by the *Hall v. Henn* decision and may also produce a future chilling effect. Most recreational use statutes include a very broad definition of "land," where a landowner enjoys protections for allowing the public to enjoy recreational and conservation activities. The 2004 version of the Illinois Recreational Use Act was in line with this broad definition, defining land as: "roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty."⁵³ The Illinois General Assembly changed the definition in 2005 by adding the proviso that land "does not include residential buildings or residential property."⁵⁴ By excluding residential property from the definition of land, the Illinois Act strays from the great majority of other recreational use statutes' definitions. Only Alaska, Colorado, North Carolina and Oklahoma also severely restrict the definition of "land" in their

52. *Minn. Fire & Cas. Ins. Co. v. Paper Recycling of La Crosse*, 627 N.W.2d 527, 533 (2001).

53. 745 ILL. COMP. STAT. 65/2(a) (2002).

54. 745 ILL. COMP. STAT. 65/2(a) (2005).

recreational use statutes.⁵⁵

Having restrictions on the definition of land significantly limits the public's opportunities to pursue recreational activities on open property in areas of any state that are readily available and proximate to the population center. However, it is much more vital for a state such as Illinois, with urban intensive portions of the state having very high population densities and little unimproved, open space, as compared to states like Alaska, Colorado, and Oklahoma which all have significantly lower population densities and much larger rural areas.⁵⁶ It is unclear how the definition of "residential property" would account for the vast differences in population density throughout the state, as there are rural residential sites that span acres, while sites that are sought after in more dense areas could be less than an acre. All of these sites could be extremely valuable assets to the public as open space for recreational and conservation activities, particularly in Illinois where there is not an abundance of available open space. By no longer extending any type of tort liability protection to residential landowners, the Illinois public will undoubtedly lose access to miles of public trails and waterways throughout the state that are connected through small pieces of land in "residential property." Because the amount of public land in Illinois has already decreased significantly, the lack of such tort liability protection will decrease even further the amount of land available to the public and increase the already onerous burden on existing landowners.

Furthermore, Illinois' restriction on "residential buildings or residential property" is very unclear. While the restriction on residential buildings, being the house, building or apartment per se, may be warranted, the restriction on residential property only creates confusion. Under North Carolina's statute, "land" is defined as "real property, land, and water, but does not mean a

55. For example, the Alaska statute only covers "unimproved land" which is limited to "a trail, abandoned aircraft landing or abandoned road." ALASKA STAT. §09.65.200 (2007). Colorado's recreational use statute has a narrow definition of land that does not include:

[r]eal property, buildings, or portions thereof which are not the subject of a lease, easement, or other right of use granted to a public entity; except that land on which a landowner has acquiesced to public use of existing trails that have historically been used by the public for recreational purposes need not be subject to a lease, easement, or other right of use granted to a public entity.

COLO. REV. STAT. § 33-41-103 (2007). Oklahoma's statute specifically excludes "realty which is used primarily for farming or ranching activities." OKLA. STAT. ANN. tit. 76, § 10 (2004).

56. U.S. Census Bureau, *Cumulative Estimates of Population Change for the United States, States, and Puerto Rico April 1, 2000 to July 1, 2007*, available at <http://www.census.gov/popest/gallery/maps/maps-state2007.xls> (last visited Sept. 26, 2006).

dwelling and the property immediately adjacent to and surrounding such dwelling that is generally used for activities associated with occupancy of the dwelling as a living space.”⁵⁷ However, the definition of “residential property” under the Illinois statute is far less clear. Is it a zoning classification or is it designated by how close the area is to a property owner’s dwelling? If Illinois is insistent on excluding “residential property” from its definition of “land” it should focus on the activities that are occurring on the land and not the land itself. For example, if a landowner allows the public to travel on a strip of his land in order to connect a series of public trails, the fact that the landowner’s dwelling is a hundred feet away should not impact whether he is eligible to receive tort liability protection under the Act.

The General Assembly’s possible rationale for the change in the definition of “land” was to ensure that landowners do not receive limited liability in situations with facts similar to those in *Hall v. Henn*. However, the court in *Hall v. Henn* intentionally did not focus on zoning or the nature of the land. Rather, it focused on the use that was being made of the land, the distinction being between owners who open their land to the public and those who only allow select individuals, as the purpose of the statute at the time of the decision was to encourage the public use of land.

V. CONCLUSION

Illinois needs to amend its Recreational Use Act because the existing version does very little to promote the public recreational use of land and is in complete discord with the majority of other states’ recreational use statutes. As it stands, the Act only extends limited protection from tort liability to landowners who allow hunters and recreational shooters to utilize their non-residential property. This falls short of the fundamental goal of the Act, which since its inception in 1965, has been to encourage owners of land to make land and water areas available to the public for recreational purposes. If the Recreational Use Act is not amended, an increasing number of landowners will be less likely to allow the public to pursue recreational activities on their property. As this “chilling effect” permeates throughout the state, the public will increasingly lose recreational access to privately owned property and will be restricted to only using the limited amount of publicly owned areas that are left. The “chilling effect” will also increase the burden on the few remaining private landowners that open their lands to the public.

The availability of access to privately owned land is an essential need and should be restored to the breadth of use that prevailed prior to the 2005 Amendment. Public funding for the

57. N.C. GEN. STAT. § 38A-2 (1995).

acquisition of land for open space and recreational use must compete with a host of other important public needs such as the funding of health care and regional mass transportation. Without a dedicated effort from the federal, state and local governments to preserve open space and create incentives for private landowners to make their property available to the public, present and future generations of residents will miss out on the wide array of recreational activities that are potentially available in Illinois.

