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Challenging Highways: Widening the Access to Judicial Review

The federal interest in highways stems from provisions in the Constitution for establishing post roads,¹ regulating commerce among the states,² providing for the national defense,³ and promoting the general welfare.⁴ Despite this interest, Congress failed to alleviate the states' highway construction burden for more than a century.⁵ Now that Congress has entered the field, few highways are constructed without federal aid and control.⁶

Under the Federal-Aid Highway Acts, codified in Title 23,⁷ the states take the initiative in selecting federal-aid highway route locations. They choose the route locations and plan the individual projects.⁸ However, the

1. U.S. CONST. art. I, § 8, cl. 8.

2. *Id.*, cl. 4.

3. *Id.*, cl. 1.

4. *Id.*

5. In 1806, Congress authorized construction of the National Road, which by 1838 required approximately \$7,000,000 in appropriations. Half a century later, after the invention of the rubber-tired bicycle and considerable lobbying effort by the League of American Wheelmen, Congress established the Office of Road Inquiry and appropriated \$10,000 for research in road management and construction. In 1912, the Post Office Appropriations Act allotted \$500,000 for highway construction. For a discussion of these early federal efforts, see Miller, *History of the Modern Highway in the United States*, in *HIGHWAYS IN OUR NATIONAL LIFE* (J. Labatut & W. Lane ed. 1950). Finally, Congress passed the Federal-Aid Highway Act of 1916, 39 Stat. 355, which initiated the present federal-state roadbuilding partnership.

6. Federal-aid highways are divided into three categories or systems: primary, secondary, and interstate systems. 23 U.S.C. § 103(a) (1964). The primary system is made up of "important city-to-city, interstate and intrastate highways, serving essentially through traffic." 23 C.F.R. § 1.6(d)(2) (1970). The secondary system generally consists of rural roads which may include "farm-to-market roads, rural mail routes, public school bus routes, local rural roads, county roads, township roads, and roads of the country road class." 23 U.S.C. § 103(c) (1964).

The more recent interstate system will consist of about 42,500 miles of four-lane superhighways connecting "the principal metropolitan areas, cities, and industrial centers" of the nation. *Id.* § 103(d) (Supp. V, 1970). The federal government limits its share of the cost of constructing the primary and secondary systems to approximately 50 percent. *Id.* § 120(a). However, in the interstate system, the federal contribution amounts to about 90 percent of the total cost. *Id.* § 120(c).

7. *Id.* §§ 101-41, 301-20 (1964), *as amended*, (Supp. V, 1970), and §§ 501-11 (Supp. V, 1970).

8. *Id.* § 105(a) (1964). The federal government does not advance money to the states for roadbuilding. The states make the initial expenditure and then claim reimbursement for the appropriate federal share of the cost of the project as the work progresses. The state highway departments are able to plan their programs in anticipation of federal reimbursement since federal aid for any fiscal year is appor-

Secretary of Transportation must approve all of the project locations before federal funds are committed.⁹ Because the Secretary's decision is not subject to administrative review, the courts provide the sole avenue of appeal to those citizens challenging his determinations. This article will examine the reviewability of the federal-aid highway route location procedures in the federal courts.

Judicial Review

According to Section 701(a) of the Administrative Procedure Act (APA),¹⁰ judicial review of federal agency decisions is available unless "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."¹¹ Section 704 of the APA states: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."¹²

Although the federal-aid highway legislation has no provision relating to judicial review, a wide degree of discretion has been granted to the Secretary of Transportation. Congress has placed only one mandatory restriction on the Secretary's approval, *i.e.*, that he may not approve state plans and specifications which fail to provide for "safety, durability, and economy of maintenance."¹³ There are other requirements for federal approval, but they are either directed to state officials or are left to the discretion of the Secretary. For example, when a highway project must traverse an urban area, public hearings on its economic, social, and environmental impact on the community must be held by the state authorities.¹⁴ The Secretary

tioned to the states long before the year begins. *Id.* § 104(e).

Specific amounts of federal highway aid are authorized for each fiscal year by act of Congress, separately for the interstate system and for the other federal-aid systems. *Id.* § 104(b)(5) (Supp. V, 1970) (interstate system); *id.* §§ 104(b)(1)-(3) (1964) (other systems). These total funds are then divided among the states in accordance with formulas prescribed by law. *Id.* (primary and secondary systems); *id.* § 104(b)(5) (Supp. V, 1970) (interstate system). The apportionment, usually made nearly a year in advance of the fiscal year for which apportioned, is a notification to the state of the amount available to it and against which it can present claims for federal reimbursement. *Id.* § 104(e) (1964).

Following the apportionment, each state highway department prepares a program, or list of projects, on which it intends to use its federal aid. *Id.* § 105(a). When detailed plans, specifications, and cost estimates prepared by the state for a specific project have been approved, the federal share of the cost is formally committed, and the state may then proceed with the work of construction. *Id.* § 106(a).

9. *Id.* The Secretary has delegated this function to the Federal Highway Administrator who in turn may delegate the function to an official of the Bureau of Public Roads (BPR). 23 C.F.R. § 1.37 (1970).

10. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5362, 7521 (Supp. V, 1970).

11. *Id.* § 701(a).

12. *Id.* § 704.

13. 23 U.S.C. § 109(a) (1964).

14. *Id.* § 128(a) (Supp. V, 1970).

merely receives certification¹⁵ and transcripts of the hearings before extending federal approval.¹⁶ An example of the discretion left to the Secretary is his latitude of action under legislation which controls outdoor advertising and junkyards along the interstate system. "[W]henever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of these subsections to a State."¹⁷ Suspension would then enable a state to construct a highway along an otherwise federally unacceptable route. Another example is furnished by the recent highway relocation legislation which states:

The Secretary shall not approve any project . . . which will cause the displacement of any person, business, or farm operation *unless he receives satisfactory assurances . . . that . . . those displaced receive reasonable relocation and other payments . . . and within a reasonable period of time . . . there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable . . . decent, safe, and sanitary dwellings, as defined by the Secretary . . . reasonably accessible to their employment.*¹⁸

Finally, although initially prohibiting the Secretary from approving highway projects running through public parks, recreation areas, wildlife refuges, and historic sites of state or local significance, Congress amended the legislation to permit discretionary approval.¹⁹

Although one might argue that the wide degree of discretion given the Secretary of Transportation under the federal-aid highway legislation prevents review under Section 701(a)(2) of the APA,²⁰ Title 23 is silent on this point. Moreover Title 23 does not explicitly preclude judicial review for purposes of Section 701(a)(1) of the APA.

Statutory silence has been interpreted as an indication that no review was intended, but the presumption is generally in favor of review.²¹ Commenting on this situation as it relates to the APA, Congress has stated:

The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convinc-

15. *Id.*

16. *Id.* § 128(b) (1964).

17. *Id.* § 131(b) (Supp. V, 1970).

18. *Id.* § 502 (emphasis added).

19. See Federal-Aid Highway Act of 1966 § 15(a), 80 Stat. 771, as amended, 23 U.S.C. § 138 (Supp. V, 1970).

20. See generally Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

21. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). See also L. JAFFEE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 336-63 (1965).

ing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.²²

The Supreme Court recently considered this problem in *Barlow v. Collins*.²³ Finding that tenant farmers have the right under the APA to question regulations formulated by the Secretary of Agriculture, the Court declared that "judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated."²⁴ In a companion case decided the same day, *Association of Data Processing Service Organizations v. Camp*,²⁵ the Court stated: "There is no presumption against judicial review and in favor of administrative absolutism . . . unless that purpose is fairly discernible in the statutory scheme."²⁶ In both of these cases the Supreme Court cited *Abbott Laboratories v. Gardner*,²⁷ for the proposition that "judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."²⁸

Although the Supreme Court has never reviewed federal-aid highway route location decisions, several lower federal courts have reviewed agency decisions regarding causeway construction, hearing procedures, and highway route location. In *Citizens Committee for the Hudson Valley v. Volpe*,²⁹ the Secretary of the Army had permitted state authorities to advertise for causeway construction bids without the approval of the Department of Transportation. Considering this action, the Second Circuit stated:

The statute pursuant to which the Army Chief of Engineers issued the disputed permit contains no provision for judicial review, nor does it include specific procedures for appeal of the Army's decision. . . .

. . . Since the Army's issuance of this permit was final agency action for which there is no other adequate remedy in a court, and review is not clearly and convincingly precluded by the Rivers and Harbors Act, the Administrative Procedure Act must be read to confer equitable jurisdiction on the district court . . . if the Administrative Procedure Act could not itself serve as a basis for jurisdiction, the important goal of subjecting final agency action to judicial scrutiny would be frustrated.³⁰

22. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946).

23. 397 U.S. 159 (1970).

24. *Id.* at 166.

25. 397 U.S. 150 (1970).

26. *Id.* at 157.

27. 387 U.S. 136 (1967).

28. *Id.* at 140.

29. 425 F.2d 97 (2d Cir. 1970).

30. *Id.* at 101-02.

Other federal courts have reviewed similar agency action without discussing the jurisdictional issue. The Sixth Circuit reviewed the administrative discretion of Tennessee officials in *Nashville I-40 Steering Committee v. Ellington*.³¹ The plaintiffs brought suit to enjoin the defendants from constructing a section of Interstate Route 40 along its planned route in the northern section of Nashville. When the district court denied their preliminary injunction, plaintiffs appealed on the grounds that the route selection was arbitrary and that it discriminated against the Negro and low socio-economic elements of the city's population. The court did not discuss the APA since the defendants were state officials. The defendants did not even argue the reviewability issue. The case turned on the question of injunctive relief—an issue which the court ultimately resolved in favor of the defendants. In *D.C. Federation of Civic Associations, Inc. v. Airis*,³² the District of Columbia Circuit examined the District government's planning procedures for several highway projects.³³ Once again, the question of injunctive relief claimed the attention of the litigants and the issue of administrative discretion was not raised. In *D.C. Federation of Civic Associations, Inc. v. Volpe*³⁴ the same plaintiffs sought a declaratory judgement and injunction against the Secretary of Transportation and the District government. On appeal from an adverse decision in the district court the Federation alleged that the Three Sisters Bridge was being built in violation of Title 23 which requires hearings on such projects.³⁵ Without discussing the issue of administrative discretion or the APA, the court reversed the district court on the grounds that Title 23 could not constitutionally permit the construction of the bridge without prior public hearings.³⁶

The issue of judicial review was squarely faced in *Road Review League v. Boyd*,³⁷ where a New York district court reviewed a Federal High-

31. 387 F.2d 179 (6th Cir. 1967).

32. 391 F.2d 478 (D.C. Cir. 1968).

33. In this case suit was brought to restrain the Director of the Department of Highways and Traffic of the District of Columbia, the District Commissioners, the members of the National Capitol Planning Commission, the FHWA, and various other federal and District officials and agencies, from constructing four highway projects—the North Central Freeway, the East Leg, the Three Sisters Bridge, and the Missouri Avenue Expressway.

34. Civ. No. 23,870 (D.C. Cir., Apr. 6, 1970).

35. 23 U.S.C. § 128 (Supp. V, 1970).

36. The Secretary of Transportation and the District of Columbia argued that Congress intended to bypass the hearings procedures required by Title 23. Nevertheless, the court ruled that public hearings must be held to consider the environmental impact of the bridge project. The court held that denial of such hearings would amount to an invidious discrimination against District residents in that they would be unable to participate in planning the future of their community to the extent that other United States citizens enjoy that right. Civ. No. 23,870 (D.C. Cir., Apr. 6, 1970).

37. 270 F. Supp. 650 (S.D.N.Y. 1967).

way Administration (FHWA) route location decision made by the Bureau of Public Roads (BPR).

In that case, the New York Superintendent of Public Works had selected the Chestnut Ridge alignment when opposition surfaced at the initial public hearing. With the approval of the BPR, the Superintendent held a second hearing at which an alternate westerly route was considered. After the second hearing, the Superintendent requested that the BPR approve the westerly route. The BPR denied the request. The Superintendent then resubmitted the unpopular Chestnut Ridge alignment which the BPR approved. Despite BPR approval, further studies of the westerly route were submitted to the FHWA Administrator who with the concurrence of both the Secretary of Transportation and the Secretary of Commerce made the final determination. He chose the Chestnut Ridge alignment.

The plaintiffs, a local community, and several civic associations, were seeking a permanent injunction and a declaratory judgment that the selection of the Chestnut Ridge alignment of Interstate Route 87 was arbitrary and capricious. The Agency moved to dismiss the case on the grounds that its discretion was absolute and not subject to judicial review.³⁸ However, the district court saw "nothing in the Highways Act which indicates a congressional intent to immunize the Bureau of Public Roads from judicial scrutiny of its acts."³⁹ The court noted that the Transportation Act specifically makes the Administrative Procedure Act applicable to its proceedings,⁴⁰ and declared: "To hold that these decisions cannot be reviewed, no matter how arbitrary they may be, would be unsound and unjust."⁴¹

Standing

Granted that administrative route location decisions are subject to judicial review, the question remains: who can bring such determinations to the attention of the courts—*i.e.*, who has the requisite standing? Early state court decisions laid down the answer with such uniformity as to make it axiomatic: an individual or group whose property did not lie directly in the path of or immediately adjacent to a new highway was not entitled to bring suit to secure judicial review of the governmental authority responsible for determining the location of the highway.⁴²

38. *Id.* at 652. To contrast this position with that taken by the FHWA in proposing review procedures, see discussion of Proposed FHWA Reg. § 3.17, 33 Fed. Reg. 15666 (1968).

39. 270 F. Supp. at 659 (S.D.N.Y. 1967).

40. 49 U.S.C. § 1655(h) (Supp. V, 1970).

41. 270 F. Supp. at 660 (S.D.N.Y. 1967).

42. *See, e.g.*, *Brown v. Smith*, 147 Ga. 483, 94 S.E. 567 (1917); *Brown v. Paul*, 100 Kan. 319, 164 P. 288 (1917); *Lord v. County Comm'rs*, 105 Me. 556, 75 A. 126

In *Overbeck v. Galloway*⁴³ the Missouri Supreme Court held that a taxpaying citizen of the affected community whose own property was not jeopardized by the new road did not have standing to attack the county court order establishing the road. Permitting the citizen to bring suit, the court reasoned "would not only be ruinous, but violative of those general principles, that a common interest which belongs equally to all, and in which the parties suing have no special or peculiar property, will not maintain a suit."⁴⁴

In *Conklin v. County Commissioners*,⁴⁵ a town resident asked the Minnesota Supreme Court to review the Fillmore County Commissioners' decision to change the location of a highway. In quashing the writ of certiorari, the court stated the prevailing rule of the 1880's:

[T]he plaintiff has not a right to prosecute this action. He does not show nor pretend that he is damnified more or otherwise than any other resident of the town near or over whose land the road is laid, or who ordinarily travels on the road. The change complained of is not on or near his land. The injury . . . if any . . . is to the community, not to him in his individual capacity, and it is for them, not for him, to redress it . . . [for] if one member of the community in his individual capacity has a remedy for such an injury, so has every other member. To permit this would be intolerable, and contrary to all precedent or reason.⁴⁶

Just after the turn of the century, a group of community citizens and taxpayers petitioned the Supreme Judicial Court of Maine for a writ of certiorari to set aside the highway location determinations of county officers in *Lord v. County Commissioners*.⁴⁷ The court held that the petitioners did not have sufficient interest to maintain the writ.

The only ground for their claim of right to petition for this writ is that they 'are citizens and taxpayers of said town of Naples.' If, for this reason, they have the right to petition for certiorari to quash the laying out of this townway, then for a like reason has each citizen and taxpayer of the town alike right. But to permit that would be both unreasonable and contrary to precedent."⁴⁸

(1909); *Vanderstalph v. Highway Comm'r*, 50 Mich. 330, 15 N.W. 495 (1883); *Blakely v. Board of Superintendents*, 171 Miss. 652, 158 So. 483 (1935); *Overbeck v. Galloway*, 10 Mo. 364 (1847); *Bennett v. Tuftonborough*, 72 N.H. 63, 54 A. 700 (1903); *Allen v. Parker County*, 23 Tex. Civ. App. 536, 57 S.W. 703 (1900). See also 39 AM. JUR. 2d *Highways, Streets and Bridges* § 38 (1968); 39 C.J.S. *Highways* § 54 (1963).

43. 10 Mo. 364 (1847).

44. *Id.* at 365.

45. 13 Minn. 423 (1882).

46. *Id.* at 423-24.

47. 105 Me. 556, 75 A. 126 (1909).

48. *Id.* at 559, 75 A. at 128.

Standing presents a more complicated problem for federal courts.⁴⁹ Generally, the question of standing in the federal courts must be considered within the framework of Article III which restricts judicial attention to cases and controversies.⁵⁰ In *Flast v. Cohen*⁵¹ the Supreme Court stated:

[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.⁵²

When the plaintiff asserts under the APA that he is "aggrieved by agency action within the meaning of a relevant statute"⁵³ the federal courts must ask "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question."⁵⁴

Departmental Regulations

The federal highway legislation protects a considerable zone of interest. For example, the Secretary of Transportation must approve all federal-aid highway route locations⁵⁵ and in so doing he must consider the social, economic, and environmental impact of the proposed highway on each community affected.⁵⁶ Local needs are to be given as much consideration as the needs of interstate commerce.⁵⁷ To implement this legislation, the Secretary has published regulations requiring state highway departments to consider natural resources, land use patterns, and social values of the communities affected by the selected route.⁵⁸ Moreover, the regulations authorize the Administrator of the FHWA to "promulgate and require the observance of such policies and procedures . . . as he may deem necessary for carrying out the . . . Federal laws and the regulations in this part."⁵⁹

49. See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE 208-94 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-545 (1965). For an excellent discussion of the problem see Judge Tamm's opinion in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

50. U.S. CONST. art. III, § 2.

51. 392 U.S. 83 (1968).

52. *Id.* at 101.

53. 5 U.S.C. § 702 (Supp. V, 1970).

54. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 153 (1970).

55. 23 U.S.C. § 103(e) (Supp. V, 1970).

56. *Id.* § 109(a) (1964), § 134 (Supp. V, 1970).

57. *Id.* § 101(b).

58. 23 C.F.R. § 1.6(c) (1970). See *Barlow v. Collins*, 397 U.S. 159, 165 (1970); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 153 (1970).

59. 23 C.F.R. § 1.32 (1970).

If states fail to comply with such regulations, the Administrator may withhold funds for the projects involved, refuse approval of future projects, or take "such other action as he may deem appropriate under the circumstances."⁶⁰

Pursuant to the above regulations,⁶¹ the Administrator has issued two important memoranda—one concerning highway location approval⁶² and one dealing with urban transportation planning.⁶³ The highway location memorandum requires that state highway departments afford an opportunity for two hearings before approval will be given for any primary or interstate system project.⁶⁴ States must afford the opportunity for a "corridor public hearing"⁶⁵ before approval of route location, and a "highway design public hearing"⁶⁶ before approval of a design proposal. Ideally, the corridor hearing affords interested persons the opportunity to (1) participate in determining the community's highway needs⁶⁷ and (2) present their views on the probable impact of the alternate route locations upon their community.⁶⁸ The design hearing offers concerned citizens the chance to participate in choosing the specific location and major design features of the highway, "including social, economic, environmental and other effects."⁶⁹ According to the FHWA memorandum, "'social, economic, and environmental effects' means the direct and indirect benefits or losses to the community and to highway users."⁷⁰

60. *Id.* § 1.36.

61. *Id.* § 1.32.

62. Policy and Procedure Memorandum 20-8, Jan. 14, 1969, 23 C.F.R. ch. I, pt. 1, app. A (1970) [hereinafter cited as PPM 20-8].

63. Policy and Procedure Memorandum 50-9, June 21, 1967, *as amended*, Nov. 24, 1969 [hereinafter cited as PPM 50-9].

64. PPM 20-8 ¶ 6a. Hearings are not required for projects involving mere improvements to existing facilities. *Id.* ¶ 6c.

65. *Id.* ¶ 4a.

66. *Id.* ¶ 4b.

67. *Id.* ¶ 4a(2).

68. *Id.* ¶ 4a(3).

69. *Id.* ¶ 4b(3).

70. *Id.* ¶ 4c. Included among such social, economic, and environmental effects are:

- (1) Fast, safe and efficient transportation.
- (2) National defense.
- (3) Economic activity.
- (4) Employment.
- (5) Recreation and parks.
- (6) Fire protection.
- (7) Aesthetics.
- (8) Public utilities.
- (9) Public health and safety.
- (10) Residential and neighborhood character and location.
- (11) Religious institutions and practices.
- (12) Conduct and financing of Government (including effect on local tax base and social service costs).
- (13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area).
- (14) Natural and historic landmarks.
- (15) Noise, and air and water pollution.
- (16) Property values.
- (17) Multiple use of space.
- (18) Replacement housing.
- (19) Education (including disruption of school district operations).
- (20) Displacement of families and businesses.
- (21) Engineering, right-of-way and construction costs of the project and related facilities.
- (22) Main-

In the transportation planning memorandum, the FHWA provides state highway departments with definitions and interpretations of the urban planning process to be developed and utilized by states in formulating federal-aid highway programs.⁷¹ This memorandum is applicable to all urban areas with populations in excess of 50,000.⁷² In such areas, transportation planning is to be a continuing, comprehensive, cooperative process.⁷³ The term, "continuing," indicates the necessity for maintaining current data to be used in re-evaluation and analysis of transportation plans.⁷⁴ To be "comprehensive" the planning process must correlate economic, population, and land use factors, and must include estimations of future transportation needs.⁷⁵ "Cooperation is construed to mean that each jurisdiction having authority and responsibility for actions of regionwide significance should have appropriate voice in the planning process."⁷⁶ The memorandum sets out and defines ten elements to be included in the planning process. Among these elements are: economic factors, population, land use, zoning and other local ordinances, transportation facilities, and social and community values.⁷⁷ The FHWA makes its most novel contribution with the inclusion of a final section declaring that "citizen participation is needed at all stages of the planning process beginning with the spelling out of goals and objectives and extending through the choice between alternatives for both land use and transportation."⁷⁸

It is clear that the FHWA procedures for double public hearings and citizen planning participation reflect DOT's concern for public opinion on the subject of route selection and location.⁷⁹ However, the fact that FHWA location approval may be issued only after appropriate state highway department planning and public hearings does not suffice to protect the rights of

tenance and operating costs of the project and related facilities. (23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion.

Id.

71. PPM 50-9 ¶ 1. The authority for the urban transportation planning requirements is the Federal-Aid Highway Act of 1962, 23 U.S.C. § 134 (1964).

72. PPM 50-9 ¶ 3a(1). The boundaries of the urban areas are those established by the U.S. Bureau of the Census' list of Standard Metropolitan Statistical Areas, or, in lieu thereof, the municipal boundaries. *Id.* ¶ 3b(1). However, for purposes of comprehensive planning, these areas should be expanded to include all surrounding areas likely to be urbanized within the next 20 years. *Id.* ¶ 3b(2).

73. See 23 U.S.C. § 134 (1964); PPM 50-9 ¶ 4.

74. *Id.* ¶ 4c.

75. *Id.* ¶ 4b.

76. *Id.* ¶ 4d(2).

77. *Id.* ¶¶ 4a(4), 5a-j.

78. *Id.* ¶ 6a.

79. The issue of route locations is so heated that the Secretary of DOT has on several occasions denied construction permission. See Karr, *Halting Highways*, Wall Street Journal, Apr. 7, 1970, at 1, col. 1.

the public. There should be a system of procedures for administrative appeal of route location approval. Unfortunately, the FHWA has no such procedures.⁸⁰ In light of this absence, it is especially important that FHWA determinations be reviewable by the courts and that concerned citizens and civic associations be entitled to maintain such suits.

Citizen Environmental Suits

Although the federal highway legislation contains no explicit provision conferring standing upon a party aggrieved by DOT action, it is clear that the provision of the APA granting a remedy by way of judicial review to persons "aggrieved by agency action" fills this void.⁸¹ Moreover, under the rationale of *Scenic Hudson Preservation Conference v. FPC*⁸² and *Office of Communication of the Church of Christ v. FCC*,⁸³ the aggrieved person need not assert an economic interest in order to maintain his suit. Indeed, as the Supreme Court noted in *Association of Data Processing Service Organizations v. Camp*,⁸⁴ standing under the APA may stem from aesthetic, conservational, and recreational interests.⁸⁵ Therefore it follows that individuals and groups, devoid of any real property interests, who assert that the public's aesthetic, conservational, or recreational interests are at stake, should be entitled to bring suit to enjoin the construction of a federal-aid highway.

Several lower federal court decisions support this conclusion. In *Road Review League v. Boyd*⁸⁶ the plaintiffs were the town of Bedford, a local civic association of town residents, two wildlife sanctuaries, certain owners whose property would be taken for the project, and the Road Review League, "a non-profit association which concern[ed] itself with community problems, primarily those affecting the location of highways."⁸⁷ The Road Review League made no showing that any of its members owned or leased any property affected by the proposed highway. In holding that all the plain-

80. Appellate procedures were proposed by the FHWA in 1968 but the proposal was withdrawn for further study. See Proposed FHWA Reg. § 3.17, 33 Fed. Reg. 15666 (1968). Under this proposal any "interested person" might file an appeal of the route location selection of the FHWA's divisional engineer "within 15 days after the date of publication of the notice of that action." *Id.* Absent such appeal, the divisional engineer's decision "becomes final for the purposes of 5 U.S.C. [§] 704, 30 days after the date of publication of the notice." *Id.*

81. 5 U.S.C. § 702 (Supp. V, 1970).

82. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

83. 359 F.2d 994 (D.C. Cir. 1966).

84. 397 U.S. 150 (1970).

85. *Id.* at 153.

86. 270 F. Supp. 650 (S.D.N.Y. 1967).

87. *Id.* at 652.

tiffs had standing, the court based its opinion on the APA and *Scenic Hudson*:

The Administrative Procedure Act . . . entitles a person who is "aggrieved by agency action within the meaning of a relevant statute," to obtain judicial review of that action. The "relevant statute" in this instance is the Federal Highways Act. . . .

I have concluded that these provisions [of the highway legislation] are sufficient, under the principle of *Scenic Hudson*, to manifest a congressional intent that towns, local civic organizations, and conservation groups are to be considered "aggrieved" by agency action which allegedly disregarded their interests.⁸⁸

In *Nashville I-40 Steering Committee v. Ellington*,⁸⁹ the Sixth Circuit ruled on the standing of similar litigants. The appellants were "members of an unincorporated association of some thirty businessmen, teachers, ministers, civic and professional leaders, and residents of North Nashville. . . . su[ing] on behalf of themselves as individuals, in the name of their association, and on behalf of the community they represent."⁹⁰ No contention was made that property owned by the appellants was directly affected by the route location. In holding that the appellants had standing the court cited *Scenic Hudson* and stated: "Appellees urge that appellants have no standing to maintain this action. We reject this contention."⁹¹

More important is the Second Circuit's discussion of standing in *Citizens Committee for the Hudson Valley v. Volpe*.⁹² Among the plaintiffs were the Citizens Committee—an unincorporated association of citizens residing near the proposed expressway—and the Sierra Club. The court noted that neither group claimed that it would suffer any personal or direct economic injury if the highway should be constructed. Rather, both associations asserted that the public's interest in the environmental resources of the area gave them the right to maintain the suit.⁹³ In examining the nature of this public interest, the court justified the propriety of the Sierra Club's speaking on behalf of the local citizens by pointing to the fact that although the Sierra Club is a national organization, it has a "substantial membership in the area of the Expressway, and a history of involvement in the preservation of national scenic and recreational resources."⁹⁴

The court's treatment of this point is brief but the matter is not trivial. A group asserting the public interest should be required to show the extent of

88. *Id.* at 660-61.

89. 387 F.2d 179 (6th Cir.), *cert. denied*, 390 U.S. 921 (1967).

90. 387 F.2d at 181.

91. *Id.* at 182.

92. 425 F.2d 97 (2d Cir. 1970).

93. *Id.* at 102.

94. *Id.* at 103.

the public's interest in the group. Any such group should disclose its purposes, goals, and specific interests as well as the extent of its memberships—both local and national. Judicial scrutiny of such associations will lessen the possibility that any group of individuals motivated by narrow self-interest might successfully assert that it speaks for the public.

Finding that both groups in the instant case were qualified to speak for the public, the court declared:

We hold . . . that the public interest in environmental resources . . . is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest.⁹⁵

These cases secure the right of citizens and qualified civic associations to assert the public's interest when the nation's natural resources, recreational facilities, or historical monuments are endangered by the federal highway program. No longer need a plaintiff be a landowner to maintain an injunctive suit. Now a citizen or civic association, without any real property interest can halt the highway when the community's environmental resources are threatened.

Conclusion

The purpose of highways is not the carrying of traffic. That is the function of highways. The purpose of the highways is to serve the community. The confusion of highway purpose and function may be due to the fact that the Federal-Aid Highway Act of 1956,⁹⁶ having established the interstate system, delivered the program into the hands of engineers. Emphasis was on speed in roadbuilding—engineering, acquisition of rights-of-way, and construction. As a result, according to the BPR, “during the early years of the expanded and accelerated program, social considerations were subordinated to the principal assignment of getting miles of pavement open to traffic.”⁹⁷ An eminent planner lamenting this situation has stated:

The highway engineers into whose hands this program has been delivered have assumed a terrible responsibility, far beyond what many of them realize. They are, by and large, skilled and competent—perhaps more so in their field than we planners are in ours. But this program forces them to make decisions that have impacts far outside their field. It does not belittle them to say that just as war is too important to leave to the generals, so highways are too

95. *Id.* at 105.

96. 70 Stat. 374 (1956).

97. BPR, HIGHWAYS & HUMAN VALUES 5 (1966).

important to leave to the highway engineers.⁹⁸

Congress has remedied many of the defects of its earlier legislation. Title 23 now includes sections dealing with: control of outdoor advertising⁹⁹ and junkyards;¹⁰⁰ preservation of local parks, recreation areas, and historic sites;¹⁰¹ relocation assistance;¹⁰² and urban transportation planning.¹⁰³ These sections, as well as the departmental regulations issued to implement them, lay the foundation for transportation policies which must be responsive to the needs of local communities. The procedures established by the FHWA affording interested citizens the opportunity to voice their opinions at two public hearings and the opportunity to contribute to the planning process are commendable. However, the absence of any FHWA review provisions contrasts sharply with this demonstrated concern for public sentiment. The fact that agency route location decisions are subject to judicial review completes the process of public participation and prevents administrative absolutism. Such review encourages state and federal highway officials to give greater consideration to the community's opinions expressed in the initial location and design hearings, to weigh the alternate routes more carefully, and to minimize the harmful social, economic, and environmental impact of the federal-aid highway program on the nation's rural and urban areas.

John Barry Kelly, II

98. Howard, *Impact of the Federal Highway Program*, 1957 *PLANNING* 35, 39 (annual publication of American Society of Planning Officials).

99. 23 U.S.C. § 131 (Supp. V, 1970).

100. *Id.* § 136.

101. *Id.* § 138.

102. *Id.* §§ 501-11.

103. *Id.* § 134 (1964).