COMMENTS

THE CHANGING TRANSPORTATION PLANNING PROCESS

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The author reviews the history of the transportation planning process and assesses the impact of recent federal statutory requirements for public hearings, relocation assistance, environmental impact statements, preservation of open spaces, and state action plans on transportation decisionmaking.

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I. HISTORICAL BACKGROUND AND INTRODUCTION

The federal highway and mass transit funding programs grew from different historical roots. The initial support for a federal highway program began around the turn of the century when the "Good Roads Movement" sought federal funding for the construction of paved routes from farm to market. Under pressure from this rural movement, Congress passed the first Federal Aid Highway Act in 1916.1 Over the years Congress often modified the structure of the original highway program.2 However, the most significant develop-
ment came in 1956 with the passage of two acts which initiated perhaps the greatest public works project since the Great Wall of China. The principal feature of these acts was the 21 billion dollar allocation for the construction of a 41,000 mile National System of Interstate and Defense Highways. To fund this vast project, Congress created a Highway Trust Fund from which revenues were distributed to pay for federal highways.

Since 1916, when the initial statutes took effect, the development of the federal highway program has resulted in four highway systems. The primary, secondary, and urban systems are 70 percent federally funded, while the interstate system is 90 percent federally funded. Each highway system represents a certain category of highway. The primary and secondary systems include rural and farm-to-market routes; the interstate system includes major freeways which connect large population centers; and the urban system includes arterial and collector routes in urban areas. Funding includes engineering and planning as well as actual construction.

over the best possible roads at the least possible cost, and that is the only economic principle involved in this question before us today. . . . It is a fact that intercity and interstate motor-truck transportation of merchandise is growing larger and larger each year, hastened, of course, by the exorbitant freight rates charged by the railroads, and this situation should be given consideration. It is not, nor can it ever become, of primary importance, for the reason that more tonnage is hauled over our country roads, over our waterways, or by truck, from it to city or from state to state combined.

61 Cong. Rec. 3093 (1921).

Under the President’s wartime emergency powers, Congress passed in 1941 the Defense Highway Act. Act of Nov. 19, 1941, ch. 474, § 4, 55 Stat. 765. Funds were appropriated for roads constituting lines of a military strategic network of highways. For a discussion of how World War II caused increased control of national transportation policy, see MERTINS, supra note 1, at 40-41. For a presentation of the national transportation system as related to defense, see J. WHITE, TRANSPORTATION AND NATIONAL DEFENSE (1941).


8. Id. § 120(a)-(c).

9. Id. § 103(b)-(c).

10. Id. § 103(c)(1).

11. Id. § 103(d).

12. Id. § 120(h)-121(a).
The program is administered through a cooperative arrangement between the states and the federal government. State highway departments work with federal officials to design and construct highways which meet federal standards.13

Unlike the situation with long-standing highway programs, federal participation in mass transit did not begin until 1961.14 In that year, as a result of threats by several key commuter railroads to discontinue service to major metropolitan areas,15 Congress granted limited aid to mass transit. The basic structure of the present mass transit program was created under the Urban Mass Transportation Act of 1964.16 Funds were originally provided for demonstration projects and capital improvements including the purchase of land, buses and rolling stock.17 By 1966 the use of funds was extended to subsidize studies in management training, planning, and engineering.18 Federal finances presently cover 80 percent of transit construction costs and 50 percent of operating costs.19

13. Id. § 109. The organization of federal transportation programs was altered in 1966 when the Department of Transportation was established. The Secretary of Transportation was given broad duties including gathering, analyzing, and disseminating technological, statistical, and economic information as well as coordinating a national transportation policy. Act of Oct. 15, 1966, Pub. L. No. 89-670, §§ 2(a), 4(a), 7(a), 80 Stat. 931, 933, 941-42. The Federal Highway Administration, Federal Railroad Administration and Federal Aviation Administration were subsumed by the new department. Act of Oct. 15, 1966, Pub. L. 89-670, § 3(c), 80 Stat. 931-32. Subsequently, the Urban Mass Transit Administration was established within the Department of Transportation. Reorganization Plan No. 2 of 1968, § 3(a), 82 Stat. 1369. For an excellent, general discussion of the Department of Transportation, see G. Davis, The Department of Transportation (1970).

14. Housing Act of 1961, Pub. L. No. 87-70, tit. I, § 101, 75 Stat. 149. For a thorough analysis of how the legislation came about, see Smerck, Development of Federal Urban Mass Transportation Policy, 47 Ind. L. J. 249, 254-69 (1972). The mass transit industry in the United States has its roots in the early 1800’s. In 1827, Abraham Bower operated a horse-drawn carriage on Broadway in New York City. Later in the 19th century, cable lines and electric motors were used on mass transit lines. In the early part of the 20th century, passenger volume increased, but the Depression did substantial harm to the industry.

15. Among the commuter services in the New York metropolitan area which threatened to discontinue services were the New York Central Railroad, the Erie Railroad, and the Lehigh Valley and Delaware, Lackawanna, & Western Railroads. Smerck, supra note 14, at 255-60.


19. Act of Nov. 26, 1974, Pub. L. No. 93-503 § 5(e), 88 Stat. 1568. The development of the mass transit program resulted from several statutory amendments. Mass transit funding has traditionally been inadequate. The 1964 act did not appropriate adequate funds for capital improvements. Furthermore, no provision was made for funding operating expenses or for engineering and planning studies. The calibre of transit management was also quite poor. Smerck, supra note 14, at 277-78. The 1966 amendment to the 1964 act increased
Although the federal mass transit and highway programs have developed through different legislative enactments, both programs are similarly designed to satisfy the transportation demand of our urban centers. The framework for meeting this demand is complex. Automobiles, buses, trains, and trucks all contribute to the transportation of people and goods. Citizens travel for purposes of working, studying, shopping, and socializing. When workers commute to and from central business districts during rush hours, highway and transit facilities become especially congested. Mass transit travelers are often inconvenienced by noisy uncomfortable stations. Drivers breathe air polluted by noxious automobile emissions. In addition, transportation facilities are geared towards the white middle class. Crowded in overpopulated urban centers, poor black residents do not receive equal transportation service.

In this framework, transportation planners must choose between alternative investment proposals which have far-reaching ef-


22. TRANSPORTATION REPORT, supra note 19; H. LEAVITT, SUPERHIGHWAYS — SUPERHOAX 5 (1970). Highways tempt people who have used public transit to go to the automobile. In an attempt to stop congestion, highway builders construct highways which only expand the problem. Immediately after expressways open, they are crowded. Davis & Farris, The Transportation Paradox and the Federal Research Development Function, 39 I.C.C. PRACT. J. 513 (1972); L. MUMFORD, THE HIGHWAY AND THE CITY 238 (1963); Grubb, Urban Transportation Alternatives to the Automobile, 39 I.C.C. PRACT. J. 19, 20 (1971); Salaman, Towards Balanced Urban Transportation: Reform of the State Highway Trust Funds, 4 URBAN LAW 77 (1972); Smerck, supra note 14, at 250; Note, supra note 4, at 902.906.

23. See L. FITCH, URBAN TRANSPORTATION AND PUBLIC POLICY 15 (1964); Schneiderman & Cohn, Hazards to Health and Property, 20 CATH. U. AM. L. REV. 5, 5-6 (1970). These emissions are harmful to health, affecting hearing, mathematic reasoning, athletic performance, and sight. In sufficient quantity, the emissions may harm the cardio-vascular and central nervous systems. Id. at 6. For an analysis of these harmful effects, and a discussion of the failure of highway planners to adequately consider the results of pollution, see id. at 5-18.

24. See Sevilla, supra, note 4 at 299.

ffects upon the lifestyles of urban residents. In making these choices, planners must comply with several federal statutory provisions. In perhaps the most important of these provisions conditioned federal funding upon a transportation planning process. In addition, Congress has passed several provisions which have helped to move transportation decisionmaking toward a broader, more democratic process. The purpose of this paper is to clarify the meaning of the transportation planning process condition, and to demonstrate some of the ways in which recent federal legislation has contributed to changing transportation decisionmaking. Particular emphasis will be placed upon how local citizens have affected this decisionmaking process by seeking to halt transportation construction. The paper will be separated into several parts. First, the requirement of standing and the scope of judicial review will be summarized. Next, the application and meaning of the transportation planning process requirement of the federal highway and mass transit acts will be clarified. The federal statutory requirements for public hearings, relocation assistance, drafting of environmental impact statements, preservation of open spaces, and state action plans will be discussed. Finally, the effect of these and other statutory provisions upon the highway and mass transit decisionmaking process will be analyzed.

II. THE PREREQUISITE OF STANDING AND THE SCOPE OF JUDICIAL REVIEW

A. Standing: The Parties to the Law Suit

Federal highway and mass transit construction has adversely affected many citizens. These citizens have sometimes sued the Secretary of Transportation in order to halt such construction. When building a particular highway project as part of a previously adopted transportation program, the Secretary must follow certain federal provisions. Citizens seeking to halt transportation construction often allege noncompliance with these provisions.

The motives behind these citizen suits are diverse. Some citizens want to stop bulldozers from leveling their homes or local parks; others want to stop any construction which may be harmful

26. See Section IV infra.
29. See Section IV infra.
to the environment. Regardless of the motive, a plaintiff seeking to enjoin construction of a public project must have proper standing.

The question of standing concerns whether a party has sufficient stake in a controversy to obtain judicial relief. The United States Supreme Court recently clarified the test for standing in environmental suits in Sierra Club v. Morton. In that case a non-profit environmental association sought to halt the commercial development of a remote forest section nestled in the Sierra Nevada mountains. After examining past decisions, the Court adopted a two part standing test. First, plaintiffs seeking to enjoin federal agency action must allege that the action caused them "injury in fact." Second, the plaintiffs must state that the injury concerned an interest "arguably within the zone of interests to be protected or regulated" by the statute allegedly violated. Once this standing test is met, plaintiffs can assert their particular injuries as well as the injury to the public in general. The Court held that the Sierra Club lacked standing to sue because the club failed to allege that any particular members of the club suffered an injury in fact. Merely by alleging that Club members actually hiked in this remote mountain region, the Court noted, would have established proper standing.

This standing test has been applied in highway cases as well. For instance, in City of Davis v. Coleman, state officials wanted to use federal funds to provide a highway interchange near a planned industrial park. The city, whose land was adjacent to this park, claimed a violation of the National Environmental Policy Act due to a failure to prepare an environmental impact statement (EIS). The complaint also provided that the proposed project could cause contamination by industrial wastes that might adversely af-

33. 405 U.S. 727 (1972).
35. Id. at 739-40.
36. 521 F.2d 661 (9th Cir. 1975).
fect the quality and quantity of city water. Citing Sierra Club, the Davis court concluded that the plaintiff had proper standing even though the injury was speculative. The court reasoned that the procedural injury implicit in agency failure to prepare an EIS — the creation of a risk that serious environmental impacts will be overlooked — is itself a sufficient "injury in fact" to support standing. There must, however, be a geographic nexus between the site of the challenged project and the alleged injury which the plaintiff expects to suffer.

In La Raza Unida v. Volpe, the court held that plaintiffs did not need to own land adjacent to a park in order to prevent the construction of a highway through it. Instead, plaintiffs had merely to allege a use of the park. Similarly, in Pennsylvania Environmental Council, Inc. v. Bartlett, the court resolved that a conservation council whose members enjoyed the land and creek waters of a park had standing to enjoin the construction of a highway through the park. Cases such as Sierra Club, Davis, La Raza and Bartlett illustrate the meaning of the standing requirement for highway or mass transit litigants. The standing test of "injury in fact" is not difficult to meet. Residents whose homes are displaced by transportation construction can always show such injury. Individuals or environmental associations whose members enjoy parkland affected by transportation construction can also show proper standing. Consequently, the constitutional prerequisite of standing is generally a small hurdle for the litigant.

B. Judicial Review: Questioning Agency Decisionmaking

Judicial review of administrative decisions has been limited. It is generally felt that separation of powers placed executive and

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37. Id. at 671.
39. Id. at 232.
41. Id. at 245.
legislative policy decisions beyond the scope of judicial review.\textsuperscript{45} State courts generally intervene in agency decisions only when the acts of state highway departments are arbitrary or an abuse of discretion.\textsuperscript{46} Since state highway legislation generally grants broad discretion to the highway department,\textsuperscript{47} plaintiffs bringing suit against state highway departments for failure to comply with federal conditions have often been unsuccessful.\textsuperscript{48} The state courts reason that compliance with federal requirements is only a condition precedent to federal funding and that those requirements are not meant to limit the powers of the state highway departments.\textsuperscript{49} For example, in \textit{Morningside-Lennox Park Association v. State Highway Department},\textsuperscript{50} the plaintiffs tried to block the construction of an interstate highway on the grounds that the transportation planning process condition had not been fulfilled. The court reasoned that once federal funds were granted, a state court would not determine whether such funding complied with federal conditions.\textsuperscript{51}


\textsuperscript{47} \textit{E.g.}, the Iowa Code states that the State Highway Commission shall:

- Devise and adopt standard plans of highway construction and maintenance, and furnish the same to the counties ... Construct, reconstruct, improve and maintain state institutional roads and state park roads ... Prepare, adopt and cause to be published a long-range program for the primary road system ... \textit{Iowa Code Ann.} § 307.A.2(1), (12), (13) (Supp. 1976).

\textit{The Wyoming Code states:}

- The highway authorities of the state, counties, cities, towns, and villages, acting alone or in cooperation with each other ... are hereby authorized to plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide access facilities for public use wherever such authority or authorities are of the opinion that traffic conditions, present or future, will justify such special facilities ... \textit{Wyo. Stat.} § 24-72 (1967).


\textsuperscript{50} 224 Ga. 344, 161 S.E.2d 859 (1968).

\textsuperscript{51} \textit{Id.} at 345-46, 161 S.E.2d at 860-61.
strated by the *Morningside* case, state judicial review is narrow in scope, and does not question the decision of federal highway officials.²

An analysis of federal judicial review is more enlightening. In *Citizens to Preserve Overton Park v. Volpe*³ plaintiffs attempted to enjoin the construction of a six-lane interstate highway through a public park. *Overton Park* established the principle that under the Administrative Procedure Act, a decision of the Secretary of Transportation is subject to judicial review. Writing for the majority, Mr. Justice Marshall held that to comply with the federal highway funding requirements the Secretary's actions must be within the scope of the Secretary's authority and must not be arbitrary or discriminatory.⁴ However, judges will not question whether federal agency action is the best, or the better, way to solve a particular need.⁵ Thus, the scope of review limits judicial control over agency decisions.

Generally, the effect of *Overton Park* was to restrict highway litigants to procedural issues.⁶ Most complainants who have succeeded in obtaining judicial relief against the Secretary have claimed that he failed to file an environmental impact statement, to adequately protect parkland, or to make some specific finding that is required of him. If officials follow proper statutory procedures, only clearly arbitrary or unreasonable agency actions will be set aside.⁷ Consequently, judicial review in the federal courts is generally limited to compliance with procedural provisions.

### III. The Planning Condition of the Federal Mass Transit and Highway Acts

In 1962 Congress enacted the Federal Aid Highway Act which contained a section referring to transportation planning.⁸ This planning section provided that before approval of any program for

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52. See text accompanying notes 46-49 supra.
54. Id. at 415.
55. Id. at 413-15.
56. See, e.g., Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021 (4th Cir. 1975); Hopewell Township Citizen's I-95 Comm. v. Volpe, 482 F.2d 376, 380 (3d Cir. 1973), cert. denied, 423 U.S. 912 (1975); Monroe County Conservation Soc'y v. Volpe, 472 F.2d 693 (2d Cir. 1972); Citizens to Preserve Foster Park v. Volpe, 466 F.2d 991 (7th Cir. 1972); D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (1971); Concerned Citizens for Preservation of Clarksville v. Volpe, 445 F.2d 486 (5th Cir. 1971); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971).
projects on a federal aid highway system, the Secretary of Transportation must find that the program was based on a cooperative, comprehensive, and continuous transportation planning process.\(^5\) Commentators have referred to the planning condition embodied in this section as the 3c process.\(^6\)

Under the 1962 Highway Act, this 3c process is not a prerequisite for all federally funded projects, but only for those which pass through urban areas with more than 50,000 people.\(^7\) Since the primary, secondary, and interstate systems are predominantly rural,\(^8\) the 3c process provision would have only limited application to these systems. Accordingly, this planning provision applies mainly to the urban system and the extensions of the interstate, primary, and secondary systems into urban areas.\(^9\)

In the areas where the 3c process provision applies, the significance of complying with this federal requirement can be shown by examining the procedure through which the federal government becomes obligated to fund highway projects.\(^10\)

First, state highway departments submit a program for projects to the Federal Highway Administrator,\(^11\) knowing that no program can be approved unless it complies with the 3c process.\(^12\) Next, after program approval, the state highway department submits detailed plans and specifications for each project. The Secretary's approval of this project obligates the federal government to fund this particular highway project.\(^13\) Thus, the significance of the 3c process condi-

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59. Id. Transportation planning is the process through which transportation improvements are conceived, tested, and programmed for future construction. See PRINCIPLES AND PRACTICE OF URBAN PLANNING 137 (4th ed. W. Goodman & E. Freund eds. 1968). Transportation planning and the methodology used to conceive transportation plans is only one section of the larger field of urban planning. Other studies typically include population forecasting, economic studies, and land use studies. For a thorough analysis of the importance of these studies and how to do them see id. at 51-136 and F. CHAPIN, URBAN LAND USE PLANNING 129-255 (1st ed. 1957). The comprehensive plan is a synthesis of more detailed plans, and may be defined as:

[A]n official public document adopted by a local government as a policy guide to decisions about the physical development of the community. It indicates in a general way how the leaders of the government want the community to develop in the next twenty or thirty years.

PRINCIPLES AND PRACTICE, supra, at 349.

60. Sevilla, supra note 4 at 311.


64. A project is defined as "an undertaking to construct a particular portion of highway . . . ." 23 U.S.C. § 101(a) (1970).


67. Id. § 106(a) (1970).
tion is that no federal highway project in urban areas can be funded unless it has complied with the 3c process.

This planning provision applies to mass transit construction as well as highway building. In the National Mass Transportation Assistance Act of 1974, Congress adopted the 3c process as part of the federal mass transit planning requirements. Since the 3c process condition is a planning requirement of both mass transit and highway legislation, it is important to analyze the regulations which interpret this section.

These regulations provide that the transportation planning process should include several studies. For example, there should be an analysis of the capacity of the present transportation system as well as a study of the area's economic and land use patterns. In addition, there should be an evaluation of alternative investments needed to meet the area's transportation demands. Finally, a transportation plan should be developed which outlines a building program to meet long and short-term transportation needs.

In addition to explaining the elements of the transportation planning process, these regulations create a new procedure through which the Secretary determines whether the 3c process has been fulfilled. This procedure compels the state governor to appoint a Metropolitan Planning Organization to satisfy the 3c process provisions. The Metropolitan Planning Organization formulates a transportation plan. Each year the Federal Highway Administrator and the Urban Mass Transportation Administrator review the planning process of each urbanized area for compliance with the planning provisions. Certification by these administrators is conclusive evidence of compliance.

These regulations help to clarify the meaning of the 3c process requirements as well as the procedure for finding compliance. In addition, an examination of case law interpreting the 3c requirement will further clarify the planning process condition.

Although the reported cases concern only highway construction, the wording of the 3c provisions in both the Mass Transportation and Highway Acts is identical. Thus highway cases are authority for the mass transit program as well.

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69. 23 C.F.R. § 450.100 et seq. (1976).
70. Id. §§ 450.116-20.
71. Id. § 450.106.
72. Id. § 450.112.
73. Id. § 450.122.
One of the most important cases which interprets the 3c process condition is *D.C. Federation of Civil Associations v. Volpe.* The *D.C. Federation* case involved federal funding for a bridge which was part of an interstate highway. Although the bridge was approved by a regional planning agency as being consistent with a sound transportation planning process, a local transportation agency had not included the bridge as part of the published transportation plan. Since the regional planning agency had jurisdiction over the entire metropolitan region, while the local agency had jurisdiction only over the district, the lower court held that the regional planning agency’s determination was final. On appeal, the United States Court of Appeal for the District of Columbia reversed and remanded the case, reasoning that the lower court had not understood the 3c process condition. The appellate court came to three particularly important conclusions. First, judicial review should not include a determination of which planning agency takes priority. This determination should be left to the administrative agency. Second, the court asserted that the emphasis of the planning conditions was on compliance with a process rather than a transportation plan. Accordingly, the court’s decision authorizes compliance with the 3c process condition when there is no transportation plan, or when the transportation plan does not include the federal highway project in question. Since the formulation of a transportation plan sometimes takes years, the effect of this holding is to speed highway construction. Third, the court held that the Secretary must do more than simply accept a local planning agency’s evaluation that a highway project was based upon a 3c process. The Secretary must make an independent determination of compliance with the 3c process. However, in making this determination the Secretary may consider the findings of local planning agencies.

Although the *D.C. Federation* court had clarified the procedures necessary for compliance with the 3c process condition, judicial review had not yet described the type of process which would fulfill the planning requirement. The United States District Court for the District of Columbia examined such a process in *Movement Against Destruction v. Volpe.* In *Destruction,* the plaintiff alleged

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76. *Id.* at 795.
77. 459 F.2d 1231 (D.C. Cir. 1971).
78. *Id.* at 1240.
79. *Id.* For a discussion of this case’s treatment of administrative decisions, see 19 WAYNE L. REV. 1645 (1973).
that the 3c condition had not been fulfilled. In describing the "cooperative, comprehensive and continuous" planning process, the Destruction court stated that since 1963, six jurisdictions in the Baltimore region had "cooperated" in a planning effort. From this statement it may be inferred that "cooperation" means that local authorities must take part in the planning process. The court also noted that in 1967 a transportation plan was adopted. After the adoption, "continuous" examination and re-evaluation of the elements of the plan took place. Consequently, it seems that "continuous" signifies that a completed transportation plan must be continually updated and approved.

In addition to indicating what is meant by the words "continuous" and "cooperative," the Destruction court elaborated upon the meaning of other planning considerations which should be part of the 3c process. The court explained that the process should include consideration of the effects of transportation improvements upon the urban area's land use plan. However, the court did not discuss the importance of this consideration, nor did the court illustrate how detailed this consideration should be.

The Destruction court also stated that the planning committee had analyzed the need for the construction of highways as well as mass transit facilities. Such intermodal analysis was emphasized by Judge MacKinnon in the minority opinion in D.C. Federation. Judge MacKinnon asserted that the Secretary of Transportation should not pass upon any major highway project in the District of Columbia without considering the effect of the highway upon the subway construction program. However, like the majority, the judge did not suggest that all urban areas must have a published mass transportation plan, nor that such a plan is required under the 3c process.

In Citizens for Mass Transit Against Freeway v. Brinegar, the United States District Court for the District of Arizona also rejected a claim that a mass transit plan was necessary to fulfill the 3c process condition. In this case, mass transit construction for the Phoenix area had been considered by transportation officials but rejected as impractical.

81. Id. at 1395.
82. Id.
84. Id. at 1261.
85. Id. at 1255.
87. Id. at 1283.
Thus, while mass transit is a factor which must be considered during the planning process for highway construction under the federal statute, the 3c process condition does not require a mass transit plan. The converse should also be true. When mass transit funding is at issue, highways are a factor to be considered, but a completed highway plan should not be an indispensable requirement.

Through cases such as *D.C. Federation, Destruction*, and *Citizens for Mass Transit*, and through the regulations promulgated by the Department of Transportation, the meaning of the 3c process provision has been illustrated. Judicial review of the 3c process condition will not generally question whether a particular agency action was the best way to meet a transportation need. Instead, courts will limit review to whether the agency action was based upon a 3c process. This requires that urban areas maintain a planning process where state and local officials cooperate to create a transportation plan which is continually updated and approved. The process must examine the relationship of highways to mass transit facilities and the effect of these highway facilities upon local land use plans. Under the regulations, the state governor must appoint a metropolitan planning agency, and federal officials must annually review the urban transportation planning process for compliance with the 3c provision. Finally, approval by the Federal Highway Administrator and the Urban Mass Transit Administrator of this process constitutes conclusive evidence of compliance.88

IV. FEDERAL PROVISIONS AFFECTING HIGHWAY AND MASS TRANSIT DECISIONMAKING

Congress has passed other provisions which affect highway and mass transit decisionmaking. The provisions require public hearings,89 drafting of environmental impact statements,90 relocation assistance programs,91 preservation of open spaces,92 and the implementation of state action plans.93 These provisions contributed to the broadening of the decisionmaking basis of transportation plan-

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88. See text accompanying note 73 supra.
Planners often viewed these additional provisions with suspicion. Once the 3c process reached the stage of choosing appropriate routes to meet transportation needs, planners saw these requirements as obstacles to the job of highway building. Therefore, they often did not fully comply with these federal funding conditions. The cases in this section demonstrate how litigation has helped force transportation officials to comply with Congressional requirements.

A. Public Hearings: The Citizen’s Participatory Right

When highways traverse highly populated urban areas many citizens are affected. Public hearings allow these citizens to voice criticism about transportation decisions. Under both the highway and mass transit acts, federal finances cannot be appropriated unless a public hearing is held. The hearing is not meant to create a record for agency decisionmaking. The public hearing is nonadjudicatory and quasi-legislative in nature. Thus, citizens neither have the right to cross-examine transportation officials nor to force those officials to keep an accurate court-like record. The purpose of the public hearing is to inform the community of the proposed project and to elicit its views on the project’s design and route.

Of course, only notified citizens can attend the public hearings and express opposition to the transportation project. Thus, proper notice is essential to assure that the purpose of the public hearing is fulfilled. The question of notice was considered in Ward v.

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In Ward a proposed interstate highway would have encompassed part of two parks in Baltimore. Two weeks before the hearing notice was published in three local newspapers, the time and place of the public hearing were stated. Although a description of the proposed route was included, no graphic illustration was contained in the notice, and the description did not refer to the parks. Nevertheless, the court held that the notice was sufficient because local residents would know that the parks were affected. It is suggested that the reasoning of the Ward court is overly narrow. In order to adequately inform the public, the notice should have included a graphic illustration as well as a verbal description of the highway routes and the effect of the projects upon the parks.

Once affected citizens have been properly notified, highway officials must then be certain that the public hearing is fairly conducted. The public hearing provision requires consideration of the economic, social, and environmental effects of the project. In addition, the statute requires the project to be analyzed for consistency with official plans for the comprehensive development of the urban area. Although federal regulations exhaustively delineate the standards required at the public hearing, courts have approached these standards in a more general way.

The court in Keith v. Volpe ascertained that in addition to providing a forum for public protest, officials had the affirmative duty to provide attending citizens with information about the social and environmental effects of design alternatives. This affirmative duty requires officials to present alternative highway proposals. In Ward v. Ackroyd highway officials had considered both a southern and northern route. However, only the southern route was presented at the public hearing. Since the social, economic, and environmental effects of the two routes were different, the court concluded that affected citizens were not adequately informed. The Ward court also stated that highway officials need only present alternatives which have significantly different environmental and social effects. This was followed in Swain v. Brinegar where highway officials

100. 344 F. Supp. 1202 (Md. 1972).
101. Id. at 1217.
105. Id. at 1353.
107. Id. at 1221.
presented only a limited number of alternatives. These alternatives included upgrading an existing route, constructing a four-lane limited-access route, and making no highway improvement at all. Deciding that a good faith effort was made, the Swain court judged that the federal public hearing condition had been met.\textsuperscript{109}

At a public hearing, transportation officials must present the significant alternatives as well as the effects of alternatives upon the urban area. One such effect is the impact of the transportation project upon local land use plans.\textsuperscript{110} In City of Davis v. Coleman\textsuperscript{111} the plaintiffs questioned whether this effect was properly presented at the public hearing. Transportation officials had planned a highway interchange which would stimulate and service a future industrial park. The industrial park was located adjacent to an agricultural area. Although there were hundreds of pages devoted to the area's land use plan, highway officials did not present this information at the public hearing. In addition, these officials did not explain the effect which the proposed interchange would have upon the local land use plans. Resolving that the public hearing was improper, the court stopped further highway construction.\textsuperscript{112}

The Davis court's analysis is especially significant to urban planners. Traditionally, transportation decisionmakers did not fully consider the effect of transportation improvements upon local urban plans. This is unfortunate, because the transportation system can substantially alter urban growth and development. For instance, highways have contributed to changes in the basic economic and land use structure of our urban areas. The availability of highways has allowed people to commute back and forth from work and to transport goods and services more efficiently.\textsuperscript{113} Thus, the highway system has contributed to suburbanization of population and industry.\textsuperscript{114}

The suburbanization trend can be illustrated through population data. The percentage of the total national population in the urban fringes grew from 13.9 percent in 1950 to 21.1 percent in 1960 to 26.8 percent in 1970.\textsuperscript{115} In this suburbanization trend, manufacturing, retailing, wholesaling, and services all tended to move

\begin{footnotes}
\item[109.] Id. at 759.
\item[111.] 521 F.2d 661 (9th Cir. 1975).
\item[112.] Id. at 682.
\item[113.] See Sevilla, supra note 4 at 302.
\item[114.] See H. LEAVITT, supra note 22; H. MERTINS, supra note 1, at 61-62.
\end{footnotes}
outside the central city.\textsuperscript{118} Under \textit{Davis}, transportation planners must examine the effect of transportation improvements upon urban land use patterns. The extent to which local officials will be forced to consider the effect of transportation improvements upon local land use growth and development has not been fully examined. However, the \textit{Davis} decision requires at least some consideration of this effect upon urban growth.\textsuperscript{117}

The public hearing condition blends into other federal requirements as well. Transportation officials must reveal whether any residents will be displaced by the improvement, as well as how the improvement will affect public parks and other environmental resources. Highway officials have sometimes been perplexed by the overlap of these federal provisions. Thus, in \textit{City of Rye v. Schuler},\textsuperscript{118} transportation officials apparently confused the requirements of the National Environmental Policy Act with the public hearing requirements. At the public hearing, the transportation officials presented only the environmental impact statement. Several other documents which supported the highway decision were not presented. The social and economic effects of the proposed highway were not fully delineated. Thus, the public hearing condition was not fulfilled.\textsuperscript{119}

A public hearing assures that residents will better understand how transportation projects affect them. Highway officials have an affirmative duty to inform fully persons attending the public hearing of the socio-economic and environmental effect of the programs. Citizens then have the opportunity to criticize the proposed project. This criticism gives the public officials a fuller appreciation of the adverse effects of a proposed transportation project upon local residents. This public hearing provides the only forum for direct citizen participation in transportation decisionmaking. This participation is especially important because transportation decisionmaking may well have more direct impact upon the lives of residents than almost any other governmental action.

\textbf{B. Relocation Assistance: Homes for the Homeless}

When transportation projects pass through urban areas, homes and businesses are usually demolished. In 1970 alone, federally

\footnotesize{\textsuperscript{116} See generally J. \textsc{Meyer}, J. \textsc{Kain} \& M. \textsc{Wohl}, \textsc{The Urban Transportation Problem} 30-55 (1965).}
\footnotesize{\textsuperscript{117} 521 F.2d at 680-82.}
\footnotesize{\textsuperscript{118} 355 F. Supp. 17 (S.D.N.Y. 1973).}
\footnotesize{\textsuperscript{119} Id. at 28.}
aided highway construction displaced 62,000 residents from their homes. Unfortunately, it is often the poor whose homes are taken. With the increasing cost of adequate housing, these poor displaced families are having the most difficulty relocating. To help relocate persons displaced by federal programs, Congress enacted the Uniform Relocation Assistance Act. This legislation applies to both federal mass transit and highway programs. Persons displaced by state or local government activities or by purely private activity receive no coverage.

Although the act generally applies to those displaced by federal programs, not all applicants will qualify for federal assistance. For example, to qualify for relocation assistance, applicants must be in occupancy before highway officials and citizens commence negotiations. People who move into apartments after the government has paid for the apartment building are disqualified. Furthermore, unless affected residents can preliminarily enjoin highway construction, local officials may take these residents’ homes before the cases reach trial.

In Concerned Citizens For the Preservation of Clarksville v. Volpe the proposed Mo-Pac expressway was to pass through a densely populated lower income area. Residents of the area sought to enjoin the highway construction. However, all displaced residents had accepted relocation by the time of trial. In finding the issue moot, Judge Morgan stated that “any attempt at injunctive relief would require this court to undo what has, by the working of time and intervening events, escaped the power of the injunction.”

121. Hartman, Relocation: Illusory Promises and No Relief, 57 Va. L. Rev. 745 (1971); Note, In the Path of Progress: Federal Highway Relocation Assurances, 82 Yale L.J. 373, 379-82 (1972); Note, Relocation: An Investigation into Relocation under the Federal-Aid Highway Program, 7 Colum. J.L. & Soc. Prob. 466 (1971); Federal Highway Administration, U.S. Dep’t of Transportation, Social and Economic Effects of Highways 3-4 (1972). Forty-four million dollars per year in federal payments are used to relocate families. Sixty percent of this amount is spent on the Interstate System and forty percent on all other highway systems. Id. at 3. For a more elaborate discussion of the effect of highways on the urban poor, see Sevilla, supra note 4.
126. 445 F.2d 486 (5th Cir. 1971).
127. Id. at 491.
the Clarksville case indicates, residents should initiate suit before accepting relocation, and should seek an immediate halt to highway construction.

Government officials may argue that applicants do not qualify because highway construction has not reached the stage at which the Uniform Relocation Act applies. The Ninth Circuit in Lathan v. Volpe examined the highway construction process in order to determine the point at which applicants become eligible for assistance. In that case, highway officials wanted to build an interstate through a densely populated, low income area of downtown Seattle. When the corridor for this highway was selected the market value of the homes dropped. Although over 150 homes were then sold to the state, no relocation assistance was provided for the displaced families. The state argued that relocation assistance payments were not required until the highway project had been finally approved, irrespective of the fact that families had already been displaced by the highway construction. The court concluded that federal assistance must become operative at the corridor approval stage. This holding appears sound since the purpose of the Uniform Relocation Act is to provide assistance to displaced families.

The extent of federal assistance was considered in Keith v. Volpe, where the court defined the three basic requirements of the relocation act. First, state authorities must provide fair and reasonable relocation payments. Under this requirement, the state must reimburse displaced families for moving expenses, either by reimbursement for the actual cost of moving, or by provision for a set moving allowance, and the state must pay supplemental amounts (up to $15,000) which cover the difference between the compensation that a homeowner receives from the state for an old home and the purchase price for replacement housing. Second, the state must provide a "relocation assistance program." Under this second requirement, state officials must study the needs of displaced persons, and also as provide current information on the availability and cost of comparable housing. Third, the state must assure the Federal Highway Administrator that adequate replacement housing will be found within a reasonable time. This replacement housing must also be located in areas which are as desirable as the area from which the applicants are displaced.

128. 455 F.2d 1111 (9th Cir. 1971).
129. Id. at 1119.
131. See Hartman, supra note 121, at 772-73.
In *Keith* the court focused principally on the second requirement of the Uniform Relocation Act. Local officials formulated a relocation assistance program which computed the number of homes that could be used to replace dwellings destroyed during highway construction. This number represented the homes which were traditionally sold during a given year. However, the officials did not consider that persons other than those displaced by highway construction would be in the market for these dwellings. Finding the studies inadequate, the court halted highway construction.\(^3\)

As is evident in the *Keith* opinion, courts will subject the activities of state officials to rigorous examination. The recommendations and conclusions of official studies as well as the reasonableness of the methodologies used to reach these conclusions will be considered. Local officials must provide relocation assistance to those displaced at any time after corridor approval. This assistance entails payment of moving expenses as well as replacement housing. Nevertheless, it is clear that the Uniform Relocation Act is at best a palliative for the substantial disruption which results when a family is displaced.\(^3\)

C. Environmental Impact Statements: The Government as Trustee of the Nation’s Environment

The National Environmental Policy Act\(^3\) is an attempt by Congress to harmonize the relationship of man to his environment. Under the provisions of this act, the federal government is considered a trustee of the nation’s environment. In fulfilling this trust all federal agencies must provide an environmental impact statement which covers major federal actions significantly affecting the environment.\(^3\) Furthermore, federal officials must obtain comments

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133. *Id.* at 1350.
136. Federally aided highway construction almost always constitutes a “major federal action” within the meaning of NEPA. See, e.g., Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021 (4th Cir. 1975), cert. denied, 423 U.S. 912 (1976); Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1973); Hopewell Township Citizens I-95 Comm. v. Volpe, 482 F.2d 376 (3d Cir. 1973); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972); Pennsylvania Environmental
from any federal agency which has legal jurisdiction or which has special knowledge regarding the environmental impact involved. These comments must be circulated through the existing agency review process and must be given careful consideration.\textsuperscript{137}

Federal highway officials are generally required to take an active role in formulating an environmental impact statement for projects under federal supervision. In \textit{Conservation Society v. Secretary of Transportation},\textsuperscript{138} a draft of an environmental impact statement was developed and written by state highway officials. Federal highway administrators did not conceive, write, or even edit the environmental impact statement. The court held that the requirements of NEPA had not been fulfilled.\textsuperscript{139} Responding to the decision in the \textit{Conservation Society} case, Congress enacted an amendment to NEPA.\textsuperscript{140} Pursuant to this amendment, an agency which has statewide jurisdiction can draft an environmental impact statement without federal help.

Although federal officials may adequately participate in the

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\textsuperscript{137} Stop H-3 Ass'n v. Brinegar, 389 F. Supp. 1102 (D. Hawaii 1974). \textsuperscript{138} 362 F. Supp. 627 (D. Vt. 1973), \textit{aff'd}, 508 F.2d 927 (2d Cir. 1974), \textit{vacated}, 423 U.S. 809 (1975). \textsuperscript{139} \textit{Id.} at 632-36. \textsuperscript{140} See also Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021 (4th Cir. 1975), \textit{cert. denied}, 423 U.S. 912 (1976) (federal involvement held sufficient where both federal and state officials participated in the drafting of an environmental impact statement). The amendment provides that an environmental impact statement shall not be deemed to be legally insufficient solely by reason of having been prepared by a state agency or official if:
\begin{itemize}
  \item [i)] the State agency or official has statewide jurisdiction and has the responsibility for such action,
  \item [ii)] the responsible Federal official furnishes guidance and participates in such preparation,
  \item [iii)] the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
  \item [iv)] after January 1, 1976, the responsible Federal official provides early notification to, and solicits the view of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.
\end{itemize}

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

\textsuperscript{42 U.S.C. § 4332(2)(D) (Supp. V. 1975).}
drafting of an environmental impact statement, judges may still look suspiciously at statements which cover only small segments of a highway project. Such judicial suspicion was aroused in the case of Indian Lookout Alliance v. Volpe,\(^1\) where an interstate highway affected the historical Indian Lookout Bluff area near Iowa City, Iowa. Since the southern section of the highway project was approved prior to the enactment of NEPA, transportation officials argued that only the northern section required an environmental impact statement. The state highway department proposed to build the southern section up to an interchange near the lookout area. Since the southern section would affect this historic area, the court required an environmental impact statement for both the northern and southern sections.\(^2\) Similarly, in Conservation Society of Southern Vermont v. Secretary of Transportation\(^3\) the court decreed that the provisions of NEPA required an environmental impact statement for the entire highway, rather than for each individual segment.\(^4\)

Accordingly, courts should scrutinize environmental impact statements which are drafted for small highway segments. Although the adverse environmental impact of an individual highway segment may not be significant, the cumulative impact of all the segments may be. Alternatively, the environmental impact of a particular segment may be extremely harmful while the impact of other segments may not be. If highway officials can draft statements for these environmentally harmless segments and are allowed to build over these segments, construction through the environmentally destructive segment may later become a practical necessity. There are, however, limits to requiring an environmental impact statement for an entire highway. In this regard, the court in Movement Against Destruction v. Volpe\(^5\) explained that denying segmentation could be taken to extremes. Thus, requiring an environmental impact statement for an entire urban transportation system would be impractical. The court cautioned that the environmental impact statement of particular segments should, however, be considered in relation to the environmental impact of other segments. In addition, the court stated that both a segmented and a regional environmental impact statement could be required in certain instances.\(^6\)

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2. Id. at 1172.
4. Id. at 636-38.
6. Id. at 1385.
Before federal officials draft an environmental impact statement for an appropriate area of a transportation project, they should determine what the environmental impact statement must contain. In Calvert Cliffs' Coordinating Committee, Inc. v. AEC Judge Skelly Wright posited that the environmental impact statement should contain a particularly close analysis which balanced economic and technical considerations against environmental amenities. The statement might conclude that the environmental costs outweigh economic and technical benefits, or conversely, that the economic benefits outweigh the environmental costs.

In enumerating the elements of an environmental impact statement, Congress has prescribed a detailed analysis of five factors:

(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternative to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Although requiring a detailed analysis, the statute does not illustrate the extent of the detail required. Certainly a point can be reached where the cost of environmental study becomes prohibitive. In a practical context, the courts have generally required only a good faith effort at compliance with NEPA. For example, in Stop H-3 Association v. Brinegar the environmental impact statement contained a discussion of each of the elements outlined under NEPA. Although plaintiff's expert testified that the cost-benefit analysis was deficient, the expert further testified that he had never seen an adequate cost-benefit analysis of a transportation project. The court concluded that the environmental impact statement had met the requirements of NEPA.

On the other hand, courts have not allowed highway officials to ignore the provisions of NEPA or draft environmental impact statements in a conclusory, rather than a detailed, way. In finding that the highway officials had not complied with NEPA, the United States District Court for the Western District of Washington in Daly

147. 449 F.2d 1109 (D.C. Cir. 1971).
148. Id. at 1113.
151. Id. at 1113.
v. Volpe\textsuperscript{152} examined the section of the environmental impact statement which covered the irretrievable commitments of federal resources. The court explained that this section should list the cost of land, construction materials, labor and other measurable costs which cannot be returned once a highway is constructed.\textsuperscript{153}

As is evident in the Daly court's reasoning, the environmental impact statement should provide specific details of the projected dollar costs of highway construction; yet, the court did not address the detail required in determining the environmental effects of highway construction. In Brooks v. Volpe\textsuperscript{154} the plaintiffs sought to prevent construction of an interstate highway which would pass through the Cascade Mountains of Washington. The impact statement suggested that "[i]just as the old wagon road over Snoqualine Pass was retrieved by nature in less than 100 years, so would this (highway) project revert back to nature in time."\textsuperscript{155} Furthermore, the impact statement's analysis of highway noise was minimal because the "rural character of the area renders it nearly free of permanent nearby human habitation."\textsuperscript{156} The court did not appreciate the highway-wagon trail analogy. Maintaining that the requirements of NEPA must be complied with to the fullest extent possible, the court ordered each agency to undertake the research necessary to make the impact statement detailed and precise.\textsuperscript{157}

As demonstrated in the H-3 Daly and Brooks cases, NEPA is an effective way of compelling transportation officials to consider the environmental effects of transportation projects. Highways cannot be segmented in order to avoid the requirements of NEPA, the environmental impact study must be detailed and precise, and federal highway officials must make a good faith effort to comply with NEPA's provisions. As a result, NEPA is now an important factor in transportation decisionmaking.

\textbf{D. Section 4(f): The Vital Need for Open Space}

Rather than pay the high costs of urban land, transportation


\textsuperscript{153} Id. at 259.


\textsuperscript{155} Id. at 278.

\textsuperscript{156} Id.

\textsuperscript{157} Id. at 275-79. It should be noted that although in both Daly and Brooks the injunctions, originally issued against the agency for insufficient impact statements, were eventually dissolved, the principle that the EIS must be detailed and precise remains intact. The dissolution of the injunctions merely indicated that the impact statements in question were held to be sufficiently detailed.
officials often choose routes through publicly owned parklands.\textsuperscript{158} Congress enacted section 4(f) of the Department of Transportation Act\textsuperscript{159} in order to protect parkland and other open spaces. Since both the Federal Highway Administration and the Urban Mass Transit Administration are part of the Department of Transportation, section 4(f) applies to both highway and mass transit construction.\textsuperscript{160}

Section 4(f) prohibits the Secretary from approving any project which uses land in a "public park, recreational area, or wildlife and waterfowl refuge of national, State, or local significance," or uses land from an historic site unless "there is no feasible and prudent alternative . . . and" unless "such program includes all possible planning to minimize harm to such" areas.\textsuperscript{161} Where the government begins participation in the construction of a highway project, but has not granted federal funds, highway officials have contended that section 4(f) does not apply. In Named Individual Members of San Antonio Conservation Society v. Texas Highway Department,\textsuperscript{162} the Fifth Circuit examined this issue, as well as an issue concerning highway segmentation. The conservation society sought to enjoin the construction of an interstate highway which would take about 200 acres of parklands. The Secretary of Transportation approved two highway segments which led up to the park from both directions, but did not approve the section through the park itself. Highway officials argued that no 4(f) finding was needed even though, if these end segments were completed, the route through the park would be assured. The court decided that such segmentation was unauthorized under 4(f), and that in approving the segments the Secretary had exceeded the scope of his authority.\textsuperscript{163} The San Antonio case illustrates the type of skeptical analysis undertaken when judicial suspicions are aroused.

Perhaps the best known case delineating the scope of this analysis is Mr. Justice Marshall's opinion in Citizens to Preserve Over-
Overton Park comprised 342 acres near the center of Memphis, Tennessee. The park contained a zoo, a municipal golf course, picnic areas, and 170 acres of forest. The proposed six-lane highway would have severed the zoo from the rest of the park. Although highway officials maintained that the costs of other routes and safety considerations should be balanced equally against the harm to the parkland, Mr. Justice Marshall disagreed. "The few green havens that are public parks" should not be lost except in truly unusual circumstances or when there were disruptions of extraordinary magnitudes.  

Although the Overton Park opinion clarified the meaning of section 4(f), other courts have made more specific interpretations of particular phrases within the section. For instance, the phrase "no feasible alternative" has been construed to mean that no other alternative route was practicable as a matter of sound engineering. Additionally, the meaning of the phrase "national, state, or local significance" was considered in Arlington Coalition on Transportation v. Volpe, where appellees argued that the park was insignificant. The court concluded that all parks were significant for purposes of 4(f) unless explicitly determined otherwise.  

The Arlington decision did not explain the weight which should be given to a local official's determination of significance. This was the scope of inquiry in Harrisburg Coalition Against Ruining the Environment v. Volpe, where a proposed interstate highway would have taken 27 acres of the 850 acre Wildwood Park. Even though officials declared that the park was insignificant, the Harrisburg court decreed that the Secretary of Transportation must make an independent finding of significance. The holding in Harrisburg was, of course, a practical necessity. If local officials could avoid the application of section 4(f) by declaring a park insignificant, much of section 4(f)'s effect would be destroyed.  

Beginning initially with the Overton Park decision, judges have struggled over the meaning of section 4(f). Since citizens have often sought to block highways which pass through public parks, cases have developed which illustrate the meaning of such words as "feasi...
sible alternatives” and “significant parkland.” Throughout these cases, the courts have attempted to further the Congressional intent of assigning paramount importance to the preservation of parkland. Considering that each mile of freeway devours roughly 30 acres of land, the potential loss of parkland caused by transportation construction is high, and the judicial efforts are certainly justified.

E. State Action Plans: Streamlining the Highway Decisionmaking Process

Transportation officials have not always complied with federal requirements. In part this lack of compliance may be caused by the confusion which results when officials attempt to fulfill so many federal conditions. In the 1970 Highway Act, Congress included provisions which helped to alleviate this confusion. Under this act, guidelines were promulgated which attempted to assure that all adverse economic, social, and environmental effects of highway building would be considered. These guidelines apply to federal highway building only; mass transit construction is not covered. However, state highway departments have often included mass transit procedures in state proposals.

The guidelines compel each state highway department to develop an action plan which describes the procedures for the development of federal highways from the planning stage through the design stage. Federal funds will not be allocated unless states have adopted an action plan which is approved by the Federal Highway Administration. The federal highway procedures require agencies to develop organizational structures that have the capability of utilizing the disciplines of the biological, social, physical, and human


One of the most far-sighted little books written on the subject of how highways would affect the city was written by Lewis Mumford, in which he stated:

Perhaps our age will be known to the future historian as the age of the bulldozer and the exterminator; and in many parts of the country the building of a highway has about the same result upon vegetation and human structures as the passage of a tornado or a blast of an atom bomb.


175. See, e.g., State of Wisconsin, Department of Transportation, Action Plan For Transportation Development IV - 1-3 (1974).

176. See Policy and Procedure Memorandum 90.4 § 6(a), supra note 173, at 99.

177. Id. § 6(g), at 100.
relations sciences, as well as the engineering sciences. The action plan outlines the procedures for complying with federal conditions. Thus, the plan should identify potential social, economic, and environmental effects of alternative courses of action including the development of no highway at all. Additionally, the action plan should identify those persons responsible for ensuring that information is made available to the public and that interested parties, including local governments and state and federal agencies, have the opportunity to participate in an open exchange of views. Therefore, the action plan helps to ensure that the public hearing condition is met.

Besides helping to fulfill the public hearing condition, the action plan must provide for an interdisciplinary analysis which will satisfy the provisions of NEPA. The action plan should develop methods to meet the requirements of NEPA, including the development of an interdisciplinary team and should also arrange for the consideration of modes of transportation other than highways. Since the 3c process condition requires inter-modal analysis, the action plan also helps to satisfy the 3c process condition. In addition, the action plan must ensure that replacement housing is developed in coordination with transportation improvements. Thus, the action plan contributes to meeting the provisions of the Uniform Relocation Act.

States have developed differing approaches to fulfilling the guidelines of the Federal Highway Administration. Of 40 state action plans, which were included in a recent study, 17 were organized under a Department of Transportation, while 23 were organized under the state highway departments. Most of the states have included an interdisciplinary unit which will analyze the environmental impacts of transportation proposals. States with large metropolitan areas place more emphasis on the need to consider a balance of transportation modes. Despite these differences, the action plan will help highway officials to plan for and comply with federal provisions.

179. Policy and Procedure Memorandum 90.4 § 10(a), supra note 173, at 101.
180. Id. §§ 10(b)(1) - 11 (b)(3), at 101.
181. Policy and Procedure Memorandum 90.4 § 10(a), supra note 173 at 101.
182. Id. § 10(b)(3), at 101.
184. See AMOS, et al., supra note 178, at 8-10 (1975).
V. HOW FEDERAL PROVISIONS HAVE ALTERED TRANSPORTATION DECISIONMAKING

The federal government has spent billions of dollars on transportation construction. Recently, citizens have been successful in halting this construction by asserting that federal conditions were not met. By forcing highway officials to comply with federal mandates, citizen suits have contributed to changing the transportation decisionmaking process.

Fifteen years ago the transportation planning process was narrower. Transportation planning was often limited to sophisticated techniques of forecasting transportation needs. It was generally acknowledged that the benefits of efficient transportation outweighed the incidental harms which resulted from highway construction. Thus, the effects of transportation improvements on the environment, on open spaces, and on residents' homes and businesses were not fully considered.

As noted earlier, during the late sixties, Americans became more sensitive to societal problems. To protect the environment, Congress enacted NEPA under which federal transportation officials must participate in the research and preparation of environmental impact statements. In addition, the Department of Transportation Act compels special efforts to be taken to preserve the natural beauty of the countryside, public parks, recreational areas, wildlife and waterfowl refuges, and historic sites. The enforcement of these funding conditions has helped to move transportation decisionmaking towards a fuller appreciation of the adverse environmental effects of transportation projects.

To protect the rights of minority groups, Congress enacted the Uniform Relocation Assistance Act compelling transportation officials to make special provisions for people displaced by transportation improvements. To provide local residents with a forum for protest, Congress passed public hearing provisions. Under these

185. See, e.g., text accompanying notes 130-33 supra.
187. Id. at 27-29. Altshuler suggests that transportation planning in the 1950's was a product of the time. The planning process reflected less concern for environmental harm or for the needs of minority groups.
188. Id.
provisions transportation officials must properly notify affected citizens of impending public hearings. The result of these federal provisions has been to contribute to making transportation decisionmaking a more participatory process.

Federal provisions have also contributed to a movement from a regional to a more local transportation analysis. In the traditional transportation planning process, present and potential locations of population and industry were used to determine appropriate transportation routes. Recent federal conditions, prompted by neighborhood reaction, add a more localized emphasis to this regional approach. In this regard the studies required by the Uniform Relocation Act often are local in scope. Many of the adverse environmental effects which must be detailed in an environmental impact statement are also primarily local.

Over the past few years transportation planners also have moved from a pro-highway bias to a more balanced blend of highways and mass transit. This movement is partly due to a change in federal funding policy. During the 1950's and 1960's Congress appropriated billions of dollars for highways and relatively little for mass transit. Thus, federal highway expenditures in urban areas between 1961 and 1970 amounted to 21.3 billion dollars. During the same time period mass transit funding represented only 684 million dollars, or 1/31 of the highway expenditure. This one-sided funding distorted transportation planning by denying modal choice. When transportation decisionmakers reached the point of choosing whether to build highways or mass transit facilities, these decisionmakers were forced to build highways, even though the most sensi-

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193. See Altshuler, supra note 186, at 29-30.
195. Altshuler, supra note 186, at 33-34.
196. See text accompanying notes 130-32 supra. These studies analyze the number of local residents displaced by the transportation improvement. In addition, the Relocation Act requires that existing replacement housing be built or located. See also Keith v. Volpe, 352 F. Supp. 1324, 1342-43 (C.D. Cal. 1972), aff'd, 506 F.2d 696 (9th Cir. 1974), cert. denied, 420 U.S. 908 (1975).
197. Altshuler, supra note 186, at 34-35.
198. In commenting about the highway expenditures authorized under the 1956 Highway Acts, Lewis Mumford stated:
When the American people, through their Congress, voted a little while ago (1957) for a twenty-six-billion-dollar highway program, the most charitable thing to assume about this action is that they hadn't the faintest notion of what they were doing. Within the next fifteen years they will doubtless find out; but by that time it will be too late to correct all the damage to our cities and our countryside, not least to the efficient organization of industry and transportation, that this ill-conceived and preposterously unbalanced program will have wrought.
ble solution to a particular transportation problem might have been a subway system, or a combination of mass transit and highways. 199

This highway-oriented federal policy had profound effects on our urban transportation network. The availability of highways has promoted the use of automobiles rather than other forms of transportation. 200 Automobiles and trucks now dominate urban transportation. Between 1960 and 1970 automobile travel in urban areas increased 73.6 percent, and truck travel increased 80.4 percent. 201 During this same period, surface railway travel decreased 54.7 percent, trolley coach travel decreased 67.3 percent, and bus travel decreased 10.6 percent. 202 This predominance of automobile travel causes serious modern problems. Highways have become congested with traffic, particularly during rush hours. Automobiles emit carbon dioxide and particulate matter as well as other polluting substances. Furthermore, automobile transportation is extremely fuel-consumptive. 203

199. Salaman, Towards Balanced Urban Transportation: Reform of the State Highway Trust Funds, 4 URBAN LAW 77, 82 (1972). In commenting on the distortion which this single modal emphasis had, H. Leavitt stated:

[T]he Interstate System has in effect forced our society to scuttle all forms of transportation except the automobile . . . .

[H]ighway boosters had decided to make the private automobile the dominant form of urban transportation, and overemphasis on superhighways, particularly Interstate and primary highways, and lack of attention to public transportation left the public with no choice except to drive cars.

H. Leavitt, supra note 22, at 4-8. Our highway program has, in effect, made it possible for every automobile owner to have his own private transportation system. Id. See also Tax Foundation, Urban Mass Transportation in Perspective 8 (1968).

200. See Sevilla, supra note 4, at 303.

201. See id. at 297, 302 (1971).

202. See Transportation Report, supra note 19, at 78. Vehicle miles in passenger cars increased from 284,800 million in 1960 to 494,543 million in 1970, while vehicle miles for trucks went from 44,687 million to 80,606 million. Id. Total trucking freight expenditure was 40,358.8 million dollars in 1970. Id. at 81. The 1956 Highway Acts assured that metropolitan as well as intercity transportation would be automobile and truck dominated. See MERTINS, supra note 1, at 61. In 1970, intercity passenger travel by car represented 1,026 billion miles, an increase of 49.8 percent since 1958; while bus, rail and air travel came to 151.8 billion. While intercity freight movement by rail in ton miles has decreased from 54 to 35.9 percent of the total from 1947 to 1970, trucking has increased from 5.2 to 15.9 percent of the total. See Transportation Report, supra note 19, at 75, Tables 111-6, 111-9.

203. By building a vast system of highways, the federal government has sponsored the dominance of the more fuel-consumptive automobile in urban areas. The implications of automobile domination become clearer when it is realized that a 0.52 percent energy savings will result from a 20 billion passenger mile shift from urban automobile to mass transit, about 1 percent of 1970 passenger traffic. Although there are energy savings inherent in a shift from automobiles to mass transit, such a shift may be difficult to achieve. One of the effects of the predominance of automobile use is to instill reliance on automobiles. The life styles of millions of Americans include automobile use. Compared to mass transit, the advantages of automobiles are numerous. An automobile driver can go directly from home to office or store
Although transportation planners appreciated the adverse effects of automobile use, there were few funds for mass transit construction until 1974. The 1974 Urban Mass Transit Assistance Act provided 10.9 billion federal dollars for mass transit facilities over a 6-year period. This appropriation made mass transit construction a more viable alternative to highway building. It should contribute to a change in transportation decisionmaking. As a result, transportation planners should continue to move from a pro-highway bias to a more balanced blend of highways and mass transit.\footnote{204}

The courts have also aided this change in transportation decisionmaking. Although the scope of substantive judicial review of transportation agency action is generally limited, the courts have encouraged a more balanced decisionmaking process by enforcing procedural requirements. In this way courts have contributed to shifting transportation decisionmaking from a scientific, regional and single-modal approach to include a more participatory, local and balanced approach.

This shift has brought many benefits. Homes are provided for the homeless, local citizens have more participation in transportation decisions, there is more mass transit funding, and our environmental resources are better protected. However, the burden of compliance with these statutory requirements may have shifted transportation decisionmaking too far from the basic concern of building an efficient transportation network. The development of these transportation networks is essential to our economy. Raw products must be brought to the factory. Finished products must be transported to consumers. People must travel to and from work. In this economic milieu court enforcement of federal requirements has hindered the construction of these vital transportation networks. This hindrance has been caused by many factors. The time and effort required to comply with the federal provisions is enormous. The citizen suits tax an already overburdened court system. Thus transportation projects are sometimes delayed for months while the trial progresses.

\footnote{204 See Engelen & Stuart, \textit{New Directions in Urban Transportation Planning}, \textit{Planning Advisory Service}, Rept. No. 303, 3 (1974).}
Commentators have suggested alternatives to ease these burdens. For instance, special administrative and judicial procedures might be established to speed the adjudicative process. Alternatively, Congress could clarify the weight to be given various factors in this balance. However, such clarification is difficult. It is questionable whether Congress can draft standards which avoid rather than stimulate litigation.\footnote{Altshuler & Curry, The Changing Environment of Urban Development Policy - Shared Power or Shared Impotence? 10 URBAN LAW ANNUAL 3, 13 (1975).} There are no easy solutions. Transportation decisionmaking is fraught with value judgments. To a certain extent, this article is meant to challenge others to study transportation decisionmaking in order to devise means of reducing the burdens while still preserving the benefits that have resulted from the shift in the focus of transportation decisionmaking.