Possible Battle Over Routing Was Foreseen In Original Plan

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1955, it appeared to many that Overton Park offered a direct route through town with a minimum of disruption of residences and businesses. Also, because the park is publicly owned, there would be little difficulty in acquiring it.

Other routes were considered — how seriously, is a point of contention — but, according to Edgar H. Switch, deputy director of the Bureau of Public Roads, "all alternate alignments were rejected because of large displacement of persons, hospitals, schools, churches and commercial establishments."

Elected officials have wobbled on the issue from time to time. In December, 1967, United States Representative Dan Kuykendall was quoted as saying, "If I'd been a public official five years ago, they would have put this thing through over my very badly battered body." In a recent statement, he repeated his objection to the original route decision but said, "It seems to me this dead horse has been beaten long enough."

In February, 1968, opponents of the Overton Park route went before the City Council. In March, 1968, the council unanimously adopted a resolution opposing the route and asked the state and federal authorities to find another feasible route. The resolution stipulated that if no better route could be found, the expressway should be on the northern perimeter of the park and the south part of North Parkway. This was one of the alternates offered by the designer, Buchart-Horn of York, Pa. (The Overton Park route is one of the few parts of the expressway system that was not designed by Harland Bartholomew, although that firm recommended that it go through the park.)

> This report was compiled by reporters Thomas BeVier, Klink Cook and Jefferson Riker, with Morris Cunningham of The Commercial Appeal's Washington Bureau and written by Mr. BeVier.

"I can't understand it," **said** state highway Commissioner Charles Speight when he received word of the resolution.

The Memphis Area Chamber of Commerce, Future Memphis, Inc., and the Downtown Association asked the council to change its stand. It declined on March 26, 1968.

But after all that opposition, the council suddenly folded its resolve in a special executive session on April 4, 1968, and spoke in favor of the proposed park route.

Then on Feb. 4, 1969, the opposition surfaced briefly. The council pondered that perhaps the best thing—to get an expressway and soothe ruffled feathers—would be to have a depressed route.

Then, just seven days later, opposition crumbled anew. The council rescinded the Feb. 4 motion for a depressed route.

Speaking for the whole body, Councilman Wyeth Chandler said, "We've done all we can. We've tried to move it. The thing is these people (state highway engineers) are going to do it just like they want to."

It does not seem unfair to say that at times both sides have been strident in their pronouncements. Mayor Henry Loeb, who has backed the route with all his energy, has at times been moved to profanity in expressing himself on the matter. On the other hand, a long time foe to the plan, Waldo Zimmermann, an unsuccessful City Council candidate, once said about a meeting at which proponents presented their side:

"All of them orated in English; otherwise you'd have sworn it was Hitler and his Gauleiters giving a pep talk in Munich Stadium."

On July 23, 1969, the opponents went to court by asking in the United States District Court in Washington that a preliminary injunction be granted to stop the expressway. It was filed by Citizens to Preserve Overton Park, Inc.; William W. Deupree Sr. and Sunshine K. Snyder, both Memphis residents and longtime foes of the route; and the Sierra Club and the National Audubon Society, Inc., national organizations which had joined in the fight.

The suit was against Mr. Volpe, secretary of transportation, and Mr. Speight, state highway commissioner.

The case was transferred to the court of United States Dist. Judge Bailey Brown in Memphis. Hearing was scheduled for Feb. 20, 1970.

In the interim, Mr. Volpe entered the controversy in a more active way than he had before.

He told The Commercial Appeal on Oct. 11, 1969, that the department was taking a "good strong look" at the Overton Park expressway section and would consider possible alternate routes as well as design changes.

Two days later, that statement was amended by one of his aides to say that only the design would be considered, not alternate routes.

There was never a trial in Judge Brown's court. On Feb. 26, 1970, Judge Brown granted a "summary judgment" to the defendants based on the legal record in the case. He found there were not adequate issues in the case to warrant a trial.

The case was appealed to the three-judge United States Court of Appeals for the Sixth District at Cincinnati. An injunction to stop any work in the park was granted pending the hearing of that appeal.

On Feb. 29, 1970, the appeals court, with one judge dissenting, upheld Judge Brown's decision.

The court held that Judge Brown had been correct in granting a summary judgment, that there had not been an issue over any material fact in dispute. The two judges, Paul C. Weick and John W. Peck, also struck down a contention that the administrative record — the correspondence, transcripts of public hearings, etc. — of what was behind Mr. Volpe's decision was incomplete. And also, they held that the law did not require Mr. Volpe to explain his findings in writing.

They discussed at some length an affidavit submitted on behalf of Edgar H. Swick, who was deputy director of public roads.

"In addition to the valid reasons for choosing the route listed in the affidavit," the majority opinion said, "Mr. Swick went on to point out that as of 1967, prior to the time Secretary Volpe took office, all of the right-of-way leading up to either side of the park had been acquired and substantial work had been done . . .

"As of the time of this case, the interstate route has been excavated up to either end of the park with the resulting disruption of homes and businesses that necessarily result whenever a major highway is routed through a city.

"If it were now determined that a new route be chosen, not only would there be additional disruption, but that already caused would be futile and wasteful. Even assuming that the secretary was not aware of this condition, the court could not ignore the social and economic impact of changing the route at this late date."

In his dissent, Judge Anthony Celebreeze took exception to nearly all his fellow judges had said.

Of the fact that Mr. Volpe did not explain his action in writing, Judge Celebreeze wrote:

"Surely, if a statue requires an administrator to make absolute determinations that are subject to review, those reviews must appear in the record and they must be sufficiently clear and complete so that the reviewing court can determine whether they are supported by sufficient evidence. How a reviewing court (Judge Brown's) can determine whether the secretary's findings were supported by sufficient evidence, when the secretary has published no findings, is a source of great puzzlement to me."

In his conclusion, he noted that "public parklands are the only remaining sanctuaries for vast numbers of city dwellers from the polluted urban sprawl. A threat to a neighborhood parkland is a threat to the health, happiness, and peace of mind of all the neighborhood people . . ."

Attorneys involved in the case recognize that even though the arguments to be presented before the Supreme Court are primarily legal in nature, the very fact that the court is willing to hear it indicates the court's awareness of the ecological question.

Of particular significance, observers say, is the scheduling of the Memphis case and a similar one in San Antonio to be heard on the same day.

As in the Memphis case, the Supreme Court has temporarily stopped construction of an expressway leg, the middle of which is scheduled to go through city park land.

As one attorney said, "A man would be a fool to try to outguess the Supreme Court," but there are several possibilities of action the court could take.

It could uphold Judge Brown and the Court of Appeals and lift an injunction it granted to stop work while the case was being heard.

It could return the case to Judge Brown and order a full trial.

It could return the case to Judge Brown with an order that the administrative record be completed.

The latter possibility is being sought by neither the attorneys for Citizens to Preserve Overton Park or for the state of Tennessee.

That order was requested by Solicitor General Erwin Griswold.

Charles Newman of Memphis, one of the Citizens to Preserve Overton Park attorneys, however, said the solicitor general's motion "concedes, as we've argued all along, that it was not proper for the district court to grant summary judgment and deny us a trial."

The filing of it was supported by Atty. Gen. John N. Mitchell, who said that without the motion the government is in danger of losing the whole case.

There has been much controversy over that motion. United States Atty. Thomas F. Turley Jr. called it "myopic arrogance."

Mr. Turley struck out at the inexperience of the assistant in the solicitor general's office who filed the motion, William B. Reynolds. Others close to the case consider the motion overcautious and presumptious. What rankled city and state officials was the fact they were not even consulted before the motion was filed.

In a telephone conversation with city officials Friday, Mr. Griswold said the timing of the case did not allow for adequate consultation, although he regretted the resulting controversy. The solicitor general said Monday will be the court's last session of the year "so time was short" before the scheduled Jan. 11 oral arguments of the case.

The court is expected to rule on the motion to remand Monday.

Mr. Turley and J. Alan Hanover, special counsel for the state in the case, are not alone in viewing the motion as a legal error. They are upset over the introduction of what some view as a "confession of error" when they feel, in fact, there was none.

Local attorneys on the case, who were meeting with the mayor when the telephone conversation took place, told the solicitor general they respected his position but disagreed with his assumption that the court would rule against the expressway. The emphasis was on the "assumption."

If the case is remanded back to federal court here, it would not automatically result in a full trial — what Citizens to Preserve Overton Park want. It would, rather, allow the government to make the administrative record in the case more clear. The administrative record is that part of the case which sets out all of the details of what went on to make the decision to put the expressway through Overton Park.

This would open up the way for another long court fight, a possibility recognized by Mr. Mitchell. But he said a long court fight was better than losing the case. State and city officials say the case was not likely to have been lost, that at worst the Supreme Court might have ordered a full trial, and at best might have ruled once and for all in their favor. In the meantime, the expressway just sets there.

It comes up from the east to Malcom and stops, 1.6 miles from the park. It comes up from the west to Claybrook and stops, 1.2 miles from the park. The only thing lacking is pavement. And in the section in between, houses and businesses have been razed. It ties in at either end with the interstate system on the east at Summer and with I-255 near Bellevue and Overton Park Avenue on the west. Eventually, it is to tie into the bridge presently under construction across the Mississippi River.

Those who want to get the expressway completed argue that the delay is costing a great deal of money. Earlier this month, the contractor who has bid on the job said that if work does not start soon, grading costs might be as much as $60,000 higher. He said that structural steel he will need is now priced at $1,075,000 but that he could have bought it 12 to 18 months ago for $775,000.

Privately, the foes to the expressway concern themselves with possible compromise. They speak of tunneling the whole way or of partial tunneling. Government engineers have estimated a bored runnel would cost 100 million dollars and that a partial tunnel would cost 41.5 million dollars.

And there is still hope for an alternate route. Citizens to Preserve Overton Park do not accept the government's argument that the only acceptable alignments would be on the north on a line that would take, among other things, part of Southwestern or one to the south which would cut into the business district south of the park.

In the meantime, the state has already paid the city more than two million dollars for the right of way through the park. The money was used to buy Fox Meadows Golf Course.

What would happen if the route was changed so that the right of way was not used?

"The state would own itself a nice stretch of parkland," quipped City Engineer Tom Maxson.