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Judge Orders Review Of Park Route; Ruling Keeps I-40 Controversy Alive

By MICHAEL LOLLAR

Secretary of Transportation John Volpe was ordered yesterday to review alternatives to routing Interstate 40 through Overton Park, a step United States Dist. Judge Bailey Brown said Mr. Volpe apparently neglected earlier.

In a 24-page decision, Judge Brown said the "evidence is overwhelming" that Mr. Volpe did not consider alternate routes when he took office in 1969 and, even if he had, he obviously would not have interpreted the 1966 Department of Transportation Act the way it subsequently was interpreted by the United States Supreme Court.

However, Judge Brown ruled that Mr. Volpe met the letter of the law in considering design elements of the controversial expressway route and does not have to take the design into consideration again.

The 1966 act says, in effect, that parklands should not be disturbed unless there is no feasible and prudent alternative. It says a special effort should be made to preserve parklands.

Attorneys for the Citizens to Preserve Overton Park viewed the decision as a victory for environmentalists, while attorneys for the state Highway Department and the United States Department of Transportation said they are only "mildly disappointed."

"We have two options open

to us at this point," said Jeffrey Shane, special assistant for environmental affairs in the Department of Transportation. "We can appeal Judge Brown's remand decision, or we can proceed with the mandate to choose an alternate route, our choices necessarily including the present park route."

John W. Barnum, general counsel for the Department of Transportation, said: "We will decide which legal avenue to take within one month — whether to appeal or to go ahead and make a new route choice."

David Wells, chief counsel for the Department of Transportation's Bureau of Public Roads, said he is uncertain exactly what the procedure would be after Mr. Volpe made a new decision. "I would just off the top of my head say, without any research, that if Volpe makes a decision which somebody doesn't like, a new suit would have to be filed."

Mr. Wells said however, "We've had some remands to the secretary in the past where the secretary makes his decision, then sends it back to the court. The court then either approves or disapproves it, usually filing a further order. If we didn't like the further order we would appeal the judge's decision in that order."

James Jalenak, an attorney for the state Highway Depart-

ment, noted that the defendants have refrained from construction inside the park even though there is no injunction now in effect. Judge Brown said in his opinion that the plaintiffs could get an injunction if one is needed, but he noted that a gentlemen's agreement is in effect.

Although Highway Department attorneys had fought long and hard for Judge Brown's approval of the park route, they pointed optimistically to several aspects of yesterday's decision. "He (Judge Brown) did not say in any way that Secretary Volpe's decision was in error," said Mr. Jalenak.

"The ruling was not critical of Mr. Volpe," said J. Alan Hanover, special counsel for the state Highway Department.

Judge Brown's decision came after 25 days of testimony which began Sept. 27 and ended Nov. 4. The case had been remanded to Judge Brown, who originally had ruled in favor of the state and federal governments, by the United States Supreme Court.

Judge Brown said that Mr. Volpe's decision, handed down Nov. 5, 1969, was essentially a "design approval" decision, considering such factors as whether the highway should be depressed or housed in a tunnel. But, he said, the decision failed to consider any route

other than the route through the park, a route approved by Mr. Volpe's predecessor, former Secretary of Transportation Alan S. Boyd.

"In the first place," Judge Brown said, "it has been the position of Secretary Volpe through counsel in this court that his approval of the park route was unnecessary since it had been approved by Federal Highway Administrator (Rex) Whitten in 1966, and, more particularly, since it had been approved by Secretary Boyd . . . in April 1968."

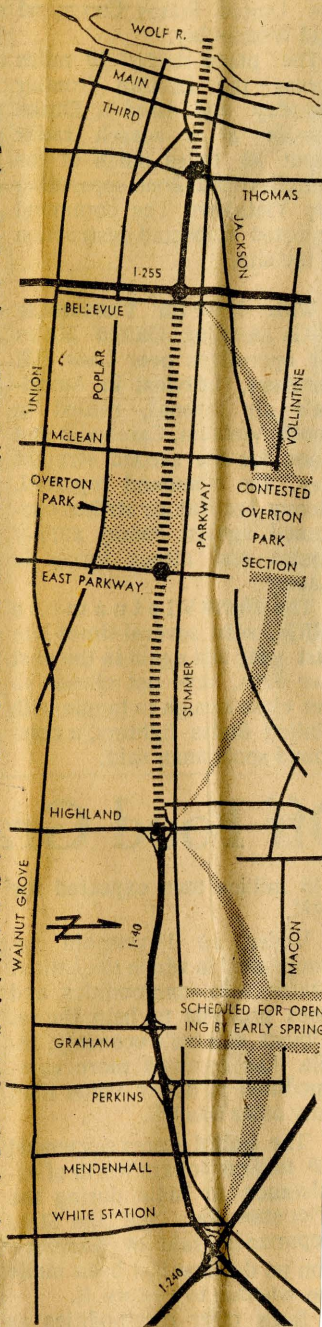
He cited testimony by several highway officials who served during Mr. Boyd's term, concluding that the route "was foreclosed by prior decisions and actions."

"Thus we conclude that, because of approval by Secretary Boyd and because of the acquisition and clearing of the park route before he took office, Secretary Volpe thought that it was at least very doubtful that he had any legal power to choose an alternative route and that in any event as a practical matter he could not choose an alternative route."

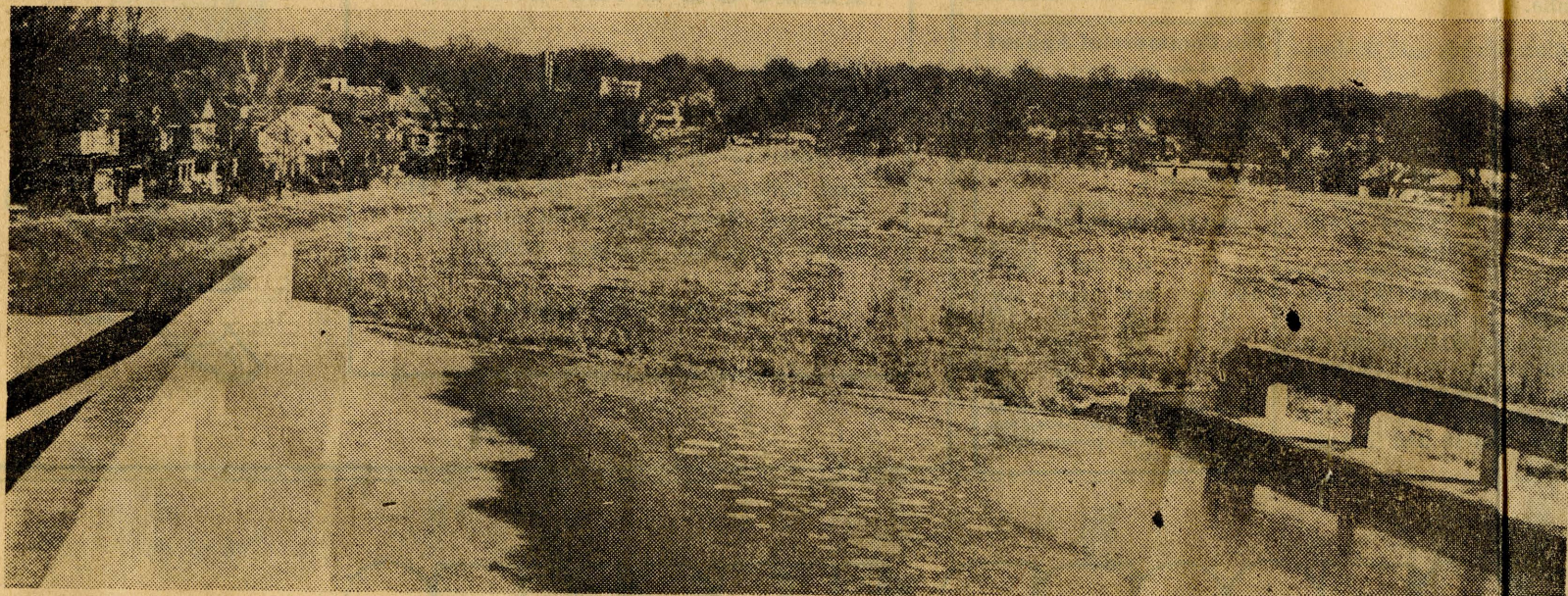
"We could, for this reason alone," remand the case to Mr. Volpe for a new determination, Judge Brown said.

He acknowledged claims by United States Atty. Thomas F. Turley Jr. that Mr. Volpe did, in fact, apply correct legal standards when he interpreted

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—Staff Map by Joe Sheridan



Looking East Toward Overton Park From I-40 Overpass At I-255

—Staff Photo by Robert Williams

Judge Brown Agrees With Volpe Stance Against Tunnel Through Park

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the 1966 Department of Transportation Act. Section 4f of the act requires that parkland must not be touched unless there is no feasible and prudent alternative.

Tom Maxson, city public works director, said he understood the environmental review under paragraph 4f normally takes "six months be-

fore it reaches Volpe's desk." The time is required for comments by various agencies, he said.

The delay "is beginning to

hurt now. It's beginning to eat up more time.

Mayor Wyeth Chandler said he was "sorry to see it has

been eaten up more time.

"I was hopeful the court would make a decision one way or another so we could take steps to do whatever nec-

essary," the mayor said.

In a related development, Bennie G. Crossnoe, a civil engineer for the Tennessee Highway Department, said the 3.4-

mile section of I-40 from Interstate 240 to Highland should be open by April 1, "if not before." Concrete paving has been finished and asphalt is

being placed along the shoulders, he said. No lights or signs have been installed, but the section could open before that work is complete, he said.