

PARKLAND PROTECTION “PARAMOUNT IMPORTANCE”

James C. Kozlowski, J.D., Ph.D.  
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On August 10, 2005, the President signed into law the “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users” or “SAFETEA-LU” (Public Law No. 109-59). Of particular concern to park advocates within this massive piece of legislation is a provision which amends Title 23 section 138, popularly known as “Section 4(f).” In pertinent part, Section 4(f) of the Transportation Act of 1966 prohibits the approval of any federally funded transportation program or project that requires the use of public parks and recreation areas, unless there are “no prudent and feasible alternatives” to such use and “all possible planning” is taken to minimize harm to these protected resources.”

Section 6009 of SAFETEA-LU amends Section 4(f) to allow federally funded “transportation programs and projects to move forward as long as the impacts are no more than *de minimis* impacts on protected parks, recreation areas, wildlife or waterfowl refuges and historic sites.”

According to the House Senate Conference Report on SAFETEA-LU (H. Rept. 109-203), the legislative intent of the *de minimis* exception to Section 4(f) is to “clarify the portions of the resource important to protect, such as playground equipment at a public park” as distinguished from “areas such as parking facilities.”

While a minor but adverse effect on the use of playground equipment should not be considered a *de minimis* impact under section 4(f), encroachment on the parking lot may be deemed *de minimis*, as long as the public's ability to access and use the site is not reduced.

Prior to finding a *de minimis* impact, the Secretary must determine that “the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section.” Moreover, the *de minimis* determination process requires the Secretary to allow for “public notice and opportunity for public review and comment.” In addition, the Secretary must receive “concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge” that the program or project will not adversely affect the activities, features, and attributes of areas protected under Section 4(f).

When determining whether a project will have a *de minimis* impact on a public park or recreation area protected by Section 4(f), the Secretary must also consider “any avoidance, minimization, mitigation or enhancement measures required to be implemented as a condition for approval of the program or project.” According to the Conference Report, “[t]his language builds in an incentive for project sponsors to incorporate environmentally protective measures into a project from the beginning.”

Once the Secretary of Transportation has determined that a transportation program or project will have a *de minimis* impact on a public park or recreation area, traditional “alternatives analysis”

shall not be included in the environmental review process pursuant to the National Environmental Policy Act (NEPA). Further, a finding of *de minimis* impact by the Secretary effectively satisfies the the Section 4(f) requirement that that there is “no prudent and feasible alternative.” On the other hand, the Conference Report comments interpreting Section 6009 of SAFETEA-LU expressly retains the Section 4(f) “requirement to do all possible planning to minimize harm to the area.” Moreover, the Conference Report notes that “traditional section 4(f) requirements will apply to all projects with impacts that exceed the *de minimis* threshold even when mitigation measures are taken into account.”

Within one year of enactment of SAFETEA-LU (i.e., August 10, 2006), the Secretary of Transportation is required to “enact regulations to clarify the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives” under Section 4(f), including appropriate “examples to facilitate clear and consistent interpretation by agency decisionmakers.” According to Federal Highway Administration officials, a Notice of Proposed Rulemaking (NRPM) containing the proposed Department of Transportation (DOT) regulations was planned for March 2006. Following publication in the *Federal Register*, a 60 day public comment period will allow individuals and organizations an opportunity to review the proposed regulations and submit written comments expressing their concerns to DOT.

Within three years of enactment (i.e., August 10, 2008), Section 6009 further requires the Secretary of Transportation and the Transportation Board of the National Academy of Sciences to complete a joint study on the implementation of the Section 4(f) as amended in SAFETEA-LU which evaluates the following:

- (A) the processes developed under this section and the amendments made by this section and the efficiencies that may result;
- (B) the post-construction effectiveness of impact mitigation and avoidance commitments adopted as part of projects conducted under this section and the amendments made by this section;
- and (C) the quantity of projects with impacts that are considered *de minimis* under this section and the amendments made by this section, including information on the location, size, and cost of the projects.

As cited in the Conference Report, in the case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the U.S. Supreme Court ruled that Section 4(f) determinations based on “no feasible and prudent alternatives must find that there are unique problems or unusual factors involved in the use of alternatives or that the cost, environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.” According to the Conference Report, “inconsistent guidance and regional interpretations of the *Overton Park* decision makes it necessary for the Secretary “to issue regulations to clarify the factors to be considered and the standards to be applied in determining whether alternatives are ‘prudent and feasible’ under” Section 4(f).

Further, the Conference Report notes that “[t]he fundamental legal standard contained in the *Overton Park* decision for evaluating the prudence and feasibility of avoidance alternatives will remain as the legal authority for these regulations.” Such regulations will simply provide “more detailed guidance on applying these [*Overton Park*] standards on a case-by-case basis.” Given

the fact that *Overton Park* remains the “fundamental legal standard” for “evaluating the prudence and feasibility of avoidance alternatives” under Section 4(f), a closer review of this 1971 landmark Supreme Court decision is warranted in determining the scope and applicability of regulations mandated by Section 6009 of SAFETEA-LU.

## OVERTON PARK STANDARD

In the case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402; 91 S. Ct. 814; 28 L. Ed. 2d 136 (1971), a group of private citizens as well as local and national conservation organizations (hereinafter referred to collectively as “Citizens”) alleged that the Secretary of Transportation had violated Section 4(f) by authorizing the expenditure of federal funds for the construction of a six-lane interstate highway through a public park in Memphis, Tennessee. The facts of the case were as follows:

Overton Park is a 342-acre city park located near the center of Memphis. The park contains a zoo, a nine-hole municipal golf course, an outdoor theater, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest. The proposed highway, which is to be a six-lane, high-speed, expressway, will sever the zoo from the rest of the park. Although the roadway will be depressed below ground level except where it crosses a small creek, 26 acres of the park will be destroyed... I-40 will provide Memphis with a major east-west expressway which will allow easier access to downtown Memphis from the residential areas on the eastern edge of the city.

After the enactment of § 4(f) of the Department of Transportation Act prevented distribution of federal funds for the section of the highway designated to go through Overton Park until the Secretary of Transportation determined whether the requirements of § 4(f) had been met.

In April 1968, the Secretary announced that he concurred in the judgment of local officials that I-40 should be built through the park. Final approval for the project - the route as well as the design -- was not announced until November 1969, after Congress had reiterated in §138 of the Federal-Aid Highway Act that highway construction through public parks was to be restricted.

Neither announcement approving the route and design of I-40 was accompanied by a statement of the Secretary's factual findings. He did not indicate why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park.

Citizens claimed that the Secretary's action was invalid because he had not made formal findings on the record to support his determination that there was no prudent or feasible alternative to avoid or minimize impacts to the park. Rather than making an independent determination, Citizens further alleged that the Secretary had simply relied on the judgment of the Memphis City Council.

In opposing the Secretary's approval of the project, Citizens claimed that it would be "feasible and prudent" to route I-40 around Overton Park either to the north or to the south. Alternatively, Citizens contended that I-40 could be built under the park by using either of two possible tunneling methods. Citizens also argued that the expressway could be depressed below ground level along the entire route through the park including the section that crosses the small creek. Assuming these alternative routes were not "feasible and prudent," Citizens argued that the plan approved by the Secretary did not include "all possible" methods for reducing harm to the park.

In response, the Secretary stated that he had indeed exercised his independent judgment and his decision was supported by the facts. Moreover, the Secretary maintained that it was unnecessary for him to make formal findings on the record to support his decision. The District Court and the Court of Appeals agreed. The Supreme Court granted the Citizens petition to review this decision.

#### SECTION 4F DIRECTIVE

As noted by the Supreme Court, Congress enacted Section 4(f) in response to "[t]he growing public concern about the quality of our natural environment." Specifically, Section 4(f) was "designed to curb the accelerating destruction of our country's natural beauty." In pertinent part, Section 4(f) declared it "to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." To achieve this national policy objective, Section 4(f) "prohibits the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a 'feasible and prudent' alternative route exists. Further, if no such route is available, Section 4(f) would "allow him to approve construction through parks only if there has been 'all possible planning to minimize harm' to the park." (23 U. S. C. § 138)

In the opinion of the Supreme Court, the clear and plain language in Section 4(f) provided a specific and explicit bar to the use of federal funds for construction of highways through parks. According to the Court, "only the most unusual situations are exempted."

Both the Department of Transportation Act and the Federal-Aid Highway Act provide that the Secretary "shall not approve any program or project" that requires the use of any public parkland "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ." 23 U. S. C. § 138

As noted by the Court, the Secretary conceded that "the requirement that there be no 'feasible' alternative route admits of little administrative discretion. For this exemption to apply, the Secretary acknowledged that he "must find that as a matter of sound engineering it would not be feasible to build the highway along any other route." Despite the "clarity of the statutory language," the Secretary, however, claimed he could exercise "wide discretion" and "engage in a wide-ranging balancing of competing interests" in determining whether there was no other "prudent" alternative route.

[T]he Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be "prudent."

The Supreme Court rejected this argument. While conceding that "Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary," the Supreme Court held that "no such wide-ranging endeavor was intended" under Section 4(f). On the contrary, the Supreme Court found "there would have been no need" for Section 4(f) "if Congress intended these factors to be on an equal footing with preservation of parkland." In the opinion of the Supreme Court, "the very existence" of Section 4(f) "indicates that protection of parkland was to be given paramount importance."

It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible...

[T]here will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction...

The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.

As a result, based upon the expressed language and legislative intent of Section 4(f), the Supreme Court held that "the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems."

Applying this reasoning to the facts of the case, the issue was whether the Secretary had "properly construed his authority to approve the use of parkland" only in those situations "where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems." In this particular instance, the Supreme Court found the litigation affidavits (i.e., out of court sworn statements) upon which the lower courts based their decision were an inadequate basis for judicial review of the Secretary's actions. As noted by the Supreme Court, the Administrative Procedure Act (APA) provides that "a reviewing court shall set aside agency action if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the action failed to meet statutory, procedural, or constitutional requirements." (5 U. S. C. § 706)

Section 706 (2)(A) [of the Administrative Procedure Act] requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors

and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. The final inquiry is whether the Secretary's action followed the necessary procedural requirements...

[T]he generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review.

In this particular instance, the Supreme Court found the evidence before the federal courts “clearly do not constitute the ‘whole record’ compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act.” As a result, the Supreme Court remanded (i.e., sent back) this case to the federal district court for review of the Secretary’s decision “based on the full administrative record that was before the Secretary at the time he made his decision.” On remand, the federal district court would apply the above described APA standard of judicial

On remand, in the case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 335 F. Supp. 873 (W.Dist. Tenn. 1973), the federal district court conducted a full hearing and ordered the Secretary to make a route determination that complied with Section 4(f). However, following the Supreme Court’s decision, Secretary Volpe ordered a full review and preparation of an environmental impact statement. After which, applying the Supreme Court’s interpretation of Section 4(f), the Secretary refused to approve the Overton Park route. The State of Tennessee claimed it was entitled to approval of the Overton Park route or a formal statement of what other route was prudent and feasible. The federal district court agreed and ordered the Secretary to “either find unequivocally that there is no feasible and prudent alternative to the use of Overton Park land for interstate 40 (thus amounting to approval of that route), or state that there is at least one feasible and prudent alternative route and specify it, so that the court can review the correctness of that decision.”

On appeal, the Secretary claimed that Section 4(f) “merely foreclosed [him] from approving a proposal which would take parklands so long as he is not convinced that there is no prudent and feasible alternative to the use of such lands.” As a result, upon such rejection, the Secretary contended that Section 4(f) did not require anything more of him and that he need not affirmatively find that a particular feasible and prudent alternative exists.

In the case of *Citizens to Preserve Overton Park, Inc. v. Brinegar*, 494 F.2d 1212 (6<sup>th</sup> Cir. 1974), the federal appeals court agreed, finding that “the Secretary properly construed his authority.”

It is clear to us that the statute is designed to require the Secretary to scrutinize proposed highways for the protection of parklands, and places no affirmative duty on the Secretary to specify any particular route as a feasible and prudent alternative to the proposed route.

The statute is drafted in a negative manner and prohibits the Secretary from approving a proposed route unless he finds that no feasible and prudent alternative exists. Had Congress intended that the Secretary specify an alternate route it would have been an easy matter to insert a requirement in the statute... In addition to the clear language of the statute, the legislative history of the Act reveals the primary purpose of the statute to be the protection of vital park lands, parks, historic sites and similar areas.

As a result, the federal appeals court held that the Secretary had “complied with his duties” under Section 4(f).

See also: “Environmental Challenge To Federal Highway Project Through Park,” James C. Kozlowski *Parks & Recreation*. Feb 1994. Vol. 29, Iss . 2