STATEMENT OF BROCK ADAMS, SECRETARY OF TRANSPORTATION, BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, SUBCOMMITTEE ON TRANSPORTATION, REGARDING THE WORKABILITY OF SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT, APRIL 19, 1978.

Mr. Chairman and Members of the Committee:

I have been asked to present the views of the Department of Transportation on whether the Overton Park controversy in Memphis, Tennessee provides a good example of the workability of section 4(f) of the Department of Transportation Act. As the Committee is aware, section 4(f) prohibits the Secretary of Transportation from approving programs or projects that require the use of publicly-owned parkland, recreation areas, or wildlife and waterfowl refuges, and historic sites, unless he determines that there is "no prudent and feasible alternative" to the use of such land. In addition, section 4(f) also requires that, before such a project can be approved, the Secretary must be satisfied that "all possible planning to minimize harm" to the parkland has been accomplished.

Section 4(f) is a specific, substantive environmental statute which the Department applies to all transportation projects and programs. It is protecting our nation's parklands by altering the traditional tendency of many federal, state, and local transportation agencies to minimize the costs and social impacts of new construction projects by building in parkland. In my opinion, the statute has been a success because of the ability of transportation planners, most notably in the highway agencies, to adapt quickly to new standards. Today relatively few federal-aid projects that would take parkland are even proposed; those that are generally take very little parkland

and are for the most part extremely well justified and carefully worked out after extensive public participation and consultation with other government agencies. They normally include plans to provide replacement lands or other measures to compensate for any lost parkland. For those reasons, relatively few 4(f) projects are disappoved. The disapprovals that do occur are made at the local level, in preliminary stages of project development, although we have rejected some 4(f) projects at the Washington level.

The process of implementing a statute that brings major changes to the highway construction process is bound to produce a number of hard cases. Most of these quite understandably arose when the statute was first being applied. Major highway projects are generally planned many years in advance of their construction, and are therefore difficult to change quickly as new standards are developed. In the case of section 4(f), additional problems arose when the statute was authoritatively interpreted by the Supreme Court in 1971, four years after its enactment. The Court's interpretation was stricter than the Department had anticipated, and a few older projects were caught up in time-consuming controversy and alteration.

Members of this Committee are quite familiar with the more famous cases - the San Antonio North Expressway and the proposal to construct Interstate Route 40 through Overton Park in Memphis. Before discussing the Overton Park issue in detail, I would emphasize that these are <u>not</u> typical 4(f) cases. They are both old proposals that were caught up in the new legislation. The San Antonio problem, as you know, was resolved by legislation

proposed by this Committee. While the Department has always oppossed special legislation for highway projects, I would like to note at this point that San Antonio was a very different case from Overton Park. The highway in issue was not an Interstate, and the possibility of developing alternative solutions was remote.

Other controversial highway cases have had significant section 4(f) involvements, but few have been stopped by the operation of that statute. In such cases, there is usually more at stake than just the parkland issue. The dispute over Interstate 93 in Franconia Notch, New Hampshire has apparently been resolved by a recent agreement between highway officials and environmental organizations to build the project at reduced standards. A similar agreement may be possible for the construction of Interstate 70 through Glenwood Canyon in Colorado.

In some 4(f) situations, the state authorities have simply withdrawn controversial projects. For example, the District of Columbia abandoned its proposal to build the Three Sisters Bridge across the Potomac above Georgetown. And Louisiana abandoned its Riverfront Expressway, which would have had severe impacts on New Orlean's historic French Quarter, electing to spend its federal-aid funds elsewhere. One 4(f) project has been radically altered as a result of litigation. H-3 in Hawaii can no longer be built through the Moanalua Valley, a location approved by the Department, because the courts accepted the judgment of the Secretary of the Interior that the

entire valley was of historic significance. The State is now developing an alternative alignment.

I would now like to review briefly the history of the I-40 problem. Interstate Route 40 goes from Durham, North Carolina to Barstow, California, passing through Memphis. As reported to the Congress in the Department's October 1976 "Interstate Gap Study," the piece of it not yet approved in Memphis is not an "essential gap" in the Interstate System. Connectivity and traffic service through the Memphis area will be provided by the already approved Interstate 240, a beltway that encircles the Memphis metropolitan area on the North and South, with two half circles joining at the central business district. I would like to submit for the record at this point a map of the Memphis area, showing the highways in question, as well as Overton Park and the alternatives to building through it.

The proposal to build I-40 through the Park has always been controversial. The location was first approved in 1956 by the Bureau of Public Roads. After continuing disputes, the location was approved again in 1966, and twice in 1968, that last time by the Secretary of the then new Department of Transportation, Alan Boyd.

When the matter came to his successor, John Volpe, the new Secretary took his predecessors' decisions on the location as given and approved the design, requiring that the project be partially depressed to limit the impacts on the Park. Litigation ensued in 1969, after the right-of-way had been acquired, and the Supreme Court ultimately decided in June 1971 that the record as presented could not support construction of the project through the Park. In

so doing, the Court established the tough standards of review that we now apply to all 4(f) projects.

The Supreme Court decision was followed by an extensive trial court hearing in Memphis, at which the judge decided, after reviewing a more complete record than had been before the Supreme Court, that the reasons for going through the Park were not sufficient to justify the prior decisions. The case was remanded to the Secretary in January of 1972.

Tennessee and the Federal Highway Administration thereafter proceeded with the development of an environmental impact statement and a formal section 4(f) analysis, which concluded that the previously approved alignment and design were appropriate. That document, with a thorough analysis of alternatives, was submitted by FHWA to the Secretary's office for review in January of 1973. On January 18, Secretary Volpe decided:

> "On the basis of the record before me and in light of guidance provided by the Supreme Court, I find that an Interstate highway as proposed by the State through Overton Park cannot be approved."

He pointed to several available alternatives, including improvements to arterial streets, alignments outside the Park, and a tunnel as possibilities.

The State of Tennessee did not accept that decision, immediately challenging it in federal court. The district court remanded the project to the Secretary again, this time directing him to designate an alternative the State

could construct. This matter was appealed to the Court of Appeals for the Sixth Circuit, which reversed, holding that the basic decisions on highway location and design must first be made by the states. The litigation lasted from February 1, 1973, to April 3, 1974. In October 1974, Tennessee submitted a response to former Secretary Volpe's January 1973 decision, asking then Secretary Brinegar to reverse his predecessor.

Secretary Brinegar reaffirmed Volpe's decision in January of 1975, and in an effort to resolve the impasse directed his staff to analyze a cut and cover tunnel in the Park, a tunnel under the adjacent North Parkway, and low-capital transit and arterial road improvements that could provide equivalent traffic service.

The staff studies were promptly done and were submitted to a new Secretary of Transportation two months later, on April 1, 1975. The studies indicated, among other things, that a tunnel could be constructed far less expensively than the State had anticipated. Later that month, Secretary Coleman, in affirming his predecessors, issued a decision setting forth standards a tunnel design would have to meet in order for I-40 to be approved within the Park. He directed FHWA and the State to prepare a new environmental impact statement addressing the new tunnel design proposal and any alternative locations. The statement was developed, and the State resubmitted the project in July 1976 with a sunken, partially covered cut design rather than a tunnel, but adopting the

construction techniques proposed by DOT staff for a tunnel. Other alternatives included two alignments to the North of the Park, one to the South, the no-build alternative, and the construction of improvements to arterial streets, with additional mass transportation service in the corridor. The State indicated that a tunnel was unacceptable to it because of cost, both costs of construction, and cost of operations, including electricity for lights and ventilation, police, towing, and emergency services.

Thereafter Secretary Coleman directed his deputy to conduct a hearing on the State's proposal in late November in Memphis, with a decision promised by the new year. At that point the State withdrew its proposal before the hearing, and resubmitted it to the Department in March of 1977. At the time, I directed the Federal Highway Administrator to meet with interested parties in Memphis to discuss the new proposal, which he did in May of 1977. In a letter of September 30, I advised Governor Blanton of Tennessee that the State's latest proposal did not meet the standards set by the Supreme Court, and that it consequently could not be approved. I am submitting a copy of that letter for the record.

Since that time, Tennessee in November 1977 submitted yet another proposal for an open cut design in the Park, with more extensive cover. FHWA informally advised the State that this design would not be approved. Most recently, Tennessee has discussed with DOT staff possible designs

for a full tunnel. On February 9, the Governor wrote me that the State would consider a tunnel if the federal government would fund the difference in cost between its last open cut design and the full tunnel, as well as part of the maintenance costs. That approach is not permitted under existing federal-aid highway law, and we would be opposed to enactment of such a change in the statute. A copy of the Governor's letter and my response is also provided for the record.

I believe that the Department has acted with reasonable expedition in reviewing and acting on Tennessee's repeated requests that three Secretaries reverse their predecessors and permit the construction of a highway through Overton Park. We have also been available to help with the development of alternatives.

Finally, I would like to review with you the nature of the interpretation the Supreme Court gave to section 4(f). When the Overton Park case was before the Supreme Court, the alternatives available to the State were not much different from what they are now. The record has not changed substantially in the interim. While the unanimous Court addressed itself to the adequacy of the record, there is no mistaking the message they gave us on the applicability of section 4(f):

> . . .This language is a plain and explicit bar to the use of federal funds for construction of highways through parks--only the most unusual situations are exempted.

Despite the clarity of the statutory language, respondents argue that the Secretary has wide discretion. They recognize that the requirement that there be no "feasible" alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route. Respondents argue, however, the requirement that there be no other "prudent" route requires the Secretary to engage in a wide-ranging balancing of competing interests. They contend that the 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."

But no such wide-ranging endeavor was intended. 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. Although it may be necessary to transfer funds from one jurisdiction to another, 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. Thus if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.

Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statute indicates that protection of parkland was to be given paramount importance. 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. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems. 401 U.S. at 411.

With that mandate, even if the State were willing to build a tunnel, we would be likely to face a legal challenge, since opposition persists to any construction in Overton Park. The reasons that I have been unable to approve a project in Overton Park other than a full tunnel are fairly simple. The Court's conclusion was that "the cost or community disruption resulting from alternative routes" must reach "extraordinary magnitudes" for a project within a Park to be prudent. In addition, the alternatives must present "unique problems" before I may approve the use of parkland. As my September 30 letter notes, the State's most recent proposal does not meet those standards.

I recognize that the choice of alternatives left to the State is not an easy one. But we must keep in mind that this is the very project the Supreme Court addressed in setting the standards we must apply in implementing section 4(f). The judicial yardstick was developed from the facts of this case, and we are of course committed to following the Court's opinion. As I testified before this Committee in October, I would be prepared to approve a full tunnel through the Park, if that is what the State wants. This commitment, of course, is subject to development of an adequate record on the 4(f) issue and is based principally on the limited and temporary nature of the damage it would do. DOT staff are also ready, as they have been in the past, to work with Tennessee officials in considering an alternative project they may select that would not use land from Overton Park. The I-40 dispute has gone on for too many years. I believed a clear final decision was necessary, and I made such a decision.

This concludes my prepared testimony. I will be pleased to respond to any questions.

Attachments

CHRONOLOGY OF THE INTERSTATE 40 - OVERTON PARK MATTER

MEMPHIS, TENNESSEE

DATE	EVENT
November 1956	Bureau of Public Roads approves the location of I-40 through Overton Park.
August 1958	Harland Bartholomew and Associates complete a location study which recommended basically the same route as previously approved.
March 1961	Public hearing held in Memphis.
September and December 1965	Buckhart-Horn. Inc., completes location and design studies recommending the original location and a depressed grade line utilizing the existing bus right-of-way as currently proposed.
January 1966	Federal Highway Administrator Whitton reaffirms the previous location approval.
May 1967	Bureau of Public Roads authorizes the Tennessee Department of Highways to proceed with purchasing the necessary rights-of-way.
April 1968	Federal Highway Administrator Bridwell reaffirms the previous location approval.
June 1968	Secretary of Transportation Boyd reaffirms the previous location approval.
May 1969	Design public hearing held.
November 1969	Secretary of Transportation Volpe approves proposal to construct I-40 through Overton Park with design qualifications.
December 1969	Legal action filed by Citizens to Preserve Overton Park.
February 1970	U.S. District Court dismissed the case granting a motion by the defendants for summary judgment.

DATE	EVENT
September 1970	The Sixth Circuit Court of Appeals upheld the District Court's grant for summary judgement
March 1971	The Supreme Court reversed and remanded for a plenary review of Secretary Volpe's approval of the release of Federal funds for this project.
January 1972	U.S. District Court remanded the case to the Secretary of Transportation for the purpose of making a route determination in compliance with Section 4(f) of the DOT Act of 1966 as that provision has been construed by the Supreme Court.
January 21, 1972	By news release, Secretary Volpe announces he will have the entire record before the court analyzed in the context of an environmental impact statement.
August 1972	Draft environmental/Section 4(f) statement circulated to appropriate agencies for comment.
September 1972	Additional public hearing held in Memphis.
January 12, 1973	Recommended environmental impact and Section 4(f) statement submitted for review.
January 18, 1973	Secretary determines Section 4(f) determination on I-40 through Overton Park cannot be approved.
February 1, 1973	State of Tennessee petitions U.S. District Court in Memphis to order Secretary to reconsider his decision, or in the alternative to relieve State from the injunction and let it construct the road without Federal funds.
April 19, 1973	U.S. District Court remands the case to the Secretary. The court held that the Secretary was obligated to do more than to decide that he could not find that there were no feasible alternative. In this context, the Secretary is obliged to find that there was a feasible and prudent alternate. In addition, the court concluded that the Secretary is obligated to specify which provisions of the National Environmental Policy Act and the FHWA noise standards would be violated by the Overton Park route. The remand order required a decision by the Secretary within 45 days.

DATE	EVENT
May 1, 1973	2nd Order of Remand clarifying April 19 decision. Decision required within 45 days. Burden of securing information alternatives lies with the Secretary.
April 3, 1974	Sixth Circuit Court of Appeals reverses the District court's orders of remand. The court held that Section 4(f) requires the Secretary to scrutinize proposed highways for the protection of parkland, but places no affirmative duty on the Secretary to specify and particuar route as a feasible and prudent alternative to the proposed route. Accordingly, it is incumbent on the State to come forward with a particular route.
October 3, 1974	Governor Dunn and the Mayor of Memphis presented the "response to the January 18, 1973, Secretarial Decision on I-40 from Claybrook to Bon Air Street through Overton Park" to Secretary Brinegar.
January 31, 1975	Secretray Brinegar reaffirms former Secretary Volpe's decision that open-cut design cannot be approved. He directs TST, FHWA, and UMTA to study (1) a cut-and-cover tunnel on the previously approved alignment, (2) a cut-and-cover tunnel under the north Parkway, and (3) low-capital transit and arterial street improvements that could, in time, provide equivalent traffic service. 1/
April 1, 1975	Task force requested by former Secretary Brinegar presents results of study to Secretary Coleman.
April 1975	Secretary Colemen decides that a full tunnel may be built under Overton Park, but specifies a number of design conditions which must be met. He directs FHWA and Tennessee DOT to prepare new EIS covering all previous alternates plus slurry wall tunnel alternative. States that his decision concerning the above design features is subject to reconsideration on the basis of new EIS.

1/ TST is the Office for Systems Development and Technology
FHWA is the Federal Highway Administration
UMTA is the Urban Mass Transit Administration

DATE	EVENT
July 1976	New draft EIS circulated for comment.
August 1976	Public Hearings held in Memphis.
October 1976	Final EIS/4(f) submitted for review. (fully depressed with several deck sections.)
November 1976	State of Tennessee withdraws request for approval of Final EIS/4(f).
March 1977	TDOT resubmits 1976 proposal to Secretary Adams with request for reconsideration.
May 9, 1977	Federal Highway Administrator Cox met in Memphis with Tennessee DOT officials and separately with officials of the Citizens to Preserve Overton Park.
May 23, 1977	Administrator Cox met in Nashville with Tennessee DOT and Citizens to Preserve Overton Park (joint meeting) to discuss the issues.
September 30, 1977	Secretary Adams rejects TDOT's request for reconsideration.
October 1977	Secretary Adams in appearance before the Senate Committee on Environment and Public Works advises Senator Baker in response to a question that he would be willing to approve a full-length, ventilated tunnel for I-40.
November 16, 1977	Meeting held in Department at which TDOT presents a new proposal which included up to sixty percent cover for the Overton Park section. The State is advised this was not responsive to Secretary Adams' statement relative to reconsideration of the project.
February 9, 1978	Governor Blanton advises TDOT will pursue a full tunnel provided the Federal Government pays all construction and maintenence costs which exceed the cost of the State's original partially covered design. The state was advised that Federal statutes do not permit increases in the pro-rata Federal fund participation as sugested by the Governor.

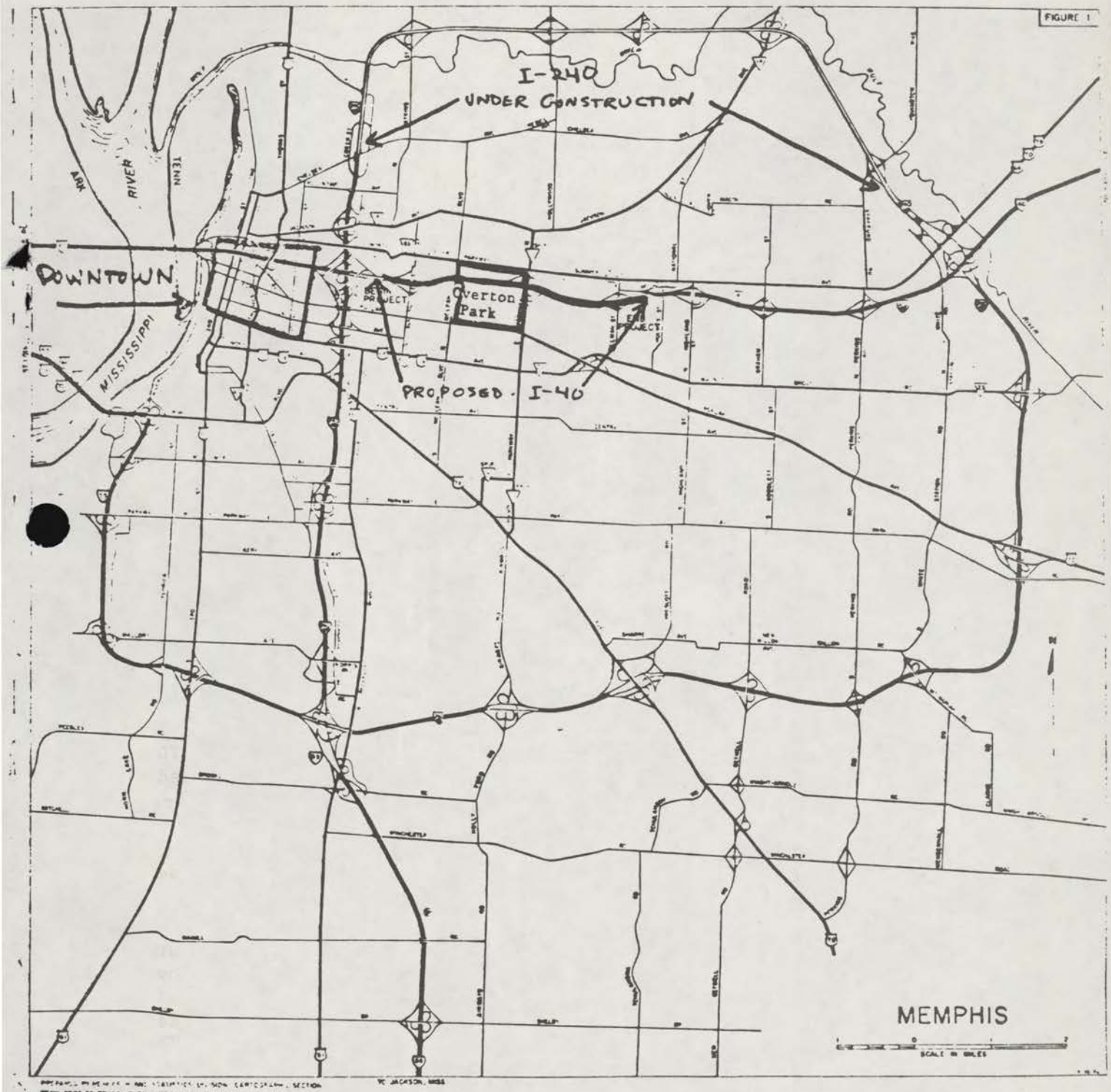
FIGURE 1
I-240
UNDER CONSTRUCTION
DOWNTOWN
Overton Park
PROPOSED - I-40
MISSISSIPPI RIVER
TENN
MEMPHIS
SCALE IN MILES