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Standing to Sue for Purposes of Securing Judicial Review of Exercise of Administrative Discretion in Route Location of Federal-Aid Highways

Final Report

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Highway Research Board is the agency conducting the research. The report was prepared by John C. Vance, HRB Counsel for Legal Research, principal investigator, and Hayes T. O'Brien, Research Attorney, serving under the Special Projects Area of the Board.

THE PROBLEM AND ITS SOLUTION

As the planning, design, construction, and operation of modern highway systems become increasingly complex, the state highway lawyer is faced with attendant legal problems multiplied correspondingly. There is need for a mechanism that will undertake research into constantly recurring problems which to date have not been satisfactorily treated in legal publications or reference works. Recent court decisions point to a liberalization of formerly well-established rules concerning standing to sue to secure judicial review of the exercise of administrative discretion in route location. Such decisions are of the utmost practical consequence insofar as highway planning and administration are concerned.

Following is a commentary dealing with certain recent decisions in the Federal courts showing that changes are occurring which may indicate that traditional concepts of standing to sue to secure judicial review of the exercise of administrative discretion in respect to route location will no longer govern. State highway administrators, planning officials, and their legal counsels need to be cognizant of this trend and, if necessary, adjust administrative procedures in a way to assure orderly execution of the responsibilities delegated to them.

A careful review of the cases summarized herein will help the state highway officials understand the trend being established at the national level, which in turn will help them tailor their states' highway planning processes in a way to minimize costly delays.

FINDINGS

SCOPE, INTRODUCTION, AND REVIEW OF EARLY CASE LAW

The question of standing to sue to review the exercise of administrative discretion in determining route location would appear to require re-examination in the light of recent decisions in the Federal courts. It should be noted at the outset that this paper is limited in scope and does not undertake a comprehensive review of the law of standing to sue, which the Supreme Court of the United States has called "a complicated specialty of federal jurisdiction." (For a more complete treatment of the entire subject see Davis on Administrative Law, Vol. 3, Chapter 22, pp. 208-294; Standing to Secure Judicial Review, Louis L. Jaffe, 75 Harvard Law Review, pp. 255-305.)

* *The full text of the agency report is presented in this Research Results Digest. Therefore, no report loan copies are available.*

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The decisions dealt with herein, although to date few in number, create uncertainties in an area which is of fundamental importance. Traditionally, under our tripartite system of government, the control of the highway systems has been within the virtually exclusive province of the legislature. The delegation of authority to administer the highway systems is uniformly pursuant to action of the legislative arm of government. In the past, the courts have been reluctant to subject to judicial scrutiny the administrative determinations of governmental officers or agencies to whom the legislative branch has delegated authority and control over the highway systems.

The rule is, of course, firmly established that administrative decisions by governmental officials and agencies charged with such responsibilities cannot be disturbed except upon a clear showing that the administrative decision taken or rendered was arbitrary, capricious, unreasonable, fraudulent, or otherwise contrary to law. Although this rule still obtains with full force and effect, a new element has entered the picture. Recent cases point to a liberalization of formerly well-established rules with respect to standing to sue to secure judicial review of the exercise of administrative discretion in route location. It goes without saying that such decisions are of the utmost practical consequence insofar as highway planning and administration are concerned. Effective long-range planning can hardly be advanced where administrative decisions are readily subject to judicial review and the consequences of being unseated by judicial determination after contracts are let and road construction has begun.

This commentary, being limited in scope, deals in the main with certain recent decisions in the Federal courts which may indicate that traditional concepts of standing to sue to secure judicial review of the exercise of administrative discretion in respect to route location are no longer governing. These decisions, unless later modified, overruled, or rejected as unsound by other courts, would appear to throw into question the validity of early decisions which laid down the rule with such uniformity as to make it axiomatic that an individual or group of individuals whose property was not affected, either by reason of being taken or by reason of lying immediately adjacent to a new highway location, did not have such interest as to entitle them to bring suit to secure judicial review of the exercise of administrative discretion in determining such route location.

By way of illustration, it is stated in 39 C.J.S., Highways, Sec. 54:

> A taxpayer, merely as such, will not be heard in opposition to laying out a highway -- his interest is too remote.

And in 39 Am. Jur. 2d, Highways, Streets and Bridges, Sec. 38, it is stated:

> Persons who own land on the highway affected by the proceedings have such an interest as entitles them to have the proceedings reviewed by certiorari. But the mere fact that the petitioner is a citizen and taxpayer of the community to be affected by the proceedings is not enough.

The rule as above enunciated is supported by many early cases, certain of which will be considered herein.

In Lord v. County Commissioners for Cumberland County, 105 Me. 556, 75 A. 126 (1909), plaintiffs (21 in number) petitioned for a writ of certiorari to set aside the record of the proceedings of county commissioners in laying out a highway. In affirming the action of the lower court in quashing the writ, the Supreme Judicial Court of Maine stated:

> There is, however, at the threshold of the case another question to be determined, the decision of which is, we think, decisive of the matter before us. Are the petitioners for the writ of certiorari shown to have such interest in the proceedings sought to be quashed as entitles them to maintain the writ? We think not. --- The only ground for their claim of right to petition for this writ is that they "are citizens and taxpayers of said town of Naples." If, for this reason, they have the right to petition for certiorari to quash the laying out of this townway, then for a like reason has each citizen and taxpayer of the town a like right. But to permit that would be both unreasonable and contrary to precedent. --- In 4 Encyc. Pl. & Prac., p. 172, the author says: "Proceedings to establish, alter, maintain, or repair roads and highways will not be reviewed on the application of private citizens who apply for the writ in their own behalf when such applicants have no special property rights or interests involved."

Conklin v. County Commissioners of Fillmore County, 13 Minn. 423 (1882), involved a writ of certiorari to review the proceedings of county commissioners in changing a highway route location. In quashing the writ the Supreme Court of Minnesota stated:

> I think the plaintiff has not a right to prosecute this action. He does not show nor pretend that he is damnified more or otherwise than any other resident of the town near or over whose land the road is laid, or who ordinarily travels on the road. The change complained of is not on or near his land. The injury -- if any -- is to the community, not to him in his individual capacity, and it is for them, not

for him, to redress it; -- if one member of the community in his individual capacity has a remedy for such an injury, so has every other member. To permit this would be intolerable, and contrary to all precedent or reason.

In Overbeck and Shaw v. Galloway, 10 Mo. 230 (1847), the Court, in holding that plaintiff could not attack the order of a county court establishing a new road, because his own property was not directly affected, stated with respect to the standing to sue of an individual whose only interest was that of taxpayer and citizen of the community affected by the route location:

This would not only be ruinous, but violative of those general principles, that a common interest which belongs equally to all, and in which the parties suing have no special or peculiar property, will not maintain a suit.

Holding that individual taxpayers whose properties are not directly affected have no right to contest the laying out of a highway, the Court in Bennett v. Tuftonborough, 72 N.H. 63, 54 A. 700 (1903), stated:

Individual taxpayers, as such, have no right to appear and be heard in opposition to the laying of a highway.

In Vanderstolph v. Highway Commissioner, 50 Mich. 330, 15 N.W. 495 (1883), a writ of certiorari was brought to vacate proceedings to lay out a highway. Plaintiff sued solely in his capacity of a taxpayer of the township, and not as the owner of property directly affected by the route location. In quashing the writ the Court stated that plaintiff's interest as a taxpayer was "too remote and too indirect and indefinite to warrant this remedy."

To the same effect see: Creswell v. The Commissioners' Court of Greene County, 24 Ala. 282 (1854); Farnell v. Commissioners' Court of Dallas County, 34 Ala. 278 (1859); In re Long Point Road 5 Har. 152 (Del.) (1849); Brown v. Smith, 147 Ga. 483, 94 S.E. 567 (1917); Taylor v. Town of Normal, 88 Ill. 526 (1878); Brown v. Paul, 100 Kan. 319, 164 P. 288 (1917); Barr v. Stevens, 4 Ky. (1 Bibb) 292 (1808); Taylor v. Brown, 6 Ky. (3 Bibb) 78 (1813); Bath Bridge and Turnpike Co. v. Magoun, 8 Me. 236 (1832); Harkness v. Waldo County Commissioners, 26 Me. 353 (1846); Blakely v. Board of Superintendents of Grenada County, 171 Miss. 652, 158 So. 483 (1935); Foster v. Dunklin, 44 Mo. 216 (1869); Goldman v. Justices of Grainger County, 40 Tenn. (3 Head) 107 (1859); Allen v. Parker County, 23 Tex. Civ. App. 536, 57 S.W. 703 (1900).

FEDERAL CASES GRANTING RIGHT TO REVIEW ON THE BASIS OF STATUTORY AUTHORIZATION

The first clear departure from the rule laid down in the cases above discussed and cited came in Road Review League v. Boyd, 270 F. Supp. 650 (S.D. N.Y., 1967). Because the holding in this case was premised largely on the decision in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (C.C.A.2, 1965), cert. denied 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966), it is necessary first to consider the holding therein.

In this case petitioners brought suit to set aside three orders of the Federal Power Commission which (1) granted a license to the Consolidated Edison Company to construct a pumped storage hydroelectric project on the Hudson River at Storm King Mountain, New York, (2) denied petitioners' application for the reopening of the proceeding to permit the introduction of additional evidence, and (3) denied petitioners' motion to expand the scope of supplemental hearings to include consideration of the practicality and cost of underground transmission lines and the feasibility of fish protection devices.

The pumped storage plant in question was designed to generate electric energy for use during peak-load periods, using hydroelectric units driven by water from a headwater pool or reservoir. The contemplated project was to be the largest of its kind in the world, Consolidated Edison having estimated its cost, including transmission facilities, at $162 million. The project was to consist of three major components -- a storage reservoir, a powerhouse, and transmission lines. The storage reservoir, located more than 1,000 ft. above the powerhouse, was to be connected to the powerhouse, located on the river front, by a tunnel 40 ft. in diameter. The powerhouse, to be both a pumping and generating station, would be 800 ft. long and contain eight pump generators. Transmission lines would run under the Hudson River to the east bank and then underground for 1.6 miles to a switching station. Thereafter, overhead transmission lines would be placed on towers 100 to 150 ft. in height and requiring a path up to 125 ft. in width running through Westchester and Putnam counties for some 25 miles, until reaching Consolidated Edison's main connections with New York City. The affected area was one generally acknowledged to be of unique scenic beauty and major historical significance.

Petitioners in this case were the Scenic Hudson Preservation Conference, an unincorporated association consisting of a number of non-profit conservationist organizations, and the towns of Cortlandt, Putnam Valley, and Yorktown, of the State of New York. In holding that petitioners, including the Scenic Hudson Preservation Conference, the members of which had no direct pecuniary interest in the matters sub judice had standing to sue, the Court based its holding on the language of the Federal Power Act. It stated:

Respondent argues that "petitioners do not have standing to obtain review" because they "make no claim of any personal economic injury resulting from the Commission's action."

Section 313 (b) of the Federal Power Act, 16 U.S.C. Sec. 825 1 (b) reads: "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located ---."

In construing the meaning, scope, and effect of Section 313 (b) the Court stated:

> The commission takes a narrow view of the meaning of "aggrieved party" under the Act. The Supreme Court has observed that the law of standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations ---." Although a "case" or "controversy" which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a "case" or "controversy." The "case" or "controversy" requirement of Article III, Sec. 2 of the Constitution does not require that an "aggrieved" or "adversely affected" party have a personal economic interest. --- Even in cases involving original standing to sue, the Supreme Court has not made economic injury a prerequisite where the plaintiffs have shown a direct personal interest.

The Court went on to rule that:

> In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under Sec. 313 (b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.

Thus, the Court held that the language of the Federal Power Act gave petitioners standing to sue, although they did not and could not show that their own properties were directly affected or that they would suffer some economic injury by reason of the action taken by the Federal Power Commission.

In the aforementioned Road Review League v. Boyd the Court employed language of the Federal Administrative Procedure Act, similar in content and substance to the above-quoted language of the Federal Power Act, to permit plaintiffs, who made no showing that their own properties were directly affected, to secure judicial review of the exercise of administrative discretion in highway route location. The facts in this case were as follows:

A complaint was filed against Alan S. Boyd, individually and as Secretary of Transportation of the United States, and Alexander D. Trowbridge, individually and as Acting Secretary of Commerce of the United States, seeking a declaratory judgment that "the selection and approval by defendants of the Chestnut Ridge alignment for Interstate Route 87 is arbitrary, capricious, and otherwise not in accordance with law." The complaint also sought a permanent injunction requiring defendants to withdraw approval theretofore given for the so-called Chestnut Ridge alignment, and restraining defendants from "interfering in any manner which is arbitrary, capricious, or not in accordance with law with the selection by appropriate action of the State of New York in accordance with the provisions of Title 23 of the United States Code of an alignment for that portion of Interstate Highway 87 which will connect Armonk and Katonah."

The background leading to the instant action was as follows: The Chestnut Ridge alignment for I-87 was originally requested by the Superintendent of Public Works of the State of New York. A public hearing was duly held and some opposition was expressed. The State Superintendent then requested approval of the Bureau of Public Roads for a second public hearing, at which were presented for consideration both said Chestnut Ridge alignment and an alternate so-called westerly alignment, being the same mentioned and described in the complaint above. Subsequent to said hearing the State Superintendent decided that the original choice of the Chestnut Ridge alignment was erroneous and requested permission of the Bureau of Public Roads to adopt the westerly alignment. This request was denied by the Bureau. Thereafter the State Superintendent formally requested approval of the original Chestnut Ridge alignment, which request was granted and approved by the Bureau of Public Roads. However, work was twice interrupted pending further study of the feasibility of the alternate or westerly route. At the completion of such studies the Federal Highway Administrator made determination that the Chestnut Ridge alignment should be selected. This decision was concurred in by the Secretary of Transportation and the Secretary of Commerce. It was this final determination of the Federal Highway Administrator which plaintiffs sought to have judicially reviewed in the instant action and set aside on the ground that it constituted an arbitrary, capricious, and unreasonable exercise of administrative discretion.

One of the issues raised by defendants was that plaintiffs had no standing to sue. The plaintiffs in the case were the Town of Bedford, a certain civic association of the Town of Bedford known as the Bedville Association, two wildlife sanctuaries, certain individuals whose property would be taken for the route selected, and the Road Review League. The latter, in the language of the court, was "a non-profit association which concerns itself with community problems, primarily those affecting the location of highways." It does not appear from the holding that it was shown that the property of any member of the Road Review League was to be taken or lay directly along the route of the Chestnut Ridge alignment.

In holding that plaintiffs, including the Road Review League, had standing to sue, the Court based its opinion on the provisions of the Administrative Procedure Act, 5 U.S.C. Sec. 702, and the holding in Scenic Hudson Preservation Conference v. Federal Power Commission, **supra**.

Said Section 702 of Title 5 of the United States Code provides as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

In construing said Section 702 and ruling on the issue of standing to sue, the Court stated:

> I see nothing in the Highways Act which indicates a congressional intent to immunize the Bureau of Public Roads from judicial scrutiny of its acts. Moreover, the new Department of Transportation Act specifically makes the Administrative Procedure Act applicable to proceedings under the Act. ... The legislative history indicates that the Transportation Act is declaratory of existing law. House Rep. No. 1701, 89th Cong. 2d Sess. (1966), in 3 U.S. Code Cong. & Ad. News, p. 3374. To hold that these decisions cannot be reviewed, no matter how arbitrary they may be, would be unsound and unjust.
>
> As to the --- question, plaintiffs' standing to ask the court to undertake such a review, I have based my decision upon the implications, rather than the exact holding, of the recent decision of the Court of Appeals in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed. 2d 540 (1966). **Under the law as it stood prior to that decision, it may well be that these plaintiffs do not have the necessary standing. --- Scenic Hudson may have changed that law in cases like the present one.**
>
> In Scenic Hudson, the court held that an organization devoted to conservation, as well as certain New York towns, had standing to obtain a review of a decision of the Federal Power Commission which granted a license to Consolidated Edison Company to build a hydroelectric project at Storm King Mountain. The court interpreted Section 313 (b) of the Federal Power Act (16 U.S.C. Sec. 825 l (b)) which provides that "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order ---." The court held that the appellants ... were "aggrieved" within the meaning of that section. ...
>
> The Administrative Procedure Act (5 U.S.C. Sec. 702) entitles a person who is "aggrieved by agency action within the meaning of a relevant statute," to obtain judicial review of that action. The "relevant statute" in this instance is the Federal Highways Act. ...
>
> I have concluded that these provisions are sufficient, under the principle of Scenic Hudson, to manifest a **congressional intent that towns, local civic organizations, and conservation groups** are to be considered "aggrieved" by agency action **which has allegedly disregarded their interests**. I see no reason why the word "aggrieved" should have a different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act. The "relevant statute" (i.e., the Federal Highways Act), contains language which seems even stronger than that of the Federal Power Act, as far as local and conservation interests are concerned. I appreciate that, speaking strictly, **Scenic Hudson** can be distinguished from the present case on the ground that Scenic Hudson involved an appeal from an administrative decision in a proceeding to which appellants were already parties, whereas here plaintiffs have brought an independent action. Plaintiffs were not previously parties in a formal sense to any administrative proceedings, although as a practical matter they participated actively in attempting to secure an administrative determination favorable to their interest. My decision here can be thought to involve an extension of the Scenic Hudson doctrine. If so, it is an extension which I believe to be warranted by the rationale of that decision. (Underscoring supplied)

After thus ruling that plaintiffs had standing to sue, the Court proceeded to the merits of the action, and held that on the facts no showing was made that the selection of the Chestnut Ridge alignment constituted an arbitrary, capricious, or unreasonable exercise of administrative discretion.

CASES PERMITTING JUDICIAL REVIEW WITHOUT RESPECT
TO AUTHORIZATION BY STATUTE

In Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179 (C.C.A. 6, 1967), the issue of standing to sue to review administrative discretion in determining route location was squarely before the Court. However, the defendants in this action were all governmental officials of the State of Tennessee, and the Administrative Procedure Act was in no wise adverted to by the Court in its holding. In this respect the case departs significantly from Road Review League v. Boyd, supra, wherein the Court based its holding on the provisions of the Administrative Procedure Act.

In Nashville plaintiffs brought suit in the Federal District Court to enjoin the defendants from constructing a section of I-40 along its planned route in North Nashville, Tenn. The section in question, approximately 3.6 miles in length, was a connecting link in I-40 extending from Memphis, Tenn., to and beyond Asheville, N. C. It was alleged that the route selection was arbitrary and unreasonable, and that it discriminated against the Negro and low socio-economic elements of the City's population. Plaintiffs were, as denoted by the Court, "members of an unincorporated association of some thirty Negro and white businessmen, teachers, ministers, civic and professional leaders, and residents of North Nashville. They sue on behalf of themselves as individuals, in the name of their association, and on behalf of the community they represent." The defendants were the Governor of Tennessee, the Commissioner of Highways of the State of Tennessee, and the Mayor of the Metropolitan Government of Nashville and Davidson County, Tennessee.

The Federal District Court denied a preliminary injunction and plaintiffs appealed. No contention was made on appeal that properties owned by plaintiffs were directly affected by the route location attacked. The matter of standing to sue was summarily disposed of by Court of Appeals in the briefest of language. It merely stated:

> Appellees urge that appellants have no standing to maintain this action. We reject this contention. Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir.), cert. denied, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540.

It is to be noted that the Court did not rely on any provision of State statute law similar in content and substance to the language of 5 U.S.C. Sec. 702, Administrative Procedure Act, in arriving at the result reached. Inasmuch as the Court did not rely on any provision of statute, Federal or State, giving an "aggrieved" party the right of judicial review of administrative action, it seems difficult to escape the conclusion that the holding of the Court constituted in effect a judicial reversal of and departure from the long-standing rule that standing to sue to review the exercise of administrative discretion in route location must be based on a showing that property owned by the litigant is being taken or is directly affected by reason of being situated immediately adjacent to the designated route.

D. C. Federation of Civic Associations, Inc. v. Airis, 391 F.2d 478 (C.C.A.D.C., 1968), although not directly applicable, would seem in practical effect to arrive at the same result. In this case suit was brought to restrain the Director of the Department of Highways and Traffic of the District of Columbia, the Commissioners of the District of Columbia, the members of the National Capital Planning Commission, the Federal Highway Administrator, and various other Federal and District officials and agencies, from constructing four highway projects known as the North Central Freeway, the East Leg, the Three Sisters Bridge, and the Missouri Avenue Expressway. It was alleged that planning and construction was in violation of certain procedural provisions of Title 7 of the District of Columbia Code. The Court of Appeals for the District of Columbia did not squarely pass on the standing of plaintiffs to sue. In lieu thereof, it disposed of the matter by footnote in the following language:

> The appellants are comprised of individual District of Columbia taxpayers, individual landowners affected by the challenged highways, park users affected by the highways, the Democratic Central Committee for the District of Columbia, and 16 different civic associations claiming to represent over 200,000 citizens of the District of Columbia. (Underscoring supplied.)

It seems apparent from such footnote, that the Court, at least sub silentio, adopted the view that citizens of the District of Columbia whose properties were not being taken or directly affected by the highway projects in question had standing to bring suit for injunctive relief. No mention was made of the Administrative Procedure Act.

DECISIONS OF THE SUPREME COURT OF THE
UNITED STATES ON STANDING TO SUE

Because the foregoing Federal decisions might properly be said to raise more questions than they answer, an examination of other case law relating to standing to sue is in order. The leading case in the Supreme Court of the United States is Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078. Although not decided until 1923, Frothingham was a case of first impression. In this case an injunction proceeding was brought by plaintiff in her capacity as a taxpayer of the United States, to enjoin the Secretary of the

Treasury, the Surgeon General, and certain other Federal governmental officials, from enforcing the so-called Maternity Act, 42 Stat. 224, alleging that the Act was unconstitutional as in violation of the Tenth Amendment, and on other grounds. In holding that plaintiff's capacity as a taxpayer of the United States did not give her standing to sue, the Supreme Court stated:

> The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed by this Court. In cases where it was presented, the question has either been allowed to pass sub **silentio** or the determination is expressly withheld. --- If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention. ... The party ... must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some definite way in common with the people generally.

It may be observed that the broad rule enunciated in Frothingham was narrowed by the holding in Flast v. Cohen, 392 U.S. 883, 88 S.Ct. 1942, -- L.Ed.2d -- (1968). In this case plaintiffs brought suit to enjoin the expenditure of Federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965, 79 Stat. 27. The gravamen of the complaint was that Federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and that such expenditures were in contravention of the Establishment and Free Exercise clauses of the First Amendment. The complaint alleged that the seven plaintiffs had as a common attribute that "each pay income taxes of the United States." The Court stated that "it is clear from the complaint that the appellants were resting their standing to maintain the action solely on their standing as federal taxpayers." The Court stated at the outset of its opinion, speaking through Chief Justice Warren:

> In **Frothingham** v. Mellon --- this Court ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. That ruling has stood for 45 years as an impenetrable barrier to suits against acts of Congress brought by individuals who can assert only the interest of federal taxpayers. In this case, we must decide whether the Frothingham barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise clauses of the First Amendment.

In holding that the plaintiffs had standing to sue the Court stated:

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayers must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, Section 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. -- Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, Sec. 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. --- The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today.

This case is the latest expression of the Supreme Court of the United States on the matter of standing to sue. Although it cannot be said to yield any precise and useful instruction on the specific question whether status as a taxpayer and citizen of the community affected by route location gives standing to sue to review the actions of administrative officials, it is adverted to for purposes of clarification of the broad rule enunciated in **Frothingham**.

FEDERAL CASES DEALING WITH THE ADMINISTRATIVE PROCEDURE ACT

We turn next to cases dealing with the provisions of the Administrative Procedure Act, which as before indicated, grants the right of judicial review to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." The results in these cases are largely inconclusive as far as the question under consideration is concerned. For example, in Kansas City Power & Light Company v. McKay, 225 F. 2d 924 (C.C.A. D.C., 1955), the Court held that

the above-quoted provisions of the Administrative Procedure Act did not give private electric power companies standing to bring suit to enjoin Federal officers and agencies from carrying out Federally-supported power programs, because the injury alleged was essentially that of competition, and such injury did not constitute a "legal wrong" within the meaning of those words as used in the Administrative Procedure Act. Citing and following Kansas City Power, supra, the Court in Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency, 310 F.2d 99 (C.C.A. 7, 1962), held that the Administrative Procedure Act did not give standing to sue to plaintiffs seeking to enjoin the change of location of an urban renewal program from the area in which they lived to another site. Similarly in Green Street Association v. Daley, 373 F.2d 1 (C.C.A. 7, 1967), the Court citing Harrison-Halsted, supra, stated:

> As has already been stated, we held there that neither section 105 (d) of the Housing Act nor section 10 of the Administrative Procedure Act provides the basis for a federal right to judicial review of an urban renewal plan. We see no reason to re-examine our position in that case.

However, cf. the statement of the Supreme Court of the United States in Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1966), where in commenting on the Administrative Procedure Act the Court said:

> The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation.

REVIEW AND CONCLUSION

It would seem that the case law to date gives no clear indication of standards which may be relied on to determine standing to sue to review route location. What conclusions can then be drawn from the present unsettled state of the case law on the subject matter under review?

Insofar as the Administrative Procedure Act is concerned it would appear that the key questions are the meanings of the phrases "legal wrong" and "adversely affected or aggrieved." Has a taxpayer and citizen of the community affected by route location, whose own property is neither being taken nor lies along the designated route location, suffered "legal wrong" by reason of an abuse of administrative discretion in determining the particular route location? No case squarely passes on this question. The body of case law which has arisen construing 5 U.S.C. Sec. 702, gives no clear indication of the full import of this phrase or the strictures or limits to be imposed thereon. It is submitted that it seems at least arguable that the scope of the phrase "legal wrong" should be limited to comprehend only the invasion of a protected property right.[1] Pursuing this argument to its conclusion, it would appear that in future actions of this kind it might well be contended by counsel for highway departments that unless a party to the action could establish that the route location attacked would cause direct injury, however slight, to property or rights in property owned by the litigant, that he had made no showing of having suffered a "legal wrong" within the meaning of that pharase as used in the Act and, therefore, that he did not have standing to sue.

The meaning of the phrase "adversely affected or aggrieved" has, however, been passed on and used as the basis of decision. Both Scenic Hudson and Road Review League are based on findings that plaintiffs, whose properties were not shown to have been directly affected in either case by the administrative action taken, were "aggrieved" parties within the meaning of that word as used in both the Federal Power Act and the Administrative Procedure Act. One cannot escape the conclusion that a very strong argument can be made that these cases stand for the proposition that mere status as a taxpayer and citizen of a community affected by route location is, or may be, sufficient to bring an individual within the meaning of the words "person -- adversely affected or aggrieved by agency action." Whether this is sound law and will be followed by other courts is, of course as yet, a matter of conjecture. It is significant that the Supreme Court of the United States has not yet given clear sanction to such construction of the Act. Although no established legal principle would seem clearly to inhibit such construction of the Act, it is submitted that in the event of a multiplicity of suits and serious interference with highway planning and construction, second thoughts may be in order. It seems certainly arguable that the Congress had no intention of opening the door to vexatious litigation that would serve no useful purpose and in many instances would impede needed highway construction, and that the words "person --- adversely affected or aggrieved," as used by the Congress, might well have been intended to mean and have reference only to those persons who are able to make showing of injury to property or interests in property owned by them. It must be conceded, however, that the present status of the case law as represented by Scenic Hudson and Road Review League appears to be otherwise, and that the decisions in these cases may portend a judicial trend which will be followed.

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[1] In support of such construction see Kansas City Power & Light Co. v. McKay, supra; Duba v. Schuetzle, 303 F.2d 570 (C.C.A. 8, 1962); Pennsylvania R.R. Co. v. Dillon, 335 F.2d 292 (C.C.A. D.C., 1964); Braude v. Wirtz, 350 F.2d 702 (C.C.A. 9, 1965); Sapp v. Hardy, 204 F. Supp. 602 (D.C. Del., 1962); Northern States Power Co. v. Rural Electrification Admin, 248 F. Supp. 616 (D.C. Minn., 1965); Paducah Junior College v. Secretary of Health, Education and Welfare, 255 F.Supp. 147 (D.C. W.D. Ky., 1966); Los Angeles Customs & Freight Brokers Ass'n v. Johnson, 277 F.Supp. 525 (D.C. Cal., 1967).

The precise ground of the holding in Nashville seems most obscure. As previously pointed out, neither the Administrative Procedure Act nor any similar State statute was involved or relied upon in the result arrived at by the Court. It seems necessary to read Nashville as either sui generis, for reasons not spelled out in the opinion (such as the prevention of racial discrimination in Federal-aid programs), or as a judicial extension and liberalization, without regard to statutory authorization, of previously well-established rules governing standing to sue to review exercise of administrative discretion in determining route location.

Finally, although it must be emphasized that the case law discussed herein is scanty, the observation might be ventured that a climate of opinion may be developing which holds to the view that in our complex urban and increasingly megalipolitan civilization the matter of route location is of such widespread concern that it has become a community affair in which the many are entitled to at least partial participation. A world-renowned statesman once said that "war is too important to be left to generals." Perhaps route location is destined no longer to be regarded as being properly left to the more or less untrammeled discretion of highway administrators, engineers, right-of-way specialists, and other recognized and knowledgeable experts in the field.

Indicative of this attitude is the recently adopted double hearing procedure, prescribed and required by the Bureau of Public Roads in PPM 20-8, appearing in the Federal Register, Vol. 34, No. 12, January 17, 1969, at pp. 728-730. Such procedure, of course, accords the general public its say with respect to both location and design. This is certainly a departure from the days when such matters were within the virtually exclusive province of highway department personnel. Hopefully, the double hearing procedure will serve to severely curtail actions to review administrative discretion; but, of course, it cannot as a matter of law prevent or preclude them.

Finally, it must be made clear that this paper is not submitted as a definitive statement of the law of standing to sue to review the exercise of administrative discretion in route location. It is too early for that, as the cases indicating a departure from the old rule are few in number. Although in our opinion the basis of the holdings in Scenic Hudson and Road Review League are quite clear, in our further opinion the basis of the holding in Nashville is not. However, this much can be said with reasonable assurance: (a) There now exists authority for employing the Administrative Procedure Act to secure review by persons who would have no standing to sue under the old rules; (b) there now exists what appears to be authority for according such persons standing to sue without regard to authorization by statute law.

If judicial review of administrative discretion in route location, instigated at the hands of persons whose properties are not immediately and directly affected, may be expected to increase, it is self-evident that an inevitable by-product would be compounded difficulties in highway planning and construction. Although it is hoped that such will not be the case, particularly in the light of the double hearing procedure, it is suggested that it is of cardinal importance that highway administrators and their legal counsel be cognizant of the problems raised and the potentials created by the decisions discussed herein. In the light of the holdings in Scenic Hudson, Road Review League, and Nashville, it seems no overstatement to suggest that the rules formerly governing the right of review of administrative discretion in determining route location may be moving in a new direction with consequences of profound practical import.

APPLICATION

The foregoing commentary should prove helpful to state highway officials in understanding changes that are occurring which challenge formerly well-established rules concerning standing to sue to secure judicial review of the exercise of administrative discretion in route location. All affected highway officials should have a thorough understanding of the Federal cases discussed. The highway planning process, where found deficient in ways that could result in court cases challenging the highway official's administrative discretion of route location, should be reviewed and adjusted to assure compliance with all statutory and regulatory requirements.