

Regular Meeting

THE LEAWOOD CITY COUNCIL

January 3, 2000

Minutes Summary

Audio Tape No. 474

The City Council of the City of Leawood, Kansas, met in regular session in the Council Chamber, 4800 Town Center Drive, at 7:00 p.m., Monday, January 3, 2000. Mayor Peggy J. Dunn presided.

Councilmembers present: Adam Bold, Gary L. Bussing, Jim Rawlings, Patrick L. Dunn, Shelby Story, Mike Gill, Louis Rasmussen, and James E. Taylor, Sr.

Staff present: Richard J. Garofano, City Administrator; Julie Hakan, Director of Human Resources; Sarah Hilton, Administrative Services Manager; Sid Mitchell, Chief of Police; Ben C. Florance, Fire Chief; Joe Johnson, Public Works Director; Diane Binckley, Planning Services Administrator; Kathy Rogers, Finance Director; Chris Claxton, Parks & Recreation Director; Martha Heizer, City Clerk; and Patricia A. Bennett, City Attorney.

EXECUTIVE SESSION. On motion and duly seconded, Council voted unanimously to convene in executive session until 7:30 P.M. to discuss land acquisition.

7:30 P.M. PLEDGE OF ALLEGIANCE – led by Mayor Dunn.

APPROVAL OF AGENDA

The agenda was approved unanimously on motion of Bold, seconded by Gill, after a change in the order of the end of New Business: 1) on return to regular session following a recess for an executive session re litigation, have a discussion about holding a work session regarding Fire Station No. 3; 2) then schedule a work session regarding goal setting; 3) then add the scheduling of an executive session to be held at the end of the meeting regarding a personnel matter.

CITIZEN COMMENTS. None.

CONSENT AGENDA. One item was removed for further discussion. The following were approved unanimously on motion of Gill, seconded by Taylor:

1. Golf Course Committee report (minutes) on their December 13, 1999 meeting;
2. Parks & Recreation Advisory Board report (minutes) on their December 14, 1999 meeting;

3. Public Works Committee report (minutes) on their December 15, 1999 meeting;
4. Assignment to the Public Works Committee to select a design consultant for intersection improvements, 119th & Mission Rd.

Minutes of the December 6, 1999 Council meeting. Mayor Dunn said on page six, about halfway down, the word “comfortable” should be changed to “uncomfortable.” The words “in that form” should be added after “...sending it to the Plan Commission.” The Mayor’s complete statement should read, “Mayor Dunn said she agreed with not debating it twice, but felt that since the ordinance was drafted in accordance with Council’s direction and if Council was uncomfortable with it, should they be sending it to the Plan Commission in that form.” On motion of Gill, seconded by Story, Council unanimously approved the minutes with the correction and addition.

MAYOR’S REPORT. Mayor Dunn said the Police and Fire Departments received a holiday donation of \$1,520.00 from The Cloisters Homes Association in appreciation of the fine services both departments rendered residents. She appreciated their generosity and was certain the money would be put to very good use.

Mayor Dunn said the merger proceedings between Western Resources and Kansas City Power & Light had been terminated due to Western Resources’ low stock price. She said the City had entered into a contract with attorney Ed Peterson to represent the City, to make sure residents received fair rates from Kansas City Power & Light. A copy of Mr. Peterson’s memorandum to her regarding the determinations would be distributed to Councilmembers.

OLD BUSINESS

Reaffirmation of denial of Nextel Communications’ application for additional antennae on cell tower at approximately Lee Blvd. & Mission Rd. Motion from Mr. Rasmussen, second from Mr. Taylor, to reaffirm the denial.

Scott Beeler, attorney for Nextel, said that at the last Council meeting, he delivered the expert report which Nextel, back on October 18th, had proffered its willingness to provide, to provide some opinions to the Council with regard to the issue of slim line antennae and their functionality for the Nextel system. Mr. Beeler said the expert took longer than expected to complete the report but did that officially on the 20th of December, the same night the City Council had a meeting. He received it late that afternoon about 4:00 and, ultimately, there was a motion to continue so that everyone would have the opportunity to read and digest the report.

Mr. Beeler said he took the liberty, due to some questions that had arisen over the course of several meetings, of putting together a memo which he delivered to be placed in Council packets last Thursday, December 30th. He understood, due to staff illness, that the memo didn’t get into Council packets, but understood it was faxed to Council today. Mr. Beeler had set forth a chronological, factual background as to what had occurred and how things had led to tonight’s meeting.

Mr. Beeler said that if Nextel was required to use slim line antennae, the result would be a 40% reduction in traffic capacity. Also, he said a two port diversity combiner didn't provide the desired reliability and further, without the requested separation between the diversity antennae, reliability was further degraded. He didn't set that percentage out, but he had talked to people at Nextel and it meant they would have about a 60 to 80% degradation of service. Mr. Beeler submitted that any reasonable person would determine that the site was not functional for Nextel in that event. He said that was un-controverted evidence. Nextel offered it to Council and now so did the independent engineer.

Mr. Beeler said the City Attorney had asked him questions with regard to competitive disadvantage, if there were any cases on that point, and he agreed to provide Ms. Bennett some case authority and did so in the memo. He said other comments had been made about the public's interest in the application. In that regard, it was clear that issues raised at meetings were issues between the applicant and the Council. The public hadn't appeared on the application, ever. There had been no opposition to it. He thought the most important part of his memo to Council was in the last several pages addressing the Telecommunications Act, the Act stating that government agencies should recognize that telecommunications providers didn't all use the same technology. In fact, there were special provisions in the Act that specifically referred to carriers like Nextel. There were separate licensing provisions which allowed them to become competitive in the digital and cellular marketplace. At times in the past Nextel was simply a dispatch carrier. They weren't today – the law had changed allowing them to carry a cellular or digital signal in combination with their dispatch signal. Both were covered under the Telecommunications Act and it was their requirement with respect to their technology that they have a tripod array of antennae to have the necessary coverage. Mr. Beeler said those were the facts, and it wasn't that Nextel didn't want to listen to the City or didn't want to do things in an aesthetic way, or something Council deemed aesthetic, it was an engineering requirement for them and there was an independent report that now said that.

Mr. Beeler requested that the Council substitute a motion for reconsideration for the motion to reaffirm denial and reconsider the application, either tonight or at the next Council meeting, and grant the special use permit since the question asked had been answered.

Mr. Beeler said that at the last Council meeting he had asked that certain records be provided to him which in large part were the proposed findings before the Council and the subject of the motion on the floor. He said he had not been given the records. He was provided a packet that had some exhibits that was woefully incomplete with regard to the record before the Council, and only received that on December 29th. Despite his informal request, his more formal request and official public records request, he was advised that he wouldn't be given a copy of the proposed findings. Mr. Beeler objected and suggested that because the Council was acting as a quasi judicial body, if he didn't have the opportunity to review the findings before Council acted, he was, in effect, being denied a due process right, as well as a right of confrontation, and Council was placing him in a position of not being able to make any meaningful objection to whatever the findings said because Council would have already allegedly adopted them before he could see them.

Mayor Dunn asked Ms. Bennett to respond to Mr. Beeler's objection. Ms. Bennett said that she and Mr. Beeler had discussed the matter. The document was originally prepared for Council by counsel, Steve Horner, for Council's review and consideration under the Telecommunications Act. While she appreciated Mr. Beeler's concerns, she said his client was given all the due process necessary, and maybe even more so, when they originally had the hearing before the Council some time ago. She said Nextel had been granted continuances many times.

Mr. Bold said he would vote against Mr. Rasmussen's motion. He said a lot of effort went into putting together a policy or ordinance with regard to where cellular or telecommunications towers could be located, an effort to try to keep the towers in commercial areas, out of residential neighborhoods and in the least obtrusive places in the City. That narrowed it down to a very few and select number of spots in the City and the site near the City Park entrance was one of the spots. He said no matter what kind of antennae were used, the cellular tower wasn't a good-looking structure. People were either going to notice there was a tower or wouldn't notice. He said he could speak from experience about the tower in his ward at 135th and Nall - he noticed it at first but afterwards drove by and didn't even notice it was there. He felt Nextel had done an adequate job of demonstrating their need for the kind of antennae they proposed.

Mr. Bussing said he would also oppose Mr. Rasmussen's motion. He found Mr. Beeler's memorandum to Council and his summary of that memorandum compelling. He recalled that the original question was if the original slim line antennae would be feasible. It seemed to him that Mr. Beeler and Nextel had answered that question - it was not feasible without a significant degradation of service, rendering them uncompetitive. He said Leawood had worked very hard to develop an ordinance that would essentially require carriers to co-locate on poles and, again, Nextel had attempted to comply with that ordinance. He thought that common sense said that a cell tower located in a manure pit between I-435 and a sewer plant wasn't a particularly attractive structure and there wasn't a better place along the highway for it. He believed, as Mr. Bold said, it would soon become invisible. He was uncomfortable with what he understood the concept to be - denying the applicant because of the appearance of the structure and the antennae. He said the idea of a denial based on appearance seemed to be rather arbitrary to the individual eye.

Mr. Rasmussen said there had been demonstrations of delay since the Council's September 27, 1999 denial of Nextel's request for a special use permit. He said Council once again experienced getting a document either at the Council table or on their fax machines, but not in their Council packets. He said that the public had had an opportunity to be heard. The document (proposed findings) before them was very clear. The City Council had denied the special use permit. He said that all that was before them was a reaffirmation of the denial. Procedure dictated that Council had to consider findings and an experienced attorney had prepared them. He respected his fellow Councilmembers' opinions, but he had to express his opinion as a Councilman from Ward 2 that contrary to a statement made, the cell tower was not in a manure pile, but at the entrance to the City Park.

Mr. Dunn said he voted for the special use permit in the first place so his vote tonight would be consistent with that. He said the tower wasn't at the entrance to the park, it was in the middle of the park, the place Council told SWB to put the tower and

that was why he voted for the application in the first place. He was confused about what was going on and thought a motion for reconsideration was in order. If that required an additional public hearing, then that was appropriate. He said he had been present for all the hearings and the only application for antennae he had seen any public appear on was the application for antennae in the middle of the Saddle and Sirloin property. He felt the Council needed to proceed with their vote.

Mr. Taylor said he would vote in favor of Mr. Rasmussen's motion. He voted against the antennae at that location, and felt the aesthetic value of the drive into the entrance of the park, as well as the one on I-435, was decayed by the tower. He spoke as one trained in design; he felt it was a poor location and poor design for the area.

Mayor Dunn asked Mr. Beeler about the height of the pole and distance for slim line technology, etc. She wondered if the pole was increased in height by 20 feet, would slim line work. Mr. Beeler said that was outside his expertise. Mr. Beeler suspected it would have to be 150 feet. He said he felt relatively comfortable from discussions and reading the report that 20 feet would not provide the necessary separation to put the number of antennae on the pole that they would otherwise have in the 3-arm array.

Mr. Gill said he voted for the denial last time and also supported the additional report. He wanted to review the reasons he had then and see where they stood now with the report. The first reason he had was there were other locations available in the general vicinity, perhaps in Missouri, perhaps in another municipality, and the City Park location would service areas beyond Leawood boundaries. He believed the record indicated that there had actually been some inquiry made of at least one property owner in Kansas City, Missouri for the possibility of putting antennae at that location. The report didn't address the feasibility or the availability of other locations. Mayor Dunn agreed that that was beyond the scope of the report.

Mr. Gill's recollection from the last meeting was that the slim line would work, but didn't afford the desired capacity, and would probably require additional locations. The report addressed that point and a portion of Mr. Beeler's memo stated that "this configuration, which is the slim line, only allows 14 channels per sector unless multiple antennae are used on each sector." That would defeat the purpose of the slim line antennae. Mr. Gill interpreted that to mean there could be multi-slim line antennae on a pole, a sector, and achieve the same desired effects. Mr. Gill said regardless of how the matter came out, he would clearly support slim line antennae at the park location. He would probably vote for multi-slim line antennae depending on their physical appearances and would certainly consider raising the height of the pole, although he might not be inclined to do so.

The key language in the report Mr. Beeler had highlighted was, "this results in a 40% reduction in traffic capacity." Mr. Gill interpreted the report to say when it said "this" it meant if there weren't multiple slim line antennae on the pole. In other words, if there was just a single set of slim line antennae on the pole, then there would be a 40% reduction in traffic capacity. It didn't say slim line wouldn't work; it said there was a 40% degradation and, obviously, if the larger antennae were there, presumably that degradation wouldn't occur.

What Mr. Gill didn't get from the report was indication that Nextel wouldn't have functionality. To him capacity was different than functionality. He thought the report said there were 40% fewer calls being processed or handled but he didn't see that Nextel

wouldn't be able to process calls, nor did he see any comparison between the processing number of calls that Nextel competitors had in the general vicinity or any numeric correlation to the competitive advantage or disadvantage that would be achieved.

Mr. Beeler said that the sector language was, indeed, the sector of the pole involved. He referred to the fourth line down in the quoted language, and said it was indicating that "this configuration" meant the slim line or slim profile configuration, "allows only 14 channels per sector." No matter how you lined them up on the pole, you were limited to the 14. That was where the conclusion of the reduced coverage of reliability and capacity came from.

Mr. Gill asked if a dual sector set of slim line antennae would make a difference. Mr. Beeler said it made no difference. Mr. Gill said there was only one set of antennae on the pole now and it was designed to carry at least three or four sets. Why wouldn't it work? Mr. Beeler said the pole size and its base controlled how many sets could be on it, its structural capacity and height. As Mr. Beeler pointed out in his memo, it was located in a spot grossly lower in elevation than the highway itself, meaning the pole didn't stand up nearly as high as most poles would in any event, and the only way it would work was to extend it up to whenever the structure couldn't hold it. It might be the size pole to put four on, but the likelihood of seeing that, unless it was someone who was truly filling a very small need for something very nearby, it wasn't going to happen.

Mr. Gill interpreted the report as saying if you could do multiple antennae, you would solve the capacity issue, but he heard Mr. Beeler say multiple antennae weren't feasible on the pole. Mr. Beeler said not for Nextel in a slim line profile. Mr. Gill said the impact of using slim line with a single set of antennae as opposed to multiple was a 40% degradation in traffic capacity. Mr. Beeler disagreed with that statement. He believed they were stating that it didn't matter how many, "this configuration (meaning the slim line antennae) would only allow 14 channels per sector, unless multiple antennae are used on each sector." He suggested you must extend out away from the pole within the sector. You couldn't drop down or you dropped out of the sector with separation.

Mr. Gill said the third point was the appearance. To Mr. Gill, the aesthetics were different between a slim line set of antennae circling a pole and the big tripods with big funny-shaped looking things coming off of them. He said clearly the pole itself had an appearance and even if nothing was placed on the pole, it was going to be seen, but the antennae were what stood out to him and he thought aesthetics was important. He said Council had tried and would continue to try to stress aesthetics in the community.

Mr. Gill said that Southwestern Bell was required to utilize the slim line and he would support the slim line. He said the issue he had to come to grips with was the issue of a 40% degradation coupled with the reliability issues associated with the hand-held paging feature. Mr. Gill asked if it was fair to say a supplemental set of antennae at a location, perhaps a building on the Kansas City, Missouri side, that had better elevation features than the pole under discussion, could solve that 40% capacity issue and hand-held paging reliability issue. Mr. Beeler said it wasn't as simple as Mr. Gill was making it seem. He said you could have another full-blown site a short distance away and possibly pick up what you were lacking in the City Park site. However, with regard to those matters, particularly on the Missouri side of the state line, he went back and read the actual transcribed text of the meeting where that was discussed and commentary was made by Mr. Gill, after his vote, with respect to the lack perhaps of an adjoining or

neighboring community's cooperation. Mr. Beeler said Nextel had approached the bank facility that was discussed at the meeting about trying to go on that facility and was refused entirely. That was noted in the propagation study provided to the Council and the Plan Commission, as well as all the other sites that they had approached. He said there were no lingering questions with regard to other available sites and there was no application to Kansas City, Missouri, for them to deny because there was no host for that site. The only other spot, just on the other side of the line, discussed at that meeting, was too far to the south to meet the search ring requirement. Again, he said there was no other available site and that was the only information that met the search ring requirements of Nextel on the I-435 corridor.

Mr. Rasmussen asked Mr. Beeler if he was saying that Nextel had contacted other property owners around the United Missouri Bank Building and was turned down. Mr. Beeler said he provided the City with a list of the property owners who were contacted and, as Mr. Gill indicated, the one with elevation, the United Missouri Bank Building, a supportive structure, was not interested. If Mr. Rasmussen was asking him if they contacted someone on the grounds next to that building, if it wasn't on the list, the answer might be no. Those that met the criteria were listed and the answers from those landowners were provided to the Council.

Mr. Rasmussen said he didn't recall seeing any other property owner mentioned except United Missouri Bank. Mr. Beeler said he read the transcript today and the property owner to the south was mentioned in the transcript as not meeting the search ring requirement. Mr. Rasmussen asked who that property owner was; Mr. Beeler said he could look it up. Mr. Beeler said, again, that they had submitted a list, one of the City's ordinance requirements, to the Plan Commission having to do with propagation study information, not towers. He didn't know if this was an appropriate time and it might take him awhile to pull the information from the transcript, but if it was important, he could try to do it.

Mayor Dunn said if they were talking about the bank on State Line Rd. at approximately 108th, that was Bank of America. Mr. Rasmussen said he knew the property owners adjacent to the United Missouri Bank Building who were not approached and he was willing to stand by that. Mayor Dunn thought Mr. Rasmussen was referring to a different bank than she was referring to. Mr. Rasmussen said he wasn't talking about banks. Mr. Bold thought Mr. Beeler was referring to the bank where EBT was. Mayor Dunn said that the one on the hill was certainly a higher elevation. Mr. Beeler thought that could be the property that they referenced as too far to the south. He didn't want to state that information without knowing specifically.

Mr. Gill asked Ms. Bennett to verify that Council would be reaffirming a set of written findings formally summarizing the basis of the conclusions. Ms. Bennett said that should be clarified in a motion because they were subject to change if the Council wanted to change them. Mayor Dunn said they were on page five with a list of 11 conclusions and she assumed they were what would be read into the record to be part of the motion. Ms. Bennett said pages five and six. Mayor Dunn asked if all of it would be made part of the record; Ms. Bennett said she would check with Mr. Horner. Mayor Dunn suggested that while they were waiting on Ms. Bennett, that Council read all 11 conclusions to see if there would be any changes. Ms. Bennett said that in speaking with Mr. Horner, apparently the cover memo that came out some time ago indicated that

Council was to adopt the entire packet. Mayor Dunn asked Ms. Bennett if Council could refer to them versus reading them as part of the motion. Ms. Bennett said yes.

Mayor Dunn asked Mr. Rasmussen if he would incorporate the entire findings into his motion to reaffirm the denial. He said yes, and repeated his motion to reaffirm the denial of Nextel Communications' application for additional antennae on cell tower at approximately Lee Boulevard and Mission Road, including all of the background material that had been presented to them. Mr. Taylor, who seconded the motion, said that met with his approval.

Mr. Gill asked, now that they had the document in a motion form that they were going to act on, if it was an appropriate time to allow the applicant to review it. Ms. Bennett said that could be done and she would give Mr. Beeler her copy if the Council was prepared to waive the privilege. Mr. Gill asked if that was a waiver issue when they voted on the matter. Ms. Bennett said the motion had been made and was part of the public record. Mr. Gill's personal preference was to allow the applicant to read it. Mayor Dunn said there would be a delay on the vote, as it would take Mr. Beeler a while to review it. She asked if it was the Council's pleasure to delay the action on the motion for however long it took Mr. Beeler. She elicited approval from Council to allow Mr. Beeler to review the materials and suggested he do so while Council continued with the agenda. Mr. Beeler said he would do so, but he wouldn't waive his objection. He couldn't possibly compare it to the record in the present environment. He hadn't had an opportunity to address it; it had been moved and seconded and discussed before he had even read it. Mayor Dunn said she was certain he could make comments before the vote after he had read it.

(Discussion continued after AMF Ranchmart Lanes.)

Request for exemption from smoking ordinance – AMF Ranchmart Lanes. Don Fazio, AMF district manager, and Martha Bredehoeft, AMF Lanes manager, said they were asking for an exemption from the smoking ordinance because of financial hardship. Mr. Fazio said it would be very difficult for them to segregate areas with barriers in a bowling facility and felt it would hurt the enjoyment of the patrons. They did segregate areas without barriers; they had signs indicating areas of non-smoking and smoking. They had adjusted their air handlers to bring more fresh air into the facility to combat the smoke. They tested different times throughout the week when they didn't allow smoking in the entire facility, for instance, in the mornings on Saturdays when they had their youth bowling leagues, and Sunday afternoons when more families were in the facility.

Mayor Dunn said that the Council took action on the case at the last Council meeting, denying the request for exemption. The Council hadn't received any information they had requested, and for that reason, denied the request. She said that hearing the case and discussing it again would take a rescission of their prior action. Mr. Dunn asked Mr. Fazio who prepared the estimate and drawings. He said they had a facilities expert from AMF prepare them.

Mr. Taylor took exception to the estimate - 1) he felt the estimate for the HVAC was too high for putting in some rooftop units to take care of the filtration of the area; his estimate was \$20,000 at the most; 2) the electrical should be about \$1,500 total instead of \$3,500. Additionally, a counter that was some \$12,000 should be somewhere around

\$4,000; 3) fire protection should be around \$1,200 to \$1,500, not \$7,500. Mr. Taylor didn't see the hardship when there were inflated dollars. He strongly questioned the \$109,000 estimate; if 30% was taken off, the estimate was down to \$60,000 or \$65,000.

Mr. Rasmussen asked Mr. Cantrell of the Planning Department why the matter was on the agenda. Mr. Cantrell said it was Council's desire to go ahead and take Municipal Court action until they received additional, substantial information. Mr. Rasmussen asked if they had started Municipal Court action and Mr. Cantrell said proceedings were underway. Mr. Rasmussen asked Ms. Bennett what the function of the Municipal Court was. She said it was to determine whether or not there had been a violation of the smoking ordinance and, if so, to cite that and fine them appropriately. Mr. Rasmussen said essentially the Council made a decision, it was in another jurisdiction, but was now coming back to Council for a reconsideration. He asked what kind of a motion Council would make. Mayor Dunn said it was the Council's option to have a rescission. She did have similar questions herself and discussed it with Mr. Cantrell, and there was some confusion. Mr. Cantrell said Ms. Bredehoeft was under the impression that, based on one of their conversations, a continuance from the Council would be forthcoming. The continuance Mr. Cantrell referred to would be the continuance granted through Municipal Court. The Court would grant a continuance at least one time if the Governing Body was to rule on the matter. The Court would be waiting for a denial or an approval. If it was an approval, the case would be dismissed and dropped. If the Council denied the request, it would still proceed under the discretion of the Court and would be susceptible to action under them. Mr. Cantrell said this was at a time when Council didn't have all the relevant facts and information surrounding the applicant's request. He said they never had the cost, only a letter stating that AMF objected on grounds of financial hardship. He said staff requested more information several times for Council to take the matter into consideration, but didn't receive it in a timely manner.

Mr. Dunn said the issue should not simply be decided on procedural grounds. Council never intended the smoking ordinance to put people out of business. He said he had made the motion to deny the request for AMF's failure to provide any information in support of their request. He said the information now before the Council didn't give him any basis to reconsider that action because it appeared to be an estimate prepared by Mr. Fazio or someone who worked for him without the type of assurance that they were actual figures of what it was going to cost for repairs. He said the Council needed a review by some independent person of the smoking situation, what it would require and what changes would need to be made and their potential costs. Absent that, Mr. Dunn didn't see any basis to try to convince Council to reconsider their prior action.

Mr. Gill had a number of concerns. He believed the City had smoking ordinance prescribed signs and didn't feel AMF's were adequate. He said to put a sign up that said non-smokers and smokers welcome, when you had a smoking-type facility, didn't meet the City's ordinance and was flat out deceptive. A non-smoker who was being welcomed to the facility was going to have to live with second-hand smoke and many non-smokers wouldn't feel that to be a welcomed environment. At a minimum, the signs would have to be reconfigured so they talked about smokers being welcomed. Mr. Gill said in the situations where Council had granted exemptions, they had done so with hard, third-party cost data. He didn't consider in-house cost estimating, even though it might be good,

acceptable. They had done so with a stipulation that there was a meaningful separation between smoking and non-smoking areas. It appeared to Mr. Gill that in the upper level everyone was free to smoke and then on stepping down 2-3 steps into the bowling area, there was immediate proximity to the smoking area. He said the lounge appeared to be a somewhat segregated area. Mr. Gill said his point was where Council had granted exemptions, there had been genuine segregation of smoking and non-smoking and he would, as part of a proposal from AMF, want to see that, and he said they would have a lot of selling to do to sell him on the motion, that the concourse area was a smoking area and everything else down below the rail was non-smoking.

Mr. Dunn moved to deny the application for reconsideration of their prior action of denial and moved to deny on the basis that he saw no additional information that would lead him to reconsider that prior action. Seconded by Mr. Taylor. Mayor Dunn asked if his motion precluded third party additional information. Mr. Dunn said it didn't, that the applicant was free to return to Council at another time and make another request.

Mr. Gill assumed if the applicant was diligent in doing so and that message was communicated to the City Prosecutor that the Council was not taking a position one way or the other on the pending case, if the City Prosecutor felt that genuine efforts to return with a proposal to Council was the basis for a continuance, that would be within the province of the City Prosecutor. Mr. Dunn agreed.

Mr. Dunn's motion carried unanimously.

Reaffirmation of denial of Nextel Communications' application for additional antennae on cell tower at approximately Lee Blvd. & Mission Road. (continued) Mr.

Beeler said he scanned the materials the Council had given him. In the interest of time, and, again, when placed in the legal vernacular of proposed findings and conclusions, which was the format the document took, he objected to the document. He briefly read through each of the conclusions stated on page five and had, what he believed to be, meritorious objections to each and every one of them. He read the stipulations before the meeting and refreshed his recollection of those same stipulations that were applied to the Southwestern Bell wireless tower on page one of the findings. He said his client was Nextel Communications, not Southwestern Bell. He didn't know what was represented in their application or what bridges were perhaps burned and caused some ill feelings, but it wasn't Nextel's application. Mr. Beeler said there wasn't any stipulation that a subsequent special use permit applicant was required to use slim line antennae only. Yet, in the conclusions on page five, in paragraph one, it says "the application fails to meet the stipulations of the approval of the Southwestern Bell wireless tower as stated in City Resolution 1443." Mr. Beeler objected, saying that was not a true statement. More specifically, the proposed antennae didn't meet the stipulations that antennae on the tower had to be of slim line design. He objected as there was no such stipulation and that was not an accurate representation. He said he had similar objections to Nos. 1 through 11 of the document. For example, in No. 2, "the proposed TR antennae is inconsistent with the nature of the other antennae to be located on the tower." He said Council had only had one application and, as someone indicated this evening, Council had approved the tower for the possibility of four co-locations. He said that was simply an incorrect statement. He said counsel had indicated in No. 3 that it was detrimental to the surrounding properties and the City at large. Mr. Beeler said the evidence in the case was

devoid of any such representation. There had not been any objection made to the tower. Again, No. 4 stated, "the applicant failed to demonstrate that the proposed antennae design is absolutely necessary for it to provide its service." Mr. Beeler didn't know where that term came from, but it wasn't their discussion on October 18th or at any of the other meetings continued because of the independent expert's opinion not being before the Council and it had not been the discussion tonight. There was no requirement in the Telecommunications Act or in the City's ordinance that Nextel demonstrate that it was absolutely necessary. What was stated was it was reasonably necessary for Nextel to provide functional market service. When you reached down further into each one of the conclusions, you would see references to the Telecommunications Act. Mr. Beeler believed the Act had been misconstrued in the proposed findings. He said it seemed to indicate, and it made a statement, that Nextel was only trying to extend its coverage and wasn't trying to provide coverage to an area that didn't have it. He questioned if that made any sense. He asked if Council thought Nextel would be before them if they had adequate coverage on the I-435 corridor. He said they were here and showed in the propagation studies the maps and colors, they had a hole; they were dropping calls. They didn't have coverage and that was why he had indicated every time before Council when he reaffirmed his agreement not to bring up delay, at Mr. Gill's request, that he so stipulated, but time was of the essence because they had a hole and it was affecting their market coverage.

Mr. Beeler said there were several statements he was quite taken aback by, statements that Nextel representatives had agreed that there were other available sites. He trusted no one heard him say that. A statement in the conclusions or findings that Nextel had admitted there were other available sites was simply untrue and it was those objections that Mr. Beeler had, among many others, to the document.

Mayor Dunn stated the motion was a reaffirmation of denial and entering for the record the entire document of findings.

Mr. Bussing asked Ms. Bennett who the author of the document was that Mr. Beeler objected to; she said attorney Steve Horner was. Mr. Bussing asked if it would be appropriate to have Mr. Horner respond to criticism of the document. He thought Mr. Beeler had a compelling argument and wanted to hear the other side of the story.

Mr. Horner said Mr. Beeler's first objection was that City Resolution 1443 didn't specifically apply to Nextel, but, instead, applied to Southwestern Bell. He had discussed that with Mr. Beeler. He read a stipulation of Resolution No. 1443 regarding Southwestern Bell.

Mr. Rasmussen questioned the fact that Mr. Horner and Mr. Beeler had discussed the items before. Mr. Horner said they discussed the issue, regarding the resolution, and whether or not it applied to Nextel. The resolution said, "the applicant (Southwestern Bell for approval of the tower) is to provide a tower with slim line designed antennae similar to the existing tower located at 95th and Mission Road." Mr. Horner said it didn't specifically say future applicants also had to have slim line antennae and it didn't say future applicants couldn't have something else. What it did say was future applicants had to go before the Council for a specific special use permit, and the purpose for that was that the Council was greatly concerned over the approval of the tower that there would be a large antennae at the entrance of the park, creating a detrimental aesthetic view, and the Council specifically wanted to review all future applications of other antennae. Mr.

Horner wrote, "the application fails to meet the stipulation of the approval of Southwestern Bell wireless tower as stated in the City Resolution 1443. More specifically, the proposed antennae does not meet the stipulation that the antennae on the tower be of slim line design." Mr. Horner felt that was accurate. He said Mr. Beeler was taking another slant on it.

Mr. Bussing asked Mr. Horner if the ordinance required only that applicants go before the City Council and not that it didn't require slim line design. Mr. Bussing said it didn't say you had to, didn't say you didn't have to, but he thought Mr. Horner's statement was that the stipulation he referenced was that all future applicants had to go before the City Council and that was the only stipulation in that regard.

Mayor Dunn said she recalled that Council stipulated that Southwestern Bell had to have slim line antennae.

Mr. Gill asked Mr. Horner to again read the language of 1443. "The applicant is to provide a tower with slim line design antennae similar to the existing tower located at 95th and Mission Road." Mr. Gill asked if they were the applicant not just on the antennae but on the pole itself. Mr. Horner said yes. Mr. Gill asked when Council approved the pole on which Southwestern Bell and other antennae were to be located, was the pole to be designed for slim line antennae. Mr. Horner said that could be read into it.

Motion for reaffirmation of denial and the insertion of all the findings failed; Taylor, Rasmussen and Gill in favor; all others (5) opposed.

Mr. Bussing moved to rescind the previous denial and reconsider the application at a later date, seconded by Dunn. He wanted Mr. Beeler to have an opportunity to look at the material and respond to it, and Mr. Horner, if he chose to do so, and to somehow arrive at some consensus on what they were doing.

Mayor Dunn asked Mr. Beeler if the pole with slim line technology was extended in height, how high should it be and what would the separation requirements, etc., be. She wanted the answers at a future meeting.

Mr. Bussing's motion carried; Taylor and Rasmussen opposed, all others in favor.

Mr. Gill said there were two sets of facts he was keenly interested in - 1) wanted to explore the alternative of whatever was meant in the report about alternative set of slim line antennae, which was part of the Mayor's question; and 2) wanted information about other sites - that they had been contacted, what they were and why they wouldn't work, like St. Joseph, UMB, Nations Bank, Amoco service station. Mr. Beeler said he would be happy to talk with Mr. Gill on the phone regarding that. Mr. Gill said the Council needed that information as part of the record. Mr. Beeler said that was already part of the record, the sites, and if there were additional sites that Mr. Gill was particularly interested in he wanted to know what they were. He wanted to be sure he answered Mr. Gill's question. Mr. Gill said he would be interested in any building along I-435 that was higher than two stories until they got too far west or east to be of value, and any commercial structure north, south, east or west along that corridor. Mr. Beeler said he was not going to completely start over a site selection effort as they had hired people to do that and they presented all that information. From a time standpoint, that could be a suggestion that would put them back in an area they couldn't deal with. They were happy to provide the best good faith effort they could in the immediate vicinity and he thought

everyone knew what those specific sites were. Mr. Beeler said that they didn't have the time, money or the staff to address every physical property there was in Leawood or any City adjacent to it with regard to the application in the next two weeks. He said they couldn't do it, even if he wanted to. They would make their best faith effort to address sites they believed met the search ring criteria and structure criteria for the facility.

Mr. Taylor asked if Mr. Beeler could establish an elevation height comparison of the pole right now so many feet above I-435 to other sites, such as a building at I-435 and Roe, that being 60 to 80 feet above I-435. Mr. Beeler said if he could obtain that information, he would provide it.

Mayor Dunn told Mr. Beeler that in conversation with staff today, she found out that the Southwestern Bell pole was approved on December 23, 1998, so his application to coincide with the duration of that pole's special use permit would probably be for four years rather than five.

Ordinance No. 1839C relating to stormwater management. Mr. Gill wanted to be sure the ordinance would be applicable to any and all projects on a going-forward basis that had not already received their final approval, including stormwater issues. Ms. Bennett said the ordinance, itself, would take effect upon publication. As far as how it might impact current pending projects, she wanted to study that and discuss it with Council in executive session.

Mr. Gill said he understood it would be in full force and effect from the day of publication and maybe that was all they needed to say. It was his understanding if final approval of a project was to be given at a point in time following the effective date of the ordinance, that the ordinance was going to apply to it. Ms. Bennett, again, wanted an opportunity to look at it and speak to them in executive session.

Mr. Rasmussen said the Stormwater Management Committee tried to address that in Section 15-505 of the ordinance; there were serious concerns in the City, so he felt a definitive opinion from Ms. Bennett was needed. Mr. Rasmussen wasn't recommending delay of ordinance approval pending that definitive opinion. He said if there was no final action in terms of zoning, etc. under Section 15-503 interpretations, the ordinance was going to be applicable. He said that was why the Committee directed the ordinance to Ms. Bennett and now she was saying she wanted to take a good look at it.

On motion of Gill, seconded by Bussing, Council unanimously passed the ordinance on roll call vote.

Ordinance No. 1840C amending Section 13-103 of the Leawood City Code and adopting that publication known as "Public Improvement Construction Standards" prepared and published by the City of Leawood, January 2000. On motion of Taylor, seconded by Bold, Council unanimously passed the ordinance on roll call vote.

Ordinance No. 1841C amending Section 15-301 of the Leawood City Code and adopting that publication known as "Hydraulic Performance of Setback Curb Inlets" prepared by Dr. Bruce M. McEnroe and Reuben P. Wade, published by the Department of Civil Engineering, University of Kansas, July 1998. On motion of Dunn, seconded by Rawlings, Council unanimously passed the ordinance on roll call vote.

Ordinance No. 1842C amending Section 15-302 of the Leawood City Code and adopting Division V-Design Criteria, Section 5600 Storm Drainage Systems Facilities of the publication known as “Standard Specifications and Design Criteria” October 26, 1984, as amended through 1999, prepared and published by the Kansas City Metropolitan Chapter of the American Public Works Association. On motion of Dunn, seconded by Bussing, Council unanimously passed the ordinance on roll call vote.

Ordinance No. 1843C amending Section 15-303 of the Leawood City Code and adopting that publication known as “Protecting Water Quality, a Field Guide to Erosion, Sediment and Stormwater Best Management Practices for Development Sites in Missouri and Kansas” prepared and published by the St. Charles County Soil & Water Conservation District, and the Dam and Reservoir Safety Program, Division of Geology and Land Survey in the Missouri Department of Natural Resources, September 1998. On motion of Dunn, seconded by Taylor, Council unanimously passed the ordinance on roll call vote.

Ordinance No. 1844C amending Section 15-304 of the Leawood City Code and adopting the Division II-Construction and Material Specifications, Sewers, Section 2600, Storm, of the publication known as “Standard Specifications and Design Criteria” October 26, 1984, as amended through 1999, prepared and published by the Kansas City Metropolitan Chapter of the American Public Works Association. Motion by Bold to pass the ordinance, seconded by Bussing. Mr. Gill asked if Council, by adopting the publication, was adopting specifications that were tied to the frequency of the storm event. Mr. Johnson said the ordinance for Section 5600 design addressed that and talked about a 10-year event and design for a 100-year event for flood control. He said Section 2600 addressed a 10-year event for an enclosed concrete pipe system. Ordinance passed unanimously on roll call vote.

Discussion of collection and cost of subdivision deed restrictions. Jeff Cantrell of the Planning Department originally anticipated that such a project would cost the City as much as \$1,000 to complete, however, he recently learned from the County that the total cost could be as much as \$4,000. Mayor Dunn said that in light of new electronic availability of such records within the next 18 months, if the City had a pertinent matter before them that needed analysis and specific homes association deed restrictions were needed for that, staff could obtain those as needed versus spending \$4,000 now to get them all and have them outdated.

Mr. Rasmussen said everyone was interested in saving the money, but Councilmembers were asked to meet with homes associations on individual problems and the reason for that was sometimes the homes associations’ requirements were not readily available. If Mr. Rasmussen called Mr. Cantrell on a Monday asking for Leawood Homes Association deed restrictions, Mr. Cantrell said he could supply that information the next day for 50 cents a copy from the County.

Mr. Taylor asked Mr. Cantrell if he had talked to any of the presidents of the homes associations to see if they could readily provide copies of their restrictions. Mr. Cantrell said he had done that and received copies from some almost immediately, but others didn't even have one to their own homes association.

Mayor Dunn said Mr. Cantrell could manually get copies for a specific homes association and there would be cost for the electronic subscription, which he was led to believe would be substantially less than the \$4,000.

Motion made by Mr. Rasmussen to direct Mr. Cantrell to provide the City with the necessary deed restrictions at the least cost possible and within an 18-month period, seconded by Dunn. Motion carried unanimously.

NEW BUSINESS

Approval of Appropriation Ordinance No. 879. On motion of Gill, seconded by Taylor, Council unanimously passed the ordinance on roll call vote, except for Mr. Dunn who was not seated for the vote.

Councilmember Dunn returned to his seat.

Request for exemption from smoking ordinance – Cactus Grill. Mr. Gill recused himself since his firm was involved in representing the applicant; he left his Council seat. Attorney Joel Oster represented Ed Gieselman, owner of Cactus Grill. They were applying for two types of hardships – 1) initial startup cost and how much it would cost to come into compliance, and 2) the continual, year after year hardship as a result of complying with the smoking ordinance. Mr. Oster said they contacted Jay McConnell Construction to determine what it would take for Cactus Grill to come into compliance. Cactus Grill was a very small restaurant, was designed to utilize every space for table space so they could make a profit. The bar was located on the lower level and was next to a non-smoking section, and they obviously had smoking at the bar. In order to put a barrier between the 2 areas to bring the restaurant into compliance, 16 seats would have to be removed. The restaurant had 128 seats. Cactus Grill made about \$1.6-1.7 million yearly and they usually ran at capacity. They would average about \$180,000 in lost revenue yearly if the seats were removed. Jay McConnell gave them an estimate as to how much it would cost to bring the restaurant into compliance: \$65,000 to erect the barriers, \$5,000 for the wiring, \$17,000 for the ventilation unit on the top and \$17,000 for the ventilation unit and AC on the bottom. When they asked Mr. McConnell to prepare the estimate, he didn't go into great detail breaking out the costs; Mr. Oster knew Council liked hard numbers.

Mr. Gieselman said they had a smoking and non-smoking section and the smoking section was in the back of the restaurant so people didn't have to walk through smoking to go to the smoking section. Mr. Bold said that effectively they had done the best they could with the facility they had and at the time they built the restaurant it was in conformance with Leawood codes. Mr. Bold moved to grant the exemption, seconded by Bussing, with Council's standard stipulations for major reconstruction, remodeling, etc. Mr. Bold explained to Mr. Oster and Mr. Gieselman what stipulations were placed on previous restaurants granted exemptions. He said if Cactus Grill should engage in a major renovation of the restaurant, they would have to come into compliance with the

current code. Should there be a change in ownership of the restaurant, the new owners would have to bring the facility into compliance. If substantial changes were made to the HVAC system, they would have to comply with the current codes.

Mr. Story asked Mr. Cantrell to prepare a form listing the stipulations to give to applicants when they applied for an exemption because it sounded like those stipulations were going to be required of each applicant if they were granted the exemption. Applicants would then know in advance what requirements were going to be placed on them.

Mr. Dunn asked Mr. Cantrell if he had reviewed the information submitted to Council by Mr. Oster and Mr. Gieselman and asked if what they said would need to be done was consistent with Mr. Cantrell's knowledge of the restaurant in order for Cactus Grill to comply with the ordinance. Mr. Cantrell said he concurred with what they had submitted. Mr. Bold's motion carried unanimously.

Councilmember Gill returned to his seat.

Authorize interlocal agreement with Overland Park for the improvement of 151st St., Glenwood to Nall Ave. Mayor Dunn said she had talked with Mr. Johnson and understood Leawood would not be developing 151st Street into four lanes for 10-15 years, east of that area.

Mr. Taylor said he was under the impression they had improvements scheduled within the next five years on the CIP. He asked if that was where the funding from the Federal government was all set up. Mr. Johnson said it wasn't in the 2000-2004 CIP, but beyond that. Mr. Taylor was curious as to why 151st Street improvements were before Roe improvements. Mr. Johnson said they had secured in 2004 \$2.5 million in Federal funds for Roe from south of Tomahawk Creek bridge to 135th Street, but no Federal funding for 151st Street between this project and the eastern city limits. Mr. Johnson said the project went to about 400 feet east of Nall and included the intersection of Nall and 151st Street and 400 feet on either side. It continued west into Overland Park and there were \$3.2 million in Federal funds for the project, most of which was in Overland Park.

Mr. Bussing noted that one-half of the City's portion of the total cost was in easement costs and he asked if the City would have to purchase easements all the way down 151st Street. Mr. Johnson said the City wouldn't have to purchase the areas that had already been platted as dedicated right-of-way. In this case, because it was a Federal aid project, the City was required to do certain things and that was to hire an appraiser and go through that process.

On motion of Bold, seconded by Taylor, Council unanimously approved the agreement.

Approve correction to pipeline easement. Motion for approval from Rasmussen, seconded by Dunn. Mr. Johnson explained that in May 1997, the City granted an easement to KN Interstate Gas Transmission Co. to construct and maintain a pipeline located in the vicinity of Mission Rd. and 148th St. The name of the company had changed and Council needed to approve the correction to the easement for the name change. Nothing else had changed. Motion carried unanimously.

Recess for executive session re litigation. On motion of Dunn, seconded by Gill, Council voted unanimously to convene in executive session for a period not to exceed 15 minutes to discuss litigation.

9:55 P.M. Council convened in executive session, same members present, and returned to regular session at 10:10 P.M., same members present.

NEW TAPE NO. 475

A work session had been scheduled for January 10th to discuss the application for Fire Station No. 3 prior to Council's consideration of the application at the January 17th Council meeting. Ms. Bennett said that District Court recently asked for further briefing on the issue which led her to believe that a decision might not be forthcoming until March. She asked that the work session and consideration of the application be continued until such time as the District Court Judge rendered his decision. Mr. Gill so moved, seconded by Story. Mr. Dunn said he would vote in favor of the motion because he felt the issue should be continued until the Judge rendered his decision, but he was not in favor of a work session. The Mayor said that residents within 200 feet of the proposed Station would be notified of the continuance by certified mail and a statement of the continuance would be noted on the January 17th Council meeting agenda. Motion carried unanimously.

Schedule work session to discuss goal setting. On motion of Bussing, seconded by Gill, Council voted unanimously to have the work session January 10th at 7:30 P.M.

Schedule executive session. On motion of Bold, seconded by Story, Council voted to convene in executive session at the end of the meeting for a period not to exceed 25 minutes to discuss litigation and a personnel matter; Taylor opposed, all others in favor.

10:15 P.M. Council convened in executive session and returned to regular session at 11:00 P.M. There being no further business before the Council, the meeting was adjourned.

Minutes prepared by court reporter Kay Elder.

Martha Heizer, City Clerk