

Regular Meeting

THE LEAWOOD CITY COUNCIL

February 7, 2000

Minutes Summary

Audio Tape No. 477

The City Council of the City of Leawood, Kansas, met in regular session in the Council Chamber, 4800 Town Center Drive, at 7:30 p.m., Monday, February 7, 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; Sid Mitchell, Chief of Police; Joe Johnson, Public Works Director; Ben C. Florance, Fire Chief; Kathy Rogers, Finance Director; Chris Claxton, Director of Parks & Recreation; Mark Andrasik, Director of Information Services; Sarah Hilton, Administrative Services Manager; Diane Binckley, Planning Services Administrator; Martha Heizer, City Clerk; and Patricia A. Bennett, City Attorney.

PLEDGE OF ALLEGIANCE – led by Boy Scout Troop 10.

APPROVAL OF AGENDA. Approved unanimously on motion of Bold, seconded by Gill.

RESOLUTIONS OF RECOGNITION (ATTACHED AS PART OF THE RECORD) FOR COMMITTEE MEMBERS ANN LEITNER AND CECILIA THOMPSON. The Mayor read and presented a resolution to Ann Leitner's husband Marty Leitner. Ann served on the Community Relations Committee from 1989 through 1992, the Leawood Arts Committee from 1992 through 1996, and the Sister City Committee from 1992 to the present. Mr. Leitner thanked the Governing Body and staff for their recognition of Ann's dedicated service to the City.

The Mayor read and presented a resolution to Cecilia Thompson for her service to the City – she became active in the Police Community Partnership of Leawood in 1994 and was one of its founding members; served as President of the Crime Prevention Council; served on the Sister City Committee from 1994 to the present; served on the Leawood Foundation Early Start Committee; and served on a sub-committee of the Leawood Arts Council. Police Chief Mitchell spoke about her accomplishments and presented a Police commemorative badge to her.

RECOGNITION OF 1999 POLICE OFFICER OF THE YEAR, GREG TURNEY, AND 1999 POLICE CIVILIAN EMPLOYEE OF THE YEAR, DISPATCHER

GREG DAMRON. Chief Mitchell described the Police Department's canine services. Officer Turney introduced the Department's newest canine, Falco. The Mayor presented the 1999 Officer of the Year award to Officer Turney.

The Mayor presented the 1999 Police Civilian Employee of the Year award to Dispatcher Greg Damron. Chief Mitchell spoke about his excellent communication skills.

CITIZEN COMMENTS. H.L. "Kit" Kittinger, 10309 Overbrook Rd., complained about the removal of trees behind the U.S. Toy Co. at 2008 W. 103rd Terr. which eliminated the screening between the commercial properties in the area and the adjacent residential neighborhood, with complete exposure of the commercial areas and I-435 Highway. He felt it had lowered the property values of the homes in the area. He asked that the screening be replaced. The Mayor said staff would have a follow-up report for the Council.

Jeff Nessel, 12012 Ensley Lane, read his response to a January 26th editorial in the Kansas City Star which he felt was unfair to the Mayor and Council. Mr. Nessel felt that Mayor Dunn and the Council had made City government citizen friendly and had constantly stepped in and protected constituents' interests when the administrative and planning staffs had refused to do so. What the editorial called "meddling" by the Mayor and Council, he called representative government. It appeared to him that there was a lack of proper preparation by City staff on matters and that staff couldn't seem to accept criticism, and that would frustrate many Councilmembers. It seemed to him that Council had been forced to act as a policymaker and administrator.

CONSENT AGENDA. The following were approved unanimously on motion of Bussing, seconded by Taylor:

1. Minutes of the January 3, 2000 Council meeting;
2. Minutes of the January 10, 2000 Special Council meeting;
3. Minutes of the January 17, 2000 Council meeting;
4. Arts Council report (minutes) on their November 23, 1999 meeting;
5. Public Works Committee report (minutes) on their January 12, 2000 meeting;
6. Public Works Committee report (minutes) on their February 2, 2000 meeting;
7. Application (renewal) for Cereal Malt Beverage License – Leawood Hen House, Camelot Court Shopping Center, 119th & Roe Ave.;
8. Application (renewal) for Cereal Malt Beverage License – Phillips Towne Center 66 service station, 119th & Roe Ave.;
9. Governing Body and staff 2000 goals and objectives;
10. Purchase of police vehicles through cooperative bidding contract – 1 2000 Windstar mini-van from Shawnee Mission Ford for \$18,827.00; 1 2000 Ford Excursion from Shawnee Mission Ford for \$28,733.00; 1 2000 Chevrolet Impala 4-door sedan from Roberts Auto Plaza for \$17,278.00; 1 2000 Ford Taurus 4-door sedan from Bob Allen Ford for \$15,077.50; and 1 2000 Dodge Intrepid from Raytown Dodge for \$16,313.00 – totalling \$96,228.50.

MAYOR'S REPORT. The Mayor attended a recent ribbon cutting ceremony for the Clairbridge of Leawood, a memory care residence for Alzheimer's patients, located at 127th and State Line Rd. She said that 85% of the residents were from Leawood families.

Mayor Dunn reported on discussions that took place last week at the Council of Mayors meeting about C.A.R.S. funding. Mayor Allen of Shawnee wanted to investigate discontinuing the C.A.R.S. program; after lengthy discussion, it was determined that C.A.R.S. was very valuable for the County. The fund-raising mechanism might be adjusted in some fashion; a technical committee comprised of engineers and public works directors in the County would be reviewing the program to arrive at a plan to fund C.A.R.S. somewhere in the neighborhood of \$15 million for each of the next five years. There were concerns that the County had too much money targeted toward the unincorporated areas of the County.

Mr. Bussing, Council liaison to the Arts Council, said that the Arts Council held its fourth annual Kansas City Brass Concert at City Hall on Saturday, February 5th. About 85 people attended and it was a great show once again.

Mayor Dunn reminded Councilmembers that they should have received an invitation for the Chinese New Year celebration on Tuesday, February 29th. She said Elizabeth Chu would attend and exhibit her artwork. Proceeds would once again go toward relief efforts for the Taiwan earthquake victims.

OLD BUSINESS

Review of AMC Theater's request to modify show scheduling to 11:00 P.M. Mrs. Binckley said the issue needed to go back to the Plan Commission as there was a traffic study involved. The matter would return to the City Council for final review.

Mr. Gill believed there were discussions about traffic studies prior to the approval of the existing theatre and some discussion about traffic studies being used as benchmarks. He didn't know if there was any study of internal traffic. He thought the studies were predicated upon 10-year or older data based on theatres that were of a different size and number. Mr. Gill encouraged the people involved with the traffic study to obtain more recent data that reflected multi-theatre concepts, such as the very successful one Leawood had.

Jason Cole, Managing Director of the AMC Town Center 20 Theatres, was present to answer questions.

Mr. Rasmussen said there were three things he felt the Council, as well as the Plan Commission, should be reminded of. There was a lot of discussion about the structure and its parking requirements when it was approved. He said parking requirements normally associated with a building of that size were going to take care of two things, one, the timing of the shows as compared to the timing of the commercial activities in Town Center. So there was a lot of discussion about the utilization of the parking lot across the street. He said when the Council directed the Plan Commission to look at it, they weren't looking at an external traffic study, but looking at an internal traffic study. The second thing he wanted to remind the Council about was the landscaping that was proposed and the landscaping that resulted appeared to be two different things. When he noticed they were taking off additional landscaping, it was of some concern to him because in the past, Council felt that they didn't want Town Center Plaza to just be a mass of cars. The third thing he wanted to remind Council about was

that the 10:30 p.m. timing of the theatres was not pulled out of the air, but was a well thought out time frame to accommodate their needs and the needs of the community. When AMC came back later and said they needed a little change in that time to accommodate the traffic problems, the Council unanimously said yes, and gave them another 15 minutes. He wanted to remind the Council that he had said at that time that what he thought was happening was the “salami technique,” slicing a time at a time. He received calls from his constituents asking, “is it going to be necessary for us for the next 2000 years to show up at City Council meetings as we watch the zoning stipulations associated with this theatre to be slowly eroded away.” He wanted this on the record so the Plan Commission would know that the Council wasn’t asking them to change the zoning requirements associated with the theatre.

Mr. Taylor said he was on the Plan Commission at the time the theatre was approved, as well as other segments of Town Center, and he was assured by staff at the time that the parking regulations that were being presented for all occupants of the Town Center were to be met, and he was concerned that parking at the theatre had grown over to the Galyan’s area. It seemed to him that the City wasn’t paying attention to the parking requirements that the whole Center was now involved in. He said the Center wasn’t completely built out and he was concerned that when the developer returned and asked for the additional building areas, the City would be faced with a lack of parking to serve not only AMC, but other present tenants. He asked that that be closely examined in the study that was being proposed for the internal traffic.

Mr. Gill said he was confused about the item on the agenda to modify the start time for shows at the theatre and the separate memo that addressed parking; they were two different things. Mayor Dunn said the modification of times for shows was granted for six months. When AMC returned to Council for permanent modification, they didn’t have the parking figured out, and it appeared that it still wasn’t because staff now wanted to have a traffic study done. Mrs. Binckley said that when the matter was discussed at the last meeting, they really hadn’t had any contact with AMC, but did now. The parking issue according to AMC also had to do with a time issue. The original resolution said 10:45 p.m. and then Council extended an additional 15 minutes to 11:00 p.m. As part of the parking issue, staff would look at the timing as well. Mayor Dunn asked if the Plan Commission would also be looking at staff’s comments about landscaping and Council’s concerns about that. Mrs. Binckley, after talking with Mr. Rasmussen, stopped by the theatre and found that he was correct regarding his concerns about the landscaping. She said they were aware some of the trees were missing because they had died and had never been replaced.

Mr. Gill moved to refer the issue to the Plan Commission for their review on February 29th, to return to the Governing Body at the March 20th Council meeting for final review, seconded by Taylor.

Mr. Bussing said it was his observation that the popularity of Town Center exceeded expectations at the time it was originally designed and built. He didn’t want to limit the consideration of solutions to the problem; recognize that there was a problem and look at the whole panorama of possible solutions and make sure none were precluded.

Mr. Dunn didn’t know what the traffic study was intended to do, but he had been at Town Center at various times of night and day and many times he had to park quite a

distance from where he wanted to go. He was concerned about the traffic encountered between his car and the facility. He was worried about his children's safety. He agreed with Mr. Bussing, that he wanted to keep minds open to creative solutions and he felt the real problem was getting around on foot. He wanted to be sure the issue was addressed at the Plan Commission meeting on February 29th.

Mayor Dunn asked Mr. Gill and Mr. Taylor to incorporate Mr. Bussing's and Mr. Dunn's remarks about not limiting solutions to the problem in the motion. She said if this was not ready for the February 29th Plan Commission meeting, she was certain the Council wouldn't have a problem with the matter being extended and returning to the Council at a future date. Motion carried unanimously.

Request for exemption from smoking ordinance – AMF Lanes, Ranchmart Shopping Center, 95th & Mission Rd. Leonard Frischer appeared as counsel for AMF Ranchmart. He asked the Council to reconsider their previous order denying the request for an exemption from the smoking ordinance and to grant the exemption. They now had the information that some Councilmembers expressed concern about that was lacking in their previous presentation. They had retained the services of Doug Anderson of Pearce Construction to address what they felt the problems would be in trying to create a smoke-free environment within the bowling center. Regarding Council's concern about signs in the facility, the signs that would be used were exclusively those provided by the City and the signs currently in place concerning smoking and non-smoking areas would be removed. They would also continuing the smoking and non-smoking areas that they previously designated. The bowling area, itself, was a non-smoking area. There was an area above it with certain tables just above the bowling lanes that would be a smoking area. The billiards room was a non-smoking area. The majority of the remainder of the facility was non-smoking except for the lounge. They had also provided Council with updated figures as to the revenues of the bowling center.

Mr. Taylor was advised that their lease was with Ranchmart Shopping Center, that it would expire June 2001, and they were in negotiations to extend the lease.

Doug Anderson was retained to review, design and create a realistic construction estimate for the construction of the smoking area within the bowling lanes. He said he was faced with the challenge that in order to continue to involve bowlers who wanted to smoke, it was paramount that the smoking area be in close proximity to the lanes, so that in watching the games, they could go back and forth to their matches. He created the smoking area at the top level above the lanes. This enclosure was a glass-enclosed room, floor to ceiling glass, with a standup or bar height countertop on the inside looking out onto the lanes. The room would be isolated with a new mechanical system to create native air pressure inside the room so the smoke didn't go outside the room when the doors were opened. The introduction of a new four-ton system to handle that load would be utilized. They had removed some of the stairs that went down into the bowling area, reconstructed the wall, enclosed it in glass, re-carpeted, repaired the ceiling and created new lights because the lights were disturbed by installing the wall that ran down the center of the aisleway. This would create an environment for the smoking patrons but yet keep them involved in the bowling area. They looked at other options trying to isolate them in other parts of the building but that wouldn't function well for the bowlers, and the lanes would probably lose a lot of patrons if that was the case. They needed to be up

there, involved in the games and able to see what was going on. Once the design was completed, he prepared the construction estimate Council had in Council packets with the glass enclosure, mechanical system, electrical work, filling in the stairs. He felt it was a realistic estimate of what would be involved for the bowling alley.

Mr. Taylor asked about the fresh air makeup of the new 4-ton HVAC system to replace the air being exhausted to the exterior. Mr. Anderson said they had retained a firm in Lenexa to review and design this air-conditioning. Mr. Taylor said he wanted the percentage of fresh air makeup under which they designed their system. Mr. Anderson said there would be 1000 adcfm's of exhaust, cubic feet of air. He said that replaced the air that was being exhausted out of the building. Mr. Taylor was concerned that the 4-ton and fresh air intake might have some problems. He asked if smoke arresters were to be placed in the same room. He was told yes and Mr. Taylor said it seemed that they wouldn't be needed. Mr. Anderson said they were a small addition to the electrical usage but felt they would aid in keeping the room as smoke-free as possible. Mr. Taylor said if there was a proper ventilation system, the smoke arresters wouldn't be needed. Mr. Anderson agreed. Mr. Taylor asked if it would be necessary to use full-time supervision on this particular size job. Mr. Anderson said absolutely yes, a full-time, working superintendent. In other words, when there was any work going on, there would be representation there.

Mr. Rasmussen understood that even though the lease would expire in 16 months, it was their request that Council grant a smoking exemption. Mr. Frischer said the purpose of the plan was by way of illustration. They strongly believed that the plan was not an appropriate working situation. Mr. Frischer said there were 24 lanes in the facility and the particular smoking aquarium would only seat 27 people at a given point in time. He said the reality of the matter was while 75% of the general population didn't smoke and 25% did, it was almost the exact opposite at a bowling alley. Mr. Frischer said they were very concerned that trying to take away the ability of people to smoke, drink beer and bowl was going to do away with a business that had been serving the community for 40 years. That was the reason they were asking for the exemption. He said he knew of no facility, certainly in Kansas City, anywhere that had that kind of smoking set up in a bowling alley.

Mr. Dunn said he respected the estimate from Pearce Construction Company, but asked Jeff Cantrell of the Planning Department that given the limitations of the site, did he see anything else that could be done to minimize the impact of smoking or were they proposing the best possible solution. Mr. Cantrell said they were extremely limited as to what they could do and that was based on the existing facility. The facility used makeup air that pulled off the entire open facility. Mr. Dunn asked Mr. Cantrell if he had discussed the stipulations placed on every other exemption with them. Mr. Cantrell answered in the affirmative and said they were comfortable with the stipulations.

Mr. Bussing said he was in favor of granting an exemption to AMF Lanes with the stipulations that Council had previously identified with other exemptions to the smoking ordinance, feeling that the documentation presented to Council did, in fact, represent a reasonable financial hardship on AMF. Mr. Bussing moved to rescind the previous action of denial, seconded by Dunn.

Mr. Taylor agreed with Mr. Bussing, that this appeared to be a hardship with the net income projection of \$58,000 a year based on a 16-month term of the lease. He

pointed out that if the lease was extended, which was usually done for a five or ten year period, that \$100,000 spread over that period of time was not a financial hardship in his opinion. Mr. Frischer agreed with Mr. Taylor; if the cost was amortized over that period of time it would not be as great. He said the greater concern was not the hard cost of the construction, but the effect on the patronage.

Mr. Rasmussen asked if when Council granted an exemption, were there stipulations that automatically went with that exemption. Mr. Cantrell said there were three - the transfer or sale of the business, substantial modification or replacement of the HVAC systems, substantial remodeling or alteration of the facility itself. He said at one point in time it was mentioned that termination of a lease or the tenancy itself would be subject to that. He said it had not been included on the last couple of requests for exemptions.

Mr. Gill was opposed to the motion but would entertain modified motions if others desired. He thought giving an exemption for the balance of the lease was appropriate. He didn't believe the ordinance was drafted when it talked about hardship in any context other than financial hardship of having to create a meaningful barrier. It was now on the record that the financial costs spread over a longer amortization period would not constitute a financial burden to the construction of the barrier. Secondly, he took issue with some of the information that was in the report, especially the analogy to the Cactus Grill. He said there were areas of Cactus Grill where one could go and engage in the fundamental purpose of the restaurant, i.e., eating and drinking good food where one wasn't subjected to smoke. Here, as he understood the self-imposed smoking barrier, there was no place one could go and bowl, which was the fundamental purpose, without having smoking anywhere along the bowling corridor above where you were bowling. You had to get there, you had to get out of there and you had to go through smoke to do it. He had hoped that a voluntary program where there was some significant portion of the bowling lanes where there was no smoking permitted would have been part of the plan. He expressed that at the last meeting, and for whatever reason, it was not offered as a solution which was, of course, the prerogative of the owner.

Regarding new facilities that AMF built, Mr. Bold asked Mr. Fazio if AMF would be able to comply with the smoking ordinance. He asked if there was a way for a bowling alley, which was inherently open because of the design, to create effective barriers or to segregate smoking areas from non-smoking areas. Mr. Fazio said it was rather difficult. He said they had two customers - the league bowler who came week after week, and the non-league bowler who came Friday and Saturday nights or Sunday afternoon, the family group. In most cases the smokers were the league bowlers. They would see in the afternoons and weekends and evenings that the mix of smokers versus non-smokers would change 100%. It would go from a league bowler who might be 75% smoking whereas a non-league Saturday night teenage group or family group, or just a casual bowler, the numbers would reverse - 25% smoking and 75% non-smoking. What they had tried to do throughout the country in a pro-active approach was to select times of the day when they didn't allow smoking at all in the whole facility. Those were usually times when they had a lot of youth programs. There were certain sections of the country in which AMF decided there would be no smoking on Sunday, making it family day. Different facilities were doing it based upon their location and the type of clientele they had.

Mayor Dunn said that the motion was to rescind the prior action of the Council which denied the request for exemption from the smoking ordinance. Motion carried; Bold, Bussing, Rawlings, Dunn, Story in favor; Gill, Taylor, Rasmussen opposed.

Mr. Bussing moved to grant an exemption to AMF Lanes with the standard stipulations that Mr. Cantrell cited earlier. The basis for that was financial hardship. Seconded by Dunn.

Mr. Rasmussen asked if the motion included a stipulation regarding expiration of the lease. Mr. Cantrell said he didn't believe the other exemptions had included that. As it stood, Mr. Cantrell said stipulations included transfer of the business or ownership, substantial remodel of the HVAC system, or substantial remodel of the facility itself. Mr. Rasmussen moved to amend the motion to include a stipulation that at the expiration of the current lease the exemption would cease, seconded by Gill. Mayor Dunn assumed that at that time AMF could come before the Council for further exemption.

Mr. Dunn didn't see how the Council could put that condition on the exemption when they hadn't put it on the others. He felt it was very clear from Mr. Cantrell's review and very clear from the information Council had seen, that telling AMF to comply with the smoking ordinance now or 16 months from now was telling them to go out of business. He wasn't prepared to do that.

Mr. Gill didn't think there had been testimony that this would put the bowling alley out of business. He said there was a major difference between the prior approvals and this request - the others actually made a concerted effort to create a significant percentage of their utilized space for the primary purpose of the facility as non-smoking. Mr. Gill said that hadn't occurred here. He said he would encourage AMF to consider designating, and they could have done so, a significant number of lanes as non-smoking, either on the floor level or above which would be comparable to the other cases that Council had heard. He thought Mr. Rasmussen's motion to amend, if all it did was bring them back 16 months from now, also put them in a situation where they had an opportunity to negotiate some meaningful type of barrier such as the one presented, when they had an opportunity to build it into a lease and to amortize it in what they had admitted as a non-financially ruinous manner. He felt Mr. Rasmussen's motion made sense and if the City was serious about public facilities providing an opportunity for smokers and non-smokers alike to participate, then Council needed to do more than was presented.

Mr. Frischer said the financial hardship was going to be the end of the business. He said the financial hardship was more than just the hard costs of building. He understood Mr. Gill's point of making some of the lanes smoking and some non-smoking. He would be happy to listen to some suggestion Mr. Gill might have to configure the bowling alley that way. Mr. Frischer said it was impossible. He said Council was suggesting they go in and block a certain number of lanes. He asked how one would get access to those lanes. He said they couldn't reconfigure the whole bowling alley that had been there for 40 years. He said the place was what it was and Council indicated the Cactus Grill was not a good example. He agreed and said there were ways to get into that restaurant where you couldn't smoke. He said the bowling alley had certain entrances and was configured in a way it was impossible to do what was suggested. He said it wasn't a matter of being unwilling to work with the Council and they had done everything they could conceivably do to comply with the ordinance. He

said they had adopted non-smoking provisions even before they came forth. He said at some point you had to let the business try to continue to do business and they couldn't do it in the way Council suggested.

Mr. Gill asked if AMF had facilities in California. Mr. Frischer said they did. Mr. Gill said he believed California had abolished smoking totally and he asked if those lanes had folded. Mr. Frischer said they had not.

Mr. Story thought a better amendment, if one was going to be made, to Mr. Bussing's motion would incorporate some of the very ideas that Mr. Fazio referenced with other bowling centers around the country. If Council had some stipulations on the application that required certain days, certain evenings, when the building was non-smoking to accommodate family bowlers or teen outings, as opposed to the times when there was league bowling, then that would be something that would be very acceptable to a greater majority of the Council. Mr. Story said he would vote against the current amendment because he wasn't in favor of making the applicant change the physical layout of the business. He would support some additional stipulations, which Council would be entitled to add, regarding the complete elimination of smoking at certain times for those members of the community who did want to go to the bowling center but didn't want to encounter a smoke-filled environment.

Mr. Bold said he was a strong believer in a free market economy. He said the bowling center had been there a long time and he felt if one didn't like the smoke, they didn't have to go there. If enough people didn't go, then AMF would either change their policies or go out of business. He felt Mr. Story was correct, that the intention of the ordinance was to protect citizens as best as possible, but it wasn't to run actively thriving businesses out of the City. He said instead of rebuilding or releasing the facility, if AMF decided to tear it down and build a brand new incredible-style bowling center in Leawood, then Council would certainly want to look at the smoking, but he thought putting the 16-month restriction would be unfair to the business and he wouldn't support the amendment.

The motion for the amendment failed; Taylor, Rasmussen, Gill in favor; all others opposed.

The main motion to grant an exemption from the smoking ordinance with all prior stipulations and conditions that had been placed on exemptions to date carried; Gill opposed; all others in favor.

Ordinance granting Axon Telecom the right to operate facilities – 2nd reading.

Christopher Smith, a representative of Axon Telecom, reviewed what Axon planned to do. Mr. Rasmussen said he discussed this earlier with attorney Steve Horner and tried to reconcile their approach of trying to be compensated for the use of public right-of-way. He indicated to Mr. Horner that when Council got to the public hearing, he was going to bring up a change in the fee structure. Mr. Rasmussen said that Axon was willing to pay the City for use of City right-of-way 1% of the gross revenues collected for any and all leases and sales of its product. That was contrary to the concept originally laid out. He understood in talking with Steve Horner that Axon proposed that the people who occupied the duct space would pay the line charge. That part of being consistent he thought was correct. He was going to propose that the fee structure be such that if they occupied the right-of-way, or if they never got to build it or whatever, they would pay

like everybody else, the front end. Then when charges built up over the City, those charges would be added on. In other words, they would pay the \$1,000. Then when they leased out or rented, they would pay the City 5% of the revenues, just like everybody else. He said there was one area where he needed reassurance - if the City wasn't careful, it could develop a monopoly structure in its right-of-way - that the duct space was really nailed down in the agreement. As he read it, it wasn't. He felt the City should be very clear as to how much of the right-of-way it was giving them. The City didn't want to automatically say it was giving them the whole right-of-way or giving them a choice of where they were in the right-of-way.

Mr. Gill agreed with the concept of parity pricing. He had an additional concern which he directed to the City Attorney. If the City departed from parity pricing for the project, did it put itself at risk contractually with its other franchisees under provisions either of its contracts or of the Federal or applicable laws that required the City to extend favored nations pricing or parity pricing to others. He said if there was a proposal by the time the City got there for a different pricing metric, he would definitely want an answer.

As currently proposed, Mr. Dunn asked Mr. Rasmussen if there were six occupants of the trunk, all six would pay the City the right-of-way fee? Mr. Dunn wanted to know if what Mr. Rasmussen was suggesting was that Axon pay the right-of-way fee, and if there were six lines running through that, the City received some percentage of those revenues. Mr. Rasmussen said that when they discussed the fees early on, the concept of a subway company was considered. Whether it was in duct or just a cable which was shared, it was irrelevant. As Mr. Rasmussen understood Axon's proposal, they were suggesting that in the 16-duct bank, that each of the occupants of the duct, since they were not horizontal anymore in the right-of-way but vertical, would pay the City the line charge. If they served in the City and their revenues at 5% exceeded the line charge, then the City received the value. It was an override. In Axon's proposal, they would pay the City nothing; they would pay the City only 1% of the rent. He said Axon wanted to come in and use City right-of-way. The City had established a pricing for the use of its right-of-way. There was nothing in the proposal for even a basic administration charge. Mr. Rasmussen stated there was nothing in the proposal other than the 1% of the rentals, which should be at least 5% to be consistent with the City's other projects. He felt there was a real problem in terms of parity. He was only trying to be sure that the City was fair to everybody. He felt Axon should pay a fixed charge like everybody else and then if the fees on the rental exceeded that, fine. Then the 5% applied and that was exactly what was in every franchise ordinance that he was aware of in the State of Kansas. He said to remember that the basis for the charges was compensation to taxpayers for the use of public right-of-way. He planned to bring the matter up at the public hearing.

In talking with the City Attorney, Mr. Rasmussen wasn't too clear about the fact that Axon could sell the ducts. He didn't have any experience in the failure rate of the ducts used for fiber, but he could say that ducts did collapse and somebody had to be responsible when the subsurface collapsed. He didn't see that anywhere in the proposal.

Mr. Smith said there might be some confusion in how the transfer of the asset would work. He said when they sold the asset itself, the person who acquired the asset, by law and by the City's current franchise, had to start paying the City the franchise ordinance fee. Therefore, if both people were charged, there would be some sort of

double dipping and the City could get paid for the asset twice. He said as it stood, when the asset was sold by Axon, 1% of the revenue from the sale of that asset went to the City. From then on, the person who acquired that asset was mandated by the City to pay for the line charges, whether it was per linear foot or 5% of their gross revenues. He said that payment was made by someone and Axon by no means paid anything.

Reconsideration of Nextel Communications' application for additional antennae on cell tower at approximately Lee Blvd. and Mission Rd. Scott Beeler, attorney for Nextel, said they received a clarification from Trott Communications Group with regard to some interpretive matters with respect to their report, the original report they submitted indicating that it would not be functional for Nextel to use slim line antennae. He said that report was dated January 13, 2000 and did conclude that "this really creates serious overall system performance problems when different channels have different coverage areas." He said that, again, stated that slim line antennae would not create a functional use of the tower for Nextel.

Mr. Beeler thought there still might be some concern about whether or not Nextel had been consistent in the way it had presented its information. He said he had gone back and read the minutes from the Plan Commission meeting at which the application was approved on a five to nothing vote in August of 1999. He said it was stated at that time by Mr. Larry Louk of Selective Site Consultants, Inc., making the application on behalf of Nextel, "Southwestern Bell has slim line antennae. Their technology (Nextel) can't use that type of antennae." Mr. Beeler thought there had been some concern during the various meetings regarding the word "can't." He said they had never said something was a physical impossibility and he said he had been before Council five or six times stating that. He stated it was about functionality, whether they could do with the antennae what was intended and that was to provide coverage over the hole or the gap that presently existed. He thought Nextel had been very consistent, going back to August of 1999, in stating that using any type of slim line antennae structure couldn't be done functionally and provide Nextel with the coverage and the capacity that it sought to fill the gap. He said that was consistent and it was backed up by the independent report. He said he hoped they had addressed each of the specific sites raised to them, plus a number as being other possible locations for the antennae and why they weren't acceptable sites in terms of the search ring, and/or the structure that it was to sit on or the appropriate zoning. He, again, said he would be happy to answer any questions but he believed that Nextel had answered all the necessary questions. He said he came before Council without a recommendation for denial from staff either last time or this time. He said they had indicated in their staff report their feelings but they didn't recommend either approval or denial of the application.

Mayor Dunn inquired about remarks in Mr. Beeler's memorandum dated January 28, 2000. Regarding configuration of Nextel's antennae expanding up to approximately 140 feet on the monopole, if slim line was employed, she wondered if it would still cause different coverage areas and serious overall system performance problems. Mr. Beeler said that would be correct. He said from a technological standpoint, there was a physical possibility to do it. He said that the tower was manufactured in terms of its structural capabilities of even being 150 feet, so it could be 50 feet higher than it was. Those things came in 50-foot sections, so they would put another 50-foot section on top of the existing

structure to do that. From Nextel's standpoint, that might work for another carrier but for Nextel, from a technological standpoint, it still wouldn't work in a functional way. Mayor Dunn asked for an explanation of a "functional way." Mr. Beeler said to the context of capacity and coverage. He said what they were talking about in engineering concepts was would the antennae, at whatever level they were on and the configuration they were on from a separation standpoint, from a radiation standpoint, all concepts of engineering, and that was all put together, did it, in fact, provide the capacity necessary to carry the I-435 corridor at a coverage limit where there weren't any holes. The answer to that was no with slim line antennae virtually at any of the heights that had been investigated. He said someone asked him earlier that if one took this at an extreme and put antennae up every 200 feet, could one make it work. He said that was the concept everyone had heard about where you could put antennae on every light pole going down the street and have an effective system. It had more parts to break down, but the question was "could it work?" He said perhaps and that was what it would take. He said he was giving an extreme example. He said that to make the best of the ordinance, which was to make the most of the existing tower and to provide the coverage and capacity necessary, Nextel needed to use the technology that it had proposed and that was what the independent engineers had verified.

Mr. Bold moved for approval of the application for a special use permit for placement of additional wireless communication antennae on the Southwestern Bell monopole, seconded by Bussing.

Mrs. Binckley reminded the Council that the original monopole was only approved through December 23, 2003.

Mr. Dunn said that the request for a special use permit was for five years from the date of Council approval, which would be longer than 2003. He asked Mrs. Binckley if the motion needed to be for approval through 2003. Mr. Bold amended his motion to include that. Mr. Beeler showed Council a picture of an inset of the tower. Mayor Dunn asked the height of the pole, and Mr. Beeler said 100 feet with the antennae being about 80 feet.

Mayor Dunn said the question before the Council was a motion to approve the application for additional antennae on the cell tower at approximately Lee Boulevard and Mission Road and the special use permit wouldn't extend beyond December 23, 2003. Motion carried; Taylor, Rasmussen opposed; all others in favor.

Public Works Committee report on 1) selection of consultant for intersection improvements, 119th and Mission Road, 2) selection of consultant for Indian Creek bank stabilization, and 3) traffic concerns at 119th and Pawnee. Mr. Dunn moved to accept the recommendations of the Public Works Committee, seconded by Taylor. Mr. Bold recused himself from the vote to avoid a potential appearance of a conflict of interest. Motion carried unanimously. Regarding traffic concerns at 119th & Pawnee, the intersection wouldn't meet the warrants for the installation of a traffic signal. However, the proposed improvements at 119th & Mission Rd. should improve access from Pawnee to 119th Street for both east and westbound traffic movement. The Committee selected Continental Consulting Engineers as consultant for the 119th & Mission intersection improvements. The Committee selected Olsson Associates as consultant for the Indian Creek bank stabilization (SMAC project IC-04-039 at 104th & State Line Rd.)

Ordinance No. 1847C repealing Ordinance No. 1840C and (re)adopting “Public Improvement Construction Standards” – required to correct section number of the Leawood City Code. On motion of Rasmussen, seconded by Dunn, Council unanimously passed the ordinance on roll call vote.

NEW BUSINESS

Approval of Appropriation Ordinance No. 880B. On motion of Dunn, seconded by Bussing, Council unanimously passed the ordinance on roll call vote, Mr. Bussing not seated for the vote.

Approval of Appropriation Ordinance No. 882. On motion of Dunn, seconded by Story, Council unanimously passed the ordinance on roll call vote, Mr. Bussing not seated for the vote.

Mr. Bussing returned to his Council seat.

Approval of Appropriation Ordinance No. 883. On motion of Dunn, seconded by Bussing, Council unanimously passed the ordinance on roll call vote.

Charter Ordinance No. 32 relating to estimate of cost of improvements; contracts, bids; bond issue, when; and repealing Charter Ordinance No. 28. Mr. Bold moved to pass the ordinance, seconded by Dunn. Mr. Taylor asked for confirmation that the City wouldn't go out for competitive pricing on the design-build concept. Ms. Bennett said the City would still go out for competitive pricing, it just wouldn't be the normal competitive bid process. Normally, the City got an estimate for a project from the design and then went out to the contractors for the building part. The Contract Review Committee discussed the matter; the charter ordinance would allow the Council to waive the normal competitive bid process and it would still be a competitive pricing situation. The charter ordinance had to pass first and then Council would be asked to waive the normal competitive bid process for the purposes of the design-build on the proposed Public Works facility. The ordinance was identical to what was currently on the books, but it allowed Council to waive the competitive bidding requirement if it was in the best interest of the City. Ms. Bennett confirmed that the intent of the Committee studying the matter was to absolutely have it be competitive pricing. The ordinance passed unanimously on roll call.

Charter Ordinance No. 33 relating to general improvements and land thereof; borrowing money and bond issues; when election required. Mr. Bold moved to pass the ordinance, seconded by Bussing. Mr. Rasmussen asked for clarification. He said that historically, if the City wanted to build a city hall, Council passed an ordinance and then within so many days if citizens objected, they filed a petition and had an election. He said the ordinance was saying they no longer had the right on a specific project to have a petition and a consequential vote. Ms. Bennett said there was no change from what was currently on the books. The reason the charter ordinance was before the Council was because it was contained in an ordinance with the ordinance Council just passed. This, in

certain instances, didn't provide for referendum and under the statutes the City could charter out. This particular statute was applicable depending upon class. Mr. Rasmussen asked if Council voted on the ordinance tonight, as a city of the first class, Council could decide to build something that citizens didn't have the right to vote on. Mr. Garofano said a public safety building was one building that was exempt from referendum by statute. He said there were certain facilities that had to be voted on and there were certain facilities that the City had no authorization to go out to a vote on. He said if a fire station was being constructed right now there was no authorization in Kansas statute for a referendum to build a fire station and the same would be for any public safety facility. Mr. Rasmussen said he didn't want to see a headline in the newspaper tomorrow that the City Council had cancelled out the people's right to vote on a "public building." Ms. Bennett said this changed nothing. This was passed over a year ago and she thought most other cities of first class had passed similar charter ordinances.

The ordinance passed unanimously on roll call vote.

Ordinance No. 1848 calling an election for the purpose of voting on a proposition to authorize a 1/8th of one percent (.125%) City retailers' sales tax. Ms. Bennett said there were two ordinances and one resolution in Council packets. She said Council needed to consider the ordinances first and the resolution second. She said Council should look at the ordinance and its alternate and decide which one, if either, they were in favor of.

Mr. Rasmussen wanted to move to pass the alternate ordinance with one suggested change which would be five lines down in the third WHEREAS clause, so it would then read, "the Governing Body of the City of Leawood, Kansas, has determined that additional revenue in the amount of approximately of at least Two Million, Four Hundred Thousand Dollars (\$2,400,000) is needed for the purpose of funding the design, construction and inspection of the accelerated residential and thoroughfare street improvement program and to make the necessary improvements to City-owned stormwater drainage in the City, when such improvements are not otherwise eligible for funding from other governmental sources."

Mr. Rasmussen said the alternate essentially said, as had been well publicized by the Chamber of Commerce, that the money would be used for the City's infrastructure non-SMAC projects. He wanted it to be very clear that Council was talking about City-owned stormwater drainage.

Mayor Dunn said she had talked with Mr. Garofano about her concerns in Section 2 of the alternate where certain percentages going toward street funding and another percentage going toward stormwater funding were actually designated. She really wanted to see that language more open so the Governing Body and budget and finance committee on an annual basis could determine at what percentages the funds would be utilized. She thought there could be years when the City would need 100% for stormwater improvements and other years flip-flopping some other percentage.

Mr. Gill asked if it was suggested to strike in Section 2, "with the street and thoroughfare program receiving as nearly as possible one-half of the additional tax revenue, and the stormwater program receiving the remaining revenue." Mayor Dunn said she wanted some relaxation of that.

Mr. Rasmussen wanted to make it clear that his comment about the addition he had on the first page was under Section 2; it would appear both places. He requested that Ms. Bennett make sure the change in wording to "City-owned" be in both places. She said if Council went in that direction, there were also other places in the ordinance where it needed to be cited. Mr. Garofano said using the word City-owned would preclude the ability of the City from going into the northern part of the City where there were no easements or an existing system and doing improvements in that area because the City didn't have a City-owned storm system.

Mr. Dunn said it seemed most of the stormwater problems Council was trying to address were not in publicly-owned areas. He said Council certainly would have the right to decide whether it would be used, but if they tied their hands, they wouldn't be able to use it at all for any of this.

Mr. Rasmussen said Council didn't know the existing City-owned stormwater system and to identify what the City did own was going to take some money and trying to get that money over the last decade had been impossible. He said what Council was talking about in the north end of the City, and in some cases the south end of the City, was SMAC funding where one could go in and get additional City funds. He said in the present budgeting, Council put in \$400,000 a year, roughly speaking. What he wanted to be sure about was that Council was saying to the people that the existing stormwater system owned by the City was failing the City and that that was the purpose of the tax. He said they tried, also, to exclude SMAC projects. Mr. Rasmussen wanted to be sure that where the City had City-owned systems that collapsed, that that was what the money was for.

Mr. Dunn said he understood everything Mr. Rasmussen had said and he understood the logic. It was his understanding that the goal they had been trying to reach as a Governing Body on the issue was to spend the City's money as cost effectively as possible to really address the problems. He was very concerned that by putting that language in there Council was tying their hands where they couldn't use the funds if a project came up that wasn't City-owned and needed to be done and didn't qualify for SMAC. There was no question Council would still have the ability to decide how to use the money but if they put that language in, they were excluding a large group of potential areas where it could be used. He didn't think that was a judicious act to take at this stage of the process. He said he would rather have the discretion left to the funding decisions than in the ordinance itself.

Mr. Bold agreed with Mr. Dunn. He said that he looked at situations they had had over the last several years such as Wilshire subdivision where a developer, residents and an engineer were all arguing about who was going to pay for repairs. In the meantime, citizens' homes were being flooded. It wasn't the City's storm system but the City, for a small amount of money, was able to mediate and take care of that problem. Mr. Rasmussen said that wasn't the intent of this. He said if the language didn't cover what Mr. Bold was saying, then he would remove it. Mr. Rasmussen said what he was trying to do was make sure that exactly the situation Mr. Bold was talking about where it became a City-owned problem could be taken care of, and it wasn't on private property. Mr. Bold thought he and Mr. Rasmussen were on the same wave length with what they were trying to accomplish, but he didn't see any reason to use the words to limit what Council could do. He said even though Council would probably do what Mr. Rasmussen

was saying, he saw no reason to use the verbiage to limit themselves to that, particularly when it came to stormwater. He said there were potentialities that Council couldn't even phantom, and he hated to limit themselves. He said when Council received this, there was a list of identified but unfunded stormwater projects. He knew when he started pushing for this some time ago, the project that got him started was the Kings Cove housing addition. He said the residents were in a bad way with their pond and he wanted to see that get on the list.

Mr. Taylor wanted clarification that by eliminating the language Mr. Rasmussen brought forth, it would open the door for the various ponds and reservoirs around the City for the privately owned homes associations to call the City to have the ponds dredged and maintained because the City's stormwater systems drained into those ponds. Mr. Dunn said those retainage ponds were part of the City's stormwater system. Mr. Taylor said they were not. Mr. Dunn then clarified they were not part of the City's own stormwater system but were part of the drainage system for Leewood. Mr. Taylor said the way Mr. Rasmussen's language was that they were city-owned rights-of-way where the ponds were not City-owned, but privately owned. What Mr. Taylor said he was hearing in the language in the document now would open Pandora's Box, not that Council shouldn't do it. Mr. Dunn told Mr. Taylor that Council had already opened it in the budget. They allocated money that was available to work on stormwater problems in the City that didn't fall under SMAC funding and they didn't limit it to public projects.

Mr. Bold said he didn't think by saying that that Council was saying they were going to do that. He thought Mr. Dunn was right, Council was saying those people were free to come in and apply for it and then the Council was going to decide whether or not they were going to use public funds to do that project. Mr. Rasmussen said maintenance wasn't included. Ms. Bennett said the statute allowed the City to use the funds for infrastructure projects, economic development initiatives and strategic planning initiatives. Mr. Rasmussen said the funds were for the hardware and not for maintenance. Mr. Rasmussen asked during the budget process for enough money to maintain, first of all, and then, second of all, at least a small amount of money to get the principal established to take care of the City's existing system.

Mr. Story tended to agree with Mr. Dunn and his assessment of adding the language. He asked what Council would gain by adding the language and what were they trying to eliminate. Mr. Rasmussen said he suggested that the money go to City-owned facilities as distinguished from some privately-owned stormwater facilities. He wanted to see the City's structure enhanced. Mayor Dunn said the limitations that were put on the use of the funding might answer the questions Council was struggling with. Ms. Bennett said the way the ordinance and resolution were written was geared toward the third part of the statute which was infrastructure projects. The statute would allow Council to go beyond that to economic development initiatives and strategic planning initiatives. She said since Council was looking at stormwater and streets, it was under the infrastructure portion.

Mr. Bussing said he was opposed to any limiting language in the ordinance and after hearing what Ms. Bennett said, he was opposed to that language, also. His reading of the language was different in the second paragraph down, "for the purpose of funding economic development initiatives, strategic planning initiatives or public infrastructure projects." He didn't read that as non-maintenance. He said further down in paragraph

four it said, "to make necessary improvements to the stormwater drainage in the city when such other improvements are not SMAC qualified." He was very much in favor of identifying the proceeds of the sales tax to be used for stormwater and streets but leaving it to the good judgment of the City Council and the City staff to determine how best to allocate the money at the time it was available. To limit at this time the application of those funds would be counterproductive. He agreed with Mr. Bold that Council didn't know what the potential uses for the funds would be. He felt Council had to rely on the good judgment of the Public Works staff and the budget staff to give Council guidance with regard to how best to utilize the funds. He was opposed to any limiting language in the ordinance, and if the language prohibited the City from doing maintenance work, then he had a concern about that. Ms. Bennett said the statute spoke to infrastructure projects and it depended on what Council was talking about with maintenance work as to what a project would be. Ms. Bennett said the statute required Council to state their intent for how they were going to spend the money with a little more specificity.

Mrs. Rogers, Finance Director, said the policy the Council approved outlined that the money would support that policy as written right now. She said it was for City-owned stormwater projects. She said Council didn't approve lakes in that policy because they were considered private. At some point in time, if Council wanted to incorporate lakes, that would be the policy mechanism. She said the dollars would enforce that policy. Capital maintenance was also defined in the policy as a project over \$50,000 that enhanced and extended the useful life. She said Council was struggling with something that had already been struggled with under the policy, and if they went back and looked at the policy, she thought whether you had City-owned in there, it probably would support the policy a little bit better.

Mr. Gill liked the alternate form of the ordinance because of the reference to non-SMAC, so he moved to pass the alternate ordinance with one change. He would strike, "with the street and thoroughfare program receiving as nearly as possible one-half of the additional tax revenue and the stormwater program receiving the remaining revenue" from all places it appeared in the ordinance, seconded by Rasmussen. The ordinance passed unanimously on roll call vote.

Resolution pledging intent of use of the .125% City retailers' sales tax. Mr. Gill asked if the resolution required immediate action. Ms. Bennett said the resolution was to run parallel to and be a little more specific than the ordinance. Mr. Gill suggested the resolution be tabled, provided it didn't keep the ordinance off the issue, to clean up some wording. Staff would return the resolution to Council in the near future.

Resolution No. 1497, attached as part of the record, providing for the issuance of general obligation bonds to pay the costs of 151st St. improvements, Nall Ave. to Glenwood. Adopted unanimously on motion of Bussing, seconded by Bold.

Schedule executive session. On motion of Bold, seconded by Dunn, Council voted unanimously to convene in executive session at the end of the meeting for a period not to exceed 30 minutes to discuss land acquisition, a matter under attorney-client privilege, and personnel matter.

10:15 P.M. Council convened in executive session, same members present, and returned to regular session at 11:05 P.M., same members present. On motion of Dunn, seconded by Rasmussen, Council unanimously approved a new employment agreement for the City Administrator. No other actions taken.

11:06 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