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EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

FILED 2004 JUL 22 PM 3 52

R.H. Gump Revocable Trust,
c/o R.H. Gump (Owner), and
Nordyke Ventures, LLC, c/o Mark Nordyke

Plaintiffs,

v.

THE CITY OF WICHITA, KANSAS, a Municipal Corporation,

Defendant.

Case No. 03 CV 2793

RECEIVED
JUL 26 2004
DEPT. OF LAW

ORDER

The above captioned matter came on for hearing on the 8th day of January, 2004 before the Honorable Timothy Lahey, District Judge. Plaintiffs appeared by and through Robert W. Kaplan, their attorney. Defendant City of Wichita appeared by and through Joe Lang and Jay Hinkel, Assistant City Attorneys. Intervenor, City of Eastborough, appeared by and through Jerry D. Bogle, its attorney.

WHEREUPON, the parties submitted to the Court the stipulated record of the City of Wichita relating to zoning case CON 2003-00008.

WHEREUPON, the plaintiffs request to submit additional evidence to the Court by way of the testimony of Greg Ferris, zoning consultant, was denied by the Court, subject to reconsideration after the Court had completed its review of the administrative record.

WHEREUPON, after completing its review of the administrative record, the Court determined that no additional evidence from Mr. Ferris was necessary to allow the Court to determine the issues presented.

WHEREUPON, on the 8th day of January, the 18th day of March and the 12th day of May 2004, counsel for the parties appeared before the Court, and whereupon, the Court having heard the arguments of counsel, having reviewed the pleadings, the administrative record, and the briefs of the parties, proposed findings of fact and conclusions of law does hereby set forth the following Findings and Order, to wit:

1. This is an appeal from a decision of the City Council of the City of Wichita to deny to Plaintiffs a requested conditional use permit to build a wireless communications tower south of Kellogg and east of Woodlawn (behind the Gump Animal Hospital at 6603 E. Kellogg Drive). The property is zoned "limited commercial".

2. In August, 2000, the City of Wichita and Sedgwick County approved the Wireless Communications Master Plan, a document setting forth numerous guidelines regarding the location of wireless communication, or "cell towers" within this community. The Wichita-Sedgwick County Unified Zoning Code was modified to reflect and adopt by reference the guidelines of the Master Plan.

3. The Master Plan recognizes the need for additional wireless communication towers by allowing such towers to be located in any zoning district within the county.

4. As to new ground based towers, the Master Plan and the zoning code allow for the building of new "disguised ground-mounted facilities" up to 85 feet in height to be approved by Administrative Permit, without approval of the Planning Commission or the Governing Body. The proposed tower in this case is agreed by the parties to be a new "disguised ground-mounted facility", the same to be disguised as a flagpole.

5. Neither the Master Plan nor the UZC prohibit the building of new disguised ground based towers in excess of 85 feet; however, they do require that a conditional use permit be sought and approved for such tower.

6. The application for the conditional use permit, which is the subject of this action, was filed in March 2003. Plaintiffs sought permission to build a new disguised ground based wireless communications tower at an initial height of 135 feet, the same to be located approximately 600 feet east of Woodlawn and 100 feet south of Kellogg. In keeping with the Co-location guidelines of the Master Plan, the proposed structure was designed "to readily accommodate 20-30 foot extensions" to allow other carriers to use the same support structure in the future.

7. The plaintiffs' application was thoroughly reviewed by the Staff of the Metropolitan Area Planning Department. The staff found that the proposed facility conformed to the guidelines of the Wireless Communications Master Plan and recommended that the Metropolitan Area Planning Commission approve the application.

8. The application was also reviewed by the District Advisory Board of Council District II, which voted to recommend to the governing body that the application be approved.

9. On April 24, 2003, the Metropolitan Area Planning Commission approved the Plaintiff's application for a conditional use permit. The only departure from the recommendation of the professional staff was that the Commission agreed to allow the U.S. Flag (not the flagpole/tower) to be lit at night to comply with Federal Law and allow the Flag to be displayed 24 hours per day. Normally, the Planning Commission action on a conditional use application is final; however, because the Commission voted to allow the lighting of the flag at night, the provisions of the UZC required City Council approval. In addition, the record reflects that one or more appeal letters were filed which mandated City Council action. (Plaintiffs subsequently expressed a willingness to withdraw any request to light the flag at night.)

10. On May 20, 2003, the City Council voted to remand the matter back to the Planning Commission for the further review, and specifically requested that the Commission and the staff consider three specific questions.

11. On June 5, 2003, after receipt of the Planning Staff input on the questions posed by the City Council, the Planning Commission voted to affirm all of its previous recommendations to the City Council by a vote of 12 to 1.

12. The matter was returned to the City Council for determination on June 17, 2003. Council Member Sue Schlapp presented a motion to the Council to deny of the requested conditional use. According to the minutes of the meeting, the motion was seconded and voted upon with no discussion beyond the reading of the motion by Council Member Schlapp.

13. The motion contained ten "findings" upon which the denial of the conditional use was to be based. The Court has reviewed each of the findings set forth in the motion, and adopted by the Council, and searched the record available to the Council for evidence to support the findings.

14. The record discloses citizen opposition based on the aesthetic impact and/or visual appearance of the tower. The "findings" of the Council in denying the application appear to be based entirely on the aesthetic impact or visual impact of the tower. However, in Finding #10, the Council concluded that "the relative gain to the public health, safety, and welfare by denial of this application as compared to the loss in value or the hardship imposed upon the applicant, requires a denial of the application." This finding is conclusory, vague and appears to lack

factual support. Because this "finding" may have a material impact on the Court's ultimate decision in this matter, the Court directs the Council to clarify the factual underpinnings of their finding.

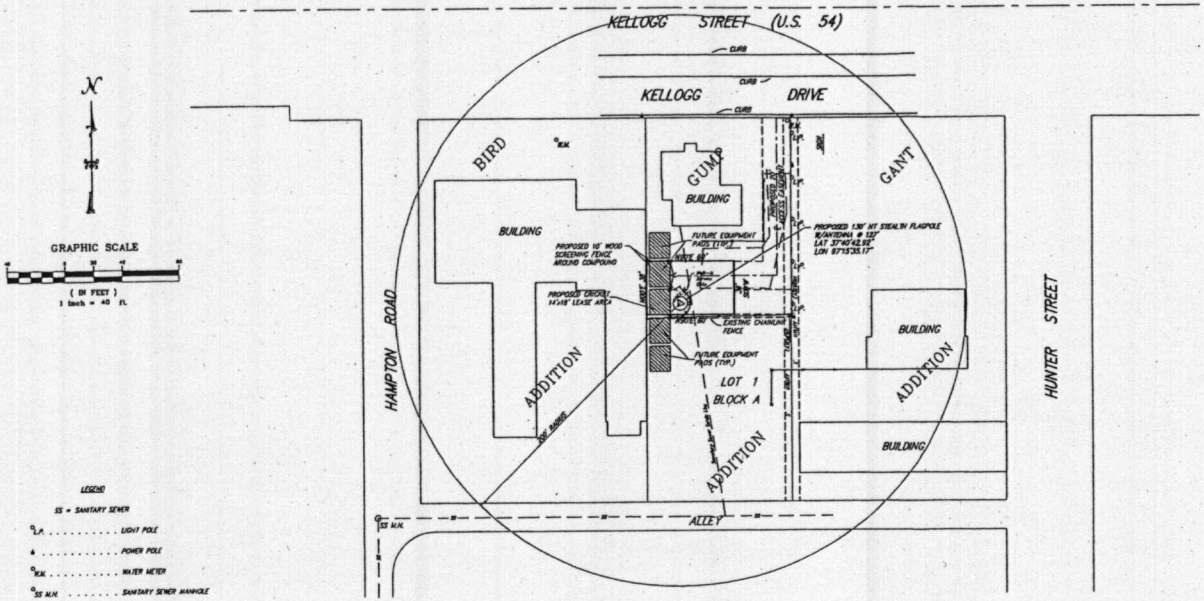
This matter shall be and the same is hereby remanded to the City Council of the City of Wichita, Kansas, with direction to the City Council to clarify the facts upon which Finding #10 is based. The Court shall rule on the appeal upon receipt of the clarification from the City.

IT IS SO ORDERED.

Honorable Timothy G. Lahey
District Court Judge

GUMP TOWER

WICHITA, KANSAS



LEGEND

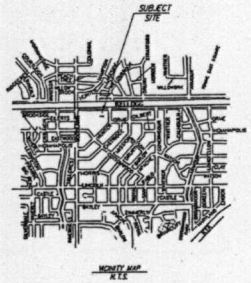
SS = SANITARY SEWER

$^{\circ}$L.P. . . . . LIGHT POLE

$^{\circ}$ . . . . . POWER POLE

$^{\circ}$W.M. . . . . WATER METER

$^{\circ}$SS M.H. . . . . SANITARY SEWER MANHOLE



VICINITY MAP
N.T.S.

COMPOUND DESCRIPTION:

That part of Lot 1, Block A, Gump Addition to Wichita, Sedgwick County, Kansas, described as commencing at the N.W. Corner of said Lot 1; thence south, along the west line of said Lot 1, 99.5 feet for a place of beginning; thence east, at right angles, 60 feet; thence south, at right angles 38 feet; thence west, at right angles, 60 feet to the west line of said Lot 1; thence north, along the west line of said Lot 1, 38 feet to the place of beginning.

INGRESS & EGRESS EASMENT:

An Easement 20 feet in width, being 10 feet left and right of the following described line: Beginning at a point 10 feet west of the N.E. Corner of Lot 1, Block A, Gump Addition to Wichita, Sedgwick County, Kansas; thence south, parallel with the east line of said Lot 1, 108.93 feet; thence west, parallel with the north line of said Lot 1, 30.11 feet to a point 60 feet east of the west line of said Lot 1 of termination.

State of Kansas)
) SS
Sedgwick County)

We, Savoy Company, P.A., Surveyors in aforesaid County and State do hereby certify that, under the supervision of the undersigned, we did on this 28th day of June, 2002, survey the above described property.

The accompanying sketch is true and correct exhibit of said survey.

MARK A. SAMPSEL
REGISTERED
LS-788
14 OCTOR
KANSAS
LAND SURVEYOR

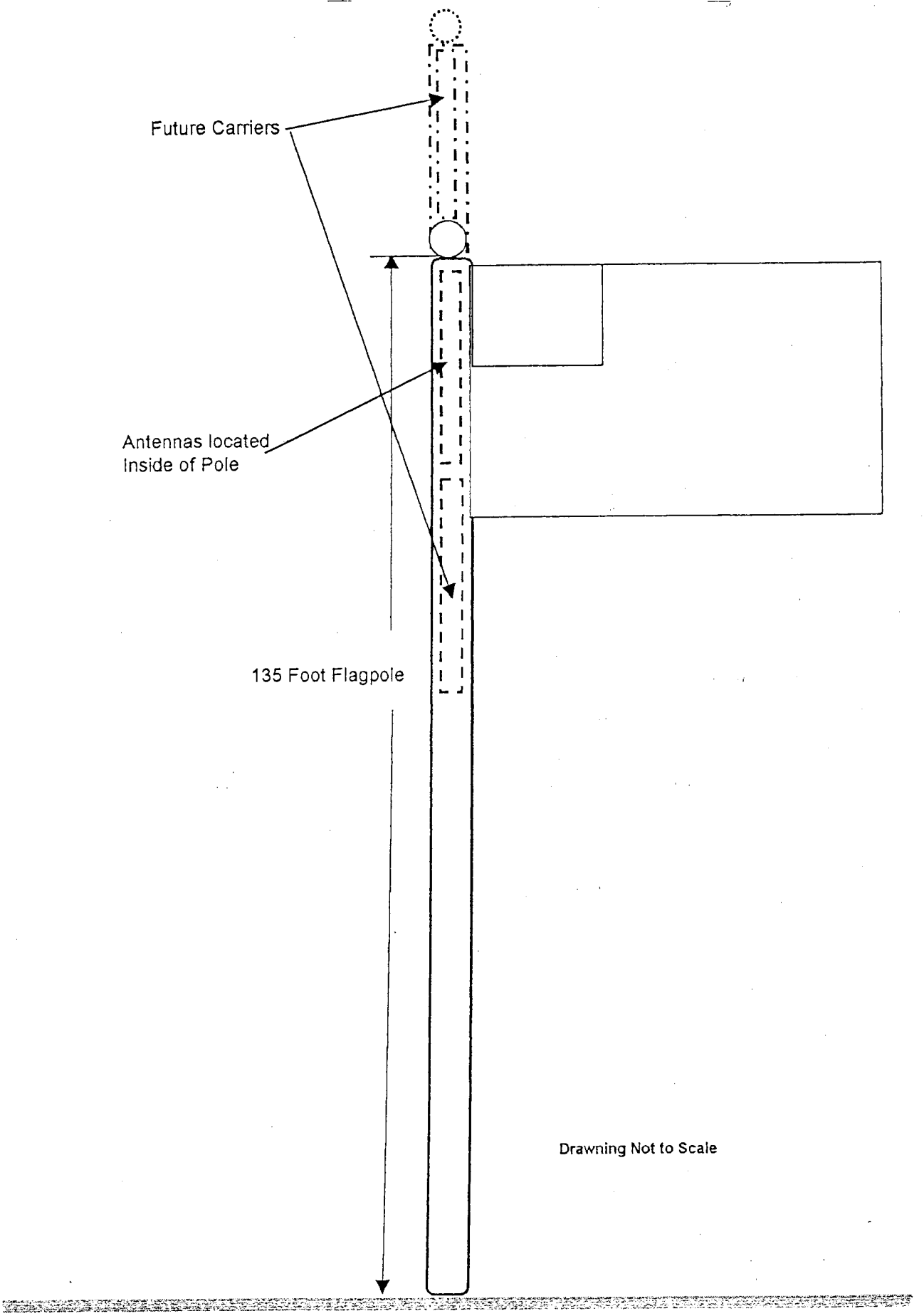
Mark A. Sampsel, P.S. Surveyor
Mark A. Sampsel PLS 788

Nordyke Ventures
NV 105
Cricket Kansas Property Company
ICT 043

Savoy Company, P.A.
Land Surveyors
333 S. Broadway, Suite 104, Wichita, KS 67202
PH (316) 263-0003
FAX (316) 263-0279
www.savoyco.com

PROJECT NO. 02FT00562 A

REV: 12 AUG 02
25 JUN 02


Future Carriers
Antennas located
Inside of Pole
135 Foot Flagpole
Drawning Not to Scale

WICHITA–SEDGWICK COUNTY

AGENDA ITEM NO. 10

STAFF REPORT

MAPC, April 24, 2003
DAB II, May 5, 2003

CASE NUMBER: CON2003-00008

APPLICANT/AGENT: R.H. Gump Revocable Trust c/o R.H. Gump (Owner); Cricket Communications c/o Kim Wimmer and Nordyke Ventures LLC c/o Mark Nordyke (Applicants); Ferris Consulting c/o Greg Ferris (Agent)

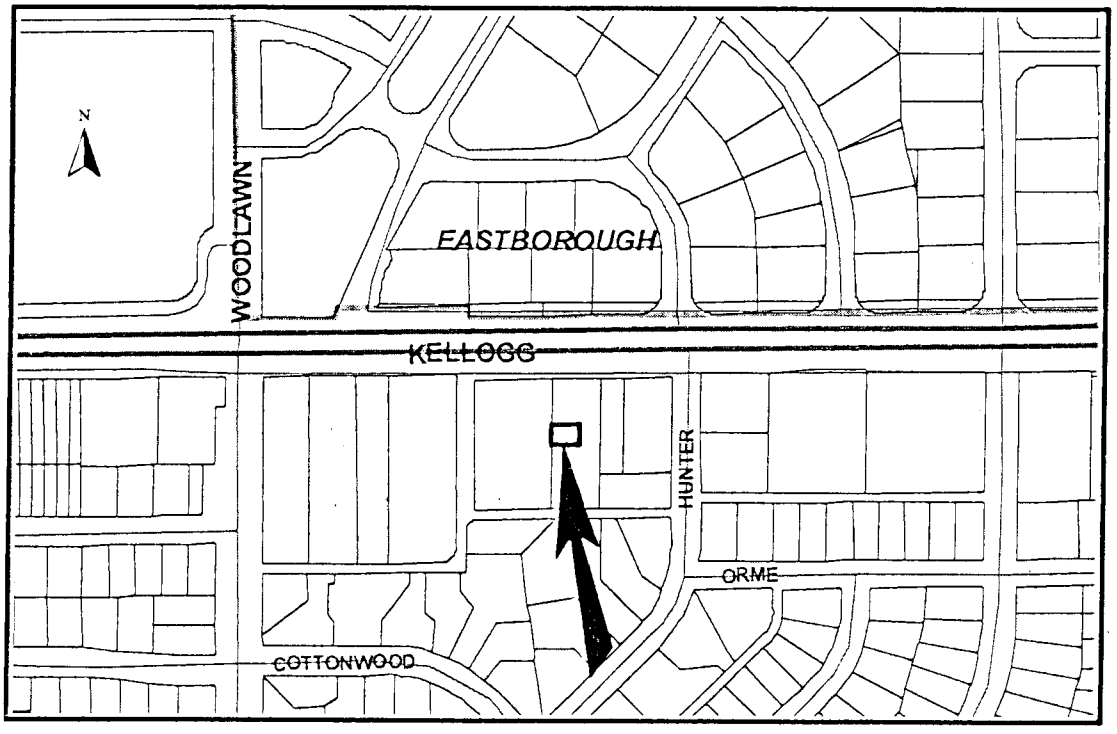
REQUEST: Conditional Use for a wireless communication facility

CURRENT ZONING: "LC" Limited Commercial

SITE SIZE: 2,280 square feet

LOCATION: South of Kellogg and east of Woodlawn (6603 E. Kellogg)

PROPOSED USE: Stealth flagpole communication tower



BACKGROUND: The applicant is seeking a Conditional Use to permit the construction of a stealth flagpole tower (see attached drawing and photograph) for use by Cricket Communications. The applicant proposes an initial height of 135 feet with provisions to extend the height of the tower to 165 feet. The proposed site is zoned "LC" Limited Commercial. Wireless Communication Facilities over 85 feet in height in the "LC" Limited Commercial zoning district may be permitted with a Conditional Use.

The applicant indicates (see attached memos, propagation plots, and topography maps) that the proposed wireless communication facility is needed for Cricket Communications to provide improved wireless telephone capacity along Kellogg. The applicant indicates that they evaluated using the existing tower at Carriage Parkway, and that it does not meet their communication needs. The applicant also indicates that they pursued constructing a tower on the VA Hospital property, but that the time required to negotiate a lease was too long to meet their needs. Finally, the applicant indicates that they evaluated locating their antennas on existing hotel buildings in the vicinity and that these locations do not meet their communication needs and are significantly more costly that the proposed tower (see attached cost comparison).

The proposed tower would be sited on a 2,280 square foot area located 100 feet south of Kellogg and 600 feet east of Woodlawn. Access to the site is proposed via an existing gravel parking lot for a veterinary clinic located on the parent tract. The applicant's site plan (attached) depicts a 38-foot by 60-foot compound enclosed by a 10-foot high solid screening fence with the tower and the initial ground-level equipment shown in the western portion of the compound. Future areas for ground-level equipment are proposed for outside the fenced compound. Per Section IV-B.3.b. of the Unified Zoning Code, screening of future areas for ground-level equipment will be required since the equipment is proposed to be located less than 150 feet from public right-of-way.

Since the tower is proposed to be disguised as a flagpole, the communication antennas will be mounted inside the pole and will not be visible. Also, a United States flag will be mounted to the pole, and the applicant proposes to display the flag at all times, which will require lighting the flag at night. Section III-D.6.g.(5) prohibits nighttime lighting of a wireless communication facility except for aircraft warning lights. Therefore, the Governing Body would need to approve an exception to the supplementary use regulation pertaining to tower lighting for the applicant's proposal to light the flag to be permitted. Another alternative would be to display the flag only during the day, which would alleviate the need to light the tower. This alternative is recommended by planning staff in order to prevent lighting of the flagpole from having a negative visual impact on surrounding residential properties.

The character of the surrounding area is a mixture of commercial and residential uses along the Kellogg corridor, with commercial uses located south of Kellogg and residential uses located north of Kellogg. The properties located east, west, and south of the subject

property are zoned "LC" Limited Commercial and are used for vehicle sales. The properties north of the subject property across Kellogg are located within the City of Eastborough and are used for single-family residences and recreational uses.

CASE HISTORY: The subject property is a portion of Lot 1, Block A, Gump Addition, which was recorded February 16, 1968. The zoning of the subject property was changed (Z-0913) from "A" Two-Family to "LC" Light Commercial on February 23, 1968.

On July 1, 2002, the applicant submitted a request for a Conditional Use to permit a 130-foot high monopole communication tower on the subject property. The request was first considered by the District Advisory Board (DAB) on August 1, 2002, and the DAB voted (8-1) to recommend that the request be denied. Subsequent to the DAB meeting, the applicant modified the request, and at the Metropolitan Area Planning Commission (MAPC) hearing on August 8, 2002, the applicant presented a modified request for a 130-foot high stealth flagpole tower. The MAPC voted (7-2) to approve the request for a stealth flagpole tower. The decision of the MAPC was appealed to the City Council by a nearby property owner, and since the applicant modified the request after the initial DAB review, the request was scheduled for reconsideration by the DAB prior to the City Council meeting. On September 16, 2002, the DAB voted to recommend that the request be deferred to allow time for a DAB subcommittee to work with the applicant and city staff on developing compromise solutions. On September 17, 2002, the City Council accepted the DAB recommendation and deferred action on the request for one month. Prior to the request being considered by the City Council, the applicant withdrew the request on October 7, 2002, based on erroneous information from planning staff that a new application could be filed immediately.

On October 14, 2002, the applicant filed a new request for a Conditional Use to permit a 135-foot high stealth flagpole tower. On October 18, 2002, the applicant requested a building permit for a 115-foot high "Gump Monument Pillar." On October 29, 2002, the building permit was denied on the basis that the proposed monument was actually a support structure for a wireless communication facility and required approval of a Conditional Use to be permitted. The applicant withdrew the Conditional Use request on November 6, 2002, and on November 15, 2002, the applicant filed an appeal of the denial of the building permit for a monument with the Board of Zoning Appeals (BZA). On December 17, 2002, the BZA considered the appeal and determined that the denial of the building permit was correct.

On March 20, 2003, the applicant requested that the MAPC permit a new Conditional Use request to be filed after six months rather than one year due to significant changes in the application and the physical development of the area. The MAPC voted (8-3) to allow the applicant to submit a new Conditional Use request, which is the subject of this report.

ADJACENT ZONING AND LAND USE:

NORTH:	Eastborough zoning	Single-family, park and recreation
SOUTH:	"LC"	Vehicle Sales
EAST:	"LC"	Vehicle Sales
WEST:	"LC"	Vehicle Sales

PUBLIC SERVICES: No municipally supplied public services are required. The site has access to Kellogg Drive, a two-lane access road to Kellogg, a four-lane expressway.

CONFORMANCE TO PLANS/POLICIES: The Wireless Communication Master Plan is an element of the Comprehensive Plan that outlines the guidelines for locating wireless communication facilities. The Location Guidelines of the Wireless Communication Master Plan indicate that new facilities should be located: 1) on multi-story buildings or other structures; 2) on existing poles in street rights-of-way, parking lots, or athletic fields; 3) on existing towers for personal wireless services, AM/FM radio, television, school district microwave antennas, and private dispatch systems; 4) in wooded areas; 5) on identified city and county properties; or 6) on highway light standards, sign structures, and electrical support structures. The Design Guidelines of the Wireless Communication Master Plan indicate that new facilities should: 1) preserve the pre-existing character of the area; 2) minimize the height, mass, or proportion; 3) minimize the silhouette; 4) use colors, textures, and materials that blend in with the existing environment; 5) be concealed or disguised as a flagpole, clock tower, or church steeple; 6) be placed in areas where trees and/or buildings obscure some or all of the facility; 7) be placed on walls or roofs of buildings; 8) be screened through landscaping, walls, and/or fencing; and 9) not use strobe lighting. The Unified Zoning Code requires wireless communication facilities to comply with a compatibility height standard of one foot of setback for each foot of structure height from adjoining properties zoned "TF-3" or more restrictive. This compatibility height standard can be reduced or waived through a Conditional Use or a Zoning Adjustment.

RECOMMENDATION: Planning staff finds that the proposed wireless communication facility conforms to the guidelines of the Wireless Communication Master Plan. The applicant has examined existing tall structures in the area and has demonstrated that co-location is not a feasible option. In an area where extensive beautification efforts, including major renovations to the park in Eastborough, will be undertaken with the Kellogg freeway project, the applicant has taken steps to preserve this visual corridor by disguising the communication tower as a flagpole, which is a prominent feature on numerous properties along this corridor. Based upon these factors and the information available prior to the public hearings, planning staff recommends that the request be APPROVED subject to the following conditions:

A. All requirements of Section III.D.6.g. of the Unified Zoning Code shall be met.

B. The applicant shall obtain all permits necessary to construct the wireless communication facility, and the wireless communication facility shall be erected within one year of approval of the Conditional Use by the MAPC or governing body, as applicable.
C. The support structure shall be a "stealth flagpole" design that is in general conformance with the approved elevation renderings. Antennas or other communication equipment shall not be visible on the exterior of the stealth flagpole. The flag shall not be displayed at night. The flag and flagpole shall not be illuminated.
D. The support structure shall be 135 feet in height and shall be designed and constructed to accommodate communication equipment for at least three wireless service providers. The support structure and its foundation shall be designed and constructed in such a manner that permits future height extensions to 165 feet and future loading expansions to accommodate communication equipment for at least four wireless service providers.
E. The applicant shall obtain FAA approval regarding "objects affecting navigable airspace" and "impacts to terminal instrument procedures" for the proposed wireless communication facility and shall comply with all conditions of FAA approval. The applicant shall submit a copy of FAA approval to the MAPD, Office of Central Inspection, and Director of Airports prior to the issuance of a building permit.
F. Any future ground-level equipment located outside the fenced compound shall screened in accordance with a revised site plan that must be approved by the Planning Director prior to the issuance of a building permit.
G. The site shall be developed in general conformance with the approved site plan and elevation renderings. All improvements shall be completed before the facility becomes operational.
H. The site shall be developed and operated in compliance with all federal, state, and local rules and regulations.
I. If the Zoning Administrator finds that there is a violation of any of the conditions of the Conditional Use, the Zoning Administrator, in addition to enforcing the other remedies set forth in Article VIII of the Unified Zoning Code, may, with the concurrence of the Planning Director, declare that the Conditional Use is null and void.

This recommendation is based on the following findings:

1. The zoning, uses and character of the neighborhood: The character of the surrounding area is a mixture of commercial and residential uses along the Kellogg corridor, with commercial uses located south of Kellogg and residential uses located north of Kellogg. The wireless communication facility is compatible with the commercial zoning and uses along the south side of Kellogg to which it is immediately adjacent.

2. The suitability of the subject property for the uses to which it has been restricted: The site is zoned "LC" Limited Commercial, and has been developed with a

commercial use. A Conditional Use may be granted to permit a wireless communication facility in the "LC" district; however, the facility should conform to the guidelines of the Wireless Communication Master Plan as much as possible.

3. Extent to which removal of the restrictions will detrimentally affect nearby property: The only anticipated negative impact is the visual impact of a tall structure in an area developed almost exclusively with one or two story structures. The visual impact of the tower should be lessened by the stealth flagpole design and the recommended condition to not display the flag during daylight hours only to prevent the need for illuminating the flag at night.

4. Conformance of the requested change to the adopted or recognized Comprehensive Plan: The proposed wireless communication facility conforms to the guidelines of the Wireless Communication Master Plan. The applicant has examined existing tall structures in the area and has demonstrated that co-location is not a feasible option. In an area where extensive beautification efforts, including major renovations to the park in Eastborough, will be undertaken with the Kellogg freeway project, the applicant has taken steps to preserve this visual corridor by disguising the communication tower as a flagpole, which is a prominent feature on numerous properties along this corridor.

5. Impact of the proposed development on community facilities: FAA approval should ensure that the proposed tower does not detrimentally impact the operation of airports in the vicinity.