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In the Spotlight: Negotiating a Rooftop Antenna Contract

What You Must Know

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As real estate values rise, building usage change, and cell phone and Internet communications become universal, wireless telecommunications companies have become popular defendants in civil court. In certain instances, owners are examining their rooftop antenna agreements to determine if they can terminate them. Many of these owners wanted to demolish the buildings, convert from commercial to residential buildings, or add multiple uses for their rooftop property. Battles for control over the rooftops of these buildings have become a high-stakes game. This article attempts to arm building owners with a few tools to negotiate a better and more lucrative rooftop agreement.

License Agreement

The most powerful weapon for negotiating the most favorable agreement is to use a license agreement instead of a lease. Chief among the owner-licensor's rights in a license relationship is the right to revoke the license "at will" and to use "self-help" to remove a defaulting licensee from the licensed premises without having to endure months or years of lengthy and frustrating litigation to regain possession of valuable real estate. However, we recognize that some telecommunications companies will insist on a lease. Accordingly, for purposes of this article, we will refer to "occupancy agreements" when describing concepts applicable to both types of agreements.

License Versus Lease

From the owner's perspective, license agreements are perfect for rooftop antenna agreements. However, the parties need to do more than title the agreement a license. Whether an agreement will be deemed a "license" or a lease will depend on the presence or absence in the agreement of the three essential characteristics of a real estate license: 1) A clause allowing the licensor to revoke "at will"; 2) The retention by the licensor of absolute control over the premises; and 3) The licensor's supplying to the licensee all of the essential services required for the licensee's permitted use of the premises. Courts have found so-called licenses actually to be leases where any one or more of these characteristics are either missing from the agreement altogether or not sufficiently present in the powers retained by the licensor. However, the less control given the licensee, the more likely the agreement is to be considered a license, because a license offers no autonomy, but merely allows a party to render services within an enterprise conducted on premises owned or operated by another, who has supervisory power over the method of rendition of the services. Thus, license agreements perfectly fit the bill for a rooftop antenna agreement:

- The building owner wants to be able to revoke the agreement at will.

- The owner stays in control of the premises and does not surrender absolute control over the premises.
- The owner supplies all of the essential services, including access to electricity, landlines, and a control cabinet.

Even with these prerequisites, careful drafting of appropriate license agreements is required. Building owners also have to make judgments about the commercial feasibility of obtaining licensees who are willing to accept license agreements with "at will" revocation clauses. If their licensee occupants do not "cure" their default, the licensees will be subject to peaceable self-help eviction from the licensed premises swiftly and without further action on the owner's behalf. Yet, it bears repeating that if the license is not "at will," it is not a license and the owner is stuck with all of the rigmarole attached to removing an ordinary tenant.

Exclusivity Clause

Beware of telecommunications companies' attempts to garner exclusivity clauses in their leases whereby an owner's entire roof space will be designated to one company. Besides the obvious revenue loss, such a provision will bind the building owner for many years. The agreement can and should explicitly state that the wireless provider will not have exclusive use of the entire rooftop, but rather will have unshared use only of the specific leased premises on the rooftop. In addition, the use of other portions of the rooftop for ingress and egress will be non-exclusive and otherwise usable by several wireless providers.

Designating the Licensed/Leased Space

Many existing contracts specify the roof without associated lease exhibits and construction drawings clearly identifying the telecommunications companies' leased premises. This omission has resulted in these companies expanding the size of their premises beyond the originally intended size and use, thereby interfering with the building owner's ability to utilize additional roof space. Upon execution, all occupancy agreements should include an exhibit specifying measurements approved by the owner. The lease exhibits should subsequently be replaced with more detailed construction drawings signed by both parties and demonstrating the specifications for the allocated space. The owner should not sign off on these until after any requisite permits have been obtained from the applicable governing authority. In this regard, one must be careful not only to account for the antennas, shelter and base radio equipment, but various appurtenances including cables and cable trays, wiring, and conduit runs. These appurtenances are some distance from the antennas, shelter and base radio equipment itself, creating numerous discreet footprints on the roof. All of these footprints must be accounted for in the construction drawings. Since cell site installations are frequently on rooftops where residential tenants are allowed recreational use, the designated space must also specify safety cordoning of the telecommunications company's equipment.

Physical Capacity of the Building's Roof

The telecommunications company must hire an engineer to determine if the land and building can support the antennas and their equipment. The engineering firm should determine whether the roof can bear the additional weight and possible negative loads; whether there are any leaks; whether the new equipment will affect the roof's warranty; and how much space is already taken up by any existing equipment. If appropriate, the owner should insist that the telecommunications company utilize the owner's preferred roof contractor for any work affecting the existing warranty. The owner should request a copy of such a report. The property owner should also provide in the contract that construction drawings for the actual

installation be drafted by a certified engineer in advance of installation. Furthermore, the wireless provider should be responsible for all costs associated with these construction drawings, and the property owner should require his or her written approval of the proposed plans prior to installation.

Assignment and Subletting

Subletting clauses should be banned so the owner's space and the agreement are not utilized by unknown third parties in the future. The building owner should keep full control over the licensed or leased space and maximize its revenue and thereby understand who or what is using the rooftop space. With respect to assignment, the telecommunications company should only be permitted to assign the occupancy agreement, upon advanced written notice, to an entity controlling, controlled by or under common control with the contracting telecommunications company and then, only if the proposed assignee has the necessary FCC and/or state regulatory agency approvals. In addition, the entity must agree in writing to assume all obligations of the contracting telecommunications company under the original occupancy agreement. The telecommunications company should be restricted from assigning or transferring the occupancy agreement to any other person or entity without the prior written approval of the owner.

Complying with City, State and Federal Laws

The standard clause in most commercial agreements requiring an occupant's compliance with all laws becomes very important in antenna rooftop occupancy agreements, as operating a telecommunications facility may require special building permits, licenses and other governmental approvals that are subject to change during the term of the occupancy. The tenant or licensee must be liable for applying and paying for all fees associated for obtaining a building permit, zoning variance or other governmental approval and the owner must cooperate and not interfere in the process.

Indemnification Clause

Every contract should include a clause that indemnifies the owner against any personal injury claims and all other lawsuits arising from the telecommunications company's negligence, intentionally wrongful acts or omissions, violations of any law, or material breach of contract. A favorable clause will also indemnify the owner against damage caused by the antennas and supporting equipment to the building, residents of the building, and other third parties such as pedestrians on the street below. While it is unlikely for such antennas to collapse, they have on rare occasion, as a result of high winds or storm conditions. Such an event may result in damage to the roof and/or parapet wall or possible personal injury. The contract should also require the telecommunications company to defend, indemnify, and hold harmless the building owner for any violations of federal communications laws or other applicable building codes and regulations concerning the telecommunications installation.

Taxes

Because the installation of antenna equipment may be considered an improvement to the building, it may result in an increase in the amount of the taxes assessed against the building. Accordingly, the occupancy agreement should clearly state that any increase in taxes attributable to the telecommunications installation shall be the sole responsibility of the telecommunications company.

Insurance

An insurance provision with the following language should be negotiated into the agreement:

Commercial General Liability — The policy shall provide a \$ _____ combined single limit for Bodily Injury and Property Damage, including Products Liability, Contractual Liability, Water Damage, Legal Liability, and all standard policy from extensions. The policy must provide \$ _____ general aggregate (per location) and be written on a Blanket basis, and must be endorsed to cover the indemnification specified under this paragraph. Licensee shall endorse policy to include the Licensor as additional insured. Definition of additional insured shall include all members, officers, directors, employees and agents representing the Licensor. Coverage for an additional insured shall apply to agents representing the Licensor. Coverage for an additional insured shall apply on a primary basis irrespective of any other insurance, whether collectible or not. Licensee shall deliver to Licensor a certificate of insurance evidencing such insurance and naming Licensor as additional insured within five (5) days of the date of this Agreement. Licensor shall not under any circumstances be responsible for fire, theft, mischief, pilferage or damage to the telecommunications equipment or any other equipment or materials installed or left by Licensee at the Premises or caused to the premises by Licensee's equipment or employees; such damage and injury shall be the responsibility of Licensee and Licensee shall indemnify Licensor against any other claims.

The owner should review the telecommunications company's insurance policy to confirm that it is consistent with the terms of the occupancy agreement. Most telecommunications companies have a general liability policy, covering basics like personal injury liability and product liability. The size of the policy varies in amount based on the size of the company. A reputable telecommunications company should be prepared and willing to present an adequate certificate of liability insurance to owners.

Demolition Clauses

In certain instances, an owner may have the ability to negotiate the right to terminate the occupancy agreement in the event the owner seeks to demolish or sell the building in the future. Such clauses may also include a minimum term or notice requirement on the owner's behalf prior to such demolition or relocation as well as other obligations on either party's behalf.

The Cancer Issue

Although the telecommunications industry will quickly point out that no studies currently exist that indicate antenna towers cause physical harm or disease to humans, many owners are understandably concerned about the long-term health effects of a cell site on the rooftop of a building. Although telecommunications companies are reticent to include language in the occupancy agreement providing for termination in the event of studies to the contrary, a concerned owner should include language allowing the owner to terminate the lease if the company is not in compliance with FCC regulations. In addition, the owner also should seek to include a requirement that the company perform annual testing to determine radio frequency emission levels on the property and to confirm compliance with FCC regulations.

Access

While common cell tower leases provide the telecommunications company with 24-hour, seven-days-a-week access to the roof, the property owner may consider restricting such unfettered access to emergency purposes only or including security measures (requiring identification or an escort) during specified time frames for normal maintenance and repairs to insure the safety of the building and its other occupants. Moreover, such clauses further ensure that the contract will be construed as a license.

Rent Commencement

The typical cell site occupancy agreement has an effective date, defined as the date the occupancy agreement is fully executed by both parties and a rent commencement date, which is the actual commencement of rental payments by the telecommunications company. Because the telecommunications company needs to perform necessary due diligence prior to installing its equipment (such as applying for building permits and performing structural and environmental testing on the owner's property), the telecommunications company typically refuses to commence rent payments on occupancy agreement execution and seeks to push out the rent commencement date as far as possible. With this in mind, the owner should allow the telecommunications company a reasonable period of time to perform its due diligence without paying rent. However, the occupancy agreement should specify a date certain for the commencement of rent to ensure that the telecommunications company does not have an open-ended option on the owner's property. For example, the rent commencement date may be the earlier of receipt of a building permit or six months from the execution of the occupancy agreement.

Interference

A well-drafted cell site occupancy agreement should include an interference provision that addresses the situation where the telecommunications company interferes with the owner's and/or its tenant's use of the property. The occupancy agreement should take into account two kinds of interference: 1) physical interference such as an actual obstruction or blockage of an access way or portion of the rooftop; and 2) radio frequency interference such as signal interference to other equipment in the building or on the rooftop. In the event of such interference, the telecommunications company should be required to correct and eliminate the interference within a specified period of time. If not corrected, the telecommunications company should be required to power down its equipment except for intermittent testing until such time as the interference is cured. Finally, where the owner's building has multiple commercial and/or office tenants, the occupancy agreement should explicitly state that the telecommunications company will not interfere with normal consumer electronics such as computers, facsimile machines, landline telephones, audio visual equipment and other similar electronic components commonly associated with operating a commercial enterprise. While interference occurs infrequently, such a provision is helpful to avoid a costly dispute in the future.

Removal of Equipment

While the typical cell site occupancy agreement term is 20-30 years, it should include an affirmative obligation on the part of the telecommunications company to remove all of its equipment upon the expiration or early termination of the occupancy agreement. Specifically, it should specify a date certain (usually 30 to 60 days after expiration or termination) in which the telecommunications company must remove all of its equipment from the property, including any associated cables, wiring and conduit. In addition, the occupancy agreement should require the telecommunications company to restore the property to its original condition which may or may not include painting and repairing the structural portions of the building such as the roof membrane and parapet walls. The occupancy agreement should also state that if such time for removal of the equipment causes the telecommunications company to remain on the property after termination or expiration of the occupancy agreement, the telecommunications company shall perform all of its obligations under the occupancy agreement, including the payment of rent, until such time as the removal is completed.

Conclusion

This article addresses some of the legal issues that a landowner needs to consider when negotiating a cell tower lease or license with a telecommunications company for the installation of equipment on its rooftop. While it is not intended to cover all of the terms and conditions in such an agreement, it is a

useful overview of essential provisions that should be included in any agreement that sufficiently protects the interests of the owner.

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