Rooftop Leases: Legal and Business Considerations for Building Owners
Negotiating and Structuring Lease Agreements for Telecom Equipment

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Rooftop Leases: Legal and Business Considerations for Building Owners


January 31, 2013
Rooftop Lease Applications and Current Trends in Rooftop Leasing

- Types of rooftop leases
  - Cell towers and other communication equipment
    - PCS, broadband, FM and TV
    - From luxury to necessity – explosive growth
  - Solar panels or micro wind turbines
    - On-site consumption or grid feed
    - Distributed generation of clean, renewable energy
Rooftop Lease Applications and Current Trends in Rooftop Leasing (cont’d)

- Types of rooftop leases (cont’d)
  - Rooftop farms
    - Distributed generation of high quality produce in urban areas
    - Rainwater recapture and reuse
    - Vancouver, New York and Philadelphia
  - Rooftop bars and restaurants
Current Trends

☐ Site / lease buyouts
  ■ Lump sum up-front payment for existing leases and/or locations
  ■ Developing secondary market

☐ Options to lease
  ■ Small income stream reserving rights to lease in the future
  ■ Allows company to “lock up” territory
Current Trends (cont’d)

- Rooftop management companies
- Solar, Solar, Solar
Benefits of Rooftop Lease

- Income – either up front or over time
- Roof repairs and/or maintenance at little or no upfront cost
- Increase value of remainder of building
Detriments to Rooftop Lease

- Forgo future opportunities for easy cash up front
- Roof repair and maintenance
- Loss of flexibility (casualty, condemnation, financing, sale, redevelopment, expansion)
- Frequently requires use of more than just the roof (staging areas, utility easements, parking, access, data rooms, inverter pads and cable runs)
- Structural issues
Deal Structures

Simple Single Lease

- Benefits
  - Monetize your roof with lump sum up-front payment or periodic rent payment
  - Condition lease on roof repairs or upgrades upfront and/or place burden of roof maintenance on tenant
  - Little effort for building owner

- Detriments
  - Sacrifice future opportunities
  - Roof leaks / maintenance issues
  - Redevelopment / sale / reconstruction restrictions or complications
  - May not maximize value of entire roof
  - Financing
Deal Structures (cont’d)

Multiple Leases for One Roof

- **Benefits**
  - Opportunity to maximize value of roof
  - Monetize your roof with lump sum up-front payment or periodic rent payment
  - Condition lease on roof repairs or upgrades upfront and/or place burden of roof maintenance on tenant

- **Detriments**
  - Coordination of and interference by multiple tenants
  - Maintenance/repair obligations and disputes – who caused that leak?!?
  - Much more effort to put together and manage
  - Multiple seats at negotiating table upon sale, redevelopment or major reconstruction
Deal Structures (cont’d)

Buyout of Existing Leases and Location

- **Benefits**
  - Monetize future income stream now
  - Eliminates future management/administrative burden
  - Removes the risk of payment defaults

- **Detriments**
  - Long term agreements that are very difficult to terminate
  - Sacrifice future opportunities
  - Greater redevelopment / sale / reconstruction restrictions or complications
  - May not maximize value of entire roof
  - Frowned upon by lenders
Deal Structures (cont’d)

**Option to Lease**

- **Benefits**
  - “Free” money
  - Very little effort and limited obligations

- **Detriments**
  - Loss of future opportunity
  - Disputes and litigation
Rooftop Lease, License or Easement

**Lease**

- **Benefits**
  - An estate in land that provides the tenant with greater protection and an alternative financing method (leasehold mortgage)
  - If properly perfected it can be binding on future property owners
  - In some states it offers landlord protection from construction liens filed by a tenant’s contractor

- **Detriments**
  - Frequently more difficult to terminate and regain possession
  - Subject to state and municipal lease formalities and tenant protection measures such as a duty to mitigate damages and statute of frauds
  - Frequently requires lender approval
Rooftop Lease, License or Easement (cont’d)

**License**

□ **Benefits**
- Not an estate in land but rather a right in contract
- Frequently easier to terminate and regain possession
- Not subject to state and municipal lease formalities and tenant protection measures such as a duty to mitigate damages and statute of frauds
- Does not always require lender approval

□ **Detriments**
- May subject owner’s property to construction lien resulting from licensee’s non-payment for licensee improvements
- May not be sufficient protection to get the deal done
Rooftop Lease, License or Easement (cont’d)

**Easement**

- **Benefits**
  - An interest in land that provides the holder with greater protection
  - Not an executory contract subject to termination in bankruptcy
  - Runs with the land
  - Not subject to state and municipal lease formalities and tenant protection measures such as a duty to mitigate damages

- **Detriments**
  - Difficult to terminate and regain possession
  - Not easily financeable
  - Unorthodox
  - May be subject to technical state formalities applicable to estates in land, such as the statute of frauds
  - Almost always requires lender approval
Thank you!

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KEY PROVISIONS
Scope of Installation

- Finite list of equipment.
- Upgrades, repairs and replacements of Equipment – YES
- Additional equipment - NO
- Standard lease language for:
  - Insurance
  - Liens
  - Rules & Regs

- Aesthetics are a reasonable component for approval of plans – consider screening requirement or obligation to paint antennas and equipment the color of adjacent walls or rooftops as a means of camouflage.
CAMOUFLAGE  A little color can make a big difference
Permits and approvals

- Building Owners – to cooperate, but at Lessee’s cost
- Not unusual for Lessees to seek express agreement that fees or charges by landlord for permitting and zoning cooperation not permissible
- Lessees should be required to provide copies of all permits and licenses requested for the property, even those that owner is not required to execute.

Utilities

- Direct connection with the utility provider, if possible
- Request for Back-up generator is common – either on rooftop or in other location
Assignment and Subletting

- Permitted assignment language will be a requirement of any Lessee as it is an industry dominated by acquisitions, consolidation, dispositions.

- Subletting is a significantly different issue and if the request to sublet is made, a determination by the Building Owner of the Lessees intentions for the building must be determined.
Alterations & Maintenance

- Structural - the weight of the equipment can be significant, particularly if generators or equipment rooms will be installed on the roof.

- Deliver rooftop AS IS;

- Lessee perform its own tests to determine what, if any, weight supporting structures must be added. Both parties should have a copy of the report at the commencement of the installation – so if problems or questions arise later the parties have a baseline to look to; similarly, an obligation on the parties to share reports in the future, should structural questions arise.

- Agreement should address party responsible for installing weight supporting structures – the cost would typically be a Lessee expense, even if installed by the Building Owner;
Alterations & Maintenance cont.

- Building Owner should have a self-help right if it feels the lessee is in default, lessee’s will similarly seek this to address structural issue.

- Typically, rooftop agreements do not impose an obligation on the Lessee to be responsible for the “roof.” However, standard lease language regarding penetrations to the rooftop, compliance with rooftop warranties and the obligation to repair, are standard.

- Lessee should be obligated to properly label all equipment and cabling.

- The obligation to remove the equipment, particularly cabling, should be included. While ownership of structural items at the end of the term may be acceptable, but the reversion of antennas it typically not.
Access

- Lessees will want 24/7 access. However, limitations on this are reasonable and standard, provided it permits immediate access in the case of emergencies. A system that will permit Lessee independent access in an emergency is recommended for the safety of the property and people (no one wants a falling antenna).

- Standard procedures for building and rooftop access in the building should be in place, such as advance notice of access and coordination of work, except in the event of an emergency; Building Owner should have the right to accompany Lessee to accompany lessee on rooftop visits or visits to critical building areas.
Contact Person for Lessee. Contact information – including cellphone – for the Lessee Rep. responsible for the equipment at the Building should be included in the agreement – and Lessee should have an obligation to update as appropriate. If there is a problem with the antenna (connector is loose, etc.), someone should be able to contact a local rep ASAP.
Compliance with Lighting Requirements; FCC requirements

- FCC Regulations – should be the responsibility of the Lessee.
- Lighting requirements will depend upon the sophistication of building owner/property manager and the height of the building. If the owner is not currently aware of whether its building is subject to lighting requirements, then this obligation must be placed on the Lessee.
- Costs should be based upon the party whose property is the result of the need to comply.
Interference

- **First in time. First in right.** - based upon time of installation of the equipment. Otherwise the rooftop becomes difficult to market in the future for other Lessees and can result in an exclusive for the benefit of one Lessee although that was not initially the desire.

- Consistency in all agreements at the property is key. If you have one or more agreements that relate back to the date of the agreement, and an antenna installed at a later date by one party interferes with an antenna that has been up and running by another Lessee, then the building owner will likely be in default of one – or both agreements.
Interference cont.

- Interference with consumer electronics and standard office equipment should not be an issue, due to running on different spectrums. Nevertheless, clarity that Lessee’s equipment may not interfere with typical office equipment and electronics for an office building or consumer electronics and equipment in a residential building should be included.

- Agreement should include right to have the equipment shut down to resolve an issue.

- Breadth of the Interference Language. Agreement should not typically include adjacent land or buildings.
Renewal & Termination Rights

- Lessees will want automatic renewal options; with set rental rate increases, my opinion is that this is reasonable, however the time period for when the non-renewal notice is given is important.

- Building Owners should consider a termination right in the event of a major redevelopment. Such a termination right would typically be granted only after the initial and one or more renewal terms and would typically require a fee. A long lead time will be required due to the time involved for Lessee to obtain permits to a replacement location.
Renewal & Termination Rights cont.

- Termination by the Lessee for convenience is often requested, however, this is unacceptable after a due diligence or option period, unless the termination right is mutual.

- Lessee termination due to loss of permits, change in laws, is often agreed upon subject to conditions, such as timely application for permits and diligent pursuit.
Relocation

- Preferable to simply terminating an agreement for redevelopment would be a relocation. Likewise, if relocation is required during the initial term or initial renewal terms, the cost should be on the landlord – the further out in the terms, the greater the likelihood that the Lessee will agree to cover a portion of the cost.

- Lessee’s will typically require that the new equipment be up and running or a cell-on-wheels be permitted during relocation.
In planning a redevelopment, or work that will require a relocation, lead time for permits to move the equipment must be kept in mind.

Allowing relocation at the Property versus termination will make the Building more marketable initially and planning a communication site in connection with a redevelopment often allows for an improved communication site for both parties.
Right of First Refusal. Notice on Sale

- The addition of provisions to grant a right of first refusal are becoming more common based upon the structures discussed by Stephen and the development of a secondary market in these agreements.
- Should be limited to communications companies or otherwise specifically addressing rooftop rights – and not any offers on the property generally.
- Should be triggered by offers the owner is willing to accept and not simply offers received.
Right of First Refusal. Notice on Sale cont.

- When representing the party benefitting from the ROFR, clarify that there is no obligation to match terms added in bad faith or for the purpose of undermining the right of first refusal. This is implied in some jurisdictions, but not all.

- Obligating a building owner to provide notice prior to a sale of the building (separate from a ROFR) is a fairly significant obligation and one that would typically not be provided.
When done right, the Rooftop can become a profitable part of a Building.