

PART 1 OF 2

WIRELESS TELECOM SITES CREATE OPPORTUNITY FOR LANDLORDS

By Jay A. Gitles, Seyfarth, Shaw, Fairweather & Geraldson



Jay A. Gitles

They can be every landlord's dream tenant -- they occupy previously unleaseable space, never ask for new carpeting, do not mind noise, and they pay the rent.

They are telecom equipment site lessees, and with the tremendous proliferation of cell phones, pagers and wireless telecommunications, landlords do not even have to incur marketing expenses to attract these new tenants. In cities and small towns across the country, telecom companies are lining up to lease space on rooftops (or on the ground) to install antennas, satellite dishes and transmitters. Because some building owners view this revenue as found money, many are signing up telecom tenants quickly -- sometimes, too quickly.

JUST SIGN HERE

In securing a rooftop lease, a common transactional pattern can be seen in this industry. The telecommunication companies (or their brokers) tender short, pre-printed form leases (sometimes calling them "license agreements") to property owners/landlords. Dazzled by incremental dollars and disarmed by the simple appearance of the telecommunication tenant's form, some landlords are hastily signing the leases without analyzing what valuable property rights and/or protections they might be giving up.

From a landlord's perspective, these transactions can be attractive for several reasons. First, the tenant typically will be leasing "found" space. Second, buildout costs are uncommon because the telecommunication company usually installs the antenna. Third, the landlord customarily will have little or no maintenance obligations in connection with telecommunication leases.

TAKE A CLOSER LOOK

Before signing the telecommunication lease, however, a thoughtful landlord should consider several "big picture" issues, as well as a basic checklist of points to be included in the final documentation.

The first issue is how one reconciles the rapid technological change in the industry with the long-term nature of these leases. Chances are the originally installed equipment will become outdated -- and lose the bulk of its economic value -- well before the end of the lease. Landlords should be careful to require removal of the equipment by the tenant when the lease is up.

Second, hazardous waste issues may be a concern for you and your community because of the alleged health hazard of non-ionizing microwave radiation. While no one can predict whether these materials and substances will be viewed as hazardous in the future, a long-term lease with a tenant whose equipment emits strong microwaves and electromagnetic fields may constitute a risk some landlords will not want to take on.

Third, landlords should consider the aesthetic implications of the telecommunications equipment. The current trend is that equipment is becoming increasingly compact and less imposing. Nevertheless, most landlords prefer to keep their rooftop's appearance clutter-free and take advantage of camouflaging precipices and cornices when available.

Fourth, landlords should consider whether it will be necessary to grant access and/or utility easements to the telecommunication tenant. Keep in mind plans for future use or development of the property, and avoid granting inflexible and burdensome easements. *See part 2 in the October issue of The BOMA/Chicago Report.* Seyfarth, Shaw, Fairweather & Geraldson is an affiliate member of BOMA/Chicago.

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LANDLORD CHECKLIST

Assuming a landlord elects to proceed with a new rooftop deal, the following checklist should help prevent the careless loss of valuable property rights and protections.

□ Evaluate Rents and Increases. Rents vary widely depending on a host of factors including the height of the building, an unobstructed "view," zoning, and availability of similar space nearby. Initial monthly rentals can be as low as \$300 for a two-way pager receiving site to as high as \$5,000 for a state-of-the-art systems site. Like most property leases, annual increases in rents are customary. You should have no problem requiring payment in advance for an entire year's lease and, to encourage prompt payment, inclusion of a late charge clause. Also, confirm that the tenant will pay all utility charges and define its obligation, if any, for "additional rent."

□ Define Space. When installed, the antenna will be on the roof and additional equipment will probably be located somewhere inside the building, usually the mechanical room. In order to maximize your opportunities to lease to other rooftop tenants, limit the space size and designate the rooftop area and the interior space on an exhibit to the lease. If you plan on housing some of the heavier systems, such as radio equipment, confirm that the exterior space can support the weight of the equipment.

□ Limit Representations and Warranties. For example, avoid representations concerning utilities, particularly with respect to their adequacy. In some cases, the tenant will cover the cost of a power upgrade to run its equipment.

□ Limit Use. Control who can operate on the roof and restrict assignment and subletting rights. Require consent to assignments and subleases and give the landlord the right to withhold. Keep the tenant directly liable. Also, where appropriate, require a profit split on sublease/assignment income. You would also be well advised to limit use to installation and transmission of the tenant's own signals from the antenna.

□ Prescribe Investigation Rights. You are best served by adding an "as is" clause.

□ List Equipment. Specify the size and

type of antenna and the specifics of equipment and wiring to go inside the building. Prevent equipment changes without the landlord's consent.

□ Control Equipment Installation and Removal. Although the tenant will install the equipment, the landlord must protect its roof (and warranty). The tenant must provide plans and specifications to the landlord for approval. The landlord should also preserve the right to oversee the tenant's work and approve any future alterations. Further, the landlord should have the unilateral right to disapprove any installations or alterations that may void or adversely affect its roof warranty.

□ Avoid Frequency Interference. The lease should require that the tenant give the landlord a copy of the governmental grant and a list of the tenant's frequencies. It should also require that the tenant cannot change frequencies without the landlord's consent and that the landlord will only have to use reasonable efforts to prevent frequency interference, but the tenant must perform its own investigations. Also, the lease should require that the tenant's use will not interfere with any existing tenant's frequencies and that the tenant will correct any interference.

□ Ensure Compliance With Laws (Including Installation). The landlord should make the tenant responsible for procuring any special permits, variances or approvals. Make the tenant give the landlord copies of permits prior to commencing installation.

□ Require The Tenant To Procure Utilities. Either make the tenant contract directly for utilities and install a separate meter (with landlord retaining control over location of the lines) or let the tenant use the utilities in the building, but make the tenant pay its share and agree not to interfere with other tenants' utility service.

□ Limit Tenant's Access. Prevent security and safety problems by limiting which of the tenant's employees can have access. Also, a landlord should require advance notice prior to access.

□ Preserve Rights of Entry. The landlord should retain free access to all rooftop space to deal with emergencies, repairs, inspections and showings to prospective tenants, buyers and lenders.

□ Retain Relocation Rights. If you can-

not get an early termination, relocation is particularly helpful. It also enhances your ability to lease to other telecommunication tenants.

□ Health or Environmental Hazard Termination Rights. The landlord should retain the right to terminate if it determines that the tenant's use is a dangerous hazard that is not (or cannot be) remediated.

□ Check for the Following Boilerplate Clauses. Some of the most common and necessary include:

- Brokers
- Indemnity (protect the landlord with respect to claims from installation, operation, removal of equipment and use and occupancy of the site by the tenant)
- Insurance
- Entire Agreement
- Casualty (clarify when the landlord must rebuild and when the landlord can terminate)
- Landlord Exculpation (limit to your interest in the property)
- Governing Law
- Surrender/Holdover (specify the condition of the return and pay double rent during holdover)
- Mechanics Liens
- Personal Property Taxes (make the tenant responsible)
- Right to Record
- Time of the Essence
- Subordination (require the tenant to subordinate)
- Severability
- Estoppel Certificates
- Waiver of Subrogation (prevents lawsuits over insured claims)
- Notices
- Further Assurances
- Binding on Successors
- Eminent Domain

With more and more players entering the telecommunications field, the battle for bandwidth in the air is paralleled by a battle for equipment sites on the rooftops. In their eagerness to claim a share of the spoils of this war, landlords must take care to ensure their "dream tenant" does not become a nightmare. The building owner's prescription for a good night's sleep is nothing more than a well-crafted lease that anticipates the nuances particular to these attractive, new, high-tech tenants.

See the September issue for Part 1 of this Article.

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