A Checklist for Attorneys Negotiating Telecommunications Equipment Leases on Municipal Property

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FAST FACTS

The demand to lease space for telecommunications equipment is exploding exponentially.

Telecommunications providers see municipal property as prime locations to lease space to expand their service area and improve quality.

Cell site leases present unique issues for municipal attorneys to consider before advising clients.

A municipality with property on which a wireless telecommunications provider could put equipment is in an enviable position. Having property to lease can provide valuable income. Many municipalities already lease space to telecommunications providers on properties such as water towers, and growing demand for lease sites has led providers to get creative in finding locations. For municipal attorneys, if a provider has not yet asked your clients to lease property for telecommunications equipment, one is likely to do so soon.

Several factors are driving the growing demand: telecommunications providers want to improve quality and expand their service areas, and they're offering new services beyond cellular that rely on locating equipment on towers.

Experts anticipate that large cellular providers like Sprint, Verizon, and AT&T will need *thousands* more cell sites—areas where providers install telecommunications equipment to deliver their services—as part of the high-speed Internet (4G or LTE) they're offering to keep their promise of faster service.[1] Some predict that Sprint alone will need *15,000 to 18,000* new cell tower sites.[2]

The demand is hitting Michigan urban and rural areas because providers want to expand their service areas and improve quality. How do providers do this? That's right—by leasing more cell sites. The demand for additional cell sites is also fueled by the fact that they are needed by both cellular phone providers and those delivering wireless Internet. In 2011 alone, wireless Internet demand caused the number of cell sites to increase by 12 percent[3]—and many of those sites were on municipal property such as a water tower or a tower built on public land by the provider. Anticipating a perceived shortage of cell sites, some service providers are considering other tall structures such as gas-station signs in prime areas of need.

To seal the deal on telecommunications leases, reputable providers use written cell site leases. Faced with a proposed site lease, municipal attorneys can protect their clients by encouraging them to resist the urge to sign quickly. The rental dollars will be there whether the client signs immediately or has a municipal attorney review and negotiate the lease proposal. Cell site leases present many issues that municipal attorneys should review before making a recommendation on the proposal. Below is a list of some of the factors municipal attorneys should consider before recommending their municipal clients sign on the dotted line.

- **Term—**The term of the cell site lease means how long the agreement will last, i.e., how long the municipality will let the provider use the property and how long the provider must pay rent. Does your municipal client want the lease to have a long or short initial term? Consider the advantages of each approach. What happens after the initial term expires? Does your client want the lease to renew automatically at the same rental amount or at an increased amount?

- **Rental amount—**Location, location, location. Put simply, consider your client's leverage. Your municipal client likely has more leverage when negotiating rental amounts if a provider has a strong

interest in leasing space in your client's area and there are few suitable alternatives. If you are unsure of the market rate for a site lease, speak with a consultant knowledgeable on the subject.

- **The leased site—**The lease should specify exactly which property the provider (the tenant) may use. In other words, how much of its property does the municipality want to let the tenant use? Providers will often seek rights to use space on the tower or structure for equipment, space on the ground to put other related equipment, and rights to access equipment. Watch for providers asking for rights to use more property than they really need. A related item to consider is the type of access rights to grant. Providers often push to have municipalities grant them an *easement* to get to and from the tower. Should your municipal client agree to that? Or should the client grant a lesser access right—such as a *license* or a *right of way*? There is a big difference between granting an easement for access and granting a license or right of way. Will the provider be allowed unsupervised access to its equipment or only when a municipal official is present?
- **Right to terminate—**In other words, a municipality's right to cancel the lease. Signing a lease indicating the provider-tenant will pay a set monthly dollar amount seems great at face value, but what happens if something goes wrong during the term of the lease? The municipal attorney should ensure that the client may cancel the lease under appropriate circumstances.
- **Indemnity—**This legalese found in many leases simply means "pay for." In cell site leases, a typical indemnity scenario involves a person or company that is not a party to the lease suing one of the parties to the lease. A standard indemnity clause would require one contracting party (say, the municipality) to pay damages that the other contracting party (say, the provider) must pay the third party. Does a municipality have the right to agree to an indemnity clause? If it has the right, should the municipality agree to such a clause? And if it agrees, how will the clause affect the municipality's other rights, such as governmental immunity? Indemnity clauses are complicated and require careful consideration.
- **Allowed equipment—**The cell site lease should specify which equipment the tenant-provider may put on the site, including model number, frequency, etc. Should the municipality require the tenant-provider to get separate approval from the municipality before installing equipment initially allowed

by the lease or before changing equipment after it is installed?

- **Other tenants—**Providers often want to locate equipment on sites that already contain equipment of other providers. There is good news and bad news with this scenario. The good news is that allowing multiple providers to lease space can generate additional revenue for a municipality. But be careful; there could be a hidden trap. Does the municipality have existing leases with other providers that limit its rights to lease space nearby to others or require advance notice to existing tenants of another provider's desire to locate on the same site? All prior leases should be considered when negotiating with a new tenant wanting to lease space near an existing tenant.
- **Interference with other tenants' equipment—**Interference is one of the most important items to consider in a cell site lease—for all parties. It becomes an issue when a municipality leases space to multiple providers. There is the possibility that the newcomer's equipment may interfere with existing equipment and degrade the service quality of an earlier provider. The lease should cover this point, bearing in mind the FCC's "first in time, first in right" policy.[4]
- **Insurance—**Most cell site leases include specific insurance minimum limits for both parties. Are the proposed insurance limits reasonable? Will the required insurance create more expense for the municipality? Consult the municipality's insurer concerning any proposed insurance clause.
- **Maintenance—**A municipal attorney should ensure that the cell site lease spells out exactly who (the municipality or the tenant) has to maintain what. In other words, if the lease allows the tenant-provider to put equipment on the municipality's water tower, who maintains the tower?
- **Letter of credit—**Depending on the provider and other circumstances, the lease may require the tenant-provider to furnish a letter of credit to the municipality to ensure funds are available to correct any damage the tenant causes during the term of the lease.
- **Lease amendments—**As with most contracts, the signing of the initial cell site lease usually is not the end of the story. It is common for a provider to want to change some lease terms such as allowed equipment because of changes in technology or other reasons. The points discussed here should also be considered when reviewing any proposed lease amendments.

Cell tower leases can be profitable for municipalities. But a municipality that rushes to sign a proposed cell site lease does so at its own peril. With a little caution up front, municipal attorneys can often reach a mutually rewarding agreement that benefits the client and keeps both parties out of the courthouse. ■

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ENDNOTES

1. See Goldman, *AT&T, Verizon and Sprint 4G: Not so fast* <http://money.cnn.com/2010/02/23/technology/4g_networks/> (accessed February 23, 2015).
2. Mansfield, *Independent Towers Will Get an EBITDA Boost as Sprint Deploys Clearwire Spectrum* <http://www.cellular-news.com/story/61605.php> (accessed February 23, 2015).
3. See *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, report and order of the Federal Communications Commission, adopted September 26, 2013 (WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32), ¶ 2, n 2.
4. See *In the Matter of an Inquiry Into the Commission's Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification*, third report and order and second order on reconsideration of the Federal Communications Commission, adopted August 14, 2013 (Docket No. 93-177), ¶ 4, n 7 and 8 (noting that the FCC's "longstanding 'newcomer' policy mandates that a newcomer (i.e., a party constructing a new or modified facility) is responsible, financially or otherwise, for taking steps necessary to eliminate objectionable interference to existing stations").