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Notes from the Editor



Welcome to the new and improved **Build On This**. After taking into consideration our readers' comments from Buckingham's newsletter survey, we revamped the **Build On This** to make it more readable and user friendly. In this issue, we provide brief summaries of significant court cases and legal developments affecting real estate and construction, and a feature article written by me, **Edward Buehrle (Akron)**. In my article, I discuss terms and tips for cellular tower leases.

For current information on Real Estate & Construction Law please visit our web blog, buildonthis.com. As always, we welcome your opinions and feedback. Thank you.

Edward V. Buehrle
Editor of the *Build On This*

FEATURE ARTICLE

Cellular Tower Leases: Terms & Tips

By: Edward V. Buehrle

As a legal real estate practitioner, it is becoming more and more common to receive a telephone inquiry from a client about a cellular tower company offering to pay rent in return for allowing the company to install a cellular antenna facility on the client's property. Predictably, the client eventually asks whether or not the terms are a "good deal."

Maximize revenues, minimize interference and minimize landowner's obligations

Before you can properly respond to any client inquiry, you need to review the lease and/or term sheet that is being proposed by the cellular tower company ("Carrier"). The general backdrop for all negotiations should reflect the title of this section, i.e., maximize revenues,

minimize interference from the Carrier, and minimize obligations of the landowner. With respect to maximizing revenues, it is always a good idea to get a barometer reading of how desperate the Carrier wants the location. It is a reasonably good assumption that if a property owner has been contacted by a cellular tower company, it means that the Carrier has done all of the research for ideal locations and has identified the site as the prime location. Topography (i.e. "top of a hill") is not always the key factor. Many times the location is identified because it strategically fills in a "dead zone." Rents can vary significantly based upon uniqueness of the site and number of alternative comparable sites. Typically, rents can fall somewhere between \$1,000 and \$2,000 per month. Suggestion: request

Cellular Tower Leases: Terms & Tips

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the Carrier to disclose the highest rates at which it has agreed to. It's not uncommon for the Carrier representative to be fairly open on their historical negotiations because their objective is to secure the site. They have upward limits on their authorization, which some share and some do not. You do not know if they will willingly offer upper-end unless you ask.

Additional revenue items consist of co-locator fees. Co-locator fees are additional fees that can be charged in the event the Carrier secures additional leases on the antenna facility. For example, if the Carrier is able to secure additional income streams for the use of its tower from more than one cell tower provider, then it's reasonable that the owner should share in that additional income stream, to the extent of up to or more than 50% of those additional revenues. The percentage of the additional revenues will impact the amount of the base rent that the Carrier is willing to provide. They tend to negotiate it on a sliding scale, i.e. the more base rent, the less percentage of co-locator fees and vice-versa.

With respect to taxes, try to negotiate a pro-rata reimbursement for the area that is used by the antenna facilities as a factor of the overall taxes on the real estate. The Carrier's utilities should be separately metered.

With respect to minimizing interference, a landowner needs to consider the size of the area that will be disrupted, the ingress and egress easements that the Carrier will need to access and the adverse impact on the overall aesthetics of the property. All of these factors will limit the future development possibilities of the landowner's real estate. Do not agree to any terms unless you have a site plan of where the ingress/egress and utility easements are to be located and how large the area is going to be. It is critical for the landowner to understand and appreciate the location of the easements and how they will impact the use and looks of the property. Many times, the Carrier will press to have the landowner sign a lease with general references or with specific site to be designated. In addition to the required fencing around the antenna facilities, it is a good idea for the landowner to require the Carrier to install natural "green" barriers in addition to the fencing.

Term

Typically, terms are offered in five-year increments, with four to six automatic renewal options. CPI or comparable rent escalator should be negotiated to trigger at each renewal increment.

Permits, zoning

Carriers request up to 12 months to obtain any necessary permitting and possibly additional extension options. Suggest six months with one six-month renewal option. Landowners should require an option fee between \$2,500 and \$5,000 (to cover set-up fees, legal, etc.), and should anticipate resistance from the neighboring community if the site is located near residential areas. The lease should require that the Carrier has the obligation to secure all required approvals, permits, zoning and otherwise.

Termination

Typically, Carriers require the right to terminate unilaterally. But, if so, the landowner should negotiate an early termination fee of at least one-year annual base rent or more. In addition, the landowner should require the Carrier to remove all antenna facilities. The Carrier should not have the right to abandon the antenna facility without the landowner's approval.

Insurance, indemnity

The Carrier must be required to carry, at a minimum, liability insurance and the landowner should require a certificate of insurance naming the landowner as additional insured. The landowner should also require standard indemnity provisions from and against any and all claims, costs, expenses or damages as a result of the Carrier's (successors and assigns, etc.) use of the property.

Security, default

Without security, it is difficult for any tenant to enforce the lease provisions. To secure the Carrier's obligations, the landlord should request a hefty security deposit. In the alternative or in addition, the Carrier can post a bond or letter of credit in an amount deemed necessary to secure the Carrier's obligation to remove the tower and any and all peripheral structures and equipments and to secure the Carrier's obligations to indemnify the landlord.

THE AUTHOR

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CASE SUMMARY

Local hiring preferences can result in withdrawal of federal funds on a city project.

City of Cleveland v. State of Ohio, et al., 2007 WL 4123743 (C.A. 6 (Ohio))

Summary: When federal funds are involved on a local project, the local municipality needs to be very cautious when attempting to institute local hiring preferences. Courts will most likely side with the decision made by the federal agency provided that decision is not arbitrary or capricious.

Case: The issue before the Court was whether a city can mandate a certain percentage of city residents as workers on a road improvement project that is partially funded by federal money. The answer is “yes,” provided the city’s ordinance does not violate federal law or regulations.

In preparing a bid package for a local project, the City of Cleveland included reference to its Lewis Law, a city

ordinance that requires 20% of the work on the project to be performed by city residents. Upon reviewing the bid package, Ohio Department of Transportation advised the City that failure to remove the Lewis Law language would lead to the withdrawal of federal funds, as the City’s local hiring preference requirement violated certain federal laws. The City altered the bid package by removing reference to the Lewis Law. However, subsequently, the City’s contractual agreement with contractor incorporated the Lewis Law’s requirements. As a result, the applicable federal agencies withdrew their federal support.

The City filed suit seeking a declaration that the application of the Lewis Law did not violate federal laws. Although the Court of Appeals agreed with the City that the substance of the Lewis Law itself did not violate federal law, the Court ultimately denied the City’s request reasonably that the withdrawal of funds was authorized under the discretion conferred by the federal agencies involved and by 23 U.S.C. §112(b), which prohibits contract requirements that are not expressly set forth in the advertised bid specification.

LEGISLATIVE UPDATE

Criminal background checks to be required on employees and contractors who work in school districts.

H.B. 190 (eff. Nov. 14, 2007) – Requires private contractors who work with a school district for a “regular period of time” to run background checks on all employees assigned to a district building or project. Public owners are beginning to rely upon this newly enacted statute to require private contractors to obtain fingerprints and request both an Ohio Bureau of Criminal Identification and Investigation (“BCII”) and an FBI records check prior to assigning employees to work on district projects. Further, the background check must be repeated every five years for each employee, and private contractors hired by school districts must pay the cost of these checks.

The new law, R.C. 3319.391, requires a criminal background check for any person, other than people transportation operators, who is:

- (1) Hired to work in a school district, educational service center or chartered non-public school; and

- (2) In any position that does not require a “license” issued by the state board of education. This definition can be applied broadly, to include groundskeepers, construction workers and others who enter school property to perform services.

Pursuant to R.C. 3319.381(A)(2), an employee is ineligible to work on a school district project if that employee has ever been convicted of or plead guilty of an offence listed in R.C. 3319.39(B)(1).

There is currently a movement aimed at adding an exception that would apply to private contractors that will not have access to children when performing work on a school district project. But currently, the law is in effect and applies to all private contractors on school district projects. Employees who were hired prior to the effective date of the law and who were not previously required to have background checks will have to be checked by September 5, 2008, as recently established by the Ohio Department of Education.

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Save the Date for these Upcoming Presentations:

February 19 - Youngstown, Ohio and February 20 - Akron, Ohio
2007 Update to AIA Contract Documents

Henry I. Reder (Cleveland)

Sponsored by: Selvaggio, Teske & Associates, Inc.

February 26

Ohio Construction Conference

Donald B. Leach, Jr. (Columbus)

Columbus, Ohio

Sponsored by: The Builders Exchange

February 27

Annual Real Estate & Construction Law Seminar

Keynote Speaker: Robert Y. Bowman (Deputy Mayor of Economic Development for the City of Akron), Henry I. Reder (Cleveland), Richard J. Lolli (Canton) and Donald B. Leach, Jr. (Columbus)

Akron, Ohio

Sponsored by: Buckingham, Doolittle & Burroughs, LLP

March 19

Liens and Encumbrances Affecting Real Estate

Donald B. Leach, Jr. (Columbus)

Columbus, Ohio

Sponsored by: Ohio State Bar Association

April 8

Insurance Law from A to Z

Scott J. Topolski (Boca Raton)

West Palm Beach, Florida

Sponsored by: National Business Institute

April 16

2007 Revisions to the AIA Contract Documents

Robert A. Hager, Henry I. Reder and Martin J. Pangrace (Cleveland)

Cleveland, Ohio

Sponsored by: Lorman Education Services

June 3

Ohio Mechanics' Lien Law: The How's and Whys of the Paperwork

Donald B. Leach, Jr. (Columbus)

Columbus, Ohio

Sponsored by: The Builders Exchange of Central Ohio

June 24

What to Do When Construction Projects Go Bad

Robert A. Hager and Martin J. Pangrace (Cleveland)

Akron, Ohio

Sponsored by: Lorman Education Services



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