



Commercial Real Estate Insights

CURRENT LEGAL TRENDS & ANALYSIS

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How Technology is Reshaping the Real Estate Industry

by Linda S. Koffman

Commercial Real Estate attorney Linda S. Koffman offers her expert insights about how technology is reshaping the real estate industry in the following article from her newsletter, *Commercial Real Estate Insights: Current Legal Trends & Analysis*. To subscribe to the newsletter, please send a request directly to Ms. Koffman at lkoffman@ghplaw.com.

Wireless communication is one of the most important and fastest growing sectors of the national economy. Not only are many households giving up their landline telephones entirely in favor of wireless services, but businesses are also incorporating wireless services into their day-to-day operations (such as the use of mobile devices to scan purchases and documents and to complete sale transactions). Companies are launching new applications on a daily basis, and use by individuals of cellular networks has expanded to include access to emails, websites, music, videos, games, and other applications. Each wireless facility can only provide service to a given area (the “coverage area”) and to a limited number of users (also known as “capacity”). The rapidly growing demand for cellular-related services along with the increasing expectation by consumers, both business and personal, of faster wireless service has resulted in a pressing need for the wireless industry to expand, upgrade and replace the existing wireless infrastructure.

One of my initial projects as a real estate attorney was the representation of a large regional telecommunications company in the build-out of their cellular infrastructure in Southern California. During that period, I drafted and negotiated over 400 cell site leases (including ground leases, building leases and colocation facilities). Colocation refers to the placement of equipment for more than one company on the same facility. Subsequently, I represented a national broadcasting company in the build-out of their infrastructure for satellite radio communications. Since then, I have had the opportunity to represent a number of parties on the other side of these types of transactions.

Wireless communication companies usually work with subcontracted site acquisition consultants to identify potential locations and negotiate cell site leases on their behalf. Each communication carrier has a team of lawyers who have prepared a form of lease that protects the interests of

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the carrier. However, few if any commercial real estate attorneys understand the unique issues raised by these types of cell site leases. In order for a property owner to be properly protected, it is imperative that the owner hire a lawyer experienced in cell site leases to review the contract.

Certain lease provisions are sacrosanct to a cell site carrier, and when a general commercial lawyer suggests deleting or significantly paring back the carrier's rights in these areas, the negotiations will come to a dead halt and the carrier will look for another location. Revenue from a cell site lease can be a valuable and stable source of additional revenue to an owner. The key for a lawyer negotiating a cell site lease is to know how to protect the client while not alienating the cell site carrier and killing the deal.

For example, most cell site leases do not specify the equipment to be placed on the lease premises. It is customary to see a description such as "equipment for a communications facility" without any further detail. The number, type and size of equipment should be specified in the lease. Otherwise, the carrier can start by placing a small antenna and subsequently add several large dishes or large antennae or sublease the premises to other users (called a colocation, and examined more fully below) without ever paying additional rent for the more intensive use.

There are two basic types of wireless facilities: (1) a ground lease where the wireless carrier builds a structure (usually designed as a monopole or lattice tower on which various antennae are mounted) and (2) a building or space lease where antennae are mounted to various existing structures (such as the exterior of a building or a building roof). In the case of a ground lease, it is common for the carrier to also require a secured space alongside the tower or monopole for communications equipment related to the antennae or dishes on the tower/monopole. In urban settings, monopoles are often camouflaged as trees and range from 50'-200' in height. On the other hand, in rural settings, one will see more lattice towers (which are generally greater in height than a monopole) because coverage must be broader in rural locations (the higher the structure, the broader the coverage). In each instance, attention needs to be paid to how and when the carrier will have access to the leased premises. Interruption in service is a deal killer to a wireless carrier, so twenty-four hour access needs to be available in a manner that works for both parties. If you enter into a ground lease in California, you will need to be mindful not to violate the Subdivision Map Act. The Subdivision Map Act prohibits the division of property for the purpose of sale, lease or financing without governmental approval. A ground lease structure would violate the Subdivision Map Act unless the pad leased to the carrier is a separate legal parcel.

When antennae are mounted onto an existing structure (a monopole or lattice tower, or mounted in a location where other wireless communications companies have already mounted equipment), the placement of equipment for a different company is called "colocation." The term "colocation" may also refer to the practice of subleasing space at an existing cell site. Colocation involves the negotiation of signal interference concerns among various parties, space separation requirements between equipment owned by different parties, and structural considerations when adding or replacing equipment. The FCC operates on a "first in time" basis; the first equipment and frequency has priority over any subsequent equipment and frequency. The party managing the colocation facility is the intermediary that resolves any interference issues. It is essential to be clear who controls the tower, monopole, roof premises, etc. For example, if the property owner owns and controls the tower, monopole, roof premises, etc. and leases a portion of it to a telecommunications user, the owner can also lease space to a different carrier, increasing the owner's profit margins through multiple rents. The property owner should understand that under this arrangement the owner becomes the ultimate decision maker among the parties in the event of signal interference concerns, space separation requirements and structural considerations – remember the FCC "first in time" rule. Many owners, however, do not have the sophistication to

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arbitrate these issues among the parties. The field has developed such that owners can turn to third-party telecom professionals to manage these issues on the owner's behalf, but this will not be relevant for most owners and the cost for such management can decrease the owner's overall revenue.

In the event the tower, monopole, roof premises etc. is leased entirely to the telecommunications carrier, that carrier has the right to sublease to other users and that carrier therefore becomes the arbiter of interference issues among the various subtenants. That carrier also receives all sublease profits. With this structure, a savvy property owner could ask for a revenue sharing agreement. Revenue sharing agreements vary considerably, but generally provide a revenue split between the tower/monopole owner and the property owner for rents received from subtenants.

After taking into account these overall structuring issues, there are a number of other unique issues raised in a cell site lease. For example, the property owner should ask the telecommunications carrier for evidence that it has obtained all permits and approvals required to operate its use on the lease premises. It is not unusual for the carrier to want the lease term (and the payment of rent) to commence upon obtaining its receipt of certain approvals. As an owner, however, I would not agree to this. The carrier may tie up the site and then never apply for the approvals. It is also possible that the applicable governmental entity may put a moratorium on these type of approvals or it may take months or even a year to grant the approval. Hence, your rent payments never start. The carrier might also ask for the term and the payment of rent to commence "upon start of construction." This means the carrier may get all necessary permits and approvals and never actually start construction. This basically ends up being a unilateral option in favor of the carrier for which there is no consideration given to the property owner and no end date by which the owner can terminate the agreement if approval is not granted by that date. To avoid these pitfalls, consider asking for rent to commence upon mutual execution of the lease and the term to commence upon the carrier obtaining all necessary permits and approvals to commence construction.

Currently, there is a bill winding its way through the California legislature concerning jurisdiction over antennae and equipment on public buildings, street lamps and traffic signal poles or within the public right-of-way (see SB 649). This bill would provide that a small cell site is a permitted use subject only to a permitting process at the city or county level. This bill imposes a state mandated local program and prohibits a city or county from adopting or enforcing any regulation on the placement or operation of a communications facility in the rights-of-way by an operator permitted by State law to operate in the right-of-way. This bill is beneficial to the cell site carriers, but would reduce demand for cell sites on private property and would take the approval process out of the hands of local governmental entities. Some consumers are concerned that the close proximity of these uses near neighborhoods poses a health risk.

If you are thinking of leasing to a communications carrier, please consider contacting a lawyer experienced in cell site leases to review the contract.

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Recently Closed Transaction



Attorney **Linda S. Koffman** recently represented LIMO Company, as Landlord, in the lease to Smoky Hollow Industries, LLC, as Tenant, of approximately 120,000 square feet of industrial zoned space on 5.8 acres in the City of El Segundo, California. Contained within the agreement is an option to purchase the portfolio. LIMO Company was represented by Lee Segal and Smoky Hollow Industries, LLC was represented by Matt Crabbs.