Wireless Landlords: Checklist for Protecting Landlord Rights and Budgets

By Gerard Lavery Lederer and Bennett Givens

Gerard Lavery Lederer is a partner in Best, Best & Krieger in Washington, DC, and Bennett Givens is an associate in the firm's Los Angeles office.

Landlords should be on the lookout for an increasing number of requests for tower co-location, generator expansions, and new sites across the country, as the nation's largest cell tower management companies are forecasting levels of increased leasing activity not experienced in two decades. According to Crown Castle, the nation's largest provider of communications infrastructure, cell site leasing activity in 2022 will be 50 percent higher than the company's trailing five-year average. This is unprecedented in the industry. Landlords' lawyers should prepare themselves in advance to deal with tower lease and license issues, as suggested in the checklist below.

Unparalleled Growth

The flurry of cell site leasing activity is largely driven by the three major carriers deploying upgraded 5G networks. Also significant, DISH Wireless is entering the market as a new nationwide competitor, which is contributing to the most co-location activity in Crown Castle's history. Additionally, the build-out of wireless network infrastructure largely through co-location requests is fueling the activity to meet the industry's rapidly expanding needs. This is expected to drive a 20 percent surge in core leasing tower activity in 2022 compared to 2021—a year that saw high levels. With T-Mobile actively pursuing its "Anchor" project (the addition of Massive Multiple-Input and Multiple-Output (MIMO) and Sprint's 2.5 GHz spectrum to T-Mobile sites) and Verizon kicking off C-Band and Citizens Broadband Radio Service (CBRS) upgrades on macros, there was a flurry of activity on existing sites, especially toward the end of 2021.

The FCC & Wireless Infrastructure

Not only is wireless infrastructure ushering in the modern mobile communications era; it is also playing a larger role in the future of information networks. Cell phone towers are the most established type of communications infrastructure and are still the most reliable way to deliver critical wireless coverage.

The Federal Communications Commission (FCC) and the state of California have attempted to streamline the regulatory process to meet the growing demand; however, it is imperative that both public and private property owners, and their counsel, understand that the regulatory relief provided does not affect important rights as property owners.

Sites & Land Rights

Adding to this frenetic level of activity is a late 2020 FCC Report and Order that mandates certain qualifying wireless facility modifications be approved by state and local governments. Report & Order, *In re Implementation of State & Local Gov'ts' Obligation to Approve Certain Wireless Facility Modification Requests*, FCC 20-153 (Nov. 3, 2020), https://bit.ly/3m42Rce. Specifically, the FCC granted cell tower tenants and operators the regulatory right to deploy generators and other communications equipment up to 30 feet outside of their currently permitted site. A site is defined by the FCC as the "leased or owned

Published in Probate & Property: Volume 36, Number 2, ©2022 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

property surrounding the tower" and "outside of the rights-of-way of a community."

In addition to the FCC Report and Order, California recently adopted a law that mandates cell tower operators have eight hours of backup power, resulting in a wave of generator siting requests. Gail A. Karish, *New Macro Cell Tower Emergency Generator Law in California*, Best Best & Krieger: Insights (Oct. 13, 2020), https://bit.ly/3GJpquK. The FCC first proposed this mandate in 2008 in response to the massive loss of service in the aftermath of Hurricane Katrina, but it was eventually vacated by OMB because of the lack of realistic implementation in the proposed time frame. California determined that the ensuing 13 years was time enough for carriers to meet this obligation. Other states, including New York and Connecticut, are considering similar legislation to mandate backup power generators at cell towers within their jurisdictions.

Protecting Your Property Interests

Cell tower tenants, operators, and their consultants may confuse recent state and federal streamlining efforts with grants of property rights. This is especially true when the property owner is a public entity that has both regulatory and proprietary authority over the land or rooftop on which a cell tower is sited. Public and private landowners, and their counsel, need to be aware that the FCC-expanded site approval and state level backup power resiliency requirements speak only to regulatory approval, not the transfer of property rights.

Here is a checklist of issues to consider to help protect the landlord's rights and budget:

- **Know the landlord's legal rights**. The FCC update to the U.S. Code of Federal Regulations, title 47, section 1.6100 Wireless Facility Modifications, and the California legislation are limited to regulatory permitting authority. In fact, a number of local governments have challenged the order in the Ninth Circuit Court of Appeals. If the landlord is a private or public property entity, it has rights as a property owner under its lease or license agreement that are separate from its regulatory capacity. Similarly, private entity owners should not be misled that a regulatory approval overrules the landowner's authority under the lease or license agreement. If the landlord is uncertain about whether it is acting in a regulatory or proprietary capacity, seek legal advice. The landlord shouldn't rely on what the cell tower operator tells it.
- **Preserve the rights in writing**. The landlord should reserve the right to approve cell site deployments and any changes either on the tower or on the site. Most operators will readily agree to the property owner's prior approval of plans or changes. But the boilerplate lease or license agreement that providers will share with the landlord rarely includes such a clause. The landlord usually has to ask for it. The cell tower operator will be represented by counsel, so the landowner should also retain counsel to help be sure its property rights are protected.
- **Require that use of additional space pays you additional rent.** Tower owners will typically agree to pay additional rent for additional space, be it for generators or additional equipment cabinets. Of course, they will rarely lead with such an offer, and some less-than-scrupulous members of the industry have tried to claim that the FCC's or California actions grant them the rights to deploy such facilities for free. Be sure this requirement is included in the lease.
- **Require that time and expenses are covered**. The wireless industry is experiencing its highest level of tower activity in history, and it will continue to do so for some time for no fewer than three reasons:

1. Sprint and T-Mobile, which operate a total of 110,000 towers, have merged and need to harmonize their different networks and streamline their tower offerings by shutting down 35,000 towers and building 10,000 new towers due to overlapping coverage as a result of the merger and filling of holes in the network;
2. **DISH needs to build an entirely new wireless network from the ground up, contributing to the most co-location activity in history; and**

Published in Probate & Property: Volume 36, Number 2, ©2022 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

3. Wireless providers are so busy adding 5G capacity to their towers that an 11 percent growth in adjusted funds from operations per share is now expected.

- **These transfers, upgrades, additions, and equipment updates require hands-on management by landlords and other professionals.** Counsel should require that the time and costs the landlord spends by employing professionals to help advise it be recoverable. These additional professional fees can add up quickly and will far exceed the rent payments the landlord receives. These recoverable costs should include legal counsel's fees.
- **Don't routinely sign off on property owner authorization requests.** Even if the landlord failed to include approval of plans in the lease or license, the landlord may have another chance to protect itself. Most jurisdictions require that a permit application include a signed property owner authorization if the applicant is not the owner of record. If the agreement does not require that the landlord take on such obligations, don't do so unless the landlord agrees with the plans and your expenses are covered.
- **Protect your client's interests if the tenant changes from a carrier to a tower management company**. Many carriers traditionally leased their own towers. To raise funds to purchase more spectrum, major carriers have sold or assigned their towers to tower management companies. A recent AT&T and Crown Castle $4.85 billion tower transaction includes AT&T's agreement to lease the rights to approximately 9,100 of its company-owned wireless towers to Crown Castle, which will also purchase approximately 600 AT&T towers. Most leases or licenses require the landlord's written consent before any such transfer can be made. Because the business plans of a tower company are significantly different from those of the carriers, the landlord should also make sure that all future licenses have such a requirement for its approval.

When considering negotiation with a tower management company, these are four questions to consider in addition to the business terms of an access agreement.

- Does the agreement protect the landlord in this changed environment and new circumstances?
- Does the transfer comply with the requirements of the existing agreement?
- Is the landlord named in insurance policies?
- Has the tower management company provided sufficient documentation demonstrating its authority to act on behalf of the tenant?

Conclusion

Counsel for owners of cell tower sites should be prepared to negotiate license and lease agreements in order to protect their client's property interests, keeping in mind the suggestions in the above checklist.

Published in Probate & Property: Volume 36, Number 2, ©2022 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.