

# Cell Tower Leases and Buyouts: The Church's Perspective

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# Varnum Law Firm

- One of Michigan's largest firms, over 100 years old
- Corporate law firm with significant communications and church law practice
- Represents property owners on cell tower leases, amendments and buyouts
- Represents municipalities in dealings with cable and telecommunications utilities, cell tower zoning
- Offers model cell tower leases, drafted from property owners' perspective at [www.varnumlaw.com/lease](http://www.varnumlaw.com/lease)
- Cell tower blog at [www.varnumblogs.com/category/cell-phone-tower-leasing-and-zoning/](http://www.varnumblogs.com/category/cell-phone-tower-leasing-and-zoning/)

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# Cell Tower Basics

- Cell towers, antennas continue to increase 5%-7%/year
  - Approx 256,000 at end of 2010
- Why the increase?
  - Minor reason - - to fill in gaps
  - Major reason - - To add capacity to networks for iPhones, iPads, Droids, etc are used for Internet, data, music, pictures
  - Result - - Many new cell tower leases
- Also many amendments to existing leases - - Most cell sites being upgraded (3G to 4G) and will be upgraded in future to add capacity, new services
  - Many leases require landlord approval (lease amendment) for any upgrades, changes to the site

# Cell Tower Basics (cont.)

- Local leasing and zoning agents for cell companies often problematic
  - Slow, little authority, change frequently
  - Often inaccurate, not knowledgeable, 8<sup>th</sup> Commandment?
  - Often do not follow through on commitments
  - Agents without authority - - Home office vetoed X
  - Cell company often NOT in loop
  - Be slow to negotiate, give them your “final offer”

# Cell Tower Basics (cont.)

- How tower/antenna sites are determined
  - Cell company engineers determine need for additional tower in certain area
  - “Search ring” (showing area where tower could be located) is drawn on map and sent to local lease agent
  - Local leasing/zoning agent scouts possible sites in ring
  - Enters into lease/option with preferred site
- From engineering perspective rarely only one site which will fill need
  - Instead economics (rent too high at other sites), speed with which site can be built, ease of zoning very important

# General Observations

- These comments are from the perspective of the property owner -  
- a private landowner, church, etc.
- Draft to be specific on what is intended
  - Long term (25-50 year) agreement
  - Property owner compensated for significant changes
- “Lease” is a misnomer
  - Really more like a sale of the property for 50 years, with a reverter
  - But landowner still has title to the property and (under provider’s version of lease) few rights and many restrictions on the use of main parcel and adjacent property
  - Providers try to make their use of property primary, and land owner’s secondary!

# Types of Leases

- Greenfield lease - - Tower on open land
  - Easiest, but usually the lowest rent
- Antenna on existing structure - - building, water tower
  - Higher rent often available
  - Unique concerns on not interfering with existing building, its uses or maintenance
  - Preventing future changes to building, development of site
- Amendment, renewal or extension of existing cell lease
  - Provides opportunity for largest increase in rent
  - BUT opportunity often missed when approved at lower level of organization with only minimal changes from current lease
  - Be especially alert for very early extensions



# Approach

- Minimize downside risks to the church or property owner
  - Liability
  - Don't restrict future use of land, buildings (e.g.—expansion)
  - Minimize interruption, impact on the church's mission, normal operations - - use or expansion of buildings, development of its property
    - Especially over long term (20-50 year life) of typical lease
- Lease dollars typically small in the scheme of things
  - Don't let tail wag the dog

# Type of Antennas Allowed

- Usually portrayed as “cell phone antennas”
- BUT typical cell company lease language in effect says “Any kind of cellular, communications, radio, FM, TV or other antenna they want”
  - Cell phone
  - Broadband Internet, WiMAX
  - Radio station broadcast antennas
  - TV station broadcast antennas
  - Microwave dishes
  - Other

# Type of Antennas Allowed (cont.)

- Property owner's typical perspective
  - Draft to allow only cell phone antennas
    - Or other specified uses
  - Lease amendment if other antennas desired
  - Draft throughout in that fashion - - specific antennas now, others by amendment.
  - So drafting affects:
    - Definitions of types of uses and antennas allowed, and
    - Plans/construction drawings attached to lease, depicting type of tower and antennas allowed
    - And documents submitted for local zoning approval, which also often should be attached

# Rent and Collocation

- Rents in general
  - Depend on location, location, location
  - How much site is needed vs. alternative locations
  - \$1,500 to \$2,500 per month range common for new leases with municipalities
  - With substantial increases possible when lease is amended
  - Often more in cities, less in rural areas
- Rent specifics - - Important for likely 50 year lease term
  - Initial Rent
  - Escalated how often (yearly?)
  - By what amount - - percentage cap?
  - Rent paid how long in event of early termination

# Rent and Collocation (cont.)

- Collocation Revenues—Who Gets Rent from Second, Third Antenna on Tower?
  - **Item most frequently overlooked** by property owners!
  - Can double or triple the initial rent
  - Several ways to draft if tenant will not agree
  - Require tower to be able handle X more sets of antennas
- Improper collocation on existing tower (e.g. WiMAX) may lead to back rent being paid, major increase going forward

# Major Rent Increases Possible for Lease Amendments, Renewals or Extensions

- **The other major item property owners overlook**
- Why? Because once tower/antenna is built, it can't be moved
  - Would create gap in coverage
  - And costs over \$250,000 to lease, zone and build a new tower; take down old one
- So . . . Existing cell tower leases are **very valuable**
  - Substantial rent increases possible for lease amendments, renewals or extensions

# Major Rent Increases (cont.)

- Watch out for “sneaky” amendments, renewals or extensions, typically where provider approaches lower level personnel with request for minor change with minor rent increase
  - **Often used, often very effectively**
  - Renewal and other major changes buried in fine print
  - Require **all** lease amendments, changes, to be reviewed by attorney, senior personnel, real estate specialists.

# Risk Mitigation

- Protect property owner from liability
  - Rentals nice, but
  - Liability if tower falls, etc. is large
- Risk to property owner increased because tenant is often a shell company
  - And tenant has right to assign lease
  - But property owner is still there, its' name is on the deed, it is easily sued - - “Deep pocket”



# Risk Mitigation (cont.)

- Broad insurance, indemnity clauses, so that property owner's reasonable expectations of protection are met
  - Adequate coverage
    - Dollar amounts
    - Environmental, similar coverages
  - Ability to increase coverage during long term of lease
  - Prohibition on retainages, no self insurance
  - High quality insurance companies
  - Notice if insurance cancelled
- Preceding just one type of example
- In general, detailed lawyer language to fulfill property owner's intent

# Risk Mitigation (cont.)

- Non-interference clauses in leases attempt to make
  - Cell company's use of church property primary, with landowner's use secondary
    - With “interference” meaning “physical interference” - - a new or expanded building being in the way
    - Not just as to parcel being leased
    - But parent parcel from which it is carved out
    - And often as to nearby lands of land owner as well
  - For 25-50 year term of lease!
- From network perspective, cell company has legitimate need to have cell tower in this general area, but . . .
- Lease should allow property owner to move, relocate tower or antennas - - generally at cell company's expense
  - So that property owner's future use and expansion of its property is not barred or limited

# Other Items

- Reject - -
  - Exclusivity provisions (provider has exclusive right to use property or site for wireless purposes). May not be valid as to municipalities
  - Non-disclosure provisions
- What does your bank, mortgage holder say?
  - Sometimes will reject lease, as violating mortgage

# Other Items (cont.)

- Attach detailed
  - Legal description of property being leased
  - Any easements for access
  - Plans of what tower, antennas will look like; photosimulations
  - Landscaping plan
- Comply with restrictions on subdividing property
- Have clear removal obligation at end of lease
- Restrict use of backup power supplies
  - Backup power NOT required by Feds
  - Generators are noisy and heavy, fuel is hazardous and polluting
  - Batteries are very heavy, acid is hazardous

# Antennas on Buildings, Churches

- Lease for antennas on a building or church much more complicated than lease for new “greenfield” tower
  - Two parcels being leased (one on ground, one for antennas) with different requirements
  - Making sure the church’s mission and principal purpose, use of building is not affected
  - Security; building access after hours
  - Preventing restrictions on use, repair, expansion of building or structure very important
  - Preventing antennas, etc. from harming, reducing useful life of building, roof, or other major building elements

# Antennas on Buildings, Etc. (cont.)

- Lease for antennas on a building or church much more complicated (cont.).
  - RF emission rule compliance more important due to people in building, workers on roof. Warning signs, automatic shutdown if people on roof, compensation for added costs for work on tower or building
  - Plans, photo simulations of finished antennas, aesthetics often more important

# Typical tricorner monopole



# Another tricorner tower





# Lattice Tower, Sedona



# Monopole somewhat camouflaged



# Flagpole antenna



# Flagpole with shroud removed





# Typical triangle sign mount



# Another triangle sign mount





# Antennas flush to side of building



# Antennas concealed on sides of steeple





# Perfect concealment, Sedona



# Perfect concealment, church





# Deciduous Tree Tower



# Palm Tower





# Sajuaro Tower



# Antennas in steeple louvers





# Scottsdale Church, 3 Sets of Antennas



# Big Cross Antenna, Mesa





# Lease Buyouts

- Offers to buy out or manage cell tower leases increasing
- Combine all the issues of ordinary leases plus additional practical and legal complications
- Property owner turns over cell site for ~50 years to third party, yet remains legally somewhat responsible for it
- Practical suggestion - - benefits (\$\$) of buyout are obvious
  - Disadvantages are hidden in VERY ONEROUS terms of contract - - They make typical cell lease look good!
  - Obtain copy of actual documents to be signed, have them analyzed by lawyer before going to church council, etc. for approval
  - So that it will have clear view of both the pluses and minuses of the buyout before deciding how to proceed

# Lease Buyouts (cont.)

- Typical approach - -
  - “We are cellular experts, know how to maximize revenues from tower site” (and you don’t)
  - Property owner approached now, 5-15 years prior to current lease expiring
  - Turns lease site over to buyout company, but still gets rents from current provider until its lease expires
  - Buyout company pays lump sum payment now, or periodic payments until current lease expires, then
  - After current lease expires, payment of X% of future rentals, with guaranteed minimum, for additional 20 to 50 years

# Lease Buyouts (cont.)

- Comments on lease buyouts
  - Partly based on ability to demand greatly increased rents from current tenants once their current leases expire
    - Due to \$250,000+ cost of relocating to new tower
    - And perhaps buyout company's knowledge of what providers will pay
  - Expectation of additional tenants, collocators
  - Federal, state laws aiding expansion of existing cell sites
  - Viewed by cell companies, tower companies as “highway robbery”, threats to take down tower (dog in manger) at lease expiration rather than cede tower to buyout company
  - Hence cell company demands for rights of first refusal on sale of lease or underlying property

# Lease Buyouts (cont.)

- Legal Issues Generally
  - Cash flow: Provider → Buyout company → Property owner
    - Risk of provider paying, but buyout company NOT paying, defaulting
  - Property owner needs clear ability to terminate contract for non-payment, other defaults and then evict company - - Generally lacking in documents
  - Protections needed against bankruptcy of buyout company, “commercial lease safe harbor”, same as in cell lease - - also generally lacking in documents
  - Buyout may violate mortgage on property by diminishing the value of the property (collateral) and restricting its future use

# Lease Buyouts (cont.)

- Legal Issues Generally (cont.)
  - Property owner needs broad indemnity, guarantee (including defense costs) for defaults, challenges to buyout, ideally from parent company
    - Agreement is for ~50 years—Who is this company, what is their financial strength, track record?

# Lease Buyouts (cont.)

- Practical suggestions
  - Church should be able to get same/similar terms from providers as buyout company
    - Buyout companies take a large cut of revenues
    - Deal direct, avoid the middleman
  - Cell companies come to property owner for leases, not the other way round
    - Buyout company approaching you an indicator you have a valuable site
  - If proceed with transaction, address issues set forth above, have buyout company reimburse property owner's legal fees, as the documents will need to be extensively reworked to protect the church

# Rent Chiseling

- Asked to reduce rent so company won't abandon tower
  - The pitch - - From third party : “Provider has excess towers in your area”, reduce rent, save yours - - provider will guarantee reduced payment for X years
  - Common pretext - - Excess due to Sprint buying Nextel, etc.
- Be very skeptical
  - Is caller licensed (as real estate agent, attorney)?
  - Generally providers need more towers
  - Are there other towers nearby?
    - Ask for specific competing locations

# Suggestions on Process

- Cell companies negotiate cell antenna leases every day
  - Property owners don't, are at a disadvantage
- Leveling the playing field
  - Use model cell tower lease, prepared from property owner's perspective
    - Leases available at [www.varnumlaw.com/lease](http://www.varnumlaw.com/lease)
  - Have knowledgeable consultant, real estate lawyer review draft of cell tower lease



# Suggestions on Process (cont.)

- Be alert for requests for lease amendments, renewals extensions
  - Scrutinize them carefully
  - Use them to get language in underlying lease improved
- If approached on lease buyout, get all documents at start, consult with attorney, cell specialist, financial advisor
  - And again, have buyout company reimburse your costs

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