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The Sky's No Longer the Limit

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KEY CONSIDERATIONS IN ROOFTOP LEASING

What used to be forgotten, unused space is now becoming one of the most innovative areas in real estate development. From cellular installations to bars, gardens, and even micro farm beekeeping, rooftops are being transformed to accommodate many uses; however, this newfound versatility brings unique obstacles and unexpected consequences for building owners.

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Rooftop leases bring obvious benefits to a property. They provide additional rental income, add to the building's amenities, and increase the building's value. With those benefits, however, come detriments. Rooftop installations can interfere with maintenance and repair of the roof and, even worse, contribute to structural issues relating to the roof's integrity. Rooftop uses can also lead to a loss of building-owner autonomy—interfering, or limiting, redevelopment and expansion capabilities, creating building access issues, and interfering with existing occupants.

Building owners that strategically negotiate rooftop lease agreements can effectively mitigate the detriments associated with rooftop developments while maximizing the benefits. An owner quick to enter a rooftop occupancy agreement may find itself responsible for unexpected obligations. Each particular use of rooftop space requires specific consideration to benefit the owner and mitigate liability and expense.

An initial consideration is whether one or more entities and/or uses may occupy a rooftop. If multiple uses are allowed, consideration must also be given on whether the uses are compatible.

Single Occupant v. Multiple Occupants

Single-occupant uses offer the opportunity to monetize the rooftop with an upfront lump sum or periodic rent payment. The burden for roof maintenance can be placed on the occupant, and the owner need not deal with the problems associated with multi-tenant occupancies. However, single occupant uses forgo future rooftop uses and revenue streams. Multiple-occupant uses allow the opportunity to maximize the value and opportunities presented by rooftop space. They also present various detriments. More occupants in a confined space can lead to issues of conflicting uses and interference among users. Disputes can occur over which particular occupant caused the damage necessitating rooftop repairs. And if relocation is necessary during repairs, a crowded rooftop complicates the ability to relocate occupants.

Lease, License, Easement: What's the Difference?

Leases, licenses and easements are all agreements for one party to use or occupy the real property of another. Each conveys different rights, and it can be difficult to determine which to use in a specific situation. Understanding the distinction between each is essential and can be summarized as follows.

Leases

Provides the tenant the exclusive right to occupy the property for a specific term

May be transferred and is irrevocable, absent a breach of the lease agreement

Generally more difficult to terminate than a license

Subject to statutory lease formalities, which include measures designed to protect tenants

Licenses

Does not transfer an interest in the property. Instead, it is a right in contract, which is revocable

Personal to the licensee; any attempt to transfer the license terminates it

Not subject to statutory lease formalities and tenant protection measures

Ideal for short term or intermittent uses, such as seasonal gardens

Easements

Transfers an interest in real property that encumbers recorded title and runs with the land

More difficult to terminate than a license or lease

Assumed to be permanent and non-exclusive; however, easement may contain language which specifies otherwise

Ideal for long-term uses, such as utility rights

Terms & Conditions

	Lease	License	Easement
Conveys Real Property Interest	Yes	No	Yes
Revocable	No (usually)	Yes (usually)	No
Transferable	Yes	No	Yes
Exclusive	Yes	Optional	Optional
Conveys Shared Right	No	Optional	Optional
Permanent	No	No	Yes
Landlord/Tenant Relationship?	Yes	No	No

As a general rule, license agreements are the most advantageous means for a building owner to convey rooftop rights. A license allows the building owner to revoke the agreement at will, while staying in control of the premises. However, simply designating an interest as a “license” does not guarantee it will be interpreted as such. To grant a license, the licensor must reserve three essential terms: (1) the licensor must be able to revoke the license “at will;” (2) licensor must retain absolute control over the premises; and (3) licensor must supply licensee all of the essential services required for the licensee’s permitted use of the premises. Generally, the less control given the licensee, the more likely the agreement is to be a license.

Key Negotiation Issues

Agreements drafted by potential occupants are usually one-sided and may contain or omit provisions that pose significant risks to a building owner. The building owner should draft its own agreement – or carefully review a proposed agreement not drafted by the owner – to fully ensure that the risks are properly allocated to the party in the best position to control the risks. Usually, the property owner will hold the bargaining power in rooftop negotiations, and property owners should use their bargaining power to maximize revenue while mitigating risk. Building owners should consider the following issues before entering into a rooftop agreement:

Scope of Installation

Owners should specifically define what uses are permitted on the rooftop. Installation plans and, if

applicable, equipment lists should be included in the written agreement. Additional equipment and modifications to the installations/use should not be permitted without owner's consent (and the potential for assessment of increased rent). Owners should also address screening requirements and aesthetics.

Alterations

Include language requiring occupant to comply with rooftop warranties, address rooftop penetration, and the obligation to repair. Any alteration should require owner approval and oversight.

Access

Limitations on access are reasonable and standard. Emergency access to the facilities is recommended for the safety of property and other building occupants.

Renewal

In exchange for the demand for automatic renewal options, address rental rate increases at the end of each term. Owners should reserve termination rights for events such as major redevelopment and resist the ability of occupants to terminate for convenience.

Relocation

Owners should preserve the right to relocate rooftop occupants to other spaces on the roof with the occupant bearing relocation cost.

Insurance & Indemnification

Review insurance provisions with insurance broker to assure requirements are adequate to protect owner. Add requirement that owner is an "additional insured" under all required policies.

Indemnification obligations should rest with the operator, as it is in the best position to control the risks. Be certain that owner's "heirs, assigns, and agents" are protected against damage or injury due to occupant's property use.

Assignment/Subletting

Owners should limit assignment rights and, at a minimum, exercise the right to assure that assignees and sublettees are creditworthy and hold the appropriate operational licenses.

Colocation

Wireless carriers will often install facilities where later carriers will also occupy a single pole on a

rooftop. Owners may wish to encourage collocation to regulate aesthetics and minimize wireless occupancy space. However, owners should require a collocation fee, allowing owner to collect rent from collocating carriers.

Termination

Consider limiting termination rights to situations outside the occupant's control (such as revocation of a license). Implementing an early termination fee may also be appropriate. Assure provisions exist for complete restoration of the rooftop space upon termination.

Rooftop space is a valuable asset. Correctly implemented rooftop use agreements can bring profit to the building owner while enhancing the benefits the building brings to its users and the greater community, and also offering a "win" to the business which is able to conduct operations on the roof.

Contact us

If you have any questions about this article, please contact Rod Carter or your Husch Blackwell attorney.