

Cellular antennas on special district property: The opportunity and the risk

By Gail A. Karish and Matthew K. Schettenhelm, Best Best & Krieger LLP

You licensed your special-district property to wireless communications companies that installed antennas and other communications facilities. You had the space. They were willing to pay for it. It just made sense. Didn't it?

Now you're not sure. The operators seem to be on your property too much—in main corridors, in sensitive areas, everywhere. You pay staff overtime just to give them access. One company went bankrupt and now pays you nothing. Another pays rent that is a fraction of what it pays the special district across town. One surprised you by adding a large, protruding antenna, earning you frequent calls from nearby residents. Another attached a competitor's antenna but paid you nothing more. They all hint that the Federal Communications Commission may limit your authority. You are not in the telecommunications business. It wasn't supposed to be this difficult. The good news: it doesn't have to be. Special districts can license space to wireless communications companies and obtain much-needed revenue while avoiding these headaches. It just requires some basic planning and negotiation up front. Here are six tips that will help you license your special district space successfully.

1. Don't guess at the price.

An operator's initial rent offer will often be low. Remember that the company views your property as a gold mine that allows it to sell advanced telephone and broadband service for decades. Finding this space is often difficult. But if there is a chance to grab it at a low rate for a long term, the operators won't miss it.

The lesson here is obvious: Do not sign a contract until you know the market rates. Also be sure that the contract includes escalator clauses that increase the payments over time. Think carefully about the term: A deal that automatically renews for decades may not reflect market changes. You should further add meaningful penalties, including those that address the operator's failure to pay its rent on a timely basis.

2. Define the provider's access and responsibilities.

Special district property often consists of sensitive areas. You cannot allow just anyone to access it. Some special districts have also had difficulty with operators demanding access at irregular hours, which requires the special district to pay staff and security overtime.

Address these issues up front. Your agreement should spell out what equipment the operator may place, where it may place it, and how and when it may access it. If any of these issues will impose burdens on you, you should require the company to propose and honor a solution. For example, if you require escorted access, address how. Reserve the right to require the operator to move its facilities later, at its own expense, should the district need the space for expansion or changes. Also be sure that you only grant rights that you control: if using an access road requires the operator to reach an agreement with a third party, be clear that this right is not one that you can grant.

3. Limit "co-location" rights.

The operator will likely want to swap out antennas and add new ones over time. It may also try to host antennas owned by its competitors. This process is known as "co-location" or collocation.

Limit the co-location that you permit automatically. Each time that an operator adds a new antenna or other facility to your property, it gains new benefits but imposes new burdens on you. You should reserve the right to approve the addition, and should be compensated for it.

4. Understand and confront any regulatory threats.

You may be told that federal law and FCC rules limit how you can control your property. You should



Conference Highlight

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understand the issue, and consider confronting it with the FCC directly.

Last year, Congress passed a statute at the center of the issue. The statute states that a state or local government “may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”

An “eligible facilities request” is any request to modify an existing tower or base station that involves “(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment.” Unfortunately, Congress left almost all of the statute’s key terms undefined. For example, it did not define “wireless tower,” “base station,” or “substantially change the physical dimensions.” In early 2013, the FCC released non-binding “guidance” interpreting the statute.

Drawing on the statute’s uncertainty, an operator could argue that you must accept many additions to the operator’s existing facilities, even when you would prefer to keep them off your property. We disagree. You have a strong argument that Congress meant only to address zoning/regulatory authority, not to restrict your fundamental property rights. The contrary view raises a serious constitutional issue.

Importantly, the FCC is expected to launch a rulemaking this year to re-visit its guidance and to clarify the statute’s scope. We expect that the wireless industry will view this as an opportunity to aggressively lobby the FCC for a reading that broadly promotes its interests. To counter this, it may be important for you and other

special districts to present your views on this issue.

5. Anticipate changes.

You should also be prepared for the possibility that the operator with whom you contract may not hold the deal for the entire term. If an operator enters bankruptcy, for example, you could find that you receive no payments for an extended period. Carefully crafting the initial agreement can avoid this. Likewise, consider reserving the right to approve any transfer of the license to another entity. You may not want just anyone operating on your property.


6. Preserve the right to terminate the deal.

Sometimes it just doesn’t work. A strong termination clause will allow you to end the agreement if the operator does not honor its commitments. You should also require the operator to remove its equipment or compensate you for such removal.

In short, licensing special district property to wireless operators does make sense—just do it the right way. Be sure to address issues up front to avoid problems down the road. ■

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