

## “And by the way...We will need to use the roof”: Negotiating a Tenant’s Right to Use Roof Space

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It is becoming increasingly common for tenants in shopping centers to want (or need) to use the roof of the building in which their premises is located for a satellite dish or antenna. Landlords get in trouble when they assume that the standard lease provisions which set out the tenant’s obligations also apply to the tenant’s use of and activities on the roof. In fact, this is often not the case. Standard lease provisions usually do not apply to a tenant’s use of the roof unless the lease specifically says they do because the roof is not part of the defined premises!

When a tenant is going to put something on the roof, there are many issues, rights, responsibilities, costs and risks which should be specifically addressed and allocated in the lease.

♦**Non-exclusive right.** While each tenant has the exclusive right to use its premises, the right to use the roof should be non-exclusive, since many tenants (as well as the landlord) may want to use the roof.

♦**What, where and how?** Most landlords want to control what goes on the roof, where it goes, how it is installed and attached, how it looks, how and where cable will be installed, the size of the equipment, and any screening which will be required for aesthetic or safety reasons. An appropriate lease provision would be:

*Tenant shall install only Equipment approved in advance by Landlord in a location approved in advance by Landlord and in accordance with drawings, specifications and plans (“Plans”) approved in advance by Landlord. Such Plans shall include all Equipment, cabling and installation specifications. Tenant shall screen the Equipment in accordance with Landlord’s requirements. Installation of the Equipment shall be at Tenant’s sole cost and shall be performed by a contractor and roofing crew approved in*

*advance by Landlord and in a manner which will not cause any roof penetrations or void or diminish any warranty on the roof. Tenant will reimburse Landlord for all costs and expenses incurred by Landlord in reviewing the Plans, including engineering fees. Landlord makes no representation and shall have no obligation with respect to the suitability of the roof for installation or use of the Equipment.*

♦**Maintenance, repair and removal of rooftop property.** There are two important issues here - who does the work and who pays. Most landlords and tenants agree that the tenant should pay the costs of installation, repair, maintenance and removal of the tenant’s equipment, and repair of any damage to the roof caused by the equipment or its removal. The more difficult question is who will actually do the work. If the tenant’s employees or contractors are going to work on the roof equipment, the landlord will want the right to approve and limit who goes on the roof and to require appropriate insurance. Alternatively, the landlord may prefer to get any necessary work done for the tenant and pass the expense (including supervision and administrative costs) along to the tenant. An appropriate lease provision might be:

*Tenant, at its sole cost, shall maintain and repair the Equipment, and within ten days after termination of this Lease, remove the Equipment and repair and restore any damage to the roof caused by the Equipment or its removal. Tenant shall notify Landlord each time Tenant desires to enter upon the roof to maintain, repair or remove the Equipment and Tenant shall enter upon the roof only at such times, in such manner and under such circumstances as shall not cause damage or any endangerment of life or limb. Access to the roof shall be limited to contractors, roofing crews and others approved in advance by Landlord, in its sole discretion. Tenant shall take all action necessary to insure that its installation, maintenance, repair or removal of the Equipment does not void, impair or diminish in any respect any warranty covering the roof.*

*Notwithstanding the foregoing, Landlord may at any time, by notice to Tenant, perform Tenant’s maintenance, repair and removal obligations set forth herein and Tenant shall promptly reimburse Landlord for the cost thereof plus a supervisory [administrative] fee of \_\_\_ % of such cost. This provision shall survive any expiration or termination of this Lease.*

♦**Cost of roof maintenance.**

Landlords are usually obligated to maintain the roof. This may be at the landlord’s expense, or the cost may be passed through to all the tenants as a part of common area maintenance. When a tenant has property on the roof, however, the tenant, and not the landlord or the other tenants, may be expected to pay for repairing damage caused by the tenant’s equipment. This also needs to be addressed in the lease.

♦**Landlord’s normal roof repairs.**

Another issue to be addressed is that, eventually a landlord will have to repair or replace a roof. The landlord will want the right to move the tenant’s roof property temporarily or even permanently (all at tenant’s cost) and without liability to the tenant, and the tenant should anticipate occasionally making temporary alternate arrangements for its telecommunications.

♦**Interference with other tenants.** As more and more tenants have complex telecommunications equipment, the possibility that one tenant’s satellite or antenna will interfere with the communications systems or frequencies of another tenant increases. Tenants usually will agree that their systems will not interfere with the existing systems of existing tenants, but it is harder to agree not to interfere with future communications systems. A common lease provision is:

*Tenant shall not allow installation, use, maintenance, repair, or removal of the Equipment to interfere with the operation or functioning of other telecommunications systems or equipment in the Shopping Center installed prior to installation of the Equipment. If the Equipment causes any such interference in Landlord’s judgment, and such interference is not corrected immediately upon notice from Landlord, Tenant’s right to use the Equipment may be terminated at Landlord’s*



option. Tenant shall not alter, redirect or change the method of operation of the Equipment in any way which will cause interference with the operation or functioning of any other communications equipment at the Shopping Center whether installed prior to or subsequent to the Equipment.

♦**Indemnities.** Indemnity provisions usually cover liability for occurrences in the premises and claims arising out of use of the premises, but standard indemnities may not cover a tenant's use of or activities on the roof, or a tenant's liability for injuries or property damage caused by roof equipment, or safety and health issues connected to emission of electrical radiation. The following indemnity covers these issues:

*Tenant shall indemnify, defend and hold Landlord harmless from and against any and all claims, actions, damages, liability costs and expenses (including attorneys' fees) in connection with loss of life, bodily injury, personal injury, damage to property or business or any other loss or injury arising out of, related to or resulting from the installation, operation, use, repair, maintenance or removal of the Equipment or use of the roof, by any third party or any employee, agent, contractor, or other person acting on behalf of Tenant, unless caused solely by Landlord or its employees', agents' or contractors' willful misconduct or gross negligence. Without limiting the foregoing, Tenant shall indemnify, defend and hold Landlord harmless from any claims by any occupant of the building or of residences or businesses in the vicinity of the Building for damage or injuries based on exposure to electromagnetic fields or other consequences related to the Equipment. This provision shall survive any termination or expiration of this Agreement.*

♦**Assumption of Risk and Waiver of Claims.** Climbing around on a roof for any reason is inherently dangerous, and landlords will want tenants to assume the risks of their activities on the roof to the extent possible, as follows:

(a) *Tenant assumes all risk of use of the roof, including the risk of any dangerous conditions existing on or related to the roof, and all other risks of installation, use, operation, maintenance, repair, existence and removal of the Equipment.*

(b) *Tenant hereby waives against Landlord and releases Landlord from all claims for damage to any property or injury, illness or death of any person arising out of or resulting from (i) installation, use, operation, maintenance, or repair access to or removal of the Equipment; (ii) any use of the roof of the Building (including, without limitation, when such damage, injury, illness or death shall have been caused in whole or in part by the act, omission, or active or passive negligence of Landlord, its employees, agents or contractors), unless caused solely by reason of the gross negligence or willful act of Landlord, its employees, agents or contractors.*

♦**Insurance.** Landlords should not assume that a tenant's insurance covering the premises will cover the tenant's rooftop equipment or liabilities arising out of its use of the roof. As a matter of fact, the tenant's business property policy will not automatically extend to rooftop installations and may specifically exclude such coverage, so the tenant needs to have its liability and property policies coverage specifically endorsed to include antennas and satellites. The Lease should require a comprehensive insurance plan to make sure the exposure of both landlord and tenant is covered as well as any contractors performing work.

(i) Consider the following requirements for the tenant's insurance:

*Tenant shall, at Tenant's sole cost and expense, procure prior to installation of the Equipment and any use of the roof, the following insurance in a form and from companies acceptable to Landlord, and shall maintain such insurance at all times until complete removal of Equipment has taken place: (i) Commercial Property insurance covering risks of direct physical loss to the Equipment in a limit adequate to repair or replace such Equipment; and (ii) Commercial General Liability insurance insuring Tenant against any liability for bodily injury, personal injury, death or damage to property, including loss of use, arising out of or relating to (a) installation, use, repair, maintenance and removal of the Equipment; and (b) repair and maintenance of the roof from damage caused by the Equipment, with limits not less than Three Million Dollars (\$3,000,000) per occurrence.*

*Such insurance shall name Landlord as additional insured, shall be primary and noncontributory with Landlord's insurance, and shall waive subrogation with respect to Landlord.*

(ii) Next, and in a separate paragraph so as not to be confusing, insurance requirements for tenant's contractors who install or maintain the Equipment need to be addressed:

*Tenant shall cause each contractor and subcontractor providing services related to the Equipment, including installation, repair, maintenance or removal, to maintain the following insurance at all times in a form and from companies satisfactory to Landlord: Workers Compensation insurance as required by statute including employers' liability coverage of not less than \$1,000,000 and a waiver of subrogation with respect to the Landlord; Commercial General Liability insurance with limits of liability not less than \$1,000,000 per occurrence, per project; and Umbrella Liability insurance with limit of liability of not less than \$5,000,000 per occurrence providing excess over all primary general liability, and protection from exclusions and gaps in the coverage afforded by the primary policies. All such liability insurance shall name Landlord and Tenant as additional insured, shall be primary and non-contributory with Landlord's insurance, and shall waive subrogation with respect to Landlord.*

It is usually most efficient for both the tenant and the landlord to address all of the rooftop issues in a separate article of the lease, almost like a stand-alone mini-lease. This insures that both parties will focus on these complexities. The provisions of this separate article can then be cross-referenced in the appropriate provisions of the lease. Certainly, the parties are well advised to take all of these issues seriously and address them specifically in the lease. ■

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