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"A CLOSER LOOK AT THE NEW OPPORTUNITIES AND CHALLENGES OF COMMUNICATION AND OTHER SERVICE ACCESS AGREEMENTS"

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Legislation

Hawaii—1999 New Laws, H.R. No. 225, proposes several requirements regarding environmental assessments for any proposed land use that is subject to discretionary approval by a state or county agency and asks the University of Hawaii Environmental Center to convene a task force to study the proposals.

Idaho—1999 New Laws, H.B. No. 323, allows municipalities to establish programs for the transfer of development rights (TDR) in order to protect significant land resources, while compensating the owners of those resources for restrictions on development.

Montana—1999 New Laws, H.B., No. 142, amends its statute relating to environmental impact statements.

Nevada—1999 New Laws, S.B. No. 391, contains a definition of "rural preservation neighborhoods" and requires counties to adopt regulations to preserve the rural character of such neighborhoods.

Utah—2000 New Laws, H.B. No. 137, amends the procedures for the imposition of impact fees and for challenges to impact fees.

From Canada

■ In Depth

A Closer Look at the New Opportunities and Challenges of Communication and Other Service Access Agreements

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Building owners are discovering a new source of revenue that involves virtually no capital outlay by them and does not encroach upon the rentable areas of their buildings, while adding a range of services that are very much in demand by tenants. Canadian Federal regulations affecting the telecommunication industry have been introduced to encourage competition. These regulations, combined with new digital communication technology, data transmission, Internet service, cable broadcasting, and satellite communication facilities and similar services have created a very competitive and active group of service providers seeking access to multiple occupant office buildings and shopping centres. In this article, "suppliers" refers generically to these service providers.

Whether access is granted through ducts or dishes, this situation creates new opportunities and new risks, both of

which require careful management. To capitalize on the opportunities, a building owner must deal with issues such as those described below.

Fee Structure

Establishing a fee for access should not be approached in the same way as rent for space within the building. What the supplier really needs is access to the tenants of the building. Regardless of how much space (usually a very small area) is made available to the supplier, it is the size of the building, and the types and the number of tenants in the building, that are of real interest. Initially, owners tended to treat agreements with these suppliers as a form of lease of a portion of otherwise surplus and unleaseable space within the building. Experience indicates, however, that this approach ignores the essential nature of the benefit that the supplier has when it obtains access to the building and its occupants. It may also ignore the high volumes of pedestrian traffic, transactions, and the large volume of services that might be consumed by retail customers and other invitees. Also, long-term arrangements that do not provide for fee adjustments to reflect the rapidly changing market and that do not reflect market conditions can seriously hamper the building owner's opportunities.

Equipment Sharing Problem

Technology allows one cable or conduit and one item of equipment to satisfy the needs of several communication suppliers; therefore, once the equipment is installed, the supplier may itself be in a position to capitalize on the value of the building by permitting others to connect to its equipment. Prohibiting the supplier from assigning, subletting, or parting with or sharing possession of the space that it occupies misses the point. The real value is in sharing the capacity of the equipment that is installed. Monitoring this equipment use and controlling the various suppliers that will gain access to people within the building through that equipment are major challenges. For example, local telephone exchange carriers are prohibited by regulation from agreeing to exclusive-use arrangements. These carriers must share their wires, on reasonable terms, with other similar suppliers.

Crowding Problems

The duct, riser and equipment room, as well as roof space of a building are usually limited. If a particular supplier is allowed to install equipment and take up too much space (for example, by installing wide diameter conduit), the opportunity to use the duct, riser space and equipment room space will be encroached upon and limited.

Interference and Other Facilities Management Issues

The introduction of high-technology equipment to crowded areas creates a high risk of interference, inadvertent damage and disruption, and imposes a major challenge to a building manager that wants to keep track of whose equipment is

installed in what parts of its building and for what purposes.

The variety of technical personnel and other representatives and suppliers that will need to attend for installation, maintenance, repair and alteration of equipment poses new challenges to security personnel. Also, modern commercial buildings are dynamic. There is constant turning over, altering and reconfiguring of space, and the buildings are frequently altered by expansion and other redevelopment. It is essential for the building owner to maintain control and flexibility. Building components that need to be altered can affect installed equipment. However, ownership and control of the telecommunication wire within the building that serves the various tenants and customers within the building carry with it the responsibility to ensure that services are provided to an acceptable level and that the equipment is maintained and repaired. It also involves making available the required personnel to modify the equipment as new customers and tenants connect to it or alter their own needs. Connecting, disconnecting, altering, supplementing, and modifying communication services and equipment within a building are a continuous process that involves a high degree of coordination, planning and responsibility.

Facilities Manager Option

There are facilities management companies that will manage communication services for a building owner and, in fact, will pay a substantial fee for the privilege. This is because the facilities management company will charge suppliers fees for access and other services pertaining to their equipment. However, to take advantage of this option, the building owner needs to have retained control of the equipment, and must not have permitted suppliers to install equipment that the building owner does not have the right to manage.

Financing Issues

Financing of equipment installed by suppliers takes various forms. It is common for lenders to take security on the equipment, and dealing with the equipment once installed may entail addressing the secured lender's interests and concerns. For example, taking control of equipment will not be permitted if it threatens the lender's security, and terminating an access arrangement may involve negotiating with the secured lender having regard to its interest in the equipment.

Termination, Relocation and Transfer Rights

The need to terminate these arrangements is essential in certain circumstances, such as where the building is to be redeveloped or where there is substantial damage and it is not feasible to rebuild. In other situations, the need to relocate equipment installed by a supplier may be critical. It might also be critical to allow termination of the agreement, on specified terms if the building is sold to a new owner that does not want to continue the arrangement. On the other hand, a building owner will need to be able to transfer the benefit of the various agreements into which it enters with suppliers so that purchasers of the building and lenders that provide security on the building by way of mortgage can assume them.

Liability Risks

The potential for liability for negligence is greatly enhanced by the communication equipment that is installed within a building. A fire has the potential of exposing the negligent party to huge claims where persons or businesses within the building or even outside of the building that are dependent upon continued networked communication services are disrupted. The number of persons that can be affected by a relatively minor act of advertence is huge. Insurers and risk managers are only now beginning to come to terms with this exposure. The impact on insurance costs is unpredictable. Strong exculpatory and release clauses and a rigorous insurance program are essential.

The Impact on Business Value

As businesses become more attuned to e-commerce and to transacting business in the "cyber world," availability of telecommunication and similar services becomes increasingly important and adds an entirely new element to the traditional means of valuing buildings. Traditionally, value had more to do with location than anything else. Now, the quality and range of telecommunication services available within the building will have an increasingly important impact. Building owners need to be proactive in order to ensure that these critical services are made available at economic rates and at the very highest level of service in order to attract and keep the best tenants in the market.

Despite the opportunities and risks, and the potential for mismanagement resulting in lost profits or unmanaged liability, many forms of agreement entered into between building owners and telecommunication suppliers are brief and unsophisticated. They are modelled on the simple forms of license agreements or short-term leases used in connection with storage areas and surplus equipment room areas, and are drafted without input from technological experts that understand the industry. Perhaps it is time to recognize that a more sophisticated approach is appropriate.

Quiet Enjoyment—What Does It Now Mean?

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Every lease contains a covenant, along the following lines: "The Landlord grants the Tenant quiet enjoyment of the Leased Premises, during the Term, subject to the terms and conditions contained in this Lease."

In legalese, this clause is referred to as the "covenant of quiet enjoyment." It is invariably found near the end of every lease. It is a clause that is never negotiated, yet is one of the few covenants found in a lease that is given by a landlord in favor of a tenant. But, what does it mean and of what use is it to a tenant?