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The Rise of Rooftop Licensing

Increasingly, owners of real estate are taking advantage of non-traditional sources of income generated by their properties. One such source is the licensing of space on the roof of a building. Although rooftop licensing is by no means new, the population of rooftop users is growing and diversifying. Historically, rooftop use was limited to operators of radio and television transmission antennae. However, newer technologies such as solar and cellular have given rise to a variety of additional users of rooftop space. These new users constitute an exciting opportunity for owners, but the legal aspects of that use can be complex.

From an owner's perspective, the legal agreement governing the user's occupancy of rooftop space is best embodied as a license as opposed to a lease. For two reasons, a license is better for an owner than a lease. First, a license allows more efficient remedies for an owner in the event of default. Most retail real estate landlords are keen to avoid the time and expense involved in an eviction. Second, a license does not convey a real estate interest to the licensee and thereby enables the owner to retain complete control over the property and all critical services rendered to the user.

The rooftop license document should include a comprehensive and precise description of the premises being licensed, as well as any space that is the subject of an expansion option. This description, usually best expressed in the form of a drawing attached as an exhibit, should state both the boundaries of the premises and the location of the premises on the rooftop. In multi-user environments, owners should define the premises in detail to aid in enforcement of cooperation and non-interference covenants and resolving disputes between licensees.

A long-term license often raises a variety of questions of early termination. Both parties will seek the right of early termination in the event of default or if the other party fails to fulfill its obligations. Also, many licensors retain a right of early termination if the building is sold or demolished or is renovated so that the rooftop no longer can be used. Conversely, a licensee will seek to include a right of termination in the event the rooftop is no longer technically feasible for its operations (e.g. for signal interference).

Another critical provision for an owner is the right to relocate the licensee. Like a commercial tenant, a licensee will likely resist this concept during negotiation of the license based upon the inconvenience and residual cost of an interruption to its use. If the licensee agrees to allow a relocation, then the typical restrictions are commonly negotiated: comparable nature of the substitute space, ample notice prior to relocation, limitation of relocations within the term, and the obligation of the licensor to cover all relocation costs.