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Cell Tower Leases: What to Do When You Get "The Letter"

If your municipality leases water tower space to cellphone carriers or ground space to a tower owner, you have no doubt received some form of "the Letter." The Letter comes in two basic types: an "Extension Letter" that contains an offer to extend the lease term in exchange for lower rent and more favorable terms for the carrier or a "Buyout Letter" that offers to buy out the municipality's interest in the lease. Either way, beware.

The Extension Letter usually comes from a company (e.g., MD7) hired by the carrier to audit its tower leases throughout the carrier's service territories and to negotiate more favorable terms for the carrier. High up on the list of proposed terms are a reduction in the current rent amount; reducing any rent escalator; obtaining greater latitude in modifying the carrier's facilities on the tower and land space; and adding a right of first refusal to purchase the land should the municipality wish to sell to a third party. The Extension Letter warns that the municipality should consider accepting the proposed terms, lest the carrier be forced to shut down your site to remain competitive. The expectation is that the municipality will be so wary of losing this income stream that it will accept the offer despite the much less favorable terms, figuring that a long-term revenue stream is better than none.

The Buyout Letter usually offers a lump-sum payment to the municipal property owner in exchange for a tower company's purchase of a perpetual or long-term right to use the municipal property or for the right to collect rents that the municipality is receiving by leasing space to carriers. The thinking behind the Buyout Letter is that the municipality will be so blinded by the amount of the lump-sum payment, that it will accept the offer without fully considering the long-term impact of the deal being offered.

After having evaluated such offers with many clients over the years, we generally recommend that they decline these offers. The offers, of course, are made in the best interests of the carrier or tower owner. And there's usually nothing but downside for the municipality, especially if the deal results in the loss of control over municipal property (especially, a water tower). There's generally little downside in rejecting such offers. In our experience, it is very unlikely that a carrier will walk away from an existing municipal site—they've already made a significant investment to get the

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site up and running, and the search for and buildout of a replacement site is time-consuming and costly for the carrier.

But that's not the end of the story. It may be worthwhile to use the Letter as an opening to engage in negotiations, especially if you can identify any leverage you might have to negotiate better lease terms. Is the lease about to expire? Is the carrier seeking your approval to upgrade its facilities in the leased space? If so, then this may be an excellent time to negotiate a new long-term lease with better terms for the municipality.

Considering an Extension Letter

Having identified your bargaining leverage, the first step in determining how to respond to a Extension Letter is to evaluate the weaknesses of the terms of the existing lease. The goal is to negotiate a replacement agreement that gets rid of any onerous terms and potential liability traps and replaces them with terms that allow the municipality to maintain control over how its land or water tower is to be used, thereby protecting the integrity of municipal property and protecting the municipality from the risks associated with allowing third-party commercial uses of municipal property.

Municipal Liability. *Does the lease expose the municipality to unwarranted financial risk?*

No amount of rent is worth exposing the municipality to potentially catastrophic damages. Many older leases with mutual indemnification provisions do just that. Generally, under a mutual indemnification provision, both parties agree to reimburse each other for damages, losses, attorney fees, and the costs of litigation resulting from the other party's contract-related negligent acts or omissions resulting in harm to the other party or a third party.

By agreeing to indemnify the carrier, the municipality may waive its statutory protections limiting the municipality's liability for its own negligence. For example, under Wis. Stat.§ 893.80, a municipality's liability for certain acts of negligence is limited to $50,000. Waiving such protections may result in the municipality paying the carrier for damages for which it would not otherwise be liable—potentially, millions of dollars depending on the nature and extent of the damage caused. And, if the municipality does not have insurance coverage for contractual liability (and many do not), this will be an out-of-pocket expense for the municipality. It is essential that any replacement agreement include only a one-way indemnification provision, under which the carrier indemnifies the municipality.

In addition, if the older lease does not address environmental liability except to have the municipality warrant that the property is free from any environmental contamination, the replacement agreement should address this issue. The agreement should require the carrier to indemnify the municipality from any environmental harm that the carrier causes, and the municipality should never warrant that the property is contamination free.

Description of Premises & Equipment. *Is it clear what equipment the carrier may install and what tower or land space they are allowed to use?*

Some older leases lack specifics as to the type, size, and location of the equipment that the carrier is allowed to install or are unclear as to the identification of the premises, easements, and the carrier's right of access to the site. To further complicate matters, the carrier's initial installation may bear no resemblance to the equipment it currently has on the site. It is important that a replacement agreement correct any such deficiency by requiring that the carrier provide a new site survey with accurate legal descriptions for the land space portion of the premises and, in the case of a water tower, that the carrier provides up-to-date as-built drawings showing the location of the carrier's equipment on the water tower and providing an inventory of such equipment.

Modifications. *Is there an approval process for upgrade projects and modifications?*

In the past, it was standard practice for a carrier to ask the municipality to sign a letter giving consent for the carrier to upgrade or modify the equipment at the site without providing sufficient information regarding the scope or potential impact of the upgrade project. For leases of space on a water tower, it is vitally important that the replacement agreement set out a clear processes for approval of any upgrade or modification projects, construction oversight, and post-construction inspection.

The agreement should specify what information the carrier must submit when requesting approval

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Cell Tower Leases

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of an upgrade or modification project, which may include detailed construction drawings, a structural analysis that determines whether there is enough loading capacity on the water tower to accommodate the carrier's proposed installation, a mount analysis to determine whether the location of the new antennas is structurally sound, and an updated site survey if additional ground space or easements are needed.

The agreement should allow the municipality to hire a technical consultant at the carrier's expense to supervise the construction. Such supervision should include: a pre-construction meeting with the carrier's contractors to review the construction plans, site supervision as necessary, and a post-construction inspection to determine whether the project was installed according to the approved specifications and to develop, if necessary, a punch-list of items that need to be addressed before the carrier can power up its new installation. The carrier should also be required to provide as-built construction drawings once the work has been completed.

Obtaining detailed information from the carrier for each project and active oversight over the construction of the project is one of the best ways to ensure the on-going structural integrity of the water tower.

For leases that do not include space on a water tower, it is less vital (though still desirable) for the municipality to have approval authority over upgrades or modification projects. If nothing else, the municipality may want to retain the right to approve certain types of projects such as increasing the height of a cell tower or adding a generator to the site.

Compensation. *Is the rent reasonable, and is there reimbursement for legal and technical consultant fees?*

Older leases often undervalued municipal sites, setting rent at an unreasonably low rate with either no rent escalator or a low escalator that applies only once every five years at the beginning of a renewal term. The goal of the replacement agreement is to negotiate a reasonable rent escalator that applies annually and a base rent that better reflects the value of the site by considering such things as the tower's location (best to be near a busy highway) and the nature of the carrier's equipment (a site that has been upgraded to 5G is more valuable than one that hasn't).

Developing and negotiating a replacement agreement can be an expensive undertaking. If, at the same time, the carrier is seeking approval of an upgrade or modification project, the undertaking will be even more expensive as the municipality will incur both attorney's fees and consulting fees. The attorney, of course, will draft and negotiate the agreement. The technical consultant will be responsible for reviewing the carrier's construction drawings, reviewing any required structural analysis and mount analysis, and supervising the construction. If there is a proposed upgrade project, that should give the municipality enough leverage to require that the carrier reimburse the municipality for all of its professional costs—both legal and consulting. Some agreements require that the carrier provide some amount of money upfront before the consultant or attorney begins their work and before the replacement agreement is drafted. If you don't succeed in getting all your costs reimbursed, then consider negotiating a higher rent increase.

Access. *Does the carrier have unfettered access to the water tower?*

Today's municipal water utility managers are much more cognizant of the need to have a secure water tower. Some older leases, however, allow carriers to have their own keys and unfettered access to the water tower, putting the security of the municipal water supply in jeopardy. A replacement agreement should place reasonable restrictions on the carrier's access, such as reasonable advance notice of the carrier's intent to access the site and only supervised access to the water tower itself, with the carrier reimbursing the municipality for the cost of supervision. In ground leases, on the other hand, it is common for the carrier to have 24/7 access to the leased site without any supervision by or notice to the municipality and, barring any unique circumstances, that arrangement is generally fine.

Considering a Buyout Letter

Water Tower Leases

Just say no! No matter how much the buyer is offering to pay to buy out the municipality's water tower leases, the risk associated with losing control of the municipality's water tower is not worth it.

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Wisconsin's Open Meetings Law: Three Cautions

Wisconsin law strongly favors transparency regarding government affairs. Wisconsin's Open Meetings Law requires governmental bodies to conduct official business in a meeting open to the public that is posted, as required by law, and provides specific notice of the matters to be addressed. Governmental bodies can only convene in closed session if a specific statutory exception applies. Here are three key areas of caution with respect to the Open Meetings Law for municipalities to have on their radar.

No Meetings Over Email

Some electronic communications may constitute a meeting under Wisconsin's Open Meetings Law, requiring public notice. Under the law, the definition of "meeting" requires only one-half or more members of the governmental body to convene to exercise their duties and responsibilities. The definition of a meeting under the Open Meetings Law does not require members to gather in the same physical location. Therefore, some electronic communication, such as email and instant messaging, may constitute a "convening of members" if multiple members are messaging back and forth in a way that resembles an in-person discussion. The courts may consider this a meeting, triggering the requirements under the Open Meetings Law. Information can be shared with governmental bodies via email without violating the law. But such one-way distribution of information should include a reminding not to "reply all" to the message to avoid a potential violation of the Open Meetings Law.

Proper Notice

Wisconsin's Open Meetings Law allows certain items to be discussed in closed session under Wis. Stat. 19.85. However, the governmental body must provide proper notice of the closed session. Closed session notices must be specific and detailed. A closed session notice that simply lists or quotes from the applicable statutory exception does not satisfy this requirement. The notice must include the subject matter to be considered in the closed session and must provide enough information for the public to determine if it falls under one of the authorized exceptions.

Closed Sessions

Generally, members of a governmental body should only take action in open session. In the *Wisconsin Open Meetings Law Compliance Guide*, the Wisconsin Attorney General advises that a vote should only be taken in closed session if the vote "is clearly an integral part of deliberations authorized to be conducted in closed session under Wis. Stat. § 19.85(1)." If there is not a legal basis to act in closed session, the board must return to an open session to conduct a vote to take action on matters discussed in closed session, which itself must be properly noticed.

Wisconsin's Open Meetings Law reflects the state's commitment to transparency and public participation in government affairs. By understanding and adhering to the cautions outlined above, officials can uphold the principles of this law while conducting their work effectively.

—Aiyanah S. Simms

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Ground Leases

There is one type of buyout offer that a municipality may wish to consider—an offer from a major tower owner (e.g., American Tower) to buy out its ground lease with the municipality by purchasing outright the land it is currently leasing. In making the offer, the tower company is looking to guarantee its control over the site in perpetuity, eliminate the municipal approval or reporting requirements in the lease and eliminate rent payments to the municipality going forward.

Depending on the value of the land at issue to the municipality, it may be worth at least exploring a buyout deal with the carrier. If the property is in an area that is not close to important municipal facilities, if the municipality has no plans for the future use of the property, and if you are able to negotiate a reasonable price, then it might be time to say "yes."

—Julie K. Potter & Anita T. Gallucci

This article was originally published in the November 2024 issue of The Municipality by the League of Wisconsin Municipalities (LWM) and is reprinted with permission of LWM.

Attorneys Brian P. Goodman and Jared Walker Smith Named Partners

We are proud to announce that Brian P. Goodman and Jared Walker Smith have both been named partners as of January 1, 2025. Brian first joined the firm 10 years ago, initially working as a law clerk for the firm while completing law school and then joining the firm as an associate. He is a member of the firm's Municipal Law, School Law, and Labor & Employment Law Practice Groups. Jared joined the firm 7 years ago after having previously worked in private practice and public interest law for 5 years. He is a member of the firm's Municipal Law, Municipal Utility Law, and Real Estate Practice Groups.

Brian P. Goodman

Brian's practice includes advising public and private sector employers in various challenging legal situations. In his municipal practice, Brian represents municipalities, including municipal utilities, in areas such as employee performance issues, employee leaves of absence and accommodations, FMLA compliance, separation agreements, and employment handbooks.

Brian uses his prior experience as a teacher to assist his clients and frequently gives presentations, trainings, and in-services to clients and professional organizations. He is a sought-after speaker due to his engaging and practical style.

In 2023, Brian was named one of In Business Magazine's 40 under 40, and Brian was selected by his peers for inclusion in the 2025 Edition of the Best Lawyers in America©, Ones to Watch, in Education Law.*

Brian graduated *magna cum laude* from the University of Wisconsin Law School and was named to the Order of the Coif. He also has a master's degree in educational leadership from Northern Illinois University and a bachelor's degree in Music Education and Jazz Studies from DePaul University.

Outside of the office, Brian enjoys spending his time cooking and watching cooking shows with his wife and child. He also loves going to musicals and playing his saxophone.

Jared Walker Smith

Jared's practice includes assisting municipal utilities, municipalities, public inland protection and rehabilitation districts, individuals, and businesses with a wide variety of legal matters—including representation before the Public Service Commission of Wisconsin; drafting and negotiating contracts, intergovernmental agreements, easements, ordinances, and other documents; counseling municipalities and their utilities on regulatory and legal compliance issues; and advising local governments on land use and development matters. Jared routinely writes and presents on issues impacting his local government clients.

In addition, Jared serves as legal counsel and lobbyist for the Municipal Environmental Group – Water Division, a coalition of Wisconsin municipal water systems that lobby on water supply legislation and regulation.

Jared is the past chair and current secretary of the Public Utilities Section of the State Bar of Wisconsin, is an active committee member of the Wisconsin Section of the American Water Works Association, and has a long history of serving on and leading non-profit boards. In 2024, Jared was selected by his peers for inclusion in the 2025 Edition of the Best Lawyers in America©, Ones to Watch, in Municipal Law.*

Outside of the office, Jared enjoys spending time with his family outdoors in all of Wisconsin's many seasons or huddled around a table playing board and card games. Jared received his J.D. from the University of Wisconsin Law School, with honors in its real estate law concentration, and his B.A., *magna cum laude,* in Biology and Environmental Studies from St. Olaf College.

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*See the firm's disclaimer regarding third-party awards at https://www.boardmanclark.com/pages/third-party-award-disclaimers

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Municipal Law Newsletter

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If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the attorneys listed below who are contributing to this newsletter.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanclark.com.

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