City as Landlord: Leasing Issues for Municipalities

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Frank Carson, an Irish comedian and member of entertainment charity "The Grand Order of Water Rats," once told a story about two men eating sandwiches in an Irish pub. Upon seeing the two, the pub's landlord sternly advised them both: "You can't eat your own food in here." So, the men swapped sandwiches.

This anecdote demonstrates the importance of specifics when spelling out the permitted uses—as well as other particulars—in leasehold situations (it is unclear in this situation whether eating another person's sandwich was expressly prohibited or a permitted ancillary use).

Texas has a lot of land. And, it has a lot of low-density, open space land. Cities across Texas have varying degrees of share in this land—whether in the form of open space, unoccupied historic buildings, and everything in between. As such, is not difficult to understand the attraction potential tenants have in leasing city properties.

There are many valuable and beneficial reasons a city might undertake the role of landlord; defining the permitted uses for leasehold property is among the most important factors a city must consider in making such a decision. Done right, leasing can prove a valuable tool and provide immense benefit for both the city landlord, its tenant(s), and the general public.

Cities across Texas grant leases to property for a wide variety of reasons consistent with its public duties, such as for farming (whether for crops, solar, or wind); business growth and expansion; general public and community services; cultural resources such as museums and performing venues; ground leases (with or without the construction of improvements); and a host of other uses limited only by imagination (and law). Whether it is in the best interests of a city to take on the responsibilities as a landlord depends on several factors—some are a matter of law; others a matter of public policy.

This paper aims to provide a sort of broad "Leasing 101" for cities, from the operational perspective as landlord. It covers basic leasing terms and law applicable to all leases, whether public or private, and filters them through specific and familiar requirements pertaining to public entities. Finally, it touches on some considerations specific to a couple of lease varieties which cities commonly encounter. As each of these subjects can constitute a lengthy examination and discussion on their own, this paper necessarily hits the high points and anticipates a deeper dive into the lease provisions discussed herein, as may be applicable to particular circumstances.

Throughout this paper, the terms "landlord" may be used interchangeably with "lessor;" and "tenant" used interchangeably with "lessee." The term "rent" will also pop in now and then, when describing lease payments.

What a Lease is

If you remember the "bundle of sticks" analogy from law school, you'll recall that a "fee simple" interest in land means a property owner owns the entire estate—the "full bundle of sticks." The city as holder of the fee estate is able to convey one of the lesser estates, or sticks, to another party. As one of those lesser estates (or sticks), a lease is a conveyance of real property for a designated period of time, with a reversionary interest in the lessor.

By statutory definition, a lease is "any written or oral agreement between a landlord and tenant that establishes or modifies the terms, conditions, rules, or other provisions regarding the use and occupancy of a dwelling."[1] So, a lease is really a hybrid of sorts between a conveyance and a contract.

The lease of real property by cities is addressed in a limited sense by the general procurement statutes of the Texas Local Government Code. Chapter 253 of the Code authorizes certain leases of submerged land, land leases to juvenile boards, leases of mineral interests, and leases of hospitals and swimming pools.[2] Chapter 272 authorizes and provides general direction regarding leases to other political subdivisions and universities, and for a few other purposes.[3] Additionally Chapter 307 provides for the lease of public piers.[4] Neither of these chapters provide any notice and bidding requirements for leases, but only do so for the sale and exchange of real property. So, conventional wisdom provides that leases are not subject to the notice and bidding requirements, and may therefore be directly contracted. However, a city landlord must be mindful of the fact that, despite the styling of a transaction as a "lease," certain circumstances can instead render the transaction a "permanent disposition of land"—in other words, a sale—and bring the transaction under the notice and bidding requirements under the Local Government Code. There is no precise formula or set of rules to determine when this happens—like many issues in the lawyering world, it is fact-specific and requires a weighing of factors. The attorney general has provided guidance: whether a lease arrangement is a sale or exchange of land subject to section 272.001 depends upon lease terms, such as the lease duration, the political subdivision's right to control the land during the lease term, and the political subdivision's right to improvements at termination.[5]

Why Lease?

As mentioned prior, becoming a city landlord can provide a valuable tool in fulfilling public purposes for its citizens, among other things. Other benefits to leasing city property instead of subjecting the property to an outright sale stem from the fact that leases are generally not subject to the requirements applicable to a sale of real property, which can provide a city with a bit more flexibility in determining when, why, and with whom to lease. Also, a

[1] Tex. Prop. Code § 92.001(3).

[2] Tex. Loc. Gov't Code Ann. Ch. 253

[3] Tex. Loc. Gov't Code Ann. Ch. 272

[4] Tex. Loc. Gov't Code Ann. § 307.023(b), providing for a maximum lease term of 40 years.

[5] Op. Tex. Att'y Gen. No. GA-0321 (2005)

lease enables the city to keep fee simple title to valuable land while at the same time providing for its beneficial use—some cities may desire to develop land in a manner for which it requires specialized expertise, such as for those related to mixed-use economic development projects, and so may look to lease to a developer with experience in in these matters as a public-private partnership.

As landlord, a city will typically enter into some sort of commercial or ground lease—such as an office lease, industrial lease, or a ground lease upon which a tenant will construct improvements. Residential and manufactured-home leases are subject to additional legislative protections for their residential tenants. Commercial leases, however, require fewer notices to tenants and therefore enjoy relatively more flexibility in negotiation.

Lease Fundamentals

All leases—whether ground, office, solar farm, development, or otherwise—have a universal requirements that at first blush appear commonsensical, but still nevertheless need careful and deliberate consideration. Just as with any contract, the absence of material terms, or the lack of specification thereof, can render a lease unenforceable or void. Although what constitutes a "material term" is determined on a case-by-case basis, it can arguably be clear when a lease lacks material terms. For example, an agreement which does not contain a description of the specific property or portion the parties supposedly agreed to lease and does not provide for the end of the lease term will likely not be binding on the parties.

A lease with a term greater than one year is subject to the statute of frauds, which means it must be in writing and signed by the landlord, at minimum. In addition, a lease subject to the statute of frauds must contain a description of the leased premises with reasonable certainty; otherwise, it may be unenforceable.[6]

It is helpful to keep a checklist of lease terms handy as a general resource, especially in the quickly-shifting and varied world of municipal law where you may or may not encounter leasing situations with regular frequency. These requirements embody basic contract elements—offer, acceptance, mutual assent, execution and delivery, and consideration:

1. *Leased property or premises description*. Once again: a lease must describe the leased property or premises with sufficient clarity. At minimum, a street address and suite, or building description, should be provided; in the event raw land is subject to the lease, a metes and bounds description or survey is sufficient. In the event a written description is unclear, a map or diagram can cure as long as it is well-marked and provides enough detail

[6] *Hebisen v. Nassau Development Co.,* 754 S.W.2d 345, 351 (Tex. App.—Houston [14th Dist.] 1988, writ denied), overruled on other grounds by *Formosa Plastics Corp. v. Presidio Engineers & Contractors, Inc.,* 960 S.W.2d 41 (Tex. 1998).

and reference.[7] It is therefore wise to include both a written description and a sufficiently-detailed map or diagram. Also specify whether common-areas, walkways, and parking are included in the leasehold interest, and whether other items are excluded from the leased premises, such as roads, sidewalks, and other public easements, or lakes and other water sources—especially when the rent amount is determined by a calculation of square footage or acreage.

Besides rendering the lease unenforceable, a misunderstanding of the exact property to be leased can trigger a cascade of additional complications—obvious examples include when the rental rate is tied to a certain amount per square footage or acreage; or if the tenant has already undertaken build-out or other improvements on property outside the intended leasehold premises, before the misunderstanding is realized.

2. *Parties.* We already know the city is to be the landlord, but who *exactly* is the tenant? A tenant, whether an entity or an individual, may share a name with any number of others. Plus, with individuals, your tenant may be a senior, a junior, or a third. At minimum, provide the state and type of incorporation or the county of residence, use full and complete given names, and reference generations.

3. *Consideration.* Basic contract element, here. How much will the rent be—and is it tied to fair market value (as determined by an appraisal), or is an amount less than fair market value, based on the leasehold being used for a public purpose or economic development performance agreement? Or, is it in-kind and in exchange for public services (for which a value has been calculated and provided)? Whichever it is, make sure to clearly so state, and provide specific conditions when leasing for below fair market value (public purpose findings and recitals, sufficient control by city to ensure public purpose is carried out, and clawback provisions in the event it isn't). Unless the lease is for a public purpose, the city must get fair market value for its lease payments; generally, the anti-gifting provisions of the Texas Constitution require that a lease of public property be for fair market value.[8]

Also: What about escalations of rent, particularly in a long-term lease? If an initial lease term is three or five years with options to renew, it is inequitable to the landlord to keep the same amount of rent payment year after year, although many tenants will insist on it. A landlord should require reasonable rent escalations tied to objective, appropriate criteria such as reference to the consumer price index or as reflected by a specific percentage increase each year.

[7] *River Rd. Neighborhood Ass'n v. S. Tex. Sports,* 720 S.W.2d 551, 558 (Tex. App.—San Antonio 1986, writ dism'd)

[8] Tex. Const. art. XI, § 5

4. *Timing of consideration or rent payments.* All leases must specify whether payments are to be made monthly, annually, semi-annually, or otherwise. Specify with clarity the date, place, and method of payment (i.e. wire transfer between banks, or a cashier's check hand-delivered to a specified person at city hall).

5. *Duration of term and options to renew.* Every lease should clearly define the length of the term. This can be pretty straightforward by providing a commencement date and an ending date, with rent payments beginning and ending aligning with the same. However, some leases (such as solar farm leases) typically require an option term or "feasibility period" at the start of the lease to first ascertain whether the property is suitable for its uses, obtain financing, and construct or develop any necessary improvements. Option terms are generally subject to a lower lease payment than when the tenant is in full operations on the premises. After the option term, the operations term of the lease can commence, at the operations rate. The commencement of the operations term may be a floating date depending on the completion of the option term—the finalization of improvements and commencement of business operations can provide a triggering event from which the operations term may begin.

   A lease may provide for one or more renewal options, for varying lengths of additional terms. These should be specific and a landlord should require a written, signed intent to renew from the tenant, within a certain period before the end of the term, before a renewal may be exercised. Be wary of automatic renewal or "evergreen" clauses—many preprinted leases contain such renewals; these do not sufficiently protect the landlord city interests (and could unwittingly shift too much control of the property to the tenant). It is easy to let the deadline for notice of intent to cancel or renew to breeze by and find oneself bound to another lease term. Changes in city personnel and access to records can undermine even the most rigorous pre-planning and calendaring, so it's best to avoid evergreen clauses.

   If, however, a lease (and any renewal terms) has expired and the tenant is still in possession of the property, this brings rise to a "holdover tenancy," which can be addressed in two ways: first, if the tenant is still operating and paying rent under the terms of the expired lease, the landlord can accept the rent payments and allow the continued tenant possession, therefore creating a "month-to-month" lease and a tenancy at will. A tenancy at will is recognized under the law and is governed under the same provisions as the original lease, except that the landlord is required to provide, in writing, either one months' notice before ending the lease or the amount of notice contractually agreed to in any existing month-to-month lease.

Contrast this with a tenant keeping possession after lease expiration but landlord does not accept rent and wishes for the tenant to move out. This constitutes a tenancy at suffrage. A tenant at suffrage who refuses to move out commits a forceable detainer, and is subject to eviction by the landlord.[9]

6. *Authorized and prohibited uses.* Just as with the sandwiches in the Irish pub, it is crucial that the authorized uses and permitted activities be defined with specificity. As landlord, a city will generally provide that these authorizations be relatively narrow in order to ensure compliance, protect its interests in the property, direct the kind of use and development in conjunction with policy and regulation, and mitigate or eliminate its risks of liability in the event the tenant undertakes dangerous or prohibited uses. Tenants, on the other hand, usually prefer a relatively broad use clause, such as a clause allowing for "any and all legitimate business uses." Stand firm. Any benefits which may be reaped from a lease can quickly become unraveled because of untethered tenants. A clause providing for the specified use or uses, plus ancillary administrative or office uses arising out of the permissible uses, plus other related items such as inventory storage, is a reasonable approach. This should provide the landlord with the protection it needs, in conjunction with other safeguards built into the lease, such as the ability for the landlord to enter the property at reasonable times or immediately in the event of an emergency or other specified circumstances. There is a balance to strike between the lawful entry to protect a landlord's interests and the risk of breaching the implied warranty of quiet enjoyment in committing material acts which substantially interfere with the tenant's use of the premises. But under no circumstances condition the landlord's entry onto the premises on obtaining permission from tenant!

The subject of use brings another important factor to light: the use of the property will speak to whether the city landlord will be able to enjoy the protections of sovereign immunity. Clearly this is a subject for which the rest of this paper, not to mention an entire event, could be devoted. Texas Courts have analyzed lease agreements in relation to Chapter 271 waivers of

[9]Tex. Prop. Code Ann. § 24.002: Forcible Detainer (a) A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person:

(1) is a tenant or a subtenant wilfully and without force holding over after the termination of the tenant's right of possession;

(2) is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease; or

(3) is a tenant of a person who acquired possession by forcible entry.

(b) The demand for possession must be made in writing by a person entitled to possession of the property and must comply with the requirements for notice to vacate under Section 24.005.

immunity and found immunity intact, as the agreements did not include agreements for services by one party to the government and wherein the government is making some type of payment to the other party.[10] So, be mindful that although the waiver of governmental immunity provided for contracts applies to goods and services and not to leases, the distinction between proprietary and governmental functions will still apply, depending on the use of the property. A city needs to ensure it understands the possible immunity ramifications which may arise out of a non-governmental use of leased property, and provide appropriate safeguards in the lease to protect itself (such as those relating to insurance and indemnity, as described further).

7. *Default and remedies.* There are plenty of ways a tenant can default—for example: failure to pay rent, using the property for activities outside of the permitted uses, and creating waste on the premises, among others. Landlords may employ a range of contractual and statutory remedies as a result; common remedies include the ability to terminate the lease upon default and recover liquidated damages equivalent to the outstanding rent due until the end of the term, including the retention of any security deposits[11] and lawful lockout[12]. Remember that, in Texas, landlords have a duty to mitigate damages.[13]

[10] *Lubbock County Water Control and Improvement District v. Church & Akin,* 442 S.W.3d 297, 303 (Tex. 2014); *City of Alamo v. Osuna,* 2014 WL 6602387, *3 (Tex. App. – Corpus Christi 2014, no. pet.).

[11] Tex. Prop. Code Ann. § 93.011 (a) A landlord who in bad faith retains a security deposit in violation of this chapter is liable for an amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld, and the tenant's reasonable attorney's fees incurred in a suit to recover the deposit after the period prescribed for returning the deposit expires.

(b) A landlord who in bad faith does not provide a written description and itemized list of damages and charges in violation of this chapter:

(1) forfeits the right to withhold any portion of the security deposit or to bring suit against the tenant for damages to the premises; and

(2) is liable for the tenant's reasonable attorney's fees in a suit to recover the deposit.

(c) In a suit brought by a tenant under this chapter, the landlord has the burden of proving that the retention of any portion of the security deposit was reasonable.

(d) A landlord who fails to return a security deposit or to provide a written description and itemized list of deductions on or before the 60th day after the date the tenant surrenders possession is presumed to have acted in bad faith.

[12] Tex. Prop. Code Ann. § 93.002 (e) A landlord may remove and store any property of a tenant that remains on premises that are abandoned. In addition to the landlord's other rights, the landlord may dispose of the stored property if the tenant does not claim the property within 60 days after the date the property is stored. The landlord shall deliver by certified mail to the tenant at the tenant's last known address a notice stating that the landlord may dispose of the tenant's property if the tenant does not claim the property within 60 days after the date the property is stored.

(f) If a landlord or a landlord's agent changes the door lock of a tenant who is delinquent in paying rent, the landlord or agent must place a written notice on the tenant's front door stating the name and the address or telephone number of the individual or company from which the new key may be obtained. The new key is required to be provided only during the tenant's regular business hours and only if the tenant pays the delinquent rent.

[13] Tex. Prop. Code §. 91.006. Landlord's Duty to Mitigate Damages: (a) A landlord has a duty to

Additional Considerations

The preceding paragraphs covered core terms of a lease; what follows are some other considerations which should be provided for in order to properly allocate the risks and responsibilities between landlord and tenant:

1. *Maintenance and repair.* A lease should specify how maintenance and repair of the leased premises will be allocated between landlord and tenant for the duration of the lease. A city landlord certainly wants to be sure that the leased premises are returned in good or desirable condition at the end of the lease term. It is common, although negotiable depending on the circumstances, that the tenant is responsible for any interior maintenance, repair, build-out, or construction to the leased areas used by the tenant, and that the landlord is responsible for exterior walls, roof, and foundation. This is harmonious with the implied warranty of suitability applicable to leases in Texas, which provides that "at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition."[14] This warranty can be disclaimed by a properly-drafted "as is" clause, where the landlord gives no assurances, express or implied, concerning the condition of the premises. When the tenant agrees to lease the property "as is," they make their own determination as to the benefits and risk of leasing the property, and precludes the tenant from claiming that the landlord's conduct caused harm.[15]

2. *Assignment and subletting.* For infinite reasons, the city needs to know with whom it is contracting. Some tenants may seek blanket permission to allow for the assignment or subcontracting to an "affiliate," such as a sister corporation. In the event of a cell tower lease, a tenant will likely require the ability to sublet to wireless providers and other appropriate entities. Be sure to insist on, at minimum, landlord notice and consent (which may or may not be unreasonably withheld), or provide advanced approval to a defined category of entities, such as a list of wireless telecommunications providers.

3. *Insurance and indemnity.* Generally, a tenant will have much more control over the leased premises than the landlord for the duration of the lease. It is imperative that a tenant obtain and retain sufficient amounts of general liability and property insurance, tailored to its specific uses, to cover itself, the leased premises, and its personal property. Additionally, a tenant should absolutely indemnify and name the city landlord as additional insured,

mitigate damages if a tenant abandons the leased premises in violation of the lease.

(b) A provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void.

[14] *Gym-N-I Playgrounds, Inc. v. Snider,* 220 S.W.3d 905, 910 (Tex. 2007)

[15] *Id.* at 914.

and provide that the amount of insurance held is sufficient to protect and indemnify the landlord from any claims or damages arising out of or attributable to the tenant's lease of the premises. Indemnification, after all, is only as good as the amount of insurance held. Be sure to require a copy of the insurance policy (an insurance certificate by itself does not usually impart coverage on the certificate holder), and require that minimum notice requirements be directed to the landlord should the policy be changed or terminated.

Finally, as city attorneys have relived time again, many prospective private-entity tenants aren't accustomed to working with public entities and may not understand the reasoning behind, for example, the striking of landlord requirements to indemnify tenants. Be prepared to explain and insist on this—do not allow your city to indemnify the tenant! That is a deal-breaker.

4. *Ad valorem taxes.* If the tenant is not leasing the property for a public purpose, beware of the possibility of ad valorem taxes being applicable to the real property as well as to the personal property of the tenant. The question of whether real property is subject to ad valorem taxes does not turn on whether the property is owned by a public entity; rather, the question depends on what the use of the property is.[16] For example, the lease of publicly-owned property to a private developer for the commercial construction and operation of apartment housing, for private benefit, rendered the public property subject to ad valorem taxation.[17] The lease in question provided that the tenant was to be responsible for "all ad valorem taxes;" to the tenant's surprise, however, the ultimate result was that the contract language providing that the tenant would be responsible for all ad valorem taxes meant that the tenant would be responsible for assessments against *both* the real and personal property, and not just the fixtures or improvements as the tenant maintained.[18] Of course, that speaks to the "meeting of the minds" or required in any contract, but that's a subject for a different day. The takeaway from this is, be certain that both parties understand the tax ramifications which may arise out of the tenant's use of the property—discussions with the county tax assessor can be helpful—and specify in the lease responsibility for payment of ad valorem taxes (such as building the amount of anticipated taxes into the rent payments).

[16] Tex. Tax Code Ann. § 11.11(a) [P]roperty owned by this state or a political subdivision of this state is exempt from taxation if the property is used for public purposes… (d) Property owned by the state that is not used for public purposes is taxable. Property owned by a state agency or institution is not used for public purposes if the property is rented or leased for compensation to a private business enterprise to be used by it for a purpose not related to the performance of the duties and functions of the state agency or institution…

[17] *Gables Realty Ltd. P'ship v. Travis Cent. Appraisal Dist.,* 81 S.W.3d 869, 870 (Tex. App.—Austin 2002, pet. denied).

[18] *Id.*

5. *Environmental concerns.* The relative control of the tenant over the property for the term of the lease also underscores the need for correct allocation of risk and requisite protection of the city landlord during that time. Given the number of historic buildings throughout Texas, city landlords must be aware of any possible environmental hazards, especially when renting buildings of considerable age. Before commencement of build-out or other construction or alteration, repair or maintenance, federal law requires landlord owners of public buildings to notify tenants, in writing, of the presence, location, and quantity of asbestos-containing materials or *presumed* asbestos-containing materials in the areas tenants will occupy.[19] Piggy-backing on the discussion of insurance and indemnity, remember that environmental liability for adverse conditions on real property are strict liability, and also joint and several. Therefore, be sure that the lease contains more than just a catch-all requirement that the tenant comply with "all existing state and federal laws"—be specific as to tenant requirements regarding any authorized use and storage of hazardous substances on the premises, if allowable. A tenant should be required to reimburse the landlord for cleanup costs; provide specialized environmental or other hazard insurance (with landlord as additional covered) and indemnify landlord from any liability arising out of adverse environmental conditions from the tenant's use of the property. A landlord should have sufficient opportunity for entry and inspection to verify tenant compliance with these matters—before, during, and after the lease term.

A Few Particulars

The preceding provisions provided some universal elements pertaining to all leases; what follows is an overview of some high points related to some particular leasing scenarios a city landlord may encounter.

1. *Solar leases.* Given the proliferation and ongoing development in clean energy, larger swaths of city property will prove tempting for a tenant wishing to install a solar panel facility. Solar farms contain some unique characteristics—they typically take a two-part form: first, an "option period" or feasibility period (similar to that in a purchase and sale agreement) is typically required in order for the prospective tenant to evaluate soil conditions, location, engineering studies, and other matters before determining whether the property is suitable for their intended use. From that point, the "operations" period of the lease commences, and the rent amount for each period will differ. The option period will generally have a lower rent amount, possibly based on a per square foot or per acreage amount; whereas the operations rent should be tied to fair market value and allow for escalations based on increased value.

[19] 29 C.F.R. §§ 1910.1001, 1926.1101

Be mindful of the fact that, when leasing land for a solar farm, the land will be out of commission for a long time. It is especially crucial therefore that these leases account for what happens at the end of the term in order to protect and retain the value of the property, and return the property to a suitable condition for the landlord. Sufficient facility and equipment removal requirements on the part of the tenant are a must. Beyond basic cleanup, the lease must contain provisions to specifically address the removal and remediation activities required of the operator so that future land use and value are protected—and do so within a reasonable time (between six and twelve months is reasonable). Be sure to also include the removal of subsurface facilities such as concrete footings and cables, at a sufficient depth (three to four feet).

This requirement leads to an absolute must: the landlord should require a removal bond covering the cleanup, equipment removal, and restoration of the property upon termination of the lease. Solar tenants may not volunteer this, and may instead propose an arrangement where the landlord instead retain the equipment and facilities to dispose of at "salvage value" to cover these costs. This is not in the best interests of the landlord. The prospect of disposing of the equipment post-lease is far too tenuous to even minimally cover the costs of restoring the property—there is no guarantee any entity would purchase the equipment; and by the time the lease term ends, which may easily be the "upper limit" of what constitutes a lease versus a sale (several decades), the advance of technology would likely render the equipment obsolete and undesirable in any instance. A reasonable compromise is to require the bond beginning the tenth year of operation, while the solar technology is still relatively fresh and the tenant's history is more firmly established.

2. *Cell tower leases:* Cell tower or cell antenna leases continue to flourish. Although the installation and operation of cell towers is sometimes done via a license or easement, most often these will be done by a lease agreement—and usually the cell tower company will have its own pre-drafted form of agreement which warrants careful attention on the part of the city.

   Similar to solar leases, a cell tower lease usually contains an option or feasibility period during which the tenant will undertake its due diligence to determine whether the site is suitable for their needs—conduct soil, environmental, and engineering studies and tests—obtain any required permits and licenses, and construct improvements. Upon satisfaction, the tenant may exercise the option to lease and the landlord can start to receive payment under the operations portion of the lease. Again, lease payments are generally smaller during the option period.

Another important consideration: a cell tower agreement will involve three parties—the city landlord; the cell tower installer/operator-tenant; and various end-users (cell phone companies) who use the tower to install their equipment, such as antennae, to serve their business and customer needs. These are typically handled through a sublease by the tenant. It is important therefore to require that any sublease terms be consistent with the terms provided in the primary lease between the city and the wireless tenant—whether it be the length of the lease term, renewal options, or other factors—the landlord is advised to specifically incorporate the terms of the primary lease into any sublease, or at minimum attached as an exhibit and incorporated into the sublease.

Keep in mind that these subleases usually don't account for any share of the sublease payments to be provided to the landlord, and insisting on this may not occur to the city landlord. While not a legal consideration, it is reasonable and fair policy to insist that as landlord a city get a certain percentage of any sublease payments.

Finally, just as with solar leases, the lease should require the removal of both above-ground and below-ground improvements by the tenant upon termination of the lease. Subsurface improvements can mean a six-foot or more depth of cement footing, possibly rendering the property useless without the further expense of city time and equipment to restore the premises back to useful condition.

Conclusion

The opportunities for a city to assume the role of landlord can be both vast and sporadic. The topics provided herein are intended to provide a general foundation and core elements required in leasing, which should be considered in depth and tailored appropriately to each leasing situation. And of course, as this is only a guide for non-clients, it does not constitute legal advice. Good luck!