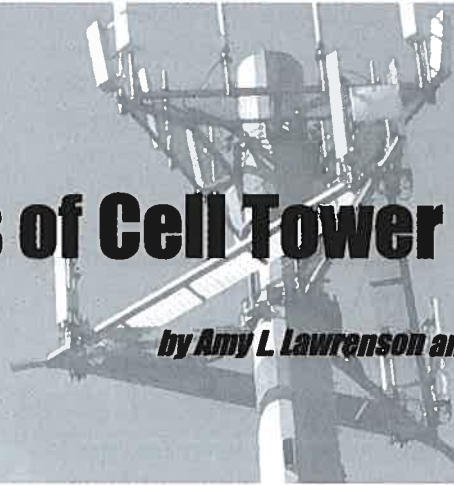


The Do's and Don'ts of Cell Tower Leasing: A Landowner's Perspective

by Amy L. Lawrenson and Patrick J. Bartman



As consumers demand better cell phone coverage, telecommunications carriers feed this demand by expanding their network service areas with more (and more) cell towers. In order to construct and thereafter operate these towers, carriers enter into agreements with landowners or purchase such rights from third parties that have entered into agreements with landowners on a speculative basis with the intent to later sell the rights to carriers. These agreements typically take the form of a lease or easement and, occasionally, a license. Regardless of form, there are several key considerations every landowner, or their legal counselor, should review when negotiating and entering into cell tower agreements. We have listed such key considerations below.

☑ **Do** negotiate the agreement. Carriers and tower companies, or their land agents, will often present pre-signed

hard copy agreements to landowners meant to discourage consultation and negotiation and encourage landowners to sign the agreement as-is. These agreements are almost invariably drafted to favor the carrier and frequently omit the key considerations listed below. Landowners should always attempt to negotiate the agreement. While there are certain terms the carriers will not negotiate, they will typically agree to certain modifications of their form document.

☒ **Don't**, however, assume you have the upper hand. With the above being said, the ability to negotiate an agreement, like most things in real estate, usually comes down to location, location, location. How attractive the property location is to the carrier will usually dictate its willingness to negotiate. Prime locations take into account areas of poor coverage for the carrier, favorable topography (ideally, high with no obstructions), space allowances for the tower, population density of the surrounding area, accessibility to roads and utilities, zoning requirements, and potential for public opposition. If the property is easily replaced with another location, a hardline

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negotiation will likely cause the carrier to move on. Likewise, carriers will typically bend over backward for prime locations.

☑ **Do** consider payment terms that will best favor the landowner's position. Payment terms, both as to the amount of payments and payment structure, are typically negotiable. There is no set formula for payment amounts, but generally, the first offer is not the best offer. As to structure, payments typically have variables of lump sums, monthly, and annual payments. When negotiating directly with a carrier, the carrier may allow the owner to either front-load the payments or extend the payments over the life of the agreement, depending on the preference of the landowner. When negotiating with a third party tower company, however, it may be less likely to successfully negotiate higher payments up-front since it is their goal to push expenses off to later in the term once a carrier has purchased their rights.

☑ **Don't** permit excessive terms. The agreements should never be perpetual in nature. Typical terms are five to 20 years for an initial term and one to 10 years for extensions thereafter. For longer terms, consider payment escalations annually or at the time of renewals to account for inflation in rents and the long term encumbrance on the property.

☑ **Do** ask for an upfront payment or reimbursement sufficient to cover the landowner's legal fees. Carriers typically prefer to structure such payments as signing bonuses, to encourage finalization of the negotiations, but, where possible, it should be negotiated that the carrier/third party must pay such amount upfront, prior to commencing negotiations, so the landowner receives the funds regardless of whether the agreement is entered into.

☑ **Don't** accept a blanket encumbrance on the property. This is one of the most common mistakes and can be critical when dealing with property that is a large parcel. Require the carrier to identify, with specificity, where on the property they will place their facilities and have rights. Preferably, this will be done with a survey of such area, prepared at the carrier's expense, but the parties can also accomplish this through visual depictions, which can be attached as exhibits.

☑ **Do** place a limit on cabling rights. In line with the suggestion above, the cabling associated with the facilities, which typically consists of underground lines running from the tower to the point of connection with public utilities, should be within a specifically identified area. This will require the carrier to run the cabling in a manner that will not interfere with farming activities or future development of the property. If the cabling will be in farmed areas, the agreement should include a requirement that the carrier install the cabling below plow depth and that the landowner will be reimbursed for crop damage or other damage to the landowner's property.

☑ **Don't** allow rights of first refusal or rights of first offer. Again, one of the most common mistakes is to grant the

carrier or third party a right of first refusal or right of first offer to purchase the property should owner decide to sell it during the term of the agreement. This can greatly diminish the value of the underlying property as well as create a hassle if the landowner wants to sell the property. In addition, if that right allows the carrier or operator to just buy the area where the facilities are located, it will require the landowner to subdivide their parcel in order to sell the property.

☑ **Do** require indemnification from the carrier and all parties the carrier authorizes to enter the property. The indemnification should be broad and cover against any and all claims or liabilities for death or injury of any person or damage to any property arising from the carrier's or third party's presence on the property, installation and operation of facilities on the property, or failure to comply and otherwise perform as required under the agreement. Indemnification should also include coverage of landowner's reasonable attorney fees.

☑ **Don't** allow unlimited relocation rights. The carrier's right to relocate their facilities should be subject to the landowner's advance written approval.

☑ **Do** spell out hunting, if applicable. Frequently, leases will prohibit hunting near or around the facilities, but agricultural owners should consider negotiating rights to hunt during desired seasons. The agreement can specify these dates/designated seasons, or the owner can agree to provide the carrier advance notice when hunters will be on the property.

☑ **Don't** assume responsibility for permitting, zoning, or other compliance requirements of facilities. The carrier should be exclusively responsible for obtaining all necessary permits, licensing, and variances to install and operate their facilities.

☑ **Do** assume the owner will need to cooperate or even reasonably assist the carrier with their permit applications and regulatory approvals. The carrier will likely need the owner to sign certain applications for county or city regulatory approvals, but, as noted above, the carrier should be responsible for shepherding such applications through approval process and should also be responsible for all costs and expenses related to preparation of documents and obtaining such approvals.

☑ **Don't** neglect interference possibilities. The agreements will typically require that the owner does not do anything on their land that will interfere with the operation of the tower. This will limit the landowner's ability otherwise freely use its property, including, but not limited to, the ability to construct new structures or plant new trees that may interfere with the facilities.

☑ **Do** require insurance. The carrier should be required to obtain and maintain throughout the entire term a commercial general liability insurance policy at a sufficient level,

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which is typically not less than \$1 million or \$2 million dollars, depending on type and size of the property. The owner should require a copy of the insurance prior to allowing the carrier to commence construction activities and should require copies of any renewals and notice prior to any terminations. The agreement should also require that the policy name the owner as an additional insured on the insurance policy.

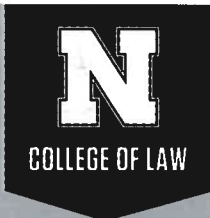
☒ **Don't** allow unlimited access rights. The carrier will need reasonable access to their facilities including emergency access, but they shouldn't require access over the entire property. Access should be limited to only those specific areas necessary to access their property, and ideally located in close proximity to the facilities. If access is needed anywhere else on the property, owner should require advance written notice.

☑ **Do** consider limitations on subleasing and co-location. Subleasing and co-location are two of the hottest issues in tower leasing. Most tower leases now permit the carrier to locate not only their own facilities on their tower, but to locate the facilities (typically just the antennas/receivers) of other carriers on the tower. This is appealing because it allows the carriers to maximize on their rental payments and reduce their infrastructure expenses. In the past, owners could typically negotiate limits on the number of antennas or require a share in the proceeds of the subleases and co-locations, but it is becoming less and less common for carriers to agree to this.

☒ **Don't** forget about tower aesthetics. Cell towers can be disguised to blend in with the natural surroundings, most commonly as trees. In order to maintain the desired aesthetic of a property, landowners should inquire and negotiate for the installation of disguised, or "stealth", towers. Carriers and third parties often have a list of different types of towers for landowners to choose from.

☑ **Do** include a termination right for default. If the carrier fails to make timely payment or breaches any material term of the agreement, the owner should have the right to terminate the agreement, subject to the carrier receiving notice of the default and an opportunity to cure the default. Likewise, the owner should have the right to cure any of its defaults prior to the carrier having a self-help right to cure the owner's defaults.

☒ **Don't** forget about decommissioning. Once the agreement expires or terminates, the carrier should be responsible for removal of all of the tower facilities. The agreement should specify whether the carrier must remove underground facilities such as cabling and foundations. The best practice is to require removal of anything within four feet of the surface. If the owner is concerned the carrier will not honor their removal requirements, it may be possible to require a decommissioning security either at the beginning of the lease or at a certain period of the term. ☐

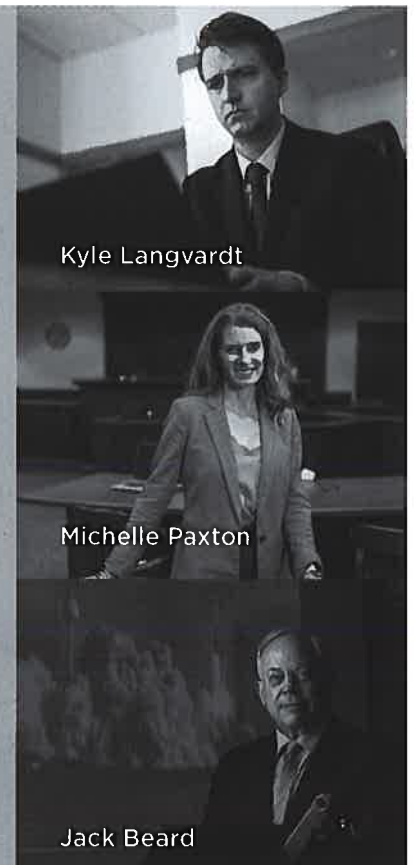


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