

Key legal issues landowners must address when drafting and negotiating a billboard lease

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Ansell Grimm & Aaron Attorney Jessica T. Zolotorofe authors an article in the *Harrisburg Commercial Real Estate Report* highlighting key legal issues to address when drafting and negotiating billboard leases.

For decades, some Pennsylvanians have loudly opposed billboard advertising, deeming it to be aesthetically displeasing and environmentally unfriendly. Movements led by groups such as the Pennsylvania Resources Council and the Society Created to Reduce Urban Blight have advocated for stronger enforcement of billboard construction and control laws in Pennsylvania. Other states, like Vermont, Alaska, Hawaii, and Maine have banned billboards altogether.

However, despite the controversy, billboards are being constructed in record numbers across the United States and well-negotiated billboard leases have proven very lucrative for land owners. Justin Vermuth, former VP of Real Estate and Public Affairs for Clear Channel Outdoor, one of the largest billboard tenants in the industry, now invests in them himself. "Billboards are a wonderful passive income stream," he said.

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With constantly evolving forms of billboard advertising, and the increasing popularity of digital marketing, billboard leases are expected to remain a staple in the advertising industry. There are a number of items that are important to address in the drafting and negotiation of a billboard lease to protect a land owner.

1. Compliance with Law

First, it should be clear in any billboard lease that the tenant is liable for familiarizing itself with local code provisions as they pertain to height, size, location, and content of signage. There should be an indemnification provision in the lease whereby the tenant has the obligation to indemnify, hold harmless, and defend the land owner in the event that there are any claims against or damages incurred by the land owner for the billboard's failure to comply with the law.

All approvals and permits, including zoning approvals, should be obtained by the tenant, at the tenant's expense, as should all surveys, site plans, municipal or other application fees, attorneys' fees, cost of engineers' reports or testimony, and all other costs and expenses in connection with the approvals process.

2. Easement or Lease

Many billboard tenants seek perpetual, or permanent easements that run with the land. Typically, an easement will provide the billboard tenant a non-exclusive right to utilize the lessor's land until the end of time in exchange for a lump sum of money, as opposed to ongoing rental payments. The grantee of the easement will have an actual interest in the real property memorialized in the public records. While a lump sum payment may be attractive to a land owner as opposed to receiving smaller monthly rent payments, it can pose a significant problem if the owner seeks to sell or redevelop the property. The owner may be unable to do so as a result of the prohibitions drafted in the easement agreement or location of the easement itself. Additionally, by virtue of the lump sum structure of payment, future owners derive no monetary benefit from the encumbrance.

The more beneficial manner for a land owner to contract with a billboard tenant would be by ground lease. In a ground lease, the tenant is responsible for maintenance of not only the structural components of the billboard itself but the ground area around it. It is important to include that the tenant must keep the property in good condition, and must maintain the property in a safe manner by putting up fencing where appropriate, and exercising other precautionary measures to eliminate the possibility of injuries. A ground lease typically has an expiration date and the owner retains far more rights than with an easement.

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Billboard lessor, Robbie Jansky, owned a vacant piece of land and a billboard lease was the perfect fit for him. His experience has been very positive, but he notes that it is of the utmost importance to negotiate the terms of the lease with knowledge of the nuances of the billboard business. "I wanted to conserve as many of my own rights as a landowner, as opposed to giving them away forever to the billboard company with the permanent easement. I was only willing to give them permission to use the land for a certain period of time," he said.

3. Use of the Property

Notwithstanding that it is a ground lease, however, the tenant should not have an unfettered right to operate any business on the premises, or build any building or structure other than the billboard. The lease should expressly provide that the property can only be used for billboards and no other purpose.

4. Other Expenses

As with any ground lease, the tenant should be responsible for paying all expenses of the property, including utilities and property taxes. Especially where the land was previously vacant, the construction of a billboard will significantly increase the land valuation, thereby increasing the land owner's property taxes, all of which should be passed through to the tenant.

5. Metes and Bounds

It is advisable to attach a metes and bounds description of the property being leased to the tenant as an exhibit to the lease. Sometimes a billboard tenant will attempt to expand the area actually leased to it in order to accommodate the installation of additional equipment or supports and the land owner should be fairly compensated.

6. Assignment and Subleasing

The lease should prohibit a tenant from assigning or subleasing without the land owner's consent. It is important that the land owner has the ability to ensure that the tenant remains a responsible operator. For example, a land owner would not want 'Verizon Wireless' to assign its lease to 'Mom and Pop Telephone Company', which has no assets, no credit, and no experience in the billboard or advertising industry, whether or not the use would remain the same.

7. Quantity

To the same point, just like with any commercial lease agreement, it should be considered whether a lease guaranty is important to the land owner. For example, if the property is leased to advertise for Verizon Wireless, but VW 123, LLC is the actual tenant, that tenant entity likely has no assets other than what is located on the property, so it is beneficial, if possible, to obtain the guaranty of a parent company, or an individual guarantor.

8. Content

The lease should also restrict the content of the billboard for two main reasons. First, land owners do not want the billboard to compete with existing commercial tenants, if

applicable. For example, if there is a gym in an adjacent shopping center owned by the land owner, the land owner would not want a competing gym advertisement on the billboard. Second, it is important that the land owner has control over the content so that the billboard does not portray anything distasteful or offensive. Some land owners even choose to specifically prohibit certain types of content such as religious or political advertisements.

9. Expiration of Term

Finally, a land owner should attempt to negotiate that it is within land owner's discretion at the expiration of the lease term to either require that the billboard be removed and the premises repaired to its original condition, or that the tenant leave the fixture in place to become the property of the land owner. From a land owner's perspective, assuming the billboard has proven a positive investment, Vermuth adds, "Many billboards

are legal nonconforming uses due to changes in zoning regulations, so in that case it is very rare you would want to remove it", though if another development opportunity arises and the land would be more useful for another use, the owner may not want the billboard to remain, or become his responsibility to remove.

According to the Outdoor Advertising Association of America, there was 7.7 billion dollars in ad revenue just in 2017, an increase over the previous year, with nearly 350,000 billboards throughout the United States. According to the Pennsylvania Department of Transportation, Pennsylvania leads the eastern region states with over 14,000 billboards on its highways, followed by New York, which has less than half as many. Especially in light of the rapid growth and evolution of the industry, it is important to always consult an attorney before signing a billboard lease or easement.

About the Author:

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