

BILLBOARD LEASES

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*Sites are scarce
& valuable*

Introduction.

This paper will examine the terms and provisions of agreements between landowners and billboard operators which allow the billboard operators to construct, maintain and operate billboards. It will not examine the agreements between the billboard operator and the advertiser, which are more in the nature of typical advertising agreements than any type of real property agreement. Also, I will not focus on those situations where the landowner has chosen to construct and own the billboard structure and to use the billboard company as a "billboard manager." I will focus, instead, on the traditional lease between the landowner and the billboard company.

I have specialized in the area of commercial real estate law for eighteen years, and have rarely been involved in the drafting, negotiation, or review of billboard leases. In preparing to write this paper, I have discovered that this is probably not an unusual circumstance. The individuals who are involved in the billboard business and the property owners they deal with tend to make and document their deals without very much involvement of attorneys. However, I think that it would be of benefit to property owners and the billboard industry to step back and take a look at the forms of documentation being used, and to polish them up a little bit so that they will cover more of the issues and circumstances which might arise.

The first decision to be made when considering the form of documentation to be used in connection with the operation of a billboard, is whether it should be structured as a license, an easement, or a ground lease. From what I could determine, the older documents were drafted as licenses, but the more recent documents are drafted as leases. In thinking through the differences between these types of property interests, it seems to me that the ground lease is the best vehicle to use for the operation of a billboard. The

problem with a license agreement is that a license is much more easily terminated by the landowner. In this day of scarce billboard locations, it is in the interest of the billboard operator to have a more binding document than a license. The problem with an easement is that, if it is an easement in gross, it would be personal to the particular billboard company and would not be transferrable. The landowner is going to be hesitant to create any other type of easement because that is more of an encumbrance on the landowner's property, and would need to be filed of record. All in all, the ground lease is probably the best vehicle to use to grant a billboard operator the right to maintain a billboard on a piece of land.

I will attempt to go through those provisions of a billboard lease which I think raise the most issues for the billboard owner and the property owner, and to discuss some of the options available to each of these parties. I have also attached a basic form of Billboard Lease Agreement as Appendix A to this paper, which can serve as a starting point in negotiating one of these leases.

Description of Property and Use.

Many of the billboard leases which I reviewed did not specify a certain area of the land which was being leased. Instead, they described the type of sign which was going to be placed in a certain general area, and then stated that the lease was to cover "the use and possession of the following described premises, for the purpose of erecting and maintaining advertising displays (painted, reflectorized, printed, illuminated, or otherwise), including necessary structures, devices, power poles and connections." I would recommend that the lease clearly designate certain dimensions on the ground (perhaps with a drawing attached), and that the sign then be described. The items used in the description of the sign are (i) the dimensions of the sign area (typically no larger than 15 feet by 50 feet), (ii) the number of poles (e.g., monopole, bipole, etc.), (iii) the height of the sign, (iv) the number of faces on the sign, and (v) the directions that the display will be facing.

The use of the property should be clearly limited to billboard usage, so that the billboard operator will be forced to obtain the property owner's consent to any other use.

One of the things that a property owner should consider is that the income to the billboard operator could be significantly increased if the billboard operator changes the sign from a double-faced sign to a tri-faced sign, or if the billboard operator permits some other attachment to the sign, such as a cellular communications unit. The property owner should state explicitly that the property owner's consent will be required for those kinds of changes in use of the sign, and that the property owner will be entitled to increase the rental rate in connection with those kinds of changes.

Rent.

Until recently, the standard billboard lease provided for a flat rental rate which was payable monthly. However, it has now become quite common for the landowner to negotiate a percentage rental. The percentage rental is normally payable annually, and the guaranteed rental is credited against the percentage rental amount. In addition, the percentage rental is usually net of agency fees. My review of current billboard leases would indicate that landowners are negotiating a percentage rental rate of 20% to 25% of the gross income generated by the sign, less the agency fee (and less the credit for the guaranteed rent). As I mentioned in the previous section, the landowner should make it clear that the percentage rental will apply to all income derived from the sign, including nonadvertising types of income, such as attachment of telecommunications equipment of any kind. A recent edition of The Kiplinger Newsletter made mention of the fact that many cellular communications companies are utilizing billboard signs upon which to mount the equipment. A billboard operator pointed out to me that this use of billboards will probably be very short lived and does have some drawbacks for the billboard operator. Apparently, the contract for use of the billboard typically provides that, if the billboard operator damages the cellular communications equipment, the billboard

operator will be liable for the repair of that damage. This could be a significant concern for billboard operators who are constantly changing the signage on the billboards and constantly running the risk of damaging the cellular communications equipment. The cellular communications equipment is apparently strapped onto the billboard structure, and can be easily removed without damage to the billboard structure. However, it probably is not the optimum situation for these cellular communications companies, and they will probably try to have permanent sites of their own whenever possible as opposed to hooking their equipment onto a billboard sign.

The billboard operator will probably want to negotiate a credit against rentals for any period of time when the sign cannot be illuminated due to interruption in utility service or legal restrictions on illumination. The form of lease attached as Appendix A contains a provision which allows the billboard operator an abatement of rent under certain circumstances, including the inability of the billboard operator to obtain advertising for a period of 90 consecutive days, a diversion of traffic past the site, the obstruction of the sign, and the inability of the billboard operator to obtain any necessary permits.

I did not find any "continuous operation" clauses in the leases I reviewed. In the form I have attached, I have given the landowner the right to terminate the lease if the lessee fails to keep the sign "occupied." This would accomplish the same thing as a continuous operation covenant, and would allow the landowner to optimize the percentage rents. I also did not find any extensive audit provisions. The form lease attached requires a statement from the billboard operator or its accountant, and gives the landowner the right to request copies of the advertising contracts or other agreements.

Term.

Due to the scarcity of billboard locations in the current environment, billboard operators are attempting to negotiate longer terms, and to negotiate automatic renewals in the absence of notice of

termination by the landowner. Each of the parties has certain circumstances which they would like to insert in the lease as triggers for a right to terminate. For the landowner, examples of those circumstances would be as follows: (a) the landowner improves property which had been unimproved; and (b) the landowner has contracted to sell the property. Some of the typical circumstances for the billboard operator would be as follows: (a) the highway or thoroughfare view has been obstructed; (b) the advertising value of the sign has been impaired or diminished; (c) use or installation of the sign has been prevented by law or the billboard operator is unable to obtain necessary permits for the sign; (d) the billboard operator is unable to obtain advertisers for a period of at least 90 consecutive days; and (e) diversion of traffic or change in direction of traffic.

If the lease does provide for a right to terminate by either the landowner or the billboard operator, then the lease should specify the number of days of written notice required prior to actual termination of the lease.

Compliance with Laws.

It is very important that the landowner require that the use of the property be in compliance with all governmental laws, rules and regulations, and that the billboard operator maintain the sign and its immediate surroundings in a neat, clean and attractive appearance. As far as I know, all billboards are regulated on either the federal, state or local levels. Those regulations require such things as minimum spacing between billboard signs, height restrictions, and restrictions against the placement of signs near residential areas, schools or churches. Permits are almost always required in order to operate billboards, and there are usually significant monetary penalties for failure to obtain or comply with a permit. In Texas, the spacing between signs needs to be 1,500 feet. Some cities choose to regulate billboard signs by local ordinance. Those cities are known in the industry as "certified cities." Other cities allow state regulations to govern. Those cities

that do choose to regulate billboard signs by local ordinance must utilize the state requirements as a minimum, and can then add more restrictive requirements which apply only to their municipality. Some cities have imposed an absolute moratorium on new billboard permits. In those areas, existing billboard signs become a legal nonconforming use. If the sign is a legal, nonconforming use, the city may or may not allow the relocation of that sign or the rebuilding of the sign in the event of a casualty. Because of the strict spacing requirements and moratoriums on new billboards, existing billboard signs or permissible locations which have not yet been utilized for billboard signs, have become a very scarce commodity and have vastly increased the worth of these sign locations to the landowner.

The billboard operator may want to request a right to relocate the sign onto adjoining property of the landowner in the event governmental regulations cause the existing location to be unworkable. If the landowner does agree to such a provision, it should be limited to an alternate site "satisfactory to landlord in its sole discretion," along with any other restrictions which might be applicable.

Restriction on Type of Advertising.

Most landowners will want to insert some restriction on the type of advertising. This restriction can be a general restriction on any advertising which is "distasteful or offensive," or a statement that the advertising will "conform to community standards." The landowner may want to prohibit any advertisers who are in "sin businesses." In addition to these general types of restrictions, a landowner may need to negotiate specific restrictions on advertising which competes with on-site tenants of the property. In the form attached to this article, I have inserted a suggested provision which restricts particular types of advertising and also states that the landowner has the right to approve each advertiser so long as such approval is not unreasonably withheld or delayed.

The billboard operator may also want to restrict the property owner from allowing competing advertisers on property owned by the landowner and adjacent to or within a certain radius of the property where the billboard is located. It seems that these radius provisions are fairly limited in reach. One that I reviewed had a radius of 600 feet.

Utilities.

All of the billboard leases which I reviewed provided that the billboard operator would install utilities to the sign and would pay those utilities directly to the providers. In representing the property owner, it would be wise to provide that the property owner can relocate those utility lines if necessary in connection with the development of the property. The landowner should also specify that it is entitled to improve the surface of the property over those utility lines as it sees fit.

Taxes.

The billboard lease should clearly make the billboard operator responsible for any real or personal property taxes attributable to the billboard sign and any accessories thereto. If the billboard operator is actually ground leasing a certain number of square feet of the land, the landowner may want to make the billboard operator responsible for its pro rata share of ad valorem taxes attributable to that section of land.

Insurance, Indemnity and Exculpation.

In reviewing both older and more recent leases, I could see that landowners are becoming more aware of the importance of including insurance, indemnity and exculpation provisions. Most billboard leases specify the minimum amounts of property and general liability insurance which must be maintained in connection with these signs, and contain broadly worded indemnity and exculpation provisions in favor of the landowner. These provisions really should be drafted the same way that they are drafted in all commercial real estate leases. The lease should require that the billboard operator provide the landowner with certificates

evidencing the required insurance. The billboard operator will want to make sure that this paragraph be revised, if necessary, to make the landowner liable for its own negligence or willful misconduct.

Assignment.

The assignment provision should be carefully negotiated just as it is in other commercial leases. Some of the billboard leases I reviewed were nonassignable by the billboard operator. As I have stated so often throughout this paper, the scarcity of these permits makes the right to assign a very valuable right for the billboard operator. Therefore, the billboard operator should attempt to negotiate a right to assign.

There should be a provision in the lease which states that, if the landowner sells the property, the landowner must give a copy of the billboard lease to the new owner, and the new owner must assume the obligations of the landowner thereunder. Again, this provision is very much subject to negotiation. Many billboard leases provide that the landowner has the right to terminate the billboard lease upon the sale of the property.

Representations and Warranties of the Landowner.

A billboard lease should contain a representation on the part of the landowner that it is the owner of the property and has the authority to enter into the billboard lease. The lease should also contain a covenant on the part of the landowner that the landowner will not obstruct the visibility of the sign and will grant no other easements or rights which would conflict with the visibility and utility of the sign. I have seen a case where the billboard operator was able to obtain a recorded "visibility restriction" from the landowner which limited development on the adjoining land so that nothing could be placed on such land which conflicted with the visibility of the billboard sign. As was stated earlier, some billboard operators also require a covenant

on the part of the landowner not to permit any signs of competing advertisers, even if those signs are the signs of on-site businesses.

Access.

It is very important that the billboard operator obtain a provision in the lease allowing the right of access to maintain and operate the sign and the utilities which connect with the sign. The landowner will want to limit this right of access by stating that the billboard operator will not exercise this right in a way which would materially interfere with the landowner's use of the property.

Condemnation.

In speaking with appraisers about the issue of condemnation of land which is being used for billboard signs, one of the issues which comes into play is whether the billboard is personalty or real estate. Apparently, the appraisal institute has made the determination that billboard sign leasehold interests are real estate. The appraisers who evaluate these signs in connection with condemnations have run into the issue of the huge discrepancy between the value of a billboard based upon a replacement cost analysis and the value of a billboard based upon an income analysis. In a Texas condemnation case a few years ago, a jury awarded \$350,000 for a billboard location which was condemned. Since billboard sign locations have become so valuable and so difficult to replace, billboard operators are well advised to obtain a provision in the lease which permits the billboard operator either to relocate the billboard to the adjacent land in the event of a condemnation, or to be compensated separately by the condemning authority for the leasehold interest created by the billboard lease.

Ownership and Removal of the Billboard.

Billboard leases typically provide that the billboard operator is at all times the owner of the billboard, and will have the right to remove the billboard upon the termination of the lease. The property owner will

want to provide that the billboard operator will restore the property upon removal of the billboard, and that the removal will take place within a certain number of days of the expiration or earlier termination of the lease.

Conclusion.

The lease agreement which is attached to this paper is a combination of provisions which I found in the different lease agreements which I reviewed. However, as with any kind of commercial lease, close attention must be paid to the specific circumstances of the parties, and provisions should be negotiated to further the interests of the specific parties involved. In speaking with several people who are in the billboard business, it became clear to me that there is a great deal of consolidation going on in this industry. As with many other industries, large national companies are gobbling up smaller local companies, and many of the national companies are publicly traded. So far, it does not appear that any of these large national companies are using more voluminous leases. As we all know, the reason that other leases have become so long and detailed is because various disputes through the years have prompted new clauses in the leases. So, maybe the fact that this industry is still using short, simple leases indicates that this is a fairly "friendly" business, and there have not been too many messy disputes. I hope that is the case and that it continues in the future. The industry does have a national association located in Washington, D.C., which is called the Outdoor Advertising Association of America. I contacted that association in connection with this paper and was told that its concern is in monitoring and providing information in connection with regulation of location and content of billboards. The association does not get involved in issues connected with billboard leases.

In conclusion, I think that, in spite of the fact that some citizens and municipalities consider billboards to be a blight on the landscape, billboards will still be around for a long time to come, and I hope that perhaps this paper will assist those involved in the industry in addressing the issues involved in a billboard lease.

APPENDIX A

Bill Board operate friendly

LEASE AGREEMENT

STATE OF _____ §

COUNTY OF _____ §

THIS LEASE AGREEMENT is entered into this _____ day of _____, _____, by and between _____ ("Lessor") and _____ ("Lessee").

WITNESSETH:

1. Lessor hereby leases to Lessee, and Lessee hereby leases from Lessor, the property located in the City of _____, County of _____, State of _____, described as _____ (the "Leased Property"), for the sole purpose of erecting and maintaining, constructing and reconstructing, repairing and leasing _____ (____) advertising display(s) (painted, reflectorized, printed, illuminated or otherwise), including the necessary structures, devices, illumination facilities, power poles, connections, service ladders and other appurtenances thereon (the "Signs," whether one or more).

2. The term of this lease shall commence on _____, _____, and, unless terminated earlier in the manner hereinafter set forth, shall continue for an initial term of _____ (____) years, and shall continue thereafter at the option of the Lessee, for a second term of _____ (____) years, and thereafter from year to year, on the same terms, until terminated as of any subsequent anniversary of the commencement date by written notice of termination given not less than sixty (60) days prior to such anniversary date by either the Lessor or the Lessee.

3. Upon the expiration of the term or earlier termination hereof, Lessee shall, at Lessee's sole cost and expense, forthwith remove the Signs and all appurtenances thereto, and restore the property of Lessor to substantially the same condition that existed prior to installation of said Signs. In the event that Lessee shall not have removed said Signs within fifteen (15) days after the termination hereof, Lessor may, at its option, either retain said Signs as the property of Lessor or remove same, and Lessee shall reimburse Lessor on demand for all costs and expenses of such removal.

4. In consideration of the mutual covenants herein contained, and other good and valuable consideration, Lessee shall pay Lessor the following sums:

(a) \$ _____ per month, payable on the first day of each month during the term hereof, commencing on the commencement date set forth above and continuing monthly thereafter; provided that the rent due during the last month of the term hereof shall be prorated to the date of termination, if such date is other than the last day of the month; and

(b) _____ percent (___%) of the gross income of any kind generated by the use of the Leased Property (including, without limitation, income from advertising or from allowing the use of the sign structure for the housing of unrelated types of telecommunications and other kinds of equipment), less agency fees. Such sum shall be payable annually within fifteen (15) days of each anniversary of the date hereof. Within fifteen (15) days of each anniversary date, Lessee shall furnish Lessor a statement certified by Lessee or Lessee's accountant as to the gross income received, whether or not any payment is due hereunder. Lessee agrees to submit to Lessor, upon request, copies of contracts for any advertising display to be carried on the sign structure or other use of the sign structure during the term of this Lease. The rent paid pursuant to Paragraph 4(a) hereof shall be a credit against the percentage rental payable hereunder.

5. Lessor shall have the right to terminate this Lease if at any time Lessor (i) decides to improve any portion of its property and determines that, in Lessor's sole judgment, improvement shall require removal of said Signs or said Signs shall be incompatible with the improvement of Lessor's property, (ii) the property upon which the Signs are located is sold, or (iii) the Signs are vacant for more than ninety (90) consecutive days. Lessor shall give Lessee sixty (60) days' prior written notice of Lessor's termination, and during such period, Lessee shall remove said Signs in accordance with Paragraph 3 hereof. All sums owed Lessor hereunder shall be paid to the date of termination.

6. Lessee shall, at Lessee's sole cost and expense cause such Signs to comply with all governmental laws, rules, and regulations, and shall maintain such Signs and their immediate surroundings in a neat, clean, and attractive appearance, and shall not allow such Signs to fall into disrepair.

7. Lessee shall pay all electricity and utility costs in connection with said Signs prior to same becoming delinquent, including all costs of installation. In the event Lessor requests the same in writing, Lessee shall relocate, at its sole cost and expense, its utility lines in order for Lessor to utilize or improve the remainder of the property.

8. If at any time (i) the visibility of the Signs to the traveling public is obstructed or obscured, (ii) the advertising value of the Signs is impaired or diminished by causes beyond Lessee's control, (iii) federal, state or local statute, ordinance, regulation or other governmental action shall preclude or materially limit the use of the Leased Property for advertising purposes, (iv) Lessee is unable to secure or maintain a required permit or license from any appropriate governmental authority, (v) Lessee is unable, for any period of ninety (90) consecutive days or more, to secure and maintain a suitable advertising contract for the Signs, or (vi) there occurs a diversion of traffic from, or a change in the direction of traffic on highways or thoroughfares leading past Lessee's Signs which materially impairs the use of the Leased Property for advertising purposes, Lessee may, at its option, terminate this Lease by giving Lessor fifteen (15) days' written notice, and Lessor agrees to refund to Lessee the rent previously paid for the unexpired portion of this Lease. If the conditions described in sections (i), (iii), (iv) or (v) of this paragraph shall at any time temporarily exist, Lessee may, at its option, instead of terminating this Lease, be entitled to an abatement of rent payable hereunder during the period such conditions or any of them exist, and to the refund of any rent paid in advance for the period of such abatement; provided, however, that such abatement is conditioned upon Lessee providing Lessor with evidence that Lessee obtained no income from the Signs during such period. If Lessee is prevented by law, government or military order, or other causes beyond Lessee's control

from illuminating its Signs, Lessee may reduce the fixed rental provided herein by _____ percent (____%), with such reduced rental to remain in effect so long as such condition continues to exist.

9. Lessor covenants and warrants that Lessee shall have reasonable means of access over, across and under the Leased Property, and any adjoining or appurtenant property owned or controlled by Lessor, to erect, illuminate, maintain, service, remove and reposition its displays; provided, however, Lessee may not exercise such right in a way which would materially interfere with Lessor's use of such adjoining or appurtenant property.

10. In the event that all or any part of the Leased Property is the subject of an eminent domain proceeding, Lessee shall, at its election and in its sole discretion, be entitled to: (i) contest the acquisition or defend against the taking of Lessee's interest in the Leased Property; (ii) relocate the Signs and appurtenances onto any portion of the Leased Property not acquired or to be acquired; and/or (iii) seek an award from such condemning authority for the value of its leasehold interest so long as such award is separate from, and does not affect, any award which Lessor would receive from any condemning authority.

11. Lessee agrees not to contract for any advertising display on the Signs for _____
or for any firm or product that is distasteful, offensive, or in direct competition to any tenant or store in _____
located at _____
at any time during the term of this Lease. Lessor shall have the right to approve any and all advertising or other use of the Signs, said approval not to be unreasonably withheld or delayed.

12. Lessee agrees to defend, indemnify and hold Lessor harmless from and against any and all actions, costs, claims, losses, expenses or damages made against or suffered by Lessor attributable to or arising out of the installation, operation, maintenance or removal of the Signs, and Lessee's agreement to hold Lessor harmless shall include Lessee's obligation to pay all attorneys' fees and costs in connection with any trial, claim, demand or cause of action. Lessee agrees to procure and keep in effect during the term of this Lease public liability and property damage insurance satisfactory to Lessor for the benefit of Lessor and naming Lessor as an additional insured, in the amount of \$1,000,000.00 for injury to one (1) person from any one (1) casualty; \$1,000,000.00 for injuries to more than one (1) person resulting from any one (1) casualty; and \$500,000.00 for property damage resulting from any one (1) occurrence. Lessor shall have no responsibility to Lessee or any third party for the security, installation, maintenance, or removal of the Signs or their contents except in the event of Lessor's willful, reckless, or grossly negligent conduct. Lessee shall provide to Lessor a certificate of insurance on the date hereof and at least fifteen (15) days prior to the expiration date of each policy.

13. This Lease is not assignable by Lessee without the prior written consent of Lessor.

14. In the event Lessee defaults in the performance of any of its obligations under this Agreement and fails to cure such default within ten (10) days after notice of default has been delivered to Lessee by Lessor, Lessor shall have the right to terminate this Agreement and/or pursue any other rights or remedies that Lessor may have against Lessee.

15. All structures, displays and materials placed upon the Leased Property are Lessee's trade fixtures and equipment, and shall be and remain the Lessee's property, subject to the provisions of Paragraph 3 hereof. Lessee shall be responsible for the payment of all taxes on account of such Signs and improvements.

16. Any notice, consent, or approval that Lessor or Lessee may desire or be required to give to the other shall be in writing and shall be mailed or delivered to the intended recipient thereof at its address set forth below or at such other address as such intended recipient may, from time to time, by notice in writing, designate to the sender pursuant hereto. Any such notice, consent, or approval shall be deemed effective (a) if given by nationally recognized overnight courier for next day delivery, one (1) business day after delivery to such courier, or (b) if given by United States mail (registered or certified), two (2) business days after such communication is deposited in the mails or (c) if given in person, when written acknowledgment of receipt thereof is given. Except as otherwise specifically required herein, notice of the exercise of any right or option granted to Lessor by this Agreement is not required to be given.

If to Lessor:

If to Lessee:

17. Lessor represents and warrants that it is the owner of the Leased Property and has the authority to enter into this Lease Agreement. Lessor covenants and warrants that, if Lessee pays the rental as herein provided, and keeps and performs the other covenants provided herein, Lessee shall and may peaceably and quietly have, hold, and enjoy the use of the Leased Property for the term of this Lease. In the event of any change of ownership of the Leased Property, and Lessor's failure to elect to cancel this Lease in accordance with Paragraph 5, Lessor shall assign this Lease to the new owner. Lessor agrees to notify Lessee of any change of ownership of the Leased Property. This Lease Agreement shall not be placed of record by either party.

18. Lessor agrees not to erect or permit any other party to erect any advertising displays or other advertising which promotes off-premise commodities or services on any property owned or controlled by Lessor within a radius of _____ () feet of Lessee's displays, nor to permit any obstruction on Lessor's property which partially or completely obscures the normal highway view of said Signs, and Lessee is hereby authorized to remove any such other advertising display or obstruction at its option, such right to include, without limitation, trimming, cutting or removal of brush, trees, shrubs or any vegetation.

19. Neither Lessor nor Lessee shall be bound by any agreement, representation or warranty, expressed or implied, not contained herein. This Lease shall inure to the benefit of and be binding upon the

parties hereto and their respective heirs, personal representatives, successors and assigns (except as expressly limited herein). Time is of the essence of this Lease.

LESSOR:

By: _____

LESSEE:

By: _____