

BILLBOARD LEASES

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Marcy C. Helfand
Marcy C. Helfand, P.C.
Dallas, Texas

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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.

