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INSIDE THIS ISSUE

Proposed S.F. Law Would Require Solar Panels on Rooftops

The San Francisco Board of Supervisors is considering a proposal that would require all new residential and commercial buildings in the city to have solar panels or gardens on their roofs. And owners of existing buildings would be offered increased incentives to install solar panels on their rooftops where feasible.

The proposal, called Solar Vision 2020, aims to double the amount of solar electricity generated in San Francisco, to 50 megawatts, by 2020. Backers of the proposal point out that it would not only reduce emissions and improve energy efficiency in the city, but it would also create more jobs in a growing industry.

Developers, however, argue that the requirements would greatly increase the upfront costs of new construction—at a time when the city is experiencing an affordability crisis. ♦

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FEATURE

Make Sure Rooftop Cell Tower Contract Is Airtight

By Andrea Brescia

Cell transmittal towers are popping up all over the country to serve the 91 percent of American adults who now own mobile phones. If your community is in a location where customers have reported a lot of dropped calls, a cell carrier could be interested in leasing the rooftop of your condominium or other community building. Service providers that are eager to place towers in strategically needed, high-traffic areas can be a good source of income for associations with available rooftops.

But what do you need to know before giving the go-ahead for a cell phone tower to be installed on association property? Who assumes the liability of the structure? Will homeowners have fears about living near a transmission hub? How much income can you expect to make each month?

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RISK MANAGEMENT

Set Guidelines for Solar Energy Installation

By Andrea Brescia

From cities to suburbia, solar panel installations are dotting the rooftops of houses and apartments, school parking lots, fields, and even street lamps. Solar is steadily becoming a growing alternative for homeowners and businesses to reduce utility costs, use cleaner energy, and, in some cases, make a few bucks by selling the surplus back to the energy grid. Most states now have provisions that protect an owner's access to the sun. So what do you need to know when your members want to install solar panels in your community? How can you help make solar installation an easy win for both your members and the association?

With more and more states passing solar rights and easements legislation and solar panel installations in HOAs on the upswing, here are a few tips to help you set solar guidelines and help your members harness the sun.

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Cell Tower Contract (continued from p. 1)

Here are some tips to help you negotiate a fair deal, generate income, and protect your association while ensuring that a cell tower installation gets a welcome reception in your community.

Location, Location, Location

Cell phone providers usually approach an association with an offer to lease space for their transmission tower, rather than the other way around. According to Steve Karzella, president and CEO of Air-Wave Management in Lewiston, Idaho, cell carriers scour an area where service is needed, such as an area where gaps in service have been reported. Today, because of the rapid growth associated with smartphones, there is a huge demand for additional data capacity and coverage. If a cell provider approaches your association, this could be a steady income stream for years to come.

Check Governing Docs, State Law

Before you do anything, check your governing documents including any architectural provisions. Is the board authorized to lease common space? Will you need to bring this to a vote?

Look for language like this in your governing documents regarding leasing common areas, says Florida attorney J. Robert Caves, III: "The board has the authority to make material alterations to the common elements up to [a specified dollar amount per year]." Your governing documents may also state exceptions, such as a cell tower provision.

If your governing documents don't specify the board's authority, check your state laws to determine the authority of the board to make changes to the common elements. In Hawaii, for example, the big issue used to be that the HOA had to get owner approval for a rooftop cell tower installation, says Hawaii attorney Richard

➤ *Checklist of Considerations When Negotiating Cell Tower Contract*

- ❑ Make sure you're comfortable with the length of time the contract covers.
- ❑ Include a provision that requires the cell provider to indemnify the association in the event the tower or property is damaged by a storm, earthquake, etc.
- ❑ Use only a reputable installer that indemnifies your association.
- ❑ Work with the roof company to make sure that your roof warranty isn't invalidated by the installation of the tower and equipment.
- ❑ Include language in the contract that gives you at least a six-month notice of termination from the cell provider should it decide to cancel the contract.
- ❑ Make sure that the contract has some manner to resolve disputes and address concerns during the life of the contract.

Ekimoto. The statute has since been amended to allow boards to lease out unused common space, he says.

Ask Carrier for Site Plan

For most condominium associations, the roof will be the likely and practical location, as well as the choice of the service provider. Antennas must be high enough, with clear sight lines, so that they can transmit signals over a wide area.

Before you even get into negotiations or sign a term sheet or letter of intent, it's important to see exactly what the carrier is proposing on your property. Ask to see site plans and drawings of what the installation will look like on your rooftop.

If the carrier balks, remember one thing: Cell providers typically approach HOAs as a last option, perceiving that it might be a challenge or take considerable time to get board and/or member approval. Yet according to Karzella, if the carrier has identified a service gap in your geographic location and it's contacted you, it has probably exhausted other avenues. He advises using this as a leverage point, to see exactly what you are getting, and to avoid signing a standard cell tower contract.

"Any association that is presented with an offer should review the contract with their attorney," says Caves. "The contracts are drafted by the cell provider's attorney for the benefit of the cell provider."

How to Negotiate a Fair Deal

Like any contract, a cell tower lease agreement should be mutually beneficial. The biggest areas to consider are the term of the contract (how long will this tower be on your rooftop?), the rate (what income can you expect to generate?), and the liability (who is responsible for insuring the association's property and the antenna?).

Signal your terms. Typically, a contract will have a term of five years, with multiple options for additional five-year terms, with the possibility that the relationship will last around 25 years. Since the provider is making a capital investment in the purchase and installation of the equipment, it's in the provider's interest to sign long-term contracts. However, if market conditions change, a provision to cancel your agreement could suddenly leave your association without the income you had come to expect.

According to Ekimoto, a current trend is for cell phone companies to add provisions that allow them to cancel the contract at any time if it no longer fits their needs—while the association is locked in for the term. While this is standard language in most cell provider contracts, knowing that your contract may be terminated earlier than you expected will help you prepare. Karzella says you can protect your association from sudden surprise by insisting that you get prior notification before termination. Typically, you can negotiate at least a six-month termination notice, and this should be built into any contract you sign.

Know your market to estimate the value of your location. When it comes to income generated, cell tower lease agreements vary greatly by market. It's all about supply and demand. Knowing your market might factor into the value of your location and help you negotiate a competitive price.

Carriers pay a flat leasing fee to the association, although the carrier generates revenue for every transaction that bounces off the tower. A tower in a high-traffic area will generate a lot of revenue for the carrier, and its leasing value will increase. For example, a comparison of the lease income on several different cell towers ranged from $1,000-$3,000 per month in the same metropolitan market. While it's difficult to estimate the cellular traffic—service providers keep this information very close to the vest—hiring an independent wireless consultant might be something to consider prior to signing the contract or renewing for another long term.

The association can make additional money if it allows the cell provider to sublet the site—and requires the provider to share its sublet profits. Standard rooftop lease agreements usually state that the cell provider "shall not assign or sublet this Lease or the Premises without the Landlord's written consent, which may not be unreasonably withheld, delayed, or conditioned." Many cell providers will try to co-locate with other cell providers at one site and reap huge profits that your association won't participate in—unless the agreement requires the providers to pay you a portion of those profits.

Inserting a profit-sharing formula into this provision could be an answer to this problem, but there are other issues to think of as well: Will the new subtenant install equipment that will inter-

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Cell Tower Contract

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fere with members' service, damage the building, be an eyesore, or block site lines? These are some of the matters to consider when negotiating a provider's standard assignment and sublet provision.

Protect your property. One of the biggest concerns is protecting your roof. You'll want to ensure that a qualified company that assumes all responsibility and liability for the installation and indemnifies the association installs the tower antenna and equipment.

Another thing to consider: the roof warranty. Does installing equipment on the roof invalidate your warranty? What happens when general maintenance is needed on the roof? Most associations are able to work with the roofing company to make sure that the warranty isn't invalidated by the installation, tower, and equipment by providing access to inspect the work, meet the installer, etc.

In addition, eventually your roof will need maintenance. Make sure you include a provision for routine roof maintenance in the contract. Cell providers might either install their equipment on platforms that can be maneuvered around or install temporary antennas during maintenance. In either case, the provider will want to ensure that service isn't interrupted to its customer base.

Look for any provision in the contract that requires the association to indemnify the cell provider in the event of damage and strike this out. You'll want to be fully indemnified by the provider if something unexpected were to damage the cell tower or property, like a hurricane.

Also address security concerns. Standard rooftop leases agreements give the cell provider 24/7 access to its equipment. Although the provider may have a legitimate interest in having round-the-clock access to its equipment, there are valid security reasons why you would want to control such access.

Require the cell provider to give you 24 hours' advance notice of its need to access the roof. In emergencies, the provider should call the association manager to give notice of its intent to enter the community. A representative of the association should have the right in all cases to accompany the provider during any such access.

Furthermore, if access to the site is requested outside normal business hours, the provider should agree to reimburse the association for the additional cost of employee salaries, including any overtime pay, that the association pays to any employee who supervises the provider's access to the site.

PRACTICAL POINTER: Ask your association's attorney to add contract language that contains some manner to resolve potential disputes—such as arbitration or mediation. Most providers are willing to consider associations' concerns about dispute resolution, says Caves.

Listen to Members' Concerns

Regardless of the financial incentives, homeowners sometimes have initial concerns or even fears over the installation of a cell tower close to their homes. A common worry is that the cell tower will have negative effects on health.

According to the American Cancer Society, there is little evidence to suggest that living or working near a cell phone tower increases the risk of cancer or other illness. The level of radio-frequency (RF) waves is relatively low—and in urban areas often mirrors the levels of RF produced by radio and television broadcast stations.

"In Florida, an owner's complaint (over possible negative side effects)—absent of compelling evidence that he's experiencing some injury (health or financial)—would not inhibit the installation," says Cave. "I'm not aware of anyone using that argument to successfully remove or bar the installation of an antenna." ♦

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RECENT COURT RULINGS

➤ Association, Manager May Have Violated FHA by Denying Lease Extension

Facts: Since Feb. 1, 2008, the owners of a townhouse, with the approval of the condominium association, rented their unit to a couple with one child. The association had a rule that "[n]o townhouse shall at any time be permanently occupied by more than four (4) persons." In August 2013, the couple gave birth to twins. In November 2013, the couple asked the owners for a 12-month lease extension. The association rejected the request. The association's manager, an employee of the management company, drafted the letters denying the request, explaining that the couple's family of five now exceeded the condominium's occupancy rule.

Claiming the rejection was based on their familial status in violation of the Fair Housing Act (FHA), the couple sued the association, its officers, the manager, the management company, and the parent corporation of the management company.

The parent corporation, the management company, and the manager asked the court to dismiss the case against them, arguing that it was possible for the court, just by reading the complaint, to see that the couple's allegations were too insubstantial to keep them in the lawsuit.

Decision: The federal district court in Florida granted the parent corporation's request but kept the remaining defendants in the case.

Reasoning: The general rule is that a court will dismiss a defendant from a lawsuit if it finds that the complaint (the written document that kicks off a lawsuit) is fundamentally inadequate. The underlying question for the judge was, did the couple present enough facts to reasonably suggest that each defendant may ultimately be found liable?

The parent corporation argued that its status as parent of the management company was an insufficient basis to impose liability. It argued that under corporate law, a parent cannot be held liable for the acts of its subsidiary absent a showing, which the couple's complaint lacked, that the two companies acted interchangeably or had an "alter ego" relationship.

The couple argued that the parent's actions in incorporating the management company, running it as a division, and sharing officers with it were enough to suggest that the two companies were operating as one.

The court agreed with the parent corporation, finding that the facts that the couple presented, if true, were too general and insufficient to establish that the two entities were alter egos that should be treated as one for the purposes of liability. The court held that the couple's complaint failed to include more significant ties as to financing, operations, and corporate formalities to keep the parent corporation in the case.

The manager argued that the extent of her involvement was that she merely conveyed the association's decision. She maintained she was not involved in the decision-making process and could not be found liable for violating the FHA solely on the basis of the letters she drafted that communicated the association's decision.

The couple alleged that by drafting the letters, the manager could be held liable as an agent who personally committed or contributed to the FHA violation that makes it "unlawful to cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on…familial status."

The court denied the manager's request to be dismissed from the case, determining that the couple's allegations provided an adequate factual basis that reasonably suggested liability. Specifically, the court said that though ultimately it was possible that the couple may fail to prove the manager's liability, for now, the act of drafting two letters that communicated the association's denial of the lease extension because the couple's family size of five exceeded the condominium's four-person occupancy limits was enough to support the couple's complaint that the manager acted as an agent who contributed to an FHA violation.

The court denied the management company's request to be dismissed from the case, determining that it could be "vicariously" liable if the manager is found liable. Since the couple adequately stated a claim against the manager, the claim against the management company was also viable. ♦

- Beck v. Royale Harbour of North Palm Beach Condo. Assoc., Inc., September 2014

Risk Management

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Four Steps for Setting Solar Guidelines

When members ask about installing solar panels on their property, or if the board considers installing panels on common elements, take the following steps:

Step #1: Check your state and local laws. Ask your association's attorney to check your state and local laws to see if there are provisions that govern solar installation. Most states have legislation in place that says a community association cannot prohibit an owner from installing a solar collection device on her property. Regardless of the language in your governing documents, states' solar rights give an owner the authority to install solar systems on a residential property that is otherwise subject to private restrictions, such as a homeowners association governed by CCRs.

In addition, many states also have solar easement provisions in place, which give rights to an owner to access direct sun for the purpose of collecting sunlight into a solar energy system. If your declaration contains language that prohibits solar installation on a unit or owner property and is in direct conflict with the laws in your state, address this language the next time your declaration is modified. The same goes for your policies, rules, and regulations: Review them for any language that bars installation of solar energy collection devices and make sure the language conforms with state law.

Step #2: Review your architectural guidelines. Depending on your state law, you may be able to have some control over the location of the installation. Check your architectural guidelines to see if they contain language that is not in line with your state legislation regarding solar installation and amend the language if needed. Usually, a community association may impose reasonable restrictions on the size, design, location, and pitch of the panels, but its architectural guidelines may not: (1) increase the cost of the solar panels to the owner; or (2) decrease the performance of the collection device. Courts have ruled against associations that have tried to enforce architectural guidelines that attempted to do either.

Example: In a 2003 Arizona case that dragged on for five years, two homeowners installed solar panels on their properties to reduce energy costs and heat their pools so they could exercise in the winter, despite their association's restriction on solar panel installations. The homeowners had installed the panels on their roofs, while the architectural review guidelines required that they be installed on a patio or behind a screen.

The association asked a court for an injunction that would force the homeowners to remove the panels because they didn't conform to the architectural review guidelines. The homeowners argued that conforming to the guidelines would compromise the effectiveness of the panels and be prohibitively expensive. The court denied the association's request and ruled for the homeowners. The association appealed.

The Arizona Court of Appeals upheld the lower court's ruling in favor of the homeowners. The court said that the association's restriction on solar panels "effectively prohibited the installation and use of SED's (solar energy devices)," in violation of a state law that had been passed in 1979, ARS-33-439, to protect individual homeowners' private property rights to use solar energy [Garden Lakes Community Assn. v. Madigan/Speak, February 2003].

"In Florida, the rule is that the HOA can regulate where the solar device is placed on the roof as long as the regulation does not interfere with the performance," says Florida attorney J. Robert Caves, III. "We prefer that it's placed on the back of the house, but if the panels have to be on the front to get the exposure, that's okay."

In a condominium association, solar installation is a little trickier. Condo associations with hi-rise buildings are rarely in a situation where installing solar panels on the roof will power the whole building. Generally speaking, the collection panels won't generate enough electricity for everyone.

According to Hawaii attorney Richard Ekimoto, installations on these types of properties tend be used to power the common areas. In cases where a condo association has the rooftop capacity to allow an individual owner to install panels on the roof, it's important to add a provision that states the owner agrees to remove the solar unit when the common area needs to be repaired or changed, such as if the roof needs to be replaced. Once the work is complete, the owner can put the installation back.

Step #3: Protect property during installation. If you're managing a condo association with a rooftop installation, use a licensed, experienced installer who will insure your association against damage during installation. Inves-

tigate how any type of installation is going to affect the water tightness of the roof. A credible contractor should be able to assist you with any issues, including accidental punctures during installation. Also, ask your installer about any maintenance issues. Panels sometimes need to be washed down when they become dirty so that they operate at maximum efficiency.

Step #4: Work with roof company to maintain warranty. The last thing you want is to install a solar energy system to reduce expenses only to have your roof warranty voided by the installation. Work with the solar installer and your roofing contractor to determine how the installation can be made to retain the roof warranty and still achieve the proper installation. While residents in planned communities are responsible for their own rooftops, sharing this information with them will help protect their investment and achieve results in line with your architectural design guidelines.

PRACTICAL POINTER: Encourage members to contact the local utility provider to see if there are rebates or other incentives for installing solar devices. ♦

Insider Sources

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➤ *States with Solar Rights or Easement Provisions*

According to the Community Associations Institute, 40 states currently have solar rights or solar easement provisions in place.

States with Solar Rights Provisions

The following 25 states have solar rights provisions that give homeowners the right to install a solar collection device on their property and do not allow this right to be denied by an association covenant or other restriction:

- Arizona
- California
- Colorado
- Delaware
- Florida
- Hawaii
- Illinois
- Indiana
- Iowa
- Louisiana
- Maine
- Maryland
- Massachusetts
- Nevada
- New Jersey
- New Mexico
- North Carolina
- Oregon
- Texas
- Utah
- Vermont
- Virginia
- Washington
- West Virginia
- Wisconsin

States with Solar Easements

In the following 15 states, there are solar easements in place, which ensure adequate access to the sun for solar energy systems:

- Arkansas
- Georgia
- Idaho
- Kansas
- Kentucky
- Minnesota
- Missouri
- Montana
- Nebraska
- New Hampshire
- New York
- North Dakota
- Ohio
- Rhode Island
- Tennessee

For example, New Hampshire defines a solar easement as follows:

477:49 Definitions. — As used in this subdivision:

I. "Solar energy" means radiant energy, whether direct, diffuse, or reflected, received from the sun at wavelengths suitable for conversion into thermal, chemical, or electrical energy.

II. "Solar energy collector" means part or all of a device or structure used to transform solar energy into thermal, chemical, or electrical energy and any space or structural components of a building specifically designed to retain heat derived from solar energy.

III. "Solar skyspace" means the space between a solar energy collector and the sun which must remain unobstructed in order to permit sufficient solar energy to the collector for thermally efficient operation.

IV. "Solar skyspace easement" means a limitation, whether or not stated in the form of a restrictive easement, covenant, or condition, in any deed or other instrument executed by or on behalf of the landowner described in the deed or instrument creating and preserving a right to unobstructed access to solar energy; provided, however, the easement shall be exempt from the frontage and area requirements of local zoning ordinances.

States with NO Solar Rights Provisions

The following 10 states *do not* have solar rights provisions and *do not* specifically address these issues in regard to associations:

- Alabama
- Arkansas
- Connecticut
- Michigan
- Mississippi
- Oklahoma
- Pennsylvania
- South Carolina
- South Dakota
- Wyoming