

Navigating Ancillary Agreements at the Shopping Centre

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Introduction

In the world of shopping centres, some transactions, projects, and initiatives garner significant attention. Examples include acquisitions/dispositions, major or anchor leases, redevelopments and more. These undertakings often have a high dollar value associated with them and/or obvious significant impacts on the shopping centre, its operation, future and prestige. Accordingly, they tend to attract involvement from senior directors and managers, and scrutiny from senior financial personnel. Somewhere down the shopping centre food chain live the so-called “ancillary agreements”. They comprise a hodgepodge of contracts of lesser dollar value and impact on the shopping centre. They are often tied to operational issues and/or deals with small footprints or short terms. Examples include telecommunications licenses, electric vehicle charging station agreements, solar panel agreements, digital signage agreements, short term “pop-up” licenses, and more. Since the financial impact of these deals is not large and they do not have an obvious impact on the trajectory of the shopping centre as an investment, their importance is regularly marginalized. This is unfortunate, as ancillary agreements often present unique opportunities to unlock value at the shopping centre and/or address important operational needs. When done right, these ancillary agreements create win-win outcomes that enhance the shopping centre for landlords, tenant, and patrons.

Telecom Agreements

There are four main types of telecommunications agreements that may be entered into at a shopping centre in Canada. They are: (a) an access license (also known as a “point of presence” or “POP” agreement); (b) a rooftop antenna license; (c) a cell tower lease; and (d) a distributed antenna license (also known as a “DAS agreement”).

The POP agreement is one whereby an internet service provider is granted a license to install its equipment in an equipment room at the shopping centre, and run cables through corridors between walls and floors/ceilings, in order to provide occupants of the shopping centre with wired internet

¹ The section relating to licenses vs leases in Quebec was written by Katy Craner, Senior Legal Counsel at FLO.

access in their units. Since almost all point-of-sale systems utilize internet connectivity, reliable in-suite internet service is a must. While the market will often permit the landlord to collect a nominal annual fee from the internet service provider (often in an amount comparable to storage rates for the standing area needed to utilize and service the panel installed in the equipment room) and recover costs, such as may be incurred for third party plan review and security escorts (plus the landlord's typical administration fee), POP agreements are not considered to be revenue generating for the shopping centre.

On the other hand, rooftop antenna licenses and cell tower leases are opportunities for the landlord to generate revenue by permitting telecom companies to install their equipment on the shopping centre lands or buildings, for the purpose of serving the telecom company's general cellular networks (rather than occupants of the property, as in the case of the POP agreement). Since many shopping centres are not more than a few storeys tall, their rooftops are not generally attractive sites for cellular antenna installation. However, underused parking fields and/or landscaped areas may be prime locations for cell tower installation. While rooftop antenna agreements are generally set up as licenses, cell tower deals are typically land leases. The incoming 5G cellular service will require many more receiver and transmission touchpoints to maintain signal integrity. One can expect an increase in requests by telecom companies to install small antennae on and around their properties as 5G is rolled out.

The DAS agreement is one whereby the telecom company installs many small antennae throughout a building to boost the cellular reception within the building. By installing a distributed antenna system, customers, tenants and the landlord's operational staff benefit from reliable cellular connectivity throughout the shopping centre.

EV Charging Stations

With the explosion in the electric vehicle industry over the last decade, EV companies are expanding their efforts to enhance the availability of charging stations. Shopping centre owners are often approached with proposals regarding installation of EV charging stations at their centres. Given the many players in the EV charging station industry and its relatively recent birth, there is considerable variability in the structure of these agreements. For example, sometimes these agreements take the form of a license. Other times, they are a lease. The EV company would likely prefer that the agreement be structured as a lease, since as a tenant, the EV company would be entitled to all the common law and statutory protections afforded to commercial tenants, such as relief from forfeiture, quiet enjoyment, and overholding. Further, EV companies (much like retail tenants) may need the security of tenure provided by a lease to satisfy their lenders' requirements. Critically, EV companies may prefer a lease to preserve their ongoing operation at the site following a sale of the shopping centre. As an *in rem* right, the lease will "run with the land" and bind successor owners of the shopping centre. Contrast this to a license, which is a mere personal contract between the EV company and the owner that entered into the license. A new owner of the shopping centre is not bound by a license entered into by a previous owner, and depending on the

wording of the license, the EV company may have little by way of recourse against the prior owner where a new owner does not permit the EV company's contributed presence on the site.

Owners, on the other hand, would generally like to avoid encumbering their land with leases for what they consider to be ancillary amenities to the shopping centre. Despite these legalities, where the financial deal terms make sense to both parties, this "license vs lease" debate will not sink the transaction. In many instances, the EV company will agree to take a license, but will be careful to build into the license the critical protections it requires to preserve its investment, which may include an obligation on the owner to ensure that any purchaser of the shopping centre assumes the license for the balance of the term, or offer the EV company some form of compensation to vacate the site to accommodate a purchaser that does not wish to continue the relationship.

It is important to note that the above noted common law distinctions between leases and licenses may not apply depending on jurisdiction. Under the Civil Code of Québec, licenses and leases are not distinctly defined legal concepts. In Québec, an agreement granting an entity the right to use commercial premises is presumed to be a commercial lease. As such, parties may very well execute an agreement with all the hallmarks of a license, however if the lands are in Québec, a commercial lease is presumed to exist, and same can be registered on title to the lands irrespective of whether or not the purported licensor/landlord expressly prohibited same within the agreement in question, a right granted to commercial tenants under Article 2936 of the Civil Code of Québec.

There is no shortage of diversity in how EV charging station agreements are set up. Sometimes they are based on a gross fee (sometimes flat and sometimes escalating). Other times, they take the structure of a net deal. Revenue sharing arrangements are also common. Some EV companies operate models whereby the landlord purchases the charging stations and the EV company operates them on the landlord's behalf for a fee (often percentage based). Sometimes these purchases are financed by the EV company through revenue generated by the use of the stations. Some EV companies provide a model where the charging stations are rented to the landlord.

Whether ownership vests with the landlord or remains with the EV company impacts which party should be responsible for maintenance and repair of the charging stations, and how the costs thereof should be dealt with. It can also impact whether and to what extent removal of the stations and related installations will or ought to be required at the end of the term or in connection with a redevelopment. Given the electrical requirements of EV charging stations, supplementary electrical facilities (additional transformers and underground transmission lines, for example) are often part of the initial capital investment. The cost of this installation work is not insignificant. Tearing up the pavement to remove these installations and repaving impacted areas, also comes with a significant price tag. Costs of this nature are at the heart of the tension to be resolved if a deal is to be struck. For the landlord, the charging stations are a "nice to have" amenity, but not something which the landlord is prepared to accommodate at a significant cost or risk, and certainly not if prevents or hinders future redevelopment of the site. The modest financial benefit to a landlord by having EV charging stations available at the shopping centre does not justify hindering

the landlord's control over the centre. From the EV company's perspective, installing charging stations is not an inexpensive endeavour. In order to justify the initial capital expense, the EV company needs to secure its presence and operation at the centre, without having to relocate and/or vacate at the landlord's discretion.

Solar Panels, Digital Signage and More

Agreements relating to solar panels, digital signs, and the like all present challenges similar to those addressed above. The lease vs license issue comes up regularly, as does the need to pin-down the financial deal terms, and balance the capital installation investment against the landlord's need for flexibility. Solar panels add additional challenges in terms of addressing impacts that the panels may have on the structure of the building, as well as considerations about tying in electricity generated from the panels to building usage or the greater grid. Digital signage agreements introduce content considerations, as landlords want to avoid signage at their centres being used to promote their competitors, their tenant's competitors, or anything that would reflect unfavorably on the centre.

Getting the Deal Done

For landlords, ancillary agreements do not present large financial incentives. As a result, these agreements are often not given due attention or priority. Landlords are also hesitant to incur costs or restrict their control of the site to complete the deal. For the service provider, the installation costs can only be justified if they have satisfactory assurances that they will have the requisite operational horizon. Creative financial models help providers put forth attractive proposals in competitive and evolving industries. Unique deal structures often warrant additional landlord attention.

In order to get the deal done, landlords need to respect the investment cost for the service provider and give the deal terms and the contract form the requisite attention. Landlords ought not discount the value of these installations. For their part, service providers need to accept that they are not the core financial driver of the shopping centre and that the landlord will not prejudice its ability to attract and retain retail tenants, or pursue a redevelopment, to accommodate an amenity.

Getting across the finish line requires being creative and open minded. Given the various structures these deals take, the parties need to think outside the box. If both sides engage with an understanding of the critical needs of the other, ancillary agreements can create win-win outcomes.