

MDU Access in A Nonexclusive World, Part 2: Easements and Licenses

To take advantage of competition among service providers, MDU owners must be careful to define providers' access rights appropriately.

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Until the late 1990s, there was little to no competition among providers of multichannel video services to residents of MDU properties. Only when small satellite antenna dishes became widely available could direct-broadcast satellite providers offer viable competition to franchised cable companies in MDU markets. Before that time, MDU owners were not greatly concerned with the kind of building access they granted to cable television providers. When the local franchised cable operator was the only option available, many property owners uncritically signed form documents that granted cable companies long-term, exclusive easements into and throughout MDU properties. As monopoly providers, franchised cable operators had the market power to negotiate virtually unlimited access to MDU properties.

By the time the Federal Communications Commission (FCC) announced its rule prohibiting exclusive MDU contracts for video services in late 2007, multiple video providers, including telephone companies, satellite television distributors and FTTH providers, had begun to compete vigorously for the right to serve MDU residents. The FCC promulgated its rule banning the enforcement of both existing and future exclusive MDU access agreements for television services primarily for the purpose of freeing up MDU markets for these new competitors. In most areas of

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the country today, thanks to technological innovations and regulatory changes, two or more broadband providers are willing to bid competitively for access to attractive MDU properties.

When multiple providers and multiple video platforms actively compete for access to MDU properties, property owners must carefully consider the nature and limits of the legal access rights they grant to the provider or providers chosen on behalf of residents. They must ensure that the access rights they grant to communications providers do not foreclose the possibility of their offering residents the newest advances in broadband technologies and services. If they fail to properly analyze and assess the extent of the access rights being conveyed

in a legal document, property owners may inadvertently give away more rights than they assumed they were granting and potentially lose the benefits that competition makes possible.

Presented with a form agreement by a broadband communications provider seeking access to an apartment or condominium complex or a master-planned community, a building owner or homeowners association (generically, an MDU owner) should ask a question that is all too easily ignored: What is the nature of the access being requested, and what does that imply legally for the complex or community? The question is easily ignored both because it is confusing and because an owner's eagerness to consummate the deal may trump

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prudence – especially when the latter involves an investment in legal fees.

The discussion in this article is based on generally applicable principles of real property law; however, property law varies from state to state. Therefore, the principles should be considered with reference to applicable law in the relevant locality.

EASEMENTS VERSUS LICENSES

Typically, a form agreement prepared by a communications provider includes a grant of easement to that provider. The word “easement” has vaguely sinister connotations for many MDU owners, who find the notion of a license much easier to swallow.

Providers generally try to secure easements whenever possible because an easement is an interest in real property. By contrast, a license is generally a personal, revocable and nonassignable privilege to do acts on the land of another without possessing an estate or interest in the land. Because an easement is a property interest, it “runs with the land,” and, subject to qualifications described below, it is more difficult to extinguish than a license.

An easement is generally defined as a nonpossessory interest in land that conveys to the holder of the easement a limited use of the land that may not be terminated at will by the grantor.¹ Because an easement is a property interest, the grant of easement must generally be embodied in a written instrument.² The written document that creates an easement need not be recorded to be effective, but unless the document is recorded in the real property records of the locality where the property is located, the easement may be terminated by conveyance of the property to a purchaser who has neither actual nor constructive notice of the easement’s existence prior to receipt of title.

Although several types of easements exist, MDU owners typically grant communications providers easements in gross. Unlike other kinds of easements (for example, an easement across the land of a neighbor that benefits a landlocked tract of land), an easement in gross exists for the benefit of a person or entity rather than for the benefit of another piece of real estate. A cable company that holds

an easement in gross benefits from the right to access an apartment complex for the purpose of installing wiring infrastructure and providing cable services to residents; the benefit consists in revenue collected from apartment residents.

Unlike an easement, a license does not create a property interest. Rather, it is a personal contractual right to access and

use property for a limited time and for a limited purpose. Because it is not a property interest, a license does not require a written conveyance or agreement; it may be terminated at any time by the property owner, with several important exceptions: First, a license that is “coupled with an interest” – for example, a limited license that allows the purchaser of a car to enter

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Whether an agreement with a service provider is called an easement or a license is less important than how it is defined and what rights it conveys.

the seller's property to pick up the car – is not terminable at will. Second, a license is not terminable at will if the licensee relies on it when making significant on-site expenditures. For example, if a cable company, relying on the access license granted it by a property owner, invests significant sums in installing wiring infrastructure and other equipment on the property, the license may not be terminated at will by the property owner. Third, and most important, because a license is a right of access created by contract, the parties may agree in the contract that the license is irrevocable or terminable only for cause – for example, the license to enter the property may terminate if the cable company breaches the service agreement.

Because it is a personal right, a license is generally not transferable to another person unless the licensor agrees to allow the license to be assigned. Thus, an agreement granting a license to enter and use private property may not be assigned without specific language to that effect in the agreement. For example, if a cable company that serves an MDU property sells its on-site assets to another cable company, and the license agreement is not expressly made assignable, the license terminates when the seller ceases providing cable services at the property.

Why communications providers prefer to gain entry to private property by way of easements is clear: Because an easement is a property interest, it is, at least in theory, more difficult to extinguish than a mere license. For that reason, an easement is more valuable to a provider than a mere license.

Does the fact that providers prefer easements to licenses imply – based on the principle that anything that benefits one's negotiating partner must be detrimental to one's own position – that a rational MDU owner should refuse to grant an easement and insist on a license?

Not necessarily. Viewing all negotiation as an adversarial process and negotiating reflexively on that basis without clear goals in mind elevates form over substance in a way that may ultimately be self-defeating.

SUBSTANCE OVER FORM

The mere presence of the words “easement” or “license” (or “right of access,” “lease,” “right-of-way,” “right of entry,” and so forth) does not determine the kind of access being granted. Although the words used to describe or categorize a provider's access to property may be important, they do not themselves determine the extent and scope of the legal rights granted.

A property owner may sign a document that says the provider is “hereby granted a license” to enter the owner's apartment complex but end up conveying to the provider legal rights usually associated with an easement. For example, if an MDU owner grants a license that the parties agree “is irrevocable”; “is coupled with an interest”; or “runs with the land” and is “binding upon [the owner's] heirs, successors and assigns”; and if the grant of license is properly recorded in the local real property records, then the license may not be revoked without cause and is not extinguished when the property is conveyed to a new owner. In such a case, the license has most of the same practical consequences as an easement, and denominating it as a license does not negate those consequences.

Conversely, saying that a cable or telephone company holds an “easement” does not necessarily imply that the company possesses the legal rights generally associated with an easement. For example, a grant of easement that fails to reasonably describe the property covered by the easement or its intended purposes may be null and void. Moreover, an oth-

erwise proper but unrecorded easement is usually extinguished when the property is conveyed to a good-faith purchaser that has no actual or constructive knowledge of the easement's existence.

Likewise, if a mortgage holder acquires a property by foreclosure under a deed of trust, an easement created after the mortgage was granted is generally extinguished as a result of the foreclosure transaction.³ One more example: An easement in gross, which benefits a person or an entity rather than an adjacent tract of land, is personal in nature, like a license. Therefore, unlike other easements, an easement in gross (such as an easement granted to a cable or telephone company to access an MDU complex) is not assignable without language expressly granting the easement holder the right to assign.⁴ Suppose Cable Company A is granted an easement in gross to access Property X for the provision of cable services and the grant of easement does not include an assignment clause. If A's assets at Property X are purchased by Cable Company B, B does not hold an easement into Property X, because without language explicitly giving A the right to assign the easement, the easement does not transfer from A to B.

As these examples show, the fact that a legal document is titled “Grant of Easement” or “License Agreement” does not necessarily mean that the legal right being conveyed has the characteristics of an easement or a license, respectively. The scope of access granted to a service provider by means of a legal document cannot be derived merely from the use of words such as “easement,” “license,” “right of way,” and so on but must be determined by the language of the grant as a whole, applicable state law and the parties' respective actions taken in reliance upon the grant, such as investing in the property or recording the grant in the local real property records.

WHEN FORM MATTERS: EASEMENTS AFFECT THIRD-PARTY INTERESTS

Does this imply that property owners should not concern themselves with the question of whether an access agreement grants an easement, a license or some other form of access? Not at all. The form

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of the grant may be very important, as the following examples illustrate:

Because an easement is a property interest, granting an easement may affect third parties that also have interests in the property. For a condominium owners association to grant an easement through common areas of a condominium complex probably requires the approval of individual unit owners, who share an ownership interest in the common elements. Similarly, an apartment or condominium developer may (depending on the terms of the loan document) be required to secure a secured lender's consent prior to granting an easement because the easement will affect the lender's mortgage interest in the property.

The distinction between licenses and easements is especially important for developers of properties that will become condominiums. Many states have enacted condominium statutes that allow certain contracts entered into between developers and service providers to be voided without cause after unit owners

assume control over owners associations or boards of directors.⁵

For example, in Florida, a newly elected owner-majority board of administration has 18 months to terminate without cause any lease that was granted by the developer while it still held the board majority. Even after the 18 months has expired, a vote by 75 percent of nondeveloper voting interests can nullify service contracts without cause.⁶ Therefore, the Florida statute allows unit owners, after they have taken control over a board of administration, to void (by either a simple or a supermajority vote, depending on the form of the agreement) an earlier-formed service agreement between a condominium developer and a broadband provider.

However, another provision of the Florida condominium law states that a board of administration may not vacate an easement created in whole or in part for the use or benefit of someone other than the unit owners without the consent

of the affected third party.⁷ A Florida court stated: "Standard real estate easements recorded in the public records by the developer, referred to in the declaration and prior to any unit sales, are not cancelable by a later formed association under Section 718.302 ... which statutory provision is clearly only directed toward contracts for vending machines, management and the like ... an easement granted to anyone other than a unit owner cannot be cancelled without the consent or approval of those third parties to whom the easement was granted."⁸

It is quite possible, in Florida and elsewhere, that a condominium owners association, having voted to nullify a developer-initiated communications service agreement under the local condominium law, would remain powerless to terminate a separately granted easement. It would be forced to allow the provider to remain on the property providing services within the scope of the uses outlined in the easement document.

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Thus, although the language used in a legal document to describe the nature of a broadband provider's access to private property may be significant in some contexts (particularly for condominium owners associations), the words used to categorize the provider's access are less important than the scope and extent of the rights as described in the grant and the document as a whole. In other words, the distinction between an easement and a license is important only because these modes of property access have different practical consequences for a property owner. However, these practical consequences cannot be derived from the mere use of words such as "easement" and "license" and can be measured only by reviewing the entire document.

THE DANGERS OF UNLIMITED ACCESS

An MDU owner must pay attention to limits on a provider's permitted activities on the property and to how a license or an easement document meshes with the corresponding service agreement.

Suppose an apartment owner or a condominium association has signed a service agreement with the incumbent local telephone carrier (ILEC) that gives the service provider the right to provide video, data and voice services to residents over a seven-year term as well as exclusive marketing rights for video and data services during that period. During the sixth year of the term, the owner learns that a cable company and a satellite television distributor are interested in submitting attractive bids for video and data service and exclusive marketing rights at the property.

In reviewing the ILEC agreement, however, the owner notices some disturbing language in the separately granted easement: The grant of easement contains no termination clause but authorizes the provider to enter "throughout the property" to market and provide services as long as it maintains any equipment at the property. The owner then checks the service agreement and finds a clause that allows the provider to maintain its equipment at the property as long as it is providing any of its services.

This example, which is loosely based on an actual case, shows the unantici-

ated consequences of signing an easement document that, in combination with the service agreement, conveys to the service provider access rights that are practically unlimited. The two documents together prevent the owner from signing an agreement for exclusive marketing rights with either the cable or the satellite company and allow the ILEC to market and provide video services in perpetuity, even after the access and service agreement expires.

A provider's access to private property, whether granted by way of a license or an easement, should be limited in scope to what is reasonably necessary for the marketing and provision of services and the maintenance of essential infrastructure. Once the installation of infrastructure is completed, there is no reason for the provider to have access throughout the property. Rather, access can appropriately be limited to a space encompassing (for example) 10 feet on either side of where infrastructure is actually located – sufficient to allow operation, repair and upgrade of the system and wiring – and to specified common areas where the provider can conduct its marketing activities.

Just as the provider's access should be limited in space, so it should be restricted in time in a way that is consistent with the scope of the service agreement. If, under the service agreement, the provider's right to provide services ceases upon expiration or earlier termination of the agreement, the agreement should include a removal clause under which any equipment or infrastructure not removed from the property within a certain time frame is deemed abandoned to the property owner. In addition, the accompanying easement or license should include a termination provision, according to which the easement or license is automatically terminated upon expiration of the equipment removal period. (In order to avoid confusion, it may be a good idea to include in the agreement a requirement that the parties execute a "termination of easement or license" document that may be recorded in local property records to put the world on notice that the provider's access has been terminated.)

Two final points: First, the FCC's 2007 order on exclusive access agreements for video services means that video providers (other than direct-broadcast satellite providers, which are excluded from the prohibition, at least for now) may not enter into or enforce contractual provisions designating a single provider as the only provider of video services at an MDU property. The order does not imply that an MDU owner must allow any particular provider to access the property. A provider must still negotiate terms and conditions of access with a building owner just as before, and nothing in the FCC rule compels an owner to allow access to any provider. In other words, in banning exclusive access and service agreements, the FCC did not create a federal right of mandatory access.

The second point relates to MDU properties located in any of the 17 states that have enacted mandatory access laws.⁹ Although state mandatory access statutes vary in their coverage, they generally bar MDU owners from interfering with a cable operator's ability to provide service to MDU residents and either explicitly or implicitly give franchised operators the right to install and maintain wiring in MDU buildings, even over owners' objections. One should not assume, however, that a mandatory access law automatically gives a cable operator an all-encompassing easement to enter property or to use existing infrastructure such as inside wiring. Even in a mandatory access state, a building owner may still negotiate the terms and conditions of a cable operator's access to the property, including the use of common areas for marketing purposes, and of existing cable wiring infrastructure for the provision of services.

FEDERAL LAW

The discussion to this point relates entirely to state property law as it relates to contracts, licenses, easements, condominiums and mandatory access. No discussion of these issues would be complete, however, without at least a brief mention of two federal statutes that affect building access.

As mentioned above, the FCC's prohibition of exclusive video service agree-

ments does not create a federal right of access to MDU properties. However, section 621(a)(2) of the Communications Act (added by the 1984 Cable Act) does establish a limited right of access for cable system operators. Specifically, the law states that any cable franchise is construed to “authorize the construction of a cable system over public rights-of-way, and through easements, which are within the area to be served by the cable system and which have been dedicated for comparable uses ...”¹⁰

Most of the controversy surrounding Section 621 has focused on whether a cable operator is authorized to access private property by means of a private easement granted to a specific user or group of users. Federal courts in five circuits ruled that an easement is “dedicated for comparable uses” only when the easement was dedicated for public use, which implies that the cable franchisee may not rely on Section 621 to access private property by means of easements granted for the benefit of specific private parties rather than the general public.¹¹ This interpretation of federal law may be of particular interest to real estate developers that wish to limit a cable company’s access to a master-planned community.

Another relevant federal statute is Section 224(f)(i) of the Communications Act (added as part of the 1996 Telecommunications Act), known as the Pole Attachments Act, which states that a utility must provide a cable or telecommunications provider with non-discriminatory access to any pole, duct, conduit or right-of-way that it owns or controls. A regulation issued by the FCC in 2000 extended the scope of access rights granted under this provision to encompass cables running through the risers and ceilings of buildings and to satellite dishes on rooftops.

Specifically, the FCC ruled that cable, telecommunications and high-speed data providers have a right under Section 224 to access on a nondiscriminatory basis ducts, conduits (such as riser conduit) and rights-of-way that are owned or controlled by any utility within an MDU building. State law determines whether, and the extent to which, a utility owns

or controls an in-building right-of-way in any particular circumstance.¹² If an MDU owner granted an easement or other form of right-of-way to a telecommunications provider to install wiring infrastructure in an in-building duct or conduit, that telecommunications provider may not use its ownership or control over the duct or conduit to preclude other providers (including cable operators or telephone or Internet providers) from using the same duct or conduit to install their own wiring for the provision of competitive services.

The FCC’s interpretation of the Pole Attachments Act does not create a federal right of building access. The rule does not compel a property owner to allow any competitive provider to install infrastructure in an MDU building. Instead, it implies that an incumbent provider may not use its control over existing ducts and conduits to deter competitive access – for example, by forcing a competitive provider to install new ducts and conduits for its parallel infrastructure.

CONCLUSION

The bottom line is that the legal distinction between an easement and a license is not especially important from an MDU owner’s perspective – unless third-party interests in the property could be negatively affected by the granting of an easement, or unless easement is granted by a condominium developer and may not be later terminated by the unit owners under a state condominium statute. What is important is that the grant of license or easement be clear and concise with regard to its permitted uses, its duration, and its spatial limitations and that it be reasonably tailored to accommodate a service provider’s intended activities on the property as specified in the service agreement. **BBP**

ENDNOTES

1 The Restatement of the Law of Property, Section 450 (1944) defines an easement as “an interest in land in the possession of another which: (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; (b) entitles him to protection as against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land; (d) is not

a normal incident of the possession of any land possessed by the owner of the interest; and (e) is capable of creation by conveyance.”

- 2 In other words, easements are subject to the Statute of Frauds. However, an easement by implication, by estoppel or by prescription may be created without a written document.
- 3 Cousins v. Sperry, 139 S.W.2d 665 (Tex. Civ. App. 1940).
- 4 Farmers Marine Copper Works, Inc., v. City of Galveston, 757 S.W.2d 148 (Tex. App. 1988).
- 5 Section 3-105 of the Uniform Condominium Act (1980), which has been adopted in whole or in part in some states, provides that at any time after the executive board elected by unit owners takes office, the owners association may terminate on 90 days notice any earlier created contract or lease that is not bona fide or was unconscionable to unit owners at the time of creation, or any contract between the association and an affiliate of the declarant. Many state condominium statutes are more strict and provide a window of time after unit owners assume control over the board within which the board may terminate any service agreement between the association and the service provider.
- 6 Leases are terminable under Florida Statutes § 718.302(2) and services contracts under § 718.302(1).
- 7 Florida Statutes § 718.111(d)(10).
- 8 The 2000 Condominium Assoc., Inc. v. The Residences at Sloan’s Curve, Inc., 513 So.2d 1324, 1325 (Fla. App. 1987); see also Forest Glen Condominium Association v. Forest Green Commons, No. 1372 WDA 2005 (Pa. Super. 2006), applying Pennsylvania law.
- 9 Connecticut: Conn. Gen. Stat. 16-333a; Delaware: 26 Del. C. § 613; District of Columbia: D.C. Code § 43-1844.1; Florida: Fla. Stat. § 718.1232; Illinois: 55 ILCS 5/5-1096; Kansas: K.S.A. § 58-2553; Maine: 14 M.R.S.A. § 6041; Massachusetts: Mass. Ann. Laws ch. 166A, § 22; Minnesota: Minn. Stat. § 238.23; Nevada: Nev. Rev. Stat. Ann. § 711.255; New Jersey: N.J. Stat. § 48:5A-49; New York: N.Y. Pub. Ser. § 228; Pennsylvania: 68 P.S. § 250.503-B; Rhode Island: R.I. Gen. Laws, § 39-19-10; West Virginia: W. Va. Code § 5-18A-1; Wisconsin: Wis. Stat. § 66.0421; Virginia: Va. Code. Ann. § 55.248, 13:2.
- 10 47 U.S.C. § 541(a)(2).
- 11 See, for example, Cable Holdings v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir. 1992) (Section 621 of the Communications Act does not authorize a cable operator to use an easement granted by an apartment owner to utilities and an SMATV operator).
- 12 *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rule-making (Released Oct. 25, 2000).