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Outdoor Advertising: How Billboard Landlords Can Protect Their Property and Their Profits

Lowndes Leasing Lawyers Blog
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Billboards are ubiquitous in the landscape along major Florida thoroughfares, at times seemingly blending into their surroundings. They dot (some would say mar) the landscape on farms and ranches along interstates and on commercial properties in urban areas. Many real estate attorneys have not given much thought to how the outdoor advertising industry (ODA) operates, and, more importantly, have not taken part in an ODA arrangement. This is unusual considering the $8.2 billion ODA industry has grown rapidly in revenue since 2009 (2020 saw a 15% dip in industry growth due to the COVID pandemic) and is expected to continue to climb as the economy awakens from its coronavirus-induced slumber. In this article, we will discuss a few ways landowners (i.e., potential billboard lessors) can maximize the revenue generated from their billboard leases, while addressing some of the more common issues that can arise in an ODA agreement.

First, it is important to note that ODA on state and federal roads in Florida is regulated by the Florida Department of Transportation. ODA is also subject to regulation by local ordinance. This generally isn't an issue for potential lessors, because entities that are engaged in building and maintaining ODA identify parcels and their owners who are eligible under state and local rules for ODA structures. Once potential ODA lessees have identified where they would like their ODA to be constructed, they reach out to the applicable landowner. Owners, however, should always have their attorney consider applicable local ordinances and state regulations before entering an agreement with an advertiser.

Second, because it is flexible, can easily be customized, and is for a stated term, a ground lease (as opposed to an easement) is the preferred means of agreement for ODA. A license could be used, but that has attributes that are usually objectionable to an ODA lessee. A ground lease is an instrument that most sophisticated parties are familiar with, and each issue identified in this article can be addressed with its own, standalone provision.

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Let's begin with "location, location, location." Your ground lease should be crystal clear as to the part of your land you are leasing to the ODA. Designate an area on a survey or add a diagram to the lease that specifies exactly where the lessee may construct their ODA. Consider where to grant the lessee access to build and maintain its structure. A diagram of the actual structure should be included, as well as its dimensions and form (height, sign width, single/double/triple-sided, number of supporting poles, etc.). Use should also be confined to purposes of advertising. Should the lessee look to place additional technology on their ODA, like a signal repeater or an LTE unit, your approval should be required, along with a commensurate increase in the rent.

Speaking of rent, depending on the location of your land and the potential of a bidding war by advertisers for a spot on your lessee's ODA, a flat rate rent may be leaving significant money on the table. A high-demand location should be compensated with matching income. Along with a slightly lower flat rate, attach a provision entitling the lessor to 15-20% of all revenue generated by the ODA during the lease period, perhaps in excess of a negotiated threshold. Don't forget that a double and triple-sided billboard can potentially increase this income without increasing any consideration on your end. A termination clause for failure by the lessee to keep the billboard continually in use could also be an effective tool in ensuring an uninterrupted flow of advertising revenue.

ODA lessees should agree to comply with all existing laws and ordinances and to maintain the billboard in an orderly and clean fashion. This will place much of the burden of knowing the regulations and statutory requirements on the lessee. Lessors should also recognize that they may restrict the types of advertising displayed on billboards. A provision that requires an ODA lessee to conform to community standards or restricts all advertising related to "sin" businesses or political messaging can avoid potential future backlash. The ODA lessee should also indemnify the lessor against liability associated with the ODA, and the lessee should maintain adequate liability and property insurance naming the lessor as additional insured.

Additionally, lessors should expect lessees to agree that they will connect and pay for any utilities that may be required to power or light the ODA. The lease should also specify who is responsible for removal of the billboard and restoration of the property to its pre-existing condition upon termination of the lease, with all work to be done in an orderly and workmanlike fashion. In addition to paying the utilities necessary for the operation of the ODA, lessors should also expect the ODA lessee to pay real and personal property taxes that are associated with their structures.

Sophisticated ODA lessees will no doubt want the lessor's mortgage holder to subordinate its mortgage to the lease. This is a fair request; in fact, in many cases the lessor's mortgage will require that the lessor obtain the lender's consent to any lease. Make sure to check your mortgage loan documents to see if a consent requirement exists. Hiring a sophisticated real estate attorney competent in leasing can give you peace of mind that small yet important things like this aren't being overlooked. The good news is that income generated from an ODA lease will make the property more attractive to a mortgage lender, increasing the likelihood that it will consent and subordinate.

When it comes to terminating the ODA lease, provisions should be included that deal with the potential sale of the property by the owner, condemnation, natural disaster, or constructive eviction. Do not leave anything up to interpretation. If, as lessor, you are worried about ODA potentially negatively affecting your resale value, then include a provision that allows you to terminate the lease on sale, but be prepared for pushback since the lessee will incur the expense of removing its improvements. The ODA lease should otherwise run with the title to the lessor's property.

While many people consider billboards to be annoying at best and an eyesore at worst, the fact remains that the industry is growing, and advertising space with guaranteed views will always be valuable. Billboards can usually be placed on existing commercial sites without disrupting other uses. Landowners looking to supplement their income would be wise to investigate the possibilities available with ODA, and a sophisticated ground lease that incorporates the above provisions can provide peace of mind as well as optimize earning potential.

Lowndes has sophisticated leasing attorneys who are familiar with ODA issues. Please reach out to us if you have any questions, concerns, or plans to get into the ODA market, and we will be happy to assist you.