



BRIDGEWATER PLACE • POST OFFICE BOX 352
GRAND RAPIDS, MICHIGAN 49501-0352

TELEPHONE 616/336-6000 • FAX 616/336-7000 • WWW.VARNUMLAW.COM

ORDER FORM - - MODEL CELL TOWER/WiMAX LEASES

FROM: John W. Pestle

RE: Model Leases -- Why Needed, How They Can Help, How to Obtain Them

Many New Leases: The cell phone industry adds over 12,000 cell towers and antennas annually. Each requires a lease. And Clearwire, cable and phone companies and others are adding high speed over-the-air broadband service to much of the U.S. The service, technically called WiMAX, is similar to Wi-Fi, but covers an entire city or county. WiMAX towers and antennas are similar to those for cell phones. Each of these requires a lease as well.

Challenge for Property Owners: Many property owners (such as municipalities, schools, forest products companies, and a wide range of private companies) and their attorneys will thus be approached for new tower leases.

Model Leases, Level Playing Field: In response, based on our communications work and representation of property owners on cell tower/WiMAX leases with several cellular and WiMAX companies, we have prepared new model cell tower/WiMAX tower leases. They are completely revised and updated versions of the model leases which hundreds of property owners have obtained from Varnum since 1996. They help "level the playing field" for property owners negotiating with cellular/WiMAX companies (who typically have the advantage, as they negotiate such leases every day). Some key points about the model leases are:

- They are a generalized form of recently signed leases.
- They require the tower and antennas and site to be built exactly according to plans given the property owner, unless the owner agrees to the contrary.
- They set forth the key provisions on rent -- initial amount, payment frequency, escalator percentage and frequency of increases.
- They allow the property owner to capture the rents from second and third companies placing their antennas on a tower, which can double or triple the rent the property owner gets.
- They allow the property owner to relocate the tower/antenna, due to a building expansion or change in use of the property, which may well occur during the 20-30 year term of a lease.
- They have detailed provisions to protect the property owner from liability arising from the lease or problems with the tower, as well as protecting the owner if the provider goes bankrupt.
- They come in two significantly different versions -- One is where a new cell tower will be built, the other is for antennas to be placed on an existing building, water tower, etc, and has provisions making sure the building, its use, maintenance and repair are not affected.

For more details on the model leases, go to www.varnumlaw.com/lease where you can see the actual memos that accompanies their purchase, and goes into detail on some of their key substantive provisions. Without sounding like late night TV, if you order a lease and do not like it, send it back and we won't charge you for it!

How to Order: Fax (or scan and email) the form on the next page. We will send the lease and our presentation from a recent national seminar on cell tower and WiMAX Tower Leases. Contact John Pestle or his assistant, Barb Allen (phone 616-336-6743, fax 336-7000), if you have questions.

Caution: The leases do not constitute legal advice. Your request for them and our provision of them does not create an attorney-client relationship. Purchasers should consult their attorneys to ensure compliance with applicable law and that the lease meets their needs.



Communications Practice: Varnum LLP is one of Michigan's largest and oldest law firms. Varnum is a business law firm with a national communications law practice in which, among other things, it represents municipalities on Federal aspects of cable and telecommunications law. It has represented over 200 municipalities on such matters. The firm is also municipal attorney for several cities and municipalities.

John Pestle prepared the model leases. He is Chair of Varnum's Cable and Telecommunications Practice Group and for over 25 years has worked on communications, utility and energy law matters. Cell tower and WiMAX tower leases are part of his practice, where he represents landowners (municipalities, schools, private parties) on leases, and municipalities on zoning issues and litigation. He is a former Chair of the Municipal Lawyers Section of the State Bar of Michigan and is a graduate of Harvard College, Yale Graduate School and University of Michigan Law School. He is admitted to practice law in Michigan and Arizona and can be contacted at jwpestle@varnumlaw.com or 616-336-6725.

****Model Cell Tower, WiMAX Tower Lease Order Form****

Please send me the model form of lease for:

Leases are licensed for one use by one user only.

- A new cellular or WiMAX tower, @ \$275
- Antennas on an existing building or structure, @ \$275
- Both leases for \$475

- Email documents
- Send by overnight delivery (add \$28 to total)
- Mail documents

Our check is enclosed for \$ _____ -or- Please invoice us for the total of \$ _____

Specify format:

- MS Word 97-2003(.doc) MS Word 2007(.docx) Other (if available) _____
- Please add me to your email and mailing list

Orders will be shipped within 2-3 working days after receipt or order; call Barb Allen if needed sooner.

Company/Municipality/Law Firm: _____

Name: _____

Title: _____

Address: _____

Phone: _____ Fax: _____

E-mail: _____

Please email, mail, or fax this form to the attention of Barb Allen at:

Varnum LLP
 333 Bridge Street, NW
 P.O. Box 352
 Grand Rapids, MI 49501-0352
 Phone: 616-336-6743; Fax: 616-336-7000
baallen@varnumlaw.com



Bridgewater Place • Post Office Box 352
Grand Rapids, Michigan 49501-0352

Telephone 616 / 336-6000 • Fax 616 / 336-7000 • www.varnumlaw.com

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William A. Dornbos
Fredric A. Sytsma
John W. Allen
Jack D. Sage
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Katherine L. O'Connor

Counsel
Terrance R. Bacon
Anthony W. Devine
Elizabeth Joy Fossel
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Kent J. Vana
Carl E. VerBeek

JOHN W. PESTLE Admitted in Michigan and Arizona
WEB SITE www.varnumlaw.com/cable

DIRECT DIAL 616/336-6725
E-MAIL jwpestle@varnumlaw.com

COMMENTS AND INSTRUCTIONS FOR MODEL CELLULAR, WiMAX LEASE FOR ANTENNA ON BUILDING OR OTHER STRUCTURE

1. **General:** Thank you for purchasing this model form of lease from www.varnumlaw.com/lease. It is a generalized form of leases we have successfully negotiated on behalf of property owners with several cellular and WiMAX providers for cellular or WiMAX antennas to be placed on our clients' buildings. It is thus a model agreement for use by companies, municipalities or other property owners (Landlords, in the terms of the lease) in negotiating a lease with a cell phone or WiMAX provider to put their antennas on a building or other structure. It is not drafted for the laws of any particular state and should be reviewed by a property owner's local attorney for compliance with applicable state and local laws prior to using it. In addition, a lease should be tailored to the individual situation in question. The model lease thus needs to be reviewed by anyone using it to make sure it conforms to that person's particular situation, needs, legal restrictions (e.g., municipal charters) and the like.

2. **Antennas on Building, Existing Structure:** This lease is for the common situation where rather than building a new tower, the provider wants to place its antennas on an existing building, existing communications tower or other existing structure owned by the property owner. We have a separate model lease for a new tower to be built, usually on a vacant piece of land.

3. Not Legal Advice: The lease, this memo and other materials do not constitute legal advice. Your request for them and our provision of them do not create an attorney-client relationship. You should consult your attorney to assure that the lease, as used, complies with applicable law and that it meets your needs.

4. Single/Multiple Users: This model lease is licensed to the person or entity purchasing it for use only by such person or entity and a non-exclusive license under the copyright in the model lease is hereby provided for that purpose. In some instances (such as a law firm with many clients, trade groups) uses of the model lease for multiple persons or entities may be desired. We will license the lease for such multiple use upon payment of double the normal fee for it (if you paid \$275, pay an additional \$275) -- contact Barbara Allen at (616) 336-6743 to arrange this.

5. General Approach: The general approach taken in this model lease is to specify exactly what is to be put on the building in question - - typically a cell (or WiMAX) antenna - - such that the property owner's reasonable expectations are met, with changes only allowed with the owner's written approval. Thus the model lease specifies that the antennas can only be used for cellular (or WiMAX) service and requires that the antennas and equipment enclosure comply with the engineering drawings that are to be attached to the lease as Exhibit B, as well as any photo simulations of the antennas in place (Exhibit D to the lease) that have been provided. This helps prevent the property owner from being told that the antennas will be of a certain type, shape and color so as to blend with the existing building and be unobtrusive antennas and ending up with something different. By contrast, the first drafts of leases offered by cell companies typically have no restrictions, such that they might claim they could put any type of radio station, TV or communications antennas or antennas on the property in question, and not harmonize with the building, contrary to the property owner's expectations.

Comments on other specific provisions are as follows.

6. Option/Lease/Rent: The lease is styled as an option to lease, followed by the lease itself. During the option period (Section 1 of the lease), the provider can make sure it can get local zoning approval, conduct a Phase One environmental assessment, and determine that it in fact wishes to enter into the lease. Sections 2 and following of the lease set forth the lease terms.

Rents vary significantly, and the lease addresses the four key elements, with appropriate provisions and blanks, namely: The amount of the rent in the first year; how often it is paid (annually, in advance); the escalator in succeeding years (a percentage); and how often the rent escalates (annually). In combination, these provisions can have a significant impact over the lengthy term of a cellular or WiMAX lease.

7. Cell Phone or WiMAX: Choose one of the two options (cell phone or WiMAX) in Section 3 of the lease, depending on whether the provider is a cell phone provider or a WiMAX company, and then select the corresponding option in Section 15(a). Keep in mind that WiMAX antennas take up as much space as cellular antennas, so the rents for the two should be the same - - WiMAX antennas reduce the number of cellular antennas a building can accommodate.

8. Bankruptcy: There is a potential that cellular or WiMAX providers (or the special purpose subsidiaries they create to own leases such as this) will encounter financial difficulties. Analysts are providing contradictory reports on whether as a general matter (outside rural areas) WiMAX will be a business success. In the past, several cellular providers have filed for bankruptcy, and technological (or other) changes during the several decades of a cellular or WiMAX lease could lead to the provider's

bankruptcy. This lease has therefore been drafted consistent with the provisions of the Federal Bankruptcy Code so that if the provider files for bankruptcy, it immediately has to either accept the lease and cure any defaults, or turn it back to the property owner. Without such provisions, there is a risk that, during the pendency of a lengthy bankruptcy proceeding, the provider would not pay rent or insurance and could allow the antennas or equipment enclosure to fall into disrepair (raising liability concerns); and the property owner would get no back rent/payment for liability claims at the end of the bankruptcy. Persons using this model lease should have the rent, default and related provisions of this lease reviewed by counsel familiar with bankruptcy and real estate law, as applied in the state and bankruptcy district where the leased property is situated.

9. Generators, Backup Power Supplies: The lease has options in Section 7(p) to expressly state whether or not the provider is allowed to put a backup generator or battery backup on the site. In some situations, property owners may not want generators due to the noise/fire hazard they (and their fuel tanks) create, or due to the risks created by allowing hazardous fuels/battery acid on the site. The FCC does not require backup power at cell sites, contrary to what providers may say (the 2007 FCC backup power rule did not so require and was later overturned in its entirety by the courts on procedural grounds).

10. Equipment Enclosure, Antennas, Access: The lease is for a cellular or WiMAX antenna which is located on an existing building, or other structure. It basically contemplates (1) the provider leasing a small piece of land next to the building for an "Equipment Enclosure" where equipment cabinets, transmitters, receivers, other electronic gear and standby generators/provisions for standby power will be located, (2) only the actual "Antennas" being located on the building itself, along with (3) cables and cable trays (included in the definition of "Antennas") running from the Antennas to the Equipment Enclosure. The lease will need to be modified for variations from this basic arrangement (for example, if the electronic equipment is located inside the building).

In addition, there are specific requirements that the provider has to shut down the Antennas and other electronic equipment whenever workers (such as maintenance workers, painters, roofers) will be near the Antennas. This is done so as to comply with FCC safety rules and common sense on not exposing people to the radio frequency emissions from the antennas, which are basically like those from a microwave oven. Related provisions require measurement of these emissions to make sure they are within bounds and safety signs warning of the Antennas at all points providing access to the Antennas, rooftops or other areas near them.

11. Antennas of Other Providers: The lease specifically states that it does not prevent other cellular or WiMAX other providers (or the property owner) from locating their antennas on the building. This complies with Federal law prohibiting exclusive leases for wireless antennas.

12. Liability, Indemnity, Insurance, Assignment: The potential for significant liability arising from the lease is a concern for many property owners, especially municipalities or other entities which have "deep pockets" and are often target defendants. This is especially the case, given that the lease may run for several decades, during which many changes may occur. The lease is drafted with such concerns expressly in mind - it has broad indemnity provisions, requires broad, detailed, meaningful insurance coverage from highly rated insurance companies (with the insurance amounts able to escalate with inflation), and prohibits the provider from assigning the lease to entities with a lesser credit rating than the provider.



13. Antenna Relocation: The lease gives the property owner - - at its expense - - the ability to relocate the Antennas and Equipment Enclosure to another site. This allows the property owner to move the them, if their current placement would prevent some highly beneficial or desirable use of the building - - or removing the building for some major new project.

14. John Pestle, Comments: This lease was principally prepared by John Pestle of VarnumLLP. He is Chair of the firm's Cable and Telecommunications Group, and for over 25 years has worked on communications, utility and energy law matters. He practices before the Federal Communications Commission and Michigan Public Service Commission. Among other things, he represents municipalities nationwide (over 200 to date) on cable and telecommunications matters such as franchising, transfers, rate regulation, Wi-Fi and FCC cases. Cell tower and WiMAX tower leases are another part of his practice, where he typically represents landowners (municipalities, schools, private parties) on leases for towers, and municipalities on cell tower zoning issues and litigation. John is a graduate of Harvard College, Yale Graduate School and the University of Michigan Law School.

For comments and suggestions on the model lease, please contact John at:

John Pestle
Varnum LLP
P.O. Box 352
Grand Rapids, MI 49501-0352
Phone 616/336-6000 or 6725, Fax 616/336-7000
jwpestle@varnumlaw.com

15. History, Communications, Municipal and Utility Practice: Varnum LLP is one of Michigan's largest and oldest law firms. In addition to a corporate practice, it has a communications and utility law practice. For example, it represents municipalities nationwide on Federal aspects of cable and telecommunications matters, and is one of the principal firms with such a practice. It also represents alternative energy producers (such as cogenerators and wind farms), oil and gas producers and major energy users. The firm also has a large municipal practice and is municipal attorney for several cities, counties and townships. See the firm's web page at www.varnumlaw.com