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Lease, License or Easement?

Clients need to use or let others use real property in ways that occasionally defy easy characterization. Most everyone understands that if you want to occupy a suite in an office building for five years, you sign a "lease"; that you give an "easement" to the utility company to get service to your home; that you occupy a hotel room, parking ramp, or a college football game under a "license." But what if a company needs its employees to park in its next-door neighbor's parking lot? Or if a church wants to permit another group to regularly hold meetings in its space? What if a municipality wants to let cell phone providers put antennas on its water towers? And what about billboards? Indeed, any time real property is being used or occupied by someone other than the owner, it is useful to consider whether to use a lease, a license, or an easement.

We consider three basic questions to choose the appropriate alternative. First, is the interest possessory or non-possessory? Second, is the interest permanent or temporary? Third, assuming the interest is temporary, would we expect the occupant to be entitled to put the owner through the onerous process of eviction after a default? (Other relevant questions include whether a particular use or occupancy of real property is exclusive or non-exclusive, and transferable or personal.)

A lease is generally intended to be a possessory interest, giving the tenant exclusive occupancy of certain real estate against the rest of the world, including the owner. Easements, in contrast, are generally intended to be non-possessory interests, granting the use of property for a specific purpose but not occupancy. A driveway easement, for example, merely gives your neighbors the temporary right to use your driveway to get to their garage; but not to build an addition, have a garage sale, or camp out on your driveway. Note, however, that the lines blur. Most leases do not confer strict, exclusive, possession, since landlords usually reserve the right to enter the leased property to inspect, repair, and show it to prospective tenants. And a billboard easement confers a possessory interest, since the sign physically occupies the land.

Easements are generally intended to be permanent interests in real property, whereas leases must end and are therefore temporary. For example, it would be impossible to run an electric utility if leases with each homeowner served had to be regularly renegotiated. (It's important to note that Wisconsin law requires easements to be re-recorded every 30 years, so in this sense, even easements are not technically permanent. But the distinction remains useful.) These lines can be blurred as well, with leases that "automatically" renew and become potentially permanent, and "temporary" easements for construction or grading.

Licenses must be temporary but can be either possessory or non-possessory. A license is not technically an interest in real property, but rather a mere

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Wisconsin Court of Appeals Upholds Termination of Probationary Police Officers

Pursuant to state statute, sworn law enforcement officers can only be terminated for disciplinary reasons for cause after a due process hearing. This does not apply to probationary officers, who are at-will employees during their probationary period. In addition to state statute, the discipline of officers, including termination, may also be subject to the terms of a collective bargaining agreement (CBA). In a recent case, the Wisconsin Court of Appeals upheld a city's termination of two probationary police officers under both a CBA and state statute. *State ex rel. Massman and Most v. City of Prescott,* No. 2018AP1621. In doing so, the court re-affirmed that probationary law enforcement officers can be terminated without just cause or a due process hearing.

In *Prescott*, officers were subject to an eighteen-month probationary period under the CBA. The CBA also precluded probationary officers from grieving discipline, including termination, under the CBA's grievance procedure. During their probationary period, two officers were notified that their employment was being terminated due to ongoing job performance issues, even though they claimed they were never given any formal written reprimands, negative job performance reviews, or discipline. Both officers filed grievances under the CBA challenging their terminations. The City took the position that, as probationary officers, they had no constitutional, contractual or statutory right to a statement of the reasons they were fired, to recourse to the grievance procedure, or to a hearing to contest their termination. Therefore, the City refused to arbitrate the grievances.

The officers sued the City and the City's Police Commission, arguing that, under the terms of the CBA, officers could only be terminated for just cause and that an employee with this protection has a property right entitling them to a due process hearing. The court noted that the purpose of probationary period would be defeated if a probationary officer could only be terminated for just cause. Therefore, the court concluded that probationary employees under the CBA have no guarantee of continued employment and have no property right to enforce through a due process hearing. This was particularly true in this case because the CBA expressly provided that probationary officers did not have access to the CBA's grievance procedure.

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contract right that confers permission to use or occupy real property. Without a license, you'd be trespassing. Licenses are typically revocable. The biggest distinction between leases and licenses is the remedy upon default. Defaulting tenants under leases are entitled to an eviction remedy, which technically allows them to continue in exclusive occupancy despite having defaulted in payment of rent or other lease terms. Eviction is a lengthy and potentially expensive process. Defaulting licensees, on the other hand, can be dispossessed without having to go through eviction: imagine having to evict someone from a hotel, football game, or parking garage.

Parking is a good example of how we work through the three questions. A grocer client had a next-door neighbor that wanted to build a restaurant, but didn't have enough parking spaces on its own lot to satisfy the requirements of the applicable zoning ordinance. Without additional parking, the local municipality wouldn't approve construction of the restaurant. The restaurant asked the grocer for a permanent easement. But the grocer wanted the restaurant to pay monthly charges rather than a one-time fee, which raised the possibility of default. Default would terminate the easement, making the interest impermanent. The municipality would have accepted a long-term lease, yet it seemed inapt to have to go through the process of evicting the restaurant for failure to pay for parking. The grocer would have preferred to give a license, but the municipality would not accept that because a license is not an interest in property sufficient to give it comfort about granting the variance. (The parties ultimately settled on an easement subject to termination for non-payment of rent.) Cell phone antennas and billboards can all be done as licenses, leases, and easements, as well as combinations of those, depending on the interests of the parties.

We tend to use easements for interests that are more "permanent" and "non-possessory"; leases for interests that are more "temporary," "possessory," and "eviction-appropriate;" and licenses when eviction is inapt. But these are not bright line tests. The characterization of an interest as a lease, license, or easement is not entirely up to the contracting parties to decide. For example, one cannot side-step the onerous requirements of residential leasing laws by having tenants sign license agreements. However, working through the three questions will generally guide you to choosing the correct interest for your situation.

— John Starkweather

Wisconsin Court of Appeals Invalidates DOT's Jurisdictional Offer

In a recent decision, the Wisconsin Court of Appeals invalidated a jurisdictional offer that the Department of Transportation ("DOT") made to acquire property for a highway project. *Christus Lutheran Church of Appleton v. Wisconsin Dep't of Transportation*, 2019 WI App 67. In doing so, the court clarified the interaction between the appraisal and jurisdictional offer requirements contained within Wis. Stat. § 32.05.

The DOT wished to acquire property from Christus Lutheran to expand and reconstruct a state highway. The DOT sent Christus Lutheran an initial offer letter, offering to purchase the property for $133,400. This initial offer did not include a line item for compensation for severance damages, which is the loss in value to the portion of the parcel remaining after the taking and construction of the public improvement. With the initial offer letter, the DOT sent an appraisal of the property prepared by an outside appraiser. The appraisal did not include severance damages. Instead, it explicitly stated that it considered whether severance damages would occur as a result of the highway project and concluded that they would not. A few months after receiving the initial offer, Christus Lutheran advised the DOT that the congregation would not authorize the sale of the property and that the DOT should acquire the property by eminent domain.

After Christus Lutheran rejected the DOT's initial offer, the DOT internally reviewed its initial offer through an administrative review process. The DOT concluded that the property acquisition warranted a higher offer than its initial offer because the acquisition was more complicated than it originally believed. Thus, the DOT sent Christus Lutheran a revised offer of $403,200. Notably, due to the church's proximity to the new right of way, this revised offer awarded the church severance damages in the amount of $159,574. Again, Christus Lutheran informed the DOT that it should proceed with the acquisition by eminent domain. The DOT responded with a jurisdictional offer of $403,200. When the DOT did not receive a response to its jurisdictional offer, it notified the County Register of Deeds of the award of damages and sent Christus Lutheran a check, closing letter, closing statement, and a copy of the award of damages. Subsequently, the property transferred to the DOT.

Christus Lutheran sued the DOT, arguing that because the DOT's jurisdictional offer was more than three times the amount provided for in its appraisal, the DOT's jurisdictional offer was not based on its appraisal in violation of the requirements in Wis. Stat. §§ 32.05(2)(b) and (e).

The court held that the jurisdictional offer was invalid because it included severance damages that were not supported by the appraisal in violation of Wis. Stat. § 32.05(2)(a). The court explained that Wis. Stat. § 32.05(2)(a) requires a condemnor to obtain at least one appraisal that values all of the property the condemnor wishes to acquire. However, the court found that the DOT's inclusion of severance damages in its jurisdiction offer was not proper because the appraisal determined that such damages would not occur. Accordingly, the court concluded that the DOT's jurisdictional offer was not sufficiently based on the appraisal, as required by Wis. Stat. § 32.05(2)(b) and (3)(e).

This decision is an important one for municipalities looking to acquire property by condemnation. Municipalities should ensure their appraisals of the property include values for all of the property they wish to acquire and that every line item in a jurisdictional offer is sufficiently based on the appraisal.

— Catherine Wiese

Wisconsin Court of Appeals Upholds Termination of Probationary Police Officers

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One of the officers also argued that he was statutorily entitled to protection against termination without just cause because he had worked for the City for more than a year. Under Wis. Stat. § 165.85(4)(a)3, officers are subject to a 12-month probationary period for purposes of satisfying the Law Enforcement Standards Board requirements. The officer argued that this provision limited the length of a probationary period to 12 months. The court rejected this argument, concluding that this statute did not limit a municipality's ability to establish a longer probationary period for newly-hired law enforcement officers. Instead, the court concluded that because this statute allows law enforcement agencies to set employment standards higher than the minimum standards set by the Law Enforcement Standards Board, it also allows them to set a longer probationary term in a CBA.

This case is important for municipalities because it re-affirms the right of municipalities to impose probationary periods on newly hired police officers and the right to terminate those employees who fail to successfully complete their probationary period without having to show cause or hold a due process hearing.

Recently, Attorneys Steven Zach, Catherine Wiese, and Julia Potter of Boardman & Clark authored chapters on the hiring and disciplinary processes of Police and Fire Commissions in the new Wisconsin League of Municipalities' Handbook for Wisconsin Police and Fire Commissioners.

— Catherine Wiese

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Municipal Law Newsletter

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