

LEASE AND LICENSE AGREEMENTS FOR EV CHARGING STATIONS



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The electric vehicle (EV) market continues to break records. In 2022, nearly eight percent of all automobiles sold in the United States were EVs and there were more than 10 million EVs sold worldwide, up 55 percent from 2021.¹ This growth trend is expected to accelerate, as federal and state governments create incentives for the continued production and consumer purchase of EVs. The International Energy Agency projects that 12 percent of all automobiles sold in the United States in 2023 will be EVs and that 50 percent of all automobiles sold in the United States in 2030 will be EVs.² Given the anticipated surge in EV accessibility and sales, demand for EV charging stations is expected to experience an accompanying increase.

The installation of EV charging stations in existing commercial and residential projects presents several new legal issues to consider. Owners and developers of commercial and mixed-use properties (developers), operators of EV charging stations (operators), and their attorneys need to understand the unique legal issues involved in the installation and presence of charging stations. They also need to be prepared to draft or modify existing recorded documents and structure charging station lease or license agreements (agreements) to protect each party from the various complications that may arise.

Matters of Record and Existing Tenant Leases

Parking lots of shopping centers and other commercial or mixed-use projects can be an ideal location for EV charging stations for both EV drivers, who can conveniently charge their EVs, and the developer and retail operators, who benefit from the drivers' patronage of the shopping center. Additionally, the mere presence of charging stations can be used as an amenity to attract customers to a particular property while simultaneously providing the operator with a built-in customer base.

One of the key considerations in determining whether charging stations can be installed is analyzing any matters of record (e.g., covenants, conditions, and restrictions; reciprocal easement agreements; etc.) and existing tenant leases for restrictions or limits. For instance, in shopping centers, a retail tenant lease may include a so-called "control area" or "no-build zone" where the developer-landlord is prohibited from installing (or leasing to a party who will install) improvements in a particular area of the parking lot. Alternatively, major tenant leases may include an area of the parking lot where charging stations can be installed or a limit on the number of parking spaces that can be converted to charging stations.

Matters of record and existing tenant leases may also include requirements that all parking spaces

at the property be provided on a “non-exclusive” basis. If parking spaces are converted to charging stations, an existing tenant could claim that the parking spaces now being utilized for EV charging are no longer available to the tenants and invitees of the property on a non-exclusive basis. A successful claim by a tenant that the charging station is prohibited by the terms of its lease could be detrimental to both the developer and operator. As such, attorneys preparing agreements between developers and operators should try to include provisions clarifying that the charging station must remain available at all times on a non-exclusive basis for use by all of the customers and invitees of the tenants of the property. Similarly, attorneys who represent commercial developers may want to consider updating their form leases to include a tenant acknowledgement that the developer can convert any parking spaces to charging stations.

Ultimately, since developers are bound by the terms of the matters of record and existing tenant leases, they may want to obtain any consents or approvals required under those documents before entering into a formal agreement with an operator. However, since it is not always practical to obtain these approvals in advance, the parties could consider agreeing to a post-execution period for the developer to obtain required consents and approvals. Operators tend to be amenable to this arrangement because they understand these approvals may be required for the operator to use the charging station for its intended purpose. This enables the operator to avoid the undesirable scenario where they build but then cannot operate a charging station.

Government Incentives

The government is incentivizing the installation of EV charging stations by providing various credits, rebates, benefits, and other consideration. Operators typically want to derive the benefit of these incentives and attorneys preparing and negotiating the agreements on their behalf should clarify that, the developer does not have any ownership in the charging station and its facilities and is not entitled

to receive any incentives from the construction, ownership, use, or operation of the charging station.

Most developers will not object to the operator being entitled to those earmarked incentives. However, since new government incentives can be created at any time, attorneys representing developers may be able to “carve out” for their developer client any incentives attributable to or given in connection with a property owner entering into an agreement with an operator to provide charging stations at a commercial or residential property. As the world of government incentives and charging stations evolves in unpredictable ways, the charging station agreement is the optimal legal document to set forth the parties’ agreement as to incentives.

Due Diligence Considerations

Some states are enacting legislation to streamline the granting of permits for EV charging stations. However, given that this legislation is new, municipalities do not necessarily always have clear implementation directives. Additionally, some states have yet to establish specific guidelines regarding issuance of charging station permits. Accordingly, since expeditious receipt of permits is not guaranteed, an operator should not commit to building the charging station (and, in some cases, paying rent) until it knows it can receive the necessary permits.

One solution an attorney can incorporate into the agreement is a “due diligence period” or “permit contingency.” Under this type of arrangement, the operator receives a predetermined amount of time to pursue the necessary permits or terminate the agreement. Some developers may not want to provide this termination right, as there is an opportunity cost associated with entering into and then terminating an agreement with the operator. However, if the developer has a post-execution period to obtain approvals required under the matters of record and existing tenant leases, then most developers and

operators will agree that it is mutually beneficial for each party to have some post-execution period to obtain their respective approvals.

Residential Projects

There are several considerations for the installation of EV charging stations in residential projects that differ from commercial projects. For instance, if the residential project is a common interest development or homeowner's association, the developer or association may not have carte blanche to install the charging stations and should review the recorded documents to determine if and where EV charging station installation is permitted. There may be specific areas of the parking lot or structure (such as guest spaces) where EV charging stations could logically be installed, while other parking spaces could be deeded to residents.

There are also a variety of jurisdiction-specific issues in the context of apartment projects. While the developer typically has more leeway to install EV charging stations in an apartment complex versus an already-developed common interest development, some states may impose restrictions on unilaterally raising prices in residential leases (e.g., if the electricity charges are passed through to the tenants). Attorneys should be aware of these jurisdiction-specific issues because even though an EV charging station could be considered an amenity, their clients may nevertheless have some restrictions in unilaterally installing this new amenity, particularly if the residential tenants will bear any portion of the cost.

Improvements and Infrastructure

For commercial properties that were not developed with the infrastructure and utility capacity necessary to support charging stations, the operator will typically install the EV chargers and necessary electrical equipment, charging adapters, connectivity hardware, utility infrastructure, and all other supporting equipment. In this scenario, since the developer usually owns the property on which the

charging stations will be installed, it will want the right to reasonably approve the plans and specifications for this work.

At the end of the term of the agreement, the developer typically requests that the operator restore the licensed area to its former condition by removing the chargers, equipment, and other infrastructure installed by the operator. However, as underground cabling and wiring may be prohibitively expensive to remove, and because the presence of such cabling and wiring potentially increases the value of the property, a developer should consider permitting the operator to leave underground cabling and wiring in place, as long as it is capped in a safe condition. Additionally, given the various issues regarding matters of record and existing tenant leases, forward-thinking attorneys representing commercial developers of new properties may want to consider having their clients identify the areas of the parking lot where charging stations can be located in order for developers to build their parking lots with technology and infrastructure. Those clients should also be advised to negotiate leases with tenants in a manner that enables the swift installation of EV charging stations.

Relocation

Many commercial retail projects are being redeveloped or repurposed (whether partially or in full) for other uses, such as multifamily or office. Accordingly, even if a particular developer does not have imminent plans to redevelop a property that is licensed to an operator, attorneys could consider advising the developer to include a relocation provision in its agreement with the operator.

A relocation provision typically provides the developer with the right to relocate the licensed area if it decides to redevelop the property, subject to certain negotiable conditions. For example, if the developer needs to relocate the charging stations, it should be responsible for providing a reasonably equivalent footprint and capacity for the charging stalls, equipment, and utilities, and paying for the costs of such relocation. In some instances, the operator may not

want its charging station to be relocated. In other instances, if the redevelopment is of the entire property, then both parties may want the right to terminate the agreement. In the event the agreement is terminated because of a redevelopment of the property or because the operator does not agree to a relocated area, the parties may decide on a negotiated termination fee.

Depending on the scope of the business deal, the developer may agree to reimburse the operator for the unamortized costs of its installation of the charging station. Developers may also agree to a termination fee in these instances, as they are deriving more value from a redeveloped property or relocated charging station than they would from the presence of the charging station in its original location.

Maintenance

In arrangements where the developer is leasing or licensing a portion of the parking lot to operators, the operator's premises will generally include the land upon which the charging stations will be located. Nevertheless, as such premises are also part of the common area of the property, developers typically prefer to retain control over this area and continue maintaining the parking lot portion of the licensed premises (such as sweeping, repaving, restriping, and snow and ice removal) because it is not practical to siphon off the licensed premises from the remainder of the common area for these purposes. However, operators should be responsible for maintaining the actual charging stations and associated equipment, hardware, software, and signage, and for complying with laws related to its use. 🏠

Notes

1 Global EV Outlook 2023, Int'l Energy Agency, available at <https://www.iea.org/reports/global-ev-outlook-2023/trends-in-electric-light-duty-vehicles>.

2 Id.