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## MEMORANDUM

To: Mayor and City Council

From: Andrew Biggerstaff, city attorney

Date: June 22, 2016

Re: Nextel Lease Termination

The city of Tonka Bay (the “City”) has a site lease agreement (the “Agreement”) with Nextel (the “Tenant”). The Agreement had an expiration date of December 31, 2016. On or around October 27, 2015, the City received notice from the Tenant that it now wished to terminate the Agreement. The Tenant relies on the termination for cause provision of the Agreement which allows the Tenant to terminate the Agreement if the “leased premises is or becomes unacceptable for technological reasons.” The Tenant’s justification for its reliance on this provision is that it no longer uses the type of hardware which is located on the tower in the City.

Upon receiving the termination notice by the Tenant, the City sent the Tenant two letters dated November 5, 2015 and February 24, 2016, respectively. In both letters, the City objected to the form of termination notice.<sup>1</sup> The City also indicated that the Tenant would need to restore the land to its previous state, as required by the Agreement, and rebuild the tower and transfer ownership to the City.<sup>2</sup> The City Council is now considering how to proceed.

The City Council ultimately has three options, which are briefly outlined below.

1. The City Council can do nothing. The City does have one other company that is renting space on the tower. Future maintenance and liability issues are certain to arise, so this is not a preferred approach.

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<sup>1</sup>It was originally the City’s understanding that the Tenant was terminating without cause, in which case Tenant would have to give the City notice at least 90 days before the expiration of the term of the Agreement.

<sup>2</sup> While these remedies appear to be somewhat mutually exclusive, the Tenant was given notice of the City’s desire to have one of them completed.

2. The City can demand that the Tenant restore the property to its pre-tower state within 60 days. This option was required under the Agreement. This option could potentially interfere with the lease for the third-party company currently using space on the tower. Based on the language of the Agreement, this is the default position, and if the City does nothing, it is possible that the Tenant may undertake this course of action and remove the tower.
3. Alternatively, the Agreement allowed the City to demand that the Tenant “rebuild and transfer ownership of an equivalent tower” to the City prior to the removal of Tenant’s tower, at Tenant’s cost. If the City chooses this option, it must notify the Tenant within 30 days of receiving written notice from the Tenant that the Agreement is terminated. Because the City responded to the termination notice within 30 days, and that response included a statement that the Tenant would be required to fulfill this contract provision, it is likely that the City has properly complied with its notice requirements.

The City Council should determine which course of action it feels is appropriate. Taking ownership of a new tower may create maintenance or liability issues in the future. The Council has also discussed the option of renting space on the City’s water tower, and seeking a third-party management group to control tower rentals. Based upon the City Council’s direction, staff will continue working with the Tenant to resolve this matter.

AMB:peb