



Hot Tips for Term Sheets and Letters of Intent

Legal Quick Hit for
ACC Real Estate Committee
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1. Overview

- Letter of Intent (“LOI”) vs. Term Sheet
 - LOI: Signed by one or more parties or their agents; some terms may be binding; language of “intent”
 - Term Sheet: Typically not executed; non-binding; mere summary of key deal points
- Parties Involved
 - Parties to Transaction: Landlord/Tenant; Seller/Purchaser
 - Other “players”: Brokers, agents, attorneys, etc.

Overview (cont.)

- Basic Structure
 - If LOI – Introductory paragraph; “letter” structure
 - Parties
 - Premises/Property
 - Rent/Purchase Price; Deposits; Other “Costs”
 - Timing
 - Leases: commencement date (lease v. rent); term; options
 - PSAs: study periods; conditions; closing date
 - Other key deal terms, conditions, rights or obligations
 - Closing paragraphs (in LOIs) – binding effect, etc.

2. Term Sheets/LOIs for Lease Transactions

- Essential Terms
 - Parties
 - Premises – Land/improvements; location; size; etc.
 - Rents, deposits, and other “costs”
 - Include rent escalations; method of calculation
 - Lease type (gross, triple net, etc.) and additional rent/costs
 - Term (initial term and any option periods)
 - Lease Commencement v. Rent Commencement
 - Include rent escalations, required notice for options, etc.
 - Permitted use, and any specific use restrictions

Lease Transactions (cont.)

- Other Important Terms to Include
 - Responsibility for repairs, maintenance and replacements
 - Build-outs; tenant improvements and allowances
 - Allowances: Consider remedies for non-payment (offset rights, etc.), escrowing funds or other alternatives
 - Rights of first refusal, purchase and expansion options, etc.
 - Include notice periods, price (or method of calc.), and term; are they “one time” rights, are they recordable, etc.
 - Exclusive use rights (primarily in retail leases); restrictions
 - Key issue for Landlords – as is, where is; no reps or warranties

Lease Transactions (cont.)

- Some Features to Consider for Ground Leases
 - Conditions to lease commencement (due diligence periods, permitting periods, etc.)
 - Identify initial site work to be performed by Landlord, if any
 - Construction and ownership of tenant improvements
 - Leasehold financing provisions; terms amenable to prospective lenders
 - Subordination issues

Lease Transactions (cont.)

- Other Terms to Consider
 - Operating Expenses
 - Audit rights; caps on annual increases; included vs. excluded costs; etc.
 - Signage
 - Approval rights; location; costs; exclusivity
 - Relocation rights for Landlord (primarily in office leases)
 - Parking rights or limitations
 - SNDA issues
 - Recording of memorandum of lease
 - Survival of obligations, if any
 - Environmental concerns

3. Term Sheets/LOIs for Purchase Transactions

- Opening Paragraph:

The purpose of this letter is to formally express the intent of [***insert name of company***], a _____ [corporation/limited liability company] (“***Buyer***”), to purchase [***insert property name and address***] from [***insert name of seller***], a _____ [corporation/limited liability company] (“***Seller***”) upon the basic terms and conditions outlined herein. This is a non-binding Letter of Intent (except as provided herein) and replaces any previous communications and written statements between Buyer and Seller with respect to the subject matter of this letter. The terms of the proposed transaction are as follows:

- What have the parties agreed to at this stage?

Purchase Transactions (continued)

- Property Description:
 - Real Property: is buyer obtaining new survey?
 - Personal Property: what is included, what is excluded?
 - Permitted Encumbrances: Seller wants to include all matters in its existing title policy
- Purchase Price:
 - What is it or how calculated: price determined by acre or a set amount?
 - If per acre, how will acreage be calculated?
 - Buyer's new survey?
 - Deposit:
 - Cash deposit posted with title company/escrow agent
 - Letter of Credit: used longer due diligence periods; title company's paying nominal interest
 - Terms for refund or not

Purchase Transactions (continued)

- Financing: Buyer contingency (if agreed to)
 - Seller Concern: are buyer's terms reasonable
- Due Diligence:
 - Will Seller begin providing due diligence during contract preparation? More common for purchase of business
 - Time Period? 60-90 days is typical
 - Buyer right to terminate (and on what basis)
 - Environmental Reports

Purchase Transactions (continued)

- Drafting the Contract: Preference is to control the initial draft
- Closing Costs:
 - Brokers
 - Attorneys' Fees
 - Recording Taxes on the Deed
 - Sales Tax on Personal Property (any exemptions?)
 - Survey Costs; Title Costs; Phase I
- Exclusivity: Backup offers; can seller continue to negotiate with other buyers?

4. Confidentiality and Binding Effect

- Confidentiality Provisions: Binding provision
 - Who may receive information?
 - When is disclosure permitted?
 - What is covered? Business terms of the LOI/contract or just due diligence items delivered by Seller
- Binding Effect: Exclusivity and Confidentiality
 - Survive execution of the contract
 - Confidentiality to survive termination of contract
 - Others:
 - non-compete for business purchase
 - Waiver and enforcement; venue
 - Refund of deposit
 - Brokers

5. Other Considerations/Questions

- What form to use?
 - LOI vs. Term Sheet
 - Long form vs. short form
 - Pros and Cons of each
- Strategies for LOI/Term Sheet preparation
 - Who should be involved
 - What issues to address
- Benefits of a “form”
- Things to avoid

Other Considerations (cont.)

- Closing Paragraph:

This Letter of Intent is an outline of potential terms and conditions for a to-be-negotiated purchase contract and, therefore, it does not constitute an offer nor is it binding on either party (except with respect to the confidentiality requirements and [*any other provisions identified in this letter as binding provisions*]). Each party hereto fully understands that no party shall have any legal obligations to the other with respect to the proposed transaction (except with respect to the confidentiality requirements and any other provisions identified in this letter as binding provisions) unless and until such time as a purchase contract has been fully executed by and delivered to all parties hereto.

Questions or Comments?

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