

# Leveraging Letters of Intent in Commercial Real Estate

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A letter of intent (LOI) is an initial term sheet used by parties which provides an outline of basic business terms for use in a transaction.<sup>1</sup> The benefit is that it can help the parties narrow down issues and ultimately leave less to be negotiated by their attorneys. Proceed with caution when using an LOI, as it could be construed as a binding contract if (i) signed by the parties, (ii) only minor terms are not addressed, (iii) is specific about the property, and (iv) contains no non-binding language.<sup>2</sup>

## Benefits of an LOI

Using an LOI can be a great guide and benefit to real estate practitioners and businesspeople alike in making a transaction more efficient. If the parties cannot agree upon the fundamental terms in the LOI, proceeding with additional documents may not make sense or be productive.

An LOI can also provide for confidentiality and exclusivity of negotiations during the period it takes to negotiate and agree upon the final transaction document. An LOI should be non-binding between the parties (and contain specific language to that effect), that way if the parties cannot agree upon terms of a purchase agreement or lease, then there is less chance of there being contract implications. Parties may be more committed to agree upon final transaction documents if there is an agreed upon and signed LOI showing the parties commitment in moving forward with the transaction.

## What Goes Into an LOI

Greater detail contained within an LOI can assist attorneys in drafting the transaction documents to better follow the party's intent; however this can be a catch-22 in that too much detail could be construed as a binding contract. The following can be found in an LOI:

1. Parties (is it a lease, purchase);
2. Identification of land, if space lease in a building (street address of building/location within building);
3. Identification (dimensions, floor, suite, sq. ft);
4. Rent (fixed, percentage)/Purchase Price/Earnest Money Deposit/Security Deposit;
5. Additional Rent/Operating Expenses (pro-rata share/formula/audit rights or direct pay);
6. Term of lease;
7. Due diligence period (if any), timing of closing;
8. Renewal options (extensions of due diligence);

9. Commencement Date/Rent Commencement Date;
10. Tenant Improvement Allowance (how much/when paid);
11. Permitted Use/Exclusive Use (broad if tenant/specific if landlord);
12. Signage (where, how big, costs);
13. Assignment/Subletting (consents);
14. Landlord maintenance responsibilities (does landlord perform/whose expense?);
15. Tenant maintenance responsibilities;
16. Environmental;
17. Insurance (who maintains/how/when reimburse?);
18. SNDA (will landlord deliver/when?);
19. Brokers;
20. Non-binding; and
21. Requirement to agree upon some type of operational documents, such as an easement or other deal points.

## LOI Tips

If you are going to proceed with an LOI in your transaction, you should indicate that submission of an LOI is not an offer to lease, purchase or sell unless you want to be bound by such LOI. Additionally, have an LOI reviewed by an attorney to help spot issues and ensure that the transaction will not have to be renegotiated later.<sup>3</sup>

Even if the LOI is intended to be non-binding, the following should be considered: (i) a short exclusivity period, to ensure that both parties are working together; (ii) confidentiality of the LOI and negotiations of the same (you don't want the terms of your deal being publicly available in the market); (iii) the right to access certain due diligence items with indemnification; meaning that you may want to consider having clauses (i), (ii) and (iii) as being binding in the LOI for a short period of time; (iv) that the LOI is non-binding but intended to initiate further discussion between the parties; and (v) do not agree to negotiate a lease, purchase agreement or other agreement in good faith (to avoid implications of the LOI or document being binding upon the parties).<sup>4</sup>

- 1) Effectively Using Letters of Intent in Real Estate Negotiations, by Stephen J. Siegel, Rejournals, December 6, 2019 @ <https://rejournal.com/effectively-using-letters-of-intent-in-real-estate-negotiations/>
- 2) Letters of Intent: Proceed with Caution, by Mitchel Chargo, Attorney at Law Magazine, March 29, 2019 @ <https://attorneyatlawmagazine.com/letters-of-intent-caution>
- 3) Shorr Law's Real Estate Blog updated on November 1, 2022 <https://schorr-law.com/letters-of-intent-loi/>
- 4) Letters of Intent Manage the Risks to Maximize the Potential of These Documents, by Susan Fowler McNally, JD, <https://www.ccim.com/cire-magazine/articles/letters-intent/>