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Proper consideration: 10 points to cover in a lease's letter of intent

Too often, prospective landlords and tenants give scant attention to the letter of intent stage of their negotiations. The landlord's satisfaction at having found a creditworthy tenant, whose intended use is in line with the character of the property, and the tenant's excitement in finding a great location at the right price, often leads both parties and their brokers to create a brief LOI without much consideration in order to capture their understanding in writing. The LOI, which should always be nonbinding, will serve as the basis for preparing the lease. Therefore, the parties should spend a meaningful amount of time considering what to cover in the LOI and how to cover it. This article provides a brief overview of 10 lease matters landlords, tenants and their brokers should consider including in the LOI.

■ **Premises.** A description of the premises is the most basic lease term and should be described as accurately as possible in the LOI. Also, the LOI should include any common or other ancillary areas such as parking and property amenities that the tenant will be able to use. Consider illustrating the premises on a floor plan or site plan that is attached to the LOI.

■ **Term.** The LOI should state the initial term as well as any extension terms, including any conditions to the exercise of the extension terms. It should also describe when



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the term will commence if other than the date on which the lease is signed.

■ **Rent.** Although the base rent is almost never forgotten in an LOI, any additional rent, com-

mon area maintenance charges, taxes and insurance costs should also be addressed, including how those charges will be calculated, apportioned and paid. Rent escalations for any extension terms, or at least a method for determining extension rent, should be included.

■ **Rent Commencement.** The LOI should mention if the base rent will start upon lease signing, a specific date or a certain number of days after, for example, the landlord's work is complete or the tenant has obtained its approvals. It should also specify whether any other charges due from the tenant will commence at a different time.

■ **Permitted Use.** This is especially important for retail and industrial uses. For the former, the LOI should be as specific as possible and include any existing exclusives or prohibited uses that will be binding on the tenant. Retail tenants may also want to ask for an exclusive right to

sell certain goods or services on the landlord's property.

■ **Transfers.** The LOI should anticipate the tenant's potential need to assign or sublet the lease or premises at some point in the future and address whether the landlord's consent will be required, the criteria that will be used in the landlord's decision, whether the landlord is due any payments as a result of the transfer and whether the tenant will remain liable under the lease after the transfer.

■ **Landlord's Work.** Any requirement of the landlord to deliver the premises in any particular condition and with any work completed should be stated in as much detail as possible. The LOI should include a procedure for the landlord and tenant to agree on plans for the work and to create and resolve a punch list once the work is complete. Any deadlines for completion of the work, and any special allocations of responsibility for permits and costs, should also be covered.

■ **Tenant's Work.** The LOI should address the extent to which the tenant will be allowed to make alterations to the premises prior to and after lease commencement, and include the landlord's requirements for such work. This is also a good place to address any tenant improvement allowance to be given by the landlord and the tenant's signage rights and responsibilities.

■ **Maintenance and Repair.**

Responsibility for the ongoing maintenance and repair of the premise's interior and the other structural and nonstructural portions of the property, along with the responsibility for maintaining and paying for appropriate property insurance, should be allocated between the parties.

■ **Hazardous Materials.** Although often considered to be part of the lease "boilerplate," landlords and tenants should discuss their expectations regarding the environmental condition of the property. Landlords will often attempt to make the tenant responsible for nearly all environmental problems during the lease term, and tenants will want to be responsible only for problems they cause.

Failing to give the LOI proper consideration usually only postpones dealing with the substantive lease issues, since those issues will inevitably arise during the preparation and development of the lease itself. Without a doubt, addressing those substantive lease issues, preferably at the LOI stage, in a clear manner with an appropriate level of detail, will minimize the parties' risk of having their deal break down after they have spent a significant amount of time, resources, emotional energy and legal fees on the preparation of the lease and on due diligence, design and construction and related matters.▲