

Letter of Intent: Less Can Be More



L. Kilberg



B. Rothschild

Lori Kilberg and Benno Rothschild are attorneys at Hartman Simons & Wood, a law firm based in Atlanta that specializes in commercial real estate acquisitions, sales, financing and leasing. Kilberg and Rothschild lead a team dedicated to representing outlet owners and developers throughout the country.

By **LORI KILBERG, BENNO ROTHSCHILD**

Retail lease negotiations can be time consuming and costly. In almost every instance, we recommend outlining in writing the basic lease terms before drafting the actual lease agreement, whether or not the parties execute a formal Letter of Intent (LOI). The LOI offers the parties the opportunity to determine whether both are satisfied with the transaction's basic economics and critical business terms.

There must be a balance between moving quickly to lease negotiations versus entering into a detailed LOI. The latter involves pre-negotiating sensitive issues of concern to streamline lease negotiations, the former using more general terms for flexibility and limiting the time spent working on a LOI.

From a tenant's perspective, particularly when using a landlord's lease form, a more detailed LOI can be useful. For national tenants, often the deal will not be presented to the final decision-making parties before completing the LOI. Thus, it often benefits the tenant to draft a comprehensive LOI to resolve all issues in advance because once the tenant commits its resources to a deal, it alleviates the need to compromise on business issues later during negotiations.

A lease form typically resolves many issues in favor of the landlord. Therefore, from the landlord's perspective, when using a landlord's lease, it is advantageous to use a minimal LOI to "get the ball rolling."

Regardless of the parties' goals, basic items should always be included:

■ IDENTITY OF THE PARTIES

Include the full legal name of the landlord, tenant and any guarantor under the lease. This is the time to determine whether the tenant is a shell entity or has the minimum financial capability expected by the landlord.

■ DESCRIPTION OF THE PREMISES AND LOCATION

Beyond identifying the exact location and the square footage of the premises, there should be a reference to the site plan and lease outline drawing, which should be attached as exhibits to the LOI, if available. Any site plan restrictions, such as protected areas, kiosk restrictions, or landscape plans, should be noted on the exhibits.

■ INCLUDE MAJOR BUSINESS TERMS

Basic terms include the term, rent, renewal options, additional charges such as taxes, common area maintenance and insurance, and any construction obligations of landlord or tenant and how they will be paid. Retail leases, particularly outlet leases, should contain other major business points, such as ten-

ant's use of the premises (including the obligation to provide for discounted sales of merchandise below normal retail pricing), co-tenancy provisions, operating covenants, radius restrictions and other items important to the landlord or tenant. For further detail on these business points and essential clauses, refer to our 2013 VRN (May issue) article, *The Fab Five: Outlet Clauses to Live By*.

■ TIME SCHEDULES

Timing and dates are important to both parties. The landlord will want assurances from the tenant that it will submit plans, obtain permits, commence construction and open within specific time frames, so the landlord can meet its co-tenancy obligations and insure that rent starts flowing as soon as possible. The tenant must have specific delivery dates and delivery requirements so that it can coordinate its construction schedule, and staff and stock the store properly. It is common to provide for penalties if either party does not perform.

■ INTENT TO BE BOUND

An extremely important consideration is a provision clearly indicating whether or not the parties intend to make the LOI binding. Often, to insure the LOI is not binding, one party does not sign, but uses the LOI as a guide to drafting the lease.

General Practice Pointers

■ UNIFORMITY

Brokers, whether representing landlords or tenants, should have a checklist of provisions that must be included in each LOI, as they will not always be working from their own forms.

■ KNOW YOUR CLIENT'S HOT BUTTONS.

If there is an issue vital to your client, include your client's position in the LOI to eliminate room for later negotiations. This will save time and money in the negotiation process, insuring that the deal does not fall apart at the last minute.

■ CONSTRUCTION WORK LETTERS

It is good practice to include landlord and tenant work letters as exhibits. These documents are important monetary items that should not be left to the lease negotiation process, particularly since the attorney is unlikely to be a construction expert.

■ ATTORNEY REVIEWS.

If you are working with the attorney who will be negotiating the lease, it is a good idea to have him/her review the LOI to confirm that it reflects the client's intentions and policy. A cardinal rule is that it is better to have less in the LOI than to have incorrect terms in the LOI. Whether your LOI is binding or not, it's difficult for either party to backtrack once an LOI is negotiated. **V**