



Commercial Classroom: Back to Basics Letter of Intent - by Edward Smith, Jr

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Back to Basics Letter of Intent (LOI)

Our role as agents in a real estate lease transaction is to negotiate all the terms and conditions. The resulting “terms agreed” points are listed in a “Letter of Intent” which is usually sent to the attorney who will be creating the lease. The Letter of Intent is not a binding agreement, only the lease is.

When we first take a listing, we have to determine the Landlords “wish list”, their position on rent and all other terms. The same holds true if we are representing the tenant, what is important to them? When representing a tenant, the landlord’s desired lease terms are known, and the Tenants LOI serves as an offer. This creates the basis for the negotiations until a final “terms agreed” LOI is documented.

Over the years the LOI format has basically remained the same, but how the process works has changed. Prior to the late 1990’s the Tenant, knowing the Landlords desired lease asking rent and terms would make a written offer on each point. Some issues would be what the Landlord was asking for, other the Tenant wanted to get a better deal on. The Landlord would evaluate and send a revised LOI back to the Tenant, perhaps compromising on some of their original positions. This back and forth process could go through several revisions until it was satisfactory to both sides. Then typically the Landlords attorney would draft the lease.

But right before the pandemic attitudes changed, especially in lease processing. Relationships were built on trust first, business second. People wanted to know who they were dealing with, to meet the other side. As agents we were told to never put the parties together, or they could go around us and possibly circumvent our commission. The new lease process started with an initial Letter of Intent, but then the parties wanted to meet in person usually at the site to get to know each other and continue the negotiations. The thinking was they were entering a business relationship typically for the next five years, so this made sense. As agents we had to adapt, and to protect our commission make sure we were present at these meetings. Then the pandemic prevented the face-to-face

meetings we went back to sending drafts of LOI's back and forth. Eventually this was replaced by virtual meetings of all the parties with their Agents. Now post-pandemic, we are finding the Landlords and Tenants want to get to know each other and are desiring to meet in person again.

Leases must be comprehensive and clearly state the facts about the space, who will be responsible for what, and who pays for what. Details are important; a good lease will cover all possible issues.

Follows is a list of items that need to be initially discussed with whichever side you are representing, Landlord or Tenant. Think of this as a "check list" for determining their position and level of importance on each issue. After the negotiations and agreements are reached these items become the basis for the LOI.

Space: If Office Space, Net Useable s/f, Loss Factor or Add-On Factor, Rentable (Billable) s/f. If Retail or Industrial Gross s/f.

Use of Space: Business usage, Certificate of Occupancy, Permits or Licenses

Lease Term: Define the initial term (length) of the lease and Renewal, Extension or Expansion Options

Rent: Base monthly rent or Rent per s/f. What is included in Base Rent?

Base rent to include? (i.e. Heat, air conditioning, utilities, cleaning)

Additional Rent: Are there any additional charges passed through to the tenant? (i.e. Common Area Maintenance (CAM), Insurance, Utilities, Taxes or Tax escalations?)

Utilities: Who pays?

Taxes: Who pays?

Rent Escalations (Increases)

Condition of Space: as is, broom clean

Alterations or Tenant Improvements (construction):

Landlord shall allow tenant to _____, at tenant's expense.

Or Tenant requests construction to be paid for by Landlord, work letter. (Attach sketch and details)

Concession Period (period of free rent): if requested

Occupancy Date

Commence of Rent Payments Date

Security Deposit

Guarantees: Personal, Corporate, "Good Guy"

Sign Requirements

Parking Requirements for Employees

Building Access: Hours Open, Overtime Use of Services

Maintenance and Repair: Who is responsible for what?

Environmental Issues or required tests

Assignment and Sub-Leasing

Liability Insurance

Termination Options

Defaults: Late Payment of Rent

Disputes: Mediated or Arbitrated

Purchase Option: if desired

Right of First Refusal: if desired

ADA – Americans with Disabilities Act Compliance

Building Regulations: “Green” Buildings

Brokers Commission: Fee to be paid and when due (typically paid by the Landlord)

Other issues unique to this situation

The Letter of Intent is a tool to help an attorney draw the lease. Remember, in most cases the attorney has not been privy to these negotiations, so the LOI must cover everything. If some of these issues are not applicable to this situation, indicate so on the LOI so the attorney will know they have been discussed.

Word of Caution: “Standard Form” leases are available at stationary stores and on the internet, these are usually slanted in favor of the Landlord. Also, in certain areas Brokers and Agents may not create or provide standard lease forms, in those areas leases can only be created by attorneys.

Once the lease has been drafted the real estate agent should review it to be sure all the terms agreed are included, that nothing has been omitted or added. Leases are binding legal agreements, both parties to a lease need legal advice. In addition to the agent’s review, both the Landlord and the Tenant need an attorney to review the lease agreements content and the “legalese” parts of the document.

Leases are contracts, in many cases for long periods of time, great care must be taken in their construction and in the review process; and it all begins with the Letter of Intent.

Landlords also need to know about the potential Tenants business and financial capabilities. Accompany the LOI with information and history of the business, marketing materials, company websites, etc.; sufficient to make the Landlord want the Tenant. Most of all the Landlords needs to know that the Tenant “has the money” to pay the rent. Attach three years of the prospective Tenants financials, or other proof of funds to the package.

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