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Letters of intent, although useful, can come back to haunt you, regardless of how savvy you are

rd Robert Delavale



Breslin Realty Development Corp.

Throughout the commercial real estate industry, negotiating letters of intent has long been the standard practice of landlords and tenants alike. Preliminary vehicles used by both parties to memorialize the basic building blocks of a lease. These fundamental documents although useful, can come back to haunt you, regardless of how savvy you are.

I recently negotiated a deal and was forced to use the tenant's form

lease which I didn't have an opportunity to preview while negotiating the letter of Intent. The form actually changed the value of the transaction. I expressed my displeasure with the implications of objectionable provisions and attempted to negotiate something more equitable. The tenant told me there was very little latitude and I would have to live with the provisions as presented or they would be forced to terminate negotiations.

I liked the tenant, but because the tenant changed the value of the transaction I felt justified to revisit the basic terms. I suggested we re-open discussions on the rent and length of term. The tenant's response to my request was: "absolutely not - these items have been agreed to in the letter of intent."

Not surprising.

Although I did agree to the basic business terms, I did so prior to the tenant disclosing their other requirements. If I had prior knowledge of the contents of the tenant's lease I would have been better equipped to evaluate the overall deal. I may have chosen to pass early on, or negotiate a higher rent.

When forced to use anything other than my form lease, I always request a copy to preview. This tenant, however, only generates leases when their real estate committee approves a deal, which is done only after a fully executed letter of intent is presented for approval.

I realize nobody forces either party to execute a lease; however, we all know the time and expense that is wasted when a deal aborts.

This is the reason that I like to follow a few general rules while negotiating letters of intent, term sheets or just speaking to prospective tenants.

Never make verbal representations to a prospective tenant that it has a lease. Doing so may inadvertently create an enforceable lease, and if the tenant can prove damages such as attorney's fees, or has canceled an existing lease based upon these representations, courts could hold you liable.

A landlord or agent should never assure a tenant that it has a deal prior to a lease being fully executed and delivered. Language such as "Don't worry it's going to be signed" or equating final execution of a lease as a mere "rubber stamp," "simply a formality," or the ever famous, "it's a done deal,"

should be stricken from a leasing professional's vocabulary.

I recently negotiated a lease with an anxious franchisee and had knowledge that his lease had been executed on behalf of the landlord. The tenant contacted me to inquire about the lease because he wanted to order his equipment. I instructed him to wait until the lease was fully executed and delivered before committing the resources for equipment. As fate would have it, the lease was forwarded to the franchisor and a few minor changes were required for their approval. Although the changes were not major, they were changes nonetheless. Had they been objectionable I still had the option to abort the deal, a decision that could have been costly had I told the tenant to order his equipment.

Similarly, I have been asked by tenants to sign off on permit applications prior to a lease being fully executed. As tempting as it is to sign the application and get a tenant open early, the implication is the tenant has a lease, making it that much harder to walk away should you so desire.

I like to avoid "contract like" language in any correspondence. Letters of intent and term sheets should appear as non-contractual as possible. Common area maintenance, insurance and tax inclusions are always addressed as "estimates." Language should not imply an offer, agreement, or be interpreted as an acceptance of any terms or conditions.

The proposition of terms should be made as simple as possible, and acceptable only when all terms and conditions of a formal lease document are discussed and agreed to. Maintain the ability to modify any terms while in the process of negotiating a formal lease; this is when other issues surface that were not contemplated during initial discussions.

Make it clear to the tenant that letters of intent may not have been fully reviewed by all of the landlord principals and could even be subject to lender approval, and therefore presented without prejudice to any changes or modifications which may be necessary after such review.

Landlords and tenants will continue to use term sheets and letters of intent as the blueprint for their final transactions. It is important for both sides to remain flexible while still protecting their interest, and not find themselves inadvertently locked into an undesirable position.

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