



## STEIN LAW, PLC

A Real Estate & Business Deal Firm

Big Picture. Small Details. Distinct Approach.

Recent Developments - Fall 2013

See This Quarter's Notable Closed Deals Below

### BOUND INTENTIONS

Nearly all commercial real estate transactions first come into being through a letter of intent or "LOI" at the outset of the deal. LOIs typically set forth the basic business terms for a deal, such as the property location, parties, and the purchase price or rental amounts, and may also include some more detailed deal points, such as rights of first refusal or renewal rights for leases and the timing for due diligence inspection and closing for a purchase. Without a doubt, LOIs are useful to allow parties to negotiate on these major points and "make a deal" while leaving the more detailed legal documents to follow.

Absent careful considerations, questions sometimes arise as to whether an executed LOI itself is binding upon parties to carry out a transaction. Principals and their brokers should be clear as to what is being agreed to initially and what can be done to ensure that the parties' intent is made part of the LOI.

In many cases, the drafter of the LOI includes language expressly disavowing any attempts at making the LOI binding. Consider this disclaimer that we recently saw on a leasing LOI: "This Letter of Intent is not intended to bind Landlord or Tenant in any way. No liability or binding obligation is intended to be created between Landlord and Tenant and any legal rights and obligations between Landlord and Tenant will come into existence only upon the execution and delivery of a definitive lease acceptable in form and content to Landlord and Tenant (and then only in accordance with the provisions of the definitive lease)." In that context, the LOI is really just a guide for the deal, which has no consequence up until the final lease document is signed. Some parties may take little comfort in that approach and worry that the other party does not have any skin in the game.

On the other end of the spectrum, in some situations a party will want an entire LOI to be treated as an enforceable contract from day one. As a matter of law, to be enforceable, the LOI must meet the Statute of Frauds (A.R.S. § 44-1101) and in most cases and the elements of a contract (mutual intent on the terms and consideration). Again, in these cases, it is even most important for there to be no ambiguity in the intent and terms of the deal. Absent express language to the contrary, in some circumstances, courts have taken the view that an entire LOI is binding among the parties. In cases of uncertainty, courts are left up to decide whether there truly was mutual intent to make the LOI itself enforceable and this can be an expensive and drawn out battle. See Rennick v. O.P.T.I.O.N. Care, Inc., 77 F.3d 309 (9th Cir. 1996).

Yet, what if the parties actually do want portions of the LOI to be binding with the remaining terms of the LOI to be nonbinding and subject to being hashed out through the forthcoming negotiations of the transaction documents? For example, many times, our clients will want certain terms to be binding once the LOI is signed, such as (1) confidentiality clauses, (2) agreements not to further market the deal, (3) earlier inspection rights with surviving indemnities and (4) even other terms such as agreements to share in certain pre-closing costs once the LOI is signed. Most certainly, clear and careful drafting is necessary if the parties want to walk this fine line.

Generally speaking, we recommend adding in a disclaimer at the end of the most LOIs stating that the LOI does not create any binding obligation on either party, except for the specific clauses that are intended to be enforceable.

Consider, for example:

***Non-Binding.*** *The provisions of this Letter of Intent do not constitute a legally binding offer or obligation. This Letter of Intent is being delivered as a condition to commence negotiations. The failure of the parties to reach a definitive agreement on the terms set forth in this Letter of Intent will not be construed as a breach of the Letter of Intent by any party. A legally binding obligation with respect to the transaction contemplated in this Letter of Intent will arise only upon execution and delivery of the definitive documents by the parties, subject to the terms and conditions set forth in the definitive documents. Notwithstanding anything in the foregoing to the contrary, upon execution of this Letter of Intent, only the following paragraphs will constitute legally binding and enforceable agreement between the parties: \_\_\_\_\_.*

We help real estate investors, developers, landlords and tenants understand unfolding areas of law and assist in all phases of commercial real estate transactions, including the drafting and negotiation of enforceable purchase agreements, financings, development, leasing and operations and help them carry out their intent!

For more information please call (480) 889-8948, send an email to [info@steinlawplc.com](mailto:info@steinlawplc.com) or visit [www.SteinLawPLC.com](http://www.SteinLawPLC.com).

**\*\*\* Upcoming Speaking Engagements:** [Scott J. Stein](#) and [Rebecca Goldberg](#) will be speaking to the [Central Arizona CCIM Chapter](#) for a Lunch & Learn on October 22nd on Practical Considerations for Commercial Real Estate Letters of Intent.

Stein Law, PLC is a boutique business and real estate deal firm focused on:

- Real estate acquisitions and sales, development and leasing (both tenant and landlord);
- Business transactions, operating agreements, joint venture structuring and corporate contracts;
- Loan financings, workouts and modifications; and
- Hospitality development, management and licensing matters.

The following is a link to our Stein Law, PLC Recent Developments Archives:

- [Recent Developments Archives](#)

Below are some of the exciting representations Stein Law handled in 3Q13:

- Purchase of 264-unit apartment project with a Freddie Mac CME and Portfolio loan (Peoria - August, 2013)
- Client bought value add multifamily complex with private equity and agency financing (Tempe - July, 2013)
- Developer client acquired parcel from one of the largest national shopping center owners for build to suit NNN lease location with a rapidly growing restaurant operator (San Antonio, Texas - August, 2013)
- CMBS loan refinance on existing shopping center (Casa Grande, Arizona - July, 2013)



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