

Beyond the LOI: *Proactive Steps to Get Leases Done Quickly*

By Steven P. Heller, Esq.

Landlords in this anemic leasing market want to act quickly to get leases signed and rent payments started. Economic instability brings fresh urgency to the need for increased occupancy. But delays and roadblocks can slow the process and frustrate a landlord's preferred schedule.

Negotiating the lease isn't enough—the landlord must move all transaction elements forward at once. This article is a checklist of common-sense considerations to get the tenant signed up, into its space, and writing rent checks.

Financing

A project's financing directly impacts the leasing process—and, in today's climate, lenders remain skittish. Practical landlords plan ahead for tenants' initial build-out costs, whether direct costs or tenant allowances. If financing or alternate funding isn't available, then proactively structure leases' business terms to address these expenses.

Tenants expect landlords' lenders to provide a subordination and nondisturbance agreement. It is increasingly difficult and time-consuming to extract reasonable SNDAs from lenders, so start the discussion early in the lease negotiation to avoid a hold

up at lease execution time. If the SNDA becomes a post-execution contingency item, the resulting delay could prevent rent commencement (or, worse, give the tenant a termination right).

Agree in advance on a form or at least initiate early discussions with the parties. A national retailer (or other multisite tenant) already may have completed SNDAs with your lender. Ask the brokers if they know of SNDAs used by the parties in comparable transactions.

This provides another reason to contact the lender early in the process: If the lender won't customize a strategy for the lease, it is at least aware of the negotiations and might be more responsive.

Permits and Construction

Obtaining building and use permits typically takes time, but budget cuts have reduced staffs at city planning and building departments, so review time may take longer than expected.

In addition, the loss of experienced city staff may lead to bumpier handling of formerly routine approvals and often to extensions, which won't help to speed up project revenues, because city approval frequently triggers a tenant's rent obligation. These concerns should motivate the parties to get the permit process in motion as soon as possible.

Because this submittal process requires costly advance design and planning work, the parties often wait until the end of the lease negotiation or make these approvals a post-execution contingency item. In that case, initiate contact with the city agencies and engage in pre-submittal due diligence, to speed the process when it does start.

Alert Tenants

Lease items important to tenants often linger as loose ends, using up critical time at the end of the transaction. For instance, a tenant may need to address its poor financials or its legal entity. Evaluate a prospective tenant's financial condition and legal entity at the start to avoid encountering these problems at the back end of the transaction.

Similarly, tenants may wait until late in the game to discuss tenant financing. A tenant's lender may want SNDA changes, a landlord lien waiver, and lease

Continued



Steven P. Heller is a partner at Gilchrist & Rutter in Santa Monica, Calif. His practice focuses on commercial real estate and business transactions. Contact him at sheller@gilchristutter.com.

Beyond the LOI *continued*

document changes. Ask the tenant for its lender's proposed requirements and integrate these issues as soon as practical into ongoing lease negotiations.

Even standard concerns like insurance and construction frequently stir up new issues just when deal closure is expected. Submit your insurance requirements to the tenant's risk consultants for review long before lease execution. Bring construction teams together to flush out misunderstandings or logistical concerns. Get the tenant's signage plans in advance to facilitate city approval and construction review.

Finally, account for final lease approval by the tenant's management team. How long does it take? What can you do to expedite the process? Current economic conditions add unpredictability to a process that often starts just when you thought things were done.

Third Parties

Because landlords and tenants cannot control adjacent owners or other parties to recorded agreements, obtaining parking or other rights for a tenant under such recorded agreements can cause delays. Similar issues arise from offsite work, environmental remediation, or

similar large-scale requirements, which raise substantial legal and practical issues. Obviously landlords should confront these matters long before they reach a crisis point.

Lease security introduces such third parties as guarantors and issuers of letters of credit such as banks. Although negotiation of the guaranty or LC routinely occurs at the last minute, try to negotiate these documents at the same time as the lease to avoid delays.

Lease Negotiation

The lease negotiation process necessarily controls the basic nature and timing of the deal. Every negotiation goes more smoothly when the parties negotiate rates and terms realistically.

The lease document frames the tenor of the legal negotiations. Onerous pro-landlord lease forms take longer to negotiate. Accordingly, to quickly close deals, avoid draconian lease forms or at least offer pre-negotiated forms that soften the hard edges.

Accept risk in the negotiations. While landlords shouldn't dispense with careful lease review or make capricious concessions, holding fast to every precaution prolongs negotiations.

Consider the big picture value when selecting attorneys. Property owners are increasingly conserving precious cash by keeping legal work in-house, but an in-house attorney may lack real estate expertise or simply be overloaded with work, ultimately delaying the deal. Also, this market calls for flexibility in approaching the legal provisions of the lease. An attorney with experience as a real estate business person, or at least a business-oriented approach, adds value in this economic environment.

When you need to put a tenant in place, look beyond the LOI and lease document. This leasing market presents multiple challenges that parties need to get out in front of to avoid delays in getting ink on the signature page and rent in the lockbox. Landlords can't control everything, but they can take a proactive approach to create momentum toward a completed deal.

This article was reprinted with permission from Commercial Investment Real Estate, magazine online, July August 2010. www.ciremagazine.com © 2010 CCIM Institute. All rights reserved.