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Basics and Issues with Selling and Purchasing Real Property, Mineral Leases and/or Cell Tower Leases

Jason Michael Adelstein

I. INTRODUCTION

This article discusses some basics and common issues regarding the selling and purchasing of real property and entering into oil/gas leases or cell tower leases. I attempt to give practical tips and red flags to look out for when proceeding with such matters, including, without limitation, the pros and cons of using a Letter of Intent ("**LOI**"), key provisions to consider in Purchase and Sale Agreements ("**PSAs**"), and fundamental understandings and concepts to contemplate when entering into oil/gas and cell tower leases.

II. ACKNOWLEDGEMENTS

I would like to thank Ken Mills for his prior paper, Top Ten Issues When Negotiating Earnest Money Contracts, and Patrick Rouse for his paper, Cell Tower Leases from the Landlord Perspective, which were great resources for me in tackling these topics.

III. PSAs

A. LOIs

What is a LOI?

A LOI is an agreement between the parties to a transaction that outlines the general business and/or legal terms of the transaction prior to drafting the formal, complete documents to effectuate the transaction. The terms, detail, and level of comprehensiveness of LOIs vary widely depending on the deal, who drafts the LOI, and the parties to the transaction. LOIs can be binding, non-binding, or a combination of the two. Additionally, a LOI can have several different titles, such as: a Memorandum of Understanding, a Gentlemen's Agreement, an Agreement in Principle, a Letter of Understanding, a Term Sheet, and a Transaction Outline. If the document is signed by the parties and outlines the general business and/or legal terms of an agreement, then it operates as a LOI and will be treated as one, regardless of its title or level of sophistication.

Why do we use LOIs?

There are many reasons why LOIs are used in a wide range of business transactions, including commercial real estate transactions. A well-drafted LOI can save the parties to the transaction time and money. First, before the parties undertake the time, expense and energy of drafting the formal, complete documents to a transaction, they can utilize a LOI to help determine the likelihood that they will be able to reach consensus on the larger points of a transaction before undertaking the expense of drafting the longer and more expensive formal documents. Second, a well-drafted LOI should streamline the process of drafting and negotiating the formal, complete transaction documents, which means reducing back and forth between attorneys and saving the parties time and fees.

Who drafts the LOI?

Anyone can draft a LOI. Most frequently we encounter LOIs drafted by the real estate brokers, the actual parties to the transaction, or an attorney representing one of the parties. No

matter who drafts the LOI, we recommend attorneys advise all of their clients to allow the attorneys to review and provide comments to the LOI.

Considerations in drafting a LOI: How do we best protect our client's interests?

1. Be specific, precise and complete, as the LOI will be utilized to draft the final, formal agreements for the transaction.

    a. Consider the purpose of your LOI in that particular transaction.

    b. The person who drafts the final transaction documents may not be you, so be clear, complete, and organized when you draft the terms.

    c. Include an expiration date on the offer and perhaps an additional expiration date to finalize the formal agreements between the parties.

2. Binding vs. Non-Binding.

    a. Depending on the transaction, there are some terms in the LOI that may be appropriate to make binding on the parties, such as: confidentiality agreements; agreements that the LOI shall be non-binding; a no-oral modification clause; "no-shop" clauses; a provision stating there is no intent to form any sort of partnership, joint venture, or any other association; any conditions precedent to the transaction being finalized; a provision stating that there shall be no waiver of conditions precedent absent written agreement of the parties; and a waiver of the right to a jury trial. However, completely binding LOIs should be approached with extreme caution and, in most circumstances, not used.

    b. From the very beginning, be clear about your intention for the LOI – whether it is intended to be non-binding or binding. If the intent is for it to be non-binding, then we would suggest titling your document "Non-Binding LOI".

        i. Include several references to the non-binding nature of the agreement. Simply stating that the parties will execute binding documentation at a later time is not enough to prevent a LOI from becoming binding. The court in *John Wood Group* made it very clear that "a party who does not wish to be prematurely bound by a letter agreement should include 'a provision clearly stating that the letter is nonbinding, as such negations of liability have been held to be effective.'" *John Wood Group USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 19 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (quoting Allan Farnsworth, Farnsworth on Contracts § 3.8b, at 193 (1990)); *see also* 1 a. Corbin, Corbin on Contracts §§ 29 and 30 at 97 (1963); Andrew R. Klein, Comment, Devil's Advocate: Salvaging the Letter of Intent, 37 Emory L.J. 139, 143 (1988) (holding a well-drafted letter of intent should explicitly state that the parties do not intend to be bound).

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