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Spend some time up front and save some time later - by John Blake

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Whenever I am presented with a letter of intent (LOI) to review on behalf of a client, on either the buyer or the seller side, my initial observation is the parties' momentum. At this nascent stage, the deal is encapsulated in a few pages of the LOI which likely has been drafted by one party, or its counsel or broker, after reaching at least an agreement in principle on key terms such price and due diligence review, financing contingency and closing dates. The LOI may be characterized as non-binding, and almost always conditions the parties' obligations on entering into a purchase and sale agreement as a complete expression of their intentions. The marching orders received along with the draft are typically to "look it over" to make sure it makes sense and save the big investment of time for the purchase and sale agreement negotiation, which may come after a sufficient amount of due diligence has taken place for the buyer to be reasonably certain there are no deal-breakers lurking.

More often than not, the above process works, and the parties get to a mutually agreeable purchase and sale agreement, followed by a successful closing. However, there are situations where a modicum of investigation before signing the LOI can save both time and money (in terms of fees) by finding a showstopper early or narrowing the focus on key issues to streamline negotiations of the purchase and sale agreement.

In some situations, digging into the details of the property may result in forgoing the LOI altogether and proceeding straight to purchase and sale agreement negotiations, when reaching final agreement on a thorny issue is uncertain and likely to require extensive give-and-take by buyer and seller. The approach of proceeding straight to purchase and sale agreement can also be helpful to a seller who has multiple interested parties in a property and wants to avoid tying it up for a protracted period only to have the deal fall apart at the purchase and sale agreement stage.

The first step in any real estate contract is to correctly identify the property and the owner. There are a multitude of on-line resources from which to obtain key information regarding both the parties and the property. Two in particular I look to are the records of the assessor in the municipality where the property is located, and the applicable Secretary of State for the domicile state of an entity owner. The assessor's records will identify the property owner and may include a reference to the recording of the instrument creating title. Depending on the domicile state of the entity-owner, the available free public access that Secretaries of State offer will have primary information regarding the entity. If the property is in a jurisdiction where real estate title records are available on-line, locating the current deed to the property confirms its legal description, and may identify encumbrances and appurtenant rights.

Assessor's maps, although not as reliable as an ALTA survey, can provide some confirmation of the property's basic features such as shape, frontage and abutting parcels. Many municipalities have incorporated their assessor maps into a geographic information system (GIS), which can overlay information such as topography, waterbodies, protected resource areas, and zoning districts.

It is also worth noting that in Massachusetts, the Department of Environmental Protection (DEP) maintains an on-line and publicly accessible, searchable database of sites with contamination subject to oversight by the DEP.

With a wide range of information nearly instantly available, it makes sense to front-load as much of the due diligence as possible at the LOI stage, while being mindful of the parties' expectations from a timing perspective. The speed of the transaction, or at least the expectations of the same, can actually be helped by the preliminary investigation, particularly in the post-pandemic reality where the availability of engineers, surveyors, appraisers, and even municipal boards has at times been limited. The milestones set forth in the LOI (e.g., due diligence period, financing contingency) should account for the buyer's particular needs for the property which may require a longer lead time, such as obtaining a survey or permits and approvals. The buyer then avoids later asking for extensions of deadlines, and the seller can plan accordingly.

There will be situations where the timing does not permit looking at these other resources. However, when the opportunity presents itself taking advantage can make life in the transaction easier further on.

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