

Real Estate and Construction Newsletter, February 2019

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Letters of Intent - Are they Worth the Time and Risk?

By: Sarah Yocum Rider

Related Practice Area: Real Estate

Related Industry: Construction

Letters of intent are often considered a necessary first step in a commercial real estate transaction, such as an acquisition, sale or lease. Parties, however, should carefully consider whether entering into a letter of intent is worth the time and risk.

Agreement on the basic terms of a transaction in a letter of intent tends to facilitate agreement on the remaining terms and typically makes the parties more committed to finalizing a deal. However, a poorly drafted letter of intent, particularly one with ambiguous terms - or lack of clear, non-binding language - will often impede a transaction or cause the parties to waste time and money.

Letters of intent are, when drafted correctly, non-binding documents that outline key terms of a business deal, while leaving the remaining issues (and the details of the agreed upon terms) to future negotiation and drafting. Many letters of intent include a defined length of time during which the parties will negotiate the comprehensive agreement, whether it be a purchase agreement or lease. The letter of intent should state that it will automatically terminate after that time period expires or, that either party may terminate the letter of intent at any time thereafter by providing written notice.

To avoid a letter of intent from legally binding the parties, it is important to include a separate provision clearly stating that the provisions contained in the letter are not legally binding. Although a letter of intent is typically non-binding, it is very common for certain provisions in the letter to bind the parties, such as confidentiality, exclusivity/no shop and brokerage payment provisions. In the case of confidentiality, make sure this provision does not preclude seeking professional assistance from advisers, such as attorneys, accountants or prospective lenders. These binding provisions should be carefully drafted so it is completely clear that they are independent, legally binding obligations

and are enforceable.

Another common provision in a letter of intent is an obligation to negotiate in good faith. It is imperative, however, that this obligation to negotiate in good faith not be included as a binding provision. If it were, one party could claim that by not following through with the transaction, the other party breached the good faith obligation and could be subject to legal action.

Although letters of intent are often useful in establishing business terms of a purchase agreement or lease, parties should consider creating a simple term sheet and proceeding directly to a comprehensive agreement. If you do decide to enter into a letter of intent, it is important to have the letter of intent reviewed by legal counsel to make sure you are adequately protected. If you have any questions regarding letters of intent, feel free to [reach out to me](#).

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Catching up with ... Derek Dissinger

In each newsletter, we'll feature someone from our Real Estate and Construction groups to help you learn more about them. In this edition, we're catching up with the groups' newest partner, Derek Dissinger.

College: Lebanon Valley College

Law School: Duquesne University School of Law

From: Lebanon, Pa., graduated from Cedar Crest High School

Lives: Lancaster

Started at Barley Snyder: December 2013

Work: Licensed to practice in both Pennsylvania and Maryland, Derek's real estate practice includes helping clients with both purchasing and selling, commercial leasing and land development. He works with clients in hotel purchases and sales, as well as purchase and sale of various types of franchised businesses. That experience pushed him to help establish the firm's new Hospitality Industry Group, which specifically works with hotels, restaurants and the service industry. Derek also is a licensed title agent in both Pennsylvania and Maryland. At the start of 2019, the firm named Derek one of its newest partners.

Did you know?: Following multiple ankle surgeries over a two-year period, Derek recovered to complete a half marathon in 2018 and was a part of the firm's softball team which won back-to-back league championships.

He says: "I believe the most effective counsel comes from partnering with my clients to accomplish their goals. This means understanding their business, the challenges they face and adding value to my representation of them by offering creative solutions where possible. I'm lucky to have a great team behind me here and I think our clients appreciate the team atmosphere that we perpetuate."

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The New Normal of Pennsylvania Liquor Licensing

By: Larry C. Heim

Related Practice Area: Real Estate

Related Industry: Construction

Changes in the Pennsylvania Liquor Code through the last several years have been the most sweeping since the end of prohibition.

Those changes have completely changed how real estate developers and investors have approached projects where a liquor license could potentially be involved.

The Pennsylvania Liquor Control Board issues liquor licenses in three categories: retail, manufacturing, and distributing. Retail licenses such as restaurant license permit the licensee to sell, spirits, wine and beer, and the changes in this license are what has caught the eyes of real estate developers, especially ones that build projects such as neighborhood centers with restaurants, stand-alone, national chain restaurants or malls that could include a restaurant.

These licenses are issued on a quota system based on the population of the county and are permitted to be transferred between municipalities within the same county under certain conditions. If you want one of these licenses you have to buy one from an existing license holder or participate in one of the sealed bid auctions of previously forfeited licenses conducted by the PLCB.

Several years ago, convenience and grocery stores such as Sheetz, Rutter's, Giant and Weis decided to get into the business of selling beer. Since there is no such thing as a convenience store license, applicants and attorneys had to create conditions that turned the convenience store into a "restaurant" under the Pennsylvania Liquor Code requirements, and to skirt the long-standing prohibition of the sale of liquid fuels at a liquor-licensed property. [Act 39 passed in 2016](#), which established new regulations within the state's liquor code, including easier access for grocery and convenience stores to receive liquor licenses.

The effect of these new buyers wading into the market has had a dramatic effect on the prices of liquor licenses. Before Act 39, the average price for a restaurant liquor license in York County was around \$180,000. One sold last week in the county for over \$400,000. The inflated prices are having good and bad effects on the local community. It is serving as a surprise retirement fund for longtime license holders of small establishments that may have been struggling with how to leave their business. It is also has been removing "nuisance bars" since the owners would rather sell the liquor license for the inflated amount instead of forfeit their license for nothing because of repeated PLCB violations.

However, current license sale prices are making it difficult for a small restaurant to enter into the business of selling alcohol. Because small bars and restaurants are being priced out of the market, the real estate where the sold license was located is left vacant and its value deflated.

This trend doesn't seem to be going away anytime soon. The appetite of these new purchasers presently seems insatiable with new players such as [Turkey Hill and Royal Farms entering the market](#).

If anyone has any questions about the "new normal" of retail liquor licensing in Pennsylvania and how it could relate to your real estate development project, please [reach out to me](#).

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Possible Pitfalls Under the Newly Amended CASPA

By: Reilly S. Noetzel

Related Practice Area: Real Estate

Related Industry: Construction

With the amendments to Pennsylvania's Contractor and Subcontractor Payment Act (CASPA) effective for over four months, it is important to consider the consequences that could result from a failure to abide by the new requirements.

Here are some possible pitfalls or mishaps that could affect a party's rights during a construction project and some suggestions for owners, contractors, and subcontractors on how to prevent them:

Failure to Adhere to Timelines: Act 27, the law that amended CASPA, contains several new timing requirements that serve as mechanisms to perfect rights under CASPA. The law caps the amount of time a contractor or subcontractor may go unpaid without suspending work at 70 days beyond the unpaid bill. Contractors and subcontractors should carefully track the timing requirements under CASPA so they can stop work as soon as they are entitled to do so. A contractor or subcontractor must provide two notices before they stop work: a 30-day notice that work will be suspended and, after 30 days have passed since the first notice, a 10-day notice of when the work will be suspended without payment. Since the 70-day time period must elapse before a contractor or sub can walk off a job, it is crucial to give notice within these timeframes. Otherwise, the right to suspend work will be delayed until those time periods have elapsed. Contractors and subcontractors may wish to keep "form" notices to suspend work in their files for each project so that these forms may be sent out quickly after the appropriate time periods have expired. It is also worth remembering that parties to a construction contract are entitled to follow the payment requirements under their respective contracts, as long as those requirements don't exceed the time limits in CASPA.

Unclear Documentation of Deficiencies: Failure to adequately explain a withheld payment could cause future headaches, so parties should carefully document and explain why a payment is being withheld. An owner withholding payment must give a written, good-faith explanation of the deficiency item within 14 days of the contractor's invoice and the amount withheld by the owner must be reasonable. Act 27 does not define what constitutes a "deficiency" and there may be disputes between parties as to whether payment has been withheld for a valid deficiency. Courts will likely need to resolve these disputes and clarify what types of items qualify as "deficiency" items.

Adequately explaining a withholding can also protect against CASPA violations. For example, **a failure to give a reason for the withholding is considered a complete waiver of the right to withhold payment.** In that situation, the withholding party must pay an invoice in full, even if there was a valid reason to withhold payment, such as incomplete work. To avoid disputes or violations, parties intending to withhold payment should calendar the 14th day after receipt of an invoice as a crucial deadline to give notice and explanation of the withheld payment. In addition, on the 15th day after an invoice is sent, the invoicing party should confirm that it has not received a notice of withholding or a reason for the withholding and then prepare to submit a claim to perfect its rights to receive payment in full.

Failure to Explain Retainage After Final Acceptance of the Work: If retainage is held more than 30 days

after final acceptance of the work, written explanation must be given. Failure to provide the written explanation will result in a waiver of the right to hold retainage, and payment must be made in full. A party holding retainage, such as an owner, should be prepared to confirm what items, if any, still warrant retainage to be held and the reasons should be given within 30 days after the work is accepted. A checklist, punch list or other document may be useful during various phases of a project to quickly identify reasons why retainage should be held. Contractors and subcontractors should also be prepared to submit a claim 31 days after final acceptance of a work to ensure that final payment is made when required.

Contract Contains Waivers or Alterations of CASPA Requirements: Act 27 prohibits parties from contracting around CASPA requirements. Owners, contractors and subcontractors should review their existing construction contracts to confirm that they either conform to or supplement CASPA, and that they do not reduce or waive any party's rights under CASPA. Provisions will be unenforceable if they require a contractor or subcontractor to continue to perform work without being paid, because an owner waives its right to withhold payment by not providing a valid reason for withheld payments within the 14-day requirement of CASPA. Many construction contracts contain requirements that contractors and subcontractors perform work during payment disputes, and this language must be modified to avoid incurring significant penalties.

Anyone in the construction industry that would like to consider how to better perfect their rights under CASPA or who would like to review their existing construction contract in light of Act 27 can [contact me](#) or any member of the [Barley Snyder Construction Industry Group](#).

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New Bidding Thresholds Up 2.3 Percent

By: Daniel T. Desmond

Related Practice Area: Real Estate

Related Industry: Construction

The Pennsylvania Department of Labor & Industry has published the authority and municipal 2019 bidding thresholds, with only modest adjustments.

The percentage change for the 12-month period that ended September 30 is 2.3 percent. On January 1, the new bidding thresholds for municipal authorities are:

- Purchases and contracts below \$11,100 require no formal bidding or written/telephone quotes.
- Purchases and contracts between \$11,100 and \$20,600 require three written/telephone quotes, but no formal bidding.
- Purchases and contracts over \$20,600 require formal bidding.

The bidding thresholds provide for an annual inflation adjustment based on the Consumer Price Index for All Urban Consumers.

[Click here](#) for the specifics of the adjustments.

If anyone has any questions on these new thresholds, please [reach out to me](#).

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