

LETTERS OF INTENT  
ACRELIVE PROGRAM  
May 9, 2017

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**EXCLUSIVITY:**

**Example 1**

Seller agrees (a) to discontinue active marketing of the Property and any current negotiations for the sale of the Property, (b) not to enter into any new negotiations with any third parties for the sale of the Property, and (c) not to solicit purchase offers for the Property from other parties from the date this Letter is countersigned unless Buyer does not proceed to Closing on or before the expiration of the Due Diligence Period. This paragraph constitutes the binding obligation of the Seller until this Letter expires or the Purchase Agreement has been executed and delivered by both parties.

**Example 2**

Seller agrees that upon execution of this letter, Seller and its agents, including Seller's listing broker, shall cease negotiations with any other existing or prospective buyers of the Property and agrees not to enter into any agreements concerning the sale or transfer of the Property with any other person or entity other than Buyer for a period of fourteen (14) days following the execution of this letter ("Exclusivity Period"). Upon execution of this letter, Buyer and Seller shall negotiate in good faith to finalize the Contract. If the Contract is not executed before the expiration of the Exclusivity Period, this executed letter shall automatically terminate and neither Buyer nor Seller shall have any further rights or obligations hereunder.

**Example 3**

In consideration of Buyer's commitment to expend significant time, effort and expense to evaluate the feasibility of the acquisition of the Property, Seller agrees that from the date of Seller's acceptance of this Letter of Intent until the earlier of \_\_\_\_\_ or the execution and delivery of the Purchase Agreement (unless sooner notified by Buyer of its intent not to acquire the Property) Seller shall not offer the Property (or any interest therein) for sale, option, grant a right of first to any other party or negotiate, solicit or entertain any offers to purchase, option, grant any other ownership interests in the Property. The parties acknowledge, however, that Seller has a signed refinancing letter of intent and is working through due diligence and document review toward a loan closing on \_\_\_\_\_. Buyer acknowledges that if Buyer and Seller do not finalize the Purchase Agreement by \_\_\_\_\_, or if the parties otherwise discontinue discussions pursuant to this Letter of Intent, Seller has the right to close on the new loan, as it deems reasonably necessary.

**Example 3**

In consideration of the expenses Buyer will incur in preparing the Purchase and Sale Agreement and performing due diligence related to the proposed sale, Seller agrees that it will not, directly or

indirectly, through any officer, director, employee, agent or representative, provide any information to, solicit, discuss, negotiate or entertain any inquiries or proposals from, or continue to enter into any negotiations with, or provide information to, any party other than Buyer and its affiliated entities with respect to the sale, lease, management, development, or disposition of the Property, or any portion thereof, without the express knowledge, involvement, and written permission of Buyer (not to be unreasonably withheld, delayed, or conditioned), until the earlier to occur of (1) the date that is thirty (30) days after the execution of this LOI if a Purchase and Sale Agreement in form and substance satisfactory to Buyer and Seller in their sole discretion has not been executed and delivered by such date, (2) the date of execution and delivery of the Purchase and Sale Agreement, which shall cover any Exclusivity Period, or (3) the date on which Buyer may have given written notice to Seller that it will not pursue the transaction contemplated hereby (“Exclusivity Period”).

## NON-BINDING NATURE:

### Example 1

The purpose of this Letter is to set forth the present mutual intent of Buyer and Seller to negotiate and attempt to enter into a Purchase Agreement. Neither Buyer nor Seller shall be legally bound to purchase or sell the Property unless and until a Purchase Agreement containing terms, conditions, and provisions satisfactory to both Buyer and Seller has been executed and delivered by both parties. Notwithstanding the foregoing, the parties acknowledge and agree that the provisions of this paragraph and paragraph 13 [exclusivity] will be binding and enforceable against the parties. The terms of a fully-executed and delivered Purchase Agreement shall fully supersede the terms of this Letter. Notwithstanding that either or both parties may expend substantial efforts and sums in anticipation of entering into a Purchase Agreement (including the efforts and sums involved in Buyer's due diligence), the parties acknowledge that in no event will this Letter be construed as an enforceable contract to sell or purchase the Property and that each party accepts the risk that no such contract will be executed.

### Example 2

Buyer and Seller each acknowledge that a transaction of the type contemplated by this Letter of Intent involves terms and conditions which have not yet been agreed upon and that this Letter of Intent is in no way intended to be a complete or definitive statement of all the terms and conditions of the proposed transaction, but contemplates and is subject to the negotiation and execution of a mutually satisfactory Purchase Agreement. Except as provided in Section 10 [Confidentiality] above and Section 12(b) [Negotiation of PSA] below, neither Buyer nor Seller will be legally bound in any manner unless and until the Purchase Agreement has been executed by both parties. The provisions of Section 10 and Section 12(b) below are intended to be and shall be legally binding upon the parties.

### Example 3

Buyer and Seller each acknowledge that a transaction of the type contemplated by this Letter of Intent involves terms and conditions which have not yet been agreed upon and that this Letter of Intent is in no way intended to be a complete or definitive statement of all the terms and conditions of the proposed transaction, but contemplates and is subject to the negotiation and execution of a mutually satisfactory Purchase Agreement. **Buyer and Seller are aware of decisional law to the effect that non-binding letters of intent may, under certain circumstances, be interpreted as binding in certain respects, but Seller and Buyer specifically agree and intend that such law shall not govern this letter of intent and that (except as expressly provided in this paragraph), no course of conduct or dealing or other factor or circumstance shall be construed or interpreted in any manner whatsoever as transforming or converting this non-binding letter of intent into a binding letter of intent. Buyer and Seller acknowledge that they are sophisticated investors of commercial real property and expressly recognize, and knowingly assume the risk, that they may be unable or unwilling to consummate the transaction described in this letter of intent and that each of them may each expend considerable sums of money in connection with the transaction contemplated by this letter of intent with no assurance that such transaction will be ultimately consummated.** Except as provided in Section 10 [Confidentiality] above and Section 12(b) [Negotiation of PSA] below, neither Buyer

nor Seller will be legally bound in any manner unless and until the Purchase Agreement has been executed by both parties. The provisions of Section 10 and Section 12(b) below are intended to be and shall be legally binding upon the parties.

**Example 4**

It is understood and agreed that until final execution of a Contract of Sale by Seller and Buyer neither party shall be legally bound to the other, except that neither Seller nor its agents, affiliates or employees shall sell, offer for sale, negotiate with respect to, or otherwise deal in, the sale, lease or other transfer of the Property or any interest therein or any entity holding a legal or beneficial interest in the Property, unless this letter agreement is terminated by Buyer pursuant to the Tests and Studies Contingency or if no Contract of Sale is entered into as aforesaid.

**Example 5**

This Letter of Intent and the terms and conditions set forth therein are solely intended to be used as an outline for negotiation of a formal written agreement. This Letter of Intent is not an offer, is not binding on Buyer or Seller, and may be withdrawn or modified at any time without notice. Nothing herein shall require any party to negotiate, and either party may discontinue negotiations at any time for any reason whatsoever, without any liability or obligation whatsoever. Each party shall proceed with negotiations at its sole cost and expense (which may involve substantial transaction costs). No definitive and binding agreement shall exist until mutual execution and unconditional delivery of a Contribution Agreement. Notwithstanding the foregoing, the terms of Sections 7 [Exclusive Period] and 8 [Brokerage] hereof are intended to be binding and shall survive the termination of this Letter of Intent.

**Example 6**

The following numbered paragraphs of this Letter (collectively, the “Nonbinding Provisions”) reflect our mutual understanding of the matters described in them, but each party acknowledges that the Nonbinding Provisions are not intended to create or constitute any legally binding obligation between Buyer, on the one hand, and Seller, on the other hand, and neither Buyer nor Seller shall have any liability to the other with respect to the Nonbinding Provisions until a fully integrated, definitive agreement (“Definitive Agreement”), and other related documents, are prepared, authorized, executed, and delivered by and between all parties. If the Definitive Agreement is not prepared, authorized, executed, or delivered for any reason, no party to this Letter shall have any liability to the other based upon, arising from, or relating to the Nonbinding Provisions.

\* \* \* \* \*

Upon execution by Buyer and Seller of this Letter or counterparts thereof, the following lettered paragraphs of this Letter (collectively, the “Binding Provisions”) will constitute the legally binding and enforceable agreement of Buyer and Seller (in recognition of the significant costs to be borne by the parties in pursuing this proposed transaction and further in consideration of their mutual undertakings as to the matters described herein).

**PROPERTY CONDITION; SURVIVAL:**

Buyer shall purchase the Property in “as-is” condition except for specific representations and warranties set forth in the Purchase Agreement. The representations and warranties shall survive the closing and the delivery of the deed for a mutually agreeable period of time and at closing Seller shall provide security reasonably acceptable to Buyer (e.g., escrow holdback or creditworthy entity) to address damages Buyer may suffer arising from a breach of such representations and warranties discovered by Buyer during the survival period.

**PSA NEGOTIATION:**

Promptly after the execution of this Letter of Intent by Seller and Buyer, Buyer shall instruct its counsel to prepare an initial draft of the Purchase Agreement consistent with the terms contained herein. Until the earliest of (i) \_\_\_\_ days after the execution and delivery of this Letter of Intent by Seller, (ii) the Execution Date, or (iii) the written termination of this Letter of Intent by Buyer, Buyer and Seller shall negotiate in good faith to finalize the Purchase Agreement and Seller shall not negotiate for nor make or accept any offers to purchase or sell the Property or any part thereof, from any other party. The Purchase Agreement shall provide that Seller will not solicit or accept any offers, regardless of whether binding, regarding the Property during the period from the Execution Date through the Due Diligence Expiration Date, and thereafter until the Closing Date.

**CONFIDENTIALITY:**

The fact that discussions are taking place with respect to a possible acquisition of the Property by Buyer, the existence of this letter, and any of the terms contained in this letter, may not be disclosed by Seller to any third party without the prior written consent of Buyer, except (i) to the extent required by law, judicial order or governmental rules or regulations or (ii) to its attorneys, officers, and employees, and solely in connection with the contemplated transaction. Seller or Buyer, as applicable, shall be responsible for any breach of the terms and confidentiality of this Section by any of the parties listed above in clause (ii). The terms of this Section are intended to be binding and shall survive the termination of this Letter of Intent.

	<b>Corbin Category</b>
<b>LOI Not Enforceable</b>	1. Parties specifically state that they are not to be bound until the formal writing is executed.
	2. Parties clearly point out one or more matters on which they must agree before negotiations are concluded.
<b>LOI Enforceable</b>	3. Parties express definite agreement on all necessary terms, and say nothing as to other relevant matters that are not essential, but that other people often include in similar contracts.
	4. Situation involving category 3, but with the addition that the parties expressly state that they intend their present expressions to be a binding agreement or contract—this is conclusive of their “intention.”

	<b>Factors used to determine whether parties manifested an intention to be bound by the LOI</b>
<i>Teachers Ins. and Annuity Ass'n v. Tribune Co.</i> , 670 F. Supp. 491 (S.D.N.Y. 1987)	<ol style="list-style-type: none"> <li>1. Language of the preliminary agreement [most important factor].</li> <li>2. Existence of open terms.</li> <li>3. Whether partial performance has occurred.</li> <li>4. Context of the negotiations.</li> <li>5. Custom of such transactions.</li> </ol>
RESTATEMENT (SECOND) OF CONTRACTS	<ol style="list-style-type: none"> <li>1. Whether the agreement has few or many details.</li> <li>2. Whether the amount involved is large or small.</li> <li>3. Whether it is a common or unusual contract.</li> </ol>

Additional Reading:

1. Thomas C. Homburger and James R. Schueller, “Letters of Intent—A Trap for the Unwary,” 37 REAL PROP. PROB. & TR. J 509 (2002).
2. J. Andrew Holten, “Letters of Intent in Corporate Negotiations: Using Hostage Exchanges and Legal Uncertainty to Promote Compliance,” 162 U. OF PENN. L. REV. 1237 (2014).
3. Gregory C. Gosfield, “The Structure and Use of Letters of Intent as Prenegotiation Contracts for Prospective Real Estate Transactions,” 38 REAL PROP. PROB. & TR. J. 99 (2003).
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