Letters of Intent in Commercial Real Estate

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Originally published in 2000, this article examines the purpose and construction of letters of intent. The majority of letter-of-intent cases decided since that time have focused on the elements necessary for a letter of intent to have contractual effect; i.e., adequate consideration, sufficient definiteness and manifestation of an intent to be bound. For example, one district court held

1 Where necessary, citations from the original article have been updated to reflect subsequent case history.

2 Gregory G. Gosfeld examines the pitfalls and perils associated with the use of letters of intent in his recent article, *The Structure and Use of Letters of Intent as Prenegotiation Contracts for Prospective Real Estate Transactions*, 38 REAL PROPERTY, PROBATE & TRUST JOURNAL 130 (2003). The following additional resources, which discuss letters of intent generally:


that, in the leasing context, a letter of intent is not enforceable unless it contains a property description that establishes and locates boundaries.\textsuperscript{3} As the OfficeMax case illustrates, parties often encounter unwanted surprises because they underestimate the import and complexity of a letter of intent.\textsuperscript{4}

Nonetheless, parties to a commercial real estate transaction often insist on entering into a letter of intent before the final sales agreement or lease is signed. The initial question faced is why use a letter of intent? Why not go straight to negotiating the contract? Letters of intent can flush out major problems of the transaction relatively early saving all parties time and expense. They serve to focus the parties on material terms. These material points provide lawyers with a skeleton of a deal from which full documentation can be drafted.

Furthermore, the letter of intent can mentally (if not legally) commit the parties to the transaction. The time, effort and expense of negotiating a letter of intent can rival that of a full-blown sales agreement or lease. Ironically, unlike the sales agreement or lease, parties often dismiss the letter of intent as preliminary and legally unenforceable. As discussed later in this article, a letter of intent deserves the same attention to detail as any other legal document. Careful drafting is imperative to avoid unwanted results.

\textsuperscript{3}OfficeMax v. Sapp, 132 F.Supp.2d 1079 (M.D. Georgia 2001).
\textsuperscript{4} Id.
I. Binding vs. Non-Binding

Letters of intent go by various names.\(^5\) Whatever the label or name, the document will generally fall into one of two categories. The first is a letter of intent that simply serves to gauge each party’s commitment to the deal before the more formal agreement. This document serves as a non-binding negotiation starting point. On the other hand, a letter of intent can contain all essential deal terms that are not subject to further negotiation. This type of document forms a binding and enforceable contract.

In deciding the type of letter of intent to draft, a lawyer must know the goals of her/his client. A client may want a binding agreement to prevent the other party from “shopping the deal.” Also, a client may seek a binding agreement in recognition that all essential business terms have been agreed upon and the deal is essentially complete. The desire for a non-binding agreement reflects the mirror image. Perhaps the client is still shopping or there are important business issues unresolved. In that case, the letter of intent should be a non-binding document. Often the client will direct that some elements be binding (for example a confidentiality clause) and others be non-binding. Whatever the situation, the issue of whether the document is binding or non-binding should be explicitly discussed to avoid a nasty surprise at the end of lawsuit.

\(^5\) E.g., deal sheet, deal letter and term sheet.