

A ROSE BY ANY OTHER NAME: IS YOUR CONTRACT *REALLY* A CONTRACT?

Margaret Shea Burnham

Nexsen Pruet Adams Kleemeier, PLLC

North Carolina Land Title Association

September 2005

One of the often litigated issues in real estate contracts is whether a so-called "paper writing" amounts only to a non-binding "agreement to agree." The most troublesome agreements to agree are letters of intent which *sound* like they are non-binding, but may surprisingly be enforced in an action for specific performance. This paper looks at some of the factors to consider when interpreting whether a particular paper writing is (or isn't) a binding agreement.

I. Agreements to Agree

One of the earliest North Carolina cases on agreements to agree goes back to 1876. In Edmondson and Smith v. Fort, 75 N.C. 404 (1876), the issue was whether "the parties came to a positive and definite agreement, and 'the bargain was struck,' which we are told by Blackstone was in old time signified by shaking hands . . . ." The defendant failed to show up at the designated time to conclude the contract. The court noted that that failure "only exposed [the defendant] to the charge of not being a man of his word and a want of punctuality," but not a breach of contract. Id.

The most cited case is Boyce v. McMahan, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974). In Boyce, the plaintiff owned 170 acres in Sedgefield and signed a "paper writing" with a developer, the defendant, identifying key components of an agreement to develop a residential subdivision. Defendant recorded the "writing" and plaintiff sued to have the writing removed from the land records as a cloud on title. The trial court held that the writing was binding and ordered the plaintiff to convey the land to defendant. The Supreme Court reversed.

The "writing" in question was quoted in full in the opinion and contained all of four (4) "recital" clauses and two (2) substantive paragraphs, one of which had four (4) subparagraphs. The recital clauses repeatedly referred to the "desires" of the parties. Twice the agreement made reference to a "more detailed agreement" to follow at a later date. One fact found by the trial

court was that the paper writing was "prepared by counsel for the defendant." Historically, this gave the other party an advantage. See § IV.B.2 *infra*.

The Supreme Court summarized the black letter law as follows:

Generally when parties not under disability contract at arms' length on a lawful subject, the courts will give redress to the injured party for a wrongful breach. On certain subjects and under certain conditions, contracts are required to be in writing. Others are valid if in parol. However, in either event the contracting parties must have agreed on all material terms of the contract.

To constitute a valid contract, the parties 'must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.'

...

The courts generally hold a contract, or offer to contract, leaving material portions open for future agreement is nugatory and void for indefiniteness. 'The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified. Therefore, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.'

Id. (citations omitted). The court held:

When measured by applicable rules, the deficiencies in the subject document are manifest. It is incomplete and insufficient to support either a decree of specific performance or damages for breach. The writing itself carries the terms which destroy its efficacy as a contract. The plaintiff is entitled to have it removed from the record.

The Supreme Court did not focus on the following terms in the defendant's favor supporting a "binding" agreement:

- the 170 acres were identified,
- the price of \$3,000 per acre,
- a further payment of 50% of the net profits,
- the timing of the payments,
- the duties of the developer,
- the commencement of the duties to be "immediately after" certain specified events, and
- the wording used in the writing:
  - "Owner agrees that said land . . . shall be developed,"
  - "Owner will convey . . . ," and
  - "Developer will pay . . . "

Boyce, despite being 30 years ago, is still considered the landmark "agreement to agree" case, being cited as authority in cases as recently as The Currituck Associates v. Hollowell, 166 N.C. App. 17, 601 S.E.2d 256 (2004) and Miller v. Rose, 138 N.C. App 582, 532 S.E.2d 228 (2000).

## II. Letter of Intent

### A. North Carolina Law

In the context of a writing identified as a "letter of intent," the results are even closer to call. The following cases are a sampling of cases which have followed since Boyce.

#### 1. Housing v. Weaver

In Housing, Inc. v. Weaver, 305 N.C. 428, 290 S.E.2d 642 (1982), the North Carolina Supreme Court applied the Boyce case to a dispute involving a letter of intent. Again, the court opinion contains a verbatim copy of the paper writing at issue. Like Boyce,

- the writing contemplated a "more definitive agreement," and

- the writing referred to the "intention" of the parties.

The facts supporting a non-binding agreement to agree were even stronger than in Boyce:

- in "letter" form, comparable to a "letter of intent" (but not labeled "letter of intent"),
- described as a "memoranda of our understanding,"
- references a "proposed" joint venture,
- references that any "problems" will be "worked out to the mutual benefit of the parties,"
- references that the entity will be "mutually agreed upon," and
- references a "possible" division of properties after completion.

The court held that the paper writing was "a mere agreement to agree." When viewed in comparison to Boyce, it would appear that if the paper writing in Boyce was not sufficient to be binding, then the paper writing in Weaver was even less so.

## 2. Pee Dee Oil

In what appears to be an anomaly in the context of letters of intent, the court in Pee Dee Oil Co. v. Quality Oil Co., Inc., 80 N.C. App. 219, 221, 341 S.E.2d 113, 114 (1986) upheld a paper writing challenged as an agreement to agree. The letter in dispute contained all material terms, but omitted a price for certain equipment, providing only that the defendant would pay the "reasonable fair market value." The court determined the omission of the price of the equipment was a "minor, incidental part" of the agreement and enforced the agreement. Pee Dee Oil relied upon Hurdle v. White, 34 N.C. App. 644, 239 S.E.2d 589 (1977)(holding a "check" satisfied the statute of frauds). See also Satterfield v. Pappas, 67 N.C. App. 28, 312 S.E.2d 511 (1984)(holding that once parties agreed upon essential terms of a lease, subsequent disagreement over "boilerplate" did not negate the agreement), relying upon Yaggy v. B.V.D. Co., 7 N.C. App. 590, 173 S.E.2d 496 (1970)(holding a "telegram" satisfied the statute

of frauds) and Hurdle v. White, *supra*. Ironically, Cap Care Group, Inc. v. McDonald, 149 N.C. App. 817, 561 S.E.2d 578 (2002), citing both Pee Dee Oil and Satterfield, concluded that "it is well established in North Carolina that a failure to agree on some issues does not invalidate the underlying agreement." Only Pee Dee Oil involved a letter of intent. For further discussion of Yaggy and Hurdle, see Section III D. *infra*. For further discussion of Satterfield, see Section III. E. *infra*.

3. Northington v. Michelotti

Pee Dee was followed by Northington v. Michelotti, 121 N.C. App. 180, 464 S.E.2d 711 (1995). Here, the court was presented with the issue in an appeal from summary judgment in favor of the plaintiff holding that the paper writing was enforceable.

The facts supporting a binding agreement were:

- partial performance by each party of activities contemplated by the paper writing, and
- joint activity (both parties together executed a subchapter 'S' election form) in furtherance of activities contemplated by the paper writing.

The facts supporting a nonbinding agreement to agree:

- agreement labeled "Agreement of Understanding,"
- references a further agreement to address open issues concerning a buyout, a non-compete and other "future business activities," and
- subsequent to the original paper writing, defendant's lawyer prepared a "letter of intent" which was not acceptable to plaintiff.

The defendant challenged the enforceability of the paper writing, submitting an affidavit that he only signed the writing "to make [the plaintiff] feel better until an attorney could prepare a formal document."

The Court found that there were sufficient questions of fact that precluded summary judgment. After quoting Boyce, the court went on to say:

Where the parties agree to make a document or contract which is to contain any material term that is not already agreed on, no contract has been made; "a so-called 'contract to make a contract' is not a contract at all." Whether mutual assent has been established and whether a contract was intended between the parties are questions for the trier of fact.

The materials submitted by the parties present a genuine issue as to whether the handwritten document reflected a "meeting of the minds" between the parties as to all essential terms of their agreement or whether it merely amounted to an "understanding" or an "agreement to agree." Under our case law, this issue should have been left to the jury to resolve, and the trial court erred in granting summary judgment to plaintiffs on their breach of contract claim.

Id. at 184-85 (citations omitted).

4. Durham Coca-Cola

Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co. Consolidated,

2003 NCBC 3 (2003) (unpublished) is a recent Business Court case in the context of letters of intent. In this case, the court considered the following factors in determining that the paper writing was a non-binding agreement to agree:

- it was subject to a "future, more complete acquisition agreement" which would contain "additional terms" and resolve "matters left open," and
- within the document it was described as a "letter of intent."

The Court focused primarily on the recognition in the paper writing that the parties intended there to be a further agreement. The Court cited several out of state cases, expanding on one in particular. Analyzing Knight v. Sharif, 875 F.2d 516 (5th Cir. 1989), the Court said:

In Knight, the parties' letter of intent regarding a stock acquisition indicated the parties intended to enter into a "final definitive agreement" at a later date. "The parties' use of the term 'final definitive agreement' also leads to the distinct conclusion that what came before, the letter of intent, was neither final nor definitive." This language clearly contemplated further negotiations and showed that the parties intended there to be a final definitive agreement before they were to be bound. The court further noted

that "[c]omplex transactions involving substantial sums are virtually always put into a detailed, formal writing." The court in Knight commented on the "potential tyranny of the courts in forcing contracts upon parties which they were not willing to make for themselves" by stating:

Parties that wish to be bound only upon execution of a formal document agree to negotiation in that manner because they wish to create a writing that is satisfactory to both sides in every respect. It is not for the Court to determine retrospectively that at some point in the evolution of a formal document that the changes being discussed are so "minor" or "technical" that the contract was binding despite the parties' unwillingness to have it executed and delivered. For the Court to do so would deprive the parties of their right to enter into only the exact contract they desired.

2003 NCBC 3 (citations omitted). The court also considered these factors:

- the writing contained a provision that the letter of intent "constitutes our good faith agreement in principle,"
- earnest money was not due until the definitive agreement was executed, and
- the writing contained a "no shop" clause<sup>1</sup>.

The court pointed out the following deficiencies in the writing:

- the form of the acquisition,
- the manner for payment,
- the lease terms,
- the representations and warranties to be included, and
- the indemnities to be included.

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<sup>1</sup> "After the execution of this letter of intent by the seller and prior to April 1, 1999 or any earlier date on which the buyer and seller shall mutually agree in writing to terminate their negotiations hereunder, the seller . . . will not negotiate in any capacity with any others . . ." The Court noted that including a "no shop" clause in a paper writing was inconsistent with a binding agreement as there would be no point in a prohibition on negotiations with third parties if there was a binding agreement. Id.



The court determined that the letter of intent was not enforceable. In addressing why the court could not grant specific performance, the court pointed out that the plaintiff was in effect forcing the court "to enforce an agreement to negotiate in good faith."

B. Fourth Circuit

The Fourth Circuit, applying West Virginia law, recently addressed letters of intent in Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp., 278 F.3d 401 (4th Cir. 2002).

The facts tending to make the writing appear to be non-binding were:

- writing labeled "Letter of Intent,"
- writing subject to certain schedules being completed, and
- writing subject to "negotiation and execution of a mutually agreeable asset purchase agreement."

The facts tending to support a binding agreement were:

- consideration recited "intending to be legally bound,"
- certain specific financing terms (except the terms did not include whether the note would be secured or not), and
- writing included a provision that the letter of intent "shall be binding on and enforceable by the parties."

The Fourth Circuit found the letter of intent ambiguous on its face. The Court adopted a test from the Honorable Leval in Teachers Insurance and Annuity Assoc. of America v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1987) in which two types of "binding" agreements to agree were identified. The court, paraphrasing Judge Leval's opinion, said:

A Type I agreement, the "fully binding preliminary agreement," occurs when parties have reached a complete agreement (including the agreement to be bound) on all issues perceived to require negotiation. *Id.* Such an agreement is preliminary only in form--only in the sense that the parties desire a more elaborate formalization of the agreement. *Id.* "The second stage is not necessary; it is merely considered desirable." *Id.*

Judge Leval referred to the second type of binding preliminary agreement as a "binding preliminary commitment." *Id.* The binding obligations attached to a Type II preliminary agreement are different from those that arise out of the first type of agreement. Type I agreements bind parties to their ultimate contractual objective in recognition that a contract was reached, despite the anticipation of further formalities. *Id.* Type II agreements do not commit the parties to their ultimate contractual objective. Rather, they commit the parties to negotiate the open issues in good faith in an attempt to reach the contractual objective within the agreed framework. *Id.* Under this duty to negotiate in good faith, a party is barred from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement. *Id.*

Id. (footnotes omitted).

Under this analysis, Type I agreements are viewed as binding. The idea is that all the essential terms are already negotiated and a further formal agreement, while desirable, is not necessary. This analysis may result in a court disregarding the expressly stated condition for a further definitive agreement between the parties.

On the other hand, Type II agreements are viewed as incomplete, although the parties obligate themselves to negotiate in good faith.

The Fourth Circuit adopted Judge Leval's five factors to determine whether the paper writing is a Type II non-binding agreement:

- 1) the language of the agreement,
- 2) the existence of open terms,
- 3) whether there has been partial performance,
- 4) the context of the negotiations, and
- 5) the custom of such transactions.

The Court stated that the first prong was "arguably" the most important. In fact, the whole reason for the lengthy analysis was because the Court first determined that the "intent" of the parties was "ambiguous." By analogy, if the agreement had been clear on its face that it was non-binding, you would not need to apply the Type I or Type II test.

After the lengthy discussion of Type I and Type II agreements, the Fourth Circuit remanded to the District Court to reconsider its analysis based upon a full record of the facts ("suggesting" that Type II agreements would be consistent with West Virginia case law recognizing an implied covenant of good faith).

Clearly the Fourth Circuit takes a different view of agreements to agree than the North Carolina Supreme Court in Boyce v. McMahan. No reported North Carolina case cites Burbach (yet).

### III. Particular Real Estate "Writings"

#### A. Settlement of a Dispute

In the context of a lawsuit over a land purchase agreement, the exchange of letters and email between attorneys was sufficient to create a settlement agreement. See The Currituck Associates v. Hollowell, 166 N.C. App. 17, 601 S.E.2d 256 (2004). See also New Hanover County Airport Authority v. Stocks, 163 N.C. App. 610, 594 S.E.2d 258 (2004) (unpublished) (enforcing settlement agreement in context of condemnation); J.H. Batten, Inc. v. Jonesboro United Methodist Church, 158 N.C. App. 542, 581 S.E.2d 832 (2003) (unpublished) (enforcing settlement agreement in context of construction dispute); King v. King, 146 N.C. App. 442, 552 S.E.2d 262 (2001) (dispute over settlement in context of trespass action). There is really nothing unique about real property law in the rapidly expanding law in the area of enforcement of settlement agreements given the evolution of mediations. See Chappell v. Roth, 353 N.C. 690, 548 S.E.2d 499 (2001) (settlement agreement in context of automobile accident).

#### B. Purchase Agreement: Terms of Seller Financing

In El-Amoor v. Needmore Store #2, Inc., 158 N.C. App. 542, 581 S.E.2d 833 (2003) (unpublished), the issue concerned how much detail is necessary in a paper writing for

seller financing to be enforceable. In this case, the parties negotiated certain terms for the sale of land from landlord to tenant, including:

- purchase price,
- interest rate,
- 15 year term,
- start date for payments, and
- end date for rent.

The court gave the parties credit for "[attempting] to address what 'form' the credit transaction was to take," but found the following deficiencies:

- whether the land would be collateral,
- "how plaintiff was to make payments," and
- provisions for default.

Therefore, the court concluded the paper writing was not sufficient to enforce.

The Court quoted Gray v. Hager, 69 N.C. App. 331, 334, 317 S.E.2d 59, 61 (1984):

Credit transactions do not lend themselves to the supplying of essential terms by the courts by implication. They can be shaped in an extensive variety of forms. When their terms remain unsettled, the courts have no basis for assuming that the parties intended to choose one of those forms over a multiplicity of potential others. Absent details of the credit arrangement, a court has no means by which to determine precisely what action prospective creditors seek to have prospective debtors take.

In Gray v. Hager, the parties agreed to the sale of a house and that there would be a note and deed of trust, but provided that they would later agree to the other terms. The court held that the financing lacked essential terms "which were beyond the court's capacity to supply by implication, and as to which the parties had not agreed upon a mode of settlement."

C. Purchase Agreement: Terms of Subordination

The leading case interpreting subordination agreements is MCB Limited v. McGowan, 86 N.C. App. 607, 359 S.E.2d 50 (1987). The parties negotiated seller financing which contained a provision that defendants would subordinate their deed of trust "in such amount as may be reasonably requested by plaintiff." The court held:

Plainly, this phrase requires the parties to agree at a future time as to whether a loan requested by plaintiff is reasonable. This requirement of future agreement on the material terms concerning application of the subordination provision renders this clause void for indefiniteness as a matter of law, without requiring this Court to consider whether the necessary material terms were present to afford defendants' security interest adequate protection.

Id. See also Smith v. Martin, 124 N.C. App. 592, 478 S.E.2d 228 (1996) (subordination agreement was "unenforceable as a matter of law"); White v. Lennon, 161 N.C. App. 742, 590 S.E.2d 23 (2003) (unpublished) (subordination agreement "void for indefiniteness").

D. Purchase Agreements: Sufficiency of Terms

In Yaggy v. B.V.D. Co., 7 N.C. App. 590, 173 S.E.2d 496 (1970), the court was presented with a telegram as the "memorandum" of the understanding, and had no trouble affirming a jury verdict that the parties had a meeting of the minds:

The statute of frauds does, of course, require that all essential elements of the contract be reduced to writing. The telegram in this case does clearly identify the vendor, the vendee, the purchase price, and, so we have held, the property sold. These are the essential elements of the contract. 'A memorandum of an agreement for the sale of land is not necessarily insufficient to satisfy the requirements of the statute of frauds because the time for performance is not stated therein. In the case of an executory contract of sale, where the time for the execution of the conveyance or transfer is not limited, the law implies that it is to be done within a reasonable time, and the failure to incorporate in the memorandum such a statement does not render it insufficient.' The fact that in the present case the attorneys for the parties were engaged in drafting and were attempting to agree upon the language of an instrument which would spell out in detail not only the essential but also the subordinate features of the agreement,

does not compel the conclusion that the minds of the parties had never met upon those features which were essential to form a binding contract.

Likewise, in Hurdle v. White, 34 N.C. App 644, 239 S.E.2d 589 (1977), the court had no difficulty finding a check satisfied the statute of frauds. Again, like Yaggy, the parties failed to agree on the terms of the "option" drafted subsequent to the terms outlined in the "memorandum" – this time in the form of a check which was endorsed. The key missing term, the exact land to be conveyed, only resulted in a "latent" ambiguity, which extrinsic evidence could remedy.

E. Leases: Sufficiency of terms

Cases interpreting sufficiency of lease terms are a bit difficult to reconcile. Smith v. House of Kenton Corp., 23 N.C. App. 439, 209 S.E. 2d 397 (1974), followed the "agreement to agree" line of cases (including Edmondson and Smith v. Fort from 1876), and found that the paper writing failed to include all material terms for an enforceable lease agreement:

In the case at bar, the agreement relied on by plaintiff did not specify all of the essential and material terms of the lease to be executed and left much to be agreed upon by future negotiations. The offer was not complete and the minds of the parties did not meet as to all essential terms. The agreement failed to provide for one of the specifics referred to by Thompson, namely the time and manner of payment of rent. The necessity for this provision with respect to rent is obvious. Whether the rent was payable monthly, quarterly, semiannually, annually, or all at one time, and whether it was payable in advance, at the end of a period or otherwise, presented a major question that finds no answer in the agreement. It might be argued that the provision of '\$400.00 per month' sufficiently implied that a monthly payment of rent was contemplated by the parties. The question then arises, was the rent payable in advance, in the middle of the month, or at the end of the month? A clear indication that the minds of the parties did not meet on this question is the provision in the formal lease proposed by plaintiff that defendant pay the first and last months' rent at the beginning of the five-year period.

Id.

The opposite result occurred in Satterfield v. Pappas, 67 N.C. App. 28, 312 S.E. 2d 511 (1984). The court, faced with a "battle of the forms" over competing lease forms, still found an enforceable agreement:

Plaintiff's argument that no new lease came into effect because neither party ever accepted the written proposals or offers of the other fails to make the crucial distinction between 'a condition which goes to the making of a contract and a statement relating only to its ultimate performance or execution....'  
[Plaintiff] admitted that he and [defendant] reached an oral agreement upon the essential elements of a new lease for the subject premises. The two written leases, each signed by the respective principal, contained identical provisions on the essential elements, reflecting the agreement previously reached by the two principals. The subsequent disagreement over boilerplate language that arose between the attorneys for the parties during the drafting of the instrument may in no way be said to have prevented formation of the contract....

Id.

F. Leases: Option to Renew

In Young v. Sweet, 266 N.C. 623, 146 S.E.2d 669 (1966), the Supreme Court held that an option to renew was unenforceable where the option provided that rent would be "subject to adjustment at the beginning of the option periods." Typically this issue is avoided today with a set increase (flat increase or CPI increase) or a set formula for the then market rates (usually an appraisal method).

G. Easements

An easement is valid even if it does not specify a width. See Intermountain Distribution, Inc. v. Public Service Co. of N.C., Inc., 150 N.C. App. 539, 563 S.E.2d 626 (2002).

IV. Miscellaneous

A. Statute of Frauds and Agreements to Agree.

N.C. Gen. Stat. § 22-2 provides:

All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, . . . and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . . "

The statute of frauds adds the "written" component to agreements to agree. In Howlett v. CSB, LLC, 164 N.C. App. 715, 596 S.E.2d 899 (2004), when the writing was a letter "proposing" lease terms, the court was unwilling to find the writing satisfied the statute of frauds. The court could just as easily have concluded there was no "offer."

B. General Rules of Construction and Agreements to Agree

1. General Rules of Construction

Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. Lane v. Scarborough, 284 N.C. 407 409-10, 200 S.E.2d 622, 624 (1973). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." Walton v. City of Raleigh, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("A consent judgment is a court-approved contract subject to the rules of contract interpretation."). Intent is derived not from a particular contractual term but from the contract as a whole. Jones v. Casstevens, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) (" 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.' ") (citation omitted).

State v. Philip Morris USA, Inc., \_\_\_\_\_ NC \_\_\_\_\_, \_\_\_\_\_ S.E.2d \_\_\_\_\_ (2005 WL 1994 021)

(August 19, 2005).



2. Presumption Against Drafter.

In addition to intent, the courts look at who drafted the document. "The terms of a written contract are to be construed most strongly against the party who drafted the instrument." Atlantic and East Carolina Railway Co. v. Southern Outdoor Advertising, Inc., 129 N.C. App. 612, 501 S.E.2d 87 (1998), *citing* O'Grady v. First Union National Bank, 296 N.C. 212, 227, 250 S.E.2d 587, 597 (1978).

Samples of typical contract language (in the context of a lease) rebutting the presumption:

- a. All provisions of this Lease have been negotiated by both parties at arm's length and neither party shall be deemed the scrivener of this Lease. This Lease shall not be construed for or against either party by reason of the authorship or alleged authorship of any provision hereof.

[or]

- b. This Lease shall be interpreted in accordance with the fair meaning of its words and both parties certify they either have been or have had the opportunity to be represented by their own counsel and that they are familiar with the provisions of this Lease, which provisions have been fully negotiated, and agree that the provisions hereof are not to be construed either for or against either party as the drafting party.

[or]

- c. This Lease is the product of negotiations between the parties hereto. Each party has had the benefit of legal counsel during the negotiations that have resulted in this Lease. As a consequence of such parity in bargaining power and position, this Lease shall enjoy a neutral construction and shall not be strictly construed against either party as the scrivener hereof or pursuant to any other legal theory of contract construction.

V. Drafting Tips

- A. If you intend your "agreement to agree" to be non-binding:

1. Label the paper writing as a "Non-binding Letter of Intent" (or even, "Non-Binding Letter of *Interest*") (or better yet, "Non-Binding Summary of Pending Negotiations"); and, in the body of the paper writing, continue to refer to the "intent" and "desires" of the parties.
2. Reference a "further definitive agreement" as a condition precedent to a binding agreement and that "partial performance" is not a substitute therefor. Include a requirement that all parties sign the exact same document (different counterparts of the same document ok).
3. Include an indemnity for all damages, including attorney fees, if a party seeks to enforce the "Letter of Intent" (maybe include a rule of construction that if any part of the paper writing is "ambiguous," no part of the writing shall be enforceable).
4. Omit earnest money at this stage.
5. Identify "material" issues "left open" for "future negotiations" (omit the details of "credit" terms).
6. Disclaim any duty of good faith with respect to the pending negotiations.
7. Consider a separate "binding" agreement regarding the confidentiality of the negotiations or the documents exchanged.
8. Consider a "no shop" clause as a "courtesy" pending negotiations.
9. Have the agreement expire on a certain date.
10. Include a list of conditions precedent (including due diligence and/or financing in the sole discretion of buyer).
11. Include a provision that the party signing this paper writing does not have authority to bind the company.

12. Include a provision that the paper writing will not be recorded by either party. Do not include a notary acknowledgement (so the paper writing is not in recordable form).

B. If you intend your agreement to be a binding agreement.

1. Do not label the agreement a letter of intent or a memorandum of understanding.
2. Do not reference a further definitive agreement.
3. Recite as consideration that:
  - a. the parties intend to be "legally bound"; and
  - b. the parties intend the agreement to be enforceable.
4. Include earnest money (especially non-refundable).
5. Identify and resolve all "material" issues (consider imposing on each party the duty to notify the other party of any omitted "material" terms that subsequently come to the attention of either party).
6. Include a good faith requirement to resolve any unanticipated issues (at a minimum, you would qualify for a "Type II" binding agreement to negotiate good faith) (if such a distinction is ever adopted in N.C.).
7. For "credit" terms:
  - a. include all essential terms; and/or
  - b. include a method by which to determine open terms.
8. Include a provision for confidentiality.
9. If a "no shop" clause is included, clarify that the seller will not shop the property because it is under contract (not as a "courtesy" pending negotiation).

C. If you drafted the document and do not want that used against you.

1. Recite that the agreement was negotiated at arms' length.
2. Recite that each party had independent counsel (or the opportunity to obtain independent counsel.
3. Refute the presumption that one party was the drafter (see § IV, B, 2, *supra*).