Commercial Real Estate Purchase Agreements: Agreeing to Disagree

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This manuscript looks at issues arising in reviewing, negotiating and closing commercial real estate purchase agreements. Unlike its residential counterpart, which tends to be standardized, a commercial real estate purchase agreement tends to be the exact opposite. Everything is negotiable. Typically, during negotiations, issues will emerge that are considered "business" terms and these are identified as areas of discussion for the business team. Other issues will emerge that are considered "legal" terms and these are left for the lawyers to work out (until the lawyers have come to an impasse and put a "legal" issue on the business team to work out). The parties "agree to disagree" on certain points but, through compromise, eventually reach a middle ground that is satisfactory to seller and buyer. Hopefully, time spent on the front end of negotiating a deal makes the back end of closing the deal perfunctory. This manuscript is not intended to be an exhaustive list of every contract issue. Rather, it is intended to highlight frequently encountered issues for commercial real estate purchase agreements.

I. The Letter of Intent

The letter of intent ("LOI") is intended to be a framework for the details to be worked out in the purchase agreement. This topic, alone, has been the subject of a seminar previously presented by one of the authors. See Margaret Burnham, "A Rose By Any Other Name: Is Your Contract Really A Contract?" (September 2005)[copy available at www.nexsenpruet.com/professionals/margaret-burnham]. While the general concept is that the LOI is "non-binding," the parties can inadvertently cross the line and include enough material business terms that the LOI is enforceable. See, e.g., JDH Capital, LLC v. Flowers, 2009 NCBC 4, No. 07 CVS 5354, 2009 WL 649161 (N.C. Sup. Ct. Mar. 13, 2009) (complicated facts but thorough analysis of problems with agreements to agree and interplay with *quantum meruit* in the alternative to an agreement); Crockett Capital Corp. v. Inland American Winston Hotels, Inc. , 2009 NCBC 5,

No. 08 CVS 000691, 2009 WL 649158 (N.C. Sup. Ct. Mar. 13, 2009) (unlike the JDH Capital case, which was asked to supply the missing terms from a letter of intent, the Crockett court relied upon "impasse provisions" found in the letter of intent to justify judicial enforcement).

A. Cases finding agreements were "non-binding:"

Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co. Consolidated, 2003 NCBC 3, No. 99 CVS 2459, 2003 WL 21017350 (N.C. Super. Apr. 28, 2003), citing Boyce v. McMahan, 22 N.C. App. 254, 206 S.E.2d 496, aff'd, 285 N.C. 730, 208 S.E. 2d 692 (1974). In Durham Coca-Cola Bottling Co., the court stated: "an offer to enter into a contract in the future must, to be binding, specify all the essential and material terms and leave nothing to be agreed upon as a result of future negotiations." The court found the letter was simply an agreement to agree because it specifically referred to itself as a letter of intent and the document stated that "the parties will enter into a definitive acquisition agreement" at a later date, establishing no definitions within the letter to resolve any open matters. The court also concluded that a "no-shop" provision is inconsistent with a definitive agreement and contemplates additional negotiations. The no-shop provision provided additional support for the court to find that the proposal was merely a letter of intent and not a binding contract.

Housing, Inc. v. Weaver, 305 N.C. 428, 290 S.E.2d 642 (1982) (the court held a writing was a "mere agreement to agree" when the writing described the document as a "memoranda of our understanding" and that any "problems" will be worked out to the mutual benefit of the parties).

B. Cases finding agreements were "binding:"

Augusta Homes, Inc. v. Feuerstein, No. COA08-1456, 2009 WL 2501399 (N.C. Ct. App. Aug. 18, 2009). In Augusta Homes, the facts are a bit peculiar as they involved the sale of a lot

with a condition that the buyer must later use the seller/builder to construct the home (details to be determined…). The case spans 3 buyers: buyer 1 was the original buyer who bought the lot subject to an option in favor of the seller/builder to buy it back if an agreement on the home purchase was not agreed upon by a certain date; buyer 2, the defendants in this case, bought the lot from buyer 1 when buyer 1 could not sell their existing home – this sale to buyer 2 was subject to a side agreement that required buyer 2 to use the same builder as with buyer 1; and buyer 3 bought the lot from buyer 2 with no obligation with respect to the builder.

The defendants never could reach an agreement with the seller/builder on the price for a custom home. The defendants argued that the builder condition in the contract was an "agreement to agree." The defendants gave as examples the following open terms left to be negotiated:

- final size of home;
- whether or not to include a basement, elevator or pool;
- terms of the builder's warranty;
- procedure for change orders;
- payment terms; and
- dispute/claims procedure.

The court decided all these terms were not essential -- "only conditions of construction to be negotiated and agreed upon at a later date, per the Agreement."

Apparently, the court believed the defendants were just looking for a way out. The court stated that the "Defendants were not trapped by the Agreement in surprise contractual obligations that they never intended…" Plus, the court jabbed at the defendants for flipping the house to buyer 3 less than 5 months after acquiring it, at a substantial increase in price, and "kept the profit." [The opinion mentions that the defendants paid $560,000 and offered it back to the seller/builder for $700,000, but did not disclose what buyer 3 paid.]

Pee Dee Oil Company v. Quality Oil Company, Inc., 80 N.C.App. 219, 341 S.E.2d 113 (1986) The court found a letter enforceable and binding even though a portion of the purchase price, with respect to certain equipment, was to be determined based upon "reasonable market value;" the covenant did not provide a specific price nor did it provide a specific formula to determine such value. The court determined the equipment was only a "minor, incidental part" of the entire transaction and that contracts "do not fail because minor details are left to future determination."

PRACTICE TIP: if you want to ensure that your LOI cannot be construed in any way as "binding," use an unsigned term sheet (perhaps coupled with a signed confidentiality agreement).

PRACTICE TIP: label the paper writing as a "Non-binding Letter of Intent" and in the body of the paper expressly refer to the "intent" and "desires" of the parties and that the parties will not be bound until there is a "formal" purchase agreement executed by the parties.

PRACTICE TIP: if the LOI is construed to be "non-binding" (as most are), there are some provisions that still may be "binding" (such as the confidentiality clause or a "no shop" clause).

PRACTICE TIP: before you rely upon a representation of "good faith" in a letter of intent, consider how such a provision will be enforced in a non-binding agreement.

PRACTICE TIP: for additional cases, see Margaret Burnham, "A Rose By Any Other Name: Is Your Contract Really A Contract?" (September 2005) [copy available at www.nexsenpruet.com/professionals/margaret-burnham]. An excerpt from this article setting forth detailed drafting tips for LOIs is attached hereto as Exhibit C.

II. Understanding "the deal"

It is impossible to draft a purchase agreement if you don't understand the deal. There is no such thing as a "standard" contract. The first question to ask is: do you represent the seller or

the buyer? Next, ask your client to explain "the deal" from your client's perspective. You need this to understand what due diligence will be needed, what representations and warranties you will need, what contingencies to include, what timeline will work, etc.

PRACTICE TIP: See Margaret Burnham, "The Seven Holy Virtues for Real Estate Lawyers," a copy is attached hereto as ***Exhibit G***

PRACTICE TIP: See Wayne Stephenson, "10 Commandments of Real Estate Closings" (reprinted with permission), a copy is attached hereto as ***Exhibit T***.

A. Who is your client?

The starting point for your legal advice is determining who is your client? A classic case of a "misunderstanding" is Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd per curiam, 330 N.C. 438, 410 S.E.2d 392 (1991). In Broyhill, the plaintiff was the seller of certain real estate and alleged that the defendant, the closing attorney, had previously represented the plaintiff, that the plaintiff employed the defendant to represent his interests in the sale, that the defendant prepared a purchase money note and deed of trust (for which the defendant attorney served as trustee), that plaintiff wrote to and telephoned defendant and that plaintiff "paid" the defendant by reimbursing the buyer. The defendant denied the allegations, and alleged that the defendant's duty was to the buyer (who indeed paid the lawyer's legal fees at closing). The court held that these facts raised a genuine issue of material fact as to whether or not an attorney-client relationship existed. The court was not persuaded by the defendant's argument that plaintiff was attempting to unilaterally create an attorney-client relationship. The court stated:

> This Court has held that an express verbal agreement is not necessary to establish an attorney-client relationship, but such may be implied from the conduct of the parties even in the absence of the payment of fees or the lack of a formal contract.

Id. at 390, 402 S.E.2d at 172 (citing N.C. State Bar v. Sheffield, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325 (1985)).

Another example is Cornelius v. Helms, 120 N.C. App. 172, 461 S.E.2d 338 (1995), rev. den., 342 N.C. 653, 467 S.E.2d 709 (1996). In Cornelius, the buyer's attorney was also sued in a purchase money transaction. The court was influenced that the sellers "relied" upon the buyer's attorney to prepare the note and deed of trust. The court was also influenced by expert witness testimony that an attorney-client relationship existed. The opinion did not indicate whether there were also experts testifying that there was no attorney-client relationship.

A recent case, Wilner v. Cedars of Chapel Hill, LLC, No. COA14-380, 773 S.E.2d 333 (2015), rev. den., 368 N.C. 355 (N.C. Ct. App. 2015), makes reference to the relative bargaining power between the parties, particularly if one party is unrepresented. In the Cedars case, the court quoted from the Plaintiff's motion for summary judgment:

> [T]he bargaining power between the Plaintiffs and Defendants…was unquestionably unequal in that the Plaintiffs as a whole are relatively unsophisticated in terms of the complex real estate and financial machinations at play while contracting with the Defendants who engaged counsel experienced in complex real property transactions and condominium governance to draft the covenant clauses requiring payment of the [fees], along with the numerous other documents…each of which include detailed provisions as to the payment and collection of the [fees].

Id. The court was not persuaded and responded:

> We find that these contentions were insufficient to establish procedural unconscionability. The contracts at issue were signed at a real estate closing, ***meaning that plaintiffs had counsel present***. The contracts had detailed, bolded notes in the margins, explaining what each contract provision entailed. Plaintiffs did not allege that they were rushed through the process, nor that they were tricked or deprived of opportunity to speak with counsel or consider their options; plaintiffs alleged only that defendants were more sophisticated and drafted the contracts to their own benefit. This alone does not rise to the level of

> procedural unconscionability. We held in Westmoreland that "bargaining inequality alone generally cannot establish procedural unconscionability. Otherwise, procedural unconscionability would exist in most contracts between corporations and consumers."

Id. (emphasis added). The court went on to find that the facts also did not support "substantive unconscionability." The court defined "substantive unconscionability" as "harsh, one-sided, and oppressive contract terms," such that the terms were "so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." Id. (citations omitted). Despite otherwise sympathetic plaintiffs, the court concluded that "[t]he mere fact that plaintiffs lacked the ability to negotiate contracts terms" does not satisfy the test for substantive unconscionability. Id.

The guiding ethics opinion in this area is 2013 FEO 14 ("Representation of Parties to a Commercial Real Estate Loan Closing"). 2013 FEO 14 (emphasis added) provides, in the context of conflicts in a commercial closing as between the borrower and the lender:

> Opinion #1:
>
> In most instances, a lawyer may not represent both the borrower and the lender for the closing of a commercial loan even with consent.
>
> Rule 1.7 prohibits the representation of a client if the representation involves a concurrent conflict of interest unless certain conditions are met. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or the representation of one client may be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a). ***The closing of a commercial loan secured by real estate is an "arm's length" business transaction in which large sums of money are at stake, the documentation is complex, and the opportunities to negotiate on behalf of each party are numerous....***

PRACTICE TIP: if you are drafting a purchase agreement, and the "other side" is unrepresented, add a provision to the contract that your law firm solely represents either the seller or the buyer, as applicable.

PRACTICE TIP: if the "other side" is unrepresented (or even if the "other side" is represented), consider also adding a provision to the contract that the contract will not be construed against the drafter. Several samples of such a provision are set out in ***Exhibit D*** attached hereto.

B. What is custom about the deal?

Your role as counsel to the seller or the buyer is to add "value" to the deal. Otherwise, the parties can fill in the blanks and no attorney is needed. To add value, you must understand the deal. If you don't understand the deal, you may not craft the due diligence properly for what is needed. For example, if the purchase agreement is for an investment property, you need the leases, estoppels, rent roll, etc. Likewise, if you don't understand the deal, you don't know what custom representations and warranties to add or what custom contingencies to add. Ask yourself what would matter to you if you were the buyer? What if you were the seller?

In Hearne v. Statesville Lodge No. 687, 143 N.C.App. 560, 546 S.E.2d 414 (2001), the court considered this very issue in the context of a real estate broker. In Hearne, the underlying premise was that the buyer intended to purchase a commercial property with the intent to build and run a restaurant on the property. Because the buyer relied on the broker and did not obtain an independent investigation of the property, the buyer discovered ***after closing*** that the buyer would be unable to obtain a permit to expand the septic field to support the private club/restaurant buyer intended to build. The court held the parties were dealing at arm's length and the buyer had full opportunity to inspect the property, including the septic field. Without finding evidence that seller or the broker prevented buyer from making "such reasonable inspections of the property," the court granted the broker's motion for summary judgment.

Similarly, the nature of the deal, including the contingencies that are applicable, will dictate the timeline. Is the due diligence period long enough? Do you need additional time

periods (for re-zoning, for environmental Phase II studies if needed, etc.)? Are there any extensions the seller will grant? If so, what terms? For example, does the original earnest money go "hard" (non-refundable)? What are the extension fees? Are they non-refundable? Are all/some of these fees applicable to the purchase price? Sometimes, the buyer will negotiate with the seller, even if the due diligence period has expired, that the "permitting" period will run up until closing (effectively a free extension). And for the timeline, are the dates "time is of the essence?" Look especially to see which dates have this qualifier (just the due diligence period? just the closing date? other deadlines?). See ***Section III, B,*** below on "time is of the essence" clauses.

PRACTICE TIP: if your client is the buyer, discuss with your client what the client intends to do with the property now; ask what the buyer envisions for the future; ask what is the "exit strategy" if something goes wrong?

PRACTICE TIP: discuss with your client whether you or the client is responsible for tickling the various deadlines to make sure no extensions are missed/no due diligence fees inadvertently go "hard."

C. Is the deal in North Carolina?

You will sometimes be asked to review a purchase agreement for property outside of North Carolina, which raises two questions: 1) whether you "can" review and 2) whether you "should" review? For the general ethics rule on the practice of law/unauthorized practice of law, see NC Ethics Rule 5.5 – Unauthorized Practice of Law.

PRACTICE TIP: always disclose to your client that you are only authorized to practice law in North Carolina and that you are only familiar with North Carolina law. If you are persuaded to

review the "business terms," document that you advised your client to have the purchase agreement reviewed by local counsel in the state where the property is located.

PRACTICE TIP: When serving as local counsel, and the document to be recorded was "prepared by" out of state counsel, consider adding below the out of state counsel signature block: "(reviewed by [insert your law firm name] as local counsel in NC)."

III. Drafting the purchase agreement

The obvious place to start is the statute of frauds. N.C.G.S.A. §22-2 requires that all contracts to sell or convey real property be in writing and "signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." What is enough of a "paper writing" to satisfy the statute of frauds?

In East Camp, L.L.C. v. Spruill, No. COA08-1081, 2009 WL 1525332 (N.C. Ct. App. Jun. 2, 2009), the court considered whether a letter agreement for "all the till able *(sic)* acreage owned by [Plaintiff]" satisfied the statute of frauds. Relying on established case law regarding patent ambiguity versus latent ambiguity, the court found the description was only latently ambiguous and, therefore, the trial court should have let in extrinsic evidence.

East Camp, L.L.C. cited as authority the proposition that "[a] memorandum or note is, in its very essence, an informal and imperfect instrument," quoting Lane v. Coe, 262 N.C. 8, 12, 136 S.E.2d 269, 272-73 (1964). Hopefully more complimentary things would have been said if the writing had been drafted by an attorney.

Further, the court was not troubled by the absence of the rent provision in the writing: "North Carolina is among a minority of jurisdictions that does not require that the memorandum state the consideration given by the party seeking to enforce the contract."

In B & F Slosman v. Sonopress, Inc., 148 N.C. App. 81, 557 S.E.2d 176 (2001), rev. den., 355 N.C. 283, 560 S.E.2d 795 (2002), the court held that a lease "negotiation summary" was not enough to satisfy the statute of frauds. Unbelievably, the tenant was allowed to move into a plant with no signed lease. The tenant was paying $36,481.97 per month with no written lease! The court also pointed out another fatal flaw: that there was no evidence that the party who signed the lease negotiation summary had authority (the "purchasing manager" for defendant). See also IHFC Properties, LLC. v. Whalen Furniture Mfg., Inc., Nos. 14-1484, 14-1526, 614 Fed. Appx. 623, 626, (4th Cir. 2015) (the fourth circuit refused to apply B&F Slosman because in IHFC Properties the facts established that tenant accepted the terms of the initial lease document and reaped the benefits of such lease, and thus, was estopped from asserting a statute of frauds claim).

The purchase agreement you draft is only as good as the "go by" you start with… Clients don't understand that there is no "form" purchase agreement. For purposes of a sample, see the form "Agreement for Purchase and Sale of Real Property" (jointly adopted by the North Carolina Bar Association and the North Carolina Association of Realtors) attached hereto as ***Exhibit A*** (reprinted with permission). Although there are many optional addenda, see the standard "Additional Provisions Addendum" attached hereto as ***Exhibit B*** (reprinted with permission).

You may be the attorney to do the first draft of the purchase agreement. If you represent the seller, what is the best "seller oriented" form you have used? If you use it, will the redline come back with so many changes you wasted time, money and effort? This is a discussion to have with your client before your first draft as custom forms require a lot more time (but worth it if you are adding "value" by protecting your client's interests). If you represent the buyer, what is the best "buyer oriented" form you have used? When reviewing "go by" templates, ask

yourself if the form is seller oriented, buyer oriented or intended to be somewhat "neutral?" You also want to know if your "go by" was prepared by an experienced North Carolina commercial real estate attorney?

Whichever form you use, the most important advice is to use a checklist. Maybe the last deal didn't have the representations and warranties you need on this one. Maybe the last deal didn't have environmental contamination or was already re-zoned. The hardest part of reviewing a contract is not "marking up" what you see but "adding in" what is missing. For a sample contract checklist, see Edmund T. Urban, A. Grant Whitney and Nancy Short Ferguson, North Carolina Real Estate with Forms, Section 2:15 (2014), a copy of which is attached hereto as ***Exhibit S*** (reprinted with permission). Remember, though, to add to the checklist custom provisions, including contingencies, representations and warranties, to fit "the deal."

Related to the "go by" template, there is an interesting issue of attribution and copyright issues. 2008 FEO 14 provides that it is not unethical when a lawyer fails to attribute or obtain consent when incorporating into his/her contract excerpts from a contract written by another lawyer. The opinion expressly carves out copyrighted material. When the ethics opinion was being circulated for comment, Susan Olive, a North Carolina intellectual property lawyer, submitted a detailed legal explanation of what attorney work product is protected by copyright laws. A copy of her letter is attached as "Exhibit B" to an article by Margaret Burnham entitled "Contractual Conundrums" (September 2009) [copy available at www.nexsenpruet.com/professionals/margaret-burnham].

A. Consideration

Consideration is a basic tenet of contract law. See McLamb v. T.P., Inc., 173 N.C.App. 586, 619 S.E.2d 577 (2005) ("A contract is simply a promise supported by consideration, which

arises...when the terms of an offer are accepted by the party to whom it is extended"); see also Boyce v. McMahan, 285 N.C. 730, 208 S.E.2d 692 (1974) (detailed summary on black letter contract law).

The McLamb case is a bit of an anomaly. In that case, the parties entered into "reservation agreements," which carved out specific requirements that seller must fulfill before the potential purchaser could determine whether to actually purchase seller's real property. Upon execution of each reservation agreement, purchaser deposited $500.00 with seller to be held until purchaser either decided to terminate the reservation, at which time seller would return the money to purchaser, or at such time as seller completed the list of requirements and purchaser then elected to purchase such properties. Id. at 587 and 590-591. The court held that "consideration which may be withdrawn on a whim is illusory consideration which is insufficient to support a contract." Id. at 591, citing Kadis v. Britt, 224 N.C.154, 163, 29 S.E.2d 543 (1944). The court's rationale was that "an option is not supported by sufficient consideration if it is purported to be held open only by a deposit which is (1) refundable at the behest of the depositing party, and (2) to be applied as payment towards the object for which the option is offered if a sale occurs. Id. at 592.

PRACTICE TIP: to avoid the result of the McLamb case, consider adding a provision dealing with consideration in the event the earnest money deposit is fully "refundable." For sample language, see ***Exhibit E***.

PRACTICE TIP: When drafting, consider whether there is a difference between an "option" and a "purchase contract" if both allow the earnest money deposit to be fully refundable if certain events occur (termination of the option, notice of termination prior to the end of the due diligence period, etc.).

B. "Time is of the essence" clauses

In North Carolina, the general rule is that "time is of the essence" means the deadline is "firm." See 42 East, LLC v. D.R. Horton, Inc., 218 N.C.App. 503, 722 S.E.2d 1 (2012), quoting S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 189 N.C.App. 601, 620, 659 S.E.2d 442 (2008) ("when a 'contract contain[s] a [t]ime is of the essence provision and plaintiff [does] not close within the required time frame, plaintiff's claim for breach of contract must fail'"). See also Harris v. Stewart, 193 N.C.App. 142, 666 S.E.2d 804 (2008), citing Kroger v. Ltd. Partnership v. Guastello, 177 N.C.App. 386, 390, 628, S.E.2d 841 (2006) (the time is of the essence clause has "a well-settled exception, the 'reasonable time to perform rule,' that applies to contracts for the sale of real property. With respect to these realty sales contracts, it has long been held that in the absence of a 'time is of the essence' provision, time is not of the essence, the dates stated in an offer to purchase and contract agreement serve only as guidelines, and such dates are not binding on the parties"). In Harris, the appraisal provision had a completion date but the provision did not contain a "time is of the essence" clause. The court found that a five day delay beyond the stated completion date was not unreasonable.

In Wedderburn Corp. v. Jetcraft Corp, the court stated that when a buyer closes on a deal *knowing* certain repairs still needed to be completed and certain conditions precedent to closing were not completed by closing, these acts manifest an intent to waive the "time is of the essence" requirement. The court held that the "'[t]ime is of the essence' requirement may be waived by statement and actions manifesting an intent to waive." Wedderburn Corp. v. Jetcraft Corp., 2015 NCBC 101, No. 15 CVS 757, 2015 WL 6951549 (N.C. Sup. Ct. Nov. 6, 2015). See also, Christenbury Eye Center, P.A. v. Medflow, Inc., 2015 NCBC 61, No. 14 CVS 17400, 2015 WL

3823817 (N.C. Sup. Ct. Jun. 19, 2015) (an individual may waive and relinquish a contractual right, such as a time is of the essence clause, if these essential elements of waiver are met: "(1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit.").

PRACTICE TIP: enforcement of a "time is of the essence" can cause a harsh result; discuss the consequences with your client.

PRACTICE TIP: if your contract includes a "time is of the essence" clause, consider whether it benefits your client to strictly apply the provision or to allow an extension for deadlines; if you decide to provide for an extension in the contract (or later amend the contract to provide an extension), be sure to draft the extension artfully so as to not waive the "time is of the essence" provision with respect to the extended date.

In S.N.R. Management Corp. v. Danube Partners 141, a purchaser argued that the time is of the essence clause had been completely waived because the parties subsequently extended closing several times. S.N.R. Management Corp. v. Danube Partners 141, 189 N.C.App. 601, 659 S.E.2d 442 (2008). The court held that seller's agreement to close two days after the date closing was originally scheduled was a limited waiver, not a complete waiver of the purchase agreement's "time is of the essence" clause. The court focused on two clauses to find that the "time is of the essence" clause was not waived: 1) there was a "warning section" stating if closing did not occur by the amended date, "the contract was null, void and in no further effect;" and 2) a catch all clause expressly stating "except as amended herein, all terms and conditions of the Contract shall remain in full force and effect."

In Phoenix L.P. of Raleigh v. Simpson, the court again looked at the issue of waiver. The time period spanned many years and two appeals. Compare the initial opinion reported as Phoenix L.P. of Raleigh v. Simpson, No. COA07-1333, 2009 WL 511297 (N.C. Ct. App. Mar. 3, 2009), to the subsequent opinion reported in 201 N.C.App. 493, 688 S.E.2d 717 (Dec 22, 2009), superseding the original opinion. For a detailed analysis, see Scott Miskimon, "The Nine-Year Closing – How Your Client's Conduct Can Change Its Contractual Rights and Obligations," Real Property, NCBA (Vol. 32, No. 2)(June 2011).

PRACTICE TIP: if representing the seller, consider a provision that any express agreement to extend time for a particular deadline does not waive the "time is of the essence" clause for the new deadline (essentially providing that failure of buyer to satisfy the time period, as extended, will result in a termination of the purchase agreement).

PRACTICE TIP: if representing the buyer, provide for reasonable flexibility on deadlines (will the seller agree to strike the "time is of the essence" clause?) OR provide for extension periods for the due diligence and/or closing dates (with or without extension fees, which are/are not applicable to the purchase price).

C. Default

The parties, in the midst of negotiating a deal, don't want to contemplate default. These provisions are not only necessary, they are also negotiable. For example, what are the limits on the seller's default? Refund of the deposit? Specific performance? Sometimes you see a buyer try to insert a provision (usually unsuccessfully) that the seller must reimburse all of buyer's due diligence expenses in the event of a seller default. What about the buyer's default? Is the buyer's only risk its earnest money deposit? Is the deposit enough for this risk to the seller? What about

the seller's right to enforce the contract by specific performance? Is the buyer a special purpose entity ("SPE") formed to acquire this land that has no assets?

There is a special statutory provision for attorneys' fees for commercial contracts. See N.C.G.S.A. § 6-21.6. This statute was enacted in 2011 after considerable lobbying for express statutory authority for attorney fee provisions in business contracts to be enforceable. N.C.G.S.A § 6-21.6 defines applicable contracts as contracts "primarily for business or commercial purposes." Note that N.C.G.S.A § 6-21.6 has carve outs (including consumer contracts, employment contracts and government contracts) and has certain requirements for enforceability (such as the attorney fee provision being "reciprocal"). A sample provision to insert into your contract is:

> Reciprocal attorneys' fees. Seller and Buyer agree that this Purchase Agreement is a "business contract" under N.C.G.S.A §6-21.6. Seller and Buyer further agree that the terms and conditions of §6-21.6 are incorporated herein by reference, including:
>
> (i) the award of reasonable attorneys' fees may not exceed the amount in controversy as set forth in §6-21.6 (f);
>
> (ii) the factors to be considered by the court in awarding attorneys' fees are set forth in §6-21.6 (c);
>
> (iii) the award of attorneys' fees shall not be governed by any statutory presumption or the amount awarded in other cases as set forth in §6-21.6 (d).

Note that in 2015 this statute was amended to clarify that the requirement in N.C.G.S.A §6-21.6 (b) for a signature "by hand" was not intended to prevent electronic signatures. At the time of that amendment, another change was made *deleting* the following sentence: "In any suit, action, proceeding or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed ***the monetary damages awarded***." Cf. N.C.G.S.A. §6-21.6 (b)(2015)(Session Law 2015-264) to N.C.G.S.A §6-21.6(b)(2011). Although the

change may seem like semantics, the deleted sentence capped the recovery of attorneys' fees at the amount of "***the monetary damages awarded***" and, as revised, the statute caps the recovery at "***the amount in controversy***" (the difference being that the amount sought in the pleadings may be more than the amount actually awarded). See N.C.G.S.A §6-21.6 (c)(1) and (f).

D. Boiler plate provisions (that actually may matter)

There are many "boiler plate" provisions to consider, such as the ones included in the sample purchase agreement attached hereto as ***Exhibit A***. When reviewing a purchase agreement, compare your "go by" to standard forms and checklists to make sure you include the "boiler plate" that may be dispositive for your particular transaction. For example, is there a provision on "successors and assigns." How does that provision work with the "assignment" paragraph? If the purchase agreement prohibits assignments, what impact does the "successors and assigns" paragraph have?

E. Miscellaneous North Carolina cases

i. Swaim v. Simpson

One of the harshest North Carolina cases in the context of real estate is Swaim v. Simpson, 120 N.C.App. 863, 463 S.E.2d 785 (1995), aff'd per curiam, 343 N.C. 298, 469 S.E.2d 553 (1996). In that case, the deed of conveyance to buyers granted an easement for purposes of "providing access of ingress and egress" to the described tract (the real property conveyed in the deed) from the highway. The buyers argued the easement grants buyers the right to maintain a residence, which includes access for utilities, and thus, includes ingress and egress for purposes of installation and maintenance of utilities. The court stated "when an easement is created by an express conveyance and the conveyance is 'perfectly precise' as to the extent of the easement, the terms of the conveyance control." Id. at 864, quoting Williams v. Abernethy, 102 N.C.App.

462, 464-65, 402 S.E.2d 438, 440 (1991) (Williams was superseded by the North Carolina Planned Community Act as stated in Happ v. Creek Pointe Homeowner's Ass'n, 215 N.C.App. 96, 717 S.E.2d 401 (2011), however, this holding does not supersede or overturn the above quote). The court reversed the trial court's interpretation of the easement to include the installation and maintenance of utilities as well as general access, finding the easement unambiguous and stating "[h]ad the grantors intended a greater use, such use should have been specified."

See also Stonecreek Sewer Ass'n v. Gary D. Morgan Developer, Inc. for application of the rule from Swaim v. Simpson. The court used and restated the Swaim easement rule:

> First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied.

Stonecreek Sewer Ass'n v. Gary D. Morgan Developer, Inc., 179 N.C.App. 721, 790, 635 S.E.2d 485, 491 (2006).

PRACTICE TIP: the lesson from the Swaim case is say what you mean.

ii. Heron Bay Acquisitions

"No-shop" clauses are frequently used in letters of intent and sometimes in purchase agreements. In Heron Bay Acquisitions, LLC v. United Metal Finishing, Inc., No. COA15-652Z, 2016 WL 611477 (N.C. Ct. App. Feb. 16, 2016), the court recently held that a "no-shop" clause in a purchase agreement is not a violation of unfair or deceptive trade acts or practices.

See also Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co. Consolidated, 2003 NCBC 3, No. 99 CVS 2459, 2003 WL 21017350 (N.C. Sup. Ct. Apr. 28, 2003) referenced above.

iii. Rose v. Potts

What may seem an elementary rule of drafting a contract…may not be so easy. In Rose v. Potts, a court found that no mutual assent existed, and therefore, the purchase agreement was unenforceable. Rose v. Potts, No. COA14-611, 2015 WL 234425 (N.C. App. Jan. 20, 2015). Buyer signed an offer to purchase, using a standard contract form. Sellers' agent told the buyer that the sellers signed the form only because the sellers' mortgagor needed it for review (sellers' mortgagor filed a foreclosure proceeding and needed to approve any short sale), but that there was no acceptance, and the agent would get back to buyer once the mortgagor reviewed the contract. The court found the evidence that sellers stated they had not accepted the offer yet, even though they had signed the contract, meant there was no mutual assent and, therefore, no contract.

PRACTICE TIP: To avoid the risk in the Rose v. Potts, add a contingency to the purchase agreement that notwithstanding execution by the sellers, the contract is contingent upon written approval by sellers' mortgagor.

PRACTICE TIP: Consider also the use of a short sale addendum (in Rose v. Potts, the court mentioned the sellers had signed a "blank" short sale addendum).

PRACTICE TIP: add a provision in your purchase agreement that mutual assent shall occur upon the execution of the purchase agreement by seller and buyer.

iv. Fairway Outdoor Advertising.

This case involved a lease dispute over a billboard, but provides lots of drafting pointers for purchase agreements as well. In Fairway Outdoor Advertising v. Edwards, 197 N.C. App. 650, 678 S.E.2d 765 (2009), the court considered 3 issues:

a. If the lease doesn't specify, what amount of holdover rent must tenant pay?

b. What is a reasonable time period for a tenant to remove its improvements?

c. When a tenant is entitled to remove its alterations, must tenant remove "all" of its alterations?

a. Holdover rent

After poking at the defendants for pursuing a claim for "unjust enrichment," the court addressed the issue as "an action to recover reasonable compensation from a holdover tenant." The court cited prior authority for the election a landlord must make:

> Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to *recover reasonable compensation* for the use of the property, or he may recognize him as still a tenant, having the same rights and duties as under the original lease, except that the tenancy is one from year to year and is terminable by either party upon giving to the other 30 days' notice directed to the end of any year of such new tenancy.

Id., quoting Coulter v. Capitol Finance Co., 266 N.C. 214, 217, 146 S.E.2d 97, 100 (1966) (emphasis added).

As to the amount of rent, the rule is:

> [i]n the absence of evidence that the rental value of the leased property has increased or diminished since negotiation of the rent at the time of agreement to lease, that negotiated rental rate will determine the rate at which the holdover must pay for his continued use and occupation. Either party may, however, introduce evidence that independently

> establishes that the reasonable value is greater or lower than the previous rental rate, and recovery will be extended or limited to that measure.

Id., quoting Restatement (Second) of Property: Landlord & Tenant Section 14.5, comment a (1977).

Because the plaintiff provided no evidence and the defendants only provided evidence of "gross income" derived from the use of the billboard, the court "presumed" the reasonable rent to be the negotiated rent under the expired lease. The court pointed out that the defendants did accept one payment after the expiration of the lease in the amount of the rent under the expired lease.

b. Reasonable time

On the second issue, the court cited a Supreme Court case:

> what is [a] "reasonable time" is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on the particular circumstances of each case....
>
> The time, however, may be so short or so long that the court will declare it to be reasonable or unreasonable as [a] matter of law....
>
> If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences can not be reasonably drawn from them that the question ever becomes one of law.

Id., quoting Claus-Shear Co. v. E. Lee Hardware House, 140 N.C. 552, 554-55, 53 S.E.2d 433, 434-35 (1906)(citations omitted).

Surprisingly, the court did not order sanctions on this issue as the court pointed out that the plaintiff filed a Declaratory Judgment action the day after the lease expired and tried to remove the billboard within two weeks of losing the Declaratory Judgment action. The current lawsuit was filed by plaintiff within two weeks of being blocked from removing the billboard.

c. What improvements must be removed by tenant?

This issue was one of first impression. The court held that:

> when … a lease agreement grants the lessee the right to remove "all structures, equipment and materials," but does not require the lessee to remove all of them or to restore the property to the same condition as at the beginning of the lease, the lessor may not require the lessee to choose between removing all or removing none.

Id. This ruling is significant because the opinion does not suggest its impact is limited to ***billboards***!

IV. Drafting the exhibits to the purchase agreement

To avoid disputes, and sometimes to avoid the argument that a contract is an unenforceable "agreement to agree," material exhibits should be drafted and attached to the purchase agreement.

A. The deed

Sometimes, it would appear easier to incorporate an exhibit by reference. For example, you may see a contract that stipulates that the "North Carolina Bar Form" deed will be used (specifying "general warranty" or "special warranty"). But often there is a dispute about the wording of the deed, particularly with respect to the legal description or the "permitted exceptions." For example, the legal description used in a purchase agreement may be a short-hand version, such as an address, tax parcel or other identifier. Even if the metes and bounds is used as the legal, from the vesting deed, the buyer may have a new survey done and may want

to use the "new" legal. Another area of potential dispute is the description of "permitted exceptions." For a seller, listing the "only" exceptions of record (presumably from the buyer's title report) is inconsistent with a special warranty deed. Even for a general warranty deed (which the authors see less and less of), the seller does not want to stand in the shoes of a title insurance company. These disagreements can be avoided if the form of the deed is completed and attached to the purchase agreement.

As an aside, one of the points most often "discussed" during negotiations is whether a seller will give a general warranty deed or "only" a special warranty deed. What does it matter to the seller? A seller does not want to be the title insurer. What does it matter to the buyer? If the buyer is purchasing title insurance (which would normally be the case, save for an unusual cash deal where the buyer opts to forego title insurance), what does the buyer lose by accepting a special warranty deed? For a detailed analysis, see Karl Knight and John T. McLean, "Know Your Warranties! North Carolina Deeds and Title Insurance Implications of Their Use", Real Property, NCBA (Vol 31, No.2)(March 2010).

There is an ethics rule, 2004 FEO 10 which provides, in the context of a residential closing, that the buyer's attorney may prepare the deed for an unrepresented seller, provided: 1) the deed is consistent with the specifications in the purchase agreement, and 2) in the absence of specifications, the buyer's attorney must inform the seller that the deed will be prepared in a manner which best protects the buyer as the attorney's client and that the seller may desire legal counsel.

B. Options

Many commercial deals have various options associated with them. For example, a deal may grant the seller an option to purchase back the property or a right of first refusal. If

these are part of "the deal," they must be negotiated on the front end so that there is not a dispute at closing as to the terms. If such options and rights are not carefully drafted they will not be enforceable. What is the impact of the rule against perpetuities (statutory or common law)? What is the purchase price? For example, if the option is tied to "fair market value," what is the definition? What is the formula? Is the formula airtight so a court, reading it later, could enforce it?

i. General issues.

Although the Rule Against Perpetuities is beyond the scope of this manuscript, be familiar with the issue when drafting options and rights of first refusal. See N.C.G.S.A. §41-15, et seq. and §41-28 et seq. The "Commentary" to N.C.G.S.A. §41-29 (emphasis added; editorial notes added) gives concrete examples:

> A, the owner of Blackacre, sells an option to B under which A obligates himself, his heirs, and assigns at any time in the future to convey Blackacre to B, his heirs, and assigns for $X.00 *[editorial note: consider this a traditional option granted by seller to a third party who is not the tenant]*
>
> Or, A, the owner of Blackacre, sells Blackacre to B. As part of the transaction, B obligates himself, his heirs, and assigns, at any time in the future to reconvey Blackacre to A, his heirs and assigns for $X.00. *[editorial note: consider this a traditional option to re-purchase reserved by the seller]*
>
> If either option remains unexercised ***30 years*** after its creation, it ceases to be valid. (Both options are excluded from the Statutory Rule Against Perpetuities by G.S. 41-18 (1) and (9).
>
> ***Options Held by a Lessee Not Affected by this Section***. This section does not apply to an option [or] right of first refusal (preemptive right) that is not in gross. Thus, this section does not apply to an option or preemptive right held by a lessee to renew, extend, or enter into a new lease of or to purchase the leased premises. Such options or rights of first refusal do not deter the lessee from making improvements on the property, and so public policy is not viewed as requiring controls on their duration.

ii. Time limits.

An issue frequently litigated with respect to options is the ***time limit***.

In re Byrd, 2015 WL 5918754 (E.D.N.C. 2015). In the context of a commercial sale, after quoting §41-15(a), the court concluded "[i]t necessarily follows that 'a right of first refusal is void as a matter of law' if the language creating such a right fails to 'mention[] how long it [is] to last,' and 'appear[s] perpetual in nature."

Lefever v. Taylor, No. COA08-1278, 2009 WL 2177323 (N.C. Ct. App. Jul. 21, 2009). In Lefever, the parties entered into an offer to purchase contract that contained a provision allowing buyers a right of first refusal to purchase separate lots owned by seller. The parties reviewed three different drafts of the deed, adding the right of first refusal (left out of the first draft) and further modifying the terms related to the right of first refusal. The final deed buyers' attorney recalled receiving, reviewing, and approving provided that buyers would have five business days to respond to the right of first refusal. The final deed signed and recorded provided buyers had only two business days to respond to its right of first refusal and that buyers' right of first refusal would terminate after one year. Before closing, the drafting attorney failed to notify buyers' attorney of the reduction in days to respond or the termination period. Harshly, the court found the deed was valid as buyers had failed to allege the changes were induced by the mistake, fraud or misrepresentation of seller. However, the court pointedly stated: "if there is any "injustice" in this case, it was the failure of seller's counsel to behave in the manner that buyers' counsel has come to expect based upon his many years of law practice, in accordance with the professional courtesy and cooperation normally extended from one member of the bar to another." Ironically, a right of first refusal with a short (one year) time limit is better than a right of first refusal with no time limit.

iii. Purchase Price.

Another issue litigated is the ***purchase price*** for the option/right of first refusal.

Taylor v. Miller, 215 N.C.App. 558, 715 S.E.2d 643 (2011), rev. den., 724 S.E.2d 529 (2012) ("an option - and therefore, a right of first refusal - providing for a fixed price will not necessary be invalid. Rather, the courts must look to the circumstances existing at the time the contract was made to determine whether the price is reasonable.").

See also Padilla v. Shore, McKinley, Conger & Scott, LLP, Third Appellate District, San Joaquin CA Super. Ct. No. 39201300295881CUPNSTK (Apr. 22, 2016). (case involved formula for an option to purchase in the context of a lease) covered in more detail in ***Section XIV, C***.

C. Closing escrow instruction letters

Sometimes you will run across an issue with an escrow closing, particularly with out of state buyers not familiar with North Carolina closing practices. Whether the closing is through an independent escrow agent or through the buyer's attorney, sometimes a closing escrow instruction letter is needed to get all parties comfortable with transferring money and exchanging originals.

PRACTICE TIP: A sample escrow closing instruction letter is attached as ***Exhibit H.***

D. Attorney as escrow agent

The North Carolina State Bar has several opinions dealing with as escrow agent. See:

2009 FEO 7	Lawyer's Obligation to Record or to Disburse Closing Funds
99 FEO 8	Escrow Agreement Containing Waiver of Future Conflict
98 FEO 11	The Lawyer as Escrow Agent

V. Due diligence issues

A. Due diligence – general

The due diligence provisions in a purchase agreement are critical. The buyer is not going to purchase the property without an opportunity to conduct due diligence. Likewise, it is critical to establish as between the buyer and buyer's counsel which party will be responsible for which due diligence. See Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 (1994). In Clouse, the plaintiff, an unhappy home buyer, sued the seller, the seller's agent and real estate firm, the surveyor and surveyor's firm for damages related to the house being located in a flood zone. The buyer's attorney was not sued--at least not at first. But, the buyer might have tried to sue the attorney after this suggestion from the court: "an attorney representing the buyer at a closing is normally expected to have conducted a title search of the property, which search would have presumably uncovered the fact that the property was located in a flood plain." Id. at 509, 445 S.E.2d at 433 (emphasis added). This is a surprising remark about a real estate attorney's duty since the author's real estate practice does not include checking flood plain maps as part of a routine title examination.

B. Due diligence – "Seller Deliveries"

One area to be aware of, depending upon which side you represent, is the definition of what the seller is obligated to deliver ("Seller Deliveries") to the buyer during the due diligence period (or sometimes, to start the clock running on the due diligence period). There is sometimes a provision that the seller will provide "everything" in its possession pertaining to the property. If you are the buyer, what a bonanza! Did the buyer really expect to obtain a copy of the seller's appraisal? What about copies of any/all prior offers? Documents such as these are clearly not intended by the seller to be disclosed. If you represent the seller, you want a narrowly drawn list

of what it is the seller is agreeing to produce. This limits the seller's exposure for not producing something unintended and also provides the benchmark that the seller complied (especially if the due diligence clock doesn't start until the Seller Deliveries are completed).

If the purchase agreement is "AS IS," the seller will be reluctant to provide due diligence reports of any kind to the buyer for fear that producing reports will be tantamount to an implied warranty that the information in the reports is accurate (and the seller may not know). This is obviously a bad result if your client is the seller and (justifiably) expected that "AS IS" meant no warranties, express or implied.

Another area to consider is whether the buyer needs to provide copies of its due diligence reports to the seller if the buyer terminates the contract? This obligation is sometimes tied to a refund of the buyer's earnest money deposit. Of course, the seller wants the reports and at no cost.

C. Due diligence - Caveat emptor

A buyer's obligation to conduct due diligence goes hand in hand with "caveat emptor" (buyer beware). The North Carolina cases on caveat emptor would fill an entire manuscript (see Margaret Burnham, "Caveat Emptor and the Disgruntled Buyer" (updated April 2008)[copy available at www.nexsenpruet.com/professionals/ margaret-burnham]. The important thing to know is that North Carolina has consistently embraced the concept of caveat emptor. Buyers that sue sellers (and their brokers, attorneys, etc.) most often lose. The theory is that a buyer had an opportunity, during due diligence, to kick the tires. See C.F.R. Foods, Inc. v. Randolph Development Co., 107 N.C.App. 584, 421 S.E.2d 386 (1992) (even after the seller removed unsuitable materials from the property, excavated, undercut and backfilled the lot, making the lot appear ready to build, the court found the seller was not liable when the purchaser began

construction on soil that was not fit to support a restaurant structure). The court held "[w]e note that this was a transaction involving commercial real estate between two commercial parties. Accordingly, defendant owed no duty of disclosure to plaintiff." For this reason, courts have generally been unsympathetic to a buyer who does not perform reasonable due diligence to verify the property was suitable for buyer's intended used.

D. Due diligence – Acknowledgement of "non" due diligence

Occasionally, despite your advice, your buyer client decides to forego all or some of the recommended due diligence. If your client decides it is not going to spend the time and money on due diligence inspections, survey, etc., be sure to get an acknowledgement that your client waived the opportunity. See ***Exhibit I*** for a sample "Due Diligence Verification." This may prevent a claim that you were (unexpectedly) expected to conduct the due diligence for your client.

E. Due diligence – Checklists

A sample checklist of items to consider during due diligence is attached hereto as ***Exhibit J.***

VI. "AS IS" versus "Representations and Warranties"

It would seem at first blush that having an "AS IS" contract is inconsistent with any representations and warranties. The truth is that there is a spectrum of acceptable representations and warranties in even an "AS IS" contract. A true "AS IS" contract has no warranties (except the warranties in a "special warranty" deed). At the other end of the spectrum is an "AS IS" contract with representations and warranties as to the seller entity, as to notice (or, more accurately, "non-notice") of certain material issues with respect to the property (contamination,

condemnation, etc.). However, the line in the sand appears to be "AS IS" with respect to the land itself and whether the land suits the buyer's intended use.

A. "AS IS" contracts

A typical "AS IS" clause is set forth in ***Exhibit K***. As evident from ***Exhibit K***, the contractual language is not usually just "AS IS, WHERE IS and WITH ALL FAULTS," although this short-hand version sums it up pretty well.

B. Representations and warranties

The first question that comes up is what is the difference between a representation and a warranty (and does it matter? and why do we use both terms together?). Black's law dictionary has an extensive definition for both "representation" and "warranty."

Black's law definition for "representation" specific to contracts states: "[a] presentation of fact – either by words or by conduct – made to induce someone to act, especially to enter into a contract <buyer relied on the seller's representation that the roof did not leak>."

> "Representation … may introduce terms into a contract and affect performance: or it may induce a contract and so affect the intention of one of the parties, and the formation of the contract … At common law, … if a representation did not afterwards become a substantive part of the contract, its untruth (save in certain excepted cases and apart always from fraud) was immaterial. But if it did, it might be one of two things: (1) it might be regarded by the parties as a vital term going to the root of the contract (when it is usually called a 'condition'); and in this case its untruth entitles the injured party to repudiate the whole contract; or (2) it might be a term in the nature only of an independent subsidiary promise (when it is usually called a 'warranty'), which is indeed a part of the contract, but does not go to the root of it; in this case its untruth only gives rise to an action *ex contractu* for damages, and does *not* entitle the injured party to repudiate the whole contract."

Black's Law Dictionary (10th ed. 2014) quoting William R. Anson, Principles of the Law of Contract, 218, 222 (Arthur L. Corbin ed., 3d Am. ed. 1919). The definition goes on to define: affirmative, material, promissory, adequate, and virtual representation.

Black's law dictionary defines a contract "warranty" as: "2. Contracts. An express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; especially a seller's promise that the thing being sold is as represented or promised. A warranty differs from a representation in four principal ways: (1) a warranty is an essential part of a contract, while a representation is usually only a collateral inducement, (2) an express warranty is usually written on the face of the contract, while a representation may be written or oral, (3) a warranty is conclusively presumed to be material, while the burden is on the party claiming breach to show that a representation is material, and (4) a warranty must be strictly complied with, while substantial truth is the only requirement for a representation. Black's Law Dictionary (10th ed. 2014).

The definition continues to define: as-is warranty, construction warranty, deceptive warranty, express warranty, extended warranty, full warranty, implied warranty, implied warranty of fitness for a particular purpose, implied warranty of habitability, implied warranty of merchantability, limited warranty, personal warranty, presentment warranty, transfer warranty, warranty ab initio, warranty ex post facto, warranty of assignment, warranty of fitness, warranty of title, and written warranty. Black's Law Dictionary (10th ed. 2014).

See Hodges v. Smith, 158 N.C. 256, 73 S.E. 807 (1912) quoting Horton v. Green, 66 N.C. 596 (1912) ("[a] representation simply of soundness does not import absolutely a stipulation of the existence of quality, but a representation may be made in such terms and under such circumstances as to denote that it was not intended merely as a representation, but that it entered into the bargain itself").

See also, Calloway v. Wyatt, 246 N.C. 129, 97 S.E.2d 881 (1957) quoting Harding v. Southern Loan & Ins. Co., 218 N.C. 129, 10 S.E.2d 599 (1940) ("it is generally held that one has

no right to rely on representations as to the condition, quality or character of property, or its adaptability to certain uses, where the parties stand on an equal footing and have equal means of knowing the truth.").

See Kenneth A, Adams, "A lesson in drafting contracts: What's up with 'representations and warranties?'", 26 A.B.A.J. 2, https://apps.americanbar.org/buslaw/blt/2005-11-12/adams.shtml (Nov-Dec. 2005); see also Tina L. Stark, "Nonbinding Opinion – Another View on reps and warranties," 15 A.B.A.J. 3, https://apps.americanbar.org/buslaw/blt/2006-01-02/nobindingopinion.html (Jan.-Feb 2006).

Representations and warranties run the gamut. In a buyer's perfect world, a buyer would not have to do due diligence because the seller's representations and warranties cover it all. This is not usually the case – the seller strikes through the vast majority of the buyer's "suggested" representations and warranties, either converting the contract back to "AS IS" or some middle ground. A sample list of representations and warranties that might be included is set forth in ***Exhibit L.*** There is no perfect list to use as a "go by" as representations and warranties should be customized to the specifics of "the deal."

Even if a seller makes a particular "representation," a buyer who seeks recourse from the seller may not be excused from failure to conduct its own due diligence to verify the representation. Because of the expectation that a "reasonable" buyer will conduct its own due diligence to verify the property is suitable for buyer's intended use, courts have generally been unsympathetic to a buyer who "unreasonably" relied upon a seller's representation. Of course, this would not excuse a blatant misrepresentation or fraud by a seller.

PRACTICE TIP: As part of your due diligence, explore new insurance products available for representations and warranties.

C. Survival provisions

One question that comes up in negotiations is how long do the representations and warranties survive? The traditional theory is that contract provisions "merge" into the deed at closing. In Sunset Beach Development, LLC v. AMEC, Inc., 196 N.C. App. 202, 675 S.E.2d 46 (2009), the court considered the effect of a survival clause in a real estate contract:

> [G]enerally, a contract for the sale of land is not enforceable when the deed fulfills all the provisions of the contract, since the executed contract then merges into the deed ... However, it is well recognized that the intent of the parties controls whether the doctrine of merger should apply.

In Sunset Beach, the contract contained the following (simple) survival clause in the section entitled "Representations and Warranties of Seller": "*Seller's representations and warranties shall survive closing.*"

The court was not impressed with the buyer's lack of due diligence but held that there were sufficient facts to preclude summary judgment for the seller. However, the court limited its holding to only those facts covered by seller's representations and warranties, which expressly included environmental matters. Because the issue of wetlands was covered elsewhere in the contract, the court did not extend the "survival" clause to those additional issues. The court interpreted the "time is of the essence" provision - - holding that such a clause might apply to different provisions in the contract (such as a pre-closing condition or a closing deadline). See also Myers v. Queens Gap Mountain, LLC, Civil No. 1:10cv171, 2011 WL 4102147 (W.D.N.C. 2011) (the language of the contract clearly shows the parties' intent that certain provisions of the contract shall survive closing).

PRACTICE TIP: although the court did not mention this, the survival clause quoted did not include a time limit. It is the author's experience that it is more typical to find a survival clause with a deadline, usually expressed in a number of "months" and hotly negotiated. A more typical clause in a commercial context is as follows:

> Except as otherwise specifically provided in this Section, the representations and warranties set forth in this Section shall survive Closing for a period of _____ (____) months (the "Survival Period"). In the event Purchaser has not given notice to Seller of a claim based on breach of a representation or warranty set forth in this Section within the Survival Period, Purchaser agrees that Seller shall be fully released and discharged from any liability whatsoever arising out of the representations and warranties contained in this Contract. In the event that Purchaser has knowledge prior to the consummation of the sale of the Property that any representation or warranty of Seller is materially untrue or incorrect, Purchaser shall have the right, as its sole and exclusive remedy, to either terminate this Contract and obtain a refund of the Earnest Money, or, alternatively, to close and take title to the Property subject to the truth of the applicable matter, in which case Purchaser shall be deemed to have waived any claim against Seller based on the representation or warranty being untrue.

PRACTICE TIP: For this reason, you sometimes see the "AS IS" clause contained in the deed, not just the contract. A buyer doesn't like to see this in the recorded deed, but it avoids the merger issue. This is another reason to have the terms of the deed negotiated and attached as an exhibit to the purchase agreement. See ***Section IV, A, above.***

D. Restrictions on "knowledge" in giving a representation

The seller who consents to give "some" representations and warranties will want to qualify the representation and warranties to a narrow and measurable standard. Different standards are used, including, but not limited to:

- Actual knowledge/express knowledge/direct knowledge
    - Actual knowledge without any duty of inquiry/investigation
    - Actual knowledge of the following person:

      _____

- "To the best of my knowledge"
- Implied knowledge/constructive knowledge/public knowledge
- Imputed knowledge

For a detailed examination of "knowledge" standards, see Edward Levin, "'Best' is not always best when it comes to knowledge," Probate & Property Journal (A.B.A. Vol. 30, No. 1) (January/February 2016).

See also, RD & J Properties v. Lauralea-Dilton Enterprises, LLC, where the court points out that when sellers' "representations and warranties were *expressly* qualified [in its purchase contract]: it represented only 'to the best of its knowledge.'" RD & J Properties v. Lauralea-Dilton Enterprises, LLC, 165 N.C.App. 737, 600 S.E.2d 492 (2004) (emphasis added). Since seller's "representations were limited in this fashion, in order to prove a breach of contract [buyer] was required to establish that [seller] knew or should have known that the diverter pipe was not in compliance with applicable regulations and that it required a permit." It is also important to note the court cited a New York rule finding a "defendant could be liable under 'best knowledge' warranty if, at the time of representation, it had actual knowledge *or*, based on documents to which it had access, should have known.") Id. citing American Transtech Inc. v. U.S. Trust Corp., 933 F.Supp. 1193, 1200 (S.D.N.Y. 1996) (emphasis added).

VII. Contingencies

Contingencies are the buyer's saving grace if something goes wrong. It allows the buyer to pull the plug and walk from the deal if something goes wrong. Some contingencies are standard, such as financing. Beware of purchase money/seller financing transactions.[1] Others are completely custom. For an example of some custom contingencies from a hypothetical development deal, see ***Exhibit M.***

VIII. Disclosures

Disclosures are included to advise the buyer of certain known risks that the seller wants to disclose to make sure that non-disclosure does not come back to haunt the seller as a liability. Typically, disclosures are risks well known to the seller that have been factored into the purchase price. For example, if the property is contaminated and there is on-going remediation, the seller knows this and the buyer has seen this while walking the site. If the contract is "AS IS," you might ask why is it necessary? It may not be, but it prevents the argument if there has been full disclosure.

The types of "known" facts that a seller may want to disclose includes:

- Environmental issues;
- Streams and wetlands/buffers;
- Cemeteries;
- Landfill/stump dump/fill;
- Conservation easement;
- Cell tower;
- Railroad line/railroad "right of way (where railroad tracks are physically located "off" the property); and
- Buried easements, including pipelines.

In some cases, a seller may want to disclose "off site" issues, such as a noise cone from an airport or a sewage treatment plant.

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[1] This manuscript does not address the issues surrounding purchase money transactions. See, e.g., N.C.G.S.A §45-21.38 and §45-21.38A. See also N.C.G.S.A §39-13.

One area of disclosure that is little understood is the "Subdivision Street Disclosure Statement." See N.C.G.S.A § 136-102.6(f) and ***Exhibit N,*** an example of a Street Disclosure Statement. With commercial properties in an office park, or a retail lot in a shopping center, there is usually a "Declaration of Easements, Covenants and Restrictions" describing the roads and road maintenance in great detail. However, there is not an exception in the statute for roads governed by a Declaration (although it seems like there should be).

PRACTICE TIP: consider disclosing all known material facts concerning the property and the adjacent area.

IX. Execution of the purchase agreement

A. For entities, trace the signature block to the authorized signer

It is critical that authorized representatives sign the purchase agreement if you need to be able to enforce it later. This can be cumbersome if there are multiple layers of ownership, such as an entity owned by another entity, which is owned by another entity, which is owned by another entity, etc. Is each entity in good standing? Do you have a representation and warranty that the "undersigned" has the authority? What would you do to verify proper authority for a deed or lease? The standard shouldn't be any less to contract to buy! Do you need a corporate/limited liability consent form for the contract or just at closing? Do you need the corporate/limited liability consent for each entity in the signature block? And, for due diligence, do you need a good standing certificate for each entity in the signature block?

For some N.C. cases dealing with authority, see Azalea Garden Bd. & Care, Inc. v. Vanhoy, 2009 NCBC 8, No. 06 CVS 0948, 2009 WL 691465 (N.C. Sup. Ct. Mar. 17, 2009) (denying summary judgment when plaintiff presented evidence that purchaser's signature on the purchase agreement was signed by defendant in his capacity as joint venturer of purchaser,

signing on behalf of the purchaser, and therefore the contract had the necessary signatures to satisfy the statute of frauds.); Manecke v. Kurtz, 222 N.C.App. 472, 731 S.E.2d 217 (2012)(an agent's acceptance on behalf of its client, with no evidence of actual or implied authority, cannot bind the parties to a purchase agreement).

PRACTICE TIP: if the opposite party in your purchase agreement is a limited liability company or corporation (or other entity), make sure you have a resolution evidencing and acknowledging that such party's signature block is enforceable and binding; also verify with the North Carolina Secretary of State's office that the entity is in good standing ("current-active").

PRACTICE TIP: if the opposite party is not a North Carolina entity, then you also need to check whether the entity is in good standing in its home state and determine if the entity is required to qualify to do business in North Carolina.

B. Dating "of even date herewith"

There have been several cases in the bankruptcy court arena dealing with effectiveness of a deed of trust when, through inadvertence, the deed of trust does not accurately describe the obligation it secures. See In re Head Grading Co., Inc. (Beaman v. Head), 353 B.R. 122 (E.D.N.C. 2006). This was a harsh case based on a literal interpretation of the phrase "of even date herewith." For two recent cases interpreting In re Head Grading Co., Inc. (Beaman v. Head), see In Re Willows II, LLC, 485 B.R. 528 (E.D.N.C. January 10, 2013) and In Re Skumpija, 494 B.R. 822 (July 26, 2013).

PRACTICE TIP: don't rely upon the court to determine if the Note was adequately identified in the deed of trust; avoid the issue by clearly identifying the obligation secured; if the deed of trust provides the obligation is "of even date herewith, " then assume the Note needs to be the exact same date.

PRACTICE TIP: when giving an opinion letter, require that the documents be dated the same date.

C. Powers of attorney

N.C.G.S.A §47-28 governs a power of attorney ("POA") for real estate transactions and requires that they be recorded. It is now customary to see entities using a POA to execute real estate documents. An often cited source to recognize the proper use of powers of attorney by an entity is Howard Borum, "Ability of a Corporation to Convey Real Property in North Carolina Through an Attorney-in-Fact," Real Property, NCBA (Vol. 12, No. 1) (October 1990). Your duty, then, is to make sure the power of attorney contains the authority to execute the purchase agreement/closing documents.

D. Notary Public considerations

A commercial real estate purchase agreement does not need to be notarized, although a Memorandum of Contract would need to be. See ***Section XII*** below. Notary public rules should be strictly followed. See N.C.G.S.A. § Chapter 10B. See NationsBank of North Carolina, N.A. v. Parker, 140 N.C.App. 106, 535 S.E.2d 597 (2000) (absent allegations of malice or corruption a notary may not be liable for acts within her scope of duties; an attorney who notarized closing documents is immune from liability, if he represents that documents were executed by a specific individuals based on his actions observed in his capacity as notary).

PRACTICE TIP: See George Jeter, "You Need the New Notary Public Manual," Real Property, NCBA (Vol. 37, No. 3)(June 2016).

X. The earnest money deposit

With respect to the earnest money deposit ("EMD"), be sure your purchase agreement clearly identifies who is to hold the EMD and the terms for release (whether to the buyer or to

the seller). Some parties want to include a provision if certain events happen (such as the buyer terminates prior to the expiration of the due diligence period), the escrow agent is authorized on the buyer's (unilateral) word that the EMD may be released to the buyer. Obviously a better practice is to have something signed by both buyer and seller. For a detailed analysis of escrow disputes, see Peter Chenery, "Real Estate Escrow Disputes," Real Property, NCBA (Vol. 29, No. 3)(March 2008).

Without terms and conditions to the contrary, the North Carolina common law rule is that: "where a party agrees to purchase real estate and pays a part of the consideration therefor and then refuses or becomes unable to comply with the terms of his contract, he is not entitled to recover the amount theretofore paid pursuant to its terms. See Star Financial Corp. v. Howard Nance Co., 131 N.C.App. 674, 508 S.E.2d 534 (1998) citing Scott v. Foppe, 247 N.C. 67, 70, 100 S.E.2d 238, 240 (1957). Even the court in Star Financial Corp. commented that the common law rule may be harsh, but that "it is not for this Court to depart from a rule that our Supreme Court has described as "settled law." In Star Financial Corp. the contract required purchaser to pay $50,000 upon delivery of the contract to seller and an additional $50,000 to seller on a specified date. Because the contract did not have a forfeiture provision nor were the amounts paid to seller specified as earnest money or liquidated damages, the court had to apply the common law rule.

XI. Assignment of the purchase agreement

A. Assignments – contract provision

An often overlooked provision in the purchase agreement is the assignability of the contract. Once the deal is closed, and absent an option for the seller to buy back the property, the buyer (now owner) can re-convey to any party. So why the issue at closing? The seller wants to

"control" the deal and know who the buyer is. A typical compromise is that it is acceptable to assign the contract to an affiliate. Of course, "affiliate" needs to be defined. Better, if you represent the buyer, form the special purpose entity ("SPE") which is going to take title and have the contract in that name if there is an issue regarding assignability. Be aware, as with other areas of practice, such as deeds of trust, of the artful dodger – the party that assigns an ownership interest instead of title and thereby avoids the assignability provision.

B. Assignment – authorized assignment

If the contract is assignable, be sure the proper party(ies) executes the assignment. The same level of review should be used as with execution of the purchase agreement. The authors are aware of one unrecorded case where one "manager" of a limited liability company attempted to assign the contract as one of two managers – but the assignee was only owned by the one signing manager. Don't let this happen to you because of a seemingly innocuous document.

PRACTICE TIP: use a formal contract assignment (see ***Exhibit F*** for sample).

XII. Recordation of the purchase agreement

A little used statute allows the recordation of a Memorandum of Contract. See N.C.G.S.A. §47-119.1 and §47-120. While a typical deal progresses quickly from contract to due diligence to closing, consider recording a Memorandum of Contract when there is an extended period between the execution of the purchase agreement and the anticipated closing date (such as multiple extensions in contemplation of assembling land or contested re-zoning).

XIII. Closing Checklists

PRACTICE TIP: Use a checklist for every part of the closing. Samples:

Contract Follow Up Checklist: See ***Exhibit O***

Pre-Closing Checklist: See ***Exhibit P***

Closing Checklist: See ***Exhibit Q***

Post Closing Checklist: See ***Exhibit R***

PRACTICE TIP: NC has a fairly new, but limited, commercial lien for brokers. See N.C.G.S.A. §44A-24.3 (Commercial real estate lien) and §44A-24.4 (When lien attaches to commercial real estate).

PRACTICE TIP: NC has its own 1099 (NC-1099NRS). See 17 NCAC 06B.

PRACTICE TIP: FIRPTA has been amended for closings on or after February 17, 2016. See Chris Burti, "FIRPTA Requirements Changed February 16, 2016," Statewide Title Newsletter and Legal Memorandum (Vol 22, No. 2)(February 2016).

XIV. Legal malpractice cases involving commercial real estate contracts

A. Keep in mind the case of Lefever v. Taylor, No. COA08-1278, 2009 WL 2177323 (N.C. Ct. App. Jul. 21, 2009). While this was not a legal malpractice suit, the court made clear an attorney has an obligation to check documents for revisions, despite failure of opposing attorney to point out a change or forward a redline before the document is executed.

B. Marion Partners v. Weatherspoon & Voltz, 215 N.C.App. 357, 716 S.E.2d 29 (2011) (considering alleged negligence of attorney to explain certain lease provisions relative to contributory negligence of the landlords, as client, to read and understand the leases). Although this case is fact specific, the court was not impressed that the landlords assumed they could rely entirely on the attorney, stating that there were no "special circumstances" that persuaded the court that the landlords were relieved of their own "duty to read the leases, especially given the emails urging them to do so and the fact that [landlords] would have understood the significance of the tax provision if [landlords] had read it.")

C. Although a Third Circuit case, in Padilla v. Shore, McKinley, Conger & Scott, LLP, the tenant in a lease agreement sued its attorney for special damages and legal malpractice after the tenant's attorney's failure to adequately provide a formula or mechanism to determine how to value the leased property upon tenant's election to exercise its option to purchase. Padilla v. Shore, McKinley, Conger & Scott, LLP, Third Appellate District, San Joaquin CA Super. Ct. No. 39201300295881CUPNSTK (Apr. 22, 2016).

D. In Bolton v. Crone, plaintiff sued his lawyer for failing to advise him that the property he was purchasing was restricted to residential use only. Bolton v. Crone, 162 N.C.App. 171, 589 S.E.2d. 915 (2004). Plaintiff intended to use the property as a commercial site for automobile sales. The case was dismissed because plaintiff failed to bring the malpractice claim within the three year statute of limitations period.

E. In Kingsdown, Inc. v. Hinshaw, the court disqualified a law firm from representing a corporate defendant due to various prior representations by multiple attorneys in the firm. Such matters ranged from corporate matters, real estate matters, and various individual matters for the CEO of the corporation and his wife. The court concluded the firm should be disqualified after the defendant failed to prove that the firm had not violated Rule 1.10(b) (that it had obtained material confidential information about the plaintiff based on prior representations); and because the firm's prior representations of the plaintiffs individually, including in connection with the sale of its beach house, creates an appearance of impropriety that requires the firm's disqualification. Kingsdown, Inc. v. Hinshaw, No. 14 CVS 1701, 2015 WL 1406311 (N.C. Ct. App. Mar. 25, 2015).

EXHIBITS

A.	Sample: "Agreement for Purchase and Sale of Real Property" (reprinted with permission)
B.	Sample: "Additional Provisions Addendum" (reprinted with permission)
C.	Drafting Tips: Letters of Intent
D.	Drafting Tips: no "presumption" against drafter
E.	Drafting Tips: Sample "Consideration" language (including "independent consideration")
F.	Form: Assignment of Purchase Agreement
G.	The "Seven Holy Virtues for Real Estate Lawyers"
H.	Form: Escrow Closing Instruction Letter
I.	Form: Due Diligence Verification
J.	Due Diligence Checklist (Status of Property)
K.	Sample: "AS IS" insert
L.	Sample: list of representations and warranties (for use by buyer)
M.	Sample: list of contingencies (hypothetical development deal)
N.	Sample: Street Disclosure Statement
O.	Contract Follow Up Checklist
P.	Pre-Closing Checklist
Q.	Closing Checklist
R.	Post Closing Checklist
S.	Commercial real estate drafting checklist (reprinted with permission)
T.	10 Commandments of Real Estate Closings (reprinted with permission)

EXHIBIT A

REALTORS' CommercialAlliance
REALTOR® North Carolina Association of REALTORS®

AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY

THIS AGREEMENT, including any and all addenda attached hereto ("Agreement"), is by and between

_____,
a(n) _____("Buyer"), and
(individual *or* State of formation and type of entity)

_____,
a (n) _____("Seller").
(individual *or* State of formation and type of entity)

FOR AND IN CONSIDERATION OF THE MUTUAL PROMISES SET FORTH HEREIN AND OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE HEREBY ACKNOWLEDGED, THE PARTIES HERETO AGREE AS FOLLOWS:

Section 1. Terms and Definitions: The terms listed below shall have the respective meaning given them as set forth adjacent to each term.

(a) "**Property**": (Address)_____

_____

Plat Reference: Lot(s) _____, Block or Section _____, as shown on Plat Book or Slide _____ at Page(s) _____, _____ County, consisting of _____ acres.

☐ If this box is checked, "Property" shall mean that property described on **Exhibit A** attached hereto and incorporated herewith by reference,

(For information purposes: (i) the tax parcel number of the Property is: _____; and, (ii) some or all of the Property, consisting of approximately _____ acres, is described in Deed Book _____, Page No._____, _____ County.)

together with all buildings and improvements thereon and all fixtures and appurtenances thereto and all personal property, if any, itemized on **Exhibit A.**

$_____ (b) "**Purchase Price**" shall mean the sum of _____

_____Dollars,

payable on the following terms:

$_____ (i) "**Earnest Money**" shall mean _____ Dollars or terms as follows:_____

_____

Upon this Agreement becoming a contract in accordance with Section 14, the Earnest Money shall be promptly deposited in escrow with _____ (name of person/entity with whom deposited), to be applied as part payment of the Purchase Price of the Property at Closing, or disbursed as agreed upon under the provisions of Section 10 herein.

REALTOR®
This form jointly approved by:
North Carolina Bar Association
North Carolina Association of REALTORS®, Inc.

STANDARD FORM 580-T
Revised 7/2013

Buyer Initials _____ _____ Seller Initials _____ _____

☐ **ANY EARNEST MONEY DEPOSITED BY BUYER IN A TRUST ACCOUNT MAY BE PLACED IN AN INTEREST BEARING TRUST ACCOUNT, AND:** ***(check only ONE box)***

☐ **ANY INTEREST EARNED THEREON SHALL BE APPLIED AS PART PAYMENT OF THE PURCHASE PRICE OF THE PROPERTY AT CLOSING, OR DISBURSED AS AGREED UPON UNDER THE PROVISIONS OF SECTION 10 HEREIN. (Buyer's Taxpayer Identification Number is: _____)**

☐ **ANY INTEREST EARNED THEREON SHALL BELONG TO THE ACCOUNT HOLDER IN CONSIDERATION OF THE EXPENSES INCURRED BY MAINTAINING SUCH ACCOUNT AND RECORDS ASSOCIATED THEREWITH.**

$_____ (ii) **Proceeds of a new loan** in the amount of _____ Dollars for a term of _____ years, with an amortization period not to exceed ____ years, at an interest rate not to exceed _____% per annum with mortgage loan discount points not to exceed _____% of the loan amount, or such other terms as may be set forth on **Exhibit B**. Buyer shall pay all costs associated with any such loan.

$_____ (iii) **Delivery of a promissory note** secured by a deed of trust, said promissory note in the amount of _____ Dollars being payable over a term of _____ years, with an amortization period of ____ years, payable in monthly installments of principal, together with accrued interest on the outstanding principal balance at the rate of _____ percent (_____%) per annum in the amount of $_____, with the first principal payment beginning on the first day of the month next succeeding the date of Closing, or such other terms as may be set forth on **Exhibit B**. At any time, the promissory note may be prepaid in whole or in part without penalty and without further interest on the amounts prepaid from the date of such prepayment. **(NOTE: In the event of Buyer's subsequent default upon a promissory note and deed of trust given hereunder, Seller's remedies may be limited to foreclosure of the Property. If the deed of trust given hereunder is subordinated to senior financing, the material terms of such financing must be set forth on Exhibit B. If such senior financing is subsequently foreclosed, the Seller may have no remedy to recover under the note.)**

$_____ (iv) **Assumption** of that unpaid obligation of Seller secured by a deed of trust on the Property, such obligation having an outstanding principal balance of $_____ and evidenced by a note bearing interest at the rate of _____ percent (_____%) per annum, and a current payment amount of $_____. The obligations of Buyer under this Agreement are conditioned upon Buyer being able to assume the existing loan described above. If such assumption requires the lender's approval, Buyer agrees to use its best efforts to secure such approval and to advise Seller immediately upon receipt of the lender's decision. Approval must be granted on or before _____. On or before this date, Buyer has the right to terminate this Agreement for failure to be able to assume the loan described above by delivering to Seller written notice of termination by the above date, ***time being of the essence***. If Buyer delivers such notice, this Agreement shall be null and void and Earnest Money shall be refunded to Buyer. If Buyer fails to deliver such notice, then Buyer will be deemed to have waived the loan condition. Unless provided otherwise in Section 3 hereof, Buyer shall pay all fees and costs associated with any such assumption, including any assumption fee charged by the lender. At or before Closing, Seller shall assign to Buyer all interest of Seller in any current reserves or escrows held by the lender, any property management company and/or Seller, including but not limited to any tenant improvement reserves, leasing commission reserves, security deposits and operating or capital reserves for which Seller shall be credited said amounts at Closing

$_____ (v) **Cash, balance of Purchase Price**, at Closing in the amount of _____ Dollars.

(c) **"Closing"** shall mean the date and time of recording of the deed. Closing shall occur on or before _____ or _____

_____.

(d) **"Contract Date"** means the date this Agreement has been fully executed by both Buyer and Seller.

(e) **"Examination Period"** shall mean the period beginning on the first day after the Contract Date and extending through 11:59pm (based upon time at the locale of the Property) on

_____.

TIME IS OF THE ESSENCE AS TO THE EXAMINATION PERIOD.

(f) **"Broker(s)"** shall mean:

_____("Listing Agency"),

_____("Listing Agent" – License #_____)

Acting as: ☐ Seller's Agent; ☐ Dual Agent

and _____("Selling Agency"),

_____("Selling Agent"- License #_____)

Acting as: ☐ Buyer's Agent; ☐ Seller's (Sub)Agent; ☐ Dual Agent.

(g) **"Seller's Notice Address"** shall be as follows:

_____

_____

except as same may be changed pursuant to Section 12.

(h) **"Buyer's Notice Address"** shall be as follows:

_____

_____

_____

except as same may be changed pursuant to Section 12.

☐ (i) If this block is marked, additional terms of this Agreement are set forth on **Exhibit B** attached hereto and incorporated herein by reference. **(Note: Under North Carolina law, real estate agents are not permitted to draft conditions or contingencies to this Agreement.)**

Section 2. Sale of Property and Payment of Purchase Price: Seller agrees to sell and Buyer agrees to buy the Property for the Purchase Price.

Section 3. Proration of Expenses and Payment of Costs: Seller and Buyer agree that all property taxes (on a calendar year basis), leases, rents, mortgage payments and utilities or any other assumed liabilities as detailed on attached **Exhibit B**, if any, shall be prorated as of the date of Closing. Seller shall pay for preparation of a deed and all other documents necessary to perform Seller's obligations under this Agreement, excise tax (revenue stamps), any deferred or rollback taxes, and other conveyance fees or taxes required by law, and the following:

_____

_____.

Buyer shall pay recording costs, costs of any title search, title insurance, survey, the cost of any inspections or investigations undertaken by Buyer under this Agreement and the following:

_____

_____

Each party shall pay its own attorney's fees.

Section 4. Deliveries: Seller agrees to use best efforts to deliver to Buyer as soon as reasonably possible after the Contract Date copies of all information relating to the Property in possession of or available to Seller, including but not limited to: title insurance policies (and copies of any documents referenced therein), surveys, soil test reports, environmental surveys or reports, site plans, civil drawings, building plans, maintenance records and copies of all presently effective warranties or service contracts related to the Property. Seller authorizes (1) any attorney presently or previously representing Seller to release and disclose any title insurance policy in such attorney's file to Buyer and both Buyer's and Seller's agents and attorneys; and (2) the Property's title insurer or its agent to release and disclose all materials in the Property's title insurer's (or title insurer's agent's) file to Buyer and both Buyer's and Seller's agents and attorneys. If Buyer does not consummate the Closing for any reason other than Seller default, then Buyer shall return to Seller all materials delivered by Seller to Buyer pursuant to this Section 4 (or Section 7, if applicable), if any, and shall, upon Seller's request, provide to Seller copies of (subject to the ownership and copyright interests of the preparer thereof) any and all studies, reports, surveys and other information relating directly to the Property prepared by or at the request of Buyer, its employees and agents, and shall deliver to Seller, upon the release of the Earnest Money, copies of all of the foregoing without any warranty or representation by Buyer as to the contents, accuracy or correctness thereof.

Section 5. Evidence of Title: Seller agrees to convey fee simple marketable and insurable title to the Property without exception for mechanics' liens, free and clear of all liens, encumbrances and defects of title other than: (a) zoning ordinances affecting the Property, (b) Leases (if applicable) and (c) matters of record existing at the Contract Date that are not objected to by Buyer prior to the end of the Examination Period ("Permitted Exceptions"); provided that Seller shall be required to satisfy, at or prior to Closing, any encumbrances that may be satisfied by the payment of a fixed sum of money, such as deeds of trust, mortgages or statutory liens. Seller shall not enter into or record any instrument that affects the Property (or any personal property listed on **Exhibit A**) after the Contract Date without the prior written consent of Buyer, which consent shall not be unreasonably withheld, conditioned or delayed.

Section 6. Conditions: This Agreement and the rights and obligations of the parties under this Agreement are hereby made expressly conditioned upon fulfillment (or waiver by Buyer, whether explicit or implied) of the following conditions:

(a) **New Loan:** The Buyer must be able to obtain the loan, if any, referenced in Section 1(b)(ii). Buyer must be able to obtain a firm commitment for this loan on or before _____, effective through the date of Closing. Buyer agrees to use its best efforts to secure such commitment and to advise Seller immediately upon receipt of lender's decision. On or before the above date, Buyer has the right to terminate this Agreement for failure to obtain the loan referenced in Section 1(b)(ii) by delivering to Seller written notice of termination by the above date, ***time being of the essence***. If Buyer delivers such notice, this Agreement shall be null and void and Earnest Money shall be refunded to Buyer. If Buyer fails to deliver such notice, then Buyer will be deemed to have waived the loan condition. Notwithstanding the foregoing, after the above date, Seller may request in writing from Buyer a copy of the commitment letter. If Buyer fails to provide Seller a copy of the commitment letter within five (5) days of receipt of Seller's request, then Seller may terminate this Agreement by written notice to Buyer at any time thereafter, provided Seller has not then received a copy of the commitment letter, and Buyer shall receive a return of Earnest Money.

(b) **Qualification for Financing:** If Buyer is to assume any indebtedness in connection with payment of the Purchase Price, Buyer agrees to use its best efforts to qualify for the assumption. Should Buyer fail to qualify, Buyer shall notify Seller in writing immediately upon lender's decision, whereupon this Agreement shall terminate, and Buyer shall receive a return of Earnest Money.

(c) **Title Examination:** After the Contract Date, Buyer shall, at Buyer's expense, cause a title examination to be made of the Property before the end of the Examination Period. In the event that such title examination shall show that Seller's title is not fee simple marketable and insurable, subject only to Permitted Exceptions, then Buyer shall promptly notify Seller in writing of all such title defects and exceptions, in no case later than the end of the Examination Period, and Seller shall have thirty (30) days to cure said noticed defects. If Seller does not cure the defects or objections within thirty (30) days of notice thereof, then Buyer may terminate this Agreement and receive a return of Earnest Money (notwithstanding that the Examination Period may have expired). If Buyer is to purchase title insurance, the insuring company must be licensed to do business in the state in which the Property is located. Title to the Property must be insurable at regular rates, subject only to standard exceptions and Permitted Exceptions.

(d) **Same Condition:** If the Property is not in substantially the same condition at Closing as of the date of the offer, reasonable wear and tear excepted, then the Buyer may (i) terminate this Agreement and receive a return of the Earnest Money or (ii) proceed to Closing whereupon Buyer shall be entitled to receive, in addition to the Property, any of the Seller's insurance proceeds payable on account of the damage or destruction applicable to the Property.

(e) **Inspections:** Buyer, its agents or representatives, at Buyer's expense and at reasonable times during normal business hours, shall have the right to enter upon the Property for the purpose of inspecting, examining, performing soil boring and other testing, conducting timber cruises, and surveying the Property. Buyer shall conduct all such on-site inspections, examinations, soil boring and other testing, timber cruises and surveying of the Property in a good and workmanlike manner, shall repair any damage to the Property caused by Buyer's entry and on-site inspections and shall conduct same in a manner that does not unreasonably interfere with Seller's or any tenant's use and enjoyment of the Property. In that respect, Buyer shall make reasonable efforts to undertake on-site inspections outside of the hours any tenant's business is open to the public and shall give prior notice to any tenants of any entry onto any tenant's portion of the Property for the purpose of conducting inspections. Upon Seller's request, Buyer shall provide to Seller evidence of general liability insurance. Buyer shall also have a right to review and inspect all contracts or other agreements affecting or related directly to the Property and shall be entitled to review such books and records of Seller that relate directly to the operation and maintenance of the Property, provided, however, that Buyer shall not disclose any information regarding this Property (or any tenant therein) unless required by law and the same shall be regarded as confidential, to any person, except to its attorneys, accountants, lenders and other professional advisors, in which case Buyer shall obtain their agreement to maintain such confidentiality. Buyer assumes all responsibility for the acts of itself, its agents or representatives in exercising its rights under this Section 6(e) and agrees to indemnify and hold Seller harmless from any damages resulting therefrom. This indemnification obligation of Buyer shall survive the Closing or earlier termination of this Agreement. Buyer shall, at Buyer's expense, promptly repair any damage to the Property caused by Buyer's entry and on-site inspections. Except as provided in Section 6(c) above, Buyer shall have from the Contract Date through the end of the Examination Period to perform the above inspections, examinations and testing. **IF BUYER CHOOSES NOT TO PURCHASE THE PROPERTY, FOR ANY REASON OR NO REASON, AND PROVIDES WRITTEN NOTICE TO SELLER THEREOF PRIOR TO THE EXPIRATION OF THE EXAMINATION PERIOD, THEN THIS AGREEMENT SHALL TERMINATE, AND BUYER SHALL RECEIVE A RETURN OF THE EARNEST MONEY.**

Section 7. Leases (Check one of the following, as applicable):

❑ If this box is checked, Seller affirmatively represents and warrants that there are no Leases (as hereinafter defined) affecting the Property.

❑ If this box is checked, Seller discloses that there are one or more leases affecting the Property (oral or written, recorded or not -"Leases") and the following provisions are hereby made a part of this Agreement.

(a) A list of all Leases shall be set forth on **Exhibit B;**

(b) Seller shall deliver copies of any Leases to Buyer pursuant to Section 4 as if the Leases were listed therein;

(c) Seller represents and warrants that as of the Contract Date there are no current defaults (or any existing situation which, with the passage of time, or the giving of notice, or both, or at the election of either landlord or tenant could constitute a default) either by Seller, as landlord, or by any tenant under any Lease ("Lease Default"). In the event there is any Lease Default as of the Contract Date, Seller agrees to provide Buyer with a detailed description of the situation in accordance with Section 4. Seller agrees not to commit a Lease Default as Landlord after the Contract Date, and agrees further to notify Buyer immediately in the event a Lease Default arises or is claimed, asserted or threatened to be asserted by either Seller or a tenant under the Lease.

(d) In addition to the conditions provided in Section 6 of this Agreement, this Agreement and the rights and obligations of the parties under this Agreement are hereby made expressly conditioned upon the assignment of Seller's interest in any Lease to Buyer in form and content acceptable to Buyer (with tenant's written consent and acknowledgement, if required under the Lease), and Seller agrees to use its best efforts to effect such assignment. Any assignment required under this Section 7 shall be required to be delivered at or before Closing by Seller in addition to those deliveries required under Section 11 of this Agreement.

(e) Seller agrees to deliver an assignment of any Lease at or before Closing, with any security deposits held by Seller under any Leases to be transferred or credited to Buyer at or before Closing. Seller also agrees to execute and deliver (and work diligently to obtain any tenant signatures necessary for same) any estoppel certificates and subordination, nondisturbance and attornment agreements in such form as Buyer may reasonably request.

Section 8. Environmental: Seller represents and warrants that it has no actual knowledge of the presence or disposal, except as in accordance with applicable law, within the buildings or on the Property of hazardous or toxic waste or substances, which are defined as those substances, materials, and wastes, including, but not limited to, those substances, materials and wastes listed in the United States Department of Transportation Hazardous Materials Table (49 CFR Part 172.101) or by the Environmental Protection Agency as hazardous substances (40 CFR Part 302.4) and amendments thereto, or such substances, materials and wastes, which are or become

regulated under any applicable local, state or federal law, including, without limitation, any material, waste or substance which is (i) petroleum, (ii) asbestos, (iii) polychlorinated biphenyls, (iv) designated as a Hazardous Substance pursuant to Section 311 of the Clean Water Act of 1977 (33 U.S.C. §1321) or listed pursuant to Section 307 of the Clean Water Act of 1977 (33 U.S.C. §1317), (v) defined as a hazardous waste pursuant to Section 1004 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §6903) or (vi) defined as a hazardous substance pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §9601). Seller has no actual knowledge of any contamination of the Property from such substances as may have been disposed of or stored on neighboring tracts.

Section 9. Risk of Loss/Damage/Repair: Until Closing, the risk of loss or damage to the Property, except as otherwise provided herein, shall be borne by Seller. Except as to maintaining the Property in its same condition, Seller shall have no responsibility for the repair of the Property, including any improvements, unless the parties hereto agree in writing.

Section 10. Earnest Money Disbursement: In the event that any of the conditions hereto are not satisfied, or in the event of a breach of this Agreement by Seller, then the Earnest Money shall be returned to Buyer, but such return shall not affect any other remedies available to Buyer for such breach. In the event this offer is accepted and Buyer breaches this Agreement, then the Earnest Money shall be forfeited, but such forfeiture shall not affect any other remedies available to Seller for such breach. NOTE: In the event of a dispute between Seller and Buyer over the return or forfeiture of Earnest Money held in escrow by a licensed real estate broker, the broker is required by state law to retain said Earnest Money in its trust or escrow account until it has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction, or alternatively, the party holding the Earnest Money may deposit the disputed monies with the appropriate clerk of court in accordance with the provisions of N.C.G.S. §93A-12.

Section 11. Closing: At or before Closing, Seller shall deliver to Buyer a general warranty deed unless otherwise specified on Exhibit B and other documents customarily executed or delivered by a seller in similar transactions, including without limitation, a bill of sale for any personalty listed on Exhibit A, an owner's affidavit, lien waiver forms (and such other lien related documentation as shall permit the Property to be conveyed free and clear of any claim for mechanics' liens) and a non-foreign status affidavit (pursuant to the Foreign Investment in Real Property Tax Act), and Buyer shall pay to Seller the Purchase Price. At Closing, the Earnest Money shall be applied as part of the Purchase Price. The Closing shall be conducted by Buyer's attorney or handled in such other manner as the parties hereto may mutually agree in writing. Possession shall be delivered at Closing, unless otherwise agreed herein. The Purchase Price and other funds to be disbursed pursuant to this Agreement shall not be disbursed until Closing has taken place.

Section 12. Notices: Unless otherwise provided herein, all notices and other communications which may be or are required to be given or made by any party to the other in connection herewith shall be in writing and shall be deemed to have been properly given and received on the date delivered in person or deposited in the United States mail, registered or certified, return receipt requested, to the addresses set out in Section 1(g) as to Seller and in Section 1(h) as to Buyer, or at such other addresses as specified by written notice delivered in accordance herewith.

Section 13. Entire Agreement: This Agreement constitutes the sole and entire agreement among the parties hereto and no modification of this Agreement shall be binding unless in writing and signed by all parties hereto. The invalidity of one or more provisions of this Agreement shall not affect the validity of any other provisions hereof and this Agreement shall be construed and enforced as if such invalid provisions were not included.

Section 14. Enforceability: This Agreement shall become a contract when signed by both Buyer and Seller and such signing is communicated to both parties; it being expressly agreed that the notice described in Section 12 is not required for effective communication for the purposes of this Section 14. The parties acknowledge and agree that: (i) the initials lines at the bottom of each page of this Agreement are merely evidence of their having reviewed the terms of each page, and (ii) the complete execution of such initials lines shall not be a condition of the effectiveness of this Agreement. This Agreement shall be binding upon and inure to the benefit of the parties, their heirs, successors and assigns and their personal representatives.

Section 15. Adverse Information and Compliance with Laws:

(a) **Seller Knowledge:** Seller has no actual knowledge of (i) condemnation(s) affecting or contemplated with respect to the Property; (ii) actions, suits or proceedings pending or threatened against the Property; (iii) changes contemplated in any applicable laws, ordinances or restrictions affecting the Property; or (iv) governmental special assessments, either pending or confirmed, for sidewalk, paving, water, sewer, or other improvements on or adjoining the Property, and no pending or confirmed owners' association special assessments, except as follows (Insert "None" or the identification of any matters relating to (i) through (iv) above, if any):

_____

_____.

Note: For purposes of this Agreement, a "confirmed" special assessment is defined as an assessment that has been approved by a

governmental agency or an owners' association for the purpose(s) stated, whether or not it is fully payable at time of closing. A "pending" special assessment is defined as an assessment that is under formal consideration by a governing body. Seller shall pay all owners' association assessments and all governmental assessments confirmed as of the date of Closing, if any, and Buyer shall take title subject to all pending assessments disclosed by Seller herein, if any.
Seller represents that the regular owners' association dues, if any, are $_____ per _____.

(b) **Compliance:** To Seller's actual knowledge, (i) Seller has complied with all applicable laws, ordinances, regulations, statutes, rules and restrictions pertaining to or affecting the Property; (ii) performance of the Agreement will not result in the breach of, constitute any default under or result in the imposition of any lien or encumbrance upon the Property under any agreement or other instrument to which Seller is a party or by which Seller or the Property is bound; and (iii) there are no legal actions, suits or other legal or administrative proceedings pending or threatened against the Property, and Seller is not aware of any facts which might result in any such action, suit or other proceeding.

Section 16. Survival of Representations and Warranties: All representations, warranties, covenants and agreements made by the parties hereto shall survive the Closing and delivery of the deed. Seller shall, at or within six (6) months after the Closing, and without further consideration, execute, acknowledge and deliver to Buyer such other documents and instruments, and take such other action as Buyer may reasonably request or as may be necessary to more effectively transfer to Buyer the Property described herein in accordance with this Agreement.

Section 17. Applicable Law: This Agreement shall be construed under the laws of the state in which the Property is located. This form has only been approved for use in North Carolina.

Section 18. Assignment: This Agreement is freely assignable unless otherwise expressly provided on Exhibit B.

Section 19. Tax-Deferred Exchange: In the event Buyer or Seller desires to effect a tax-deferred exchange in connection with the conveyance of the Property, Buyer and Seller agree to cooperate in effecting such exchange; provided, however, that the exchanging party shall be responsible for all additional costs associated with such exchange, and provided further, that a non-exchanging party shall not assume any additional liability with respect to such tax-deferred exchange. Seller and Buyer shall execute such additional documents, at no cost to the non-exchanging party, as shall be required to give effect to this provision.

Section 20. Memorandum of Contract: Upon request by either party, the parties hereto shall execute a memorandum of contract in recordable form setting forth such provisions hereof (other than the Purchase Price and other sums due) as either party may wish to incorporate. Such memorandum of contract shall contain a statement that it automatically terminates and the Property is released from any effect thereby as of a specific date to be stated in the memorandum (which specific date shall be no later than the date of Closing). The cost of recording such memorandum of contract shall be borne by the party requesting execution of same.

Section 21. Authority: Each signatory to this Agreement represents and warrants that he or she has full authority to sign this Agreement and such instruments as may be necessary to effectuate any transaction contemplated by this Agreement on behalf of the party for whom he or she signs and that his or her signature binds such party.

Section 22. Brokers: Except as expressly provided herein, Buyer and Seller agree to indemnify and hold each other harmless from any and all claims of brokers, consultants or real estate agents by, through or under the indemnifying party for fees or commissions arising out of the sale of the Property to Buyer. Buyer and Seller represent and warrant to each other that: (i) except as to the Brokers designated under Section 1(f) of this Agreement, they have not employed nor engaged any brokers, consultants or real estate agents to be involved in this transaction and (ii) that the compensation of the Brokers is established by and shall be governed by separate agreements entered into as amongst the Brokers, the Buyer and/or the Seller.

Section 23. Attorneys Fees: If legal proceedings are instituted to enforce any provision of this Agreement, the prevailing party in the proceeding shall be entitled to recover from the non-prevailing party reasonable attorneys fees and court costs incurred in connection with the proceeding.

☐ **EIFS/SYNTHETIC STUCCO**: If the adjacent box is checked, Seller discloses that the Property has been clad previously (either in whole or in part) with an "exterior insulating and finishing system" commonly known as "EIFS" or "synthetic stucco". Seller makes no representations or warranties regarding such system and Buyer is advised to make its own independent determinations with respect to conditions related to or occasioned by the existence of such materials at the Property.

THE NORTH CAROLINA ASSOCIATION OF REALTORS®, INC. AND THE NORTH CAROLINA BAR ASSOCIATION MAKE NO REPRESENTATION AS TO THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISION OF THIS FORM IN ANY SPECIFIC TRANSACTION. IF YOU DO NOT UNDERSTAND THIS FORM OR FEEL THAT IT DOES NOT PROVIDE FOR YOUR LEGAL NEEDS, YOU SHOULD CONSULT A NORTH CAROLINA REAL ESTATE ATTORNEY BEFORE YOU SIGN IT.

BUYER:

Individual

_____

Date: _____

_____

Date: _____

Business Entity

_____
(Name of Entity)

By: _____

Name: _____

Title: _____

Date: _____

SELLER:

Individual

_____

Date: _____

_____

Date: _____

Business Entity

_____
(Name of Entity)

By: _____

Name: _____

Title: _____

Date: _____

The undersigned hereby acknowledges receipt of the Earnest Money set forth herein and agrees to hold said Earnest Money in accordance with the terms hereof.

_____
(Name of Firm)

Date: _____ By: _____

EXHIBIT B

REALTORS® CommercialAlliance
REALTOR® North Carolina Association of REALTORS®

ADDITIONAL PROVISIONS ADDENDUM

Seller:_____

Buyer:_____

Property:_____

NOTE: This Additional Provisions Addendum is attached to and a part of the Agreement for Purchase and Sale of Real Property (Form 580-T) between the parties referenced above ("Agreement"). All of the following provisions which are marked with an "X" shall apply to the Agreement. Those provisions marked "N/A" or not marked shall not apply.

1. _____ **ADDITIONAL EARNEST MONEY:** Not later than the expiration of the Examination Period **(time being of the essence with regard to said date)**, Buyer shall deposit with the same party as the original Earnest Money, additional Earnest Money in the amount of $_____, which shall be treated for all purposes of this Agreement as Earnest Money. If this additional Earnest Money is not deposited prior to the expiration of the Examination Period, notwithstanding the provisions of Section 6 of the Agreement, this Agreement shall be deemed terminated and Buyer shall receive a return of the Earnest Money. Monies paid pursuant to this provision shall be applicable to the Purchase Price and shall reduce the Section 1(b)(v) cash due at Closing by the amount so paid.

2. _____ **PURCHASE PRICE:** shall mean the sum of $_____ per gross acre ("Price Per Acre") as determined by a survey obtained by Buyer prior to the expiration of the Examination Period ("Survey"). Buyer shall provide a copy of the Survey to Seller not later than the expiration of the Examination Period. The purchase price shall be determined by multiplying the Price Per Acre by the number of gross acres as determined by the Survey. Adjustments to the amounts due under Sections 1(b)(ii) – 1(b)(v) shall be made, as applicable, to reflect any adjustment in the Purchase Price in accordance with this provision.

3. _____ **ACREAGE VARIANCE:** The assumed area of the Property is _____ acres ("Stated Acreage"). In the event that the survey obtained by Buyer determines that the acreage varies (greater or lesser) from the Stated Acreage by more than __%, then Seller or Buyer shall have the right to terminate the Agreement by written notice delivered to the other within ten (10) days of the delivery of the survey to Seller by Buyer.

4. _____ **ACQUISITION AND DEVELOPMENT LOAN:** Section 1(b)(ii) of the Agreement is deleted and replaced by the following:

$_____ (ii) **Proceeds of a new loan** for both acquisition and development of the Property, in the total amount of $_____ for a term of _____ years, with an amortization period not to exceed _____ years, at an interest rate not to exceed _____% per annum with mortgage loan discount points not to exceed _____% of the loan amount, with at least the amount of $_____ (as set forth in the blank adjacent this subsection) allocated from the loan proceeds to acquisition of the Property; or such other terms as may be set forth on **Exhibit B**. Buyer shall pay all costs associated with any such loan.

5._____ **CONFIDENTIALITY:** Buyer and Seller agree that a material consideration of this Agreement is that the existence of and the terms and conditions of same (except as may be provided in Section 6(e) of this Agreement) shall remain confidential and shall not be disclosed. In the event this item is marked, Section 20 (Memorandum of Contract) of the Agreement is hereby deleted as recording a memorandum of contract would violate this provision.

6. _____ **INTENDED USE**: shall mean the use of the Property for the following purpose: _____ (state with specificity any intended use). Seller represents that to its actual knowledge, without independent investigation, there are not any changes contemplated in any applicable laws, ordinances or restrictions affecting the Property or private use restrictions or governmental regulations that would prohibit the Intended Use at the Property.

IN THE EVENT OF A CONFLICT BETWEEN THIS ADDENDUM AND THE AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY, THIS ADDENDUM SHALL CONTROL.

THE NORTH CAROLINA ASSOCIATION OF REALTORS®, INC. MAKES NO REPRESENTATION AS TO THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISION OF THIS FORM IN ANY SPECIFIC TRANSACTION. IF YOU DO NOT UNDERSTAND THIS FORM OR FEEL THAT IT DOES NOT PROVIDE FOR YOUR LEGAL NEEDS, YOU SHOULD CONSULT A NORTH CAROLINA REAL ESTATE ATTORNEY BEFORE YOU SIGN IT.

BUYER:

Individual

_____

Date: _____

_____

Date: _____

Business Entity

_____
(Name of Entity)

By: _____

Name: _____

Title: _____

Date: _____

SELLER:

Individual

_____

Date: _____

_____

Date: _____

Business Entity

_____
(Name of Entity)

By: _____

Name: _____

Title: _____

Date: _____

STANDARD FORM 581-T
Revised 1/2011

EXHIBIT C

Drafting Tips: Letters of Intent

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.).[2]

[2] See Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp., 278 F.3d 401 (4th Cir. 2002) where the Fourth Circuit discussed two "Types" of "agreements to agree" ("Type I" and "Type II") and applied a test to determine which "Type" of agreement is binding.

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).

EXHIBIT D

Drafting Tips: no "presumption" against drafter

****

Samples of typical contract language rebutting the presumption:

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

[or]

b. This Purchase Agreement 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 Purchase Agreement, 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 Purchase Agreement 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 Purchase Agreement. As a consequence of such parity in bargaining power and position, this Purchase Agreement 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.

EXHIBIT E

Drafting Tips: Sample "Consideration" language
(including "independent consideration")

NOW, THEREFORE, for and in consideration of Ten and No/100 Dollars ($10.00) and other good and valuable consideration, including the cost to be incurred by Purchaser of:

- due diligence inspections;
- re-zoning; and
- engineering and design work for a site plan to determine if the subject property is suitable for the Purchaser's intended use,

[if the contract is for an extension of the original contract: "and in further consideration of the benefit to Seller of the Purchase Agreement being extended instead of terminated"], the receipt and sufficiency of which are acknowledged, and intending to be legally bound, Seller and Purchaser hereby agree as follows:

1. Independent consideration:

Option A: add a provision for $100 non-refundable earnest money

OR

Option B: Simultaneous with the execution and delivery of this Agreement, Purchaser shall deliver a payment of One Hundred and No/00 Dollars ($100.00) to Seller as independent consideration for this Agreement (**"Independent Consideration"**). Notwithstanding Purchaser's rights under this Agreement to terminate this Agreement and in connection therewith to receive back any deposit which is specified as *refundable* to Purchaser, the Independent Consideration shall not be refundable and shall not be applicable to the purchase price at Closing. Purchaser shall be in default under this Agreement due to a breach of this provision only if Purchaser fails to cure such breach after thirty (30) days prior written notice by Seller to Purchaser.

2. Other than the Independent Consideration set forth above, any earnest money deposit paid in connection with this Agreement is either fully refundable or applicable to the purchase price at Closing.

3. All consideration recited herein is adequate to the parties. Seller acknowledges that Purchaser is relying on the adequacy of the consideration as an inducement to continue to incur the expenses set forth above during the due diligence period.

EXHIBIT F

Form: Assignment of Purchase Agreement

NORTH CAROLINA **ASSIGNMENT OF AGREEMENT FOR**

_____ COUNTY **PURCHASE AND SALE OF REAL PROPERTY**

THIS ASSIGNMENT is made this _____ day of _____, 2016, between _____ ("Assignor") and _____ ("Assignee"), for the purpose of assigning the Agreement for Purchase and Sale of Real Property originally dated as of _____, as amended from time to time (the "Contract"), a true copy of which is attached hereto (all terms used in this Assignment are as defined in the Contract unless otherwise noted), as follows:

Assignment. In consideration of Ten Dollars ($10.00) in hand paid, by Assignee to Assignor, Assignor hereby transfers, sets over, and assigns to Assignee all of its rights and interest in and to the Contract.

Consent. The undersigned Seller hereby consents to this Assignment.

IN WITNESS WHEREOF, the parties hereto have caused this Assignment to be executed on the date first above written.

ASSIGNOR:

_____

By:_____
Manager

ASSIGNEE:

_____

By:_____
Manager

SELLER:

By:_____

EXHIBIT G

The "Seven Holy Virtues for Real Estate Lawyers"

1. Understand the contract and the closing instructions, even the minute detail.

2. Verify who is responsible for conducting the due diligence and probe your client's rationale for any due diligence being waived.

3. Oversee the execution and acknowledgement of the closing documents (there is a reason for the pending re-write of the Notary Public statute).

4. Treat "other people's money" as your own.

5. Make abundantly clear to all parties which party you represent (and which party(ies) you don't).

6. Look at the "big picture" - what would matter to you if it were your personal closing?

7. Document every single thing you do.

EXHIBIT H
Form: Escrow Closing Instruction Letter

Escrow Letter

August _____, 2016

Notice: Closing Escrow Letter contains prohibition against any changes in seller wire instructions

VIA E-MAIL to:_____

Closing attorney:
_____
_____
_____

Re: ***Closing (the "Closing")***
Purchase and Sale Agreement dated _____
Seller: _____
Buyer: _____
Property: _____

Dear _____:

We understand you have agreed to act as Escrow Agent for the referenced closing. You have received a completed, executed copy of the Agreement for Sale and Purchase of Property dated as set forth above, as amended and/or assigned (the "Agreement"). As Escrow Agent, you agree to honor all of the terms of the Agreement regarding closing and disbursement of funds and you have accepted a duty to the Seller who is relying upon you to act as Escrow Agent in accordance with the terms of the Agreement.

If the earnest money deposit is transferred to your law firm, you have agreed to accept the responsibility of holding, **in trust,** $_____ initially paid by _____ to ***Nexsen Pruet, PLLC,*** as the initial earnest money pursuant to the terms of the Agreement. You agree to hold such funds in trust and disburse the funds in accordance with the terms of the Agreement. You and your client agree that the earnest money deposit and purchase price will be held for the benefit of Seller, who has superior rights to the funds over Buyer upon closing.

In connection with the Closing referenced above, the following documents will be delivered to you **in trust** on behalf of Seller (the documents listed below being collectively, the "Seller's Delivered Documents"):

1. North Carolina Special Warranty Deed ("Special Warranty Deed");
2. NCLTA Lien Affidavit;
3. Certificate of Non-Foreign Status;
4. 1099-S Certification;
5. Resolution of Seller's LLC;
6. Seller's signature block for the Settlement Statement;
7. Release Deed; and
8. Other:_____.

The Seller's signature on the Settlement Statement will be delivered to you by email.

The Seller's signature block includes a power of attorney, which is recorded in Book _____, Page _____ of the _____ County Registry.

Also enclosed are copies of:

1. Seller's good standing certificate; and
2. Other:_____.

In connection with the Closing referenced above, the following documents will be delivered to you **in trust** on behalf of Buyer (the documents listed below being collectively, the "Buyer's Delivered Documents"):

1. Settlement Statement; and
2. Other:_____.

Upon receipt, you are hereby instructed to hold the Seller's Delivered Documents and the Buyer's Delivered Documents (collectively referred to herein as the "Delivered Documents") **in trust** pursuant to the escrow instructions contained herein.

Please be advised that Seller's wire instructions will only be sent to you via OVERNIGHT DELIVERY, not email. They will be enclosed in the package of original seller documents sent to you by OVERNIGHT DELIVERY. You are not authorized to change wire instructions for the net seller proceeds without verbal confirmation from _____ (who can be reached at _____) and followed up by an email confirmation to you from _____.

Prior to releasing or recording the Special Warranty Deed, (1) Buyer and Seller must have executed a settlement statement (the "Settlement Statement") for this Closing and an executed copy delivered to the undersigned, (2) you must have received in your trust account "*good funds*" to make the disbursements (on the same day as the Closing) as set forth on the Settlement Statement approved by Seller, (3) all conditions for the release of funds must have been satisfied, (4) Buyer shall have executed the Delivered Documents which call for its signature and you must be prepared to deliver to Seller the **originals** of Buyer's Delivered Documents immediately following Closing, and (5) you must have received written authorization (via email or facsimile) from the undersigned as counsel for the Seller to proceed with the Closing.

At such time as the foregoing has occurred, you may proceed with updating and recording. If no new matters appear of record, you will be authorized to record the Special Warranty Deed.

After the Special Warranty Deed has been recorded, please: (a) immediately wire to Seller the amount to be paid to Seller in accordance with the Settlement Statement and (b) immediately following Closing, deliver to the undersigned the Buyer's Delivered Documents bearing **original** signatures of the Buyer.

The Seller's FEIN No. is _____.

If you have any questions, please do not hesitate to give me a call. Please indicate your acceptance of these conditions by signing the bottom of this letter and returning the same to me by fax or e-mail.

Very truly yours,

Accepted By:

LAW FIRM:

By: _____
Printed Name: _____
NOTE: must be signed by closing attorney

Date: _____

EXHIBIT I
Form: Due Diligence Verification

****

DUE DILIGENCE VERIFICATION

Item	Received		Waived
	Yes	No	
Appraisal			
Environmental			
Survey			
Flood certificate			
Soils report			
Asbestos report			
Lead Paint			
Radon			
Building inspection			
Zoning verification			
Proof of utility service			
UCC search			
Permits/Licenses			
Other:			

BUYER:_____

By: _____
Manager

EXHIBIT J

DUE DILIGENCE CHECKLIST
(Status of Property)

obtain copies of any existing due diligence from seller (title policies, surveys, reports, etc.)

title search (verify legal description correct)

- copies of plats/exceptions

title insurance/endorsements available

UCC search (fixtures/personal property)

access (for roads and for utilities)

- necessary driveway permit
- private access issues (easement; maintenance expenses)

survey/surveyor's certificate (including verification of acreage)

flood certificate

governmental

- zoning/conditional uses/parking
- subdivision
- watershed
- historic district/other special district (e.g., airport issues)
- other local ordinances/conditions (limited access, curb cuts)
- permits required to operate for intended use (including building permit)
- certificate of occupancy

wetlands

environmental (including asbestos)

utilities

- water (water availability; water test)
- sewer/septic ("perk" test for soil suitability)
- electric
- gas
- telephone
- cable

inspections

- soil (suitability for building; fill)
- structure/roof (including any ADA/engineering/architect inspections)
- operating systems (HVAC)
- termite

condemnation (and planned road widenings)

existence of cemeteries on acreage tracts

water issues

- riparian rights
- drainage issues/erosion issues
- stormwater runoff

verify compliance with restrictive covenants/verify status of dues/assessments/ compliance with any property owners association

possession/tenant rights

appraisal (including verification of square footage)

EXHIBIT K
Sample: "AS IS" insert

(a) Buyer does hereby acknowledge, represent, warrant and agree to and with Seller that, except as otherwise expressly provided in this Agreement: (i) Buyer is expressly purchasing the Property in its existing condition "**AS IS, WHERE IS, AND WITH ALL FAULTS**" with respect to all facts, circumstances, conditions and defects; (ii) Seller has no obligation to inspect for, repair or correct any such facts, circumstances, conditions or defects or to compensate Buyer for same; (iii) Seller has specifically bargained for the assumption by Buyer of all responsibility to inspect and investigate the Property and of all risk of adverse conditions and has structured the Purchase Price and other terms of this Agreement in consideration thereof; (iv) Buyer has undertaken all such inspections and investigations of the Property as Buyer deems necessary or appropriate under the circumstances as to the condition of the Property and the suitability of the Property for Buyer's intended use, and based upon same, Buyer is and will be relying strictly and solely upon such inspections and examinations and the advice and counsel of its own consultants, agents, legal counsel and officers and Buyer is and will be fully satisfied that the Purchase Price is fair and adequate consideration for the Property; (v) Seller is not making and has not made any warranty or representation with respect to any materials or other data provided by Seller to Buyer (whether prepared by or for the Seller or others) or the education, skills, competence or diligence of the preparers thereof or the physical condition or any other aspect of all or any part of the Property as an inducement to Buyer to enter into this Agreement and thereafter to purchase the Property or for any other purpose; and (vi) by reason of all the foregoing, Buyer assumes the full risk of any loss or damage occasioned by any fact, circumstance, condition or defect pertaining to the Property. Without limiting the generality of any of the foregoing, Buyer specifically acknowledges that Seller does not represent or in any way warrant the accuracy of any marketing information or pamphlets listing or describing the Property or the information, if any, provided by Seller to Buyer; and

(b) SELLER HEREBY DISCLAIMS ALL WARRANTIES OF ANY KIND OR NATURE WHATSOEVER (INCLUDING WARRANTIES OF HABITABILITY AND FITNESS FOR PARTICULAR PURPOSES), WHETHER EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO WARRANTIES WITH RESPECT TO: THE PROPERTY OR ITS CONSTRUCTION; DEFECTS CAUSED BY ACTS OF THE ORIGINAL SELLER, DEVELOPER, OR BUILDER OF THE PROPERTY, OR ANY SUPPLIER, CONTRACTOR, SUBCONTRACTOR, OR MATERIALMAN; DEFECTS PERTAINING TO STRUCTURAL ELEMENTS, SYSTEMS, EQUIPMENT, APPLIANCES, UTILITIES, OR FIXTURES RELATED TO THE PROPERTY; TAX LIABILITIES; ZONING; LAND VALUE; AVAILABILITY OF ACCESS OR UTILITIES; INGRESS OR EGRESS; GOVERNMENTAL APPROVALS; OR THE SOIL CONDITIONS OF THE REAL PROPERTY, REGARDLESS OF WHETHER SUCH CONDITIONS CURRENTLY EXIST OR EMERGE OVER TIME. BUYER FURTHER ACKNOWLEDGES THAT BUYER IS BUYING THE PROPERTY "**AS IS**" AND IN ITS PRESENT CONDITION AND THAT EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, BUYER IS NOT RELYING UPON ANY

REPRESENTATION OF ANY KIND OR NATURE MADE BY SELLER, OR ANY OF ITS EMPLOYEES OR AGENTS OR SELLER GROUP WITH RESPECT TO THE LAND OR PROPERTY, AND THAT, IN FACT, NO SUCH REPRESENTATIONS WERE MADE EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT; and

FURTHER AND WITHOUT IN ANY WAY LIMITING ANY OTHER PROVISION OF THIS AGREEMENT, SELLER MAKES NO WARRANTY WITH RESPECT TO THE PRESENCE ON OR BENEATH THE REAL PROPERTY (OR ANY PARCEL IN PROXIMITY THERETO) OF HAZARDOUS MATERIALS. BY ACCEPTANCE OF THIS AGREEMENT AND THE DEED, BUYER ACKNOWLEDGES THAT BUYER'S OPPORTUNITY FOR INSPECTION AND INVESTIGATION OF SUCH REAL PROPERTY (AND OTHER PARCELS IN PROXIMITY THERETO) HAS BEEN ADEQUATE TO ENABLE BUYER TO MAKE BUYER'S OWN DETERMINATION WITH RESPECT TO THE PRESENCE ON OR BENEATH THE REAL PROPERTY (AND OTHER PARCELS IN PROXIMITY THERETO) OF SUCH HAZARDOUS MATERIALS. FURTHERMORE, BUYER'S CLOSING HEREUNDER SHALL BE DEEMED TO CONSTITUTE AN EXPRESS WAIVER OF BUYER'S AND ITS SUCCESSORS' AND ASSIGNS' RIGHTS TO SUE ANY OF THE SELLER GROUP AND OF BUYER'S RIGHT TO CAUSE ANY OF THE SELLER GROUP TO BE JOINED IN AN ACTION BROUGHT UNDER ANY FEDERAL, STATE OR LOCAL LAW, RULE, ACT, OR REGULATION NOW EXISTING OR HEREAFTER ENACTED OR AMENDED WHICH PROHIBITS OR REGULATES THE USE, HANDLING, STORAGE, TRANSPORTATION OR DISPOSAL OF HAZARDOUS MATERIALS OR WHICH REQUIRES REMOVAL OR REMEDIAL ACTION WITH RESPECT TO SUCH HAZARDOUS MATERIALS, SPECIFICALLY INCLUDING BUT NOT LIMITED TO FEDERAL "**CERCLA**", "**RCRA**", AND "**SARA**" ACTS.

EXHIBIT L
Sample: list of representations and warranties

(for use by buyer)

Item	Representations/Warranties	Misc. documents
1. Structural/maintenance issues for building/foundation/roof/walls/doors/windows (per inspections conducted by buyer)		Cross reference with inspection reports
2. Mechanical systems (electrical, plumbing, HVAC, elevators, etc.)		Cross reference with any inspection reports on mechanicals
3. Fixtures to be conveyed with Property (operational condition)		Cross reference with any inspection reports on fixtures
4. Environmental issues including underground storage tanks ("USTs")	Need to see all reports Need representation we have all reports What about sites with no reports?	
5. Asbestos		
6. Lead Paint		
7. Radon		
8. Soil condition/fill/buried debris/material settling of improvements	[waive if no intent to build onto existing facilities]	
9. Zoning/conditions grandfathered	Need representation on zoning	
10. Private restrictive covenants	Need representation that no restrictive covenants applicable to property	
11. Property Owners Association ("POA") dues/assessments for POA	Need representation that no assn/no dues	
12. Utilities (including well water/septic field)	Need representation that all utilities provides by public utilities and all operational	
13. Access (public or private)	Need representation re public access for all sites	
14. Railroad right of ways	Need representation that no RR	
15. Pending/proposed condemnation	Need representation that no condemnation	
16. Pending/proposed road widening/closure	Need representation that no road widening/closure	
17. Airport/noise cone	Applicable?	
18. Parking	Need representation that parking meets code	
19. Flooding/drainage/water intrusion	Need representation that no flood zone/flooding	
20. Wetlands	Need representation that no wetlands	

21. Streams and buffers	Need representation that no streams	
22. Termite damage	Need representation that no termite damage (current or prior)	
23. Mold damage	Need representation that no mold damage	
24. EIFS/Synthetic stucco	Applicable?	
25. Title defect	Need representation regarding title being marketable and in the name of owner and no encumbrances other than standard utility rights of way	
26. Material easements (anything other than standard utility easements)	Need representation that no off site easements needed; need representation that any off site easements have good title and valid enforceable easements	
27. Survey encroachments (off subject property or onto subject property)	Representation that no encroachments exist	
28. Habitable Residence located upon property	Not applicable	
29. Notice from any governmental agency	Need representation	
30. Other: a. Seller has provided all reports in its possession b. Indemnity from Seller (just "paper" if no security/collateral/letter of credit/escrow to back it up) c. Acknowledgment by Seller that Buyer is relying upon representations and warranties of Seller and is foregoing due diligence reports in reliance on Buyer's representations and warranties		

EXHIBIT M
Sample: list of contingencies
(hypothetical development deal)

Sample project contingencies to incorporate into purchase agreement

Overall project contingencies

- Project budget satisfactory to construction lender and investors
- Project timeline satisfactory to construction lender, investors, tenant and general contractor
- Zoning approval/re-zoning for project (final approval after all appeals expired; with acceptable list of conditions imposed)
- Approval of site plan by the _____;
- Additional approval of site plan by _____;
- Approval of proposed center with parcel being acquired; record plat;
- Approval by Department of Transportation for acceptable access/curb cuts to project from both Highway _____ and Highway _____; determine what traffic study required to support full entrance on Highway _____;
- Verification of utilities/stormwater:
    - All necessary utilities;
    - Verification that utilities stubbed to edge of property;
    - DOT encroachment agreement for water/sewer lines;
    - verification of easements;
    - verification of stormwater capacity
- Approval of anchor tenant plans and specs; bid; verification that bid from general contractor does not exceed budget for cost to construct final plans and specs;
- Negotiate contract with general contractor (cap cost; guarantee tenant timetable; absorb liquidated damages in lease for late delivery)

- Due diligence:
    - Satisfactory soil compaction test
    - Clean Phase I environmental
- Appraisal satisfactory to construction lender
- Financing package to construct project;
- Approval of anchor tenant lease by construction lender/execution of lease at closing or prior to closing (contingent upon closing);
- Building permit to construct the infrastructure/anchor tenant improvements.

Editorial note: *Objective is for the following to occur simultaneously with closing*:

-acquire title (all due diligence completed and satisfactory)

-construction financing in place (so no acquisition without loan in place)

-lease signed (so no acquisition of title without lease and verification that rent covers budget)

-contract with General Contractor sign (so budget matches rent and timeline in lease)

-permit in hand

EXHIBIT N

Sample: Street Disclosure Statement

[example for "private" streets]

PRIVATE STREETS DISCLOSURE STATEMENT

This Private Streets Disclosure Statement is executed in duplicate original pursuant to North Carolina General Statutes § 136-102.6(f), one original to be retained by the undersigned Purchaser and one original being retained by _____, LLC (the "Company'), and the undersigned Purchaser's signature shall constitute acknowledgment of receipt of this disclosure statement and conclusive proof of the delivery thereof pursuant to said North Carolina law prior to signing any agreement or contract for the purchase of property within _____.

The Company does hereby disclose unto the undersigned Purchaser that all of the Lots within _____ in _____ County, North Carolina are located upon private roads and that all roadways within the subdivision are private. A homeowner's association has been or will be, prior to closing, established for the owners of property within the _____ subdivision, such homeowner's association being known as "_____ Property Owners' Association, Inc.", a North Carolina not-for-profit corporation. All property owners within _____ shall be members of _____ Property Owners' Association, Inc. The Company shall convey all roadways and rights-of-way within _____ to _____ Property Owners' Association, Inc. The responsibility for insuring, maintaining, repairing and replacing such private roads and rights-of-way shall rest solely with _____ Property Owners' Association, Inc. No representation is made that the private streets within _____ will be constructed to minimum standards sufficient to allow their inclusion on the State highway system of North Carolina for State maintenance, or that the State of North Carolina would, if requested, assume maintenance of these roadways.

Purchaser:

_____

_____

Date: _____

Company:

_____

By: _____

Date: _____

EXHIBIT O
Contract Follow Up Checklist

CONTRACT FOLLOW UP CHECKLIST

Project:_____

Contract signed by all parties? _____ yes _____ no

Contract dated? _____ yes _____ no

All exhibits attached to contract? _____ yes _____ no

Any exhibits to be recorded? _____ yes _____ no

Explain (memo of contract/option/right of first refusal):

_____

Due diligence deadlines:

_____

_____

Earnest money amount: $_____
Escrow Agent:_____
EMD paid to Escrow Agent:_____ yes _____ no

Earnest money refundable?_____ yes _____ no
Terms:_____

Earnest money applicable at closing? _____ yes _____no

DATES TO TICKLE:

_____
_____
_____
_____
_____
_____
_____

OTHER MATTERS:

_____

EXHIBIT P
Pre-Closing Checklist

PRE- CLOSING CHECKLIST

Project:_____
Owner:_____

Title work status/title binder?

Open title issues to resolve?

UCC search (owner and tenant)
- Sec of State
- _____ County

Survey of existing structures

Boundary survey/new legal description

Flood certificate

Site plan proposed

Cross access needed

Declaration needed (traditional? pond?)

Subdivision/plat needed?

Phase I status

Any Phase II needed?

Soils report status

Asbestos report status

Zoning status

Utility letters requested?

Status of approval by Walgreens

Status of loan approval

Status of appraisal

Other:_____
_____
_____

EXHIBIT Q
Closing Checklist

SELLER: _____
BUYER: _____
TENANT: _____
LENDER: _____
ADDRESS: _____

Closing Date: _____

	Party Responsible	Status
Acquisition Documents		
Deed (General Warranty or Special Warranty?)		
1099		
FIRPTA		
Seller's lien affidavit		
Seller consent		
Seller good standing		
Other:		
Development Documents		
New Plat?		
Site plan approval? Plans & Specs?		
Declaration? Right of Way? Pond issues?		
Loan Documents (see loan closing checklist)		
Promissory Note		
Deed of Trust		
Guaranty Agreement		
Opinion Letter?		
Other:		
Title Insurance		
Owner and Mortgagee Title Insurance Commitment/Policy		
Copy of all underlying recorded documents affecting the Property		
Lien Affidavits		

Mechanics Lien Agent appointed?		
Real Estate Tax Bill to All Parties		
Final title opinion post closing		
Due Diligence		
UCC Search – Secretary of State		
UCC Search – _____ County		
"Phase I" Environmental Report		
Radon		
Asbestos		
Lead Paint		
Soils Report		
Appraisal		
Survey		
Flood Certification		
Evidence of Zoning Compliance		
Utility Letters (electric, gas, telephone, water & sewer)		
Permits		
C/O		
Building Inspection		
ADA Inspection		
Stormwater Inspection		
Lease Documents		
Lease		
Memo of Lease		
SNDA		
Organizational Documents		
Articles of Organization		
Members:		
Managers:		
Operating Agreement		
Resolutions/Consents		
Federal ID Number		

Good Standing Certificate/Secretary of State		
Insurance		
Evidence of hazard insurance		
Evidence of liability insurance		
Miscellaneous		
Assignment of Purchase Contract to new LLC (if needed)		
NP conflict waiver (if needed)		
Closing Statement		
Purchase Price		
EMD		
Loan Origination Fee $		
Flood Fee $		
Appraisal Fee $		
Title Insurance $		
Recording Fee $		
Transfer Tax $		
Survey Fees $		
Phase I $		
Asbestos / Lead Paint / Radon $		
Other inspections $		
Prorate Taxes		
Payoff (if applicable) (NOTE: need to get payoff authorization letter signed)		
Broker fee		
Documents Needed / To Do:		
Send out wire instructions (in coming)		
Receipt of wire instructions (out going)		
Post Closing		
Questions For Bank:		

Questions For Seller:		
Any 1031 for Seller?		
Tax proration agreement?		
Contact Sheet:		
Deadlines Under Contract:		

EXHIBIT R
Post Closing Checklist

POST CLOSING CHECKLIST
For the following closing:_____

Title:
Recordation:_____
Re-recording of any document:_____
Final title policy obtained/premium paid:_____

Payoff to:_____
Disbursement of all checks:_____
Verify d/t (other docs) cancelled of record:_____

Original closing documents to LENDER:_____

Documents owed to LENDER:_____
_____
_____

Post closing obligations of SELLER:_____
_____
_____

Post closing obligations of BUYER:_____
_____
_____

Section 1031 document to EXCHANGE AGENT:_____

Closing index and binders (and disc?) to CLIENT:_____

1099 to central file _:_____

Other:_____
_____
_____
_____

EXHIBIT S
Commercial real estate drafting checklist

1. *Parties*
   a. Identify seller and buyer;
   b. All owners must sign;
   c. Perform title work if necessary to identify owners;
   d. Spouses of sellers must sign contract.
2. *Legal description*
   a. Identify by both street address and legal description;
   b. Sufficiency of legal description (see § 1:4);
   c. Include all appurtenances and other rights to be purchased, including interests in adjacent roads.
3. *Purchase price*
   a. Earnest money
   Identity of escrow agent; indemnification of escrow agent;
   Interest- or noninterest-bearing escrow;
   Who is entitled to earnest money and interest and under what conditions;
   b. Purchase money financing;
   c. Balance in cash.
4. *Inspections/inspection period*
   a. Termination of contract/refundability of earnest money;
   b. Duration;
   c. Type and nature of inspections;
   d. Indemnity to seller for entries and testing.
5. *Conditions*
   a. Financing;
   b. Zoning and subdivision;
   c. Use of property;
   d. Access;
   e. Driveway and curb cuts;
   f. Building permits;
   g. Special conditions.
6. *Representations and warranties*
   a. Valid existence and good standing of nonindividual sellers;
   b. Environmental condition;
   c. Pending litigation, judgments, etc.;
   d. Zoning;
   e. Condemnation;
   f. Change of access;
   g. Authority;
   h. Illegal use of property.
7. *Title*
   a. Type of deed;
   b. Permitted title exceptions;
   c. Time period to examine and object to title;
   d. Seller's right (obligation) to cure title objections;
   e. Buyer's right to terminate or accept title "as is."
8. *Prorations*
   a. Taxes;
   b. Rent;
   c. Insurance premiums;
   d. Service and management contracts;
   e. Other prepaid items.

9. *Closing*
    a. Date;
    b. Location;
    c. Time is of the essence.
10. *Closing documents*
    a. Deed;
    b. Lien affidavit;
    c. Resolutions;
    d. FIRPTA nonforeign affidavit;
    e. Substitute Form 1099;
    f. Form NC1099NRS;
    g. Settlement statement;
    h. Balance purchase money note;
    i. Balance purchase money deed of trust;
    j. Reaffirmation of representations and warranties.
11. *Hazardous substances/environmental remediation*
12. *Condemnation/casualty/risk of loss*
13. *Special provisions*
14. *Miscellaneous provisions*
    a. Notices;
    b. Merger clause;
    c. Successors and assigns/assignments;
    d. Memorandum of contract.
15. *Authorized signatures*

EXHIBIT T

10 COMMANDMENTS OF REAL ESTATE CLOSINGS

By Wayne Stephenson

1. Thou shalt not walk into the deed vault nor close a real estate transaction unless thou knowest what thou art doing or thou has learned brethren or sistren to lend a helping hand. The days when "anyone can close a loan" are gone.

2. Thou art not a title insurance company nor is thy malpractice carrier. Many are those, both owners and lenders, who are using the attorney as their title insurance company.

3. Thou shalt document the substance of every telephone conversation involved in the transaction. Thou shalt cover thine hind parts.

4. Thou shalt have a working knowledge of environmental law. And lo, there shall one day be pestilence upon the entire face of the earth and environmental law will touch every transaction.

5. Verily, verily I say unto you that the closing attorney is as the hub of a wheel and each party to the transaction a spoke. If in the future any of the spokes is broken economically, ye whose name was blessed at closing shall be called "Oh cursed one." Beware of the potential conflicts of interest that could be alleged in the future and proceed cautiously.

6. Thou shalt not disburse loan proceeds before updating and recording title. "Tis better to suffer the wrath of an angry realtor or property owner than to bury thy law license in the sand."

7. Thou shalt uncover thine eyes and proofread carefully the work of those thou superviseth. If thy support staff has erred and thou has not reviewed their work, then two errors have occurred. Many is the attorney who has suffered a claim because of a typo the size of a mustard seed.

8. Thou shalt say "Get thee behind me Satan" if thou art pressured to perform a transaction in a way that thou thinks is improper. Do not succumb to the almighty dollar. Tis better to lose a closing fee that to suffer the slings of multiple claims resulting from a system breakdown because one has worshiped at the altar of the "Cash Cow" client.

9. Thou shalt always review each instrument within the title search in its entirety. Beware the deed of trust that encumbers the property in the hidden "Attached Schedule A."

10. Thou shalt never forget this real estate transaction is the biggest transaction of thy client's life. Communicate, communicate, communicate.