8 Steps to Keep Your Letter of Intent Non-Binding

You own real estate and sign a letter of intent that contains the material deal points for your transaction. At the end of the letter, it clearly states: “Unless a formal agreement is entered into within 30 days of the date of this letter, this letter of intent shall be non-binding and of no further force or effect.” Sounds clear enough. But be careful, you can be bound by a letter of intent, even if it states it is non-binding.

The two main issues used by courts to determine whether a letter of intent is binding or not are the parties’:

- Intent, as expressed in the letter of intent, and
- Actions, taken after the letter of intent is signed.

Below are eight simple steps you can take, and a sample non-binding clause you can use, to help ensure that your letter of intent will remain non-binding.

1. Language should not imply the existence of a binding agreement.
   Avoid using language that can be interpreted as creating a binding agreement. Language included in a letter of intent such as “agree,” “offer,” “acceptance,” or “offer will be null and void if not accepted by xx/xx/xx at 5:00 p.m.” may be interpreted as an agreement by the parties to be bound by terms of the letter of intent.
2. Do not agree to negotiate in good faith.

Although this may be counterintuitive to the spirit of moving a deal forward, it is never abundantly clear what “good faith” means or how one party can inadvertently breach this covenant. Accordingly, it is a best practice not to include “good faith” language in a letter of intent.

3. Terminate negotiations in your sole and absolute discretion.

Parties realize that letters of intent are intended to be non-binding. Accordingly, it is a best practice to have language in your letter of intent that affirms the non-binding nature of the letter of intent and your right to terminate negotiations in your sole discretion.

4. Exclusive right to negotiate - honor the covenant completely.

As a practical matter, to move a deal forward you may have to agree to a period of exclusive negotiations. If you do, you must honor this pledge completely, carefully and absolutely. Otherwise, you may face claims of “bad faith.”

5. Do not treat the letter of intent as a binding agreement.

If the other side fails to live up to the terms of the letter of intent, such as a time period for contemplated action, don’t state that they “breached” the terms of the letter of intent. Use of such language expresses that the letter of intent is a binding agreement that can be breached.

6. Constantly confirm the deal is not binding.

While moving the transaction along prior to signing a binding agreement, always confirm with each communication that “in accordance with the terms of the letter of intent, the parties will not be bound to the transaction until a definitive written agreement is executed by the parties.”

7. Avoid communications stating the deal has been finalized.

Avoid internal and external communications indicating the deal has been finalized prior to the execution of the final agreement. Such statements can be used as evidence that the parties agreed to use the terms of the letter of intent as the terms of the final agreement.

8. Have strong non-binding language in your letter of intent.

Whether a letter of intent is interpreted as a binding agreement is a question of the parties’ intent as expressed in the letter of intent and through their actions after the letter of intent is signed.
There is no better way to express your intent than having a strong non-binding clause in your letter of intent.

**Here is a sample provision:**

This letter, though not binding, is intended to serve as the basis for negotiating a final written agreement which will contain material terms not mentioned in this letter. This letter does not create an exclusive right to negotiate or an obligation to continue negotiations. Either party may terminate negotiations at any time in their sole discretion. Partial performance by either party of the terms of this letter, or the efforts by either party to perform due diligence or carry out other acts in contemplation of consummating this transaction, shall not be deemed evidence of intent by either party to be bound by the terms of this letter. The parties will not be bound to an agreement unless and until each party reviews, approves and executes a final and definitive written agreement.

A Letter of Intent is an important first step in most real estate transactions, stating the parties’ intentions as well as laying out deal points. However, as outlined above, you must exercise caution and prudence to avoid having your letter of intent inadvertently converted into a binding agreement.

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