You can’t address everything, but the more you define, the fewer unpleasant surprises you’ll get.

THERE ARE NO magic bullets for drafting a good commercial lease. No set formulae, no infallible boilerplate, and no shortcuts. Each lease has to reflect the circumstances of the lessor and the lessee. That said, it is still important to keep in mind a couple of guiding principles: More specificity is usually a good thing, and space and term issues don’t suffer from being spelled out with as much clarity and precision as possible. In this article, we provide a checklist of some of the most crucial points, and hope that it will serve as a useful starting point for the attorney who wants to draft the best commercial lease that he or she can, regardless of whether the client is the landlord or the tenant.

DESCRIBING SPACE IN LEASES • Describing space is a fundamental issue in leases and is often taken for granted. But it shouldn’t be. Description and measurement of space is key to practical functionality of the space tenants receive (which affects profitability) and the basis for the lease economics of rent and additional rent.
1. Common Areas

- In retail leases, common areas are typically parking areas and pedestrian and vehicular accessways.
- In office leases, common areas can mean those areas plus areas of the building that are not leasable but are used for the benefit of the building (or the specific premises). Examples include building equipment rooms, risers and elevator shafts, janitorial closets, and so on.
- Office common areas also can be differentiated between building common areas and floor common areas. (For example, the building entrance lobby vs. the eighth-floor corridor).
- Office common areas are often more expensive to maintain than retail common areas due to the need for HVAC/temperature control, maintenance costs, and lighting/electricity costs.

2. Describing The Premises And Space In A Lease

- A legal description and site plan/drawing is the best way to describe the premises; however, a street address for a single tenant building is also a sufficient description. Even if you forget to attach a site plan, it is OK if the remaining description is sufficient.
- Landlord tip:
  __ Be careful to exclude air rights where applicable;
  __ Try to obtain the legal description for the premises and/or building from a title commitment;
  __ The lease should make clear if walls and roof are excluded from "Premises" so that the tenant does not gain rights to use these areas without additional charge;
  __ If an office tenant is leasing a full floor, make sure that the description excludes the common areas like risers, elevator banks, and janitorial closets, so that the tenant does not claim it has exclusive use of these areas.
- Tenant tip:
  __ Tenants should ask for the most recent title commitment or policy—especially because tenants typically accept the premises subject to matters of record;
  __ Tenants often want to specify that the premises end at the drop ceiling to limit liability exposure for asbestos and maintenance of that space (but want use of that space for their wiring, etc.);
  __ Tenants should have the right to remeasure the space (or confirm the remeasurement) whenever the build-out is completed and then adjust their liabilities;
  __ Tenants should insist that all area is measured in a similar fashion for all tenants—otherwise, they could end up paying more than their share of common area costs;
  __ Tenants should protect the visibility of their premises—future
development, scaffolding, and kiosks can block the visibility and view; 
__ Use of “approximately” generally benefits the landlord. The tenant will want some check of the actual measurement and should also specify that the landlord cannot increase or decrease the space by more than a given amount when it remeasures.

• Be specific about appurtenances:
  __ Appurtenances must exist at the time the lease is executed;
  __ If they are not detailed or specified, a court will make the determination as a matter of interpretation;
  __ These can range from items “essential to the tenant’s use and enjoyment” to items that are “reasonably necessary for the use and enjoyment.” Examples include parking areas, access improvements such as pedestrian walkways, building doors and entryways to the building, the lobby, the directory, corridors, elevators, bathrooms, stairways, basement area, and utility connections;
  __ Appurtenances pose a risk for the landlord if it wants to destroy improvements or do remodeling;
  __ A model clause could read as follows: “Landlord, in consideration of the rents and covenants hereinafter set forth, does hereby demise, let, and lease to Tenant, and Tenant does hereby hire, take, and lease from Landlord, on the terms and conditions hereinafter set forth, the Premises described in Section _____, to have and to hold the same, with all appurtenances, unto the Tenant for the Term herein specified.”

3. Measuring Leased Premises

• Office tenants pay for almost every area of the building through a combination of common area operating expenses and a secret load factor.

• “Gross up” strategy is used, but it is different from operating expense gross up:
  __ Each office is allocated a percentage share of the common areas. For example, a 5,000 sf premises is grossed up and listed as 5,500 sf;
  __ Whenever gross up is used, the landlord has a greater opportunity to recover more than 100 percent. This is why we need objective standards for measuring space across all tenants in the building.

• Building Owners and Managers Association ("BOMA") standards:
  __ BOMA set up the “Standard Method for Measuring Floor Area in Office Buildings.” In leases, this is often described as: “calculated in accordance with the ANSI/BOMA Z65.1 1996 Standard”;
  __ New York and Washington, D.C. have their own standards;
  __ The BOMA Standard has evolved over time—the year of the Standard used is important. The 1996 Standard is commonly thought to be the most tenant-favorable;
  __ There is also a BOMA Standard for retail store areas in office buildings.
• “Gross area” is usually the entire “footprint” of the building—wrap a tape measure around the building’s exterior.

• “Usable area.” The easy way to describe this is the area you would buy carpet for (before you add the interior walls and furniture). This isn’t “useful” area; for example, poor design or bad interior build-out will not affect the usable area even as it decreases the useful area.

• “Rentable area.” This is the usable area plus a set share of the floor and building common areas. Thus, the tenant cannot ever access or use all of the rentable area. If a tenant wants 5,000 sf of usable area, it may need to lease 5,500 sf of rentable area. The difference between the usable and rentable areas is often called a “loss factor” or a “load factor.” In many cases, market forces determine how much loss factor a landlord can apply to its tenants. The lower the loss or load factor, the better for the tenant.

__ Tenant tip: Exclude major loss factors, such as an atrium in the middle of your building!

__ Landlord tip: Try to say that the landlord uses a modified BOMA Standard when possible to build in flexibility in measuring space. The landlord could say this modified standard will be uniformly applied to the tenants to keep flexibility but give the tenant comfort that the building is being uniformly measured. If being aggressive with measurement, try to state that the premises or building are “deemed to be __________ rentable square feet.”

4. Options To Expand And Contract

• Let’s remember that options are “extra”—they are really outside the basic lease terms and the initial agreement regarding the premises.

• Options are often limited to apply only to available space. Thus, definition of “available space” is critical:
  __ Existing options;
  __ Existing tenants;
  __ Adjacent premises.

• Many options have a huge “apples to apples” comparison problem when they relate to or contemplate an offer made to another party—What terms are offered to the tenant and what terms are offered to other party?
  __ Size/space;
  __ Rent (both amount and structure);
  __ Term.

• Difficult scenarios. Should the tenant have a right to exercise the option when:
  __ The landlord decides to use the space for its own management office?
  __ The landlord decides to leave the space vacant until the market improves?
  __ The landlord wants to lease the space for other “use” like an amenity for the building at less than the market rate?