

§ 1.05 Drafting and Analysis Basics

The complexity of the modern office lease mandates diligent review of even the most basic clauses. This section introduces the reader to some techniques employed in drafting basic office lease clauses, as well as to the thought process involved in determining exactly what these clauses say and do.¹ The examples provided in this section illustrate: (1) the drafting technique referred to as "pyramiding" definitions, together with the approach needed to analyze such definitions; (2) the analysis of the flow of dates and time lines; and (3) precision drafting of specific definitions within the lease document.²

[1]—Interpreting Definition Pyramids

Drafters of complex office leases often employ the technique of building one definition upon another definition. This style of drafting is referred to as "pyramiding," "layering" or "compounding." While it is an effective style of drafting, it can be difficult, if not dangerous, to follow the language, interpret the layers of definitions and understand their interaction within the overall text. An error in either drafting or analysis can be significant when definitions are pyramided and compartmentalized. Such errors have the potential to multiply the costs commensurate with the square footage area of the premises affected.

A great deal can be hidden or excluded within the definitions, making it very problematical for a reader to anticipate and deal with what is not said. In certain jurisdictions, this is made even more difficult if definitions are referred to or labeled in such a way as to lead the reader to believe a right is being conferred when, in fact, rights are being limited.

Pyramiding of definitions may occur across many different articles in the lease, adding to the complexity of the analysis. It is a challenge for the reader to keep focused on the pyramided definitions as they stretch across a wide spectrum of the document's provisions—from the demising section, through the condition of delivery of premises,^{2,1} to the impact on the work letter, for instance. Ideally, however, once the pyramiding of definitions and their interaction within the document has been deciphered, each

¹ The lease clause examples contained in this section and throughout this treatise are illustrative of concepts discussed herein. They are not meant to be universally applicable in all jurisdictions. The practitioner should carefully check the law of the relevant jurisdiction to ascertain that jurisdiction's exact requirements and should structure his or her approach accordingly.

² See Appendix A *infra* for an Analysis Checklist of issues to consider when negotiating, drafting or reviewing an office lease.

^{2.1} Premises delivery condition should mean the space delivered fully improved (as defined) with core, shell and installations, as well as building services and common areas in good working order, in compliance with all laws, orders, ordinances and regulations, free of asbestos and hazardous materials and substances, and in working order for the tenant's conduction of operations therein.

party's responsibilities for doing work and the timing of the commencement of obligations should be clear.

There are several ways to read a complex office lease document. Many practitioners read a lease from front to back. However, if the practitioner is going to read the lease only once, this may be a mistake. It is important to read the lease by jumping from provision to provision, following the interaction of the pyramided defined terms on all the applicable sections in the lease. Relevant concepts should be tracked through the provisions dealing with those concepts first; the reader can then go back and read the balance of the lease for the other independent, noninterrelating or interacting provisions. Some definitions can only be properly dissected by reading the pyramided definition from back to front through the building blocks of its elements. This is generally true with escalations.

The following drafting example subdivides and unbundles definitions to illustrate how this drafting technique can be utilized to set out the allocation of certain time periods for construction between the landlord and the tenant. Note the different time lines for different components of rent, additional rents and other charges, thus creating independent commencement and running dates for measurement, and payment. The example also deals with resulting delays in the performance of either party and the impact on all of the defined measurement periods of any delays. Without reference to other facts and documents, the reader will see the benefit of precise complex definitions and also the danger that can result from the casual review of a document that employs the pyramiding of one definition upon another.

Example 3:

Section 1.0 Definitions.

"Commencement Date" shall mean the later of (a) April 1, 1996 and (b) one hundred twenty (120) days after the Plan Date. After the Commencement Date, Landlord and Tenant shall enter into a letter agreement confirming the Commencement Date, provided, however, that any failure by Tenant to execute such letter agreement shall not affect the occurrence of the Commencement Date.

"Plan Date" shall mean the later of (a) December 1, 1995 and (b) the date Tenant delivers to Landlord the items required to be delivered to Landlord as set forth on Exhibit "C" attached hereto and made a part hereof with respect to Tenant's Initial Alterations, which items are subsequently approved by Landlord in accordance with Article 3 hereof.

"Rent Commencement Date" shall mean, subject to the provisions of Section 31.3 hereof, the date which is the later of (a) sixteen (16) months after the Term Commencement Date and (b) January 1, 1998.

"Term" shall mean a term which shall commence on the Commencement Date and shall expire on the Expiration Date.

"Term Commencement Date" shall mean, subject to the provisions of Section 31.3 hereof, the later of (a) September 1, 1996 and (b) five months after the Commencement Date.

Section 1.1. Landlord hereby leases to Tenant and Tenant hereby hires from Landlord the Premises for the Term to commence on the Commencement Date and to end on the Fixed Expiration Date at the annual rental rate of One Million Dollars (\$1,000,000).

Section 1.2. Commencing on the Term Commencement Date and ending on the Expiration Date, Tenant shall pay to Landlord an amount equal to the Site-Wide Common Area Expenses.

Section 1.3. If the Rent Commencement Date shall occur on a date other than the first (1st) day of any calendar month, then on the Rent Commencement Date Tenant shall pay to Landlord an amount equal to the product of (a) the Fixed Rent then payable, divided by Three Hundred Sixty-Five (365) and (b) the number of calendar days in the period from the Rent Commencement Date to the last day of the month in which the Rent Commencement Date shall occur, both dates inclusive.

...

Section 2.1. (a) Landlord, at its expense, shall cause the work listed in Exhibit "D" attached hereto and made a part hereof ("Landlord's Work") to be substantially completed in a good and worker like manner by the dates shown Exhibit "D" attached hereto and made a part hereof. Landlord shall deliver possession of the Premises to Tenant on the Commencement Date, with that portion of Landlord's Work indicated on Exhibit "D" which is required to have been completed by April 1, 1996, having been substantially completed and the Premises shall be capable of receiving and otherwise ready for Tenant to commence the Initial Alterations, free of any noncompliance with any Requirements or any violations thereof or other conditions with respect thereto which would prevent or delay the filing of plans and specifications or the filing for and obtaining permits (building and otherwise), certificates or other filings with or from any Government Authority by Tenant in connection with the Initial Alterations. Notwithstanding the foregoing, Landlord shall grant Tenant access to the premises as of the Access Date upon all of the terms and conditions of this Lease, other than the payment of any item of Rental, to permit the commencement of the Initial Alterations, provided that from the Access Date until the Commencement Date such access shall be granted at Landlord's sole discretion, to the extent that such access will not interfere with or delay the performance of the portion of Landlord's Work remaining to be performed. Within five (5) days after Substantial Completion of Landlord's Work, Tenant

shall inspect such Work and shall deliver to Landlord a notice (the "Punchlist Notice") setting forth the Punchlist Items which are not completed. Subject to the provisions of subparagraph (b) of this Section 2.1, Landlord shall promptly commence and diligently prosecute to completion the performance of the Punchlist Items.

This drafter clearly subscribes to the theory that when you pyramid definitions, the words do not necessarily have to describe what they mean! Remember when interpreting language of this sort, do not let the mind and logic take over completely. The perception is likely to be quite different from the reality of the definition.

A slow and careful walk through Example 3 provides the reader with a keen understanding and appreciation that the drafter fully understands all of the concepts of measurement and all of the different leasing benchmarks, such as commencement, contract, possession, occupancy, term, demising and rentals. The drafter also provides for an erosion of any rental abatement and adjusts all of the terms based on subsequent performance under the lease, e.g., completion of Landlord's and Tenant's Work or any subsequent delays.

The drafter begins the definition section with "Commencement Date." Absent any other terms, the reader might believe this refers to the commencement date of the obligations under the lease. In this instance, however, the lease was dated *as of* an earlier date.³ It was the original intention of the parties that the landlord would construct a major improvement pursuant to detailed specifications provided by the tenant and would complete the landlord's portion of the installation by a date certain, reflected here as April 1, 1996. However, as the negotiations evolved, it became clear that the landlord would not know *what* to construct until the tenant was able to complete its plans. The tenant, however, could not complete its plans until data could be obtained from the landlord about the building's basic core and shell space. Additionally, a considerable amount of the Landlord's Work depended upon the prior completion of certain Tenant's Work. Therefore, although the expectation under the deal was that Landlord's Work would be concluded and presented on April 1, the definitions reveal an acceptance of the reality that the dates may be forced to change depending upon when necessary information could be obtained. The result is that the pyramided definitions flowing from "Commencement Date" provide for an outside time period of four months after the tenant is able to submit its plans for the commencement of Landlord's Work.

The next definition to consider is "Plan Date." Because the plan submission date must also contemplate the possibility that the tenant may fail to submit its plans within the relevant time period, the definition provides an outside or cut-off date of December 1,

³ See discussion of dating at § 1.05[2] *infra*.

1995 for that submission.⁴ The "Plan Date" is hard to pin down because it is dependent upon a great many additional facts.⁵ For instance, a tenant's ability to submit final plans may depend upon its receiving governmental or landlord's approval, coordination with the building engineer, prompt turn around on preliminary plan approvals and the availability of specified materials to its contractor. Furthermore, the definition is made more difficult because it contains a condition subsequent:⁶ "which items are subsequently approved by Landlord." The landlord may, of course, disapprove many things, approve some with variations or even delay the granting of its approval.

The definition for "Rent Commencement Date" pyramids on top of, and triggers after, the occurrence of yet another defined term, the "Term Commencement Date." Other possible conditional adjustments for the "Rent Commencement Date" are contained in Section 31.3 of the document, which deals with adjustments of the building time for landlord and tenant to pursue their obligations for "Initial Alterations." These adjustments deal with unavailability of materials, *force majeure* delays, delays of landlord in completing its work or in approving the plans, and delays caused by tenant. Tenant delays might include changes in the scope of the work or delays in obtaining materials.⁷

The definition of "Term" is a critical one. Under this definition, the period of time necessary for the landlord to do its construction is made to constitute part of the contract term. However, the demising term is dependent upon landlord's delivery condition being reached and tenant entering the premises and beginning its alterations. The alterations will take what appears to be

⁴ At first blush, this would seem unfair since the landlord may not have provided the tenant and the tenant's architect with the necessary specifications of the building core and shell by that date. Thus, the tenant would not be able to develop the requisite plans contemplated in the lease exhibit. This is addressed later in the Term and Rent Commencement Date provisions by adjusting the date, including the outside for delays caused by the landlord or delays caused by the tenant or their respective agents or contractors.

⁵ The attentive reader will also realize several more pyramided operating definitions that allow the Plan Date to be adjusted based upon activities of the parties. These adjustments may include one party's need to obtain governmental authority for permits or filings, approval of variances or site plans, architectural or engineering approval, etc.

⁶ The inclusion of a condition precedent or condition subsequent in a pyramid definition introduces a permutation that may cause the entire definition to have many alternative meanings. Each alternative must be explored like a decision tree.

⁷ The drafter appears to be quantifying the period of time that commences after landlord's prescribed work is done, but before tenant's obligation to pay rent begins. Thus, the tenant will have a certain period of negotiated build-out time without losing any of its operating (or rent) abatement, which occurs approximately five months later. The tenant operating abatement under this lease is approximately 16 months after the premises are ready for occupancy for conducting business, adjusting for delays and difficulties.

approximately five months with an outside date of September 1, 1992, subject to landlord or tenant delays.

Section 1.1 states that the "Term" is to start on the "Commencement Date" and end on the "Fixed Expiration Date." This section seems to refer to the demising term only, with all other terms either having to do with contract obligations, abatement periods, landlord's construction periods, tenant's construction periods or the impact in the event that any of those periods go on longer than they should. The other terms in the lease accommodate delays or other adjustments, and affect the fixed term of the lease and abatement periods.⁸ This language illustrates how external forces may impact on the benchmark time periods, causing each to move either as a result of the impact of outside factors or because other time periods have moved, causing a particular definition to move along a time line that begins after the other time periods have ended.

In Section 2.1, the drafter states in detail the nature and definition of "Landlord's Work" and the timing for completion and the impact of various delays. The drafter deals with the interaction of work that under good construction practices has to be commenced and completed prior to the commencement of other types of work. The drafter also balances the negotiations between the landlord and tenant for each parties' respective portion of the work in order to blend with the work schedule of the other. The drafter further deals with the condition of the premises when it is delivered to the tenant so that the tenant may be assured of being able to pull its working permits and complete its construction without delays resulting from violations, hazardous materials, asbestos or other noncompliance matters within the building or particular premises. The drafter very carefully deals with the granting of access on the "access date" for the tenant to commence its work at the same time that landlord is doing its work, while dealing with the related issues of nonharmonious labor of landlord and tenant in the premises at the same time. This clause clearly states that this is an access and not a possession date and therefore does not allow the other periods to be contaminated by the presence of tenant in the premises.

The drafter deals with delivery from the landlord in a "substantially completed manner" as a condition best dealt with and agreed to by both of the parties through a "punchlist" process. This is a procedure whereby the tenant inspects the premises with its architect and details any unfinished work for the landlord to finish. The "punchlist" process avoids disputes when a landlord later sends a notice to a tenant stating that the premises are substantially complete and in delivery condition when, in fact, these issues may still be in dispute.

Failure to draft any of the pyramiding definitions with precision in this difficult example will confuse and contaminate all of the

⁸ These periods should not otherwise change as long as all of the time period concepts stay compartmentalized in accordance with the original intent of the deal.

time period benchmark compartments. In Section 2.1(A), for instance, the second sentence deals with the delivery of the premises to the tenant for the commencement of the tenant's alterations, which are to be commenced after the completion of landlord's initial alterations. This delivery is not necessarily for occupancy, but merely for possession by tenant, its contractors or agents. The drafter properly refers to delivery of "possession" and then uses that section to deal with the possession conditions in addition to completion of the Landlord's Work. These conditions include variables such as "free from violations, hazardous material and asbestos, and ready for the receipt of permits for the commencement of the Tenant's initial alterations to complete the work." This concept is critical since all the other time compartments contemplate certain construction periods and abatement periods. The length of a demising term and any delay in the ability of the tenant to take the hand-off^{8.1} of the space and immediately cause installations to be commenced may spoil the deal further down the line.

The parties in this example have anticipated that the tenant's contractors might want to do certain types of initial alterations before the landlord's initial alterations are completed. Many practitioners "fudge" the definitions to allow access prior to the delivery of possession and the commencement of the demising term. When interpreting such imprecise clauses in light of earlier access, or in the event of litigation, it is very difficult to reconcile what occurred with the stated commencement of the possessory or demising term. The drafter in this example, however, went the extra step of defining "Access Day" and insulating it from impacting upon any of the other compartmentalized time periods.

As the reader may suspect, this example was taken from an extremely large transaction to demonstrate the complexity and precision of this line of practiced and quality drafting. It can also be used as a road map in future transactions where all of the timing elements are relevant to the deal.

[2]—Following Lease Time Lines

Typically, a lease is dated with a specific date at the beginning of the document. However, there may be language preceding the date, such as, "dated on," "entered into upon this __ day" or "dated as of." These few simple words can have an incredible impact on the transaction's dynamics. The "on" or "as of" language may cause a lease contract to arise in the future or retroactively depending on how it is used. In turn, this may cause obligations that had been expected to come into existence at the moment of signing, to have considerably different risk and dollar impacts.

Most leases are built on a time line continuum. The contract may begin on a certain date, the demising term on another date, and the fixed rentals on a different date. Escalation charges may begin on

^{8.1} "Hand-off" is i.e., to take the space over in the path of construction and finish the work.

any date. Concession periods and abatements may move on a time line that is not necessarily specific, but certainly identifiable with data existing outside the document. This may occur, for example, when the landlord's fix up work is completed and the space is delivered to the tenant in a predefined condition prior to commencement of certain obligations.

The following language is taken from a typical New York City metropolitan area office lease. Observe how the drafter determines what periods of time are measured and when they begin using the pyramiding definitions drafting technique.

Example 4:

Section 2.2. Commencement Triggering Events.

(A) The term of this Lease (the "Term") shall commence on the later of (i) the date when the work to be done by Landlord ("Landlord's Work"), as provided in Exhibit "D" annexed hereto, is substantially completed or (ii) August 1, 1995 (such later date being hereinafter referred to as the "Commencement Date") and shall end at noon on the day preceding the sixteenth (16th) anniversary of the Commencement Date (the "Expiration Date"), or shall end on such earlier date upon which the Term may expire or be canceled or terminated pursuant to any of the conditions or covenants of this Lease or pursuant to law. Tenant shall have the right to occupy the Demised Premises as of the Commencement Date upon all the terms and conditions of this Lease, except that Tenant's obligation to pay Fixed Rent (hereinafter defined) shall be fully abated to June 30, 1996, provided, however, that for each day after August 1, 1995 that Landlord is not able to substantially complete Landlord's Work in the Demised Premises and Landlord's delay if substantial completion results in additional delay in Tenant's Work (as hereinafter defined) and is not attributable to Tenant Related Delay (as defined in Paragraph 6 of Exhibit D), then (i) the abatement of Fixed Rent shall be extended from June 30, 1996 by the number of days between August 1, 1995 and the Commencement Date (the date on which Tenant is obligated to commence paying Fixed Rent hereinafter called the "Rent Commencement Date") and (ii) Landlord shall pay or credit Tenant against Fixed Rent due hereunder an amount equal to the additional costs of construction incurred by Tenant to complete its work in the Demised Premises occasioned by such delay (without giving any effect to any delay referred to in Subparagraph 6B of Exhibit D of this Lease).

(B) Landlord's Work shall be deemed to be Substantially Completed upon completion of construction except for minor details of construction, decoration or mechanical adjustment, the noncompletion of which will not materially interfere with Tenant's use of the Demised Premises. The taking possession of the Demised Premises shall be presumptive evidence that, at the time such possession was taken, the Demised Premises were in good and satisfactory condition and that Landlord's Work was

Substantially Completed. Tenant shall have the right to submit a “punch list” to Landlord no later than Fifteen (15) business days after the Commencement Date and Landlord shall promptly complete