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INTERPRETING STALE PREFERENTIAL RIGHTS TO ACQUIRE REAL ESTATE: BEYOND THE RESTATEMENT OF PROPERTY

CARL J. CIRCO*

IMAGINE that the owner of an environmentally sensitive site in a scenic town wants to preserve the land's natural beauty and protect an important aquifer. The landowner agrees to sell the property to the town at a price far below its fair market value, subject to a use restriction requiring that the land be maintained in its natural state. There is, however, a potential problem: the current owner acquired the site some twenty years ago under a deed that granted to the prior owner and his children a right of first refusal to purchase, exercisable whenever the current owner might decide to sell the property. Should one of the children, wishing to profit from the land's development potential, be able to prevent the proposed sale or even preempt the sale and acquire the property at the discounted price? Does it matter that the prior owner is willing to waive his own first refusal right? How long should the objecting child be able to thwart the proposed sale or acquire the property for development? Twenty-five years? A lifetime? The lifetime of the last surviving family member plus twenty-one years? Longer?

So came about *Peters v. Smolian*,¹ a dispute over a pristine site in the Town of East Hampton.² An article in the *New York Times* reports that the parties to the original transaction negotiated the right of first refusal to assure that the property, situated in a forested patch of Long Island's East End, could not be resold for development purposes.³ Local celebrities with ties to the area, including the actor Alec Baldwin, advocated publicly

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1. 12 N.Y.S.3d 824 (Sup. Ct. 2015), *aff'd on other grounds*, 154 A.D.3d 980 (N.Y. App. Div. 2017). The opinion on appeal, which was issued as this Article was going to press, affirmed the trial court's decision without adding materially to the aspects of the case discussed in this Article.

2. *See id.* at 829–31.

3. *See* Matt A.V. Chaban, *In the Hamptons, a Fight over Land Is Also One over Water*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/nyre>

for the site's preservation.⁴ Applying long-standing common law principles, however, the *Smolian* court sided with recalcitrant members of the prior owner's family, and held that the sale to the town could not proceed.⁵ The court hinted that if Smolian family members wished to exercise the preferential purchase right, they might not be bound by the development restriction agreed to between the town and the landowner.⁶

Problems like this can arise because preferential rights to purchase real estate often survive beyond the imaginations of the parties who establish them. When a landowner grants a prospective purchaser a long-term, preferential right to acquire the land, legal disputes may emerge decades or generations later. While preferential purchase rights may take several different forms, including options to purchase and rights of first offer (ROFOs), some of the most common and intractable disputes involve stale rights of first refusal (ROFRs). This Article addresses problems that often arise as circumstances change over time after contracting parties agree to a long-term ROFR or other similar rights.⁷ In particular, drawing on contract interpretation principles already extant, it advocates a more contextual approach that empowers courts to fill in contractual gaps in preferential rights agreements with terms that are reasonable under the circumstances.

ROFRs and other preferential purchase rights involve an agreement by one party, the grantor, to grant to another party, the holder, a potential right to acquire an interest in the property at a future time.⁸ This Article focuses on aging preferential purchase rights in real estate transactions, although similar issues come up in several other contexts.⁹

gion/in-the-hamptons-a-fight-over-land-is-also-one-over-water.html?_r=0 [https://perma.cc/DD9K-9YAH].

4. *See id.*

5. *See Smolian*, 12 N.Y.S.3d at 830–31, 837–40.

6. *Id.* at 842.

7. Portions of this Article originally appeared in a paper the author presented to the American College of Real Estate Lawyers. *See* Carl J. Circo, *Purchase Options, ROFRs, and ROFOs: Theory and Practice*, in *ACREL PAPERS—SPRING 2016* (AM. LAW. INST. ed., 2016).

8. The real estate interest involved may be fee title, a leasehold, or something else, but unless a particular context requires otherwise, this Article assumes the interest is fee title. Although real estate practitioners sometimes resort to other preferential rights as alternatives to ROFRs and ROFOs, this Article does not consider these other devices in detail because they are much less common and are less frequently addressed by courts and legal commentators. Other devices include a right of last refusal and a right of first negotiation. *See generally* *Jeremy's Ale House Also, Inc. v. Joselyn Luchnick Irrevocable Trust*, 798 N.Y.S.2d 416 (App. Div. 2005) (involving right of last refusal); John C. Murray, *Options and Related Rights with Respect to Real Estate: An Update*, 47 REAL PROP. TR. & EST. L.J. 63, 68–76 (2012); David I. Walker, *Rethinking Rights of First Refusal*, 5 STAN. J.L. BUS. & FIN. 1, 8–11 (1999).

9. *See* Walker, *supra* note 8, at 10–13 (noting that, in addition to being used in real estate transactions, ROFRs often appear in agreements among corporate shareholders and other business ventures, production contracts for commercial products, employment agreements, and franchising arrangements); Robert K. Wise et al., *First-Refusal Rights Under Texas Law*, 62 BAYLOR L. REV. 433, 440–42

Agreements creating preferential rights to acquire interests in real estate may take several different forms. A lease may grant the right to the tenant. A buyer may negotiate for the right in a contract to purchase other property. A distinct contract between the grantor and the holder may establish the right, or it may be incorporated into a deed by which the grantor conveys related property to the holder. A seller may secure an opportunity to reacquire property by incorporating the right in the deed conveying the property to a buyer. No matter the form, litigation arises all too often because the parties to these agreements fail to anticipate specific circumstances that may emerge when the preferential right continues over an extended term.

The Restatement (Third) of Property (Servitudes) (Restatement) reflects contemporary property law applicable to preferential purchase rights.¹⁰ The Restatement's fundamental principles, while generally sound as far as they go, fail to provide an effective framework for analyzing the common situation in which unforeseen developments render the parties' agreement incomplete. The problem requires something beyond what the Restatement offers.

Drawing on recent cases, Part I of this Article briefly illustrates how relationships between grantors and holders sometimes deteriorate into disputes when preferential purchase rights remain in place over years, decades, lifetimes, and beyond. Using the Restatement as a point of reference, Part II explains why our legal system often proves inadequate to resolve many of these disputes logically and fairly. Most significantly, Part II assesses the rationale and limits of the Restatement's principles directly relating to long-term preferential purchase rights, which primarily implicate the Rule against Perpetuities (RAP) and the rule governing restraints on alienation.¹¹ Part II ultimately criticizes the current judicial approach

(2010) (explaining that first-refusal rights often appear in wide range of contexts, including oil and gas instruments, power-generating contracts, distributorship and dealership agreements, and many others). Contracts in the entertainment industry also sometimes include ROFRs or ROFOs. *See generally* Brit Grosskopf & Alvin E. Roth, *If You Are Offered the Right of First Refusal, Should You Accept? An Investigation of Contract Design*, 65 *GAMES & ECON. BEHAV.* 176 (2009).

10. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 1.1, 1.3 (AM. LAW INST. 2000) (referred to throughout this Article as "the Restatement" or "Restatement"). The American Law Institute is currently working on the Restatement (Fourth) of Property, but it does not appear that anything has yet been drafted on servitudes. *See Property*, AM. L. INST., <https://www.ali.org/projects/show/property/> [<https://perma.cc/4XKC-WE7Y>] (last visited Apr. 14, 2017). This Article draws on the current Restatement primarily because it reflects a modern, overarching perspective on options, ROFRs, and ROFOs. Whether the drafters of the new Restatement may or should address any of the relatively narrow issues discussed in this Article remains a question for another time.

11. Both common law rules aim to promote transferability of property interests. The RAP addresses the relatively narrow problems of remote vesting of property interests generally associated with contingent future interests. Professor John Chipman Gray's statement of the Rule remains the classic articulation: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in

that relies almost exclusively on such formal rules to regulate long-lasting preferential purchase rights. Part III examines how grantors and holders can best structure their agreements to anticipate and manage the inherent risks and asks what more courts can do to resolve disputes logically and fairly. Part III(A) argues that the superior approach under existing law is for the parties themselves to negotiate comprehensive agreements that anticipate and resolve every reasonably foreseeable contingency.¹² Unfortunately, only the most sophisticated parties take that approach, and even they cannot address every issue that may arise in the distant future. As a result, for most grantors and holders, a preferential purchase right with an extended duration is simply a bad idea under existing law. In light of this dilemma, Part III(B) proposes an alternative interpretive model for courts to use when relationships between grantors and holders (or their successors in interest) break down in the face of unforeseen circumstances. If the express terms of the governing agreement prove inadequate because the contracting parties failed to anticipate the future circumstances, courts should use a more flexible approach that acknowledges the relevant contextual aspects of the dispute and that accords appropriate weight to the passage of time.¹³

being at the creation of the interest.” John Chipman Gray, *THE RULE AGAINST PERPETUITIES* § 201, at 191 (4th ed. 1942). The RAP primarily regulates dead-hand controls stemming from attempts by property owners to determine who will enjoy their property for generations to come. *See, e.g.*, *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 802–03 (N.Y. 1996). The separate rule governing restraints on alienation prohibits certain restrictions on an owner’s right to transfer an interest in property and is more broadly concerned with preserving relatively free transferability of property interests. *See generally* Luke Meier & Rory Ryan, *Aggregate Alienability*, 60 *VILL. L. REV.* 1013, 1015–16 (2015). It renders unenforceable those preferential purchase rights that courts consider to be unreasonable restrictions on transfer. *See, e.g.*, *Bortolotti v. Hayden*, 866 N.E.2d 882, 890 (Mass. 2007).

12. For purposes of this Article, a contract is incomplete whenever a contractual dispute stems from circumstances that the parties did not explicitly address in a written agreement. Courts, lawyers, and contract scholars do not necessarily mean the same thing when they call a contract incomplete. *See* Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 *CASE W. RES. L. REV.* 187, 190–91 (2005). Professors Scott and Triantis refer to “the complete, contingent contract—one that specifies obligations in each possible state of the world.” *See id.* at 189. This Article essentially references to that same notion of a complete contract, although without a focus on the economic efficiency characteristics that are important to economic theory. *See id.* at 190–91.

13. To some extent, Part III(B) of this Article proposes that courts might learn from relational contract theory when addressing disputes involving preferential purchase rights, just as certain drafting techniques that experienced real estate lawyers use, as described in Part III(A), reflect relational contract norms. Relational contract theory emphasizes, among other things, context and flexibility for purposes of managing exchange relationships, and it eschews rigid rules. *See generally* Jay M. Feinman, *Relational Contract and Default Rules*, 3 *S. CAL. INTERDISC. L.J.* 43, 54–58 (1993). The judicial approach recommended in Part III(B), however, does not explicitly rely on relational contract theory.

I. THE FUTURE IS UNCERTAIN

Parties contracting for preferential purchase rights are planning for future circumstances that they imagine but cannot predict. If the future unfolds as they have anticipated, their relationship should not break down. The option holder either will purchase during the term of the option agreement under the contemplated terms or will allow the option to expire. During the term of a ROFR or ROFO, the grantor either will or will not want to sell, and if the grantor wishes to sell, the holder either will or will not purchase according to the terms of the triggering offer (whether coming from a third party, in the case of a ROFR, or from the grantor or the holder, in the case of a ROFO). In fact, however, disputes too often arise because the future does not line up well with the parties' expectations. The longer the preferential right continues, the greater the risk that circumstances eventually may significantly alter how the right affects either the grantor or the holder.

This Part highlights three recent cases that demonstrate how long-lived preferential purchase rights may generate disputes that are hard to resolve under the existing legal framework. The first case stems from a ROFR, the second from a ROFO, and the third from an option to purchase.

The *Smolian* case out of Long Island, mentioned at the beginning of this Article, serves as the first example.¹⁴ It illustrates the problem especially well if, as the *New York Times*' version of the story has it, Richard Smolian negotiated the ROFR, in conjunction with the sale of a few undeveloped acres to Alexander Peters, to make sure that the Smolian family could prevent further development should Peters later wish to sell some part of land not needed for Peters's own residence.¹⁵ Note that use of the ROFR in this way presumably would allow Smolian to charge the full market price, taking into account the land's development potential, because Peters could recoup that value by negotiating an arms-length, third-party sale whenever he wished. Under these circumstances, the ROFR might not be triggered, or at least the Smolians logically would not opt to exercise it, when Peters proposed to sell the property to the Town of East Hampton under a contract imposing a use restriction assuring that the land would remain in its natural state.¹⁶ But, as things turned out according to the newspaper's account of the dispute, Richard's son, Jonathan, decided that he wished to build on the land himself, or perhaps hoped to

14. See *Peters v. Smolian*, 12 N.Y.S.3d 824, 829–31 (Sup. Ct. 2015), *aff'd on other grounds*, 154 A.D.3d 980 (N.Y. App. Div. 2017).

15. See Chaban, *supra* note 3.

16. The contractual use restriction took the form of an acknowledgment by seller and buyer that the property would "remain as open space, as authorized by" certain resolutions of the town board. See *Smolian*, 12 N.Y.S.3d at 831. The original contract between Peters and the town, however, did not include the use restriction; it was added about four months later by a rider to the contract. See *id.* at 830–31.

profit from its ever-increasing development value. As the court analyzed the case, the original parties' underlying motivation in negotiating the ROFR was but a matter of irrelevant speculation because Jonathan's rights depended solely on a set of technical legal rules.¹⁷ For present purposes, the question of interest is not whether the case was rightly or wrongly decided, but how the circumstances in 2014, when Peters wished to sell the property to the town, fit into the deal the contracting parties made when Peters acquired the two parcels in 1992 and 1997.¹⁸

Changed circumstances played a more central role in *SKI, Ltd. v. Mountainside Properties, Inc.*¹⁹ The predecessor to SKI sold thirty-three acres to Mountainside for development purposes and granted a ROFO to Mountainside on sixty-two additional acres that could not then be developed because of inadequate sewer treatment capacity.²⁰ At the time, the grantor owned the sewer treatment facilities, located on other land, that would presumably be able to provide the necessary capacity at a later date. The ROFO provided that if the grantor decided to sell the sixty-two acres, it would first offer that property to Mountainside at its market value (as determined by the grantor), along with sewer disposal rights sufficient for a designated number of dwelling units.²¹ By virtue of various subsequent transactions, title to the sixty-two acres eventually came to be held by SKI, while an unrelated development group acquired the sewer treatment facilities and other neighboring land.²² Mountainside became an active opponent of the neighboring group's development plans.²³ When SKI decided to sell the sixty-two acres, it made an offer to Mountainside to sell the property for \$390,000, along with sewer disposal rights sufficient for eight dwelling units.²⁴ The offer, however, was contingent on Mountainside agreeing not to oppose any plans for development of the neighboring land. SKI claimed that because it no longer owned the sewer treatment facilities, the only way that it could offer sewer disposal rights along with the sixty-two acres was to comply with the neighbor's no-contest condition.

The primary issue presented to the Vermont Supreme Court was whether SKI's offer complied with the terms of the ROFO. The court held that it did not: "The record supports the trial court's finding that the ROFO did not anticipate that Mountainside would have to give up its rights to oppose development within the Killington Ski Area in order to

17. *See id.* at 835–40.

18. A partnership and a limited liability company held interests in some of the properties, but Peters apparently controlled those entities. *See id.* at 830. The court treated Peters effectively as the owner of the properties, and this Article does the same.

19. 114 A.3d 1169 (Vt. 2015).

20. *See id.* at 1171.

21. *See id.*

22. *See id.* at 1171–72.

23. *See id.*

24. *See id.*

exercise its rights.”²⁵ As a result, the ROFO remained in force, and SKI was not free to sell the property to a prospective purchaser who was willing to accept the no-contest condition.

By approaching the issue this way, the court ignored the corresponding question—whether the ROFO agreement anticipated that SKI could effectively be prevented from liquidating its holdings in the area. SKI raised this point by arguing that the ROFO constituted an illegal restraint on alienation because, as the circumstances evolved, Mountainside might be able to prevent the sale of the property indefinitely given that SKI had no control over the neighboring investor’s demand for the no-contest agreement as a condition to providing the sewage disposal rights.²⁶ Apparently satisfied that commercial realities might ultimately resolve the dilemma, the court reasoned that “while the condition may have stalled the transfer of the parcel, it does not definitively preclude alienation of the sixty-two-acre parcel.”²⁷

A recent Washington case provides a good example of unanticipated developments radically affecting the motivations of parties to an option agreement. What makes the case especially interesting is that the relevant developments apparently were completely beyond the control of either the grantor or the holder.²⁸ The holder, a private college that subleased two floors of the building in question, missed a deadline for making a \$50,000 payment to extend the option to purchase contained in the sublease.²⁹ Although the court recognized that strict compliance is normally required to exercise an option, “equitable relief from such strict construction may be warranted in limited circumstances where an inequitable forfeiture would otherwise result.”³⁰ While other aspects of the case (several of which suggest questionable motives on the sublessor’s part) undoubtedly affected the outcome,³¹ it is fair to say that the court’s willingness to approve the trial court’s decision to allow an equitable grace period for exercising the option was influenced by evidence that the grantor was attempting to avoid the option because an appraisal showed that the property had appreciated as a result of a recent rezoning of the area such that the property was likely worth well over \$7,000,000 instead of the \$3,000,000 option price.³²

25. *See id.* at 1175.

26. *See id.* at 1177–80.

27. *See id.* at 1180.

28. *See Cornish Coll. of the Arts v. 1000 Va. Ltd. P’ship*, 242 P.3d 1, 9 (Wash. Ct. App. 2010).

29. *See id.* at 5–7.

30. *See id.* at 9 (citing *Wharf Rest., Inc. v. Port of Seattle*, 605 P.2d 334, 340–41 (Wash. Ct. App. 1979)).

31. *See infra* notes 229–32 and accompanying text.

32. *See Cornish Coll. of the Arts*, 242 P.3d at 10. The sublessor leased the entire property under a master lease with the fee owner, an affiliated entity; a single document served as both the sublease and the option agreement. *See id.* at 5–6.

While these three cases offer especially helpful illustrations, many other preferential rights cases also show how unforeseen future developments produce perplexing contractual disputes, especially those stemming from a grantor's failure to anticipate how a long-term ROFR or ROFO might become unduly restrictive. For example, given enough time, a grantor whose sole focus once was to promote a relationship that might lead to an eventual sale of the property at a favorable price may become more interested in making a gift of the land to a relative.³³ In other instances, years after the agreement establishing a ROFR, the grantor may unexpectedly encounter the opportunity to swap the land for other property that has unique value to the grantor.³⁴ One of the most common situations involves an unanticipated proposal by a third party who wishes to buy a larger tract owned by the grantor that includes the property subject to ROFR.³⁵

In all of these situations, the passage of time in one sense or another places the ROFO or ROFR in a significantly different context than what existed when the original agreement was struck. As Part II shows, however, in preferential rights disputes current law ascribes but a minor role to context and little, if any, significance to temporal considerations.

II. LONG-TERM PREFERENTIAL PURCHASE RIGHTS UNDER CURRENT LAW

As noted at the beginning of this Article, the three categories of preferential purchase rights most commonly used in real estate transactions are options to purchase, ROFRs, and ROFOs.³⁶ As a preliminary matter, this Part summarizes the distinct legal characteristics of each of these devices. It then reviews how current law, as articulated by the Restatement, deals with long-lasting preferential purchase rights, and it explains why existing legal principles are inadequate to resolve many of the disputes that these arrangements tend to engender.

A. *The Legal Characteristics of Options, ROFRs, and ROFOs*

1. *Purchase Options*

As a matter of contract law, a purchase option is a one-sided contractual device by which the grantor makes a binding offer to sell the property to the holder.³⁷ For a more or less fixed time, an option imposes a legal

33. See, e.g., *Rucker Props., L.L.C. v. Friday*, 204 P.3d 671, 673 (Kan. Ct. App. 2009); *Schroeder v. Duenke*, 265 S.W.3d 843, 845–46 (Mo. Ct. App. 2008).

34. See, e.g., *Castle Props., Inc. v. Wasilla Lake Church of the Nazarene*, 347 P.3d 990, 992–93 (Alaska 2015).

35. See, e.g., *DePetrillo v. Belo Holdings, Inc.*, 45 A.3d 485, 493 (R.I. 2012); *Advanced Recycling Sys., LLC v. Se. Props. Ltd. P'ship*, 787 N.W.2d 778, 780 (S.D. 2010).

36. Other less common devices include a last right of refusal, a first right to negotiate, and a commitment by the grantor to sell the property, if at all, via a public auction. See *Circo*, *supra* note 7, at 12, 29, 31.

37. See, e.g., *Steiner v. Thexton*, 226 P.3d 359, 364 (Cal. 2010).

obligation on the grantor to transfer the property to the holder. It gives the holder an enforceable right to purchase the property, but it does not obligate the holder to purchase nor, in the usual case, does an option bind the holder to any other obligations unless and until the holder elects to convert the offer to sell into a purchase and sale agreement. During the term that the option is in effect, at least if the holder has given consideration, the grantor's offer is irrevocable.³⁸ For that reason, option agreements almost always clearly define the duration of the holder's rights.

Most recurring legal issues surrounding options involve well-settled legal principles. As a matter of contract law, because an option obligates the grantor to sell if the holder exercises the right, an option establishes an irrevocable offer to sell during the specified term only if it is supported by consideration.³⁹ To transform an option into a purchase and sale contract, the holder must accept the offer by properly exercising the option.⁴⁰ This typically means taking precise steps established by the document creating the option. The exercise must be timely, and it must conform to any other specified requirements concerning how and to whom a notice of exercise should be given. Further, because the holder's exercise of an option creates an enforceable purchase and sale contract, the option must include the material terms of the sale.⁴¹ For these reasons, the option agreement or other governing document typically provides for monetary consideration for the grant and includes at least the key terms that will come into effect as the sale contract once the holder exercises the option.

2. *Rights of First Refusal*

In contrast to an option, a ROFR is not an offer by the grantor to sell the property. A ROFR restricts the grantor's future freedom to sell the property during the term of the ROFR by giving the holder the opportunity to acquire the property in preference to any third party should the grantor wish to sell.⁴² A ROFR creates some contract rights and burdens relating to the property, but the characteristics of those rights and burdens will vary significantly based on the parties' intent and the precise language they use to create the ROFR.

The classic ROFR empowers the holder to accept what is in effect, if not in form, an irrevocable offer from the grantor at a future time to sell the property to the holder on terms satisfactory to the grantor, as defined

38. *See, e.g., id.* at 365.

39. *See, e.g., id.*

40. *See, e.g., Foye v. Parker*, 790 N.Y.S.2d 787, 788 (App. Div. 2005).

41. *See, e.g., Creely v. Hosemann*, 910 So.2d 512, 520 (Miss. 2005).

42. *See, e.g., Bayer v. Showmotion, Inc.*, 973 A.2d 1229, 1246 (Conn. 2009) (explaining distinction between option and ROFR and holding that once grantor notified holder of acceptable third-party offer ROFR ripened into option to purchase); *Anderson v. Parker*, 351 S.W.3d 827, 831 (Mo. Ct. App. 2011) (discussing distinctions between option and ROFR).

by the terms of a third-party offer that the grantor is willing to accept.⁴³ The event that triggers the holder's right is the third-party offer that the grantor finds satisfactory. The grantor's notice of the third-party offer functionally becomes the grantor's offer to transfer the property to the holder on those same terms. Because the grantor's offer at that point is irrevocable for the period established for the holder's exercise under the terms of the ROFR agreement, the grantor's notice converts the ROFR to an option in the holder to purchase the property.

In this more or less standard version of a ROFR, the phrase "right of first refusal" recognizes that the grantor may not sell to the third party unless the holder refuses to enter into a contract to purchase the property on the terms proposed by the third party. Once the right is triggered, if the holder exercises it, the parties enter into a purchase and sale agreement on the specified terms, and if the grantor will not execute an agreement on those terms, the holder is generally entitled to specific performance.⁴⁴ If the holder declines to exercise the right, the grantor is free to sell the property to the third-party offeror (and perhaps to anyone else) on those terms but not on terms that are less favorable (or perhaps *materially* less favorable) to the grantor. From one jurisdiction to another, the cases characterize the interest that a ROFR creates in different ways, sometimes as a real property interest, but more commonly merely as a contract right.⁴⁵

Until the point when a triggering event converts a ROFR into an option to purchase, the most common legal issues concerning ROFRs involve matters of contract interpretation. As a result, cases often turn more on the particular terms the parties negotiated than on general common law principles. A ROFR agreement normally designates the duration of the right, the manner in which the grantor must notify the holder of the opportunity, the length of time the holder has to exercise the right after receiving the notice, and the process the holder must follow to exercise the right. More comprehensive ROFR agreements address many other contingencies and nuances, including what specific events and circumstances will or will not trigger the right, whether the holder's exercise may deviate in certain respects from the terms of the third-party offer, whether and under what circumstances the grantor may sell the property to someone other than the specified third party if the holder does not exercise the right, whether the holder's right will survive if the holder declines to exercise the right but the deal with the third party does not close, and more.⁴⁶

43. See Murray, *supra* note 8, at 70.

44. See, e.g., Jarvis v. Peltier, 400 S.W.3d 644, 654 (Tex. App. 2013).

45. See Wilhelmina F. Kightlinger, *To Insure or Not to Insure, That Is the Question: Title Insurance Considerations for Options, Rights of First Refusal, and Other Similar Rights*, in ACREL PAPERS—SPRING 2016 2 (AM. LAW. INST. ED. 2016).

46. See Murray, *supra* note 8, at 65–68, 134–37 (discussing importance of clear and comprehensive drafting and providing sample ROFR agreements in appendixes B and C); Joshua Stein, *It Seemed Like a Good Idea at the Time: Rights of First*

3. *Rights of First Offer*

A ROFO, like a ROFR, restricts the grantor's future freedom to sell the property during the term of the ROFO by giving the holder a contractual preference to acquire the property if the grantor wishes to sell during that time.⁴⁷ Just like a ROFR, a ROFO is not an offer by the grantor to sell the property. Courts, real estate investors, commentators, and attorneys do not always clearly distinguish ROFOs from ROFRs. As used in this Article, a ROFO differs from a ROFR primarily because a ROFO leaves it to the grantor, or under an alternative structure to the holder, rather than to a third party, to specify the terms of the offer that triggers the right. If the grantor wishes to consider selling the property during the term of a ROFO, the grantor must notify the holder, who then has the opportunity to accept the grantor's terms or, in the alternative version, to make the first offer. While the practice literature commonly refers both to the grantor offer structure and to the holder offer variation of the ROFO, the leading contemporary ROFO cases typically involve ROFO provisions that require the grantor, not the holder, to make the offer once the grantor gives notice of the desire to sell.⁴⁸

In either variation, if the grantor and the holder agree on the terms offered, they enter into a purchase and sale agreement on that basis. If not, the ROFO agreement generally allows the grantor to market the property but only on terms that are *the same as the first offer or at least not materially less favorable to the grantor*. As with ROFRs, in practice the terms of ROFOs vary significantly from transaction to transaction. With a few exceptions, ROFOs and ROFRs typically generate similar legal issues. In recognition of this similarity, this Article sometimes groups ROFRs and ROFOs together as "preemptive rights" to distinguish them as a subcategory of preferential purchase rights that includes options to purchase as well as ROFRs and ROFOs. Where, however, significant differences require distinct analyses, this Article discusses ROFRs and ROFOs separately.

B. *The Restatement's Principles Governing Long-Term Preferential Purchase Rights*

On the whole, the Restatement reflects current law governing preferential purchase rights. To be sure, cases in different jurisdictions deviate from the Restatement and from each other on some of the most theoretical questions, such as whether or when to classify a preferential purchase right as a property interest or merely as a contract right, and the extent to

Offer and First Refusal, 42 N.Y. REAL PROP. L.J., no. 4, Fall 2014, at 6, 14–15 (providing extensive list of drafting points).

47. See Murray, *supra* note 8, at 76.

48. An economic analysis might discern that these two variations on ROFOs create significantly different incentives. See generally Marcel Kahan et al., *First-Purchase Rights: Rights of First Refusal and Rights of First Offer*, 14 AM. L. & ECON. REV. 331, 354–61 (2012) (providing detailed economic analysis of ROFOs in which grantor must make first offer).

which the RAP applies. As a practical matter, however, the Restatement and contemporary courts generally approach disputes that involve the duration of preferential purchase rights with essentially the same juridical perspective. Moreover, the Restatement offers the most coherent and comprehensive set of principles currently available for analyzing preferential purchase rights. As the discussion that follows shows, however, the Restatement falls short of providing a fully satisfactory framework for analyzing long-term preferential rights.

The Restatement classifies options to purchase, ROFRs, and ROFOs as servitudes burdening the grantor's title and, as a result, treats all of these preferential purchase rights similarly for many purposes. In some important respects, however, the comments to the Restatement distinguish between options to purchase and ROFRs. In the few instances in which the comments explicitly mention ROFOs, they treat them as forms of ROFRs rather than as a distinct brand of servitude. The contemporary cases also frequently treat ROFRs and ROFOs together, at least in the context of durational disputes. In keeping with this approach, unless otherwise noted, the analysis that follows presumes that the Restatement's principles governing ROFRs also apply to ROFOs.

Litigation involving the duration of preferential purchase rights most often presents issues under the RAP, the rule on restraints on alienation, or both. Accordingly, the Restatement's principles on these rules provide the logical place to begin this overview.

Section 3.3 of the Restatement bluntly provides that the RAP does not apply to servitudes and therefore cannot be a basis for voiding preferential purchase rights.⁴⁹ Although the Restatement's position on the RAP deviates from the traditional majority view, it reflects what may be a growing trend in the contemporary cases, at least with respect to ROFRs.⁵⁰ In any event, on policy grounds, the Restatement's analysis is sound. The RAP is far too connected to historical concerns about dead-hand control over family wealth to deserve a place among the principles governing arms-length real estate transactions as routine as preferential purchase

49. See RESTATEMENT, *supra* note 10, § 3.3 cmt. a.

50. See Murray, *supra* note 8, at 94–101 (indicating that majority of jurisdictions still apply RAP to preferential purchase rights). The modern cases are inconsistent and, if a trend exists, it is still evolving. See, e.g., *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So.2d 1279, 1285 (Fla. 2008) (declining to apply common law RAP to ROFR that predated Florida Uniform Statutory Rule Against Perpetuities); *Pew v. Sayler*, 123 A.3d 522, 532 (Me. 2015) (holding that ROFR in deed violated RAP and was void, but same ROFR in separate contract was valid as against parties to contract); *Bortolotti v. Hayden*, 866 N.E.2d 882, 891 (Mass. 2007) (declining to apply common law RAP to ROFR that predated Massachusetts Uniform Statutory Rule Against Perpetuities); *Hensley-O'Neal v. Metro. Nat'l Bank*, 297 S.W.3d 610, 615–16 (Mo. Ct. App. 2009) (applying RAP to ROFR); *Jarvis v. Peltier*, 400 S.W.3d 644, 652 (Tex. App. 2013) (holding that ROFR does not violate RAP).

rights are in contemporary practice.⁵¹ While sound policy reasons justify an artificial time limit to protect distant generations from a deceased ancestor's vision for the future, such a rigid restriction makes little sense when parties negotiate over preferential purchase rights.

As an alternative to the RAP, the Restatement provides that courts should analyze challenges based on the time period during which preferential rights may be exercised under the rule governing direct restraints on alienation.⁵² That rule permits certain restraints that are reasonable under the circumstances. Property interests, such as an option to purchase, a ROFR, or a ROFO, should not be invalidated automatically because of an extended duration. As applied to preemptive rights, the rule against unreasonable restraints on alienation establishes a sensible control by imposing the burden on the party challenging a preemptive right to articulate to a court in what respect a preferential purchase right unreasonably conflicts with the law's bias favoring free alienability of property.⁵³ Thus, in assessing the validity of long-term servitudes as a class, the Restatement adopts a practical approach by opting for the more flexible principles governing restraints on alienation rather than the RAP. In applying those principles, the Restatement treats options and preemptive rights differently.

If an option agreement, other than one appurtenant to a leasehold estate, does not specify a duration, the Restatement conveniently provides that the option lasts for a reasonable period, thereby sidestepping reasonableness challenges to options that might otherwise be viewed as lasting indefinitely.⁵⁴ The following excerpt from a comment to section 3.4 sum-

51. A contemporary court may apply the RAP to preferential rights primarily in deference to long-standing precedent even while acknowledging the strong policy arguments against doing so. *See* *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 804–05 (N.Y. 1996) (noting that New York law exempts certain preferential purchase rights from RAP, including tenant's option to purchase leased property during leasehold term, but holding that controlling precedents required invalidation of particular option to purchase involved in case); *see also* *CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Grp., Inc.*, 642 S.E.2d 393, 397 (Ga. Ct. App. 2007), *aff'd*, 659 S.E.2d 359 (Ga. 2008) (applying Delaware law to invalidate ROFR under RAP while acknowledging policy conflict with Georgia law, under which RAP does not apply to ROFR).

52. RESTATEMENT, *supra* note 10, § 3.4 cmt. f.

53. The Restatement states as follows:

A preemptive provision does not control to any extent the transfer of property other than by sale. Unless its existence reduces the likelihood that an opportunity to sell the property subject to the provision will arise should the owner desire to sell, the provision simply provides a possible buyer who is constantly available. As long as another interested buyer is not likely to be deterred from making an appropriate offer, the preemptive provision does not interfere with the alienability of the property involved.

RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.4 cmt. a (AM. LAW INST. 1983).

54. RESTATEMENT, *supra* note 10, § 4.3 cmt. e. Special considerations apply to options created in leases. *See id.* cmt. c.

marizes the most important considerations of the Restatement's rule relating to restraints on alienation as applied to options:

e. Options. The reasonableness of an option in gross to purchase land is determined by the duration of the option and the price. If the price is set at fair market value when the option is exercised, the practical effect of the restraint is much less than if the price is fixed, and a longer duration is justifiable. If the price is fixed, the effect of the option is to discourage improvement of the land, and the option is unreasonable unless its duration is specified. Even if the duration is specified, an option for a lengthy period may be unreasonable unless the length is justified by the purpose, or unless it is clear that the parties expressly bargained over the specified duration. If the duration is not specified, an option terminates after a reasonable time under rules stated in §§ 4.3 and 7.2.⁵⁵

Ordinary options to purchase will almost always survive judicial scrutiny under these principles because rational property owners instinctively avoid making long-term, fixed-price offers to sell.⁵⁶ Under the usual commercial arrangement, an option agreement sets a specified purchase price for a relatively short duration. As an alternative, the option agreement may provide for a longer term if the purchase price is to be determined based on a current market appraisal at the time of exercise.

Other comments explain how the Restatement's rule concerning restraints on alienation applies to ROFRs.⁵⁷ The general principle is that validity of a ROFR under the rule "depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the proce-

55. *See id.*, § 3.4 cmt. e.

56. A real estate option is "in gross" if it is transferrable but not appurtenant to some other real estate interest owned by the holder. *See id.* § 4.5(1)(b). The comments to section 3.4 do not offer any guidance of general application concerning the reasonableness of an option that is appurtenant to an interest in real estate. The comments do specifically address two situations that would often involve appurtenant options. First, the reasonableness of an option in favor of owners in a common ownership regime, such as under a property owners' declaration "is determined by the circumstances, including the price and the terms for exercise." *See id.* § 3.4 cmt. e. Second, the same comment provides that an option "to repurchase in the event the property is not developed within a particular period of time may also be reasonable, depending on the price, duration, and other circumstances." *See id.* Apparently, the Restatement intends to leave most questions about the reasonableness of appurtenant options to the broad rule of section 3.4, which calls for reasonableness to be determined "by weighing the utility of the restraint against the injurious consequences of enforcing the restraint." *See id.* § 3.4. Note that the duration of an option appurtenant to a leasehold would ordinarily be coterminous with the leasehold and would be subject to the law of landlord and tenant rather than any contrary principles of the law of servitudes. *See, e.g., id.* § 4.3.

57. *See id.* § 3.4 cmt. b.

dures for exercising the right.”⁵⁸ Beyond this rather vague guidance, the comments to the Restatement advance the proposition that a typical ROFR imposes such a modest restraint on alienation (presumably, because the grantor remains free to market the property at any time) that the duration of the right should rarely affect validity. Indeed, ROFRs “of indefinite duration may be valid, but once they trigger an option to purchase, the duration of the option must be limited to avoid invalidation as an unreasonable restraint on alienation.”⁵⁹ Another significant distinction that the Restatement makes between options and ROFRs involves the treatment of an agreement that does not explicitly address the duration of the preferential purchase right. As already noted, the Restatement provides that an option terminates after a reasonable time if the agreement does not specify a term.⁶⁰ If a ROFR agreement does not specify a duration, however, the Restatement provides that the ROFR will continue indefinitely.⁶¹

Note that the Restatement’s relaxed principles concern the duration of the ROFR and not the length of time available to the holder to decide whether or not to exercise the right after the triggering event occurs. That is, an indefinite time during which the ROFR survives is generally acceptable and is even implied when the agreement does not specify how long the right itself continues, but a long or indefinite duration for exercising the option that results when the right is triggered is a different matter. This attitude toward ROFRs seems practically to create a presumption against almost any claim that a ROFR itself is an illegal restraint on alienation. Yet in some other respects, the Restatement’s perspective on unreasonable restraints could justify deeper scrutiny of the context of a ROFR.

The following excerpt from the most relevant comment demonstrates these nuances:

If the right to purchase is on the same terms and conditions as the owner may receive from a third party, if the procedures for exercising the right are clear, and if the period within which it must be exercised is relatively short, the right of first refusal is valid unless the purpose is not legitimate. Since the practical effect of the restraint on alienability is minimal, duration of the first-refusal right should not affect validity.

If the price at which the right of first refusal may be exercised is fixed, either absolutely, or by reference to a formula, the impact on alienability is greater than if the seller will get the same price whether or not the right is exercised. Stronger justification is required. The duration of such a restraint may be important in determining its reasonableness.

58. *See id.* § 3.4 cmt. f.

59. *See id.* § 4.3 cmt. c.

60. *See id.* § 4.3 cmt. a.

61. *See id.* § 4.3 cmt. e.

The provisions governing exercise of the right of first refusal are important in determining its impact on alienability. Lack of clarity may cause substantial harm by making it difficult to obtain financing and exposing potential buyers to threats of litigation. Lengthy periods for exercise of rights of first refusal will also substantially affect alienability of the property. Potential buyers will be deterred by the possibility that they may not know for a lengthy period of time whether they will obtain the property or be obligated to pay the price. The risks of change in their needs and in financial markets will be greater than most buyers will be willing to accept. Strong justification would be required to conclude that any right of first refusal that imposed vague procedures or long waiting periods was not an unreasonable restraint on alienation.⁶²

These principles have considerable practical significance. Unlike options to purchase, the durations of ROFRs and ROFOs frequently correspond to long-term planning affecting those having a connection to the same or related property or some relationship to each other.⁶³ For example, they may stem from sales of other property within a development, co-tenancies, ongoing business ventures, dealings between neighboring property owners, or succession planning for either business interests or family wealth management. At the inception, the parties will often view a long duration not only as mutually beneficial, but practically risk-free because a preemptive right does not obligate either party to do anything unless and until the grantor triggers the right. Yet, neither the grantor nor the holder can predict how the relevant circumstances and relationships may change over time. As a result, a long incubation period can contribute to disputes.

On the basis that preemptive rights ordinarily do not significantly restrain alienation, the Restatement concludes that even a preemptive right having an indefinite duration is normally valid absent other factors that may cause the right to be viewed as an unreasonable restraint.⁶⁴ The Re-

62. *Id.* § 3.4 cmt. f. For a case involving a ROFR that used a purchase price formula, see *Huntington Nat'l Bank v. Cornelius*, 914 N.Y.S.2d 327 (App. Div. 2010), and for one involving a preferential right at a fixed purchase price, see *Nat'l City Bank v. Welch*, 936 N.E.2d 539, 648 (Ohio Ct. App. 2010), that stated deed establishing right at issue provided that holder could force sale of the property at specified price after death of surviving grantee under the deed.

63. Options to purchase as well as ROFRs and ROFOs, of course, frequently arise out of long-term lease transactions. For those situations, however, the Restatement defers to landlord-tenant law, which is itself a contextual concession. *See infra* notes 82–89 and accompanying text.

64. As noted in the paragraph that immediately follows in the text, the Restatement's underlying assumption could be challenged because, in a practical sense, ROFRs and ROFOs significantly impede marketability. The impact, however, is of a different kind than the restraints of concern to the common law because preemptive rights adversely affect marketability but do not literally bar alienation. Moreover, exposing standard ROFRs and ROFOs to attack under the

statement may well be correct in discerning no policy reason to invalidate long-lasting preemptive rights. It considers a long duration to be objectionable only if, when combined with other factors, the right burdens alienability to such an extent that it should be wholly unenforceable on policy grounds. This all-or-nothing approach is an understandable characteristic of a principle designed to prohibit unreasonable restraints on alienation.

So far, so good for the Restatement.

But should the inquiry into long-term preemptive rights end here? The fact that a long-term preemptive right may survive a challenge under the rule against illegal restraints on alienation does not necessarily mean that duration should be wholly irrelevant when unanticipated circumstances lead to disputes over an aging ROFR or ROFO. The question should not invariably be limited to validity or invalidity at the time the right is created. The frequency and nature of litigation involving stale preemptive rights suggests a need for some degree of judicial regulation that goes beyond the traditional rule against illegal restraints on alienation. Even though ROFRs and ROFOs will rarely run afoul of that ancient rule, they do significantly impair marketability by indirectly discouraging third-party interest and otherwise complicating proposed transfers.⁶⁵ The contracting parties often make these problems worse by drafting incomplete agreements that fail to imagine what the distant future may bring. When preemptive rights extend over years, decades, and beyond, perhaps some principle in addition to the rule against illegal restraints should empower courts to use a more flexible, contextual approach if the underlying agreement proves to be incomplete in light of circumstances that have changed significantly over time.

Chapter 4 of the Restatement, which provides rules for interpreting the terms of servitudes, introduces a principle that could often help to resolve disputes that arise when preferential purchase rights extend over long terms. Section 4.1(1) establishes this general rule: “A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.”⁶⁶ Section 4.2 then sets the stage for a series of default rules articulated in sections 4.3 through 4.13 that courts should use to fill in gaps when the parties’ agreement creating a servitude fails to address one of the selected topics that those sections cover. Section 4.2 goes on to add this broad principle for situations in which none of the default rules of interpretation under sections 4.3 through 4.13 apply: “If additional terms are necessary to determine the rights and obligations of

rule against illegal restraints would evade rather than address the contract interpretation question.

65. See *infra* notes 173, 196, & 209 and accompanying text.

66. See RESTATEMENT, *supra* note 10, § 4.1(1).

the parties or their successors, terms that are reasonable under the circumstances are supplied by the court.”⁶⁷

Taken literally, section 4.2 invites courts to supplement the parties’ explicit agreement as needed when unanticipated circumstances arise in the future, thereby taking a step toward a more contextual approach to interpretation. In fact, however, neither the notes and comments to the Restatement nor the cases that adopt the Restatement expressly invoke this provision for any such purpose. At least insofar as the recent cases go, chapter 4 seems to have had no significant impact on the interpretation of preemptive rights agreements when the distant future brings circumstances that the parties to those agreements never contemplated. Part III analyzes how this state of current law impacts contracting practices when parties enter into long-term preferential rights, and then it proposes a more contextual model courts could use to interpret disputes in the face of incomplete contracts.

III. DRAFTING PRACTICES AND JUDICIAL INTERPRETATION PRINCIPLES

This concluding Part initially reviews how experienced real estate lawyers draft preferential rights agreements to anticipate a wide range of potential disputes. Taking their instruction from the many reported cases in which courts have resolved contested issues without sufficient guidance from the contractual language, knowledgeable lawyers for grantors and holders routinely avoid or at least carefully manage the most common risks that an uncertain future presents.⁶⁸ A continuous flow of lawsuits shows, however, that too many grantors and holders suffer from gaps left by incomplete contracts. The second subsection of this Part reconsiders the limits of the dominant interpretive principles, and it proposes a more contextual model for courts to use when the future outmaneuvers the contracting parties’ foresight.

A. *Contracting Practices for Long-Term Preferential Purchase Rights*

Contemporary practice literature demonstrates that experienced real estate lawyers, mindful of the incomplete contract dilemma, work diligently to manage the considerable risks their clients face when entering into preferential rights agreements.⁶⁹ These lawyers caution their clients

67. *See id.* § 4.2.

68. Several papers presented at the spring 2016 meeting of the American College of Real Estate Lawyers discuss many practical issues and drafting solutions. *See* Kathryn E. Allen, *Beware the Horse You Rode in on—“Preferential” Is Her Name and Mischief Is Her Game*, in ACREL PAPERS—SPRING 2016 (AM. LAW. INST. ed., 2016); Circo, *supra*, note 7; Kightlinger, *supra* note 45; Beat U. Steiner, *Hold Your Horses Before You Close That Deal: Rights of First Offer, Rights of First Refusal and Options*, in ACREL PAPERS—SPRING 2016 232 (AM. LAW. INST. ed., 2016).

69. *See, e.g.*, Murray, *supra* note 8, at 91–93; Kevin L. Shepherd, *Rights of First Refusal: Poison Pills and Bad Faith*, 21 PROB. & PROP. 52 (2007); Stein, *supra* note 46, at 6.

to weigh the risks and benefits of preferential purchase rights, especially ROFRs and ROFOs.⁷⁰ They know that, for grantors in particular, prudence often favors rejecting a proposal for a preferential right or countering it with some alternative.⁷¹ In many transactional settings, however, prospective buyers aggressively press for preferential purchase rights, and grantors regularly conclude that the requested device best serves their immediate transactional interests as well.⁷² In these situations, unless the preferential right will be of short duration, one constant challenge is how to deal with an uncertain future.⁷³

When expert real estate attorneys represent sophisticated grantors and holders, the preferred tactic calls for the most comprehensive agreement feasible under the circumstances.⁷⁴ To a considerable extent, knowledgeable lawyers can anticipate and cover a wide range of circumstances that might develop during an extended relationship between the grantor and the holder. While even the most experienced and cautious lawyer cannot completely account for all future events, this strategy often serves the well-represented client adequately. As the discussion that follows shows, however, the risks and practical solutions differ significantly between options to purchase and preemptive rights.

1. *Options to Purchase*

Options to purchase admit of some fairly standard negotiating and drafting solutions, largely dictated by market forces and the relatively clear legal principles that govern the enforceability of options.⁷⁵ In the first place, market considerations ordinarily lead the negotiating parties to

70. See Stein, *supra* note 46, at 14 (concluding that ROFRs and ROFOs “create a world of trouble and surprise for all parties involved”).

71. See, e.g., Walker, *supra* note 8, at 37–43 (discussing reasons why would-be grantor should consider, as alternatives to ROFR, commitment to negotiate with would-be holder in good faith for fixed period or commitment to offer property, if at all, via public auction).

72. See, e.g., Stein, *supra* note 46, at 7.

73. See, e.g., *id.* at 14–15 (providing extensive drafting suggestions, many of which anticipate problems that might arise during life of preferential right).

74. See Joshua Stein, *Model Right of First Offer*, 42 N.Y. REAL PROP. L.J., no. 4, Fall 2014, at 20 (providing recommended provisions for ROFO in long-term ground lease); Video: Beat U. Steiner, *Easier Said Than Done: Rights of First Offer, Rights of First Refusal and Options*, Presentation at the 34th Annual Colorado Real Estate Symposium (2016) (Colorado Bar Association) (providing checklist of issues to address in preferential rights agreements).

75. See generally Ronald Benton Brown, *An Examination of Real Estate Purchase Options*, 12 NOVA L. REV. 147, 206 (1987) (concluding that promulgation and use of standardized forms can solve most significant problem presented by option contracts, which is failure of parties to address certain key aspects of option agreement and details of purchase contract that will result if holder exercises option); Gregory G. Gosfield, *A Primer on Real Estate Options*, 35 REAL PROP. PROB. & TR. J. 129, 137–56 (2000) (summarizing essential elements of an option contract).

agree on a relatively short option period.⁷⁶ Because an option is a form of offer to sell the property that is irrevocable during the option term, the parties also normally agree either on a purchase price that is fixed for a short term or an objective method for determining fair market value at the time the option is exercised.⁷⁷ Few property owners, even among the least sophisticated, will agree to lock in a sale price for an extended period.⁷⁸ Moreover, the rule against illegal restraints on alienation threatens to invalidate an option granted for an unusually long term, especially one that sets a fixed price.⁷⁹ Additionally, the RAP, although in decline as a limitation on options, remains a factor in many jurisdictions.⁸⁰

Market forces, together with basic tenets of contract law, typically mandate that an option holder who wants to keep the property off the market for more than a short time will pay a meaningful option price. Unless and until the holder pays for the right, an offer to sell may be revocable for lack of consideration.⁸¹ When a holder wishes to keep the option in effect over a long term, sophisticated grantors and their legal counsel often require a higher option fee, perhaps payable on a periodic basis, to prevent expiration of the right.⁸² Alternatively, an option agreement providing for the purchase price to be determined based on a formula or a future appraisal may overcome a grantor's resistance to a long duration.⁸³ Addressing the price in one of these ways could also overcome a challenge under the rule against illegal restraints on alienation.⁸⁴

Even when an option agreement has a long duration, the legal principles governing enforceability practically assure that parties represented by competent counsel will negotiate a comprehensive agreement that not only reduces the risk of litigation but that also guides courts in resolving disputes when they occur. Experienced attorneys know to set out detailed

76. See COMMERCIAL REAL ESTATE TRANSACTIONS § 7:77 (Westlaw, 3d ed. 2016) (noting that option periods traditionally last only thirty to ninety days).

77. See Gosfield, *supra* note 75, at 141–44.

78. See COMMERCIAL REAL ESTATE TRANSACTIONS, *supra* note 76, § 7:77 (noting that although holder may seek relatively long period, grantor “will want to limit the term of the option because the property will not be on the market during the time the option is in effect”).

79. See RESTATEMENT, *supra* note 10, §3.4 cmt e.; Brown, *supra* note 75, at 195.

80. See Brown, *supra* note 75, at 192–95.

81. See, e.g., Steiner v. Thexton, 226 P.3d 359, 365 (Cal. 2010); LaRoche v. Nehama, 979 So.2d 1021, 1022 (Fla. Dist. Ct. App. 2008); see also RESTATEMENT (SECOND) OF CONTRACTS § 87(1) (a) (AM. LAW INST. 1981).

82. See COMMERCIAL REAL ESTATE TRANSACTIONS, *supra* note 76, § 7:77 (discussing “rolling option” structure in which holder “has the ability to extend the option by making additional option payments”).

83. See Gosfield, *supra* note 74, at 142–44.

84. See RESTATEMENT, *supra* note 10, § 3.4 cmt. e (providing that long-term option to purchase is less likely to be invalidated as unreasonable restraint on alienation if purchase price is at fair market value at time of exercise rather than at fixed price).

procedures for exercising the option and explicit provisions determining the consequences of a failure to follow those procedures.⁸⁵ Additionally, because the holder's exercise of an option creates an enforceable purchase and sale contract, the practicing bar recognizes that an option agreement must include the material terms of the deal.⁸⁶ Particularly from the holder's perspective, these considerations militate in favor of a comprehensive written agreement that unambiguously sets out the timeframe and procedures for exercising the option and that includes the terms of the resulting contract.⁸⁷

Leases often give tenants relatively long-term options to purchase the leased property, but options in leases constitute a special category.⁸⁸ The applicable legal principles are somewhat more protective of the option. The Restatement recognizes this by deferring to landlord-tenant law to the extent of any "special rules and considerations" that apply to preferential purchase rights created by covenants in leases.⁸⁹ In most jurisdictions a tenant's option to purchase tied to the leasehold estate requires no separate consideration and the RAP does not apply.⁹⁰ For purposes of the rule on restraints on alienation, courts that adopt the Restatement should not consider a tenant's option to be a restraint on the landlord's fee title at all.⁹¹ In jurisdictions in which a tenant's option is viewed as a restraint, courts typically hold that it is reasonable for the option to continue throughout the lease term, especially if the price will be determined by an appraisal, is based on a formula or process intended to result in a fair market price, or if the tenant has made significant capital improvements.⁹² Even an option to purchase at a fixed price at any time during a long-term may be reasonable.⁹³

Contemporary practices for incorporating the material terms of the prospective purchase and sale agreement into the option vary across jurisdictions. Attaching a complete copy of the proposed purchase and sale

85. See Gosfield, *supra* note 75, at 151–52.

86. See, e.g., *id.* at 155–56. See generally Creely v. Hosemann, 910 So.2d 512, 520 (Miss. 2005).

87. See COMMERCIAL REAL ESTATE TRANSACTIONS, *supra* note 76, § 7:77 (advising that best practice is either "to include a copy of the proposed contract as an exhibit to the option, or to include the contract terms in the option").

88. See generally Brown, *supra* note 75, at 168–72; Stein, *supra* note 46 (discussing ROFRs and ROFOs primarily in context of ground leases).

89. See RESTATEMENT, *supra* note 10, § 1.1(2)(a).

90. See Murray, *supra* note 8, at 99–100 (discussing inapplicability of RAP when option is integral to a leasehold interest).

91. See RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2 cmt. a (AM. LAW INST. 1977).

92. See Brown, *supra* note 75, at 196.

93. See Mr. Sign Studios, Inc. v. Miguel, 877 So.2d 47, 49 (Fla. Dist. Ct. App. 2004); Venture Stores, Inc. v. Pac. Beach Co. Inc., 980 S.W.2d 176, 185 (Mo. Ct. App. 1998).

agreement is a prudent method.⁹⁴ In that way, the parties avoid disagreements over the terms of the deal after exercise, and the holder, in particular, precludes any argument that the agreement omits any material terms. But in locations where standard contract forms are used for certain property types, an acceptable shortcut may be to specify that the parties will execute the standard form.⁹⁵ A riskier approach is for the option agreement to state only those terms the parties consider material, with an express or implied agreement that open terms must conform to standard practices.⁹⁶ As long as the parties have included the essential terms, such as the parties' identities, pricing, an adequate property description, and the method of exercising the option, courts will often fill gaps in option contracts based on customary practices and standard forms for real estate sales contracts in the jurisdiction.⁹⁷ To this extent, the incomplete contract problem is less severe for options to purchase than it is for other preferential rights agreements, especially ROFRs.⁹⁸

The net result of all these factors is that a well-drafted option agreement is typically complete enough to manage at least the most common causes of disputes between the parties. If properly structured, the option price should compensate the grantor on a basis that takes into account the option's duration. The agreement will also normally include, implicitly if not explicitly, all of the terms that will come into effect as the contract of purchase and sale once the holder exercises the option. This is particularly important because, as Part I shows, the fact that parties to ROFRs and ROFOs, as distinguished from options, do not know in advance all the terms that the triggering offer will include, accounts for some of the most common disputes over preferential purchase rights.

Even when parties enter into inadequately drafted option agreements, recent option cases suggest that problems associated with long duration are not prominent.⁹⁹ Litigation most often involves the application

94. See, e.g., *LaRoche v. Nehama*, 979 So.2d 1021, 1022 (Fla. Dist. Ct. App. 2008).

95. See, e.g., *Elderkin v. Carroll*, 941 A.2d 1127, 1130 (Md. 2008) (option agreement called for "standard contract").

96. See, e.g., *Creely v. Hosemann*, 910 So.2d 512, 520 (Miss. 2005).

97. See 1 MILLER & STAR, CALIFORNIA REAL ESTATE § 2:11 (Westlaw, 4th ed. 2016) (acknowledging willingness of courts to fill in gaps in this way but cautioning that better practice is for parties to include all terms of prospective sale in option agreement).

98. When a ROFO agreement fails to specify certain terms of the ultimate sale contract a court might presume that the grantor and the holder must have intended that terms other than the purchase price would conform to standard practices. But with a ROFR, and sometimes even with a ROFO, customary practices may be largely irrelevant if the triggering offer includes unique terms that the grantor and the holder did not anticipate. See *infra* notes 122–34 and accompanying text.

99. See generally *Brown*, *supra* note 75, at 206–11 (arguing that three most common legal problems associated with options to purchase involve: using option when some other device, such as loan or participation venture, is more appropri-

of fundamental legal principles, such as lack of consideration, the impact of the Statute of Frauds, or failure to include material terms.¹⁰⁰ Other cases present routine questions of contract interpretation. This latter category includes factual disputes over compliance with contract terms governing exercise of the option.¹⁰¹ Another common question of contract interpretation is whether the parties intended the option to be transferable.¹⁰² In almost all of these cases, the dispute could have been simplified or avoided entirely had the parties documented their agreements in accordance with established best practices.¹⁰³

2. *Preemptive Rights*

ROFRs and ROFOs present contexts markedly different from those typical of options to purchase. Property owners and prospective buyers use these preemptive rights in a wide range of situations and then must live with them later, often in the distant future, when the circumstances may be much different from what they anticipated. Unlike option contracts, preemptive rights agreements cannot specify the detailed terms of the potential sale contract between the grantor and the holder because that deal must match the unknown terms of a future triggering offer. Disputes stemming from incomplete preemptive rights contracts are common.¹⁰⁴

Experienced real estate lawyers negotiating and drafting these agreements know that they must become familiar with the nuances of the governing jurisdiction's law concerning preemptive rights and, even more importantly, must strive to craft contract terms that anticipate and resolve many theoretical and practical issues that the future could bring.¹⁰⁵ Risks associated with incomplete contracts, however, remain inherent in the

ate; violating RAP or rule against illegal restraints on alienation; and failing to address all material terms of ultimate sale contract).

100. *See, e.g.*, *Steiner v. Thexton*, 226 P.3d 359, 365 (Cal. 2010) (discussing consideration); *Elderkin*, 941 A.2d at 1130 (enumerating material terms); *Pardee v. Jolly*, 182 P.3d 967, 972–73 (Wash. 2008) (explaining Statute of Frauds).

101. The traditional rule requires that the holder strictly comply with the terms of the agreement relating to the exercise of the option. *See, e.g.*, *Casey v. Nat'l Info. Servs., Inc.*, 906 So.2d 710, 719 (La. Ct. App. 2005); *Elderkin*, 941 A.2d at 360–61; *Parker v. Booker*, 822 N.Y.S.2d 156, 160 (App. Div. 2006). Some recent cases, however, adopt a substantial compliance standard. *See, e.g.*, *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387, 399 (N.J. 2005); *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 242 P.3d 1, 9 (Wash. Ct. App. 2010).

102. *See* RESTATEMENT, *supra* note 10, § 4.6 (declaring that servitude benefits (and therefore option rights) are generally transferrable if it is not personal).

103. *See generally* *Brown*, *supra* note 75, at 211 (concluding that “the rules and theories governing purchase options are not that difficult” provided that contracting “parties actually take the effort to agree fully to the terms” and otherwise understand governing legal rules).

104. *See* *Stein*, *supra* note 46, at 6–8; *Murray*, *supra* note 8, at 64–68.

105. *See* *Stein*, *supra* note 46, at 14–15.

preemptive rights structure because unanticipated problems often materialize only when a future offer is made that triggers the preemptive right or a circumstance develops that tempts the property owner to structure a transaction in a way that arguably falls outside of the preemptive right.¹⁰⁶

As explained in Part II of this Article, the two theoretical issues most often tied to the duration of a preemptive right concern whether or how to apply the RAP and the rule against illegal restraints on alienation.¹⁰⁷ While either of these legal principles may present significant issues for the uninitiated, they should rarely stump experienced counsel.

In jurisdictions where the RAP remains a concern, the holder's lawyer simply must draft around whichever version of the rule applies.¹⁰⁸ In a few jurisdictions, this is still essentially the common law rule.¹⁰⁹ In others, it is a version of the Uniform Statutory Rule Against Perpetuities.¹¹⁰ No matter which variation is involved, real estate lawyers know how to structure the term of the agreement to protect validity. Parties to transactions in these jurisdictions may sometimes be disappointed that they cannot create indefinite or perpetual preemptive rights, but the practical impact is generally insignificant when experienced counsel is involved. In rare cases, the RAP may blindside even sophisticated parties and their counsel.¹¹¹ For the most part, however, the RAP, when it applies, is nothing but an ambush awaiting an inattentive victim. On policy grounds, many jurisdictions now agree with the Restatement that the RAP should not apply at all to preemptive rights.¹¹²

106. See Stein, *supra* note 74, at 20 (opining that no ROFR or ROFO “will ever actually work as the parties expect” and “will instead simply create disputes, issues, and uncertainty”).

107. Other theoretical issues discussed in the practice literature include compliance with the Statute of Frauds, the application of Article 9 of the UCC, the impact of the jurisdiction's recording act, the application of the relation-back doctrine, and the effect of bankruptcy. See Murray, *supra* note 8, at 107–15. While these considerations may require lawyers documenting the deal to be aware of the issues, they do not generally involve durational concerns. In any event, if the lawyers recognize these issues to the extent relevant to the particular transaction, they can usually structure the deal to avoid the associated legal problems.

108. See, e.g., Murray, *supra* note 8, at 101.

109. See, e.g., *Pew v. Saylor*, 123 A.3d 522, 528 (Me. 2015); *Hensley-O'Neal v. Metro. Nat'l Bank*, 297 S.W.3d 610, 615 (Mo. Ct. App. 2009).

110. See *CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Grp.*, 642 S.E.2d 393, 397 (Ga. Ct. App. 2007), *aff'd sub nom.*, 659 S.E.2d 359 (Ga. 2008) (discussing contrasting applications of Delaware's version of RAP and Georgia's version of uniform act in connection with ROFR).

111. See *id.* at 397 (explaining that joint venturer in commercial project was foiled by contractual choice-of-law provision that resulted in application of Delaware RAP to invalidate ROFR that would have been valid under Georgia law, where property was located).

112. See, e.g., *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So.2d 1279, 1285–88 (Fla. 2008); *Bortolotti v. Hayden*, 866 N.E.2d 882, 887–90 (Mass. 2007); *Jarvis v. Peltier*, 400 S.W.3d 644, 652 (Tex. App. 2013).

Concerns with the rule governing restraints on alienation can be slightly more difficult for lawyers to address due to the vagueness of a rule that generally turns on reasonableness when applied to preemptive rights. Even so, the rule typically represents a mild obstacle because the contemporary cases in most jurisdictions measure reasonableness only by reference to the time during which the holder may exercise the right after it has been triggered, not by the length of time that the right is in effect.¹¹³ This again comports with the Restatement's view.¹¹⁴ As noted previously, the Restatement even approves of ROFRs with indefinite terms as long as the holder has only a reasonable time in which to exercise the right once it has been converted to an option by the triggering event.¹¹⁵ Under this approach, few preemptive rights can be successfully challenged because the standard arrangement calls for preemptive rights to be exercisable only during a relatively short time after the grantor notifies the holder of the triggering event.¹¹⁶ Contemporary courts consistently uphold preemptive rights as reasonable restraints where the agreement gives the holder a relatively short time to exercise the right following the triggering event.¹¹⁷

The more significant problems associated with long-term preemptive rights exist at the practical rather than the theoretical end of the spectrum.¹¹⁸ On these matters, knowledgeable real estate practitioners often agree that preemptive rights agreements should anticipate and address potential issues in great detail.¹¹⁹ The practice literature recommends addressing several common drafting issues that can arise with almost any preemptive right, and some of those become distinctly more important with longer-term preemptive rights.¹²⁰ Most of these concerns apply both to ROFRs and ROFOs, although, as noted below, not always to the same extent or in the same way.¹²¹

Perhaps the most commonly litigated issue concerns what it means for the holder of a ROFR to match a third-party offer in order to exercise the right.¹²² This problem arises in several different recurring variations.

113. See, e.g., *Bortolotti*, 866 N.E.2d at 890–91; *MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust*, 864 N.W.2d 83, 91–92 (Wis. 2015).

114. See RESTATEMENT, *supra* note 10, § 4.3 cmt. c.

115. See *id.*

116. See Stein, *supra* note 46, at 8 (indicating that thirty-day period for exercising preemptive right is common).

117. See *Bortolotti*, 866 N.E.2d at 890–91; *Peters v. Smolian*, 12 N.Y.S.3d 824, 838 (Sup. Ct. 2015), *aff'd on other grounds*, 154 A.D.3d 980 (N.Y. App. Div. 2017); *SKI, Ltd. v. Mountainside Props., Inc.*, 114 A.3d 1169, 1177–80 (Vt. 2015).

118. See Circo, *supra* note 7, at 5–7.

119. See, e.g., *Murray*, *supra* note 8, at 63, 77–91, 116–32; *Steiner*, *supra* note 74.

120. See, e.g., *Murray*, *supra* note 8, at 77–91 (discussing “carve-out” provisions used to anticipate future transactions that may or may not serve as triggering events under preemptive rights agreements).

121. See Circo, *supra* note 7, at 25–26; Stein, *supra* note 74, at 24.

122. See *Allen*, *supra* note 67, at 14–17; *Shepherd*, *supra* note 66.

For example, experienced lawyers know to plan for the possibility that a potentially triggering offer may specify either more or less property than what the preemptive right covers.¹²³ The issue comes up often in the context of a proposed package deal, a bulk sale, or a proposed subdivision.¹²⁴ Parties may provide for the package deal possibility by agreeing that an offer relating to more or less property than that to which the right applies will not trigger the right but also will not extinguish it.¹²⁵ With that approach, the right will continue to apply to a subsequent offer for the specific property subject to the preemptive right. Under such an agreement, if the grantor sells to a third party a tract that includes the encumbered land plus other property, the new owner may not later accept an offer to purchase the parcel subject to the ROFR without giving the holder the right to match that offer. Only the parties' imaginations limit other possible approaches, which include agreeing that the holder may prevent a package sale or will have the right to match the offer to purchase the entire property, or that the grantor's acceptance of a package deal will extinguish the holder's right. Similar drafting solutions can address the possibility that a triggering offer may cover only a portion of the property subject to the preemptive right.

A comprehensive preemptive rights agreement will also usually address another fairly common version of the matching problem—what to do about unique terms in the third-party offer that the holder either cannot precisely match or that the holder may logically view as infeasible or economically irrational to match.¹²⁶ This issue often emerges when a triggering offer involves the transfer of stock or some other equity interest as consideration for the proposed sale.¹²⁷ Less common, but still significant

123. See Allen, *supra* note 68, at 17.

124. See *DePetrillo v. Belo Holdings, Inc.*, 45 A.3d 485, 493 (R.I. 2012) (noting that triggering offer included more land than what ROFR covered); *Advanced Recycling Sys., LLC v. Se. Props. Ltd. P'ship*, 787 N.W.2d 778, 785 (S.D. 2010) (explaining that triggering offer covered entire development that included leased property subject to ROFR); *Riley v. Campeau Homes (Texas) Inc.*, 808 S.W.2d 184, 189 (Tex. App. 1991) (holding that triggering offer was to purchase all units owned by seller in condominium project, which included unit subject to ROFR). See generally Murray, *supra* note 8, at 80–86 (discussing several cases involving “portfolio or bulk” sales transactions).

125. See Allen, *supra* note 68, at 17.

126. See *infra* notes 205–18 and accompanying text for a discussion of the *SKI* case, in which the triggering offer included a covenant by the proposed buyer not to oppose development plans that the holder was already contesting. See also Shepherd, *supra* note 69, at 54–55 (discussing “poison pill” provisions of triggering offers that are repugnant to holder's specific interest in property).

127. See, e.g., *Roeland v. Trucano*, 214 P.3d 343, 351 (Alaska 2009) (explaining that transfer to LLC that resulted in same parties retaining control of property did not trigger ROFR).

in light of the reported cases, are special financing terms¹²⁸ or a restrictive covenant limiting the buyer's use of the property.¹²⁹

The potential that a future offer may include unique terms makes it impossible for the parties to address every possibility. In many cases, the holder could be allowed to match the third-party offer by agreeing to pay a price premium that assures the grantor an economically comparable deal.¹³⁰ Some courts have adopted this as an appropriate remedy for a complaining holder.¹³¹ Such solutions, whether built into the negotiated agreement or introduced by a court, will be less than ideal because the parties may have radically different views on what the appropriate price adjustment should be in the particular situation.¹³² Moreover, some special terms, such as a third-party offer to maintain the property in its natural and undeveloped state, cannot necessarily be measured by monetary value to the grantor.¹³³ One way to manage some unique terms is to classify certain contract provisions, such as a specific closing date, closing location, or escrow arrangement, as immaterial and therefore not subject to the matching requirement or requiring only substantial compliance.¹³⁴ Some cases have relieved the holder from the obligation to match immaterial terms, but others insist on precise matching.¹³⁵

128. See *Christian v. Edelin*, 843 N.E.2d 1112, 1115 (Mass. App. Ct. 2006) (finding that holder's offer that included financing condition was not substantially same as cash terms of triggering offer).

129. See *Del. River Pres. Co., Inc. v. Miskin*, 923 A.2d 1177, 1182 (Pa. Super. Ct. 2007) (finding that holder failed to exercise ROFR effectively by not agreeing to restriction included in triggering offer to prohibit development of property).

130. See *Circo*, *supra* note 7, at 7.

131. See *Castle Props., Inc. v. Wasilla Lake Church of the Nazarene*, 347 P.3d 990, 989–99 (Alaska 2015) (explaining that when triggering offer involved land swap that grantor had special interest in acquiring, ROFR holder had right to make commercially equivalent offer, but grantor could reject holder's alternative offer on commercially reasonable basis); *Roeland*, 214 P.3d at 349–50 (holding that if holder cannot “exactly duplicate” aspects of triggering offer, holder “may propose comparable terms”).

132. See *Castle Props.*, 347 P.3d at 997 (approving grantor's determination that holder's cash offer was not commercially comparable to property swap proposed by triggering offer); *St. George's Dragons, L.P. v. Newport Real Estate Grp., L.P.*, 971 A.2d 1087, 1101–02 (N.J. Super. Ct. App. Div. 2009) (rejecting grantor's argument that holder had to offer not simply same purchase price as triggering offer, but same net yield to grantor after taking into account brokerage commissions payable).

133. See *infra* notes 179–99 and accompanying text discussing the *Smolian* case.

134. See *Steiner*, *supra* note 68, at 237 I-6 (noting that holder may want agreement to specify that matching offer is one on “substantially (materially) the same terms” or “commercially similar terms” rather than exactly terms set out in notice triggering right).

135. See *Shepherd*, *supra* note 69, at 53 (noting cases holding that matching requirement in ROFR agreement only requires holder to match material terms of triggering offer). Compare *Fienberg v. Hassan*, 928 N.E.2d 356, 359 (Mass. App. Ct. 2010) (finding holder who failed to match the third-party offer's closing date did not validly exercise the ROFR), with *Jones v. Stahr*, 746 N.W.2d 394, 403 (Neb. Ct.

Matching issues affect ROFOs less commonly than ROFRs because with a ROFO the triggering offer comes from either the grantor or the holder rather than a third party and contemplates a sale contract directly between the holder and the grantor. Even so, a matching problem can arise under a ROFO. For example, a package deal issue may arise if the grantor wishes to sell more or less property than what the ROFO covers.¹³⁶ Another matching issue may result if the holder and the grantor do not come to terms over the first offer and the holder subsequently accepts a third-party offer with additional or different terms that are difficult to compare to the first offer.¹³⁷ A grantor's first offer may lead to a dispute over whether the holder must match every detail of that offer no matter how unexpected or insignificant the detail may be.¹³⁸

The practice literature also recommends that preemptive rights agreements should anticipate that the grantor may someday wish to transfer the property by gift, may wish to incorporate the property in some way into an estate plan or a business succession plan, or may be willing to accept less than fair market value should a particular purchaser wish to acquire the property.¹³⁹ The popular shorthand drafting solution provides that only a bona fide offer will trigger the preemptive right.¹⁴⁰ Predictably, this approach has led to enough litigation to convince many lawyers to negotiate extensive provisions that exclude from the preemptive right several potential transactions that the parties can agree to exclude.¹⁴¹

In addition to using carve-out provisions to exclude one or more of the possible transactions just mentioned, thoroughly structured preemptive rights agreements may explicitly address certain other transactions affecting title that experience shows can lead to disputes between grantors and holders. All kinds of financings involving the property fall into this

App. 2008) (finding holder's addition of clause reserving right to assign was not fatal deviation from terms of third-party triggering offer).

136. See *Kutkowski v. Princeville Prince Golf Course, LLC*, 300 P.3d 1009, 1009–10 (Haw. 2013) (holding that grantor could not sell 1040-acre tract that included half-acre parcel subject to ROFO without giving holder right to purchase smaller parcel).

137. See *infra* notes 203–20 and accompanying text where a somewhat similar situation is suggested by the *SKI* case that explains a proposed sale to the ROFO holder failed to close a few years before a triggering offer was made that included a unique term unacceptable to the holder.

138. A ROFO agreement could be drafted to contemplate this issue. See Stein, *supra* note 74, at 22 (suggesting model ROFO agreement in which any notice triggering ROFO must specify “all material economic terms” that grantor proposes).

139. See Murray, *supra* note 8, at 77–79.

140. See, e.g., *Bergman v. Commerce Trust Co., N.A.*, 129 P.3d 624, 626 (Kan. Ct. App. 2006); *Schroeder v. Duenke*, 265 S.W.3d 843, 848 (Mo. Ct. App. 2008).

141. See Murray, *supra* note 8, at 77–91; Steiner, *supra* note 68, at 236.

category, as do various debt workouts, arrangements between co-owners or partners, and business restructurings.¹⁴²

The reality of an uncertain future complicates the process of negotiating and drafting carve-out provisions when the parties agree on a preemptive right that has an especially long duration. A grantor's motivations (in good faith or otherwise) for favoring a particular future transaction involving the property over a standard and presumably market-driven sale to the holder may evolve in totally surprising ways. Unanticipated developments may relate to the grantor's family situation or other personal relationships,¹⁴³ the relationship of the burdened property to other property that the grantor owns,¹⁴⁴ or a perceived impact that a future sale, either to the holder or to a different buyer, may have on the neighborhood or environment.¹⁴⁵ The longer the duration, the less likely it is that the parties' agreement will adequately express their mutual intentions relating to surprise developments.

Countless disputes over the years involving such issues have persuaded some of the most experienced real estate lawyers to craft much lengthier and more complex preemptive rights contracts.¹⁴⁶ Yet, more than one seasoned practitioner has expressed frustration or even despair that the truly comprehensive agreement may be unattainable.¹⁴⁷ Even if nearly complete contracts are possible, the many grantors and holders who do not know to ask for, cannot afford, or do not wish to pay for such agreements are largely left out in the cold. For these potential grantors and holders, long-term preemptive rights are simply bad ideas due to the risk of future disputes and litigation.

More than anything else, the practice literature teaches that preemptive rights agreements take place in an environment that invites disputes attributable to incomplete contracts when preemptive rights last for many years. The final subsection of this Article explores whether courts should

142. See generally Murray, *supra* note 8, at 78–79, 87–91 (discussing business entity restructurings, foreclosure sales, deeds in lieu of foreclosure, and transfers by eminent domain). Based on the terms of the preemptive rights agreements involved, recent cases have concluded that mortgage foreclosure sales did not trigger preemptive rights. See *Huntington Nat'l Bank v. Cornelius*, 914 N.Y.S.2d 327, 249–50 (App. Div. 2010); *Wells Fargo Bank, N.A. v. Michael*, 993 N.E.2d 786, 794 (Oh. Ct. App. 2013).

143. See *Rucker Props., L.L.C. v. Friday*, 204 P.3d 671, 673 (Kan. Ct. App. 2009) (holding that gift to family member did not trigger ROFR); *Bergman*, 129 P.3d at 630 (holding that transfer pursuant to will contest settlement agreement did not trigger ROFR).

144. See *Peters v. Smolian*, 12 N.Y.S.3d 824, 829–30 (Sup. Ct. 2015), *aff'd on other grounds*, 154 A.D.3d 980 (N.Y. App. Div. 2017) (noting owner of property encumbered by ROFR, who resided on adjoining land, wished to sell property to government entity that would agree to preserve property in its natural state).

145. See *id.*

146. See generally Murray, *supra* note 8, at 77–91.

147. See, e.g., Stein, *supra* note 74, at 20; see also *supra* notes 69–72 and accompanying text.

use a more flexible and contextual approach to contract interpretation when dealing with circumstances that the contracting parties did not expressly anticipate.

B. *An Alternative Judicial Model for Filling Gaps in Long-Term Preferential Purchase Rights*

The common law offers no easy solutions when contracting parties dispute how to interpret their rights and obligations in the face of developments that they did not explicitly contemplate in their written agreement. In broad terms, an ongoing scholarly debate pits formalistic approaches to contract interpretation against contextual ones.¹⁴⁸ The neoclassical understanding of contract is decidedly more contextual than the classical perspective of the 19th and early 20th centuries, yet it has not by any means abandoned formalism.¹⁴⁹ Indeed, contemporary contract scholarship provides renewed support for formalism.¹⁵⁰ Similarly, a more contextual approach to interpreting preemptive rights agreements has its

148. To reduce the competing scholarly perspectives on contractual interpretation and gap-filling to a debate between formalists and conceptualists greatly simplifies a vast, fascinating, and still-evolving body of theoretical analysis. See e.g., Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115, 133–44 (1993) (discussing alternative theories of default rule analysis); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1826–27 (1990) (referring to formalist, who “treats interpretation as problem of decoding,” and the contextualist, whose methodology “has a generative or context-specific aspect that resists reduction to code formulations”); Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 23 (2014) (labeling two contrasting camps as textualists and contextualists); Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 497–98 (2004) (contrasting formal approach “emphasizing certain potentially relevant interpretive materials, and discounting or excluding others,” with substantive approach that promotes “a more all-things-considered understanding”); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 926 (2010) (referring to two contemporary camps as formalists and antiformalists); see also Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 IND. L.J. 339, 340 (2013) (critiquing Schwartz and Scott’s theory of interpretation). For present purposes, however, the simplification will do. Indeed, in an inquiry concerned solely with a narrow topic of real estate transactions, it would truly be a fool’s errand to engage in the broader debate. The primary concern here is with interpretive disputes attributable to preemptive rights contracts that must be enforced in light of developments that the parties did not expressly contemplate. No matter the merits of the alternative theories, in such relatively simple arguments over contract interpretation, judicial opinions continue, for the most part, to divide over whether or to what extent a devotion to text and formal rules of interpretation preclude resort to context. See Gilson et al., *supra* at 35–36; Swartz & Scott, *supra* at 928.

149. See Gilson et al., *supra* note 148, at 34–37.

150. See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1775 (1995); Swartz & Scott, *supra* note 148, at 939.

judicial proponents, but most courts have not strayed far from formalism, at least not for long and not for most purposes.¹⁵¹

In keeping with this mixed approach to contract interpretation, recent preferential rights cases mostly adhere to formalism, yet contextual elements influence some of the most thoughtful decisions. As the analysis near the end of this subpart shows, a particularly significant concession in some of the cases has been a willingness to assign controlling weight to the implied duty of good faith and fair dealing.¹⁵² Drawing on energy from the formalist-contextualist divide, this concluding subpart proposes a model courts can use whenever called on to interpret a preferential purchase right, especially if the dispute develops many years after the original parties entered into an agreement creating a preemptive right and involves circumstances they apparently did not anticipate.

The Restatement's principles for interpreting preferential purchase rights agreements include both formal and contextual components. In considering the significance and potential impact of these principles, it is important to keep in mind that the Restatement deals with the broad category of servitudes, of which preferential purchase rights are a minor subset.

Section 4.1 sets the stage with a nod to both theories of contract interpretation, referring to surrounding circumstances as well as to the exact language the parties use:

A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.¹⁵³

151. Courts interpreting preferential rights agreements often begin by proclaiming that they must apply the contractual language that the parties themselves agreed to and must not supply other terms, as if that cliché could often be sufficient to resolve interpretive disputes about which reasonable minds are manifestly in conflict. See, e.g., *Bayer v. Showmotion, Inc.*, 973 A.2d 1229, 1247–48 (Conn. 2009); *Randolph v. Reisig*, 727 N.W.2d 388, 389 (Mich. Ct. App. 2006); *SKI, Ltd. v. Mountainside Props., Inc.*, 114 A.3d 1169, 1175–76 (Vt. 2015). In easy cases, the assertion is largely insignificant, but when a court invokes this principle to avoid confronting a true contractual gap made apparent only by unforeseen developments, it is, at best, a disingenuous distraction. For example, in *SKI*, the parties' contractual terms did not consider how their rights and obligations would be affected if, at a time in the distant future, the grantor could no longer provide sewer treatment capacity to serve the property covered by the ROFO. See *SKI*, 114 A.3d at 1171. When that situation materialized, like it or not, the circumstances required the court to fill in the gap by interpreting the agreement in favor of one party or the other. The court's interpretation was certainly defensible, but it was a gap-filling one all the same. See *infra* notes 203–20 and accompanying text. By contrast, in *Cornish College*, the court's analysis of what the parties' agreement required for the tenant to extend its option to purchase was distinctly contextual. See *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 242 P.3d 1, 18 (Wash. Ct. App. 2010); *infra* notes 221–38 and accompanying text.

152. See *infra* note 187 and accompanying text.

153. RESTATEMENT, *supra* note 10, §4.1(1).

As noted in Part II(B) of this Article, section 4.2, which serves primarily to introduce the supplemental rules of interpretation established in sections 4.3 through 4.13, includes this distinctively contextual statement: “If additional terms are necessary to determine the rights and obligations of the parties or their successors, terms that are reasonable under the circumstances are supplied by the court.”¹⁵⁴

The implicitly expansive promises of sections 4.1 and 4.2 notwithstanding, none of the Restatement’s eleven supplemental rules of interpretation offers courts much help in resolving disputes stemming from changes in circumstances or unanticipated developments over the course of a long-term preferential purchase right.¹⁵⁵ Two of the sections, however, deal with matters of duration.

Section 4.3 provides default rules for determining the duration of servitudes when the parties’ agreement is silent on the point. Specific rules apply to four distinct categories of servitudes, but only one of those applies to any kind of preferential purchase right. “An option to purchase property, other than an option appurtenant to a leasehold estate, lasts for a reasonable time. The duration of an option appurtenant to a leasehold estate is determined by the law of landlord and tenant.”¹⁵⁶ The general rule of section 4.3 that applies in the case of all other preferential purchase rights, including ROFRs and ROFOs, provides: “The duration of other servitudes is indeterminate.”¹⁵⁷ This principle comports with the perspective that ROFRs ordinarily do not operate as significant restraints on alienation.¹⁵⁸ As previously discussed, while the Restatement’s endorsement of a preemptive right of indefinite duration reflects a sound perspective on the policies behind the common law rule on illegal restraints on alienation, it ignores the many problems associated with long-term preemptive rights.¹⁵⁹

Section 4.4 addresses the duration of a party’s rights or obligations in connection with a servitude. These principles help implement the essential distinctions between servitudes that are in gross, appurtenant, or personal. Section 4.4 may sometimes be relevant to preemptive rights

154. *See id.* § 4.2.

155. Some of the default rules of interpretation are more often important with respect to prototypical servitudes, such as easements, than to preferential rights. *See id.* § 4.8 (emphasizing location, relocation, and dimensions of servitudes); *id.* § 4.9 (explaining servient owners right to use servient estate); *id.* §§ 4.10 & 4.11 (explaining use rights); *id.* § 4.12 (listing rights of multiple holders); *id.* § 4.13 (enumerating duties of repair and maintenance). Others can be as relevant to preferential purchase rights as to most other servitudes but do not concern the kinds of contractual gaps that figure prominently in the recent cases. *See id.* § 4.5 (explaining how to determine whether benefit or burden is appurtenant, in gross, or personal); *id.* § 4.6 (discussing transferability of benefits); *id.* § 4.7 (discussing delegability and transfer of burdens).

156. *Id.* § 4.3(2).

157. *Id.* § 4.3(5).

158. *See id.* § 3.4 cmt. f.

159. *See supra* notes 63–65 and accompanying text.

disputes that arise long after the original parties negotiated the terms of the agreement, but it does not offer any help in interpreting an agreement in the face of changed circumstances or unanticipated developments.¹⁶⁰

Chapter 7 of the Restatement deals with modifications and terminations of servitudes. It includes sections concerning abandonment and estoppel.¹⁶¹ Either of these rules may occasionally be relevant to preferential purchase rights.¹⁶² The topic having the most potential relevance, however, is changed circumstances, which sections 7.10 and 7.11 address. Unfortunately, neither of those sections deals with that concept in connection with preferential purchase rights. Section 7.11 only concerns the narrow topic of conservation easements. Section 7.10 states principles of broader scope, at least nominally applicable to any servitudes. One of these rules allows a court to modify or terminate a servitude if a change in circumstances “makes it impossible as a practical matter to accomplish the purpose for which the servitude was created.”¹⁶³ Situations may arise in which this principle would be relevant to the interpretation of a preferential right, but it holds limited promise for resolving the kinds of disputes grantors and holders commonly litigate.¹⁶⁴ The other potentially relevant provision of section 7.10 allows for judicial modification of a servitude if, “because of changed conditions the servient estate is no longer suitable for uses permitted by the servitude.”¹⁶⁵ The critical phrase “uses permitted by the servitude” shows that the drafters did not have preferential purchase rights in mind.¹⁶⁶

Given that the Restatement classifies preferential purchase rights as a category of servitudes, it is understandable that the drafters did not address specific principles applicable to narrow questions of interpretation

160. See, e.g., *Gilmore v. Jordan*, 17 N.Y.S.3d 545, 546–47 (App. Div. 2015) (holding that ROFR contained in deed was extinguished upon grantor’s death because deed did not purport to bind grantor’s heirs and assigns).

161. See RESTATEMENT, *supra* note 10, § 7.4 (dealing with modification and abandonment); *id.* § 7.6 (detailing modification or extinguishment by estoppel).

162. See, e.g., *Waste Connections of Kan., Inc. v. Ritchie Corp.*, 298 P.3d 250, 267 (Kan. 2013) (concluding that holder was not estopped from pursuing its argument about price at which it could purchase under ROFR).

163. See RESTATEMENT, *supra* note 10, § 7.10(1).

164. The circumstances involved in *SKI, Ltd. v. Mountainside Properties, Inc.* arguably presented such a circumstance, but the opinion does not mention the Restatement’s rules of interpretation. 114 A.3d 1169 (Vt. 2015). See *infra* notes 205–20 and accompanying text.

165. See RESTATEMENT, *supra* note 10, § 7.10(2).

166. Even if the premise of section 7.10(2) could apply because the property subject to a preferential purchase right somehow becomes unsuited for purchase, as might be the case when changing climate conditions result in the property being permanently submerged, it is hard to imagine what kind of modification a court could approve that would “permit other uses under conditions designed to preserve the benefits of the original servitude.” See *id.*

relating to these rights under changed conditions.¹⁶⁷ If sections 4.3 and 7.10 have much significance to the issue at hand, it is by way of analogy. Should courts develop special principles of interpretation to help resolve disputes attributable to circumstances that the parties to preferential rights agreements did not anticipate and, if so, what kind of rules make sense?¹⁶⁸

The modest proposal offered here stems from the proposition that context is often relevant to the interpretation of preferential purchase rights and can be especially significant when disputes emerge concerning preemptive rights long after the parties struck their bargain. On that basis, courts should be open to a more flexible approach to resolving a dispute that arises under a preemptive rights agreement, particularly one that has a long duration. As far as it goes, the Restatement provides salutatory principles governing preferential rights, but it does not establish specific principles that will often help courts deal with gaps in preemptive rights agreements.

The first relevant principle under the Restatement—that servitudes as a category should be free of the RAP—has much to commend it.¹⁶⁹ The justifications for this conclusion have already been summarized.¹⁷⁰ In deference to precedent and the legislative prerogative, a few courts will continue to apply the RAP to at least some preferential rights.¹⁷¹ In those jurisdictions, preferential purchase rights to which the courts have traditionally applied the RAP will remain subject to invalidation on that formal basis, but that is a matter of marginal significance.

167. Whether classifying preferential purchase rights as a category of servitudes is helpful as an analytic matter is a question of no immediate interest in this Article.

168. An approach not addressed in this Article would encourage courts to develop default rules to fill in gaps in preemptive rights agreements. Arguably, some courts have done so to address certain recurring questions of interpretation, such as in the package deal cases or to deal with triggering offers that include nonmonetary terms. *See supra* notes 119–34 and accompanying text. Default rules could be far more efficient than the highly contextual model proposed here. The contract interpretation issues of the greatest interest for purposes of this Article, however, do not fit into recurring patterns to which default rules could easily apply, with the possible exception of the package deal problem.

169. *See* RESTATEMENT, *supra* note 10, § 3.3.

170. *See supra* notes 49–51 and accompanying text.

171. *See, e.g.*, *Pew v. Saylor*, 123 A.3d 522, 528 (Me. 2015); *Hensley-O’Neal v. Metro. Nat’l Bank*, 297 S.W.3d 610, 615 (Mo. Ct. App. 2009); *see also* *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 804–05 (N.Y. 1996) (explaining that, in interpreting New York’s RAP, precedents distinguish between options to purchase, to which rule applies, and certain preemptive rights, to which it does not). The *Symphony Space* court acknowledged “compelling policy reasons” for not applying the RAP to commercial options to purchase but held that legislative action “similar to that undertaken by numerous other State lawmakers” would be required to reform New York’s rule, which is codified. *See Symphony Space*, 669 N.E.2d at 805.

The Restatement's second principle, equally valid on policy grounds, is that the rule against illegal restraints on alienation applies with full force to options to purchase.¹⁷² As a result, a long-lasting option is subject to challenge, particularly if, as is often the case, the option agreement provides for a fixed purchase price.¹⁷³ The Restatement clarifies an important point not often addressed in the cases by specifying that the reasonableness of a preemptive purchase right's duration, in contrast to that of an option, turns not on the time during which the right continues but on the time allowed for exercising the right once it has been triggered.¹⁷⁴ This too reflects a sound policy decision because the all or nothing function of the rule against illegal restraints on alienation, just like the function of the RAP, is to distinguish valid from invalid rights or interests. Experience shows that long-term ROFRs and ROFOs often serve the economic and other interests of the parties involved. No policy requires the law to preclude these arrangements on a categorical basis.

Beyond these basic principles concerning how two highly formal rules should apply to servitudes, the Restatement offers little help for resolving disputes over how to enforce a preferential rights agreement when it fails to address circumstances central to the controversy. A court inclined toward a contextual approach can find support in the Restatement's general principles that (1) judicial interpretation should "give effect to the intention of the parties ascertained from . . . the circumstances surrounding creation of the servitude"¹⁷⁵ and (2) a court should supply "terms that are reasonable under the circumstances" where "additional terms are necessary to determine the rights and obligations of the parties or their successors."¹⁷⁶

How might a court use this more contextual approach to resolve disputes of the kind that are especially likely to arise concerning preemptive rights? And what, if anything, should the duration of the right have to do with a contextual approach? First, courts can and should acknowledge that it is often inefficient or impractical, and sometimes it is impossible, for parties to preemptive rights agreements to anticipate circumstances that may lead to disputes in the future. Second, courts should recognize that long durations increase the probability of disputes over the proper interpretation of a preemptive rights agreement. As previously noted, the experience with preemptive rights that last for long periods does not justify a rule of invalidation. But any long-term preemptive right tends to operate as a drag on the marketability of the property that can foster an

172. See RESTATEMENT, *supra* note 10, § 3.4.

173. See *id.* § 3.4, cmt. e.

174. See *supra* notes 57–62 and accompanying text.

175. See RESTATEMENT, *supra* note 10, § 4.1(1).

176. See *id.* at § 4.2.

inordinate number of disputes about the proper interpretation of an “obligationally incomplete” agreement.¹⁷⁷

It is one thing to conclude that preemptive rights should be free from property law’s all-or-nothing restrictions, but it is entirely another thing to use fixed rules for interpreting preferential rights agreements to shield long-term preemptive rights from careful judicial scrutiny. Indeed, in light of the arguably marginal social utility of long durations in some contexts, at least a modest degree of heightened scrutiny may be warranted when a holder argues that a preemptive right should apply under circumstances that the contracting parties never anticipated during distant negotiations.

Under this model, duration alone would never be determinative; it would simply be one of the factors that the court should consider in assessing the conflicting interpretations that the grantor and the holder propose. When added to other contextual factors that courts already use in these cases, the weight given to duration will sometimes turn the balance one way or the other.

How might this alternative judicial model play out? For that question, a reassessment of the three cases highlighted in Part I is in order. As will be seen, these cases already take context into account but only to a limited extent and without considering the duration of the right or the length of time that has passed since its creation.

For the first example, consider the trial court’s ruling on cross-motions for summary judgment in the *Smolian* case.¹⁷⁸ There, the court held that an offer by Alexander Peters to sell to the Town of East Hampton (where the property was located) triggered a twenty-year-old ROFR but did not necessarily require the holder to match the preservation restriction in the contract between Peters and the town. Peters’s title to the two tracts derived from deeds that included identical ROFRs.¹⁷⁹ For convenience, this discussion refers to the owners of the property simply as Peters, as did the court, because he was both the individual owner, who lived on a neighboring tract, and the managing member of the co-owning limited liability company.¹⁸⁰

The ROFRs ran in favor of a prior owner and three other members of his family. Because only the three family members were asserting rights

177. Professors Scott and Triantis have used the phrase “obligationally incomplete” to distinguish what lawyers typically mean when they say that a contract is incomplete from what economists mean. See Scott & Triantis, *supra* note 12, at 190–91. This Article deals mostly with the conceptually simpler notion that lawyers have in mind. Empirical studies and economic analysis, however, may help explain how preemptive rights restrain alienability in ways that matter a great deal to real estate lawyers and their clients. See Grosskopf & Roth, *supra* note 9, at 26–28; Kahan et al., *supra* note 48, at 346; Walker, *supra* note 8, at 10–13.

178. See *Peters v. Smolian*, 12 N.Y.S.3d 824, 842 (Sup. Ct. 2015), *aff’d on other grounds*, 154 A.D.3d 980 (N.Y. App. Div. 2017).

179. See *id.* at 830–31.

180. See *id.* at 829–30.

under the ROFR, in his first count, Peters challenged the ROFR's validity primarily under the "stranger to the deed" rule.¹⁸¹ That rule, as articulated by the court, invalidates a reservation or exception included in a deed that runs in favor of someone who is not a party to the deed.¹⁸² The court held that the ROFRs were not subject to that rule and that they also did not violate New York's version of the RAP or the rule against illegal restraints on alienation.¹⁸³ On all these issues, the opinion is well-reasoned, and the rulings on the second two points line up well with the Restatement.¹⁸⁴ The court's dismissive treatment of an important question of contract interpretation, however, merits close examination.

Peters's second count presented the interpretation issue simply as whether, if the three family members had a valid ROFR, they could exercise it only by agreeing to purchase the property subject to the same use restriction included in the pending contract with the town.¹⁸⁵ In denying Peters's requested declaration that the holders would be bound to the preservation condition, the trial court initially relied on procedural grounds. The court reasoned that Peters did not present a justiciable controversy because he had not conditioned the contract with the town on obtaining a waiver of the ROFRs, and he had never given the holders written notice of their right to purchase the property.¹⁸⁶ Had the court's analysis ended there, the case would not present an opportunity to discuss a contextual model for interpreting a long-term preemptive rights agreement. But for some reason, the court went on at length to analyze the merits of Peters's argument.

For this purpose, the court focused first on whether the no-development provision of the proposed sale contract was added by amendment to sidestep the ROFRs.¹⁸⁷ A finding that Peters had convinced the town to modify the terms of the original triggering offer in order to frustrate the ROFR could establish a breach of Peters's duty of good faith and fair dealing.¹⁸⁸ The court observed: "When a property owner and a potential buyer attempt to circumvent another's right of first refusal, the covenant

181. *See id.* at 831.

182. *See id.* at 833.

183. *See id.* at 833–38.

184. *See supra* notes 49–64 and accompanying text.

185. *Smolian*, 12 N.Y.S.3d at 840.

186. *See id.* at 840–41. The court's reasoning on the justiciable controversy issue is not entirely convincing. It appears that Peters and the town still wished to proceed with their transaction, and the court's rulings that the ROFRs were valid and that the proposed sale to the town triggered the holders' rights left open the question whether the holders had to match the terms of the town's offer. Even though the court determined that Peters had breached his contractual duty to give notice to the holders of the triggering event, the holders obviously had notice of the pending transaction by the time the cross-motions for summary judgment were filed. As a practical matter, it seems that a ruling on the matching question would have resolved the balance of what was in fact an actual controversy.

187. *See id.* at 841.

188. *See id.*

of good faith and fair dealing is breached.”¹⁸⁹ The court commented that the contract amendment adding the use restriction “apparently seeks to ensure the sterilization of the properties,” and “could be seen to be an attempt to potentially frustrate” or “to diminish” the ROFR.¹⁹⁰ Note that the implied duty of good faith and fair dealing is one of the first and greatest cracks in the wall of formalism in contract interpretation. In preferential rights cases, courts regularly recognize this duty, often assigning significant weight to it, and the trial court’s willingness to do so in the *Smolian* case is hardly unusual.¹⁹¹ This observation serves as a reminder that legal formalism does not completely dominate even the majority approach to contract interpretation under the contemporary cases. Whether the court’s suspicions that Peters was acting in bad faith may have been misplaced is an interesting question but of little importance for present purposes.¹⁹²

The interpretation issue before the court was whether the terms of the ROFR left Peters free to decide that he would only sell to a buyer willing to accept a use restriction. At the conclusion of its analysis of Peters’s challenges to the validity of the ROFRs, in addressing a related point, the court had already indicated a conventional approach to interpretation. Peters had asserted that a motivation for including the ROFRs in the deeds conveying the properties to him in the first place was to give members of the Smolian family, who also owned other property in the

189. *See id.* (citation omitted).

190. *See id.*

191. *See, e.g.,* T.W. Nickerson, Inc. v. Fleet Nat’l Bank, 924 N.E.2d 696, 704–09 (Mass. 2010) (noting that trustee that held legal title to property did not violate duty of good faith owed to tenant under lease that included option to renew and ROFR); Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 864 A.2d 387, 399 (N.J. 2005) (landlord breached its duty of good faith through “a demonstrable course of conduct, a series of evasions and delays, that lulled plaintiff into believing it had exercised the lease option properly”); FWT, Inc. v. Haskin Wallace Mason Prop. Mgmt., L.L.P., 301 S.W.3d 787, 803 (Tex. App. 2009) (upholding summary judgment against ROFR holder on basis that grantor had met its burden to show that condition in triggering offer “was commercially reasonable, imposed in good faith, and not specifically designed to defeat” holder’s right).

192. Apparently, the court thought it especially significant that the original contract with the town did not include the condition for the use restriction. *Smolian*, 12 N.Y.S.3d at 840–42. Peters and the town executed the sale contract on May 22, 2014, the town board authorized the purchase on June 6, 2014, and in September 2014, Peters and the town amended the contract to “acknowledge that the Town is purchasing the subject premises with the express understanding that the subject premises shall remain as open space” as authorized by certain Town Board resolutions and a state enabling act. *See id.* at 830–31. Aside from the timing of the amendment, the trial court’s opinion does not refer to any evidence or even allegations about the town’s plans for the property or what the town board’s resolution authorizing the purchase permitted the town to do with it. Given that the proposed sale was to a public entity that apparently had an established program for purchasing property in the area for conservation purposes, the court’s suspicions on this detail may have been unjustified. According to the *New York Times* account, the Town of East Hampton had been purchasing land in the area for conservation purposes for two decades. *See* Chaban, *supra* note 3.

area, the ability to prevent a future sale of the property for development.¹⁹³ Presumably, Peters thought that if he could prove this, the holders could not complain that his offer to sell included the use restriction.¹⁹⁴ The court dismissed this claim, commenting that if the contracting parties had intended to restrict the future use of the property, they could have explicitly included language to that effect in the deeds.¹⁹⁵ Fair enough, although they also could have explicitly restricted Peters's freedom to impose use restrictions on any sale if they intended to immunize the preemptive right from such conditions in the future.¹⁹⁶ The ROFR language quoted in the opinion does not suggest anything approaching the level of comprehensive drafting discussed earlier in this Article.¹⁹⁷

The central question, therefore, was not whether the original contracting parties intended to preserve the property in its natural state but whether, in the absence of any agreement on the point, Peters could condition a triggering offer on such a severe use restriction. The interpretive dispute did not call on the court to decide what the parties actually intended with respect to this unanticipated circumstance but how to deal with the contractual gap. On this issue, the court stated that "it would appear that Peters cannot defeat the right of first refusal by eliminating one of the more important sticks from the 'bundle of sticks' that constitute the rights of ownership of real property, that is, the right to utilize the property in keeping with the applicable zoning ordinances."¹⁹⁸ Apparently, the court thought that, unless otherwise expressly limited, a right of

193. *Smolian*, 12 N.Y.S.3d at 839.

194. To be meaningful, however, Peters's version of what motivated the parties to the original transaction to include the ROFRs in the deeds would require evidence that they intended that the ROFRs could only be exercised to prevent development on the property. Proving that a preservation objective might be one of several reasons why the holders might want to exercise the preemptive right in the future would not be sufficient.

195. *See id.* at 839. The court offered this observation near the end of its analysis of the ROFR's validity, but the comment actually relates more directly to the court's interpretation of the ROFRs.

196. Even if the parties to the original transaction implicitly assumed that any future sale of the property either could or could not be encumbered by a use restriction, without the benefit of experienced real estate counsel, they would have been unlikely to build that understanding into the language of the ROFR.

197. *See supra* notes 100–43 and accompanying text. Presumably, only the short provision quoted in the opinion was relevant, as the court introduced that provision with the admonition that it is "important in such cases to examine the language creating the right of first refusal." *Smolian*, 12 N.Y.S.3d at 831. The provision simply (1) stated that the conveyance was subject to a ROFR in favor of the named members of the Smolian family so long as they owned certain identified land, (2) specified a method for giving notice if Peters "received a bona fide offer," (3) gave the family members ten days after receiving the notice "to agree to purchase the land *upon the same terms and conditions as specified in the offer*," and (4) provided for the ROFR to survive if the family members did not exercise the right but the proposed sale to the third party failed to close within 120 days. *See id.* at 831–32 (emphasis added).

198. *See id.* at 842 (citations omitted).

first refusal should be understood as a right to purchase fee simple title unencumbered by this kind of use restriction.¹⁹⁹

If the model proposed here for interpreting long-term preferential rights agreements had applied in the *Smolian* case, factors beyond the limited language of the deeds could have tipped the scales a bit one way or the other. The point here is not that Peters should have prevailed, but only that context, including the duration of the ROFRs, should have factored into the decision. The conventional approach considers the duration of a preferential purchase right only in reference to the RAP and the rule against illegal restraints on alienation, which concern the validity of the right. A long-term preemptive right, however, can impose a heavy burden on marketability even though it does not restrain alienation in the sense addressed by the common law rules concerning free alienability and dead-hand control. For Peters, the conventional rules of interpretation invoked by the trial court may prevent him from selling his property on terms acceptable to him until the last of the four holders named in his deeds dies.²⁰⁰

The duration of the right, while not controlling, should be a factor a court may consider when interpreting a preferential rights agreement. In interpreting the ROFRs in the *Smolian* case, for example, might it have been important to inquire whether the use restriction in the town's offer to purchase was, under the circumstances prevailing in 2014, just as material to the proposed deal as was the purchase price? How likely is it that the parties to the original transaction intended to limit the terms and conditions upon which Peters could consider selling the property under the unknowable circumstances the distant future would bring? Should it have been relevant to know whether the prospect of a sale to a public entity for

199. Perhaps the court's explanation could be understood as a viable default rule, but to create a default rule in such a circumstance would seem to sacrifice logic for the sake of efficiency. See *supra* note 164 and accompanying text. If, however, the court was truly trying to discern what the contracting parties might have intended had they considered the contingency, the interpretation is, by no means, unreasonable. The ROFRs operated as some kind of burden on Peters's fee title, and if he had simply imposed the use restriction on the property the holders would have argued that the ROFRs, as prior matters of record, gave them the right to purchase free of the subsequent restriction. The actual case was in a different posture because the use restriction, if not a ploy to frustrate the ROFRs, could be seen simply as one of the terms of the triggering offer. To conclude that by accepting title subject to the ROFRs Peters gave up his right to negotiate the terms of a future sale contradicts the express terms of the ROFR requiring the holders to purchase on the terms and conditions of the triggering offer. See *supra* note 193 and accompanying text. In other words, the underlying question of interpretation in the case remains whether the holders should have to accept whatever conditions might be included (in good faith) in a triggering offer Peters was willing to accept in the future.

200. In concluding that the ROFRs did not violate the RAP, the trial court held that the language in the deeds created preemptive rights personal to the named holders. See *Smolian*, 12 N.Y.S.3d at 838.

preservation purposes might have been hard for the parties even to imagine in 1992 and 1997?²⁰¹

Although this Article is primarily interested in temporal considerations, other contextual aspects could also be relevant to interpreting the ROFRs in the *Smolian* case. Why not consider whether Peters paid full market price when he purchased the properties and therefore had every reason to believe that he would remain free to sell the property for its full market price or to accept a lower price in exchange for whatever nonmonetary terms might serve his interests at the time? Should it have been important to know whether the price that the town offered to pay was materially below the property's market value if sold free of the use restriction?²⁰² Perhaps it would even have been fair to consider evidence, if Peters actually had any, that a preservation motivation played some role in the original transaction.²⁰³

The *SKI* case, in which the Vermont Supreme Court dealt with a ROFO, provides an even stronger argument for a contextual model of interpretation that gives some weight to the duration of a preferential purchase right.²⁰⁴ The case involved not only a triggering offer that included unique terms the parties did not anticipate when they negotiated the agreement many years earlier, but it also arose in the aftermath of significantly changed circumstances.

The original parties agreed to the ROFO in 1988 in connection with the sale by SKI, Ltd. to Mountainside Properties, Inc. of thirty-three acres within a much larger ski resort area.²⁰⁵ Mountainside was interested in developing both the thirty-three-acre tract and an adjoining sixty-two-acre site that SKI also owned (the ROFO property), however, development of the ROFO property would have required offsite sewer treatment that was not available at the time.²⁰⁶ SKI owned the local sewer treatment plant, but it did not have capacity at the time sufficient to support development on the ROFO property. For that reason, rather than attempting to negotiate a sale of the additional sixty-two acres immediately, the parties agreed that if, in the future, SKI wished to sell the additional land, SKI would first

201. A contextual analysis might view a 2014 offer differently than the same offer made much closer to the time the ROFRs were granted. A sale on unique terms that the parties likely did not contemplate might more strongly suggest violation of the duty of good faith and fair dealing if proposed relatively soon after creation of the original transactions.

202. The *New York Times* article reports that Peters claimed that he could sell the property to a developer for twice the price the town offered. See Chaban, *supra* note 3.

203. See *supra* notes 189–92 and accompanying text.

204. See *SKI, Ltd. v. Mountainside Props., Inc.*, 114 A.3d 1169, 1177–80 (Vt. 2015).

205. See *id.* at 1171. The grantor in the original transaction actually was SKI's predecessor in title, but the two entities were affiliated. For convenience, the text treats the two as the same entity, as nothing of significance turns on the distinction.

206. See *id.*

offer the property to Mountainside, along with sewer treatment capacity. Insofar as the opinion discloses, the terms of the ROFO agreement were sparse and did not address the terms of a potential future offer except to say that the offer would be at a market purchase price and that sewer treatment would be at a to-be-specified capacity, both as determined by SKI at the future time.²⁰⁷

In 2006, nearly twenty years after the original transaction, a proposed sale of the ROFO property to Mountainside fell through.²⁰⁸ In 2007, SKI sold the rest of the property it owned in the area, other than the ROFO property, to three entities that took title as tenants in common (TICs).²⁰⁹ That sale included the sewer treatment facility, and SKI did not reserve any rights to sewer treatment capacity for the ROFO property. Subsequently, Mountainside opposed the TICs' development plans; litigation between Mountainside and the TICs eventually ensued and was pending when the case between SKI and Mountainside went to trial.²¹⁰ In 2012, in an effort to complete the liquidation of its holdings in the area, SKI negotiated with the TICs to provide sewer treatment for eight lots on the ROFO property, contingent on a requirement, insisted upon by the TICs, that the owner of the ROFO property would not oppose the TICs' development plans.²¹¹ SKI offered to sell the ROFO property to Mountainside, subject to the no-contest condition. Mountainside predictably found the condition unacceptable and argued that its preemptive right could not be saddled with such a restriction.²¹²

Particularly because of the time that had elapsed between the grant of the ROFO and the eventual offer made to the holder, this situation cries out for a contextual approach to contract interpretation. What circumstances were involved in SKI's decision to liquidate its real estate holdings in the area? Why did SKI sell the land that included the sewer treatment facility but retain title to the ROFO property without reserving any sewer treatment rights? Was there a relationship between SKI and the TICs that might suggest collusion to evade the ROFO? What effect did the ROFO have on the market value and marketability of the ROFO property, first in 1988, and then in the critical period of 2006–2012? Over time, had the ROFO property become practically unmarketable because of Mountainside's aging preemptive right?²¹³ Did any dealings among SKI, Mountain-

207. *See id.*

208. *See id.*

209. *See id.*

210. *See id.* at 1172.

211. *See id.*

212. *See id.* at 1172–73.

213. After Mountainside rejected SKI's offer, SKI successfully negotiated a sale of the ROFO property at a higher price to another buyer who agreed to the no-contest condition, but that sale was thwarted because SKI could not provide title insurance to the buyer in light of the pending dispute with Mountainside. *See id.* at 1173.

side, and the TICs suggest whether SKI was acting in accordance with its duty of good faith and fair dealing?

The court relied on traditional rules of contract interpretation, which virtually foreclosed exploration of these questions, even though much in the record indicated that the parties had addressed some of them during the trial and the trial court had based its ruling on the question of SKI's good faith.²¹⁴ When it insisted that the contract must "be enforced according to contract principles,"²¹⁵ the Vermont Supreme Court had in mind a set of formal rules that apply generically to all contracts without reference to the context in which any particular dispute arises. Under this approach to contract interpretation, the fact that twenty-four years after the original deal was struck SKI no longer had control over the critical sewer treatment capacity had "no bearing on what the parties intended at the time they entered into the contract."²¹⁶ One could just as validly argue that the parties' original failure to negotiate terms that would apply if and when SKI no longer owned the sewer treatment plant had no bearing on whether SKI should be able to offer the ROFO parcel on terms that made economic sense when that state of affairs developed. The court invoked a judicial restraint refrain: "We will not rewrite the contract, nor graft conditions onto an unambiguous contractual provision merely because the passage of time and the course of development have led the parties to positions they had not anticipated."²¹⁷

For reasons previously stated, the long duration of the ROFO in the *SKI* case presents no policy reason to invalidate Mountainside's preemptive right, nor does it, when considered in isolation, mean that SKI should have been able to impose the no-contest condition on its offer to Mountainside.²¹⁸ The long duration of the ROFO, however, unquestionably contributed to a dispute that the original parties quite rationally did not anticipate in their contract. Was the court's approach truly designed "to give effect to the parties' intent" as "reflected in the contract's language," as the court insisted?²¹⁹ Would it not have been more honest for the court to decide openly, based on all of the relevant circumstances,

214. *See id.* at 1173–77. On appeal, SKI claimed alternatively that Mountainside had failed to raise the implied duty of good faith and fair dealing at the trial court level and that, even if the issue was raised, no evidence supported the trial court's finding that SKI had breached that implied duty. *See id.* at 1174. By relying on traditional rules of contract interpretation, the Vermont Supreme Court was able to avoid addressing the issue. *See id.* at 1177.

215. *See id.* at 1176.

216. *See id.* at 1175.

217. *See id.* at 1175–76.

218. *See supra* notes 165–73 and the accompanying text. Relying in part on the Restatement, the Vermont Supreme Court reversed the trial court's holding that the ROFO imposed an illegal restraint on alienation. *See SKI*, 114 A.3d at 1177–80. Despite the indefinite duration of the ROFO, SKI did not raise the RAP, and the court expressed no opinion on that question. *See id.* at 1177 n.8.

219. *See id.* at 1175 (quoting *R & G Props., Inc. v. Column Fin. Inc.*, 968 A.2d 286, 294 (Vt. 2008)).

whether to imply an agreement by SKI not to relinquish control over the sewer treatment plant for the life of the ROFO?²²⁰ This, of course, is precisely the dilemma that indefinite and incomplete contracts always present. When the parties' written agreement does not contemplate the circumstances that lead to a dispute, will justice best be served by applying relatively inflexible rules of interpretation that disfavor a full consideration of the particular context? Or should courts develop principles of interpretation that encourage a fuller development of the evidence related to the dispute?

In both *Smolian* and *SKI*, a fully contextual approach might have advanced the property owner's interpretation of the preferential rights agreement over the holder's interpretation. But context, including temporal aspects, can just as effectively support a holder's interpretation in favor of the preferential right. The final case to be considered, *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*,²²¹ illustrates this point.

Cornish College of the Arts, as the subtenant of a portion of a building, held an option to purchase the entire building under an agreement to which both the sublandlord and the fee owner were parties.²²² The option was at a \$3,000,000 purchase price during an initial term of approximately eighteen months, with a right to extend for an additional year at the same purchase price in exchange for a \$50,000 extension payment.²²³ The court allowed exercise of the option even though the college had attempted to extend the option term without complying with the clear requirements of the sublease and even though an unanticipated intervening development radically changed the economics of the deal.²²⁴

The dispute began shortly after the deadline for extending the option term passed. Not only was the college a few days late in tendering the extension fee, but its \$50,000 check appeared to be invalid on its face for lack of a required second signature.²²⁵ The sublandlord rejected the tender and returned the check. Nearly a year later, claiming that it had properly extended the option period by its prior tender, the college attempted to exercise the option and again tendered the \$50,000 extension

220. If the contracting parties had expressly agreed to such a restriction, would it have been unenforceable as an illegal restraint on alienation?

221. 242 P.3d 1 (Wash. Ct. App. 2010).

222. *See id.* at 5–6. The opinion does not fully explain the underlying ownership structure. A portion of the property not covered by the sublease was involved with a low-income housing tax credit program, and it appears that the sublandlord, as an affiliate of the fee owner, may itself have leased the property, or part of it, from the fee owner as part of a more complex arrangement related to the housing program. *See id.* at 6. Because these details are not relevant to the aspects of the case of interest in this Article, the text refers to the fee owner and the sublandlord simply as the sublandlord.

223. *See id.*

224. *See id.* at 8–13.

225. *See id.* at 7. "The check contained only one signature, despite language on the check indicating that two signatures were required for amounts greater than \$7,500." *Id.*

fee, but the sublandlord again rejected the payment.²²⁶ Four months later, the sublandlord gave notice of termination of the sublease pursuant to a clause that gave either party the right to terminate early in the event of substantial damage to the property, and the college moved out.²²⁷ The college apparently did not challenge the termination notice at that time. One of the most interesting aspects of the case is that a few months before the college attempted to exercise the option, the sublandlord obtained an appraisal estimating that the property had appreciated in value to \$7,700,000 due to a zoning change by the city of Seattle.²²⁸

The Washington Court of Appeals affirmed the trial court's decision that the college was entitled both to a grace period to extend the option and to specific performance of the option, as well as to damages for wrongful eviction.²²⁹ Instead of interpreting the clear language of the sublease rigidly under traditional principles, the court adopted a broadly contextual approach. The primary considerations were that (1) the initial tender of the extension payment was only a few days late, (2) the error was inadvertent, (3) the subtenant had made substantial investments in the property with the intention of exercising the option, and (4) the evidence failed to show substantial prejudice to the sublandlord.²³⁰ The fourth point is especially interesting in light of the unanticipated zoning change that increased the property's value.²³¹ The court reasoned that if this was prejudice to the sublandlord, it was not caused by the late tender of the extension payment.²³²

The court rejected the sublandlord's arguments that the college did not act in good faith and did not come to court with the clean hands equity requires and therefore should be strictly bound by the deadline.²³³ Indeed, several factors noted in the opinion, although not expressly cited as a basis for the holding, emitted an aroma of bad faith on the sublandlord's part. In particular, some peculiarities raised suspicions about the sublandlord's motivations for rejecting the initial tender of the extension payment and for giving the early termination notice. The evidence the sublandlord presented to support its claim of "substantial destruction" of the property was contradictory and was not based on a casualty event but rather on a dubious claim about the general deterioration of the prop-

226. *See id.*

227. *See id.* at 7.

228. *See id.*

229. *See id.* at 8–16. Because the subtenant sought specific performance of its option rights, the court was able to rely on equitable principles to grant a grace period for exercising the option. Frustrated holders often seek specific performance of a preferential rights agreement, thereby opening the door to equitable principles and making a contextual approach more feasible than in a standard breach of contract action.

230. *See id.* at 9–11.

231. *See id.* at 7.

232. *See id.* at 10.

233. *See id.* at 8–11.

erty.²³⁴ Additionally, the college introduced evidence that pre-existing title encumbrances created by the sublandlord but not disclosed to the college would have made it difficult for the sublandlord to convey clear title in accordance with the requirements of the option.²³⁵ Finally, when the sublandlord filed a bankruptcy petition after the trial court's ruling, the bankruptcy court denied a motion to reject the option agreement, opining that the sublandlord's motivation was to profit from the property's appreciation in value and holding that the bankruptcy filing "was a litigation tactic rather than a bona fide effort to reorganize."²³⁶

As noted, *Cornish College* is of interest in the first place because it shows how a court can use context to relax the formal rules governing a preferential purchase right. Much authority supports the rule that the holder must exercise an option strictly in accordance with the terms of the agreement.²³⁷ The Washington court of appeals, however, was willing to relax the formal standard in light of the full context in which the dispute arose. The case is also of interest because a question of interpretation not addressed in the litigation lay just below the surface due to the dramatic and unanticipated increase in the property's value. What about that 150% increase in market value in less than two years?

Under the framework being proposed here, the fact that the parties undoubtedly did not anticipate that the property's value would appreciate so much in such a short time could be a relevant factor. But the very nature of a contextual approach is that no single factor will be determinative when the circumstances involve so many other potentially relevant aspects. One especially critical consideration in the *Cornish College* case is that the option to purchase arose out of a lease transaction and thus should be interpreted in that context. The Restatement concurs in this view by deferring to landlord-tenant law with respect to preferential purchase rights in leases to the extent it is inconsistent with the law of servitudes.²³⁸ Even though in other contexts an option at a price that is fixed for a relatively long duration is susceptible to challenge as an unreasonable restraint on alienation, a tenant's option to purchase is ordinarily not treated as a restraint on the landlord's right of alienation at all.²³⁹

234. *See id.* at 13–14. The court did not decide whether there had been a qualifying occurrence of substantial destruction for purposes of the early termination clause because the court held that the sublandlord's notice of termination was not timely. *See id.* at 14 n.13.

235. *See id.* at 6–7, 13. The title issues arose because the portions of the property not leased to the college were committed to the low-income housing program for a period that extended until 2022. *See id.* at 6.

236. *See id.* at 14.

237. *See, e.g.,* *Casey v. Nat'l Info. Servs., Inc.*, 906 So. 2d 710, 719 (La. Ct. App. 2005); *Elderkin v. Carroll*, 941 A.2d 1127, 1136–37 (Md. 2008); *Parker v. Booker*, 822 N.Y.S.2d 156, 159–60 (App. Div. 2006); *Foye v. Parker*, 790 N.Y.S.2d 787, 788 (App. Div. 2005).

238. *See* RESTATEMENT, *supra* note 10, § 1.1(2)(a).

239. "A provision in the lease giving the tenant an option or a preemptive right to purchase the leased property is not a restraint on alienation of the land-

Even so, in the face of an unanticipated and highly favorable zoning change, an out-of-time attempt to exercise an option under which the purchase price is fixed for more than two years calls for thoughtful interpretation of the terms of the option. Nothing in the language of the sublease suggested that a change in zoning or in market conditions should affect the parties' rights. But certainly the parties never contemplated such a rapid appreciation in value. Would not a thoroughly contextual approach to interpretation support an argument against enforcing the fixed-price option under these circumstances?

Taking into account all of the circumstances, had the sublandlord made this argument, a court applying a fully contextual approach probably would have been most heavily influenced by the evidence that the subtenant had made significant capital investments in the property based on an intention to exercise the option at the specified price. The fact that the option at the fixed price could be continued for an additional year in exchange for a significant extension fee, as well as the many indications of questionable motivations on the landlord's part, would also have been relevant. Under the totality of the circumstances, the college would likely have prevailed on the interpretation question, just as it did on the strict compliance issue.²⁴⁰

The circumstances involved in the *Smolian*, *SKI*, and *Cornish College* cases illustrate that the duration of a preferential right can be relevant when a dispute involves the proper interpretation of the agreement creating the right. In such cases, temporal considerations often can assist a court in resolving disputes over interpretation in a logical and fair way, but only if the court relaxes the relatively rigid rules that traditionally govern interpretation of preferential rights agreements. This is especially so when a dispute involves an aging preemptive right, as in the *Smolian* and *SKI* cases.

IV. CONCLUSION

The model proposed in this Article for interpreting long-term preferential purchase rights does not advance a general argument for a less formalistic, more contextual approach to contract interpretation. Others have written eloquently on that broad and important topic, and this Article need not enter that debate writ large.²⁴¹ To be sure, sound reasons support adherence to formalism in interpreting contracts. In particular, the formal rules of contract interpretation serve the law's interest in resolv-

lord's interest in the leased property within the meaning of this section." See RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT, *supra* note 91, § 15.2 cmt. a. Note that a landlord that has granted the tenant an option to purchase can still sell its fee interest, the value of which should reflect the economics of the lease and option.

240. Perhaps the sublandlord bypassed this argument because it would have undermined its insistence on a strict reading of the written agreement.

241. See *supra* notes 148–50 and accompanying text.

ing disputes efficiently and discouraging reliance on evidence that is speculative or susceptible to manipulation. But the relative merits of a traditional and a more contextual approach may themselves vary with context. This is true even within the realm of real estate transactions. Purchase and sale agreements, leases, and mortgages, for example, may be relatively well-served by the conventional rules. Preferential purchase rights agreements are different.

This Article advances the modest proposition that in preferential rights cases the principles governing interpretation should recognize the significance of the context in which the dispute arises, including the temporal aspects. Several considerations show why this is so. First, while long-term preferential rights often serve the legitimate, immediate interests of the contracting parties, they also can impose significant burdens on marketability, both in the sense relevant to a technical title examination and in the more practical sense of commercial marketability. These burdens can outweigh the marginal social utility of long-term preferential rights. Although an all-or-nothing bar, such as the RAP or the rule against illegal restraints on alienation, is not justified, sound policy reasons recommend affording these disputes close judicial scrutiny. Second, the contracting parties cannot anticipate every circumstance that may arise over a long period. Only sophisticated and well-represented parties even try to negotiate and draft comprehensive terms, and many highly experienced real estate lawyers concede that the goal is frustratingly elusive. Third, the expansive role that the implied duty of good faith and fair dealing often plays in these cases has already opened the door to a more contextual notion of contract. These conditions, taken together, commend an approach that encourages the finder of fact to treat the duration of the right and the amount of time that has passed as relevant considerations in disputes over the proper interpretation of preferential rights, especially aging preemptive rights.