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## Repulsed by RAP? Renewal Options are Singing a Different Tune: An Analysis of Bleecker Street Tenants Corp. v. Bleeker Jones, LLC

Cover Page Footnote

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**REPULSED BY RAP? RENEWAL OPTIONS ARE SINGING A  
DIFFERENT TUNE:  
AN ANALYSIS OF *BLEECKER STREET TENANTS CORP. V.  
BLEEKER JONES, LLC***

*Jonathan M. Vecchi*\*

**I. INTRODUCTION**

In *Bleecker Street Tenants Corp. v. Bleeker Jones LLC*,<sup>1</sup> the New York Court of Appeals held that options to renew in a lease, regardless of duration, are not subject to New York's statutory Rule Against Perpetuities (hereinafter "RAP").<sup>2</sup> Never before had the Court of Appeals fully exempted an entire interest from the grasp of RAP.<sup>3</sup> Even so, *Bleecker Street* is the third substantial decision by New York's highest court to hinder RAP's ability to void land interests.<sup>4</sup>

An analysis of *Bleecker Street* requires an evaluation of RAP at common law, in the New York statutes, and in the New York Court of Appeal's rulings, which have previously limited the current statutory interpretation.<sup>5</sup> This Comment analyzes the court's reason-

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\* J.D. Candidate 2013, Touro College, Jacob D. Fuchsberg School of Law; B.B.A. 2010, Hofstra University. I would like to thank Professor Sepowitz for the inspiration to pursue this subject and for her guidance throughout the writing process. I also want to thank my mother and grandmother for their continued love and support throughout my life; all of my successes are due to their constant encouragement.

<sup>1</sup> 945 N.E.2d 484 (N.Y. 2011).

<sup>2</sup> *Id.* at 487.

<sup>3</sup> See *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 805 (N.Y. 1996) (stating that in limited circumstances of preemptive rights, "enforcement [of the right] would promote the purposes underlying [RAP]").

<sup>4</sup> The other two cases are *Symphony Space, Inc.*, 669 N.E.2d at 806 (holding that the appurtenant exemption to RAP applied to purchase options) and *Metro. Transp. Auth. v. Bruken Realty Corp.*, 492 N.E.2d 379, 385 (N.Y. 1986) (holding RAP does not apply to commercial and governmental preemptive rights).

<sup>5</sup> See, e.g., *Symphony Space, Inc.*, 669 N.E.2d at 806 (stating that the appurtenant exemption could save certain purchase options even if they would otherwise vest beyond the statu-

ing for exempting the entirety of lease renewal options from RAP as opposed to extending previously created doctrines. Furthermore, this Comment suggests a different reasoning that the majority could have used to quell the criticisms of the concurring and dissenting opinions. Part II discusses the history of RAP, its common law purposes, and New York's statutory adoption of the rule. Part III examines two previous New York Court of Appeals cases which limited RAP's application to contingent rights. Part IV reviews the treatment of renewal options by New York courts before the *Bleecker Street* decision. Part V examines the reasoning of the majority, concurring, and dissenting opinions of *Bleecker Street*. Part VI analyzes the *Bleecker Street* decision's consistency with other New York Court of Appeals opinions, the effects of the case on landlords and tenants, addresses the concerns of the concurring and dissenting opinions, and suggests an alternative approach the majority could have taken to reach the same conclusion while alleviating the concerns of the concurring and dissenting judges. Part VII briefly concludes. The *Bleecker Street* decision is the continuation of numerous changes to a common law rule that is respected, feared, and criticized by the legal community.<sup>6</sup>

## II. HISTORY OF NEW YORK'S RULE AGAINST PERPETUITIES

### A. The Common Law Rule Emerges

As King Henry VIII of England lavished himself with the pleasantries of the English Court, his financial problems grew along with his waistline.<sup>7</sup> To alleviate these financial woes, the King increasingly leaned on Parliament to find new and clever ways to sustain his lifestyle. For instance, in 1535, Parliament reluctantly passed

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tory perpetuities period); *Wildenstein & Co., Inc. v. Wallis*, 595 N.E.2d 828, 834 (N.Y. 1992) (holding that RAP does not apply to personal property interests in commercial transactions); *Bruken*, 492 N.E.2d at 384 (finding preemptive rights in government and commercial transactions are exempt from RAP).

<sup>6</sup> *Anderson v. 50 East 72nd St. Condo.*, 505 N.Y.S.2d 101, 106 (App. Div. 1986) (“[RAP] is frequently viewed as a regressive relic of the dim and distant past, a principle to be avoided or evaded, if at all possible.”); George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 20 (1977) (“The Rule Against Perpetuities is among the oldest, most respected, and difficult to understand rules of the common law.”).

<sup>7</sup> JESSE DUKEMINIER ET AL., *PROPERTY* 190, 267 (7th ed. 2010).

the Statute of Uses which had the outward appearance of preventing land abuse from the previously required use of feoffees, but actually was intended to provide additional taxation for the Crown.<sup>8</sup> While the passage of the act led to much resistance, the King and Parliament furthered their commitment to taxation by passing the Statute of Wills in 1540.<sup>9</sup> This act allowed landowners, for the first time, to devise their land to the people they chose at death.<sup>10</sup> Of course, it also allowed the property to escheat to the Crown if the decedent had no living relatives.<sup>11</sup>

These two acts of Parliament caused many landholders to attempt to restrict alienability of their property by ensuring that property would remain in the family for generations after their deaths.<sup>12</sup> What resulted were property interests that restricted ownership, marketability, and usage for present and future owners of property, potentially in perpetuity.<sup>13</sup> Meanwhile, the English courts fought the use of such restrictions as hindering the “free and ready transfer of property.”<sup>14</sup> Over the next few generations, the courts struck down land transfers that were found to create a perpetuity;<sup>15</sup> but, judges constantly struggled to determine a bright line rule on what constituted a perpetuity.<sup>16</sup> In 1681, a compromise was reached between landholders and the courts in *The Duke of Norfolk’s Case*,<sup>17</sup> which created the rule against perpetuities.<sup>18</sup> This rule was meant to promote the development and use of land while still allowing property owners to retain some control for limited subsequent generations.<sup>19</sup> At its founding, RAP was “a flexible balancing principle.”<sup>20</sup>

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<sup>8</sup> *Id.* at 267-68.

<sup>9</sup> See *Anderson*, 505 N.Y.S.2d at 106 (stating that RAP “was a necessary response” to the Statute of Wills).

<sup>10</sup> JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 9 (8th ed. 2009).

<sup>11</sup> *State by Furman v. Jefferson Lake Sulphur Co.*, 178 A.2d 329, 336 (N.J. 1962) (stating the revenue from escheat was well recognized in the statutes of wills).

<sup>12</sup> *Haskins*, *supra* note 6, at 29.

<sup>13</sup> *Anderson*, 505 N.Y.S.2d at 106.

<sup>14</sup> *Bruken*, 492 N.E.2d at 381.

<sup>15</sup> See *Haskins*, *supra* note 6, at 35 (“[T]he judges of the king’s courts had been fighting against perpetuities long before the first enunciation of [RAP].”).

<sup>16</sup> See *id.* at 43.

<sup>17</sup> (1681) 22 Eng. Rep. 931 (Ch); 3 Chan. Cas. 1.

<sup>18</sup> *Anderson*, 505 N.Y.S.2d at 106.

<sup>19</sup> *Wildenstein & Co.*, 595 N.E.2d at 832-33.

<sup>20</sup> *Id.* at 833; *Haskins*, *supra* note 6, at 43 (stating a perpetuity under *The Duke of Norfolk’s Case* was an interest that “would not last too long, and the test of ‘too long’ became

### B. Early Developments of the New York Rule

As the common law rule developed, RAP became a much more rigid formula and the validity of a property transfer was determined exclusively by a specific time limitation. Chancellor Kent, the highest judge in New York at the time, stated the common law development best:

The courts of justice have . . . wisely and steadily determined that they would not permit [contingent interests] to tie up property beyond a moderate and reasonable period. They have determined that *the contingency of an [interest] must happen within a life, or lives in being, and twenty-one years afterwards*. This is the utmost length to which property can be so tied up . . . and if it attempts to go beyond that limit, it is void.<sup>21</sup>

The possibility that the estate may vest beyond the perpetuities period voids the interest from its inception; “it is immaterial how the fact actually turns out.”<sup>22</sup> New York pursued this common law rule, as developed by the courts following *The Duke of Norfolk’s Case*, until the New York legislature altered the rule by statute.<sup>23</sup>

In 1830, the New York legislature passed a statute that substantially altered common law RAP as it applied within the state.<sup>24</sup> The statute limited the drafter’s control to two lives in being.<sup>25</sup> Additionally, in regard to real property, a period of minority was utilized to extend the statutory perpetuity limit if the holder of the remainder

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whatever was inconveniently long”).

<sup>21</sup> *Anderson v. Jackson*, 16 Johns. Ch. 382, 399 (N.Y. Sup. Ct. 1819) (emphasis added). Years later, Professor John Chipman Gray simplified the common law articulation of RAP as “[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.” John Chipman Gray, *The Rule Against Perpetuities* at 166 (2d ed. 1906).

<sup>22</sup> *Anderson*, 16 Johns. Ch. at 403.

<sup>23</sup> See *Symphony Space, Inc.*, 669 N.E.2d at 803 (stating that New York created its first statutory RAP law in 1830).

<sup>24</sup> *Purdy v. Hayt*, 92 N.Y. 446, 450-51 (1883) (“[S]uccessive estates for life shall not be limited unless to persons in being at creation thereof; and where a remainder shall be limited on more than two successive estates for life all the life estates subsequent to those of the two persons first entitled thereto shall be void.”) (quoting 1 R.S. 723, § 17).

<sup>25</sup> *Symphony Space, Inc.*, 669 N.E.2d at 803; *In re Wilcox*, 87 N.E. 497, 499 (N.Y. 1909).

interest was a minor.<sup>26</sup> The legislative intent for such a unique change was “to enact some further limitation on the power to create future estates.”<sup>27</sup> Interestingly, unlike the common law rule, the statutory rule limited the number of future interests that could be created, and invalidated any subsequent interests regardless of whether the interest holder was alive at the transfer or how long the interest lasted.<sup>28</sup> Furthermore, RAP did not apply to all interests, but it did exclude *all* options.<sup>29</sup> The statute was considered so unnecessarily complex and different from the common law rule that courts found little logical connection between the two.<sup>30</sup> Due to the statute’s very narrow scope, New York courts conceded that many transfers that would have fallen under the common law rule were now free to be created by grantors without repercussion.<sup>31</sup>

### C. The Current New York Law

After much criticism and confusion over the wording and meaning of the statute, the New York legislature enacted a series of revisions between 1958 and 1965.<sup>32</sup> What resulted was a codified resurrection of common law RAP in New York which continues in force today.<sup>33</sup> The statute reads:

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<sup>26</sup> *Greenland v. Waddell*, 22 N.E. 367, 370 (N.Y. 1889) (finding a trust void for failure to meet the two lives in being condition of RAP). *See also* *Symphony Space, Inc.*, 669 N.E.2d at 803; *In re Wilcox*, 87 N.E. at 499 (stating that the statute discontinued the twenty-one year period and replaced it with a minority period for real estate perpetuity determinations).

<sup>27</sup> *In re Wilcox*, 87 N.E. at 500.

<sup>28</sup> *Purdy*, 92 N.Y. at 451 (“[A] remainder shall be limited on more than two successive estates for life[;] all the life estates subsequent to those of the two persons first entitled thereto shall be void . . . .” (quoting 1 R. S. 723, § 17) (internal quotation marks omitted)).

<sup>29</sup> *See, e.g.*, *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d 457, 463 (App. Div. 1982), *aff’d*, *Buffalo Seminary v. McCarthy*, 447 N.E.2d 76 (N.Y. 1983); *Bruken*, 492 N.E.2d at 382 (noting that RAP would not apply to the provision at issue before 1965, regardless of whether that provision was an option or a preemptive right); *Bleecker St. Tenants Corp.*, 945 N.E.2d at 281 (Read, J., concurring).

<sup>30</sup> *See In re Wilcox*, 87 N.Y. at 500 (questioning the reasoning of various sections in the statute, claiming “they added nothing” to the aforementioned sections, and jesting that perhaps “the revisers were under delusion as to their necessity”); *Purdy*, 92 N.Y. at 451 (stating that the statute has “no necessary connection with the law of perpetuities”).

<sup>31</sup> *Buffalo Seminary*, 451 N.Y.S.2d at 461 (stating that options to purchase were not covered under the 1830 statute); *Bruken*, 492 N.E.2d at 382 (reasoning that options to purchase and preemptive rights were both valid under the 1830 statute).

<sup>32</sup> *Symphony Space, Inc.*, 669 N.E.2d at 803.

<sup>33</sup> *Id.*; *Bruken*, 492 N.E.2d at 382. There are some modifications. For example, a presumption that only men over fourteen and women between the ages of twelve and fifty-five

No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.<sup>34</sup>

The statutory change in revoking the requirements of two lives in being and the period of minority shows that the legislature specifically intended to incorporate the American common law rules governing perpetuities into the New York statute.<sup>35</sup> New York's purpose in codifying the common law rule was the same as that in *The Duke of Norfolk's Case* nearly 300 years prior: to promote land development and provide greater alienation of property.<sup>36</sup> Since its inception, the statutory rule has been continually proclaimed "inflexible, measured solely by the passage of time."<sup>37</sup> No longer is the rule a balancing test as originally conceptualized at English common law.<sup>38</sup> In accordance with this rigidity, RAP cannot be waived by agreement of the parties, and if a violation occurs, a court will invalidate the entire provision.<sup>39</sup>

If an interest extends beyond the perpetuities period it is not necessarily void under New York's RAP law. New York's Estate Powers & Trusts Law (EPTL) § 9-1.3, commonly referred to as "the 'saving statute,'" <sup>40</sup> presumes that "the creator intended the estate to be valid."<sup>41</sup> The statute further provides that if the vesting of an in-

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can produce children. N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e)(1) (McKinney 2012).

<sup>34</sup> N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(b) (McKinney 2012).

<sup>35</sup> *Buffalo Seminary*, 451 N.Y.S.2d at 462 (reviewing the legislative history).

<sup>36</sup> *Kaiser-Haidri v. Battery Place Green, LLC*, 925 N.Y.S.2d 557, 560 (App. Div. 2011) (quoting *Symphony Space, Inc.*, 669 N.E.2d at 475).

<sup>37</sup> *Inwood Park Apartments, Inc. v. Coinmach Indus. Co.*, 783 N.Y.S.2d 453, 457 (Sup. Ct. 2004); see also *Symphony Space, Inc.*, 669 N.E.2d at 803 (claiming New York's statutory RAP law is "a rigid formula" unlike the common law rule which "evaluate[d] the reasonableness of the restraint based on its duration [and] purpose").

<sup>38</sup> See *Wildenstein & Co.*, 595 N.E.2d at 649 (stating that RAP originated as an *ad hoc* balancing principle which over time "acquired rigid encrustations" as a reaction to modern transactions).

<sup>39</sup> *Bruken*, 492 N.E.2d at 381.

<sup>40</sup> See, e.g., *Symphony Space, Inc.*, 669 N.E.2d at 806; *TDNI Props., LLC v. Saratoga Glen Builders, LLC*, 914 N.Y.S.2d 746, 748 (App. Div. 2011).

<sup>41</sup> N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(b) (McKinney 2012).

terest is dependent upon “any specified contingency, it shall be presumed that the creator of [the interest] intended such contingency to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate.”<sup>42</sup> The policy of such a rule is to protect interests that violate RAP on their face, but that typically take a short time to vest.<sup>43</sup> However, the saving statute does not allow for an “extensive rewriting of [an] option agreement . . . to make it conform to the permissible period”;<sup>44</sup> nor can it be used to insert a time limitation when no time restrictions appear.<sup>45</sup>

### III. PAST RAP EXEMPTIONS BY THE NEW YORK COURT OF APPEALS

Following the enactment of the current statute, the New York courts have been called upon, on numerous occasions, to interpret its meaning.<sup>46</sup> In particular, the reasoning behind two previous Court of Appeals cases, *Metropolitan Transportation Authority v. Bruken Realty Corp.*<sup>47</sup> and *Symphony Space, Inc. v. Pergola Props., Inc.*,<sup>48</sup> help illuminate its determination in *Bleecker Street*.

#### A. *Metropolitan Transportation Authority v. Bruken Realty Corp.*

In 1986, the Court of Appeals sought to determine RAP’s applicability to preemptive rights (also referred to as rights of first re-

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<sup>42</sup> N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 2012).

<sup>43</sup> *Rozina v. Casa 74th Dev. LLC*, 907 N.Y.S.2d 603, 607 (Sup. Ct. 2010) (finding that an option to purchase a condominium unit was valid because it was to take place on a to-be-determined closing date and closings are “expected to occur within a relatively short period of time after the date of execution of the Option Agreement”). *But see Symphony Space, Inc.*, 669 N.E.2d at 807-08 (holding that the parties’ expectation that the purchase option would be exercised within the statutory period does not validate an option that expressly allows the holder to exercise the option three years beyond the perpetuities period).

<sup>44</sup> *Symphony Space, Inc.*, 669 N.E.2d at 807; *TDNI Props.*, 914 N.Y.S.2d at 748.

<sup>45</sup> *TDNI Props.*, 914 N.Y.S.2d at 748-49 (reasoning that the lack of any time limitation, paired with the express terms letting the option pass to the holders’ heirs and assignees, shows an intent to allow the option to last in perpetuity).

<sup>46</sup> *See, e.g., Bleecker St. Tenants Corp.*, 945 N.E.2d 484; *Symphony Space*, 669 N.E.2d 799; *Wildenstein & Co.*, 595 N.E.2d 828; *Bruken*, 492 N.E.2d 379. A simple Westlaw search yields approximately 150 New York cases discussing RAP since the enactment of the 1965 amended statute.

<sup>47</sup> 492 N.E.2d 379 (N.Y. 1986).

<sup>48</sup> 669 N.E.2d 799 (N.Y. 1996).

fusal).<sup>49</sup> In this case, the MTA and Bruken's predecessor entered into an "option agreement"<sup>50</sup> giving the predecessor a ninety-nine year right to purchase property, at market value, if and when the MTA decided it was unnecessary for its operations.<sup>51</sup> After Bruken was assigned the right, the MTA concluded it no longer required the property and Bruken sought to exercise its right.<sup>52</sup> The MTA brought a declaratory judgment action to determine if the right was void under RAP.<sup>53</sup>

The court held that preemptive rights within government and commercial transactions should be exempt from the statutory RAP law for public policy concerns.<sup>54</sup> In its ruling, the court first noted the policy reasons under common law RAP were to "ensure the productive use and development of property by its current beneficial owners by simplifying ownership, facilitating exchange and freeing property from unknown or embarrassing impediments to alienability."<sup>55</sup> The court thereafter noted that EPTL § 9-1.1 was an "inflexible" rule, "measured solely by the passage of time."<sup>56</sup> Yet while commenting on this inflexibility, the court found that the utility of the rule was offset by "modern legal transactions," which allow for an exemption of preemptive rights from the rule.<sup>57</sup> The court reasoned that enforcement of the right actually promoted the underlying policy reasons *for* RAP by encouraging the holder of the right to develop the property and ensure his ability to recoup his investment.<sup>58</sup> The court found this to be particularly true in government and business transactions, reasoning that neither "lives in being" nor "twenty one years"

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<sup>49</sup> *Bruken*, 492 N.E.2d 379.

<sup>50</sup> Though the parties called their agreement an "option agreement," the court determined that what Bruken's predecessor purchased, and what Bruken was assigned, was in fact a preemptive right. *Bruken*, 492 N.E.2d at 382. The difference between an option and a preemptive right is that an option holder can force the property owner into honoring his option right, whereas a preemptive right only requires the owner to give the holder a right of first refusal when a predetermined condition is satisfied. *See, e.g., id.* (distinguishing between options and preemptive rights).

<sup>51</sup> *Id.* at 380.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 381.

<sup>54</sup> *Bruken*, 492 N.E.2d at 385.

<sup>55</sup> *Id.* at 381 (citing *De Peyster v. Michael*, 6 N.Y. 467, 494 (1852)).

<sup>56</sup> *Bruken*, 492 N.E.2d at 381.

<sup>57</sup> *Id.* at 383.

<sup>58</sup> *Id.* at 383-84.

are relevant in such transactions.<sup>59</sup> Subsequently, the court extended the scope of this ruling by exempting preemptive rights regarding *personal property* in commercial transactions from RAP.<sup>60</sup>

**B. *Symphony Space, Inc. v. Pergola Properties, Inc.***

Ten years later, the court was confronted with whether New York's statutory RAP law should apply to commercial options to purchase.<sup>61</sup> In this case, the parties devised a complex arrangement to provide mutually beneficial tax exemptions in which Symphony Space purchased property and leased it back to the original owner, Broadwest Realty Corp.<sup>62</sup> As part of this transaction, the original owner was granted an option to repurchase the property up to twenty-four years after the sale.<sup>63</sup> Furthermore, the option to purchase was written as a separate agreement and stated that the right to exercise the option was unconditional and not dependent on any other obligations between the parties other than rent past-due at the time of closing.<sup>64</sup> The original owner transferred its right to purchase to Pergola Properties, Inc. ("Pergola").<sup>65</sup> When Pergola attempted to exercise its option, Symphony Space brought suit seeking a declaratory judgment that the option violated RAP and was therefore void.<sup>66</sup>

The Court of Appeals quoted *Bruken* on the importance of RAP and the policy reasons for its enforcement.<sup>67</sup> The court reasoned that because an option to purchase can allow the holder to purchase the property at any time, and even perhaps at a preset price

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<sup>59</sup> *Id.* at 384. The court did not discuss RAP as it applies to options.

<sup>60</sup> *Wildenstein & Co.*, 595 N.E.2d at 833-34 (holding that an agreement regarding artwork between an art dealer and art collector constituted a "significant commercial interest" which did not hinder the public policy rights of RAP because it "facilitate[d] broader marketing of world-renowned art treasures while posing . . . only a minimal limitation on the alienability of the works"). In *Morrison v. Piper*, the court declined to extend the exemption to preemptive rights in residential transactions. 556 N.E.2d 643, 646 (N.Y. 1990).

<sup>61</sup> *Symphony Space, Inc.*, 669 N.E.2d at 800.

<sup>62</sup> *Id.* at 800-01. This sale and lease-back transaction would allow Symphony Space to receive a sizable tax exemption allowing it to use the property at minimal cost; meanwhile, Broadwest would see a reduction in real estate taxes while retaining a substantial rental income. *Id.*

<sup>63</sup> *Id.* at 801.

<sup>64</sup> *Id.* at 801-02.

<sup>65</sup> *Symphony Space, Inc.*, 669 N.E.2d at 802.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 803 (stating RAP seeks freedom of alienability and simplification of ownership).

lower than market value, it “creates a disincentive for the landowner to develop the property and hinders its alienability.”<sup>68</sup> Such an effect defeats the common law policy of RAP, which EPTL § 9-1.1 is intended to replicate.<sup>69</sup> The court further made a distinction between its ruling in *Bruken*, exempting preemptive rights in commercial and government contracts from RAP, and its current holding that options to purchase are not exempt.<sup>70</sup> However, the court failed to articulate precisely whether its holding was to apply to all options generally or only to options to purchase.<sup>71</sup>

The court articulated the possibility that an option to purchase may be valid even though its interest may vest beyond the statutory RAP period.<sup>72</sup> The court stated that if an option originated in the lease, cannot be exercised after the lease expires, and cannot be separated from the lease, it will be exempt from RAP as an “appendant” or “appurtenant” option (appurtenant option).<sup>73</sup> The common law public policy reasons for RAP, again, were the motives for exemption of particular interests from New York’s statutory RAP law.<sup>74</sup> The court found that appurtenant options encourage the holder to “invest in maintaining and developing the property by guaranteeing the option holder the ultimate benefit of any such investment,” much like the reasoning for exempting preemptive options in *Bruken*.<sup>75</sup>

Lastly, the court discussed whether the option could be saved under the saving statute by shortening the exercise period.<sup>76</sup> Howev-

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<sup>68</sup> *Id.* at 804, 805. *But see* Robert E. Parella, *Real Property*, 47 SYRACUSE L. REV. 681, 701-02 (1997) (claiming that a court should balance the disincentives purchase options create in improving the property for landlords and the incentives for improvement they provide the option holder as an alternative to the appurtenant exemption test).

<sup>69</sup> *Symphony Space, Inc.*, 669 N.E.2d at 804-05.

<sup>70</sup> *Id.* at 805 (“[U]nlike options, preemptive rights . . . in the context of the governmental and commercial transaction[s] . . . actually encourage[] the use and development of the land, outweighing any minor impediment to alienability.”).

<sup>71</sup> *Id.* at 804 (stating that “[u]nder the common law, *options to purchase* land are subject to the rule” and further that “[i]t is now settled in New York that, generally, EPTL 9-1.1[] applies to *options*.”) (emphasis added).

<sup>72</sup> *Id.* at 806.

<sup>73</sup> *Id.*; *Bruken*, 492 N.E.2d at 383.

<sup>74</sup> *Symphony Space, Inc.*, 669 N.E.2d at 806.

<sup>75</sup> *Id.* (stating that the option was not appurtenant because it was separate from the lease agreement, the right to exercise was exempt from any other lease obligation, and the option could be exercised beyond the lease term). *But see* Parella, *supra*, note 68, at 702 (claiming the appurtenant exemption requirements are “highly formalistic” burdens).

<sup>76</sup> *Symphony Space, Inc.*, 669 N.E.2d at 806-07.

er, use of the saving statute requires that a “contrary intention” does not appear in the agreement.<sup>77</sup> The court held that an option that explicitly provides for a definite exercise period over twenty-one years cannot be revised under the savings statute.<sup>78</sup>

#### IV. OPTIONS TO RENEW RULINGS LEADING UP TO *BLEECKER STREET*

Clearly, options to purchase were found to be subject to RAP under the *Symphony Space* ruling.<sup>79</sup> However, the court was ambiguous as to whether its reasoning applied to options to renew.<sup>80</sup> Therefore, after *Symphony Space*, many New York courts took different approaches to whether an option to renew is subject to and/or valid under RAP.<sup>81</sup>

Many lower courts determined that options to renew should be accorded the same legal analysis as options to purchase; therefore, RAP and the appurtenant exception applied to options to renew.<sup>82</sup> For example, in *Deer Cross Shopping LLC v. Stop & Shop Supermarket Co.*,<sup>83</sup> the parties entered into a twenty-five year lease agree-

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<sup>77</sup> N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(a) (McKinney 2012).

<sup>78</sup> *Symphony Space, Inc.*, 669 N.E.2d at 807 (holding that the unambiguous exercise period of twenty-four years cannot be “saved” under the saving statute).

<sup>79</sup> See, e.g., *Harrington v. Gage*, 843 N.Y.S.2d 745, 746 (App. Div. 2007) (holding option to purchase property in a lease to harvest hay was void under RAP and was not saved by the appurtenant exception because the option was separable from the lease) (citing *Symphony Space*, 669 N.E.2d at 806).

<sup>80</sup> *Inwood Park Apartments, Inc.*, 783 N.Y.S.2d at 458 (“[T]he Court has held that all options in real estate are subject to the rule against perpetuities.”) (quoting *Symphony Space, Inc.*, 669 N.E.2d at 477-78) (emphasis added); see *Symphony Space, Inc.*, 669 N.E.2d at 804 (“Under the common law, options to purchase land are subject to [RAP] . . . .”); contra *Symphony Space, Inc.*, 669 N.E.2d at 804 (“It is now settled in New York that, generally [RAP] applies to options.”).

<sup>81</sup> See, e.g., *Soldiers’, Sailors’, Marines’, & Airmen’s Club, Inc. v. Carlton Regency Corp.*, 911 N.Y.S.2d 774, 778-79, 781 (Sup. Ct. 2010), *aff’d*, *Soldiers’, Sailors’, Marines’ & Airmen’s Club, Inc. v. Carlton Regency Corp.*, 945 N.Y.S.2d 40 (App. Div. 2012) (looking at the Restatement (First) of Property in holding a renewal option valid); *Deer Cross Shopping LLC v. Stop & Shop Supermarket Co.*, 773 N.Y.S.2d 211, 213 (Sup. Ct. 2003) (renewal options are subject to RAP, but can be saved by the appurtenant exemption).

<sup>82</sup> See, e.g., *Double C Realty Corp. v. Craps, LLC*, 870 N.Y.S.2d 333, 334 (Sup. Ct. 2009) (option to renew lease met the requirements for the appurtenant exception and was thus not void under RAP); *Soldiers’, Sailors’, Marines’, & Airmen’s Club, Inc. v. Carlton Regency Corp.*, 911 N.Y.S.2d at 780 (citing cases where the appurtenant exception was applied).

<sup>83</sup> 773 N.Y.S.2d 211 (Sup. Ct. 2003).

ment with three ten-year options to renew.<sup>84</sup> The lease provided that the tenant give notice of its intent to use its renewal option at least eleven months before it would take effect.<sup>85</sup> Failure to confer such notice required the landlord to furnish the tenant notice of the tenant's option and allowed a sixty-day extension for the tenant to renew.<sup>86</sup> If the landlord failed to notify within sixty days, the lease term was extended to sixty days after tenant received the reminder notice of its renewal options.<sup>87</sup>

In determining whether the options to renew were void under RAP, the court took note of the appurtenant exemption as articulated in *Symphony Space*, stating that, "options that originate in one of the lease provisions, are not exercisable after the lease expires and are incapable of separation from the lease, are valid even though the option holder's interest might vest beyond the perpetuities period."<sup>88</sup> Judge Cahn held that the renewal option at issue was appurtenant to the lease under this definition because he interpreted the sixty-day extension to exercise the renewal option as also extending the original lease term; therefore, the option was not "exercisable after the lease expire[d]."<sup>89</sup>

Other courts have devised more individualistic ways of determining the RAP analysis for options to renew. In *224 Seventh Street Associates, LLC v. AMP Management, Inc.*,<sup>90</sup> the renewal option was for "an additional period of five (5) years from expiration of the lease term . . . ."<sup>91</sup> The landlord argued that the option was void under RAP because the holder could renew at any time, even after the expiration of the lease term.<sup>92</sup> Judge Fairgrieve held the option valid by choosing an interpretation of the agreement that would render RAP inapplicable and by looking at what the landlord and tenant in-

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<sup>84</sup> *Id.* at 212.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* The opinion provides a discrepancy regarding the notice requirements in the lease; however, the terms described are the most logical and the ones most often used by the court in its description of the terms.

<sup>88</sup> *Deer Cross Shopping LLC*, 773 N.Y.S.2d at 213 (citing *Symphony Space, Inc.*, 669 N.E.2d at 806).

<sup>89</sup> *Deer Cross Shopping LLC*, 773 N.Y.S.2d at 213-14.

<sup>90</sup> No. SP006535/09, 2010 WL 1463036 (N.Y. Sup. Ct. Apr. 13, 2010).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

tended under the agreement.<sup>93</sup> The judge stated that, “[i]t is implied that the renewal must take effect before [the lease expires].”<sup>94</sup> Furthermore, the judge held that the tenant may exercise his right to renew simply by maintaining possession after the lease expires.<sup>95</sup>

In *Soldiers’, Sailors’, Marines’, & Airmen’s Club, Inc. v. Carlton Regency Corp.*,<sup>96</sup> Judge Ramos relied on the Restatement (First) of Property<sup>97</sup> in determining whether two, twenty-five year options to renew were valid.<sup>98</sup> The judge held that even though the option seemed to be a perpetuity at first glance, under the Restatement, the landlord’s argument that the options must be exercised immediately upon the expiration of the initial lease period “renders [RAP] inapplicable.”<sup>99</sup> Furthermore, the judge acknowledged an interesting argument by the tenant, who suggested that the provision should violate RAP because it placed an “unreasonable restraint on alienation” by requiring the tenant to perform repairs during the lease term.<sup>100</sup> The tenant claimed that creating such conditions prevents free alienation of the property.<sup>101</sup> This policy argument is commendable considering the public policy reasoning made by the Court of Appeals when exempting certain preemptive rights in *Bruken* and creating the appurtenant exemption for options. However, the court ultimately rejected this argument stating that New York statutory RAP is measured “exclusively by the passage of time,” thereby making public

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<sup>93</sup> *Id.* The judge did not provide this analysis under the saving statute; nor was there any mention of *Symphony Space, Inc.*

<sup>94</sup> *Id.* (claiming that the parties could not have agreed to exercise the option after the lease expired).

<sup>95</sup> 224 *Seventh St. Assocs. LLC*, 2010 WL 1463036 (quoting *Brooks v. Elabed*, 801 N.Y.S.2d 230 (App. Term 2005)).

<sup>96</sup> 911 N.Y.S.2d 774 (Sup. Ct. 2010).

<sup>97</sup> *Id.* at 778-79. Restatement (First) of Property § 395 states in pertinent part:

When a lease limits in favor of the lessee an option exercisable at a time not more remote than the end of the lessee’s term . . . to obtain . . . an extension of his former lease, then such option is effective, in accordance with the terms of the limitation, even when it may continue for longer than the maximum period.

*Id.* (quoting RESTATEMENT (FIRST) OF PROP: OPTION LIMITED IN FAVOR OF A LESSEE § 395 (2012)).

<sup>98</sup> *Soldiers’, Sailors’*, 911 N.Y.S.2d at 778-79.

<sup>99</sup> *Id.* at 779, 781.

<sup>100</sup> *Id.* at 781.

<sup>101</sup> *Id.*

policy arguments irrelevant.<sup>102</sup>

**V. BLEECKER STREET TENANTS CORP. v. BLEEKER JONES LLC**

**A. The Lease, Background of the Case, and the Parties' Arguments**

On September 1, 1983, the parties entered into a commercial lease in which Bleecker Street Tenants Corp. (“Landlord”) was the landlord and Bleeker Jones LLC (“Tenant”) was the tenant.<sup>103</sup> The lease provided for a fourteen-year initial term with nine consecutive renewal options.<sup>104</sup> Under the lease, an option to renew would be executed when Tenant gave at least six months notice to Landlord of its intent to renew before the previous term expired.<sup>105</sup> Additionally, the options clause provided a “savings provision,” which was at the heart of the case.<sup>106</sup> The provision states in pertinent part:

Notwithstanding the foregoing, in the event [Tenant] has not heretofore timely exercised any renewal option . . . *each such renewal option shall continue to remain in effect and [Tenant] may exercise such renewal option within sixty (60) days after [Landlord] notified [Tenant] in writing of its right to exercise each such option, notwithstanding the fact that the term of said lease may have expired. If the term shall have expired, [Tenant] shall remain in possession as a month-to-month tenant until [Landlord] shall [sic] have complied with the foregoing.*<sup>107</sup>

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<sup>102</sup> *Id.* The court however does state that the argument would have held weight under common law RAP because “the common-law rule evaluate[d] the reasonableness of the [condition].” *Soldiers’, Sailors’*, 911 N.Y.S.2d at 781 (quoting *Symphony Space, Inc.*, 669 N.E.2d at 476).

<sup>103</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 484.

<sup>104</sup> *Id.* at 484-85; Brief for Plaintiff-Respondent at \*8 *Bleecker St. Tenants Corp. v. Bleeker Jones LLC*, 945 N.E.2d 484 (N.Y. 2011) (No. 2011-0012).

<sup>105</sup> Brief for Defendants-Appellants at \*6, *Bleecker St. Tenants Corp. v. Bleeker Jones LLC*, 945 N.E.2d 484 (N.Y. 2011) (No. 2011-0012).

<sup>106</sup> Brief for Plaintiff-Respondent, *supra* note 104, at \*8.

<sup>107</sup> *Bleecker St. Tenants Corp. v. Bleeker Jones LLC*, No. 600053-2008, 2008 WL 4411822 (N.Y. Sup. Ct. Aug. 4, 2008), *rev’d*, *Bleecker St. Tenants Corp., v. Bleeker Jones LLC*, 882 N.Y.S.2d 42 (App. Div. 2009), *rev’d*, 945 N.E.2d 484 (N.Y. 2011). The Supreme

Simply put, if Tenant failed to provide its sixty-day notice, Tenant was entitled to remain in possession as a month-to-month tenant without the expiration of any renewal option.<sup>108</sup> Landlord then had the right to provide sixty days notice of Tenant's ability to renew, within which time Tenant must renew or the option expired.<sup>109</sup>

The original lease term expired on August 31, 1997, without Tenant's exercising its right to renew; thus, Tenant remained as a month-to-month tenant after that date.<sup>110</sup> Ten years later, Landlord brought the action under discussion, claiming the renewal options under the lease violated RAP and were thus void.<sup>111</sup> Landlord claimed that *Symphony Space* held that RAP applied to all options.<sup>112</sup> Landlord also argued that the renewal options are not appurtenant to the lease, claiming that the month-to-month tenancy, which took effect when tenant failed to exercise its renewal, was a "holdover provision" and *not* an extension of the lease.<sup>113</sup> Therefore, Landlord claimed that the options to renew could be exercised after the lease expired and they could not be saved under the appurtenant exemption; nor could the option be saved under EPTL § 9.1-3 because the options contained no durational limitations, showing the parties' intent that the options last indefinitely, and EPTL § 9.1-3 cannot alter an unequivocal interpretation of the lease.<sup>114</sup>

Tenant argued that renewal options should be exempt from RAP because such options promote the public policy behind the rule.<sup>115</sup> Tenant contended that both Landlord and Tenant benefit from the renewal options, to which Tenant provided assurances that it

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Court refers to the defendant as "Bleeker Jones LLC," whereas the Appellate Division and the Court of Appeals spell the defendant's name as Bleeker Jones LLC. In its briefs, the defendant spells its name in accordance with the latter. Brief for Defendants-Appellants, *supra* note 105, at \*1.

<sup>108</sup> *Bleeker St. Tenants Corp.*, 945 N.E.2d at 485.

<sup>109</sup> *Id.*

<sup>110</sup> Brief for Plaintiff-Respondent, *supra* note 104, at \*9.

<sup>111</sup> *Bleeker St. Tenants Corp.*, 2008 WL 4411822; Brief for Defendants-Appellants, *supra* note 105, at \*8 (suggesting the Landlord brought this action due to a change in the tax law, which allowed Landlord to generate a higher rental income without subjecting itself to an increased tax rate).

<sup>112</sup> Brief for Plaintiff-Respondent, *supra* note 104, at \*16.

<sup>113</sup> Brief for Plaintiff-Respondent, *supra* note 104, at \*29-30. A holdover tenancy results at the expiration of a lease by operation of law and each month is considered a separate contract for a new lease term. *Bleeker St. Tenants Corp.*, 882 N.Y.S.2d at 46.

<sup>114</sup> Brief for Plaintiff-Respondent, *supra* note 104, at \*36.

<sup>115</sup> Brief for Defendants-Appellants, *supra* note 105, at \*15.

could recoup its investment in property and therefore encourage its development of the premises.<sup>116</sup> Meanwhile, Landlord's property became more attractive to potential buyers, as the property came with a long-term tenant, making the land more alienable.<sup>117</sup> Tenant alternatively argued, if renewal options are subject to the rule, the options in the current lease are appurtenant, and therefore exempt from RAP.<sup>118</sup> Lastly, Tenant argued that any ambiguity in the language of the lease must be determined in favor of the option's validity, as EPTL § 9-1.3 requires a presumption that the creator of the lease intended it to be valid.<sup>119</sup>

### B. New York Supreme Court Decision

After both parties sought summary judgment, the Supreme Court held that the options to renew in the lease were not barred by RAP.<sup>120</sup> Although the court noted that *Symphony Space* involved an option to purchase, it also recognized that *Deer Cross* held a renewal option was subject to the appurtenant exemption.<sup>121</sup> The Supreme Court held that the renewal option at issue did not violate RAP because it qualified as appurtenant to the lease as the option originated in the lease, could only be exercised while the lease was in effect, and could not be separated from the lease.<sup>122</sup> In so holding, the court rejected Landlord's claim that the lease expired when Tenant failed to give notice of its renewal, but rather held that the month-to-month occupancy was a continuation of the lease.<sup>123</sup> By holding the renewal options valid under the appurtenant exemption, the Supreme Court adopted the majority view regarding the applicability of New York's RAP law on such options: that the exemption was meant to include renewal options.<sup>124</sup>

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<sup>116</sup> Brief for Defendants-Appellants, *supra* note 105, at \*15.

<sup>117</sup> Brief for Defendants-Appellants, *supra* note 105, at \*15, 19 (arguing that renewal options are less restrictive than preemptive rights).

<sup>118</sup> Brief for Defendants-Appellants, *supra* note 105, at \*20, 28 (arguing that the month-to-month tenancy was not a holdover because Tenant was still subject to the lease terms throughout that time period).

<sup>119</sup> Brief for Defendants-Appellants, *supra* note 105, at \*28.

<sup>120</sup> *Bleecker St. Tenants Corp.*, 2008 WL 4411822.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* (considering the option to be analogous to the option in *Deer Cross Shopping LLC*).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* The court failed to address the possibility of exempting renewal options from RAP

### C. Appellate Court Determination

The Appellate Division also pondered the appurtenant exemption in determining the validity of the renewal options under RAP.<sup>125</sup> The court focused on the phrase “[i]f the term shall have expired” Tenant will become a month-to-month tenant until Landlord provides sixty days notice of the renewal.<sup>126</sup> The court considered this phrase to be the unequivocal intention by the parties to allow Tenant to utilize its options after the expiration of the lease.<sup>127</sup> The court reasoned that the month-to-month tenancy stipulated in the lease was a reiteration of New York’s default rule upon the expiration of a lease and was not an extension of the lease itself.<sup>128</sup> As a result of this reasoning, the Appellate Division found that the renewal options were not appurtenant to the lease because they could be exercised after the lease expired.<sup>129</sup>

Furthermore, the court held the saving statute could not save the options because the only interpretation to be made is one that violates RAP, and the court cannot rewrite the provision to allow it to properly vest.<sup>130</sup> Lastly, the court stated that the renewal options in the case “call[] to mind the very object of [RAP], ‘to defeat an intent of a . . . grantor to create unreasonably long restrictions upon the use or marketability of . . . property.’ ”<sup>131</sup> Therefore, the Appellate Division reversed the decision of the Supreme Court.<sup>132</sup>

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for public policy purposes, but did discuss how strict the rule was on contingent interests. *Bleecker St. Tenants Corp.*, 2008 WL 4411822.

<sup>125</sup> *Bleecker St. Tenants Corp. v. Bleeker Jones LLC*, 882 N.Y.S.2d 42, 43 (App. Div. 2009), *rev’d*, *Bleecker St. Tenants Corp. v. Bleeker Jones LLC*, 945 N.E.2d 484 (N.Y. 2011).

<sup>126</sup> *Bleecker St. Tenants Corp.*, 882 N.Y.S.2d at 45-46 (internal quotation marks omitted).

<sup>127</sup> *Id.* at 46 (“This explicit recognition that the lease term expires if not renewed establishes that the renewal option clause was intended to give the tenant an ability to renew [after expiration].”).

<sup>128</sup> *Id.* (determining that the alternative view is that the lease could last in perpetuity under the month-to-month tenancy providing the Landlord never gave notice to Tenant of the renewal option).

<sup>129</sup> *Id.* at 47.

<sup>130</sup> *Id.* at 46-47.

<sup>131</sup> *Bleecker St. Tenants Corp.*, 882 N.Y.S.2d at 47 (quoting *In re Kellogg*, 316 N.Y.S.2d 293, 296 (App. Div. 1970)).

<sup>132</sup> *Id.*

#### D. New York Court of Appeals Decision

The Court of Appeals was heavily divided in its reasoning. Even so, the majority opinion, written by Judge Jones, was succinct.<sup>133</sup> Unlike the lower courts, the Court of Appeals did not focus on the appurtenant exception test, but rather on the treatment of the common law on renewal options. The court noted that under the common law, perpetual renewal options were not void under RAP.<sup>134</sup> The court reasoned that since the New York statute is a codification of the common law rule, it follows that renewal options should be exempt from New York RAP.<sup>135</sup>

Furthermore, the court explored the principles underlying a rule against perpetuities.<sup>136</sup> The court reiterated that the prime objective of RAP was always “to protect the alienability of property.”<sup>137</sup> The court then explained that renewal options naturally render the lease and the property more alienable by making the property more attractive to a potential buyer, should the owner wish to sell.<sup>138</sup> The court expanded on this reasoning by distinguishing renewal options from options to purchase, because renewals do not enable the option holder to divest title from the owner<sup>139</sup> and are “inherently appurtenant to the lease.”<sup>140</sup> Lastly, the court noted that the renewal option at bar “encourage[s] the efficient use of the property” as it allows a tenant to maintain possession without interruption.<sup>141</sup>

Judge Read’s concurring opinion found a number of faults with the majority opinion and suggested a different theory as to why the renewal option should be valid.<sup>142</sup> Judge Read took particular

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<sup>133</sup> Chief Judge Lippman and Judges Ciparick, Smith, and Pigott concurred in the majority opinion.

<sup>134</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 486 (citing *Hoff v. Royal Metal Furniture Co.*, 103 N.Y.S. 371 (1907)); see also Edwin H. Abbot, *Leases and the Rule Against Perpetuities*, 27 YALE L. J. 878, 883 (1918) (suggesting that perpetual renewal options were an exception to common law RAP).

<sup>135</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487.

<sup>136</sup> *Id.* at 485.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 487 (noting that renewal options are regularly used in commercial transactions to attract potential tenants).

<sup>139</sup> *Id.* at 486.

<sup>140</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487.

<sup>141</sup> *Id.* (stating that the option is consistent with the public policy purposes of RAP).

<sup>142</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487-88 (Read, J., concurring).

note that common law RAP was not applied to *perpetual* renewal options.<sup>143</sup> She reasoned that perpetual options are different from options with a definite end date because, in essence, they give the tenant a fee simple in the property.<sup>144</sup> Therefore, considering that the purpose of RAP has been to invalidate restraints on alienability, perpetual renewal options were rightfully exempted under the common law rule.<sup>145</sup>

Second, Judge Read noted that the authorities cited by the majority, showing that non-perpetual renewal options were exempt under common law RAP, were actually cases (and articles about cases) that were decided under New York's narrow statutory rule, which notably excluded options.<sup>146</sup> Judge Read concluded that the majority's reasoning for exempting all renewal options "is simply not supported by the authorities cited."<sup>147</sup>

Judge Read then stated that the *Symphony Space* ruling was intended to encompass all real estate options and thus the appurtenant exemption should be applied to lease renewals.<sup>148</sup> In determining whether the option could be exercised after the lease terminates, Judge Read, like the Appellate Division, sought to define the scope of the term in the lease.<sup>149</sup> The judge found that the lease did not expire when the month-to-month tenancy was triggered because the lease provided for continuing "rights and responsibilities" during that period, which would not have been the case if the month-to-month tenancy was a reiteration of the statutory default rule.<sup>150</sup> Therefore, Judge Read concluded that the option could not be exercised after the

<sup>143</sup> *Id.* at 488.

<sup>144</sup> *Id.* (quoting William Berg, *Long-Term Options and the Rule Against Perpetuities*, 37 CALIF. L. REV. 1, 22 (1949)).

<sup>145</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 488 (Read, J., concurring). To solidify this point, Judge Read discusses *Bridges v. Hitchcock*, (1715) 2 Eng. Rep. 498 (H.L.) (discussing how a perpetual renewal option makes a tenant inclined to improve the property). *Id.* at 488-89.

<sup>146</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 489-490 (Read, J., concurring). Judge Read then notes that the cases cited by the majority would have been saved under the appurtenant exemption, had it been available to those renewal options at the time. *Id.* at 490.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* Judge Read notes that the parties only dispute was whether the option could be exercised after the lease expires; therefore, she restricts her analysis to that part of the appurtenant exemption test. *Id.* at 491.

<sup>149</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 491 (Read, J., concurring).

<sup>150</sup> *Id.* Judge Read provides the example that the tenant must maintain property damage insurance of at least \$500,000 during the month-to-month tenancy. *Id.*

lease expired and the court should have determined that the renewal option was appurtenant to the lease.<sup>151</sup>

In Judge Graffeo's dissent, she argued that exempting all renewal options is inconsistent with the plain meaning of EPTL § 9-1.1(b) and the holding in *Symphony Space*.<sup>152</sup> Judge Graffeo made note of many inconsistencies and poor conclusions in the majority opinion.<sup>153</sup> She stated that while the majority was correct in noting perpetual options to renew were exempt from RAP at the turn of the twentieth century, New York was not following the common law rule at that time, as the majority assumed.<sup>154</sup> Judge Graffeo stated that New York had a statutory rule since 1830, which "was drafted so narrowly that it [excluded options]."<sup>155</sup> Therefore, the authorities cited by the majority as common law decisions were in fact decided under the old statute and its reasoning was therefore faulty.<sup>156</sup> Furthermore, those cases were superseded in 1965, when New York adopted the common law rule, which covered options.<sup>157</sup>

The dissent further referred to the previous Court of Appeals cases that held options were under RAP's grasp.<sup>158</sup> Judge Graffeo stated that these previous rulings alone should prevent the court from exempting renewal options as a class.<sup>159</sup> The dissent then stated that the majority should have applied the appurtenant exception to the renewal option and praised the lower courts for taking such a view.<sup>160</sup> The dissent noted two important reasons why the court should have adhered to the appurtenant exemption as opposed to the general waiver.<sup>161</sup> First, Judge Graffeo opposed the majority's statement that

<sup>151</sup> *Id.* (agreeing with the Supreme Court's decision).

<sup>152</sup> *Bleecker Street Tenants Corp.*, 945 N.E.2d at 491 (Graffeo, J., dissenting).

<sup>153</sup> *Id.* at 491-92, 493.

<sup>154</sup> *Id.* at 492.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 492, 493 ("[T]he early twentieth century decisions that the majority relie[d] on were grounded on the absence of a statutory prohibition that applied to perpetual leases.").

<sup>157</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 493 (Graffeo, J., dissenting). Judge Graffeo also states that the cases cited by the majority were perpetual lease renewals, "which are not at issue in this case." *Id.*

<sup>158</sup> *Id.* at 492-93 (citing *Symphony Space, Inc.*, 669 N.E.2d at 804; *Wildenstein & Co.*, 595 N.E.2d at 832; *Buffalo Seminary*, 451 N.Y.S.2d at 462).

<sup>159</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 493 (Graffeo, J., dissenting).

<sup>160</sup> *Id.* The dissent also recognizes other lower court decisions over the past fifteen years which applied the appurtenant test in similar circumstances. *Bleecker St. Tenants Corp.*, 945 N.E.2d at 493 (Graffeo, J., dissenting).

<sup>161</sup> *Id.* at 493-94.

an option to renew inherently originates in the lease and therefore is always appurtenant.<sup>162</sup> She stated that there is no bar against parties to a lease that would prevent them from creating an option renewal contract after entering into a lease agreement—and in such instances the option would fail the appurtenant test and be void under RAP according to *Symphony Space*.<sup>163</sup> Additionally, the dissent noted that a renewal option could be worded to allow the exercise of the option after the original lease expired.<sup>164</sup> Judge Graffeo stated that such an option would discourage a landlord from improving the property and hinder transferability because the option holder possesses his right to renew at the old price, after expiration of the original term.<sup>165</sup> The dissent stated, “[RAP] was designed to deter such barriers to transferability.”<sup>166</sup> Judge Graffeo then reasoned that under the appurtenant test, the option at bar would fail and be void under RAP because the lease expressly expired when the month-to-month tenancy was triggered and the lease wrongfully allowed the tenant to exercise its option after the expiration of the lease.<sup>167</sup>

## VI. THE REALITIES OF THE BLEECKER STREET DECISION

Considering the New York Court of Appeals’ line of cases over the last twenty-five years, it is not surprising that the court has continued to narrow the scope of RAP in *Bleecker Street*.<sup>168</sup> In *Folio House Inc. v. Barrister Realty Partners*,<sup>169</sup> the single New York case deciding RAP’s applicability to renewal options since *Bleecker Street*, the court’s opinion was short, comprised of only a few sentences. In *Folio*, the court, in considering whether a renewal option could vest after the tenant left possession, simply noted that it “need not resolve the parties’ disagreement on the interpretation of the lease

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 494.

<sup>165</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 494 (Graffeo, J., dissenting).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (following the same reasoning as the Appellate Division). Thus, the difference between the concurring and dissenting opinions is whether the lease expired when the month-to-month tenancy was triggered, which has a dispositive outcome on whether the option could be exercised after the lease expires.

<sup>168</sup> See, e.g., *Symphony Space, Inc.*, 669 N.E.2d 799; *Wildenstein & Co.*, 595 N.E.2d 828; *Bruken*, 492 N.E.2d 379.

<sup>169</sup> No. 118068/2009, 2011 WL 1467646 (N.Y. Sup. Ct. Mar. 21, 2011).

language.”<sup>170</sup> The court stated that *Bleecker Street* expressly held that RAP does not apply to renewal options and therefore the option in the case at bar is not void under RAP.<sup>171</sup>

It is very rare in the area of property law, and particularly regarding RAP, for there to be a black letter rule because of the strong influence of public policy in its application.<sup>172</sup> However, in *Bleecker Street*, the Court of Appeals made it very clear that RAP does not apply to any renewal options in New York State.<sup>173</sup> In regard to these options, the courts no longer have to determine whether the appurtenant exemption applies to analyze the particular option under the rule. Furthermore, the courts do not need to determine whether a renewal option that fails RAP on its face may be allowed under the saving statute. Such a clear ruling will deter most parties with similar disputes from litigating. The cases that do make it to the courts’ docket can be swiftly resolved.<sup>174</sup> In a case on appeal after *Bleecker Street*, the landlord ceded its argument that the renewal option violated RAP and instead pursued other avenues to void the lease renewals.<sup>175</sup> Clearly, *Bleecker Street* allows courts to avoid the complexity of RAP, at least in the area of lease renewal options.

#### A. Benefits of the *Bleecker Street* Decision

The court’s decision in *Bleecker Street* is also consistent with both *Bruken* and *Symphony Space*. The *Bruken* court found that preemptive rights in government and commercial contracts should be exempt from RAP because an exemption furthered the policies that RAP was designed to advance.<sup>176</sup> Similarly, the court in *Bleecker Street* determined that exempting renewal options promoted the poli-

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<sup>170</sup> *Id.* at \*2, \*3. (“The Court of Appeals ruling [in *Bleecker Street*] applies to all options to renew leases, and *a fortiori*, to the lease in this particular case.”).

<sup>171</sup> *Id.* at \*2.

<sup>172</sup> See, e.g., *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487 (stating the policy goals of RAP were a large factor in exempting renewal options); *Bruken*, 492 N.E.2d at 383-84 (finding commercial and government preemptive rights were exempt from RAP because “enforcement did not violate the underlying purposes of the rule . . .”).

<sup>173</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 484 (“We hold that [RAP] does not apply to options to renew leases.”).

<sup>174</sup> This was the situation in *Folio House Inc.*, described above.

<sup>175</sup> *Soldiers’, Sailors’, Marines’ & Airmen’s Club, Inc. v. Carlton Regency Corp.*, 945 N.Y.S.2d 40 (App. Div. 2012).

<sup>176</sup> *Bruken*, 492 N.E.2d at 384.

cies of alienability, fostering productive use of property, and facilitating exchange.<sup>177</sup> By allowing long-term renewal options (i.e., options that would typically vest beyond the statutory perpetuities period), a tenant may be more inclined to invest in the property to the same extent as an owner because of his reliance on the indestructibility of his option, thereby maximizing productive use of the property.<sup>178</sup> The landlord may also benefit from such options because of the possibility of acquiring a long-term tenant. This is true especially if the landlord wishes to put the property on the market because renewal options will make a property more attractive to other investors, thus facilitating exchanges.<sup>179</sup>

More beneficial is the fact that long-term renewal options assist the surrounding community. When tenants are inclined to invest in property, there is a greater opportunity for revitalization of the surrounding area.<sup>180</sup> Not only will tenants be more interested in maintaining their establishment, but they also will be concerned about the neighborhood, local political concerns, and community functions and causes.<sup>181</sup> Such initiatives become important to a long-term tenant, because they affect their clientele, the value of their options and the ability to quickly recoup their investment.<sup>182</sup> Furthermore, such options do not hinder the commitment of the landlord, who continues to own the land, in enhancing the value of the property and promoting the prosperity of the surrounding community.<sup>183</sup>

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<sup>177</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487.

<sup>178</sup> Brief for Defendants-Appellants, *supra* note 105, at \*15.

<sup>179</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487 (finding that renewal options “render[] the lease more attractive and readily alienable than less so”); Brief for Defendants-Appellants, *supra* note 105, at \*15 (stating that renewal options “make the property more attractive to a buyer of the landlord’s interest”).

<sup>180</sup> See Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 715 (1955) (stating that if a life tenant could invest in currently unproductive property, it could become a profitable enterprise).

<sup>181</sup> See Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143, 170 (2010) (suggesting that a new tenants lack of “social or economic networks,” mixed with their uncertainty of future rent increases, negatively impacts their “incentives to invest in the community”).

<sup>182</sup> Being able to recoup investments in leased property was an important argument made by Tenant. Brief for Defendants-Appellants, *supra* note 105, at \*15. Furthermore, the argument appears to have resonated with the court, though not explicitly mentioned in the opinion. *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487. The court used the same argument in *Bruken* in regard to preemptive rights. *Bruken*, 492 N.E.2d at 383-84.

<sup>183</sup> Brief for Defendants-Appellants, *supra* note 105, at \*15 (“From the landlord’s viewpoint, the restraint on alienability [if any] is minimal, because the property can still be trans-

The *Bleecker Street* decision also alleviates the courts' dockets, allowing the judiciary to work more efficiently while providing a means for spending less money. For many years, the court system has noted the burden of high cases and low resources, and decisions that reduce litigation help to mitigate these costs.<sup>184</sup> Claims or defenses based on RAP in the lease renewal context can now be dismissed swiftly during pre-trial litigation and at the trial level.<sup>185</sup> Furthermore, the economic impact of the ruling extends to landlords and tenants.<sup>186</sup> RAP's application to renewal options can no longer be a point of contention, potentially leading to lengthy litigation in court and animosity between two parties in a business relationship which behooves them to remain amicable.

The holding of *Bleecker Street* also promotes the increasingly popular conservative views of limited government and free market policies.<sup>187</sup> Exempting the entirety of renewal options from a strict rule allows parties more freedom to contract.<sup>188</sup> In agreeing to a renewal option, parties, especially tenants, will not have to worry about the validity of the option.<sup>189</sup> By removing RAP in this circumstance,

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ferred subject to the lease.”).

<sup>184</sup> See generally Vincent E. Doyle III, *Court Funding: A Statewide Perspective*, New York State Bar Journal (Jan. 2012) (stating that decreases in court funding further burden already overcrowded court systems and create negative effects on litigants and the public); see also Richard S. Fries, *Amendment to RPAPL Article 14 Allows Nonjudicial Foreclosure of Commercial Mortgages*, 70-Dec N.Y. St. B.J. 50, \*50 (claiming New York's cumbersome foreclosure process hinders an already overburdened court system).

<sup>185</sup> See generally *Folio House Inc.*, 927 N.Y.S.2d 816 (stating its ruling in a few short paragraphs).

<sup>186</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487 (stating renewal options make leases more attractive).

<sup>187</sup> See, e.g., Michelle Malkin, *GOP Looking for 'Fresh Blood'*, AMARILLO GLOBE-NEWS (Feb. 17, 2012, 4:01PM), <http://amarillo.com/opinion/opinion-columnist/weekly-opinion-columnist/2012-02-17/gop-looking-fresh-blood> (“[G]rassroots activists are coalescing around a stellar slate of limited government candidates looking to reinforce and reenergize the right in Washington.”).

<sup>188</sup> See Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends – An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 659 (2000):

We live in a world of default rules. Default rules are those that control in absence of a contrary expression and can be easily set aside. It is beginning to seem as though almost every rule of law can be set aside. So what is the big deal if we allow grantors to set aside the RAP?

*Id.*

<sup>189</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 484 (all renewal options are exempt from RAP).

courts will not interfere with the long-term goals of the tenant.<sup>190</sup> The tenant will then have the maximum possible chance to recoup any investment and improvement he made on the property based on the availability of the option, without concern about the impact of RAP on the option.<sup>191</sup> In addition, both parties must assume more personal responsibility to ensure that their deal will be profitable.<sup>192</sup> Although *Bleecker Street* furthers these conservative objectives, the Court of Appeals' decision was not a political one. In fact, Judge Jones's majority opinion garnered support from judges appointed by both democratic and republican governors.<sup>193</sup>

### B. Contractual Changes and Landlord Repositioning

Removing RAP's statutory restraint on renewal options provides some protection to the tenant from the landlord.<sup>194</sup> A landlord is in a better position and more inclined to know about the intricacies of a contract and the methods of invalidating provisions which are no longer beneficial.<sup>195</sup> This ruling prevents the courts from interfering and allowing RAP to be one of the possible ways to remove a tenant despite the provisions of a negotiated contract.<sup>196</sup> Therefore, the ruling is more likely to promote property development through long-term tenants.<sup>197</sup> Of course, it may also decrease the inclination of landlords to agree to renewal options in their leases.<sup>198</sup>

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<sup>190</sup> See Simes, *supra* note 180, at 715 (incentivizing a tenant to make long-term improvements makes a more profitable investment).

<sup>191</sup> See *Bleecker St. Tenants Corp.*, 945 N.E.2d at 484.

<sup>192</sup> *Soldiers', Sailors'*, 945 N.Y.S.2d 40 (“[T]hat is the deal that plaintiff struck. Represented by competent counsel, it negotiated and executed the lease . . . and ‘the courts will not interfere’ with the economically harsh result.”).

<sup>193</sup> *Judges of the Court*, COURT OF APPEALS: STATE OF NEW YORK, <http://www.nycourts.gov/ctapps> (last visited Oct. 22, 2012) (see biography of each judge under “Judges of the Court” tab).

<sup>194</sup> See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970) (“The inequality in bargaining power between landlord and tenant has been well documented.”).

<sup>195</sup> *Id.*

<sup>196</sup> See generally *Bleecker St. Tenants Corp.*, 945 N.E.2d 484.

<sup>197</sup> *Id.* at 484 (allowing landlords and tenants to enter into perpetual renewal options without invalidation by RAP).

<sup>198</sup> See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 111 (Nov. 1986) (stating that there is an inherent “tension between landlords and tenants over

Another inevitable result of this decision is that landlords will increase their reliance on providing conditions which accompany renewal options.<sup>199</sup> Faced with the certainty of an option included as a term in the lease, landlords are likely to find unique ways to ensure that the renewal option remains favorable to their long-term goals.<sup>200</sup> To protect their interests, the landlords will mainly rely on attaching rental increases to any renewal options the tenant exercises.<sup>201</sup> Without such a condition, and without the possibility of voiding the renewal options under RAP, the landlords' interests and profits under the agreements could diminish quickly, especially in the face of multiple long-term renewals, perhaps in perpetuity. However, landlords should be wary of not providing too many conditions or creating "to be determined" rent amounts which may be void for vagueness as a matter of contract law.<sup>202</sup>

The *Bleecker Street* decision does not leave landlords unprotected when creating their lease agreements, though it will hinder those who utilize RAP as a means of escape when a lease turns sour.<sup>203</sup> As such, the landlords who continue to offer options to renew will likely come up with creative ways to back out of the option, because they can no longer hide behind the intricacies of RAP. One such possibility is including a provision in the lease that allows the landlord to reject the tenant's exercise of an option for cause.<sup>204</sup> Therefore, if the tenant is problematic (i.e. causing excessive damage to the premises), and the landlord has the potential for a better busi-

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lease renewals").

<sup>199</sup> *Hindquarter Corp. v. Prop. Dev. Corp.*, 631 P.2d 923, 926 (Wash. 1981) ("[P]rompt payment of rent [was] a condition precedent to the renewal."); 88 Am. Jur. *Trials* § 9 (2003) (leases typically require compliance with all conditions of the lease as a condition precedent of renewal).

<sup>200</sup> See David E. Pierce, *Evaluating the Jurisprudential Bases for Ascertaining or Defining Coalbed Methane Ownership*, 4 WYO. L. REV. 607, 612 (2004) (stating contracts should be interpreted primarily based on the intent of the parties).

<sup>201</sup> Even the Association of Legal Administrators (ALA) entered into leases which contained renewal options with attached 4% rent increases. *A Message from the Executive Director*, ALA News, July 1999, at 32.

<sup>202</sup> *Rhee v. Dohan*, 457 N.Y.S.2d 684, 685 (App. Div. 1982) (finding tenant's letter was unenforceable as creating a lease renewal agreement because it did not stipulate a rent amount or provide a commencement date).

<sup>203</sup> Brief for Defendants-Appellants, *supra* note 105, at \*8 (claiming landlord wanted to terminate the lease because tax code changes made other opportunities more profitable).

<sup>204</sup> See *Williams v. Millward & Co.*, 412 N.W.2d 369, 369 (Minn. 1987) (noting that defendant's attempt to exercise his renewal option was rejected for cause).

ness opportunity, he will not be forced to continue his relationship with his current tenant.

Similarly, the landlord might provide terms in the lease for a potential buy-back of the option.<sup>205</sup> Like the denial for cause, this will allow the landlord to pursue a better business venture by regaining the unexercised options upon payment of a premium to the current tenant.<sup>206</sup> The availability of these types of conditions and others means that landlords will have an incentive to include renewal options in their leases without the accompanying uncertainty about their validity.<sup>207</sup> However, increased reliance on these intricate conditions also may lead to longer and more complex leases and, consequently, more litigation as the parties quarrel over the provisions' meaning and intention.

### C. The Concurring and Dissenting Opinions

The concurrence and dissent point out a number of faulty rationales in the majority opinion.<sup>208</sup> Both Judges Read, in her concurring opinion, and Graffeo, in her dissenting opinion, discuss that the majority bases its ruling, in part, on identifying the early 1900s as a time New York used the common law rule, when in fact the State was using the narrow 1830 statutory rule.<sup>209</sup> Due to this error, Judge Graffeo even argues that the majority fails to provide any authority

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<sup>205</sup> See *Evaluating the Jurisprudential Bases for Ascertaining or Defining Coalbed Methane Ownership*, *supra* note 200, at 612 (“Under the American freedom of contract model, absent some flaw in the bargaining process . . . the public interest lies in giving effect to the agreement freely made by the parties”); Aaron Bassan, *Mortgages to Secure Other Indebtedness: A Statutory Proposal*, 4 ANN. REV. BANKING L. 259, 268 (1985) (“[T]he basic principles of contract law [are] protecting the parties’ intent while permitting maximum freedom of contract.”). This idea is similar to the ability of a corporation to buy back outstanding shares at a predetermined rate. See, e.g., *Ingle v. Glamore Motor Sales, Inc.*, 535 N.E.2d 1311, 1313 (N.Y. 1989) (upholding a buy-back agreement which could be exercised without cause).

<sup>206</sup> See *Ingle*, 535 N.E.2d at 1312 (stating the agreement allowed corporation to buy back stock from employee if that employee ceased to be employed by corporation “for any reason”).

<sup>207</sup> James P. McAndrews et al., *A Practical Guide to Reviewing a Commercial Lease*, 19 REAL PROP. PROB. & TR. J. 891, 929 (1984) (stating landlords do not want vacant buildings and are willing to provide renewal options to prevent such an outcome “provided adequate provisions are made” to protect a landlord’s financial interests).

<sup>208</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487-91 (Read, J., concurring); *id.* at 491-94 (Graffeo, J., dissenting).

<sup>209</sup> *Id.* at 489-90 (Read, J., concurring); *id.* at 492 (Graffeo, J., dissenting).

that renewal options were exempt from RAP under the common law.<sup>210</sup> However, all of the judges agree that the purpose of RAP has always been to promote alienability and the development of property.<sup>211</sup> In this respect the majority opinion remains sound.<sup>212</sup>

### 1. The Concurring Opinion's Flaws

A flaw in Judge Read's concurring opinion, however, leads to an unraveling of her argument. The judge relies upon distinguishing perpetual renewal options from options which have a definite end date.<sup>213</sup> To further this point she cites to an article by Professor William Berg, who equates a perpetual renewal option with a fee simple estate.<sup>214</sup> While she never equivocally states so, Judge Read offers substantial evidence to suggest that a perpetual renewal option would be found valid under RAP and that she would have held the option at bar valid had it been an option in perpetuity.<sup>215</sup>

There are faults in equating a perpetual renewal option with fee simple ownership. In Berg's article, which Judge Read uses as authority, he conditions the option's "fee simple" status on the expectation that "the value of the land does not drop to the point where the rental becomes prohibitive."<sup>216</sup> Such a situation, Berg claims, would cause the rent to become unreasonable and the tenant would likely decide against exercising his renewal right.<sup>217</sup> The problem with a fee simple comparison thus becomes apparent: a true fee simple ownership right cannot be harmed by fluctuations in the price of real estate whereas the interest in a renewal option hinges on comparative

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<sup>210</sup> *Id.* at 493 (Graffeo, J., dissenting) ("[T]he early twentieth century decisions that the majority relies on were grounded on the absence of a statutory prohibition that applied to perpetual leases.").

<sup>211</sup> *Bleeker St. Tenants Corp.*, 945 N.E.2d at 485 (majority opinion); *id.* at 488 (Read, J., concurring); *id.* at 492 (Graffeo, J., dissenting).

<sup>212</sup> See discussion *supra* detailing how renewal options are beneficial not only for landlords and tenants, but also for the surrounding community.

<sup>213</sup> *Bleeker St. Tenants Corp.*, 945 N.E.2d at 488 (Read, J., concurring) ("[T]he common law enforced 'perpetual options to renew leases.'" (quoting majority opinion at 486).

<sup>214</sup> *Id.* at 488 (Read, J., concurring).

<sup>215</sup> *Id.* at 488-89, 490. This hypothesis is based on her extensive reliance on Berg, *supra* note 144 and W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938), as authorities, both of which state that perpetual renewal options were exempt from RAP under the common law. *Id.*

<sup>216</sup> *Id.* at 488 (citing Berg, *supra* note 144, at 22).

<sup>217</sup> *Bleeker St. Tenants Corp.*, 945 N.E.2d at 488 (Read, J., concurring).

market flows.<sup>218</sup> For example, if property values drastically drop to half of the original value, the landlord's ownership rights remain the same; he is still the owner of the property. Yet, the tenant's interest in a lease renewal plunges because it is based on the previous land market. The holder has a better chance of finding a new space at a much lower rate than the one stipulated in the renewal because of the change in market conditions. Thus, the tenant's interests are severely disadvantaged while the landlord's rights remain intact; the parties are not equally situated.

Furthermore, when Berg wrote his article in 1949, significant real estate market drops were not a foreseeable possibility.<sup>219</sup> However, in the twenty-first century, we have seen drastic declines in property values in a relatively short period,<sup>220</sup> making such a condition much more likely than it was in Berg's time.

Therefore, the reality is that perpetual options also include the possibility that the option will terminate if the tenant fails to exercise his right, and such a situation is more likely to occur during our current economic condition or a comparable depressed period.<sup>221</sup> Thus, a perpetual option and a renewal option with a stated end date are not as distinct as Judge Read suggests. One must think of the phrase, "[n]othing lasts forever"—and that maxim includes “perpetual” options.<sup>222</sup>

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<sup>218</sup> Neil Z. Auerbach, *A Transactional Approach to Lease Analysis*, 13 HOFSTRA L. REV. 309, 352 (1985) (stating that the lower the renewal rate compared to the current fair rental value, the greater the economic benefit on the option holder).

<sup>219</sup> See Kevin Drum, *Chart of the Day: Housing Prices Since WWII*, MOTHER JONES (Aug. 24 2010 1:23 PM), <http://motherjones.com/kevin-drum/2010/08/chart-day-housing-prices-wwii> (“[I]f you look at a fifty-year period after World War II, home prices were *absolutely* steady.”).

<sup>220</sup> See Calculated Risk, *Summary for Week Ending December 30th*, CALCULATED RISK: FINANCE AND ECONOMICS (Dec. 31, 2011 9:00 AM), [http://www.calculatedriskblog.com/2011\\_12\\_01\\_archive.html](http://www.calculatedriskblog.com/2011_12_01_archive.html) (“Nineteen of the 20 cities covered by the indices . . . saw home prices decrease over the month. The 10- and 20-City composites posted annual returns of -3.0% and -3.4% versus October 2010, respectively.”)

<sup>221</sup> Furthermore, during any era, a perpetual option can also be terminated if the tenant fails to exercise his right (or give notice to the landlord of his intent) to renew according to the terms of the lease.

<sup>222</sup> See *Voyles v. Sasser*, 472 S.E.2d 80, 81-82 (Ga. 1996) (giving credence to deposition testimony that contracting parties never discussed duration and “nothing lasts forever”).

2. The Dissenting Opinion's Criticism and the Potential to Alleviate Those Concerns

Judge Graffeo also criticizes the majority's claim that renewal options are "inherently appurtenant to the lease."<sup>223</sup> She reminds the majority that one of the requirements for an appurtenant option is that the option must originate in the lease.<sup>224</sup> She then provides the example that an option agreement can be executed in a document completely separate from the lease agreement, perhaps even years after the lease has been in effect.<sup>225</sup> Not only does Judge Graffeo's scenario indicate that a renewal option can originate outside the lease, but she also demonstrates that it could be exercised after its expiration.<sup>226</sup> When a renewal option is included in a separate agreement, it may not be subject to the time restraints of the lease.<sup>227</sup> Therefore, contrary to the statements by the majority, it appears that a renewal option may violate all three requirements for the appurtenant exemption as articulated in *Symphony Space*.<sup>228</sup>

A court may adopt several interpretations that would not allow a renewal option to become exercisable after the termination of the lease. First, the court could find that when the lease term ends so does the option to renew, regardless of a provision for an extended date for the tenant to exercise the option.<sup>229</sup> This interpretation would not only mean that a renewal option could not be exercised after the lease expires, but also that it could be connected to the intention of the parties.<sup>230</sup> The parties could not intend for there to be a renewal after termination; such a situation would not constitute a renewal, but

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<sup>223</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 494 (Graffeo, J., dissenting) (quoting majority opinion) (internal quotation mark omitted).

<sup>224</sup> *Id.* at 493.

<sup>225</sup> *Id.* at 493-94.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 494 ("[I]t could be drafted so that the ability to exercise the option is independent from the lease . . .").

<sup>228</sup> See *Warren St. Assocs. v. City Hall Tower Corp.*, 608 N.Y.S.2d 429, 430 (App. Div. 1994) (holding six twenty-five year renewal options failed the appurtenant test because they could be exercised after the lease expired); *Symphony Space, Inc.*, 669 N.E.2d at 806.

<sup>229</sup> *Simons v. Young*, 155 Cal. Rptr. 460, 466 (Ct. App. 1979) (holding that option to renew billboard lease expired with the lease even though the agreement stipulated renewal could be exercised three months after lease expiration because it would be "nonsensical" for a lease to be "renewed" after it had expired).

<sup>230</sup> *Id.* (stating expiration of renewal with the lease furthers the intent of the parties because all other rights, including the right of possession, expire with the lease).

rather a creation of a new lease.<sup>231</sup> Alternatively, the majority claims that *any* option that allows the tenant to exercise an option after forfeiting possession is an option to enter into a new lease.<sup>232</sup> However, the former interpretation is more logical as a person generally renews before term expiration.<sup>233</sup>

A second interpretation to prevent the exercise of options after the lease expires is that upon expiration of the lease term, an unexercised option to renew is converted into an option to create a new lease under the specified terms.<sup>234</sup> Certainly, this approach resolves the problem of creating options exercisable after the lease term, but it also can create new difficulties in practice.<sup>235</sup> For example, it would be possible for the original tenant to exercise an option after removal from possession and a new tenant is in place.<sup>236</sup> Regardless of its negative effects, however, these two interpretations would help correct the majority's statement that renewal options are inherently appurtenant. This is especially true if these alternative interpretations are coupled with a requirement that the option to renew either be created with the lease or subsequently added to the lease.<sup>237</sup> In this situation, based on the analysis in *Symphony Space*, renewal options would always be appurtenant.<sup>238</sup>

An examination of the majority's decision reveals that it disregarded the court's analysis of the appurtenant exemption in *Symphony Space*.<sup>239</sup> The majority expressly states that if a renewal option

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<sup>231</sup> See *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487 (majority opinion) (stating that an option exercised by a former tenant is an option to enter into a new lease, not a renewal option).

<sup>232</sup> *Id.* (responding to the dissent's arguments that the holding allows a former tenant to exercise a renewal right after the lease expires).

<sup>233</sup> This is true in all facets of life, not only in the landlord-tenant context. For example, a customer does not pay utility bills only after the electricity is turned off, nor does a driver purchase gas only after the car has stopped running.

<sup>234</sup> See *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487 (“[A]n option exercisable by a former tenant no longer in possession is not a renewal option: it is an option to enter into a new lease.”).

<sup>235</sup> See *id.* at 493-94 (Read, J., dissenting).

<sup>236</sup> *Id.*

<sup>237</sup> See *Symphony Space, Inc.*, 669 N.E.2d at 806 (stating one of the elements of the appurtenant exemption is that the option “is incapable of separation from the lease”).

<sup>238</sup> *Id.*

<sup>239</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487 (“[A]n option to renew a lease (1) is exercisable pursuant to the lease agreement and [is], thus, inherently appurtenant to the lease . . .”).

is pursuant to the lease, then it is appurtenant.<sup>240</sup> Therefore, the majority concludes that since *all* renewal options are in furtherance of their respective leases, they are appurtenant.<sup>241</sup> But, this description takes into account none of the elements of the *Symphony Space* appurtenant exemption.<sup>242</sup> Perhaps what the majority meant to articulate was that a renewal option is always connected to and in furtherance of the greater landlord-tenant relationship, thus, using the term appurtenant in its broader non-legal context.<sup>243</sup> Alternatively, though less plausible, the statement could connote an even broader definition of the appurtenant exemption, furthering limiting New York's statutory RAP law.<sup>244</sup>

#### D. An Alternate Rationale

Even with the flaws mentioned by the concurring and dissenting opinions, the majority opinion provides the most promising outcome not only because of the benefits for landlords, tenants, and the community, but also due to its furtherance of the common law public policy.<sup>245</sup> Since long before the days of King Henry VIII, there has been a battle between landowners and courts regarding the control of property and the validity of long-term restrictions and future interests.<sup>246</sup> Since RAP's premiere in *The Duke of Norfolk's Case*, its purpose has been to promote the development of land and facilitate alienability.<sup>247</sup> While the majority's authorities and reasoning may be faulty and unclear, the underlying argument is undeniably true—renewal options inherently further the common law purpose (and therefore New York's statutory purpose) of RAP.<sup>248</sup>

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Symphony Space, Inc.*, 669 N.E.2d at 806.

<sup>243</sup> THE AMERICAN HERITAGE COLLEGE DICTIONARY 67 (Robert B. Costello et al., 3d ed. 1997) defines appurtenance as “[s]omething added to a more important thing; an appendage.”

<sup>244</sup> See Lance Liebman, *Forward: The New Estates*, 97 COLUM. L. REV. 819, 825 n.31 (1997) (expressing surprise that the Court of Appeals failed “to adapt [RAP] to modern conditions” by not exempting commercial options from RAP in *Symphony Space*).

<sup>245</sup> See generally *Bleecker St. Tenants Corp.*, 945 N.E.2d 484.

<sup>246</sup> See Haskins, *supra* note 6, at 27-29 (discussing the strain between judges seeking “freely alienable” land and landowners attempting long-term dead hand control).

<sup>247</sup> *Id.* at 20.

<sup>248</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487.

In its opinion, the majority should have focused more on the public policy reasons for exempting renewal options from RAP as opposed to discussing the appurtenant exemption.<sup>249</sup> While the court briefly mentioned the benefits which accrue to landlords by the renewal option immunity, it did not discuss the advantages to the tenant and, more importantly, the community.<sup>250</sup> Furthermore, the majority would have strengthened its argument by discussing the parallels between the public policy reasons for exempting commercial preemptive rights in *Bruken* and exempting all renewal options in *Bleecker Street*.<sup>251</sup> Lastly, because this case revolved around the statutory interpretation of New York RAP, the court was correct to briefly describe the legislative intent to exempt renewal options in the drafting of the statute.<sup>252</sup> The problem with Judge Jones's consideration of this point is his discussion of the exemption of *perpetual* renewal options under the common law without explaining why that equates to an exemption of *all* renewal options under the statute.<sup>253</sup> However, this gap could have been bridged by a simple deduction. If subject to RAP, perpetual renewal options are potentially the most egregious violators of the lives in being plus twenty-one year statutory (and common law) period.<sup>254</sup> If such options are exempt, then clearly, a renewal option which violates RAP by a shorter time period should be included in the exemption. With these modifications and focus, the majority opinion would have been more persuasive in arguing for exempting renewal options and would have quelled some of the concerns of the concurring and dissenting opinions.<sup>255</sup>

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<sup>249</sup> See generally *id.*

<sup>250</sup> See *id.* These arguments were made by Tenant in its brief. Brief for Defendant-Appellants, *supra* note 105, at \*15.

<sup>251</sup> *Bruken*, 492 N.E.2d at 383 (stating that any hindrance to alienability caused by the right is "properly offset by [its] utility in modern legal transactions . . .").

<sup>252</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487 (claiming that because perpetual renewal options were exempt from RAP under the common law, and the New York statute codifies the common law, renewal options should be exempt in New York).

<sup>253</sup> *Id.* at 486-87.

<sup>254</sup> See *Gleason v. Tompkins*, 375 N.Y.S.2d 247, 252 (Sup. Ct. 1975) (perpetual is synonymous with "forever," "for all time[]," and "everlasting," clearly in violation of lives in being plus twenty-one years).

<sup>255</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 488-90 (Read, J., concurring) (arguing that the majority only cites authorities that exempt perpetual options without any reasoning for exempting all options and questioning the majority's claim that all renewal options are appurtenant); *id.* at 493-94 (Graffeo, J., dissenting) (arguing that the majority's authorities are faulty and providing examples of renewal options that would not be appurtenant). Neither

Additionally, courts should not take on the tedious task of determining whether RAP is violated and then perhaps applying the appurtenant exemption test when the only reason for doing so is the mere existence of the common law rule.<sup>256</sup> As the common law has adapted to the ever changing modern era, courts have become more reasonable in their application to ensure outcomes that are more fair and beneficial, not only to the parties but also to the public.<sup>257</sup> The court's decision in *Bleecker Street* simply furthers the development of the common law to promote modern transactions.<sup>258</sup>

### E. RAP's Continued Place in New York Law

Although the court found that RAP should not be applied to renewal options, RAP still has its importance in other areas of law.<sup>259</sup> Just like commercial and governmental preemptive rights, renewal options are part of a niche group of property rights where the non-enforcement of RAP actually furthers the policy reasons RAP was intended to promote.<sup>260</sup> Alternatively, exempting the distribution of property from RAP would yield a contrary result.<sup>261</sup> Clearly, the common law purpose to promote alienability of property would be violated.<sup>262</sup> Additionally, transferors or testators could then restrict the sale or transfer of property in perpetuity, resulting in a smaller in-

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the concurring opinion nor the dissenting opinion suggests that applying RAP to renewal options is beneficial for public policy purposes or claims that the majority's discussion of public policy is flawed. *See generally id.*

<sup>256</sup> *Symphony Space, Inc.*, 669 N.E.2d at 806 (stating that some options further the public policy objectives of common law RAP).

<sup>257</sup> *See, e.g., id.* (holding appurtenant options to purchase are exempt from RAP); *Bruken*, 492 N.E.2d at 384 (holding RAP does not apply to preemptive rights in commercial or governmental transactions).

<sup>258</sup> *See Symphony Space, Inc.*, 669 N.E.2d at 806 (holding RAP does not apply to purchase options that meet the appurtenant exemption); *Wildenstein & Co.*, 595 N.E.2d at 833 (stating RAP does not apply to personal property interests in commercial transactions); *Bruken*, 492 N.E.2d at 384 (holding RAP does not apply to commercial and governmental preemptive rights).

<sup>259</sup> *Symphony Space, Inc.*, 669 N.E.2d at 806 (voiding purchase option under RAP in part because it deters development of the land); *id.* at 808 (rejecting the "wait and see" approach to RAP in part because of RAP's importance in the area of wills).

<sup>260</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 487.

<sup>261</sup> *Bruken*, 492 N.E.2d at 381 (RAP was intended to "restrict family dispositions" that created "embarrassing impediments to alienability").

<sup>262</sup> *Id.*

centive for current landowners to develop the property.<sup>263</sup> This would result because the landlord would have to wait a longer period of time to recoup his investment considering that a sale of the property is no longer a viable option. Furthermore, the community would also suffer due to this disincentive of development.<sup>264</sup>

Even with these negative results a number of states have abolished common law RAP by statute.<sup>265</sup> Other states have created new and separate rules that apply to the vesting of options.<sup>266</sup> However, deciphering the potential results of such an extreme legislative determination shows that it is not in the best interests of the parties or the public.<sup>267</sup> Rather, with the *Bleecker Street, Bruken, Symphony Space*, and *Wildenstein & Co., Inc. v. Wallis*<sup>268</sup> opinions, New York has found an effective balance for when RAP should be applied and when rights should be exempt. Together, these four decisions exempt the rights that further the public policy of RAP as well as provide a means for other types of rights to be exempted on an individual level if it is found that they are appurtenant.<sup>269</sup> Meanwhile, New York still enforces RAP in situations in which non-enforcement would cause broad public policy concerns.<sup>270</sup>

RAP has long been one of the most confusing and misinterpreted aspects of the law.<sup>271</sup> Unfortunately for New York lawyers,

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<sup>263</sup> See, e.g., *id.* at 383-84 (reasoning that in only limited circumstances is the non-enforcement of RAP used to further the alienability of property).

<sup>264</sup> *Controlling Residential Stakes*, *supra* note 181, at 170 (suggesting uncertainty lowers incentive to invest).

<sup>265</sup> Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2103 (May 2003) (“[A]t least fourteen states and the District of Columbia have abolished a rule that has been in place for four centuries.”). These states include Florida, New Jersey, and Virginia. *Id.* at n.31.

<sup>266</sup> Patricia Y. Reyhan, *Perpetuities Perpetuated: Symphony Space, Inc. v. Pergola Properties, Inc.*, 60 ALB. L. REV. 1259, 1270-71 (1997) (citing a Massachusetts Law which gives option holders a flat thirty year period to exercise their right, even if the express terms of the option agreement go beyond that period).

<sup>267</sup> See generally Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (Aug. 1983) (discussing the negative effects of broad changes to RAP).

<sup>268</sup> 595 N.E.2d 828 (N.Y. 1992).

<sup>269</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 484; *Symphony Space, Inc.*, 669 N.E.2d at 806; *Wildenstein & Co.*, 595 N.E.2d at 833; *Bruken*, 492 N.E.2d at 384.

<sup>270</sup> See, e.g., *Symphony Space, Inc.*, 669 N.E.2d at 806 (holding option that deterred development and was not appurtenant was void under RAP); *Morrison*, 556 N.E.2d at 646 (holding RAP applies to residential preemptive rights because “lives in being” and “twenty-one years” become more relevant restrictions).

<sup>271</sup> Haskins, *supra* note 6, at 20.

the *Bleecker Street* decision does not help solve the complexity of RAP as it applies to other rights.<sup>272</sup> Therefore, it is likely that despite the *Bleecker Street* decision, there will continue to be cases regarding RAP, its misinterpretation, and the resulting unnecessary costs to clients due to attorney confusion. Just nine months after the *Bleecker Street* case, a decision was rendered in a case in which a landlord failed to understand the application of RAP.<sup>273</sup> The landlord was seeking to avoid a very unprofitable ninety-nine year lease by using RAP as an argument.<sup>274</sup> In its decision, the court reminded plaintiff's counsel that RAP only applies to future contingent rights, not vested ones.<sup>275</sup> Therefore, although *Bleecker Street* simplifies RAP as it pertains to renewal options (since no application is required), the decision does not promote a greater understanding of RAP as it applies in other circumstances.<sup>276</sup>

## VII. CONCLUSION

The *Bleecker Street* decision is the most recent case by the New York Court of Appeals that limits the reach of RAP to particular contingent interests. Even though the majority opinion contained a number of flaws, the public policy effects it has on parties' freedom of contract, the benefits and protections to landlords and tenants, and the advantages to the general community make the decision consistent with RAP's common law purpose of alienability of property. The decision also allows the legal community to be more at ease when drafting leases. Perhaps, in the future, the New York Court of Appeals will exempt other interests from RAP, further reflecting the court's and the public's interest in adapting RAP to coincide with modern legal transactions. However, based on its focus on the common law and public interest concerns in this area, the court seems unlikely to create significant exemptions to RAP in the future.

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<sup>272</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 484 (limiting holding to renewal options).

<sup>273</sup> *U.T.O.S. Inc. v. DeBaron Associates LLC*, 932 N.Y.S.2d 468 (Sup. Ct. 2011).

<sup>274</sup> *Id.* at 469.

<sup>275</sup> *Id.* at 470 ("Plaintiff's argument . . . is misplaced.")

<sup>276</sup> *Bleecker St. Tenants Corp.*, 945 N.E.2d at 484.