Ms. Julie Walpert  
Assistant Commissioner  
Department of Housing Preservation and Development  
100 Gold Street, Room 7-L2  
New York, New York 10038

Re: Comment on Proposed Amendments to Mitchell-Lama Regulations, Subdivision (p) of Section 3-02 of the Title 28 of the Rules of the City of New York

Dear Ms. Walpert:

I am commenting solely on the proposed amendments to Section 3-02 of the Title 28 of the Rules of the City of New York. The complete excising of succession protections for families that have lived with the tenant in emotionally and financially committed and interdependent relationships will expose scores of Mitchell-Lama residents to the grievous harm of eviction from their family homes. In addition, limiting family anti-eviction protection to situations where the tenant dies or is relocated to a long term care facility will also expose scores of family members -- including spouses, children, and parents -- to the harsh consequences of eviction from their family homes where the tenant relocates for reasons other than institutionalization in a long term care facility.

Indeed, these draconian and unnecessary amendments will not only nullify the family protection measures mandated by Braschi v. Stahl Assoc., 74 N.Y.2d 201 (1989) and RSA v. Higgins, 83 N.Y.2d 156 (1993), but will result in family anti-eviction protections that are less protective than HPD’s 1985 succession regulations.

I have litigated numerous succession cases over the past two decades, including successfully arguing before the New York State Court of Appeals on behalf of Defendants-Intervenors, defending DHCR’s promulgation of succession regulations codifying the *Braschi* decision. *R.S.A. v. Higgins*, 164 A.D.2d 283 (1st Dep’t. 1990), *aff’d* 53 N.Y.2d 156 (1993), *cert. denied*, 114 S. Ct. 2693 (1994).

**COMMENT**

Preliminarily, I would like to note the inappropriateness of HPD’s not including any mention whatsoever of such significant changes in the succession provisions in the “Summary of Proposed Rule and Bases for Proposed Changes.” Given this radical departure from settled law and practice in the area of tenancy succession, which removes HPD’s succession provisions from
the uniformity that marks such provisions in regulated and subsidized housing throughout the State, the failure to draw the public’s attention to this matter is unconscionable.

A. REMOVING ANTI-EVICTION PROTECTIONS FROM “BRASCHI” FAMILIES WILL RESULT IN THE EVICTION OF NUMEROUS FAMILY MEMBERS WHO SHOULD BE PROTECTED FROM EVICTION FROM THEIR FAMILY HOMES.

Almost 25 years ago, the Court of Appeals held that the public policy underlying family-protective succession schemes mandates that the

the term family... should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage license or adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.

Braschi v. Stahl Assocs., 74 N.Y.2d 201, 211 (1989) (emphasis added). Within one year, the Appellate Division, First Department, also held that the public policy underlying these family anti-eviction protections mandated that the definition of family for succession purposes could not be limited to blood or legal relationships in any of the rent-regulation schemes. East 10th St. Assocs. v. Goldstein and Wells, 154 A.D.2d 142 (1st Dep’t. 1990); Park Holding Co. v. Power, 161 A.D.2d 861 (1st Dep’t. 1990).

Within three years, the Court of Appeals unanimously affirmed DHCR’s codifying the holding and factors set forth in Braschi in order to protect families in all of the State and City’s rent-regulated apartments who lived together in relationships of emotional and financial commitment and interdependence. R.S.A. v. Higgins, 164 A.D.2d 283 (1st Dep’t. 1990), aff’d 53 N.Y.2d 156 (1993), cert. denied, 114 S. Ct. 2693 (1994). These protections were extended to families residing in Mitchell-Lama apartments regulated by the State in 1991 and by the City in 1993.
The uniform, almost verbatim adopting of these regulatory provisions by the legislature, DHCR and HPD has provided a rational, state-wide uniform policy for protecting scores of families that would have otherwise been subjected to "one of the harshest decrees known to the law – eviction from one’s home." *Braschi*, 74 N.Y.2d at 215 (Bellacosa, J., concurring).

Nevertheless, without explanation, HPD now proposes to excise whole cloth all protections for Mitchell-Lama families whose relationships do not "rest on fictitious legal distinctions or genetic history." *Id.* at 211. In one fell swoop, HPD would deprive City Mitchell-Lama residents of the family anti-eviction protections enjoyed by State Mitchell-Lama residents and residents of other regulated and subsidized residences in the State.

The Court of Appeals recently noted that such a deprivation of succession protections is antithetical to the very spirit of the Mitchell-Lama scheme.

*Succession is in the spirit of the statutory scheme*, whose goal is to facilitate the availability of affordable housing for low-income residents *and to temper the harsh consequences of the death or departure of a tenant for their ‘traditional’ and ‘non-traditional’ family members."


Nevertheless, HPD would now revert to the limitations of its 1985 succession scheme and deprive “non-traditional” family members protection from eviction from their family homes.

Since no reason is given by HPD for this radical departure, one may surmise that it mistakenly believes that same-sex marriage equality has rendered *Braschi*-protections superfluous on the theory that the expanded definition of “family” in *Braschi* and the ensuing regulations were primarily about protecting gay spousal relationships prior to marriage equality. This is a misreading of both the history of *Braschi* and *RSA*, and the promulgation and enactment of the codifying regulations.
Although the plaintiff in Braschi was a surviving gay life partner, the case was not limited to those facts. The certified question to the Braschi Court asked whether non-eviction protection applies "only to family members within traditionally, legally recognized familial relationships." 74 N.Y.2d at 207. Amici from numerous groups raised the need for non-eviction protections for various forms of "non-traditional" families, straight and gay, spousal and non-spousal – such as poor people who could not afford to divorce and remarry; non-spousal families of support within the disabled community, etc.


In particular, the Braschi Court relied on a non-spousal case to identify the factors by which a non-traditional family could be defined. Id. at 213, citing 2-4 Realty Assocs. v. Pittman, 137 Misc.2d 898 (two men living in a "father-son" relationship for 25 years). DHCR relied in significant part on these non-spousal-specific factors as set forth in Pittman to craft the "factors" set forth in the succession regulations. In amending its own succession regulations in 1993, HPD adopted verbatim these very same non-spousal-specific "factors."
Since the enactment of these regulatory schemes, numerous non-spousal families, straight and gay, have been protected from eviction on the death or departure of the tenant of record. For a partial list of such cases, see Appendix of Selected Cases, Section I, A and B.

In addition, non- formalized spousal families continue to exist for a variety of reasons — economic, cultural, etc. — and also require protection. The Braschi court clearly recognized that although marriage was available to heterosexual couples, protection from eviction “should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage license . . . .” Id. at 211; see also the cases cited by the Court involving unmarried heterosexual spousal families, id. at 213. A number of such families have been protected under the post-Braschi regulatory schemes. For a partial list of such cases, see Appendix of Selected Cases, Section II, A.

Similarly, although marriage is now available to gay couples in New York, unmarried gay spousal couples will continue to exist for a variety of reasons and also are deserving of respect and protection. A number of such families have been protected under the post-Braschi regulatory schemes. For a partial list of such cases, see Appendix of Selected, Section II, B.

Thus, marriage equality does not render the Braschi-protections superfluous. Rather, Braschi’s admonition that protection from eviction “should find its foundation in the reality of family life” remains as valid today as it did in 1989. Id. at 211.

However, without stating any reasons whatsoever for such a radical change and without any fact-finding or public hearings on this important issue, HPD would deprive scores of families of any protection from eviction from their family homes on the permanent vacatur of the tenant. I urge HPD to withdraw this proposed amendment in its entirety.
Additionally, HPD’s deletion of “including adopted children” from 3-02(p)(2)(ii) is similarly misguided. As noted above, the Braschi Court urged that eviction protection should not be “rigidly restricted to those people who have formalized their relationship by obtaining, for instance, . . . an adoption order.” 74 N.Y.2d at 211 (emphasis added). Nevertheless, by this ill-conceived change, HPD would remove protection even from those families that have formalized their relationship by obtaining an adoption order. However, it has been held that even without the specification that HPD would remove, an adopted child would be protected from eviction under “son” or “daughter.” Krashes v. 76 W. 86th Corp., N.Y.L.J., Jan. 30, 1989, 26:1 (Sup. Ct. N.Y. Co.); see also Dom. Relns. L. § 117(c) and (g) (adopted child has the legal relationship of son/daughter of the parents and brother/sister of the natural born siblings).

Accordingly, since this change should not affect the legal rights of adopted children, including eviction protection, the deleting of “including adopted children” will cause unnecessary confusion, uncertainty, litigation and disrespect. Therefore, this change should not be adopted.

Finally, HPD’s proposed absolute 90-day succession application deadline is unfair and unconscionable on its face. 3-02(p)(10). The regulations provide for no notice at all to family members regarding how, what and when they must assert their succession claim. It is not unreasonable to contemplate that given the trauma of the death or institutionalization of the tenant, or the break-up of a long-term relationship, the family member may not be aware of or have the capacity to meet such a deadline.

Certainly, a person who has co-resided in the family home for many years and has been on every family composition and income certification should not be evicted from her family
home solely because an administrative procedure, regarding which she has no notice has been imposed. Rather, a “reasonableness under the circumstances” standard should be used in determining the timeliness of the application, as well as considering whether the housing company or HPD has been demonstrably prejudiced by the passage of time.

B. REPLACING “PERMANENTLY VACATED” WITH “RELOCATED TO A LONG TERM CARE FACILITY” WILL WILL HAVE THE ABSURD RESULT OF SUBJECTING MYRIAD FAMILIES TO DISLOCATION FROM THEIR FAMILY HOMES ON THE TENANT’S PERMANENT VACATUR FOR OTHER REASONS.

Although rent-control succession anti-eviction protections initially applied only where the tenant died, it was soon expanded to protect family members when the tenant moved out of the apartment for any reason. Herzog v. Joy, 74 A.D.2d 373 (1st Dep’t. 1980), aff’d 53 N.Y.2d 821 (1981). Similarly, although death and permanent vacatour were originally treated differently under rent stabilization, the provisions were unified by the 1987 code. The reason for this development is quite simple.

As indicated above, the public policy underlying the family anti-eviction protections is to protect family members from “sudden eviction,” Braschi, 74 N.Y.2d at 211. “The family succession provisions . . . were enacted in response to the harsh consequences resulting from displacement from one’s home upon the death or departure of a named tenant . . . .” Lesser v. Park 65 Realty Corp. 140 A.D.2d 169, 171 (1st Dep’t. 1988) (emphasis added).

More recently, in the context of family anti-eviction protections within the Mitchell-Lama scheme, the Court of Appeals held that

Succession is in the spirit of the statutory scheme, whose goal is to facilitate the availability of affordable housing for low-income residents and to temper the harsh consequences of the death or departure of a tenant for their ‘traditional’ and ‘non-traditional’ family members.”

Therefore, in light of the underlying family anti-eviction public policy, the issue is not why or under what circumstances the tenant permanently vacates the apartment, but whether the apartment has been the family home of the remaining family member for the requisite period of time, from which she should not be evicted. HPD’s current regulation and the regulatory provisions of all other succession schemes provide for that appropriate inquiry and do not penalize family members based on the reason for the tenant’s departure, over which they have no control.

If HPD were to adopt the proposed amendment, there would ensue absurd results. For example:

(1) A husband (the tenant) and wife co-reside for 30 years. As with far too many marriages, their marriage ends in divorce. The husband moves out. Under the current regulation, she succeeds to the tenancy if she meets the co-residency and income documentation requirements. **Under the proposed amendment, she does not.**

(2) A disabled daughter co-resides with her parents (the tenants) for 35 years. The parents, in their 70s, decide to retire to Florida. Under the current regulation, she succeeds to the tenancy if she meets the co-residency and income documentation requirements. **Under the proposed amendment, she does not.**

(3) A tenant co-resides with her lesbian life partner for 30 years. The tenant permanently relocates for health reasons to the home of their daughter in a different state. The life partner remains in New York City for employment purposes so she can support her partner. Under the current regulation, she succeeds to the tenancy if she meets the co-residency and income documentation requirements. **Under the proposed amendment, she does not.**

Unfortunately, these scenarios are endless since there are myriad reasons why family co-residency ends. In most instances, the family member may have no control whatsoever regarding the timing or reasons for the tenant’s departure. However, whatever the reason, the fact remains that without the protections of the current regulation, the remaining family member will be subjected to “the harsh consequences resulting from displacement from one’s home upon the . . . departure of a named tenant.” *Lesser,* 140 A.D.2d at 171. As shown above, this is exactly
the result that succession regulations is intended to prevent as a matter of public policy, or what the *Murphy* Court called the "spirit" of the Mitchell-Lama statutory scheme.

One can only surmise -- since HPD again provides not explanation for this drastic change -- that it is concerned about some sort of mechanical handing over of apartments to family members, which it seeks to cabin in. However, such concerns are more appropriately dealt with by the requirements of family relationship, primary co-residency, and family composition and income reporting. The proposed amendment, in contrast, takes a baby with the bath water approach that can have no other effect except the "wholesale eviction of family members" on the departure of the tenant other than for placement in a long term care facility (a term which is not defined in the proposed amendment). *Lesser*, 140 A.D.2d at 173.

Therefore, for all of the reasons stated above, I strongly urge HPD to reject these ill-considered amendments and to refuse to adopt them in the final promulgation. I remain available to discuss any of these matters.

Respectfully submitted,

[Signature]

Paris R. Baldacci

Enc.: Appendix of Selected Cases (3 pages)
APPENDIX OF SELECTED CASES
November 5, 2013
(compiled with the assistance of Emilio Paesano and Michael Dishi,
Legal Interns, Cardozo School of Law)

Section I. Non-Spousal Braschi Succession Cases

A. HETEROSEXUAL NON-SPOUSAL BRASCHI CASES:

1. 2-4 Realty Assoc. v. Pittman, 137 Misc 2d 898 (Civ Ct, NY County 1987), aff'd 144 Misc 2d 311 (App Term, 1st Dept 1989) ("father/son" relationship)


10. Colon v. Frias, 162 Misc.2d 36, 615 N.Y.S.2d 618 (Civ. Ct. Kings Co. 1994) (two women who had lived in a close, committed non-sexual relationship as "sisters" for thirty-four years)


B. GAY/LESBIAN NON-SPOUSAL BRASCHI CASES:


Section II. Unmarried Spousal Braschi Succession Cases

A. HETEROSEXUAL SPOUSAL BRASCHI CASES:

1. 1058 Southern Blvd. Realty Corp. v. Ortiz, N.Y.L.J., November 1, 1994 (App. T. 1st Dep’t.)


3. Amsterdam 488 Inc. v. Ferreros, N.Y.L.J., June 6, 1995, 26:3 (App. T. 1st Dep’t.)


B. **GAY/LESBIAN SPOUSAL BRASCHI CASES:**