November 6, 2013

Julie Walpert
Assistant Commissioner
Department of Housing Preservation and Development
100 Gold Street, Room 7-L2
New York, NY 10038
Submitted via first-class mail and at
www.nyc.gov/nycrules

Dear Assistant Commissioner Walpert,

This letter responds to the Department of Housing Preservation and Development’s Proposed Rule Amendment for City-Aided Limited-Profit Housing Companies. In particular Lambda Legal Defense and Education Fund opposes the narrowing of the definition of Family Member through the elimination of Subdivision (p)(2)(ii)(B) of Section 3-02 of Chapter 3 of Title 28 of the Rules of the City of New York.¹ Headquartered in New York City, Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender (“LGBT”) people and people living with HIV through impact litigation, education and public policy work.

I. Economic Disadvantage in the LGBT Community and the Need for Succession Rights in Regulated Housing

Lambda Legal has a particular interest in commenting on this Proposed Rule due to its potential effect on the LGBT community, in particular lower- and moderate-income couples and families. Lesbian, gay, and bisexual people are statistically likely to have lower incomes (or to be poor) as compared to heterosexual people.² A recent study has shown that the children of same-sex couples are particularly economically vulnerable.³ For example, African-American children in gay male households have the highest poverty rate, at 52.3%, of any children in any household type.⁴ Economic challenges intensify with age; according to a recent study, 31% of older LGBT households live at or below 200% of the federal poverty level.⁵

Succession rights are particularly important to lower- and moderate-income LGBT couples and families because they ensure secure affordable housing after the death of a loved one. Given that such

¹ See Proposed 28 RCNY § 5.
³ See id.
⁴ See id.
individuals and their children are likely to already face bias and exclusion in the housing market, succession rights are an important protection against further hardship and increased poverty.6

II. Braschi Decision and Its Legacy: What Makes a Family

Miguel Braschi lived together with Leslie Blanchard for eleven years in a rent-controlled New York apartment before Blanchard died in September 1986.7 The landlord brought suit to evict Braschi because his name was not on the lease.8 The landlord argued that without being named on a lease, the law only allowed surviving spouses or family members to remain in a rent-controlled apartment after the death of the tenant.9 The case was eventually appealed to the New York Court of Appeals, which held that protection from eviction from a rent-controlled apartment should extend to “those who reside in households having all the normal familial characteristics.”10 The court outlined six characteristics that a trial court could consider in applying this test, and stated that the controlling factor should be the “totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties.”11 Braschi and Blanchard met this test, and Braschi was allowed to stay in his home.12

As Lambda Legal argued in our amicus brief in the case of Braschi v. Stahl Associates Co.,13 a narrow definition of “family member” used in determining succession rights would affect thousands of nontraditional family units, including LGBT couples, heterosexual unmarried couples, and poor families.14 As our brief argued and the court found, families with nontraditional structures are just as worthy of government protection as traditional families.15 This Proposed Rule would destroy the legacy of the Braschi decision, which has protected marginalized populations at the critical time of a proposed eviction, after the death of a loved one.16

The legacy of the court’s decision in Braschi has resulted in an appropriate definition of “family member” in the Rules of the City of New York that looks to “emotional and financial commitment and

8 See Braschi, 74 N.Y.2d at 206.
9 See id.
10 See id. at 211.
11 See id. at 213.
12 See id. at 214.
15 See id.
16 See Professor Paris R. Baldacci, Director, Housing Rights Clinic and LGBT Litigation and Leadership Practicum at the Cardozo School of Law in Comments to Proposed 28 RCNY § 5.
interdependence.” This definition considers a multitude of factors including the “longevity of the relationship” and financial commitment including the “sharing or relying upon each other for payment of household or family expenses,” as well as “engaging in family activities by jointly attending family functions, holidays and celebrations.” This definition is important, as it protects a group of people for whom marriage may not be financially or socially feasible.

III. Continued Need for Recognition of Non-Marital Families in Regulated Housing

While we worked toward and are pleased that New York passed the Marriage Equality Act in 2011, which provides for marriage without discrimination based on sexual orientation, the law does not eliminate the need for succession rights for family members as currently defined. We agree with Professor Katherine Franke, the Isidor and Seville Sulzbacher Professor of Law and Director, Center for Gender and Sexuality Law at Columbia Law School, who notes in her comments to this Proposed Rule that recent changes in the recognition of same-sex couples’ right to marry do not affect the need to recognize domestic partnership and other non-marital families. For many couples, both same-sex and different-sex, marriage may not be a viable option.

Financially, there are marriage penalties to consider. For example, the Earned Income Tax Credit (EITC) is the primary tax benefit for poor families, who have the lowest marriage rate. Many of these couples state that a lack of financial stability is an important factor in their decision to not marry. Lower-income people who are employed can qualify for the EITC. For example, under current EITC rules, two partners who are each earning $17,100 and who are the parents of two children can each collect the maximum credit of $3,169 for a total of $6,338. If these two partners married and jointly earned $34,200, they would only be eligible to collect $2,735. Thus, they are penalized by $3,603, which amounts to 10.5% of their salaries. As the Court of Appeals noted in the Braschi decision, the state’s rent control laws protect against the sudden loss of one’s home. The Proposed Rule forces lower-income couples to decide between losing an important income tax credit, or the potential eviction of a partner in the event of the death of the primary tenant. Lower-income couples should not be forced to make such choices.

Combining incomes by getting married can result in the loss of benefits for many older couples, whether same-sex or different-sex. Many LGBT elders heavily rely on Social Security, Medicaid and Medicare, especially as poverty is particularly severe for LGBT older adults. Given increasing recognition of marriage of same-sex couples at the federal level after the Supreme Court decision in United States v.

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17 See 28 RCNY § 3-02(p)(ii)(B).
18 See id.
19 See e.g. Marsha Garrison, Reviving Marriage: Could We? Should We?, 10 J. L. Fam. Stud. 279, 322.
20 See id.
22 See id.
23 See Braschi, 74 N.Y.2d at 218.
24 See e.g. SERV. & ADVOCACY FOR GAY, LESBIAN, BISEXUAL & TRANSGENDER ELDERS (“SAGE”), POVERTY IN LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ELDERS: A NEW YORK CITY AND NATIONAL SNAPSHOT 1 (2010). See also, SAGE AND MOVEMENT ADVANCEMENT PROJECT ET AL., IMPROVING THE LIVES OF LGBT OLDER ADULTS 11 fig. 7 (2010).
Windsor, there are increasing concerns for some couples that being married will result in a loss of necessary income and health insurance, in ways that co-habiting may not.  

Same-sex couples may also face societal barriers to marriage, including the social cost of being “outed” to their community. Marriage is a public act, and while some same-sex couples may be “out” to their close friends, they may not wish to share their relationship with their family, community, or church. Tragically, there has been and continues to be, an alarmingly high incidence of hate-motivated crime against the LGBT community in New York and across the country. In such a context, many same-sex couples may choose to not marry, or otherwise publicly announce their relationship. In particular, older LGBT adults may be less likely to marry for a host of reasons. The majority of LGBT elders have lived through a lifetime of state sanctioned harassment and discrimination based on sexual orientation and gender identity and expression. These experiences have resulted in many having serious concerns about living “out of the closet” on official records that could be accessed by service providers and family members. A recent Gallup poll examined self-identification of adults as lesbian, gay, bisexual, or transgender. The poll found that “adults aged 18 to 29 (6.4%) are more than three times as likely as seniors aged 65 or older (1.9%) to identify as LGBT.” Also, after a lifelong exclusion from marrying a same-sex partner, many older LGBT adults view marriage as a heterosexual institution that they do not wish to join.

Finally, same-sex couples may choose not to marry because of the patchwork of state protections and recognition for marriages of same-sex couples across the United States. New York is one of only fifteen states that provide marriage equality. Married same-sex couples who move to states that do not recognize same-sex marriage may face legal obstacles, including, for example, not being able to divorce in those states. In light of this reality, same-sex couples may not wish to risk being married in New York. They should not, however, be penalized for the understandable choice not to enter a status that still does not provide equality, by losing the shelter of their homes.

25 See E-mail from Hilary Meyer, Director, Nat’l Programs, SAGE, to author (Nov. 5, 2013, 20:50 GMT) (on file with author).


Comments by Lambda Legal Deputy Director Hayley Gorenberg - 4
For the foregoing reasons, Lambda Legal strongly urges the Department of Housing Preservation and Development to preserve Rule § 3-02(p)(ii)(B) codifying *Braschi*.

Sincerely,

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