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Appellate Division—First Department Case No. 2022-03774

Court of Appeals
of the
State of New York

KERMIT MANTILLA,

Petitioner-Appellant,

— against —

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND
DEVELOPMENT,

Respondent-Respondent,

— and —

M PLAZA, LP,

Respondent.

**BRIEF FOR *AMICUS CURIAE* THE LEGAL AID SOCIETY IN
SUPPORT OF PETITIONER-APPELLANT**

Evan Henley
Edward Josephson
THE LEGAL AID SOCIETY
49 Thomas Street, Floor 5
New York, NY 10013
Tel.: (212) 298-5233
Fax: (646) 616-4198
ewhenley@legal-aid.org
Counsel for Amicus Curiae

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New York, NY

DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Pursuant to Court of Appeals Rule 500.1(f), The Legal Aid Society states that it is a nonprofit corporation with no parent corporation or subsidiaries.

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PRELIMINARY STATEMENT

The Mitchell-Lama program is an important source of affordable housing for low- and middle-income New Yorkers. Succession plays a critical role in the program by preventing the dislocation of residents who have little chance to find another affordable unit. The New York City Department of Housing Preservation and Development (“HPD”) supervises many Mitchell-Lama projects in New York City. When a Mitchell-Lama tenant vacates their apartment, a remaining resident may apply for succession—first to the housing company, and then via an appeal to HPD. If an HPD hearing officer denies the application, the housing company evicts the applicant.

Although an HPD hearing officer has discretion when reviewing a succession application, their decision must be “genuine[ly] reasonable[] and rational[] in the specific context presented” by the application (*Matter of Murphy v N.Y. State Div. of Hous. & Community Renewal*, 21 NY3d 649, 654–655 [2013], quoting *Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999]). HPD cannot ignore a succession applicant’s reality, foremost the reality of living as a low-income person in New York City, and how it impacts the applicant’s ability to prove where they lived (*cf. Rezoagli v Blum*, 433 NYS2d 491, 492 [2d Dept 1980] [finding that administrative determination was arbitrary and capricious where it “ignored the reality of the situation”]). To make a rational decision on a succession application, a hearing

officer must first take account of what a low-income person would reasonably do within a limited amount of time after moving to a new apartment, including where they would update their address and where they would have no pressing reason to do so. Then, the hearing officer must consider how the applicant would reasonably present information showing their connection to the Mitchell-Lama apartment (“the apartment”) without the aid of live testimony.

Drawing on these basic principles, we urge this Court to reverse the Appellate Division for two main reasons:

First, an HPD hearing officer should generally give more weight to evidence affirmatively linking the applicant to the apartment during the relevant co-residency period (an “active connection”) than to evidence of a different address that predates the relevant period, which the applicant has not updated (a “passive connection”). When HPD denies a succession application because of a passive connection to an address on, for example, a previously issued driver’s license without providing a reasoned explanation for disregarding an active connection to the apartment, like the use of the address to enroll in public benefits programs, the decision is “without sound basis in reason or regard to the facts” (*Murphy*, 21 NY3d at 652 [citations omitted]).

Second, if succession applicants must either prove that they filed a state tax

return as a New York City resident or that they were not legally obligated to do so,¹ the regulatory scheme's text and practical purpose both require that HPD examine the record for proof that an applicant was exempt from filing state tax returns during the co-residency period. This is a simple inquiry where, as here, the applicant has provided evidence of their income.

Because the record demonstrates that Petitioner-Appellant Kermit Mantilla² had substantial active connections to the apartment during the co-residency period, HPD's decision to deny him succession rights was arbitrary and capricious. And because his income fell below the threshold for filing a state tax return during the relevant period, he satisfied any tax return requirement.

STATEMENT OF INTEREST

The Legal Aid Society is a non-profit organization that provides free legal services to low-income New York City residents, including residents of Mitchell-Lama developments. Its staff members have direct experience regarding the salutary effects of succession on the lives of low- and moderate-income New Yorkers and frequently provide testimony and guidance to the New York State

¹ The parties dispute whether the tax return issue is properly raised here and if the tax return rule requires succession applicants to submit tax returns. This brief assumes that the issue was properly raised and that tax returns are required and addresses how an applicant may prove an exemption from filing (*see* 28 RCNY 3-02 [n] [4] [iv]).

² This brief will refer to Petitioner-Appellant as Kermit to distinguish him from his brother, Ray Mantilla.

Legislature and New York City Council about policy and legislation related to affordable housing.

As a result, The Legal Aid Society has a unique and valuable perspective on the regulatory goals underlying Mitchell-Lama succession and HPD’s role in effectuating these goals.

ARGUMENT

I. The Importance of Mitchell-Lama Housing and Succession for Low-Income New Yorkers.

The Legislature created the Mitchell-Lama housing program in 1955 in response to “a seriously inadequate supply of safe and sanitary” housing for low- and middle-income New Yorkers (*see* Private Housing Finance Law § 11). The program established “Limited-Profit Housing Companies” that receive “low-interest mortgage loans and real property tax exemptions” in exchange for government supervision and regulation, including rent restrictions, for a certain amount of years. (New York Homes & Community Renewal, *Mitchell-Lama: Preserving Housing for Middle-Income Residents*).³ In New York City, HPD supervises 44,392 units of city-funded Mitchell-Lama housing, including almost 9,000 units with Section 8 project-based rental assistance (New York Homes & Community Renewal, *2024 Annual*

³ Available at <https://hcr.ny.gov/mitchell-lama> [last accessed July 29, 2025].

Report: Mitchell-Lama Housing Companies in New York State, at Summary).⁴ HPD has promulgated rules that govern its administration of Mitchell-Lama housing (*see* Private Housing Finance Law §§ 23 [2], 579; *see generally* 28 RCNY 3-01 *et seq.*).

Mitchell-Lama units—especially those with federal subsidies like Section 8 project-based rental assistance—are a desperately needed source of affordable housing for low-income New Yorkers (*see, e.g.*, Oksana Mironova et al., *Testimony: Ensuring the Future of Mitchell-Lama*, Community Serv Society [Dec. 11, 2024]⁵ [“The addition of federal subsidies made Mitchell-Lama rental accessible to low-income tenants.”]). When rejected succession applicants face eviction, they lack other affordable housing options. In 2024, over 95% of HPD-supervised Mitchell-Lama apartments were occupied (*2024 Annual Report: Mitchell-Lama Housing Companies in New York State*, at Summary). The vacancy rate for apartments with rents below \$1,650 is less than one percent (New York City Comptroller, *New York City’s Housing Supply Challenge* 4 [Feb. 13, 2024]).⁶ When the New York City Housing Authority’s Section 8 Housing Choice Voucher Program waitlist briefly

⁴ Available at https://hcr.ny.gov/system/files/documents/2024/11/2024.07.12_2024-annual-mitchell-lama-report.pdf [last accessed July 29, 2025].

⁵ Available at <https://www.cssny.org/news/entry/testimony-ensuring-the-future-of-mitchell-lama> [last accessed July 29, 2025].

⁶ Available at <https://comptroller.nyc.gov/wp-content/uploads/documents/February-2024-Spotlight-New-York-Citys-Housing-Supply-Challenge.pdf> [last accessed July 29, 2025].

reopened in June 2024, more than 630,000 people applied (New York Housing Conference, *2024 NYC Housing Tracker Report* 10 [June 6, 2024]).⁷ The dearth of affordable options means that nearly 30% of low-income New York City tenants are severely rent-burdened and spend more than 50% of their income on housing costs (New York City Comptroller, *New York City's Rental Housing Market* 4 [Jan. 17, 2024]).⁸

Elderly New York City residents, many of whom have fixed incomes, are more reliant on long-term affordable housing than the general population. The median annual household income of older adults living alone in New York City is \$22,900, compared to \$80,000 across all ages (Center for Research on Housing, Opportunity, Mobility, & Equity, *Older Adults in New York City* 12 [Oct. 2024]).⁹ Though it constitutes a small percentage of New York City's housing stock, Mitchell-Lama housing is still a significant source of affordable housing for elderly New Yorkers (New York City Comptroller, *Senior Housing in New York City: The*

⁷ Available at <https://tracker.thenyh.org/wp-content/uploads/2024/06/NYHC-Tracker-2024-Web.pdf> [last accessed July 29, 2025].

⁸ Available at <https://comptroller.nyc.gov/wp-content/uploads/documents/January-2024-Spotlight.pdf> [last accessed July 29, 2025].

⁹ Available at <https://www.nyc.gov/assets/cabinetforoldernewyorkers/downloads/pdf/Older-Adults-in-New-York-City-Report.pdf> [last accessed July 29, 2025].

Coming Crisis 10 [May 2013]¹⁰ [“Mitchell-Lama units are predominately occupied by older segments of the population.”]; *see also* New York University Furman Center, *State of New York City’s Subsidized Housing in 2017* at 6 [June 2018] [“[O]ver time, many [Mitchell-Lama] residents have become elderly and lower income, and new [Mitchell-Lama] tenants are often lower income.”)].

Only 28% of older adults live alone (*Older Adults in New York City* 7). Because the spouses, partners, and siblings of elderly New Yorkers are also likely to be elderly (and disproportionately have disabilities) (*cf. id* at 15 [discussing prevalence of disabilities among older adults]), succession to Mitchell-Lama units is an especially important means of ensuring that vulnerable low-income New Yorkers are not displaced and rendered homeless (*see Murphy*, 21 NY3d at 653).¹¹

II. The Succession Application Process

An applicant to succeed to a Mitchell-Lama apartment must satisfy three criteria: 1) they have an enumerated familial relationship with the departed tenant; 2) they were included on annual income affidavits; and, as relevant here, 3) they lived in the apartment as their primary residence for two years (or one year for a

¹⁰ Available at https://comptroller.nyc.gov/wp-content/uploads/documents/NYC_SeniorHousing.pdf [last accessed July 29, 2025].

¹¹ “Regulations providing for succession rights to Mitchell-Lama apartments serve the important remedial purpose of preventing dislocation of long-term residents . . . [, and] [s]uccession 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 . . . family members” (*Murphy*, 21 NY3d at 653).

senior citizen or disabled applicant) prior to the date the tenant vacated (28 RCNY 3-02 [p] [3], [n] [4]). “The reduced co-residency requirement” for elderly and disabled people “facilitate[s] such persons’ ability to find suitable housing of which they generally are in greater need” (Notice of Adoption, NY St Reg, Nov. 10, 2009).

An applicant for succession completes a one-page application, attaches documents that demonstrate their eligibility for succession, and submits the application to the housing company (*see* 28 RCNY 3-02 [p] [8]; New York City Department of Housing Preservation & Development, *Application for Succession Rights*;¹² R193-219). HPD has published instructions for applicants (New York City Department of Housing Preservation & Development, *Instructions: Application for Succession*).¹³ In addition to documents that establish a familial relationship with the departed tenant and income affidavits, HPD advises applicants to provide as many documents as possible to prove co-residency and primary residency (*id.* at 2; *see also* R232). The suggested documents include employment records, documents from government agencies, Board of Elections records, Department of Motor Vehicles documents, utility bills, and credit card and

¹² Available at <https://www.nyc.gov/assets/hpd/downloads/pdfs/services/Succession-Rights-Application.pdf> [last accessed July 30, 2025].

¹³ Available at <https://www.nyc.gov/assets/hpd/downloads/pdfs/services/Succession-Application-Instructions.pdf> [last accessed July 30, 2025].

bank statements (*Instructions: Application for Succession* at 2). HPD also instructs applicants that “[i]f you were required to file New York State tax returns, your failure to provide certified copies of those returns will result in a finding that the subject apartment was not your primary residence” (*id.*). The application does not include a section where the applicant can provide a narrative explanation regarding their eligibility (*see Application for Succession Rights*).

The housing company then reviews the application and issues a written determination (28 RCNY 3-02 [p] [8], [i]). If the housing company denies the application, the applicant may appeal to HPD by explaining why they are entitled to succession and identifying any errors made by the housing company (28 RCNY 3-02 [p] [8] [ii]). A hearing officer reviews the housing company’s determination and any additional information from the applicant (*id.*; R225-232). If HPD also denies the application, the applicant may only obtain review of its decision via an Article 78 action (28 RCNY 3-02 [p] [8] [ii]). So, applicants must provide written submissions at each stage of the process and must rely almost exclusively on documentary evidence; they have no opportunity, at a hearing or otherwise, to answer questions that a hearing officer may have about submitted documents (*see id.*). Apart from the application instructions, there is little guidance for a succession applicant who must scramble to collect documents while facing eviction and who, like Kermit, is often elderly and grieving the loss of a close family member.

III. HPD must conduct a primary residence inquiry that adequately weighs active connections to a particular address.

Administrative action must meet standards of “genuine reasonableness and rationality in the specific context presented by a case” (*see Murphy*, 21 NY3d at 654–55, quoting *Kuppersmith*, 93 NY2d at 96). An agency must be guided by “common sense and elemental fairness” and cannot rely on documents that are “insufficient, inapplicable, or irrelevant,” particularly where they are controverted by more reliable evidence (*see Matter of 125 Bar Corp. v State Liquor Auth.*, 24 NY2d 174, 179 [1969]; *cf. Matter of Maldonado v Crotona Place W. Hous. Dev.*, 168 AD3d 524, 525 [1st Dept 2019] [stating that a SNAP printout was a more reliable indicator that petitioner was a household member than her mother’s self-certification]).

The primary residency requirement’s regulatory goals include preventing displacement and ensuring that the limited supply of affordable housing is fairly distributed to people who actually use it (*see Murphy*, 21 NY23d at 653; *Emay Props. Corp. v Norton*, 136 Misc 2d 127, 128 [App Term 1st Dept 1987]). Therefore, to establish primary residency, an applicant must have “an ongoing, substantial, physical nexus with the . . . premises for actual living purposes . . .” (*Katz Park Ave. Corp. v Jagger*, 11 NY3d 314, 317 [2008], quoting *Norton*, 136

Misc 2d at 129).¹⁴ To further these regulatory goals and make a rational decision in the specific context of a succession application, HPD must recognize the reality that applicants for succession are frequently more concerned with taking essential actions for themselves and their families—such as obtaining vital benefits or caretaking—than preparing for a possible future succession application by updating their address with various government agencies and companies. As a result, when making a primary residency determination, HPD must give more weight to the address the applicant provided and used during the claimed period of co-residency with the departed tenant than their failure to update their address.

HPD’s primary residency rules recognize the importance of such active connections by using the present tense (*see* 28 RCNY 3-02 [n] [4]). This is logical: if a Mitchell-Lama tenant “specifies” a different address on a tax return or driver’s license or “gives” a different address as their voting address during the term of their Mitchell-Lama tenancy, this bears directly on the question of whether they primarily reside in the apartment (*see* 28 RCNY 3-02 [n] [4]). Similarly, the address a succession applicant specifies or gives during the co-residency period is the most reliable indicator of their primary residence. Conversely, the specification of a different address prior to the co-residency period is irrelevant.

¹⁴ *Compare* 28 RCNY 3-02 [n] [4] [listing “facts and circumstances” to be considered, among others, for Mitchell-Lama primary residency], *with* 9 NYCRR 2520.6 [u] [listing similar factors for rent-stabilized primary residency].

- A. *An applicant's passive connections to a prior address have limited probative value.*

An applicant's failure to update a previously provided address with government agencies, banks, or similar institutions is of little probative value—particularly given that the required co-residency period may only be one year. Many of the suggested documents listed in HPD's instructions (R232) are not reliable indicators of a person's residence during a one-year period.

First, many documents that bear an address are received electronically (and relate to accounts that are accessed electronically), so there is little reason to ensure that addresses in an electronic database are updated. Importantly, electronic documents with an address block do not prove that the applicant received correspondence at the stated address. Moreover, government agencies such as the Social Security Administration do not only generate electronic documents; they also exclusively make electronic payments (*see, e.g.*, 31 USC § 3332 [a] [1]; *see also* Social Security Administration, *Social Security Transition to Electronic Payments—What Beneficiaries Receiving Paper Checks Need to Know* [July 14, 2025]¹⁵). Across age groups, people overwhelmingly conduct their banking via mobile applications or online (American Bankers Association, *2024 Preferred*

¹⁵ Available at <https://blog.ssa.gov/social-security-to-fully-transition-to-electronic-payments/> [last accessed July 30, 2025].

Banking Methods [Nov. 21, 2024]).¹⁶

Second, obtaining a new driver's license in a new state is difficult. Appointment wait-times and lines are often long, and REAL ID requirements are burdensome (see, e.g., Corey James, *Long Lines at New York DMVs as REAL ID Deadline Arrives*, Spectrum News 1 [May 7, 2025];¹⁷ James Barron, *Need a New Driver's License to Fly? Prepare for a Real Wait*, NY Times [Feb. 18, 2020]¹⁸ [describing long wait times for DMV appointments during Kermit's co-residency period]). This is one reason why Americans frequently have expired driver's licenses or licenses with inaccurate addresses (Jillian Andres Rothschild et al., Center for Democracy and Civic Engagement, *Who Lacks ID in America Today? An Exploration of Voter ID Access, Barriers, and Knowledge* 2 [Jan. 2024]¹⁹ [reporting that over twenty-seven million United States citizens have an unexpired driver's license with an outdated address]; see also Charles Stewart III, *Voter ID: Who Has Them; Who Shows Them*, 66 Okla L Rev 21, 40 [2013] [discussing a survey that found that 26% of voters who had lived at their address for less than

¹⁶Available at <https://www.aba.com/news-research/analysis-guides/preferred-banking-methods> [last accessed July 30, 2025].

¹⁷Available at <https://spectrumlocalnews.com/nys/central-ny/news/2025/05/07/real-id-deadline-dmv-wait-times> [last accessed July 30, 2025].

¹⁸Available at <https://www.nytimes.com/2020/02/18/nyregion/real-id-drivers-license-dmv.html> [last accessed July 30, 2025].

¹⁹ Available at <https://rb.gy/napite> [last accessed July 29, 2025].

four years had a license without their current address]). “For purposes of identification and even driving, any license is fine” (R10).

Third, few New Yorkers vote, especially in odd-year elections (*see, e.g.,* New York City Campaign Finance Board, *2019-2020 Voter Analysis Report* 4, 15 [April 2020]²⁰ [reporting that 17.2% of registered voters turned out for the 2019 general election]). An applicant’s failure to update their voter registration is more likely attributable to their decision not to vote than their continued connection to a previously registered address.

B. *A rational primary residence inquiry focuses on active connections during the co-residency period.*

An applicant’s maintenance of passive connections to a different address cannot rationally defeat a succession application when an applicant controverts them with evidence of an active and substantial connection to the Mitchell-Lama apartment. The active use of an address during the co-residency period is a far more reliable indicator of an “an ongoing, substantial, physical nexus” (*see Jagger*, 11 NY3d at 317). For low-income applicants, several types of credible evidence are readily available.

For example, to receive SNAP benefits (food stamps) in New York City, an applicant must provide proof of their residence, which is verified “through the use

²⁰ Available at https://www.nycfb.info/pdf/2019-2020_Voter_Analysis_Report.pdf [last accessed July 29, 2025].

of documentation or a contact with a third party to confirm the accuracy of the statements or information provided by households” (*see, e.g.*, 18 NYCRR 387.8 [b], [b] [1] [i] [e], 387.9 [a] [1]). Therefore, SNAP records are a reliable source for verifying a household’s composition (*Maldonado*, 168 AD3d at 525). The same is true of other public benefits such as Medicaid and Public Assistance (18 NYCRR 360-2.3 [b], 360-3.2 [k], 369.2 [e]). These benefits are not only useful evidence of primary residency because they require that a New York City agency has verified residency: they are benefits that low-income people require for survival and consequently must obtain near their homes. Although a person may not prioritize obtaining a new driver’s license or registering to vote, they will ensure that they have local access to housing, food, and healthcare. And they are incentivized to comply with reporting rules and to provide their current address to ensure that they do not lose the essential benefits (*see, e.g.*, 18 NYCRR 387.9 [a] [7] [requiring household cooperation with recertification and eligibility review]).

Similarly, although an applicant’s inclusion on Mitchell-Lama income affidavits may not be dispositive, it demonstrates an active and substantial connection to the apartment because “the principal purpose of the income affidavit is to provide proof of the applicant’s primary residence” (*Murphy*, 21 NY3d at 654; *see also* 28 RCNY 3-02 [l] [i] [“All members of the household must be listed on the income affidavit whether or not income was earned.”])). For Mitchell-Lama

apartments with federal subsidies, inclusion on the income affidavit creates another substantial connection because the household must pay 30% of the applicant's income to the housing company as rent (*E.g.*, R85-88; U.S. Department of Housing and Urban Development Handbook 4350.3 REV-1 at 5-65–5-68 [Nov. 2013]²¹). A low-income person is extremely unlikely to pay rent at an apartment where they do not reside.

An administrative action must be grounded in a realistic appreciation of its context (*see Murphy*, 21 NY3d at 654–655). For the reasons given above, a rational hearing officer must focus their review of a succession application on the applicant's active connections to an address during the co-residency period.

C. *HPD's decision was arbitrary and capricious.*

The hearing officer's decision was arbitrary and capricious because they focused on Kermit's passive connections to a Florida address on his driver's license, Social Security letter, and Wells Fargo bank statements while discounting his active connection to the Mitchell-Lama apartment, as demonstrated by New York City public benefits documents, income affidavits, Chase account usage, and other evidence. Kermit's application and appeal sufficiently demonstrate that he began living in the apartment in 2018 and that the apartment remained his primary

²¹ Available at <https://www.hud.gov/sites/documents/43503hsgh.pdf> [last accessed July 30, 2025].

residence until his brother's passing (*see* R9-11; R471-472).

Kermit received Medicaid/Medicare, SNAP, and HEAP in New York based on his residence in the apartment. He submitted multiple public benefits documents dated before and during the co-residency period that bear the address for the apartment (*see, e.g.*, R414-415 [Medicaid/Medicare letter dated January 7, 2019]; R417-418 [EBT card report for period between December 21, 2018 and February 21, 2019]; R420 [HEAP approval notice dated February 11, 2019]; R421 [SNAP notice dated April 9, 2019]; R422 [New York City Human Resources Administration (“HRA”) benefits center change notice dated May 17, 2019]).

These documents indicate that Kermit “remained an active member of the household” (R471). During the co-residency period, some public benefits recipients in New York City completed recertifications via telephone (and now all recipients may recertify via telephone or online using AccessHRA) (*see, e.g.*, New York City Human Resources Administration, *SNAP Benefits Information* [“How to Recertify”]).²² So, Kermit may not have received any additional correspondence from HRA during the co-residency period despite receiving continued benefits. He also submitted his succession application and appeal while the COVID-19 pandemic raged (R225-226; R426-427) and would have faced serious obstacles in

²² Available at <https://www.nyc.gov/site/hra/help/snap-benefits-food-program.page> [last accessed July 30, 2025].

obtaining additional records from HRA. Many HRA centers were closed to the public during this time (*e.g.*, Community Service Society, *COVID-19: Its Impact on Public Benefits* 3, 8 [May 18, 2020]).²³ A rational factfinder would have taken these circumstances into account.

Other documents demonstrate Kermit's active connection to the apartment. For example, Kermit was his brother's power of attorney and medical proxy (R210-214). These were not only labels. He took his ailing brother to healthcare appointments (*e.g.*, R206) and managed their home and finances (*see, e.g.*, R156; R349-R374 [bank statements showing that purchases or ATM withdrawals were made in the area around the apartment on well over half of the days between June 2019 and March 21, 2020]).

Kermit specified, gave, and otherwise actively used the apartment's address before, during, and after the co-residency period. The hearing officer's disregard of these active connections, especially compared to the weight they placed on passive connections to a Florida address, does not have a sound basis in reason (*see* R9-10; *Murphy*, 21 NY3d at 652).

As explained above, the most reliable indicia of Kermit's residence during the co-residency period are the public benefits records (because HRA verified

²³ Available at https://cssny.s3.amazonaws.com/system/files/uploads/COVID-19_Impact_on_Benefits.pdf [last accessed July 30, 2025].

Kermit's address, and he was subsequently under an obligation to report any changes to it) and the income affidavits (because Kermit's inclusion obligated him to contribute 30% of his limited income toward rent) (Section III.B, *supra*). The hearing officer irrationally dismissed this substantial evidence as "some limited documents" (R430).

Further, the hearing officer gave no explanation for why they found that the bank statements for the Chase account which Kermit controlled as his brother's power of attorney were not "credible, sufficient and reliable proof" that Kermit "actually resided in the subject apartment as his primary residence" (R429). The hearing officer's conclusory assertion ignored reality. The record demonstrates that Kermit's brother was seriously ill; he would not have been able to regularly travel around the area by himself to make all these purchases and withdrawals (R207; R334-336). Only Kermit and his brother were account holders (R349-374). The sole reasonable available inference is that Kermit made near-daily purchases in the area around the apartment during the co-residency period.

The hearing officer emphasized Kermit's passive connections to a Florida address, but these connections have slight probative value (*see* Section III.A, *supra*; R10-11 ["The fact that is that of course petitioner had some documents referencing Florida; that is where he lived before he moved to New York to take care of his brother.']). Yes, Kermit used his Florida license when applying for a

bank account in March 2020—it was the identification document he possessed, it was valid until March 2021 (R429), and obtaining a new license would have taken valuable time. The Social Security and Wells Fargo documents do demonstrate that Kermit did not update his address with those entities, but he had no pressing reason to do so because of electronic payments. Indeed, these documents do not indicate that Kermit maintained a connection to Florida. Rather, the Social Security Administration and Wells Fargo evidently sent them directly to the housing company as part of the Section 8 income verification process (*see, e.g.*, R104-105 [Social Security authorization signed by Kermit]; R290-291 [showing that Wells Fargo records were faxed to Manhattan Plaza and referring to the Wells Fargo records as “3rd party verification”]; *see also* R238 [email from housing company leasing manager attaching, *inter alia*, the “2019 recertification documents from the tenant file”]).²⁴ In other words, these documents do not “bely” Kermit’s claim that he moved to the apartment in August 2018 whatsoever (*see* R428). It was irrational for the hearing officer to conclude that they did.

When passive connections are properly discounted, the evidence in the record illustrates Kermit’s ongoing, substantial physical nexus to the apartment: he

²⁴ The record shows that the housing company followed the HUD Multifamily Housing Program Handbook’s procedures for directly obtaining third-party verification of residents’ income and assets (*HUD Handbook 4350.3* at 5-55–5-59 [stating that owners may verify income and assets via “written documentation sent directly by the third-party source by mail or electronically by fax, email or internet” and may create their own verification forms for this purpose]).

signed lease documents for the apartment in August 2018 (R75-81); officially became part of the household composition in September 2018 (R72-73);²⁵ signed other lease documents over the following months, up until February 2020 (R83-96); obtained public benefits by listing the apartment as his address (R414-422); regularly made purchases around the apartment (R349-R374); and cared for his brother (*e.g.*, R206). Simply put, the record shows that Kermit did what a low-income person with a dying brother would be expected to do (R10 [“For someone thinking solely about future succession rights, they might take time away from a sick brother to deal with the bureaucracy of changing a driver’s license. But the typical layperson will get around to it eventually.”]). HPD’s contrary and myopic focus on what Kermit did not do—update his address, get a new driver’s license, vote (R429)—was irrational, arbitrary, and capricious. HPD made “a mountain out of a molehill” (R10), and its decision disregarded common sense and elemental fairness.

²⁵ Kermit joined the household as an authorized occupant. HPD’s arguments regarding the significance of the housing company not naming Kermit as a “tenant of record” fundamentally misunderstand the rules governing Mitchell-Lama housing (*see* Respondent-Respondent’s Brief 15, 38). Kermit’s only lawful path to a tenancy in the apartment was through succession (*see* 28 RCNY 3-02 [h] [15] [iii], [o], [p]). Plus, a tenant of record already has rights under the lease, making succession irrelevant. Kermit signed the lease documents as his brother’s power of attorney and as an authorized occupant who was ensuring that the household complied with Mitchell-Lama, Section 8, and the housing company’s rules.

IV. HPD must determine whether succession applicants have submitted proof that they are exempt from filing a tax return.

As an alternate ground for reversal, the Appellate Division found that Kermit did not submit a New York state tax return or establish his exemption from filing (R469). This ruling was in error.²⁶ HPD must evaluate whether the record demonstrates that an applicant's income falls below the filing threshold, rendering them exempt from filing a state tax return. Assuming that Kermit was required to comply with 28 RCNY 3-02(n)(4)(iv), he complied by providing evidence that he was exempt.

HPD's rule links primary residency to the tenant's submission of proof that they filed a "New York City Resident Income Tax Return" or "proof . . . that the tenant/cooperator was not legally obligated to file such tax return" (28 RCNY 3-02 [n] [4] [iv]). In its application instructions, HPD lists "Certified New York State Tax Returns" as a suggested document and advises, "[i]f you were required to file New York State tax returns, your failure to provide certified copies of those returns will result in a finding that the subject apartment was not your primary residence" (*Instructions: Application for Succession 2*). After the housing company denied Kermit's application, the hearing officer's instruction letter informed him that he must submit copies of his New York state tax returns or explain why he was not

²⁶ Also, HPD did not invoke the lack of a tax return in its decision, which means that it cannot deem it to be a categorical bar to succession now (*see, e.g.,* Petitioner-Appellant's Reply Brief at 19).

legally obligated to file them for the co-residency period (R226). Neither instruction document provides any guidance about how an applicant might prove their exemption from filing or what sort of explanation might be deemed acceptable.

HPD's determination regarding whether an applicant has complied with the tax return requirement must have a "foundation in fact" (*Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 231 [1974] [internal quotation marks omitted]). The only practical means that a low-income succession applicant has to prove that they are legally exempt from filing a tax return is to provide documentary evidence of the amount and source of their income (*see* 28 RCNY 3-02 [n] [4] [iv] [listing "because the tenant/cooperator's income for such year was below that required for the filing of a return" as one reason for an exemption]). A hearing officer need not look far for this evidence: it is contained in the income affidavits and verification documents in the tenant file, and should be present in every case (*e.g., id.* § 3-02 [l] [1], [2], [p] [3]). It is irrational for HPD to ignore these facts (*cf. Weekes v O'Connell*, 304 NY 259, 266 [1952] [stating that administrative agencies should perform a "conscientious and painstaking assessment of the evidence presented"]).

Then, the hearing officer can easily compare the applicant's income to the income tax filing thresholds for the relevant period (*see, e.g., Internal Revenue*

Service, *Publication 501 for Use in Preparing 2019 Return 2* [Jan. 13, 2020];²⁷ 20 NYCRR 151.2 [a] [1]). If the applicant’s income is below the threshold, they have proved that they were not “legally obligated” to file a “New York City Resident” income tax return in a straightforward and effective manner (*see* Administrative Code of City of NY § 11-1751 [a] [stating that New York City residents must file personal income tax return where required by state law]). If their income is above the threshold, the applicant may provide certified returns or establish that they are exempt from filing for some other reason.

Here, Kermit’s income affidavits and Social Security award letter establish that his annual income during the co-residency period was approximately \$10,000 in Social Security benefits (R93, 102-103). With that level of income from Social Security benefits, he was exempt from filing a federal income tax return (*see Publication 501 for Use in Preparing 2019 Return 2*). And because Social Security benefits are subtracted from federal adjusted gross income in determining New York adjusted gross income (20 NYCRR 112.3 [c] [4]), he was also exempt from filing a New York state tax return (*see id.* § 151.2 [a] [1]).

The hearing officer ignored the tax return issue (R426-431), perhaps because they recognized that Kermit was exempt from filing state taxes. Had they

²⁷Available at <https://www.irs.gov/pub/irs-prior/p501--2019.pdf> [last accessed July 30, 2025].

considered it, it would have been irrational for them to determine that Kermit did not satisfy the rule's requirements. Therefore, the Appellate Division erred in deeming Kermit ineligible for succession on this ground.

CONCLUSION

For the foregoing reasons, this Court should reverse the court below.²⁸

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Respectfully submitted,

THE LEGAL AID SOCIETY
Evan Henley, Of Counsel
Edward Josephson, Of Counsel
49 Thomas Street, Floor 5
New York, NY 10013
Tel: (212) 298-5233
ewhenley@legal-aid.org

²⁸The Legal Aid Society's Civil Law Reform Unit recognizes the contributions of legal intern Charlotte Saltzman to this brief.

CERTIFICATION

I hereby certify pursuant to 22 NYCRR 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

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Evan Henley