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STATEMENT OF FACTS AND FINDINGS

Re: BSA Application No.:
231 East 11th Street, Manhattan (Block 467, Lot 46)

Introduction

This is an application brought before the Board of Standards and Appeals ("the Board") by Paul K. Isaacs, owner of a four-story building at 231 East 11th Street, Manhattan ("the Premises"), to appeal a determination of the New York City Department of Buildings ("DOB") dated April 10, 2012 ("the Denial") (copy of the Denial annexed hereto as Exhibit A).

Mr. Isaacs is an amateur radio or "ham" radio operator, and holds an Extra Class Amateur Radio operator license, call sign W2JGQ, issued by the Federal Communications Commission ("FCC") (copy of license annexed hereto as Exhibit B).

Mr. Isaacs has erected an antenna support structure, with antenna, ("the Antenna System") for the purpose of communicating with radio hams overseas on frequencies that are appropriate for that purpose. The Antenna System is approximately 40 feet high (see photograph of the Antenna System, annexed hereto as Exhibit C). In 2010, DOB issued building permit No. 120213081 for the Antenna System ("the Permit") (see copy of building permit and supporting documentation, annexed hereto as Exhibit D).

However, in January, 2011, DOB revoked the Permit (see copy of DOB's intent-to-revoke letter, annexed hereto as Exhibit E) and issued a stop-work order for the Premises ("the Stop-Work Order"). The intent-to-revoke letter stated that the revocation was based on a single objection: "Proposed Antenna is not accessory to the function or principal use of the building. Comply with [New York City Zoning Resolution ("ZR")] 12-10."

Mr. Isaacs appealed the revocation of the Permit and the issuance of the Stop-Work Order using DOB's Form CCD-1 (Exhibit A). DOB, in the person of First Deputy Commissioner Thomas Fariello, issued the Denial in response. Mr. Fariello wrote that "[a]s per ZR 22-21, radio or television towers, non-accessory, are permitted by special permit of the BSA. The proposed ham radio antenna, approximately 40 feet high, is not customarily found in connection with residential buildings and is therefore not an accessory use to the building" (Exhibit A).

Mr. Isaacs hereby appeals to the Board from the Denial, and seeks a determination from the Board reinstating the Permit and rescinding the Stop-Work Order. An antenna system of this type is a customary use of a roof-top (one cannot put this sort of antenna indoors), and an ordinary accessory use of the Premises, which is the residence of Mr. Isaacs. Accordingly, the ZR is no bar to the maintenance of the Antenna System at the Premises by Mr. Isaacs.

Furthermore, and in the alternative, federal laws and FCC regulations strongly favor the maintenance of ham radio equipment such as the Antenna System, and pre-empt local ordinances which prohibit the maintenance of such equipment, either on their face or as applied.

Background

The Premises is located on East 11th Street, between Second and Third Avenues, in an R8B zone (see Zoning Map 12c, annexed hereto as Exhibit F). The building is a four-story tenement, on a 25' by 100' lot, of the type typically found on Manhattan's lower east side. Upon information and belief, the building was built in the 1870's. The building is not landmarked, and the surrounding area is not a historical district.

Mr. Isaacs' family acquired the Premises in 1960. Mr. Isaacs, personally, became an owner of the Premises as joint tenant with his father, Max Isaacs, in 1999 (see copy of deed, annexed hereto as Exhibit G). Max Isaacs died in 2011, leaving Mr. Isaacs as sole owner of the Premises. Mr. Isaacs has maintained a residence in the Premises since 1975.

Mr. Isaacs is in frequent contact with other amateur radio operators around the world, including his close friends Baruch Zilberstraz, call sign 4Z4RB, in Nitzanay-Oz, Israel, and Recardo Pontes, call sign PT7AUT, in Fortaleza, Brazil. Both Zilberstratz and Pontes have been guests in Mr. Isaacs' New York home.

Over the years, Mr. Isaacs' ham radio activities have included interventions in emergencies and assistance in humanitarian efforts. In 1977, Mr. Isaacs received an emergency dispatch by ham radio from the Peoples' Temple Agricultural Project in Guyana, and succeeded in arranging contact over ham radio between Guyana and doctors in California for the provision of medical assistance. For his efforts, Mr. Isaacs received a letter of commendation from the White House (see copy of letter, annexed hereto as Exhibit H).

Mr. Isaacs first attempted to operate an amateur radio station at the Premises using a wire dipole antenna only ten feet above the roof. This antenna allowed coverage, at times, on the 14 MHz amateur radio band, out to distances of only 800 miles, and did not allow reliable international communications of the sort in which Mr. Isaacs routinely desires to engage.

Therefore, in 2009, Mr. Isaacs constructed the Antenna System, on a support structure roughly thirty feet in height on the roof of the Premises. The entire structure was designed by Jung Wor Chin, P.E., and included guy wires to hold it securely in place (see photograph, Exhibit C).

On November 2, 2009, the Premises received a violation from DOB for work without a building permit in conjunction with construction of the Antenna System (see violation documentation, annexed hereto as Exhibit I).

Accordingly, in 2009, Mr. Isaacs began the process of applying for a building permit from DOB for the Antenna Structure. DOB Plan Examiner Rosanne Dimaio rejected Mr. Isaacs's first application on or about December 22, 2009, stating: "Existing antenna is contrary to Section ZR 23-62 (Permitted obstructions) and thus is not permitted."

ZR Section 23-62 states, in its entirety:

> In all Residence Districts, except as provided in Section 23-621 (Permitted obstructions in certain districts), **the following shall not be considered obstructions and may thus penetrate a maximum height limit** or front or rear sky exposure planes set forth in Sections 23-63 (Maximum Height of Walls and Required Setbacks), 23-64 (Alternate Front Setbacks) or 23-69 (Special Height Limitations):
>
> (a) Balconies, unenclosed subject to the provisions of Section 23-13;
>
> (b) Chimneys or flues, with a total width not exceeding 10 percent of the aggregate width of street walls of a building at any level;
>
> (c) Dormers having an aggregate width of street walls equal to not more than 50 percent of the width of the street wall of a detached or semi-detached single- or two-family residence;
>
> (d) Elevators or stair bulkhead, roof water tanks or cooling towers (including enclosures), each having an aggregate width of street walls equal to not more than 30 feet. However, the product, in square feet, of the aggregate width of street walls of such obstructions facing each street frontage, times their average height, in feet, shall not exceed a figure equal to four times the width, in feet, of the street wall of the building facing such frontage;
>
> **(e) Flagpoles or aerials;**
>
> (f) Parapet walls, not more than four feet high;
>
> (g) Wire, chain link or other transparent fences.

> Building columns having an aggregate width equal to not more than 20 percent of the aggregate width of street walls of a building are a permitted obstruction, to a depth not exceeding 12 inches, in an initial setback distance, optional front open area, or any other required setback distance or open area set forth in Sections 23-63, 23-64, or 23-65 (Tower Regulations).
>
> *(Emphasis added).*

Mr. Isaacs, assisted by Harold Weinberg, P.E., then submitted a Zoning Resolution Determination Form to DOB, in which Mr. Isaacs sought DOB's approval for the Antenna System.

On July 29, 2010, DOB's Deputy Borough Commissioner for Manhattan, Bryan Winter, R.A., indicated his approval of Mr. Isaacs's application on the Zoning Resolution Determination Form, citing to ZR §23-62 (see copy of approval, annexed hereto as Exhibit J). Thereafter, DOB Plan Examiner Dimaio approved a revised set of plans for the Antenna System on or about August 23, 2010 (see copy of approved plans, annexed hereto as Exhibit K).

DOB issued Building Permit No. 120213081-01-AL on September 30, 2010 ("the Permit"), indicating DOB's full approval of the Antenna System. See Exhibit D.

Mr. Isaacs enjoyed unimpeded use of the Antenna System for more than three months, until January 13, 2011, at which time Mr. Isaacs received a letter from DOB informing him that DOB intended to revoke the Permit. The sole reason stated was: "Proposed Antenna is not accessory to the function or principal use of the building. Comply with [ZR] 12-10." See Exhibit E.

ZR 12-10 is the definitions section of the Zoning Resolution. In pertinent part, it states:

> An "accessory use":
>
> (a) is a use conducted on the same zoning lot as the principal use to which it is related (whether located within the same or an accessory building or other structure, or as an accessory use of land), except that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, accessory docks, off-street parking or off-street loading need not be located on the same zoning lot; and
>
> (b) **is a use which is clearly incidental to, and customarily found in connection with, such principal use;**
>
> and

(c) is either in the same ownership as such principal use, or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use.

When "accessory" is used in the text, it shall have the same meaning as accessory use.

* * *

An accessory use includes:

* * *

(16) Accessory radio or television towers.

(Emphasis added).

By revocation retroactively dated January 12, 2011, DOB revoked the Permit and instituted a stop-work order on Mr. Isaacs's property, which remains in effect to even date (see copy of printout from DOB Web site for the Premises, annexed hereto as Exhibit L).

The undersigned counsel, on behalf of Mr. Isaacs corresponded with DOB in an attempt to have DOB reinstate the Permit. (See copy of correspondence, annexed hereto as Exhibit M).

In particular, DOB was asked to consider 47 C.F.R. §97.15(b)(2006), a regulation of the FCC, and FCC Opinion and Order PRB-1, Federal Preemption Of State and Local Regulations Pertaining To Amateur Radio Facilities, 101 FCC 2d 952, 50 Fed. Reg. 38813 (Sept. 25, 1985) ("PRB-1").

PRB-1 may be accessed at:
http://wireless.fcc.gov/services/index.htm?job=prb-1&id=amateur&page=1 (last accessed May 7,2012) (see copy of PRB-1, annexed hereto as Exhibit N).

The undersigned counsel repeatedly brought DOB's attention to PRB-1's preemption of local regulations concerning amateur radio, and to the requirements of PRB-1, codified at 47 C.F.R. § 97.15(b), mandating that local authorities "reasonably accommodate" amateur radio. See Exhibit M; see also Discussion, *infra*.

DOB's only response to this correspondence was to dispatch inspectors to the Premises, who issued citations for building code violations for conditions totally unrelated to the Antenna System (see copies of violations, annexed hereto as Exhibit O), and who forced Mr. Isaacs to erect a costly sidewalk scaffold to protect the street from the allegedly crumbling façade of the Premises.

Perversely, DOB refused to lift the stop-work order, even partially, preventing Mr. Isaacs from repairing the Premises – effectively leaving Mr. Isaacs in a legal limbo.

On March 29, 2011, DOB issued a criminal summons to Max Isaacs, Mr. Isaacs's father and co-tenant in common as fee owner of the Premises, because of the alleged illegality of the Antenna System (see copy of summons, information, and supporting papers, annexed hereto as Exhibit P).

The undersigned counsel pointed out in a letter to DOB that there was no legal basis for the summons, and asked that it be rescinded (see copy of letter, annexed hereto, as Exhibit Q). In that letter, the undersigned counsel discussed each of the purported bases for the Antenna System's illegality, as per DOB's citation, and explained why each was inapplicable:

> More importantly, though, I write to respectfully request that the Department reconsider the underlying issue of the radio antenna itself. On or about March 29, 2011, my client received a criminal court summons (attached as Exhibit C), stating that the "defendant has failed to remove radio antenna tower from the roof." The sections of law cited in the violation are as follows:
>
> - Zoning Resolution §12-10. This is a section of definitions. It does not prohibit radio antennas.
> - Administrative Code §28-201.1. This section states generally that it shall be unlawful to violate the Administrative Code, Zoning Resolution, or Rules of the City of New York. It does not specifically prohibit radio antennas.
> - Administrative Code §28-203.1. This section lays out criminal penalties for persons convicted of violations of other laws or rules administered by the Department. It does not specifically prohibit radio antennas.
> - 1 RCNY §102-01. This section classifies Environmental Control Board violations and describes procedures for adjudicating them. It does not specifically prohibit radio antennas.
>
> Thus, it appears as if the Department wants to characterize this antenna as illegal and wants to punish my clients for having it, but cannot even cite to a specific section of law that makes the antenna illegal. On the other hand, in my March 8, 2011 letter, I pointed out that radio antennas are considered legal by Zoning Resolution §23-62(e), and that Federal law and policy strongly favors the maintenance of amateur radio equipment.

The criminal summons was dismissed upon the death, on June 26, 2011, of defendant Max Isaacs.

On or about June 5, 2011, counsel for Mr. Isaacs submitted to DOB's Technical Affairs Unit an application for a reconsideration of DOB's decisions to revoke the Permit and to issue a stop-work order on the Premises.

On July 12, 2011, and again on April 10, 2012,[1] DOB denied Mr. Isaacs's request for reconsideration (see Exhibit A). DOB's Deputy Borough Commissioner for Manhattan, Thomas J. Fariello, R.A., stated:

> The request to lift the Stop Work Order associated with application no. 120213081 to legalize a ham radio antenna above the existing 5 story residential building[2] is hereby denied.
>
> As per ZR 22-21, radio or television towers, non-accessory, are permitted by special permit of the BSA.
>
> The proposed ham radio antenna, approximately 40 feet high, is not customarily found in connection with residential buildings and is therefore not an accessory use to the building.

ZR Section 22-21 states, in pertinent part:

> In the districts indicated, the following uses are permitted by special permit of the Board of Standards and Appeals, in accordance with standards set forth in Article VII, Chapter 3.
>
> R1 R2 R3 R4 R5 R6 R7 R8 R9 R10
> Radio or television towers, non-accessory

Mr. Isaacs, still unable to fix the alleged violations of building code at the Premises, and saddled with the responsibility to maintain an expensive sidewalk scaffold, again appealed to DOB to provide at least a limited lift of the stop-work order so that the façade violations could be addressed.

DOB's only response was to issue another violation on October 11, 2011 to the Premises for the Antenna System (see copy of violation, annexed hereto as Exhibit R).

[1] In the latter part of 2011 and early 2012, Mr. Isaacs considered legal remedies other than the instant appeal to the Board. DOB re-issued its July 12, 2011 denial on April 10, 2012 to enable Mr. Isaacs to make the instant appeal.
[2] Incorrect. The Premises has only four stories.

DISCUSSION

Mr. Isaacs hereby appeals from DOB's Denial, and seeks a resolution of the Board reinstating the Permit and lifting the Stop-Work Order.

Mr. Isaacs grounds his appeal on three arguments in the alternative. First, the Antenna System is an "accessory use" under the ZR. Consequently, there is nothing in the ZR, or any other law, preventing Mr. Isaacs from maintaining the Antenna System. DOB's Denial has no basis in law.

Second, to the extent that DOB maintains that an outdoor amateur radio antenna above the roof is not an "accessory use" pursuant to the ZR, the ZR effectively precludes international communications and is thus void – preempted by federal law and regulation.

Third, to the extent that DOB maintains that the Antenna System is impermissible due to its height, DOB's interpretation of the ZR is subject to limited preemption because DOB has not "reasonably accommodated" Mr. Isaacs' needs.

BSA Jurisdiction

Pursuant to New York City Charter §666(6)(a), the Board has power to hear and decide appeals from orders of a deputy commissioner of buildings, such as the Denial.

The instant appeal is timely made as within thirty days of the Denial, dated April 10, 2012. 2 RCNY § 1-07(b).

A Non-Commercial, Amateur ("Ham") Radio Antenna is an Accessory Use

The cited basis for the Denial is that the Antenna System is "non-accessory" (Exhibit A).

As shown *supra,* following its review of the building plans prepared by Mr. Isaacs' engineer, DOB initially accepted the Antenna System as structurally sound and otherwise appropriate by issuing the Permit.

Later, several months *after* issuance of the Permit, DOB changed its mind and stated that the Antenna System was not an "accessory use" to the Premises, as detailed *supra.*

DOB acknowledges that the principal use of the Premises is as a residential building. Moreover, it is uncontested that Mr. Isaacs maintains a residence at the Premises, and that his amateur radio station is licensed for this address.

As shown herein, 47 C.F.R. § 97.1, Public Law 103-408, PRB-1 and 47 C.F.R. §97.15(b) explicitly contemplate, and provide the regulatory framework for, *amateur* radio communications.

Mr. Isaacs' radio license, call sign **W2JGQ**, is an *amateur* radio license (see Exhibit B).

Mr. Isaacs is not engaged in a commercial use of the Antenna System, and DOB has made no showing, or even a claim, that Mr. Isaacs is engaged in commercial use of the Antenna System.

Indeed, DOB has made no factual showing at all. The entire justification for revoking the Permit is an erroneous conclusion of law that the Antenna System is not an "accessory use" to the Premises.

However, Mr. Isaacs' use of the Antenna System meets the definition of "accessory use" in ZR §12-10 as "a use which is clearly incidental to, and customarily found in connection with, such principal use; and is either in the same ownership as such principal use, or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use." Mr. Isaacs' use of the Antenna System is clearly that of a hobbyist engaged in an avocation from his own residence.

New York courts have discussed the definition of "accessory use" as follows:

> "[I]ncidental", when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of "incidental" would be to permit any use which is not primary, no matter how unrelated it is to the primary use. The word "customarily" is even more difficult to apply. Courts have often held that the use of the word "customarily" places a duty on the board or court to determine whether it is usual to maintain the use in question in connection with the primary use. The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use.' "
>
> 7-11 Tours, Inc. v. Board of Zoning Appeals of Town of Smithtown, 454 N.Y.S.2d 477, 478 (2d Dept. 1982).

In the instant case, there is no doubt that Mr. Isaacs' hobby of "ham" radio use is both "attendant to," and "commonly, habitually, and by long practice reasonably associated with" the primary use of the Premises as a residence. Courts nationwide have consistently held for decades that amateur radio is an accessory use to a residence. See, e.g., Bay v. Zoning Bd. of Appeals of Town of New Caanan, No. CV91 0113378 S, 1993 Conn. Super. LEXIS 2345 (Conn. Super. Ct. Sept. 9, 1993) (in sustaining amateur radio operator's challenge to town's ban of 72-foot and 59-foot antennas, holding that "the record does not support a finding that an amateur radio antenna is not an accessory use"); Pirtle v. Wade, 593 P.2d 1098 (Okla. Ct. App. 1979); Town of Paradise Valley v. Lindberg, 551 P.2d 60 (Ariz. Ct. App. 1976); Dettmar v. County Bd. of Zoning Appeals, 273 N.E.2d 921 (Ohio Com. Pl. 1971)("Appellant is an amateur radio operator. This is a hobby."); Skinner v. Zoning Bd. of Adjustment, 193 A.2d 861 (N.J. Super. Ct. 1963); Appeal of Lord, 81 A.2d 553 (Pa. 1951); Wright v. Vogt, 80 A2d 108 (N.J. 1951); Village of St. Louis Park v. Casey, 16 N.W.2d 459 (Minn. 1944).[3]

[3] Because the issues raised in this appeal implicate questions of Federal law, useful guidance can be found in decisions from many federal and state courts without this jurisdiction. Copies of the decisions from other jurisdictions cited within are available upon request, for the convenience of the Board and DOB.

The FCC Web site, at http://wireless2.fcc.gov/UlsApp/UlsSearch/searchAmateur.jsp (last accessed May 7, 2012), lists the names of all amateur radio licensees in the United States. This Web site lists a total of 1,086 active amateur radio licenses in Manhattan. At least 2,235 licensees can be found in the other four boroughs of New York City over which DOB has jurisdiction.[4] Thus, there are at least 3,321 persons with active amateur radio licenses within New York City, not including those who may legally and properly be active within New York City under licenses issued to other locations. (Unlike broadcast station licenses, amateur radio licenses are not necessarily limited to one location.)

Almost all of these licenses are issued to natural persons. (A small number of licenses are issued to non-profit groups, such as the American Red Cross Amateur Radio Club, or to the clubs that provided, for example, emergency communications on September 11, 2011, when both conventional and cellular telephone systems failed.) Many of these licensed persons enjoy long distance amateur radio communications from their residences, as contemplated by 47 C.F.R. § 97.1, Public Law 103-408, PRB-1, and, most particularly, 47 C.F.R. §97.15(b). Of necessity, then, outdoor antennas to support international communications are commonly in use by radio amateurs in New York City.

Thus, DOB should not be heard to state that Mr. Isaacs' amateur radio station "is not customarily found in connection with residential buildings and is therefore not an accessory use to the building" (see Exhibit A; see also P.L. 103-408, which recognizes that amateur radio users operate "from their residences"[5]).

One possibility is that DOB grounds its erroneous conclusion of law on its apprehension that the Antenna System is "approximately 40 feet high" (see Exhibit A), and that, seemingly, by virtue of this height, it is therefore "non-accessory."

However, as shown *supra,* ZR Section 23-62(e) specifically excludes "aerials" from height regulations in residential districts. The primary definition of aerial as a noun is "antenna." http://www.merriam-webster.com/dictionary/aerial?show=1&t=1320442815 (last accessed May 8, 2012).

Moreover, there is no height restriction whatsoever included when "aerials" are mentioned in ZR Section 23-62(e). A cardinal rule of statutory construction is that what is left out of a statute is intended to be left out, and that a statute should not be interpreted to add language that is not there. American Surety Co. of New York v. Town of Islip, 48 N.Y.S.2d 749 (2d Dept. 1944).

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[4] There are 1,129 licensees in Brooklyn, New York; 459 in Bronx, New York; and 545 in Staten Island, New York. A search for licensees in "Queens, New York" yields 102 results. The number of licensees in Queens is likely far higher due to the common practice in Queens County to list one's address by neighborhood, i.e., "Flushing," "Astoria," "Jamaica," and so forth, rather than as "Queens."

[5] The full text of Public Law 103-408 (J.Res., 103d Congress, 1994) appears *infra.*

Thus, the cited sections of the ZR do not restrict the height of the Antenna System in any way. No other section of the ZR imposes a regulation, with regard to height or otherwise, which prohibits Mr. Isaacs from using the Antenna System. Moreover, DOB points to no other law, rule, or regulation which prohibits Mr. Isaacs from using the Antenna System.

Accordingly, as a matter of simple statutory construction, the Board should decide that Mr. Isaacs' installation and maintenance of the Antenna System is a lawful use.

To the Extent that DOB Maintains that the Antenna System is Not an "Accessory Use," the ZR is Void as Preempted by Federal Law and Regulation

The text of 47 C.F.R. § 97.1,[6] Basis and purpose [of the amateur radio service], reads:

> The rules and regulations in this part are designed to provide an amateur radio service having a fundamental purpose as expressed in the following principles:
>
> (a) Recognition and enhancement of the value of the amateur service to the public as a as a voluntary **noncommercial** communication service, particularly with respect to providing emergency communications.
>
> (b) Continuation and extension of the amateur's proven ability to contribute to the advancement of the radio art.
>
> (c) Encouragement and improvement of the amateur service through rules which provide for advancing skills in both the communication and technical phases of the art.
>
> (d) Expansion of the existing reservoir within the amateur radio service of trained operators, technicians, and electronics experts.
>
> (e) Continuation and extension of the amateur's unique ability to enhance international goodwill.
>
> *(Emphasis added).*

The text of Public Law 103-408 (J.Res., 103d Congress, 1994) reads:

> SECTION 1: FINDINGS AND DECLARATIONS OF CONGRESS
>
> Congress finds and declares that --
>
> (1) radio amateurs are hereby commended for their contributions to technical progress in electronics, and for their emergency radio communications in times of disaster;

[6] As per the United States Supreme Court, FCC regulations have the force of statutes. City of New York v. FCC, 486 U.S. 57, 63-64 (1988).

(2) the Federal Communications Commission is urged to continue and enhance the development of the amateur radio service as a public benefit by adopting rules and regulations which encourage the use of new technologies within the amateur radio service; and

(3) **reasonable accommodation** should be made for the effective operation of amateur radio from **residences,** private vehicles, and public areas, and that **regulation at all levels of government should facilitate and encourage amateur radio as a public benefit.**

(Emphasis added).

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_bills&docid=f:sj90enr.txt.pdf (last accessed May 7, 2012).

The text of 47 C.F.R. § 97.15(b) reads:

Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. **(State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose.** ***See*** **PRB–1, 101 FCC 2d 952 (1985) for details.)**

(Emphasis added).

In PRB-1, see Exhibit N, the FCC explicitly promulgated a scheme of preemption of state and local regulations pertaining to amateur radio antenna systems:

24. Similarly, we recognize here that there are certain general state and local interests which may, in their even-handed application, legitimately affect amateur radio facilities. Nonetheless, there is also a strong federal interest in promoting amateur communications. Evidence of this interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service. Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the Amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. **Upon weighing these interests, we believe a limited preemption policy is warranted. State and local regulations that operate to preclude amateur**

communications in their communities are in direct conflict with federal objectives and must be preempted.

(Emphasis added).

In PRB-1, see Exhibit N, the FCC has further ruled that antenna height is important to effective radio communications:

> 25. **Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in.** For example, an antenna array for International amateur communications will differ from an antenna used to contact other amateur operators at shorter distances. We will not, however, specify any particular height limitation below which a local government may not regulate, nor will we suggest the precise language that must be contained in local ordinances, such as mechanisms for special exceptions, variances, or conditional use permits. Nevertheless, local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.
>
> *(Emphasis added).*

DOB's act in wrongfully declaring that the Antenna System is "non-accessory" does not represent the "minimum practicable regulation" for the Antenna System (see also 47 C.F.R. § 97.15(b), *supra*). It must be stressed here that there is no "balancing test" involved – the federal government has already done the balancing in promulgating PRB-1 and 47 CFR § 97.15(b):

> Although some courts have evaluated whether the municipality properly balanced its interests against the federal government's interests in promoting amateur communications, we read PRB-1 as requiring municipalities to do more – PRB-1 specifically requires the city to accommodate reasonably amateur communications. This distinction is important, because a standard that requires a city to accommodate amateur communications in a reasonable fashion is certainly more rigorous than one that simply requires a city to balance local and federal interests when deciding whether to permit a radio antenna.
>
> Kleinhaus v. Zoning Bd. of Appeals, Town of Cortlandt, 3/26/96 N.Y.L.J. 37 (col. 3) (Sup. Ct. Westchester County March 26, 1996) (annulling determination of town zoning board which prevented amateur radio operators from installing 120-foot antenna at their residence).

In 1999, the FCC made its position on balancing tests clear. FCC DA 99-2569 may be found at http://wireless.fcc.gov/services/amateur/prb/prb1999.html (last accessed May 7, 2012), and reads:

> 7. . . . PRB-1 decision precisely stated the principle of "reasonable accommodation". In PRB-1, the Commission stated: "Nevertheless, local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." **Given this express Commission language, it is clear that a "balancing of interests" approach is not appropriate** in this context.
>
> . . .
>
> 9. . . . [W]e believe that PRB-1's guidelines brings *(sic)* to a local zoning board's awareness that **the very least regulation necessary** for the welfare of the community must be the aim of its regulations **so that such regulations will not impinge on the needs of amateur operators** to engage in amateur communications.
>
> *(Emphasis added.)*

If DOB's position is that *no* outdoor amateur radio antenna system is permissible, DOB has effectively precluded Mr. Isaacs from the international amateur service communications that he desires to engage in.

Therefore, such an interpretation of the ZR by DOB is preempted on its face by the federal laws, rules, and regulations cited herein. Pentel v. City of Mendota Heights, 13 F.3d 1261 (8th Cir. 1994); Themes v. City of Lakeside Park, 779 F.2d 1187 (6th Cir. 1986) (per curiam); Bodony v. Incorporated Vill. of Sands Point, 681 F.Supp. 1009 (E.D.N.Y. 1987).

To the Extent that DOB Maintains that the Antenna System is Impermissible Due to tts Height, DOB's Interpretation of the ZR as Applied to the Premises is Subject to Limited Preemption because DOB has Not "Reasonably Accommodated" Mr. Isaacs' Needs

On the other hand, if DOB's position is that Mr. Isaacs' amateur radio antenna system *at its height above the roof of the Premises* is impermissible, DOB has failed to reasonably accommodate the international amateur service communications that Mr. Isaacs desires to engage in, and, by this interpretation, DOB's position is subject to the limited preemption of PRB-1 and 47 CFR § 97.15 (b) and is preempted as applied.

Mr. Isaacs sought an expert opinion to confirm his own understanding, based on decades of experience as a "ham" radio operator, that the same antenna system that is now 40 feet above the roof, if repositioned to only ten feet above the roof (if that were permitted by DOB, and, under the interpretations put forward DOB it is not permitted) would not allow effective

communications to the two target areas he desires to contact (Israel and Brazil, as discussed *supra*). Mr. Isaacs also asked the expert to model the results with the formerly permitted antenna system. The results are a Needs Analysis by James Nitzberg, B.S.E.E. (annexed hereto as Exhibit S).

Mr. Nitzberg concludes that the same antenna system only ten feet above the roof is totally unsatisfactory for the communications desired, and that the existing Antenna System, for which the Permit has been revoked, is better, yet also unsatisfactory for effective communications to the target areas. However, Mr. Isaacs is willing to compromise by accepting the Permit as originally issued and the Antenna System as currently constituted.

As demonstrated by modeling in the Needs Analysis (Exhibit R), and reflecting Mr. Isaacs' experience, Mr. Isaacs' previous antenna was inadequate for the sorts of international communications in which he wished to engage, and the current Antenna System is of the minimum bulk necessary to support Mr. Isaacs' desired communications.

Again, courts throughout the United States support Mr. Isaacs' position. In the leading case of Howard v. City of Burlingame, 937 F.2d 1376 (9th Cir. 1991), the United States Court of Appeals, Ninth Circuit, found that in order to "reasonably accommodate" an amateur radio operator and his or her proposed antenna, a municipality must, at the very least, consider the application, make factual findings, and attempt to negotiate a satisfactory conclusion with the applicant. Howard, 937 F.2d at 1380. Here, DOB has met, at best, the first of these requirements – if its disregard of Mr. Isaacs' correspondence (Exhibits M and Q) can be regarded as "consideration." Clearly, in the Denial itself (Exhibit A), there are no findings of fact whatsoever, such as those presented by Mr. Isaacs in his Needs Analysis (Exhibit R) – only a conclusory statement that the Antenna System is "non-accessory." Nor was there any attempt by DOB to negotiate a satisfactory conclusion with Mr. Isaacs. Thus, in no way can DOB be said to have "reasonably accommodated" Mr. Isaacs and the Antenna System.

Similarly, in Pentel v. City of Mendota Heights, 13 F.3d 1261 (8th Cir. 1994), the United States Court of Appeals, Eighth Circuit, found that a Minnesota city did not reasonably accommodate an amateur radio operator when it limited her to using a 56 ½ - foot antenna at her residence, when she presented evidence that a 68-foot antenna was necessary for the communications in which she desired to engage. The Eighth Circuit reversed the district court and ordered the city to reasonably accommodate the operator's interests. See also MacMillan v. City of Rocky River, 748 F. Supp. 1241 (N.D. Ohio 1990) (city, in prohibiting amateur radio operator from maintaining 30-foot antenna at his residence, did not apply ordinance so as to reasonably accommodate operator; city's action was thus preempted by PRB-1); Bulchis v. City of Edmonds, 671 F. Supp. 1270 (W.D. Wash. 1987) (city's ordinance was preempted, as applied, to homeowner who applied for, but was denied, permit to erect 70-foot amateur radio tower; ordinance, as applied, conflicted with federal regulation).

There is simply no way that DOB's actions can be viewed as a "reasonable accommodation" of Mr. Isaacs' interests, as per PRB-1 and the cases interpreting it. Accordingly, DOB's Denial must be overturned by this Board.

Conclusion

Given DOB's unclear rationale for revoking the Permit, Mr. Isaacs has no way of knowing how to plan an antenna system for the international communications he desires to engage in that will comply with DOB's interpretation of the ZR.

Moreover, DOB has submitted Mr. Isaacs to a pattern of harassment by continuing to write violations for the Antenna System, even after the illegality of DOB's conduct under PRB-1 had been brought to their attention by the undersigned counsel. DOB has also trapped Mr. Isaacs in a legal Catch-22, by writing violations for other conditions at the Premises unrelated to the Antenna System, and simultaneously enforcing the Stop-Work Order, thus preventing Mr. Isaacs from addressing those violations.

Accordingly, Mr. Isaacs hereby appeals to the Board from the Denial, and seeks a determination from the Board reinstating the Permit and rescinding the Stop-Work Order.

Respectfully submitted,

Christopher M. Slowik, Esq.
Fred Hopengarten, Esq.[7]

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[7] Mr. Hopengarten, amateur radio call sign K1VR, is an attorney admitted to the bars of Maine, the District of Columbia, and the Supreme Court of the United States. Since 1990, Mr. Hopengarten has been a lawyer handling federal communications law matters -- especially those involving land use for antennas and towers. In 2001, the American Radio Relay League published his book Antenna Zoning for the Radio Amateur. The Second Edition appeared in April 2011. In 2009, the Society of Broadcast Engineers sponsored the commercial version of his book, covering broadcast, and cellular antenna structures, WISP and other antenna installations. Antenna Zoning - Professional Edition (440 pages) was published by Focal Press, a division of Elsevier.

He has published articles on various aspects of satellite television services and tower zoning in Communications-Engineering Digest, ComputerWorld, Dealerscope, Pay Television, Inside SPACE, CQ, Satellite Communications, Radio-Electronics, Cable Television Business, CableVision, Cable Marketing, Broadcasting, Cable Television Business, QST and the New England Real Estate Journal. A frequent speaker at technical and trade events, Mr. Hopengarten has been a guest speaker for the Electronics Industries Association, the Satellite Communications Users' Conference, Online Systems, Payment Systems, M.I.T., Boston University, Boston College Law School, Resource Management Consultants, the National Association of Broadcasters, the Dayton HamVention (tm), the Society of Broadcast Engineers and others. He has often been interviewed for articles, as well as TV and radio shows, on satellite television, mini-cable (tm) (SMATV) systems, and satellite teleconferencing. Selected articles discussing Mr. Hopengarten have appeared in The Wall Street Journal, UPI, The New York Times, The Atlanta Constitution, The Chicago Sun-Times, The Los Angeles Times, The Boston Herald, The Boston Globe, Business Week, and so forth, as well as virtually every cable and satellite communications trade publication.

Mr. Hopengarten is a graduate of Colby College (A.B., economics), Waterville, Maine, where he was the chief engineer of the college radio station, WMHB. He has taught Business Law, as well as Marketing, as an Associate Professor at Colby. He received his J.D. from the Boston College Law School. He is also a member of the Federal Communications Bar Association. He graduated from the Harvard Business School (M.B.A.).

Mr. Hopengarten maintains the Web site http://www.antennazoning.com, a nationally known resource.

Mr. Isaacs, Mr. Klein, and Mr. Slowik are pleased to welcome Mr. Hopengarten to their legal team.