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September 25, 2012

Chair Meenakshi Srinivasan
NYC Board of Standards and Appeals
40 Rector Street, 9th Floor
New York, NY 10006.
BY HAND

Re: BSA Application No.: 151-12-A
231 East 11th Street, Manhattan (Block 467, Lot 46)

Dear Chair Srinivasan and Honorable Members of the Board:

Introduction

Applicant Paul K. Isaacs ("Applicant") writes in further support of his May 9, 2012 application ("the Application") to appeal a determination of the New York City Department of Buildings ("DOB") dated April 10, 2012 ("the Denial") (copy of the Denial annexed as Exhibit A to the Application).

Several points raised by the Board and by counsel for DOB are addressed *seriatim* herein.

The Antenna is an Accessory Use

As stated at length and in detail in the Application, the Applicant maintains that the amateur radio or "ham" radio antenna that is the subject of the Application ("the Antenna") is an accessory use to Mr. Isaacs' residence at 231 East 11th Street, Manhattan ("the Premises"). Applicant's maintenance of the Antenna at his residence meets the definition of "accessory use" in New York City Zoning Resolution ("ZR") section 12-10: "a use which is clearly incidental to, and customarily found in connection with, such principal use."

At open hearing before the Board on August 21, 2012, Chair Srinivasan expressed a desire to "have the appellant give us evidence... in terms of the customary use" of ham radio antennas generally in New York City (see transcript of August 21, 2012 hearing, annexed hereto as Exhibit A, at p. 11; see also transcript, Exhibit A, p. 14: Chair Srinivasan: "I just want to see what it looks like. That's all.")).

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Similarly, counsel for DOB stated at that hearing: "I feel like we're speculating. Maybe if we could get some more facts on what else is out there, we'll be able to answer the question of customary." (Transcript, Exhibit A, p. 23).

Accordingly, since the August 21, 2012 hearing, the undersigned counsel have gathered a series of photographs showing similar antennas maintained throughout New York City. These photographs are shown in a document that is annexed hereto as Exhibit B.

Exhibit B depicts photographs of the Antenna and of the other antennas that have been maintained by the Applicant at the Premises over the years. It then shows photographs of nine other antennas from various locations in New York City.

All of the photographs were either taken by the undersigned counsel or were forwarded to counsel by other ham radio operators. As per the concern voiced by the undersigned counsel at the August 21, 2012 hearing that antenna owners would incriminate themselves and thereby subject themselves to possible enforcement action by DOB (transcript, Exhibit A, p. 32), in most cases,¹ the address of the antenna is not given.² For each antenna, the borough, the underlying zoning, and the size and use group of the residence to which the antenna is accessory is listed.

The antennas depicted are found in Manhattan, the Bronx, Brooklyn, and Queens. They are found on single-family homes, on massive apartment buildings, and on everything in between. They are found on buildings in residential zones, commercial zones, and manufacturing zones. There is thus an impressive diversity in the buildings depicted. They share one thing in common: they are all residences, and the ham radio antennas attached to each residence is, in each and every case, an accessory use to the main use of the building as a residence.

No representation is made that these are the only other antennas in New York City in addition to that of the Applicant. Given the time constraints of the hearing and the understandable reluctance of some ham radio operators to expose themselves to prosecution, the applicant's legal team was able to present these nine photographs. There are many more such antennas annexed to other residences throughout the City.

Moreover, as discussed by Fred Hopengarten, Esq., at the August 21, 2012 hearing (transcript, Exhibit A, p. 13-14), similar antennas have been maintained by ham radio operators throughout the world. Mr. Isaacs and his legal team have access to dozens of photographs of similar antennas installed as accessories to residences throughout the world, should the Board wish to see them.

¹ In one case (3985 Gouverneur Avenue, Bronx), a DOB permit was obtained for the antenna; accordingly, the address of this antenna is a matter of public record.

² Annexed to these papers is an affidavit in which the undersigned counsel swears on penalty of perjury that all of the photographs contained in Exhibit B were either taken by him personally or were forwarded to him by licensed ham radio operators in New York City.

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The Oxford English Dictionary (<http://oxforddictionaries.com>) defines "customarily" as "in a way that follows customs or usual practices; usually." As pointed out by Mr. Hopengarten (transcript, Exhibit A, p. 2), a use can be "customary" without being very common (the examples given by Mr. Hopengarten were swimming pools and tennis courts, which are undoubtedly "customarily" found as accessories to residences, regardless of the frequency with which they so appear).³

As long ago as 1944, the Supreme Court of Minnesota wrote:

The use of radios in private residences is as common as the use of refrigerators. The court takes judicial notice of the custom of householders to use outside antennae or aerials for radio reception. This custom may be waning on account of the improvement of inside aerials, especially for local reception, but it is still recognized as good practice, especially for long-range, short-wave reception, for which most good sets are equipped. While many aerials are attached to poles above the roofs of dwellings, and even to trees, the use of separate poles or masts for this purpose still prevails when a householder seeks the best reception. Such equipment is certainly customarily incident to a residential establishment.

The use of short-wave amateur sets for both reception and transmission is so common in the United States that the Federal Communications Commission licenses such sets for transmission within certain wave lengths, and there is an American Radio Relay League of the proprietors of amateur stations. That many, if not most, of these amateur stations are operated in connection with residences is too well known a fact to be ignored.

Village of St. Louis Park v. Casey, 16 N.W.2d 459, 218 Minn. 394 (1944).

Here, by virtue of the evidence adduced by the Applicant herein, it is easily seen that ham radio antennas "usually" are found as accessories to residences – in other words, when such antennas are found, they are attached to residences. Upon reviewing the array of photographs annexed hereto as Exhibit B, it is respectfully submitted that no other conclusion can be reached, and that the Applicant has thus shown that his use of the Antenna is, indeed, "a use which is clearly incidental to, and customarily found in connection with" the principal use of the Premises as Applicant's residence.

The Applicant stands ready to further supplement the evidence presented in Exhibit B should the Board so require.

³ In making this argument, Mr. Hopengarten was echoing the words of the court in *Town of Paradise Valley v. Lindberg*, 551 P.2d 60, 62 (Ariz.App.Div.1, 1976): "The fact that not many people have amateur radio antenna (sic) no more precludes this use than the fact that not many people have tennis courts precludes their use (in Arizona we could also add swimming pools)."

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DOB's Reliance on *Botanical Garden* to Deny that the Antenna is an Accessory Use is Misplaced

Although the Applicant's position is that his is an accessory use as a matter of law, and it is respectfully submitted that the factual evidence provided herein by the Applicant (Exhibit B) suffices to establish that the Antenna is an accessory use, the Applicant wishes to address DOB's misplaced reliance on the case of New York Botanical Garden v. Bd. of Standards and Appeals, 91 N.Y.2d 413 (1998). DOB attempts to use Botanical Garden as its sole support for the proposition that the Antenna is not an accessory use, when a clear reading of that case shows that it supports the Applicant.

A brief review of the facts is helpful. The New York Botanical Garden in the Bronx brought an Article 78 proceeding to annul the Board's ruling that a 480-foot radio tower on the adjacent campus of Fordham University was an accessory use to the university. Supreme Court, New York County upheld the Board's ruling, as did the Appellate Division, First Department, and, ultimately, the Court of Appeals of New York.

It is puzzling that DOB attempts to use Botanical Garden to support its contention that the Antenna is not an accessory use to the Premises, when the Board, the Supreme Court, the Appellate Division, and the Court of Appeals all found that the Fordham antenna was an accessory use, using arguments similar to those advanced by the instant Applicant. In the Fordham case, the Board expressly ruled that "the sole issue is whether the proposed tower is 'incidental to and customarily found in connection with the University and not whether the tower could be smaller or relocated to another site.'" Botanical Garden, 91 N.Y.2d at 418. The same is true in the instant case.

The trial court that upheld the Board's ruling found that "the record was devoid of any proof that the Botanical Garden would suffer any economic harm, that the tower presented any sort of danger or that the tower would prompt an undesirable change in the character of the neighborhood." Id. So here: DOB has done nothing to show that the Antenna has any sort of negative impact, or any impact at all, on the surrounding neighborhood, except to advance a conclusory argument in its statement to the Board that "the use is out of context in this residential neighborhood" and that "no other buildings have aerials even remotely approaching the proposed radio tower's size and complexity"⁴ (August 7, 2012 statement of DOB, at p. 5).

⁴ It is obvious that, in determining whether a proposed accessory use is "customarily" found in conjunction with the primary use, there need not be immediate geographical proximity of comparables. In Botanical Garden, Fordham was the only university neighboring the Botanical Garden; there were no other universities in the area. The Board, correctly, considered the custom and usage of other universities in reaching its determination that such radio antennas were customarily found as accessories to universities. It would have defied logic for the Board to have found that the antenna was not an accessory use because there happened to be no other 480-foot antennas appurtenant to other universities on the same block. Similarly, here, the fact that no other buildings on the immediate block have such antennas is a red herring. The Applicant has submitted substantial evidence (Exhibit B) that such antennas are "customarily" found as accessories to residences throughout New York City, and can provide evidence of such antennas around the world if so desired. That there does not happen to be another such antenna on the same block is completely irrelevant.

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In Botanical Garden, the Appellate Division, First Department, unanimously affirmed the trial court, finding that such antennas were commonplace at universities, id., just as the Applicant in the instant case has shown that antennas similar to his are commonplace at residences. Furthermore, the First Department court took pains to indicate that the trial court's ruling was "based on a statute that specifically lists radio towers as an 'accessory use.'" Id. Similarly, here, the Applicant has shown that the ZR lists radio antennas as an accessory use (see Application, p. 5; see also ZR 12-10(16)).

In upholding the lower courts in Botanical Garden, the Court of Appeals rejected the appellant's contention that it is not customary for universities to maintain radio towers of such height: "This argument ignores the fact that the Zoning Resolution classification of accessory uses is based upon functional rather than structural specifics." Id. at 421 (emphasis added). So argued the undersigned counsel at the August 21, 2012 hearing, in pointing out that DOB's contention – that the Antenna is not an accessory use because of its size (August 7, 2012 statement of DOB, at p. 3) – conflates use regulation and bulk regulation in a way that is not contemplated by the Zoning Resolution (transcript, Exhibit A, p. 31).

The Court of Appeals went on to observe:

[The specifics of the proper placement of the station's antenna, particularly the height at which it must be placed, are dependent on site-specific factors such as the surrounding geography, building density and signal strength. This necessarily means that the placement of antennas will vary widely from one radio station to another. Thus, the fact that this specific tower may be somewhat different does not render the Board's determination unsupported as a matter of law, since the use itself (i.e., radio operations of this particular size and scope) is one customarily found in connection with an educational institution. Moreover, Fordham did introduce evidence that a significant number of other radio stations affiliated with educational institutions in this country utilize broadcast towers similar in size to the one it proposes.]

Botanical Garden, 91 N.Y.2d at 422.

Again, the parallel to Applicant's case is obvious: the key determination is whether the use of the antenna is "customarily found" in connection with the primary use.

Moreover, the following holding of the Court of Appeals in Botanical Garden applies equally well to the instant case:

Separation of powers concerns also support the decision we reach today. Accepting the Botanical Garden's argument would result in the judicial enactment of a new restriction on accessory uses not found in the Zoning Resolution. Zoning Resolution § 12-10 (accessory use) (q) specifically lists "[a]ccessory radio or television towers" as examples of permissible accessory uses (provided, of course, that they comply with the requirements of Zoning Resolution § 12-10 [accessory

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use] [a], [b] and [c]). Notably, no height restriction is included in this example of a permissible accessory use. By contrast, other examples of accessory uses contain specific size restrictions. For instance, Zoning Resolution § 12-10 defines a "home occupation" as an accessory use which "[o]ccupies not more than 25 percent of the total floor area * * * and in no event more than 500 square feet of floor area" (§ 12-10 [home occupation] [c]) and the accessory use of "[l]iving or sleeping accommodations for caretakers" is limited to "1200 square feet of floor area" (§ 12-10 [accessory use] [b] [2]). The fact that the definition of accessory radio towers contains no such size restrictions supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of need.

Botanical Garden, 91 N.Y.2d at 422-23.

To summarize: there is no "bright line." There is no height restriction in the ZR beyond which an accessory antenna becomes non-accessory.⁵

The Applicant has already established that ZR 23-62(e) specifically exempts antennas from height regulations in residential districts, and that no height restrictions generally for radio antennas can be found in the ZR (Application, p. 10). The undersigned counsel so argued at the August 21, 2012 hearing: "There doesn't seem to be anything to say, well, twelve feet is okay but forty feet isn't - you know, is thirty-eight okay? Is thirty okay? Is twenty six-okay?" (Transcript, Exhibit A, p. 30). Chair Srinivasan recognized this when she asked counsel for DOB "Is there any fine line? Is there some bright line which you're saying that this makes it accessory and this makes it non-accessory?" (Transcript, Exhibit A, p. 23). Tellingly, counsel for DOB could only say that "I think I'll have to go back and think about that and discuss it with our men and see how we can better characterize or at least be more consistent with the way that—" (Transcript, Exhibit A, p. 23).

DOB thus makes an error of law in trying to forbid the Applicant's maintenance of the Antenna as non-accessory in the absence of a guiding statute. There is no law, rule, or regulation which permits DOB to deem the Antenna non-accessory on grounds of its purportedly excessive height; in so doing, it is arrogating powers onto itself far in excess of its statutory grant. "Laws are made by the law-making power, and not by administrative officers acting solely on their own ideas of sound public policy, however excellent such ideas may be." Picone v. Comm'r of Licenses of New York City, 241 N.Y. 157 (1925). "It does not lie within the power of the administrative agency to nullify the legislative intent and to engraft upon the statute, under the guise of a regulation, a policy which was neither expressed nor intended." N.Y. JURISPRUDENCE 2D Administrative Law §54 (2012); see also In re Federal Tel. & Radio Corp., 301 N.Y. 95 (1950); Sharp v. DeBuono, 723 N.Y.S.2d 279 (4th Dept. 2000) (administrative agency determination unguided by statutory standards overturned as arbitrary and capricious).

⁵ Even if such a bright line had been included in the ZR, it would have been invalidated by the federal government's passage of PRB-1 (see Application, p. 13, and Exhibit N thereto).

Thus, Botanical Garden wholly supports Applicant's position; DOB's reliance on it seems, at best, misguided. Moreover, DOB cites to no other cases to support the proposition that the Antenna is not an accessory use. Without Botanical Garden, which, we remind the Board, is not an "accessory use to a residence" case, it is respectfully submitted that DOB's case rests on hardly any support at all.

DOB's Own Memorandum from 1955 Acknowledges that Radio Towers are Accessory Uses to Residences

As mentioned at the August 21 hearing (transcript, Exhibit A, p. 5), the Applicant has located a copy of a memorandum from then-DOB Commissioner Bernard J. Gillroy, dated November 22, 1955, on the subject of radio towers ("the 1955 Memo"). A copy of the 1955 Memo is annexed hereto as Exhibit C. DOB had evidently been unaware of its existence at the time of the Application (transcript, Exhibit A, p. 17).

The 1955 Memo states that "[n]umerous radio towers have been erected throughout the city for amateur radio stations." It further states in numbered paragraph 6 that such towers "may be accepted in residence districts as accessory to the dwelling." Thus, it is plain that, even in 1955, DOB accepted that amateur radio towers were numerous in New York City and were customarily found as accessory to residences.

It has been noted that the 1955 Memo states that the height of such towers shall not exceed seventy-five feet above the adjacent ground (1955 Memo, Exhibit C, paragraph 3). As noted throughout the Application, the tower for the Antenna rises approximately forty feet above the roof of the Premises, which is, in turn, a four-story building roughly forty feet in height. However, DOB may not be heard to argue that the Antenna is illegal pursuant to the 1955 Memo, on the ground that the height of the Antenna plus the height of the building exceeds the 75-foot threshold found in the 1955 Memo. First, that height limit clearly applies to free-standing "towers" only.⁶ Second, and most importantly, that height limitation would have been invalidated by the passage by the United States government in 1985 of PRB-1, which, as shown at length in the Application, rendered unlawful any bright-line restrictions in local ordinances on the height of amateur radio antennas (see Application, p. 13, and Exhibit N thereto).

Thus, the 1955 Memo lends further support to the proposition that amateur radio antennas have, for decades, been found as accessory uses to residences in New York City.

⁶ Consider the common case of a nineteen-story apartment building, such as that pictured on Exhibit B, page 7. Such a building is more than 200 feet high. If the 1955 Memo were to be read so that the height of the building plus the height of the antenna structure had to be less than 75 feet, then no antenna at all could be maintained on the roof of a 19-story building. Even DOB would not agree with such a construction.

Case Law from Many Jurisdictions Holdsthat Ham Radio Antennas Are an Accessory Use to a Residence

In his July 12, 2012 response to the Board's Notice of Comments, the Applicant included a wealth of case law from courts around the country which have considered the question of whether an amateur radio antenna constitutes an accessory use to a residence.

For the Board's convenience, the most pertinent holdings from these cases are excerpted and annexed hereto as Exhibit D. The Board is respectfully urged to review these excerpts, as they show unequivocally that state and federal courts throughout the United States support the position of the Applicant in the instant case – amateur radio antennas are customarily found as accessories to residences.

Other Issues Raised at the August 21, 2012 Hearing are Unavailing

The Applicant wishes briefly to address a few other issues raised at the August 21, 2012 hearing, either by DOB or by the Board.

The Antenna is Not a Nuisance; Considerations Of Radio Interference are Beyond the Purview of the Board

Commissioner Montanez raised the issue of whether the Antenna posed a nuisance, in that the transmissions of the Antenna might conceivably interfere with radio and television signals of others in the building (transcript, Exhibit A, p. 8-9).

First, it must be noted that no proof of any such interference has been introduced into the record, by DOB or by any other party. As noted above, there is no evidence in the record of the hearing that the Antenna has any impact at all upon the neighborhood.

Second, as stated by Mr. Hopengarten (transcript, Exhibit A, p. 9-10), federal law is clear that the regulation of such matters is absolutely committed to the Federal government. Exhibit E hereto contains excerpts from statutory and case law to this effect.

Thus, consideration of the Antenna as a nuisance by the Board is indicated neither as a matter of fact nor as a matter of law.

The Fact that the Antenna Transmits is of No Legal Import

In its August 7, 2012 submission to the Board, DOB tries to make much of the fact that the Antenna "both receives and *transmits* radio signals" (August 7, 2012 submission, at p. 3), in order to insinuate that, because the antenna transmits signals, it is somehow not an accessory use.

There is absolutely no support in any statute, anywhere, for this proposition. The ZR does not treat antennas differently depending on whether or not they transmit. Furthermore, the entire body of federal law and regulation already introduced by the Applicant in the Application

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obviously contemplates that ham radio antennas would transmit signals – that is, indeed, the entire point of amateur radio.

Thus, it is respectfully submitted that this concern, as expressed by DOB in its August 7, 2012 submission and by counsel for DOB at the August 21, 2012 hearing (transcript, Exhibit A, p. 16 and following), should be disregarded entirely by the Board.

There Is No Requirement of "Need" in the Test for Accessory Use

The undersigned counsel once complained in a letter to DOB that "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" (Application, Statement of Facts and Findings, p. 6).

DOB's evident attitude of bias, uninformed by law or fact, against the Applicant and the Antenna was, unfortunately, evidenced in comments by counsel for DOB at the August 21, 2012 hearing. In comparing the Applicant, to Fordham University, counsel argued as follows:

MR. BEENE: But the point is that there was a need [for Fordham to maintain its antenna]. Here, there was a desire. There's not a need to operate ham radio. There's nothing inherent about a residence that –

CHAIR SRINIVASAN: I don't see that as relevant.

COMM. OTTLEY-BROWN: There is a need to reach a seventy-foot clearance in order to operate your ham radio properly and reach the Middle East.

There's a need to reach a seventy foot clearance regardless of how you do it, it seems; whether or not you're in a six or seventy story building with a ten foot antenna or a two-story building with a fifty foot antenna or a four story building with a thirty foot antenna on top.

You need to reach that clearance.

MR. BEENE: Well, with all due respect, it seems that the need was – the nexus between the institutional mission of Fordham and the tower seems a lot closer than the need to have a specific type of ham radio use in a residence.

CHAIR SRINIVASAN: I'm just troubled by the fact that you're interjecting need when, I think, the definition of accessory use doesn't speak to meet (sic – should be "need").

Transcript, Exhibit A, p. 26.

As a matter of simple statutory construction, Chair Srinivasan and Commissioner Ottley-Brown were absolutely correct to point out that there is no requirement of "need" in the definition of "accessory use" in ZR 12-10. DOB is evidently inventing this requirement from whole cloth.

More troubling is DOB's pejorative attitude toward the Applicant and his avocation of amateur radio. DOB ignores the considerable body of federal laws, rules, and regulations repeatedly brought to its attention by the Applicant, which plainly state that the United States Congress has found that "radio amateurs are hereby commended for their contributions to technical progress in electronics, and for their emergency radio communications in times of disaster," and that "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" (Public Law 103-408; see Application, Statement of Facts and Findings, p. 11-12).

Indeed, no better testimony to the value of Mr. Isaacs' avocation could be provided than the words of Mr. Isaacs himself. Mr. Isaacs rose at the conclusion of the August 21, 2012 hearing to address the Board, and he spoke briefly and eloquently about providing assistance with his ham radio to the People's Temple in Guyana, South America, in 1977 (see transcript, Exhibit A, at p. 33-34; see also Application, p. 4, and letter of commendation from President Carter to Mr. Isaacs, annexed to the Application as Exhibit H).

The Applicant is pleased to introduce into the record further evidence of the value of amateur radio in times of emergency, in the form of articles detailing the substantial contributions of ham radio operators in the wake of the September 11, 2001 terrorist attacks and in the Hurricane Katrina relief efforts in 2005, annexed hereto as Exhibit F.

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Thus, while DOB's calculus of "need" is entirely absent from the definition of "accessory use" as found in the ZR, it is respectfully submitted to the Board that the United States Congress and the Federal Communications Commission have made detailed findings of fact regarding the value of the amateur radio service to the nation at large, and that Mr. Isaacs, in particular, has already demonstrated the value of his services in time of emergency.

The Stop-Work Order Should Be Lifted Immediately

As detailed in the Application (Statement of Facts and Findings, p. 10), and as reiterated by the undersigned counsel in the August 21, 2012 hearing before the Board (transcript, Exhibit A, p. 32), a stop-work order perversely remains in effect at the Premises, which prevents Mr. Isaacs from making much-needed repairs to areas of the Premises that have nothing to do with the Antenna.

Counsel for DOB pledged to address this issue (transcript, Exhibit A, p. 33). Subsequently, the undersigned counsel communicated with DOB; yet, to date, nothing has been done.

Speaking plainly, this is grossly unfair to Mr. Isaacs. DOB has caught him in a catch-22 – DOB issues violations to him for conditions at the Premises, yet will not allow him to repair them. DOB is hereby again implored to lift the stop-work order so as to enable Mr. Isaacs to repair the Premises; and if it does not, it is hereby expressly requested that the Board include in its resolution deciding the instant appeal a provision directing DOB to lift the stop-work order.

Conclusion

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As has been conclusively shown herein, in the Applicant's other submissions, and in the August 21, 2012 hearing before the Board, the Antenna is an accessory use to Mr. Isaacs' residence at the Premises, and there is no provision of the ZR or other law that prevents its maintenance.

Accordingly, it is respectfully requested that the Board grant the instant appeal in its entirety.

I thank the Board for the evident care it has taken in the consideration of Mr. Isaacs' application.

Respectfully submitted,

Christopher M. Slowik, Esq.
Stuart A. Klein, Esq.
Fred Hopengarten, Esq.