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November 13, 2012

Chair Meenakshi Srinivasan
NYC Board of Standards and Appeals
40 Rector Street, 9th Floor
New York, NY 10006
*via e-mail*¹

**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:

Applicant Paul K. Isaacs ("Applicant") responds to the submission of the New York City Department of Buildings ("DOB") in the above-referenced matter dated November 8, 2012, and further supports his May 9, 2012 application ("the Application") to appeal a determination of DOB dated April 10, 2012 ("the Denial") (copy of the Denial annexed as Exhibit A to the Application).

DOB covers no new ground in its November 8, 2012 submission. It merely "reiterates its position" that the amateur radio antenna system ("the Antenna System") maintained by Applicant is "non-accessory."

DOB also submitted a letter from the New York City Department of City Planning ("DCP") dated November 8, 2012, in which DCP states that "we express no opinion regarding the merits of this matter," but that "we urge the board to take the antenna height into consideration."

Because it takes no position on the underlying application, the intended effect of DCP's letter is unclear. However, DCP's request that the Board should take the height² of the Antenna

¹ The Applicant understands that the Board has been temporarily displaced from its usual offices by the effects of Hurricane Sandy, and as per direction on the Board's Website, hereby files these papers via e-mail with the Board. As per the annexed affidavit of service, copies have been provided to DOB and DCP both via regular mail and via e-mail.

² The Applicant wishes to correct a misapprehension that has been repeated in the record several times. In hearings before the Board on August 21, 2012 and October 16, 2012, and several times in the various submissions, Applicant's building at 231 East 11th Street, Manhattan, was referred to as being forty feet in height. This is incorrect. The building is 58 feet in height. Applicant's initial Statement of Facts and Findings, dated May 8, 2012, at pages 1 and 2, identifies the building as a "four-story tenement," without giving the height in feet. The Needs

System “into consideration” suffers from the same flaw as DOB’s enforcement action against the Applicant and its subsequent arguments in the instant appeal: neither DOB nor DCP can point to any legal standard which would guide the board in taking the height of the Antenna System “into consideration.”

The Board is aware of the Applicant’s arguments, well-documented in previous submissions, in two hearings before the Board, and unrefuted by DOB, that the New York City Zoning Resolution (“ZR”) allows maintenance of the Antenna System; that federal law supports a strong amateur radio service, and that, to the extent that the ZR, either as written or as applied, prevents maintenance of the Antenna System, it is pre-empted by federal law; and that DOB has presented little legal argument and no facts in support of its position.³

Against this background, DCP’s request to “take into consideration” the height of the Antenna System provides no practical guidance to the Board, and is indeed so vague as to be of no use. The Board addressed this issue several times in the October 16, 2012 hearing (transcript annexed hereto as Exhibit A):

CHAIR SRINIVASAN: Why is that relevant? Why is the size of the building and the zoning district relevant to ham radio antennas and what generally their sizes are and if they're customarily found. That, I think, is the real issue that I have, that it's acceptable in one case and it's not acceptable somewhere else.

MR. DERR: Well, this goes to the question about whether there’s a bright line or not. And, the fact is we do not have a bright line. This is a relatively rare issue.

CHAIR SRINIVASAN: But, you don’t seem to have any line.

(Transcript, Exhibit A, pp. 2-3).

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VICE-CHAIR COLLINS: I just think that the problem I’m having with this particular case is that you’ve undertaken an enforcement action without a standard and you’re just saying that I’m looking at this and saying that this one is too big

Analysis for the Antenna System performed by James Nitzberg, BSEE, gives the correct dimensions (Exhibit S to May 8, 2012 submission, at Page 10). The earliest reference to the building as forty feet tall in the submissions of any party comes in DOB’s submission of August 7, 2012, at page 1 (“The building is an Old Law Tenement that measures approximately 40 feet in height.”) The source of DOB’s incorrect information is unknown to the Applicant. This discrepancy does not change the essential calculus in this case – the Antenna System is an accessory use to the primary use of the building as Appellant’s residence.

³ As discussed at length in Applicant’s submission of September 25, 2012, the sole case cited by DOB, New York Botanical Garden v. Bd. of Standards and Appeals, 91 N.Y.2d 413 (1998), actually supports Applicant’s position. Other than to describe Applicant’s block and to observe that there are no other antennas on it, in its submission of August 7, 2012, DOB has offered no factual support for its position, and has done nothing to refute Applicant’s extensive factual showing.

without suggesting that there is a standard at all and that's what I find somewhat arbitrary about the enforcement action in this case.

(Transcript, Exhibit A, page 7).

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COMM. OTTLEY-BROWN: But, I'm having trouble with the fact that you're saying that, well, the Department would look at the situation and say, well, I don't know if I'm going to allow that because I don't think it should be here is basically what you're saying but you're not articulating a Department position as to why it can't be there. What's going on? Is it-- are you worried it's going to be unsafe? Are you worried that it's blocking the view of other places? Are you worried that it's somehow getting in the way?

There's no rationale for your objecting to it other than in the individual minds of the people who are on the technical committee, they've never seen it before. I have a problem with that. How do I know that these are not just people who are just small minded and don't get around very much? You know, what if there were five ham radio users who were appointed to that technical meeting? Well, then it would be fine, right because they've all seen it before. So, I have a problem because the Department of Buildings is not articulating any real rationale for why they want to limit the height other than we've never seen this before.

(Transcript, Exhibit A, page 9-10).⁴

DOB has been given ample opportunity to identify a standard for evaluating the height of the Antenna System with regard to the question of accessory use. Despite repeated prompting by both the Applicant and the Board, DOB has chosen not to do so. Nor does DCP do so in its November 9, 2012 letter. It is respectfully submitted that DCP's request to the Board to cover this ground again, at the hearing's eleventh hour, does not provide useful guidance to the Board.

Again, although it takes no position on the instant appeal, DCP refers in its November 9, 2012 letter to BSA Cal. No. 14-11-A ("the Cellar Case"), ostensibly to support the position that the size of a use can be relevant to whether it is "incidental to" and "customarily found in connection with" a principal use. This is irrelevant here for several reasons.

First, in the Cellar Case itself, the Board specifically rejected the use of size as a criterion in evaluating whether radio antennas are accessory uses:

⁴ At hearing on October 16, 2012 (transcript, Exhibit A, p. 8), counsel for DOB stated: "Well, as I said, this is a relatively unique situation. This doesn't come up very often, so we saw it. Our technical people looked at it. They determined it wasn't customarily found." Yet DOB never provided the Board with data from a technical analysis, or otherwise did anything to refute the body of material provided by Applicant to support his position.

WHEREAS, the Board finds that size can be a rational and consistent form of establishing the accessory nature of certain uses such as home occupations, caretaker's apartments, and convenience stores on sites with automotive use, but may not be relevant for other uses like radio towers or massage rooms.

BSA Cal. No. 14-11-A, p. 6 (emphasis added).

Second, New York State Court of Appeals, in Botanical Garden, has also rejected this proposition as it pertains to radio antennas:

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 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 (emphasis added).

Third, Chair Srinivasan pointed out at the October 16, 2012 hearing that, in the Cellar Case, there was an attempt to promulgate and follow universally applicable standards for determining accessory use in cellars, whereas in the instant case, DOB's determination is entirely arbitrary and limited to this single antenna:

CHAIR SRINIVASAN: All right. But, unlike the cellar case, which actually established some parameters, and that was applied across the board, every zoning district, this case is not. This is not what you're telling us and so I find it untenable and I don't know what to say.

(Transcript, Exhibit A, at p. 6).

Fourth, the rationale expressed by the Board in the Cellar Case that “there is a public interest in distinguishing between the primary habitable space and the accessory non-habitable

space and limiting the amount of non-habitable space” (BSA Cal. No. 14-11-A, p. 7) is obviously inapplicable to the instant case.

Fifth, and perhaps most importantly, the Cellar Case only is implicated if it is conceded that the Antenna System is somehow “too big” for Applicant’s premises at 231 East 11th Street, Manhattan. The point is not conceded. The Antenna System is in no way “too big” for the premises. It is a standard, if not smaller than standard, amateur radio antenna chosen specifically for “the types of communications that the amateur operator desires to engage in, the intended distance of the communications, and the frequency band.” FCC ORDER ON RECONSIDERATION (RM 8763), DA 00-2468, at para. 6, <http://wireless.fcc.gov/services/amateur/prb/prb2000.html>.

Comparing the bulk of the project in relationship to the footprint of the building, the Antenna System is not large. The footprint of the roof on which the Antenna System is located is 75’ by 26’, or 1950 square feet. In contrast, the triangular tower is only 18 inches on a face, occupying 130.5 square inches, or 0.906 square foot (144 square inches is one square foot). The tower occupies less than one square foot of space on the roof, or 0.05% of the roof’s square footage to be exact. The square footage of roof space occupied by the tower would be, of course, the same no matter the height.

As to the horizontal elements of the antenna, the existing Yagi antenna at the site is (make and model) a Force 12 XR-5, and made of thin tubing amounting to 8.5 square feet. It occupies 0.43% of the roof area. It does not extend past the perimeter of Applicant’s building, as did the cellar of the applicant of the Cellar Case, thus eliminating the main source of concern to the Board in that case.

This accessory use does not present a major addition to the bulk of the building, and the Cellar Case is inapposite.

For the reasons stated herein and in the several submissions of the Applicant, it is respectfully requested that the Board grant this appeal in its entirety.

Respectfully submitted,



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

EXHIBIT A

NEW YORK CITY BOARD OF STANDARDS & APPEALS

TRANSCRIPTION OF CD.

Cal. #151-12-A

231 East 11th Street, Borough of Manhattan.

10-16-2012

MR. COSTANZA: Item number fifteen. Calendar number 151-12-A. 231 East 11th Street, Manhattan. The Law Office of Stuart Klein.

MR. SLOWIK: Good morning. Christopher Slowik, for the Law Offices of Stuart A. Klein.

Just some housekeeping. First off, I did attend your Executive Session yesterday so I heard your comments and I appreciate that you've gone into this issue in some detail and really considered the arguments that we've advanced to you and I thank you for that.

We were last here on September 25th and after that, Ms. Matias called me and explained that you wanted to see some more information. She told me that you wanted to see more pictures of more antennas from other jurisdictions and that you wanted to see information on the size of the antennas in New York City that we had provided to you on September 25th and I just wanted to let you know that yesterday we did submit another submission to you that contained that information.

We were not able to get height information on every single New York City antenna that we had because, in some cases, that information just wasn't available to us but where we had it, we provided it to you and I think we provided twenty-eight photos of antennas from other jurisdictions.

So, because that came in late in the day yesterday, I just wanted to make sure that you knew that that had been submitted.

And, also, at Executive Session, yesterday, Madam Chair, you had said that you had wanted us to explain why the Presnel (Phonetic) case was no longer controlling. That was also included in that submission so I just wanted to bring that to your attention and to let you know that that had been done.

So, with that, if you have any further questions on the legal issues raised in our papers, especially with regard to the Federal Law, I'll ask that you direct those questions to my co-counsel, Mr. Hopengarden (Phonetic), who is here as well.

CHAIR SRINIVASAN: Okay. Any questions? All right. No questions now. Mr. Derr, from the Building's Department.

MR. DERR: Good morning, Amandus Derr, Department of Buildings.

I attended the Executive Session yesterday and, obviously, it sounded like the Board had some concerns and we went back and we looked at it and the evidence that they submitted, including we briefly got to look at their submission that they submitted yesterday. I think we only got it about 4:30, 5:00 yesterday and we did notice that there were some heights of antennas that they included in their submission yesterday.

The problem that DOB is having is that we just don't think that this evidence is enough to show that this size antenna on this size residential building in a residential zoning district with a maximum height of seventy-five feet is customarily found in New York City.

Again, if we look at the evidence that they submitted and we go through this in our submission that we did recently, they submitted nine photographs. Five of the nine photographs are of buildings eleven stories or more and most of them are in zoning districts with maximum building heights of 210 feet.

CHAIR SRINIVASAN: Why is that relevant? Why is the size of the building and the zoning district relevant to ham radio antennas and what generally

their sizes are and if they're customarily found. That, I think, is the real issue that I have, that it's acceptable in one case and it's not acceptable somewhere else.

MR. DERR: Well, this goes to the question about whether there's a bright line or not. And, the fact is we do not have a bright line. This is a relatively rare issue.

CHAIR SRINIVASAN: But, you don't seem to have any line. I mean, we don't understand - -

MR. DERR: Well, we drew a line here. We certainly did here.

CHAIR SRINIVASAN: But, it doesn't give any guidance to this applicant as to what you're looking for or what would make it accessory. I'm not sure this is way to go about doing something but to take that argument further, which is what are they supposed to do?

If you said that this is not accessory, you have to tell them what would make it accessory?

MR. DERR: Well, an applicant comes to us with plans to show that they want to do something or either we go out on a complaint - -

CHAIR SRINIVASAN: You can't just tell them, no, this is not okay. Come back and try something else. You have to tell them - -

MR. DERR: Well, the truth of the matter is we can't - - I think it would be impossible for the Department or the City to come up with a list of every single accessory use and - -

CHAIR SRINIVASAN: I agree with you. And, I don't think that you necessarily have to do that but you are confronted with this issue, here, so you're just going to have to reject it.

MR. DERR: Right. Well, the fact of the matter is you have to look at - - this is how you determine accessory uses and if you look at the Botanical Garden's case, it says that - - and I'll quote the exact language here. It actually says that you need to take into consideration the overall character of the particular area in question. The particular area in question means the building; the area around the building and this evidence that they submitted, none of them show this type of zoning district with a forty foot building and the exact same height and antenna on top of it.

They simply haven't shown that to us.

How can we make a determination that that's customary without any evidence showing that that's the case? Now, if we played out what you just said, then it would seem to me that any height antenna could be - - I'm not sure would the Board be okay with a hundred foot height antenna?

We drew the line here and said that in this particular case, they come to us. Here's a forty foot antenna on top of a forty foot high building and we don't think it fits the overall character.

CHAIR SRINIVASAN: Well, the antenna can be subject to the bulk regulations of the zoning district.

MR. DERR: Well, right now, they're not.

CHAIR SRINIVASAN: Well, that's your issue. I don't know why they're not.

MR. DERR: Yes. The zoning doesn't say that but because the zoning doesn't say that doesn't mean there shouldn't be a reasonable limitation as to the size. This is the same issue with the cellars. The zoning didn't say how big a cellar could be. But, based on the case that you had before you before you and now there's a bulletin describing that apartment's position. It's limited in size.

This is not exactly the same but it's similar.

CHAIR SRINIVASAN: Right. But, it's limited in size and that rule applies for every district. That's not what you're coming up with over here. And, you, yourself, took a position, meaning the Building's Department, that they're putting some kind of limitation is different from a radio antenna and the Botanical Garden's case. That's what you said in that particular case.

MR. DERR: Well, actually, we went back and looked at the submission that was made and I don't think we actually took a different position in that case.

And, if I may read it, this is from calendar number 14-11-A. This is what we said. "The Court of Appeals then upheld - - this is regarding the Botanical Garden's case. "The Court of Appeals then upheld the Appellate Division explaining that there was more than adequate evidence to support the conclusion that the operation of a 50,000 watt radio station with a 480 foot radio tower is customarily found in connection with a college or university."

The Court indicia also observed that 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."

The new restriction, to which the court was referring, was the imposition of a size limitation on radio towers.

The appellant seized on this language because they believed that it serves as a blanket prohibition on limiting the size of an accessory use.

One need only read a few sentences further to understand the court's actual opinion regarding size limitations on accessory uses and this is a quote from the court finding.

“The fact that the definition of accessory radio towers in Section 12-10 contains no size restrictions such as a home occupation or a living or sleeping accommodation for caretakers; supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of the need.”

In other words, where the Zoning Resolution does not provide a size limitation, the appropriate limitation is based on an individualized assessment of the need for the accessory use.

So, I don't think we were taking a different position. We're saying in both cases, the cellar case and in this case, that there can be some limitation on the size.

So, I don't there was necessarily a different position that we took in that case.

CHAIR SRINIVASAN: All right. But, unlike the cellar case, which actually established some parameters, and that was applied across the Board, every zoning district, this case is not. This is not what you're telling us and so I find it untenable and I don't know what to say.

MR. DERR: Right. The difference is that there are thousands and thousands of cellars in New York City.

We don't have a bulletin or a policy right now regarding these radio towers. They're just not as common as cellars and the Board is saying that there's an unlimited size allowed for all these radio towers, we would like some guidance on that in the resolution because we simply just don't think that this building could have a hundred or two hundred foot ham radio tower. And, we think that they haven't demonstrated that this situation, a forty foot radio tower on top of a forty foot building is customarily found.

The other evidence that they submitted about other jurisdiction, these are all rural areas. Most of them are rural areas with these giant ham radio towers.

There's no similarity at all to what we're talking about on this case.

And, I think Botanical Gardens says you have to look at similarly situated buildings in similarly situated neighborhoods and that's part of the analysis of determining whether something is accessory and customarily found.

VICE-CHAIR COLLINS: I just wanted to say that the Building's Department is not without the ability to regulate this sort of structure. I mean, you could do it through the Code. You can do it through zoning. There's a TPPN already in existence with regard to rooftop installation of antenna.

I just think that the problem I'm having with this particular case is that you've undertaken an enforcement action without a standard and you're just saying that I'm looking at this and saying that this one is too big without suggesting that there is a standard at all and that's what I find somewhat arbitrary about the enforcement action in this case.

MR. DERR: Right. Well, as I said, this is a relatively unique situation. This doesn't come up very often, so we saw it. Our technical people looked at it. They determined that this is not customarily found.

If they had come forward and given us the evidence, we certainly would have - -

CHAIR SRINIVASAN: What did you feel about their argument about customary and that it doesn't have to be common-place. I know that you raised that. You talked about things like you have tennis court - - I think one of the case laws talks about tennis courts. Everybody doesn't have a tennis court. Maybe five people in the neighborhood has a tennis court but you can't say that it's not customary and to residential use.

MR. DERR: Right, right.

CHAIR SRINIVASAN: And, in their recent set of papers, they talk about that a little bit more.

What evidence do they have to provide to you to show that it's customary?

MR. DERR: Well, we've already said that ham radio usage and these radio towers is a perfectly acceptable accessory use. It's the magnitude and the size of this radio tower that we're concerned with.

CHAIR SRINIVASAN: Right. But, the need for the tower in terms of its height and its structure depends on issues outside or not necessarily, to some degree, context, but, you know, its geography, I think - -

MR. DERR: Right. And, they submitted evidence. I think that's clear.

CHAIR SRINIVASAN: But, the usage is ultimately the person, about the person who is sitting at their home and using it. That use is the same regardless of the size, right?

MR. DERR: Yes. Yes, of course, that's true. But, just because there's a need to have - - for more power or a need to get around other buildings doesn't mean that it's okay in zoning and customarily found.

I mean, let's say, there's a four-story building in midtown east and they need a two hundred foot tower to get around the City Group Building or the Lipstick Building, I mean, I'm not sure if the Board maybe would.

But, the Department would certainly have an issue with that. And, just because there's someone living in that building who wants to communicate half way across the world and needs a tower that high, I don't think that we would find that that's customarily found.

COMM. OTTLEY-BROWN: But, I'm having trouble with the fact that you're saying that, well, the Department would look at the situation and say, well, I don't know if I'm going to allow that because I don't think it should be here is basically what you're saying but you're not articulating a Department position as to why it can't be there. What's going on? Is it - - are you worried it's going to be unsafe? Are you worried that it's blocking the view of other places? Are you worried that it's somehow getting in the way?

There's no rationale for your objecting to it other than in the individual minds of the people who are on the technical committee, they've never see it before. I have a problem with that. How do I know that these are not just people who are just small

mindful and don't get around very much? You know, what if there were five ham radio users who were appointed to that technical meeting? Well, then it would be fine, right, because they've all seen it before. So, I have a problem because the Department of Buildings is not articulating any real rationale for why they want to limit the height other than we've never seen this before.

MR. DERR: Well, I mean, I think the rationale is that they have to demonstrate that this is customarily found and the evidence just, we don't think, shows that.

COMM. OTTLEY-BROWN: They are demonstrating that it - -

MR. DERR: We don't think that they have, though. They have eleven story buildings with some - - are not forty feet in height. A few are. I think, in their latest submission, they actually put the height. Then you have one and two-family homes for their four other photographs that they submitted.

COMM. OTTLEY-BROWN: Some of which have eighty foot towers that are from the floor to eighty feet up.

MR. DERR: Right. And, I think we would actually have a problem with the size of that.

COMM. OTTLEY-BROWN: Because you've never seen that before.

MR. DERR: Right. And, if we went out and - -

COMM. OTTLEY-BROWN: But, that's a problem. That's really a problem, at least I find that to be a problem. It just seems to me that they have shown us a lot of photographic evidence that there are towers that are - - antenna that are

customarily found, okay. They are varying in size, like you say, and there are various different situations which I think I want to see because I want to see as much as the universe of the possibilities of antennas as I possibly can see, so I've seen all of that.

Then, they've coupled that with a report, an expert in the field, who talks about the link between tower size and coverage, so to speak or ability to reach different areas and what gets in the way.

Well, to me, they've provided the links necessary to show that, a tower, an antenna, no matter what size, is considered customary and that size really only relates to the distance that you want your communication to travel.

MR. DERR: Okay, if that's the position is going to take then I'm assuming that any size would be okay because it's required - - if you want to contact half way around the world, then there's no issue with size.

COMM. OTTLEY-BROWN: Why should that person be penalized? Why should the person who lives in densely populated area not be able to reach Israel or China?

MR. DERR: Well, I don't think you're penalized.

COMM. OTTLEY-BROWN: You are if you're going to tell them what you think your opinion about their need and you're going to try and create some sort of rules and regulations that restricts them from practicing their hobby - -

MR. DERR: Right. But, there may be lots of hobbies that someone has that they can't do in New York City based on where they live.

COMM. OTTLEY-BROWN: But, this one isn't hurting anybody. You haven't articulated any danger to the general public. There's no reason why you would have to limit the size of this tower. At least you haven't articulated that yet.

MR. DERR: Okay.

COMM. HINKSON: One thing I'm sort of having a problem with your reasoning is that every time you see a case of first impression, you're going to have to say no because you haven't seen it before.

So, without some sort of clear cut way of analyzing all of the situations, every time you see something new under the way you're describing it, you have to say no. It's not acceptable.

So, I wonder if you - - you're self-limiting? It's like, okay, anything that's out there that I can say, yet, looks like exactly like this is okay so you've limited your universe. You never allowed the universe to grow in any way and I have a problem with that because a rule shouldn't be able encompass on the majority of situations and you have decided, perhaps, to limit the situation and keep it there and it never can grow outside of it. So, I think that is an issue that the Building Department needs to take a look at.

MR. DERR: Well, I understand that concern but I think that if they had come forward with similarly situated circumstances; evidence of similarly situated circumstances and we don't think that these photographs are - - I think that there might be a disagreement here but if they had come forward with that, then I think we would have accepted it. I would like to believe that our technical people would have looked at it and said, okay, what's the standard for accessory use customarily found and

incidental customarily found to the principal use? And, they would have looked at it and said, okay, this is fine.

CHAIR SRINIVASAN: But, you're saying customarily found. Let's say they come to you with fifty pictures of a forty foot tower, that's customarily found but you're still going to say no because it's on a four-story building. That's the problem with your analysis.

MR. DERR: No, I don't think we would say - - if it was in a residential district like this, again Botanical Gardens requires you to look at the character of the neighborhood. It's not just, okay, there's a forty-story ham radio tower on top of the Empire State Building, how come we can't have it?

CHAIR SRINIVASAN: Right. I mean, I understand the language that you've quoted from the Botanical Gardens. I don't know if it's a proposition that every time something comes to you, you have to engage in what seems to me a subjective review because if you're talking about the character of the neighborhood that, itself, is subject; if you have land use boards that will comment on that.

But, the Building's Department shouldn't be veering towards something that is discretionary. You would agree with that, right, which is a different group of people say it's one thing. Another group of people say it's another thing, exactly what Commissioner Brown is saying.

MR. DERR: Right. But, in this particular situation, there is a way for applicants to come in with very large radio towers - -

CHAIR SRINIVASAN: Right. But, you could take a position on this case which is that they've given you enough information that you do have towers that

are forty foot high because they've shown some and accept this instead of saying - - and that doesn't mean that the one that's 120 feet, you can stop them at that point, too, and say that the 120 foot tower is not customarily found.

But, I think that if you're asking for examples, they've shown you some examples, right?

So, to me, the point is not that they didn't show you forty foot towers. The point that you made, at least in your papers, is that it's forty feet vis-à-vis the forty foot building.

MR. DERR: Yes, that's definitely an issue.

CHAIR SRINIVASAN: So, then, it doesn't matter how many they show you because - - what if it was a ten-story building in the East Village, then it would be okay? Because then it's forty feet versus a hundred foot building?

MR. DERR: Again, that's not before us. What's before us is - -

CHAIR SRINIVASAN: Exactly. What's before you is this. So, when you come to us and say your decision is going to open it up to everything at any height, I don't know, but I think one can take a position that this - - they've given us enough evidence that this particular height is considered accessory.

MR. DERR: I don't think they've shown any forty foot high buildings with forty foot high antennas or they have eleven story buildings and up and then they have two-story buildings. And, the two-story buildings don't have forty foot antennas except for the one with - -

CHAIR SRINIVASAN: Okay. We're going around in circles. You seem to be taking two different points or maybe I think that.

You said that if they actually showed lots of towers that are forty feet, you wouldn't make them engage in this height versus the relative size of the building. That's what you said, right?

MR. DERR: If they show us that there are examples of this similarly situated buildings and antennas like this then, yes, I believe we would find that it's customarily found but we don't think that the evidence has.

CHAIR SRINIVASAN: I'm just troubled by the fact that customarily found somehow is related to the size of the building, not just the height of the antenna. I can't get past that.

MR. DERR: I mean, Botanical Gardens says you have to look at the overall character. Character includes the building where it's located and the surrounding neighborhood.

CHAIR SRINIVASAN: I don't know - - I feel that you're taking that language maybe too far and I think like its - - I feel it's like stymieing the Department in looking at this in maybe a more common sense and logical manner.

MR. DERR: Okay. We would actually ask to keep the record open. You can close the hearing, if you'd like but there are some discussions with City Planning about how we're going to deal with this.

CHAIR SRINIVASAN: But, that may be an appropriate route. I made a comment yesterday and I said, you know, antennas are like other accessory uses; could be subject to zoning regulations including the height limits that districts have.

This is an R and R-8 district. There's a height limit of seventy-five feet. Maybe that's the appropriate way to regulate these things so you should take a look at that.

And, I only note that because that Mr. Weinberg, in his reconsideration, originally said exactly that. He claims that he was compliant with the R8(b) and, I think he's five feet off that.

MR. DERR: Yes, that's close, right.

CHAIR SRINIVASAN: The other thing is at the last hearing, the appellants did come to us and say, well, if we get some guidance, we can also think about it, isn't that correct? They just said you can think about the height and how to deal with the height if you had some guidance. Okay.

MR. DERR: Thank you.

CHAIR SRINIVASAN: Are there any other speakers or any other comments that need to be made? Yes. Any questions? Mr. Slowik, do you want to speak? Yes.

MR. SLOWIK: Just briefly to address a couple of points raised by counsel.

With regard to whether or not the applicant has shown the need as Commissioner Ottley-Brown, I believe, alluded to.

There was an extensive needs analysis in our papers that was prepared for this particular site that demonstrated the need for this particular antenna and that actually showed that if we were to really maximize the effectiveness of the antenna for the communications we wish to engage in, we should build a bigger antenna but that we opted not to and we opted to have a smaller antenna than we possibly could have gone for and I just wanted to note that for the record.

I also wanted to echo something that Commissioner Hinkson said with regard to this being an issue of first impression and it being the applicant's responsibility to make the record for the Department.

As per the concerns shared by Commissioner Hinkson, I don't think it was necessarily the applicant's responsibility to do as much as the applicant did in this case in terms of making the record.

You know I think that fact-finding mission falls more properly to the Department and the Department need no finding effects at all on this case. There was no studies put in. There was no comparables put in. And, so that's just something that I would like to make clear for the record.

And, with regard to counsel's comments on not seeing exactly a forty foot antenna on a forty foot building, the array of antennas that we showed in New York City, we had bigger buildings. We had smaller buildings. We had buildings in commercial districts, residential districts, manufacturing districts, even though they were all residences.

We had buildings in Manhattan, Queens, Bronx and Brooklyn.

We had smaller antennas on bigger buildings, bigger antennas on smaller building, bigger antennas.

I think we showed and I think the Board's comments reflect that what is submitted by the applicant here is right smack down in the middle of what's typical for antennas in New York City.

So, the idea that we haven't shown exactly the same thing, I would reject that premise.

And, I also have a bit of concern about the concern that Commissioner Collins raised about arbitrary enforcement and moving the goalposts.

I'm really not sure that - - you know, frankly, we were quite strident with the Department in the proceedings leading up to filing this appeal in terms of just having them informally take another look at this.

And, we got pardon the pun, radio silence. I mean, there was just no interest in engaging on the facts and looking at the record in any other way.

And, finally with regard to the Botanical Garden argument and this is something that echo's something that Commissioner Collins said in Executive Session yesterday, there is not - - the Botanical Garden case looks at use as opposed to size. It makes an argument in terms of accessory use being a question a function, not necessarily a question of size.

And, also, to adopt the reasoning of counsel, as I pointed out in my last submission, Botanical Garden, the idea that Botanical Garden requires you to look at the immediately surrounding context, of course, there was no other university other than Fordham right next door to the Bronx Botanical Garden. There was no other university that had a 480 foot antenna in the immediate vicinity.

The universe of comparables is not confined to that particular building or to that particular block.

You know, in our case, it's at least the five boroughs of New York City and, perhaps, beyond as was in the Botanical Gardens, they went beyond, obviously, the five boroughs to look at what other universities did and, you know, I'm quite comfortable in suggesting to you that what we've shown you has, in fact, established that the applicant's

antenna is an accessory use within the context - - looking at the proper universe of comparables.

And, again, the only other comment I would make is that I echo Commissioner Ottley-Brown's observation that the Department has introduced no findings of facts to show that anyone whatsoever was harmed by the maintenance of this antenna.

There has been nothing, not even a conclusory allegation that somehow there's been harm to anyone by the maintenance of this.

So, with that, I thank you very much for your consideration of this application.

CHAIR SRINIVASAN: All right. So, if we have no other questions or issues, I think we can close the hearing.

I know the Building's Department would like to respond in writing. We did get a recent set of paper so you'd like to look at that as well as, perhaps, give us an idea of what you're thinking is discussing with City Planning.

So, how much time do you think you would need?

MR.DERR: I think two weeks is fine.

CHAIR SRINIVASAN: So, October 30th?

MR. DERR: That's fine.

CHAIR SRINIVASAN: And, Mr. Slowik, you can respond back on October 5th. Does that seem fine?

MR. SLOWIK: November 5th?

CHAIR SRINIVASAN: Sorry, November 5th. And, then we can vote this out on November 20th.

MR. COSTANZA: On the motion to close.

CHAIR SRINIVASAN: On the motion to close?

MR. COSTANZA: Chair Srinivasan?

CHAIR SRINIVASAN: Aye.

MR. COSTANZA: Vice-Chair Collins?

VICE-CHAIR COLLINS: Aye.

MR. COSTANZA: Commissioner Hinkson?

COMM. HINKSON: Aye.

MR. COSTANZA: Commissioner Montanez?

COMM. MONTANEZ: Aye.

MR. COSTANZA: Commissioner Ottley-Brown?

COMM. OTTLEY-BROWN: Aye.