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July 12, 2012

Ms. Toni Matias
NYC Board of Standards and Appeals
40 Rector Street, 9th Floor
New York, NY 10006
BY HAND

Re: Cal. No. 151-12-A
231 East 11th Street, Manhattan (Block 461, Lot 46)

Dear Ms. Matias:

This represents the reponse of Paul Isaacs, Applicant in the above-referenced case, to the Board's Notice of Comments, dated June 8, 2012.[1]

The Applicant responds, *seriatim,* to the Board's inquiries, as follows:

1. Provide evidence into the record that supports your argument that the subject antenna is as accessory use customarily found in connection with the principal use, a residential building.

The Applicant respectfully states: This is an issue of law, not of fact.

As posed, the question appears to treat the issue of amateur radio as an accessory use to be a question of fact. However, the applicant's amateur radio antenna system (antenna support structure plus antenna) is an ordinary accessory use as a matter of law. It is a question of law because (a) federal law supports amateur radio uses as a matter of national policy and mandates that the use cannot be forbidden anywhere (including from residences), (b) the Congress has recognized such a use from residences and requires municipalities to accommodate the use, and (c) case law supports the use as customary at a residence. In addition, amateur radio is not, and cannot be, a commercial use as a matter of law. And finally, the use fits within the regulation's definition.

(a) A federal regulation preempts any prohibition of an amateur radio use.

[1] By email dated July 6, 2012, you had extended Applicant's time to respond to July 13, 2012.

Acting under its authority provided by the Telecommunications Act, the FCC has promulgated a regulation which absolutely preempts prohibitions of amateur radio. The regulation, found at 47 **CFR §97.15(b),** reads:

> Sec. 97.15 Station antenna structures.
>
> . . .
>
> (b) 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.)*

http://edocket.access.gpo.gov/cfr_2007/octqtr/pdf/47cfr97.15.pdf

(b) P.L. 103-408 (1994) declares Congressional intent to support the use of amateur radio *from residences.*

The Congress has recognized amateur radio as a use from residences and requires municipalities to accommodate the use. Here is the full text of P.L. 103-408 (J.Res., 103d Congress, 1994).

PUBLIC LAW 103-408—OCT. 22, 1994

103d Congress
Joint Resolution

To recognize the achievements of radio amateurs, and to establish support for such amateurs as national policy.

Whereas Congress has expressed its determination in section 1 of the Communications Act of 1934 (47 U.S.C. 151) to promote safety of life and property through the use of radio communication;

Whereas Congress, in section 7 of the Communications Act of 1934 (47 U.S.C. 157), established a policy to encourage the provision of new technologies and services;

Whereas Congress, in section 3 of the Communications Act of 1934, defined radio stations to include amateur stations operated by persons interested in radio technique without pecuniary interest;

Whereas the Federal Communications Commission has created an effective regulatory framework through which the amateur radio service has been able to achieve the goals of the service;

Whereas these regulations, set forth in Part 97 of title 47 of the Code of Federal Regulations clarify and extend the purposes of the amateur radio service as a—

(1) voluntary noncommercial communication service, particularly with respect to providing emergency communications;
(2) contributing service to the advancement of the telecommunications infrastructure;
(3) service which encourages improvement of an individual's technical and operating skills;
(4) service providing a national reservoir of trained operators, technicians and electronics experts; and
(5) service enhancing international good will;

Whereas Congress finds that members of the amateur radio service community has provided invaluable emergency communications services following such disasters as Hurricanes Hugo, Andrew, and Iniki, the Mt. St. Helens Eruption, the Loma Prieta earthquake, tornadoes, floods, wild fires, and industrial accidents in great number and variety across the Nation; and

Whereas Congress finds that the amateur radio service has made a contribution to our Nation's communications by its crafting, in 1961, of the first Earth satellite licensed by the Federal Communications Commission, by its proof-of-concept for search rescue satellites, by its continued exploration of the low Earth orbit in particular pointing the way to commercial use thereof in the 1990s, by its pioneering of communications using reflections from meteor trails, a technique now used for certain government and commercial communications, and by its leading role in development of low-cost, practical data transmission by radio which increasingly is being put to extensive use in, for instance, the land mobile service: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

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;

(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 operation as a public benefit**.

Approved October 22, 1994.

(Emphasis added.)
(text) http://thomas.loc.gov/cgi-bin/query/z?c103:S.J.RES.90.ENR:
(PDF) http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_bills&docid=f:sj90enr.pdf

(c) Case law supports the use as customary at a residence.

Though counsel is capable of constructing the argument, due to the thoroughness of the research displayed, we urge the Board to consider as persuasive the holding of Judge Leonard M. Cocco, Superior Court of Connecticut, in *Bay v. Zoning Board of Appeals of the Town of New Canaan, 1993 Conn. Super. LEXIS 2345* (allowing a 72-foot antenna support structure with two antennas on it, totaling 82-feet, as well as a 57-foot tall vertical, at a single-family residence).

> The plaintiff . . . claims that an amateur radio antenna is a permitted accessory use to a single-family residence. . . . The majority of courts hold that an amateur radio antenna is an accessory use to a single-family residence. *Town of Paradise Valley v. Lindberg, 27 Ariz. App. 70, 551 P.2d 60 (1976); Wright v. Vogt, 7 N.J. 1, 80 A.2d 108 (1951); Skinner v. Zoning Board of Adjustment, 80 N.J. Super.380, 193 A.2d 861 (1963); Village of St. Louis Park v. Casey, 218 Minn. 394, 16 N.W.2d 459 (Minn. 1944); Dettmar v. County Board of Zoning Appeals, 28 Ohio Misc. 35, 273 N.E.2d 921 (1971); Appeal of Lord, 368 Pa. 121, 81 A.2d 533 (1951).* Extensive research has found only one court which has held that an amateur radio tower was not an accessory use. *Presnell v. Leslie, 3 N.Y.2d 384, 144 N.E.2d 381, 165 N.Y.S.2d 488 (1957).*

Since the 1985 promulgation of the FCC Report and Order known as PRB-1, summarized in 47 C.F.R. § 97.15(b) (above), *every* New York and federal case involving amateur radio antenna systems has ignored *Presnell v. Leslie. Bodony v. Incorporated Village of Sands Point,* 681 F. Supp. 1009 (ED NY 1987), *Basile v. Town of Brookhaven,* 170 A.D.2d 1043 (1991), *Kleinhaus v. Zoning Bd. of Appeals,* Town of Cortlandt, Index No. 19396/95 (Supreme Court, Westchester County, 1996, Lefkowitz, J.S.C.). 3/26/96 NYLJ 37, (col. 3), *Anderson v. Planning Board of Islip,(* Supreme Court, Suffolk County, 1998, James A. Gowan, J.S.C.)(1998) (slip opinion), *Palmer v. Saratoga Springs,* 180 F. Supp. 2d 379 (ND NY 2001).

Amateur radio cannot be a commercial use as a matter of law.

All amateur radio uses are inherently non-commercial, under the terms of the license. See especially 47 CFR §97.1 (a):

> PART 97--AMATEUR RADIO SERVICE
>
> Subpart A--General Provisions
> Sec. 97.1 Basis and purpose.
>
> 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 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 supplied.)*

This structure will be used for amateur radio, not cellular telephone or any other commercial purpose. The Applicant will accept a permit condition to the following effect: "The structure shall not be used to support common-carrier cellular telephone or any other commercial purpose antennas."

The use fits within the regulation's definition of an accessory use.

The Board is respectfully referred to the Applicant's May 8, 2012 Statement of Facts and Findings ("Applicant's Statement,") pp. 8-10, for an exhaustive explanation that the subject antenna ("the Antenna") comes within the definition of "accessory use" as found in ZR 12-10.

2. Discuss whether the antenna falls within the parameters of TPPN 5/98.

It does not.

TPPN 5/98 (copy annexed hereto as Exhibit A) is a policy notice of the New York City Department of Buildings ("DOB"). The notice states as follows:

- The subject is "Cellular Antennas." No mention is made of amateur radio antennas in the title, or elsewhere in the notice.

- The notice states that "those companies wishing to erect cellular antennas and install related equipment are to be treated with the deference accorded other public utilities" (emphasis added). Cellular telephone antennas are always erected by companies, operating commercial enterprises for private gain. (There is no such thing as amateur cellular telephony.). By contrast, the Applicant is an amateur and is using his antenna as a hobby.

- The notice states that "[t]hese specifications and requirements are based on the standards for cellular telephony at this time." They are based on the standards for cellular telephony – NOT amateur short-wave radio. It should be obvious, even to laymen, that these are different technologies, and that a policy statement regarding the requirements of one technology would not apply to the other.

4. Provide examples of similar other antenna approvals by the Department of Buildings.

The Applicant is unaware of any such approvals, but is also unaware of any denials similar to the one addressed by the instant appeal.

With regard to this issue, the Applicant stands on his submission of facts in Applicant's Statement, p. 10, that there are "at least 3,321 persons with active amateur radio licenses in New York City."

5. Provide enlarged highlighted sections of the plans that illustrate the areas of concern that are in dispute with the Department of Buildings that are the subject of this appeal application.

Respectfully, the Applicant submits that it is not possible to comply with this request.

As alluded to in Applicant's Statement, DOB's denial statement dated April 10, 2012 ("the Denial") is somewhat cryptic. It states, in its entirety:

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 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.

As explained at length in Applicant's Statement, it is unclear if DOB is stating that *any* ham radio antenna would be non-accessory under the ZR, or that the ZR *as applied to* this particular Antenna prevents the maintenance of the Antenna, or if it objects on some other basis. The height of the Antenna ("approximately 40 feet high")[2] is mentioned, as if in passing, but is not compared to any standard or rule in the ZR or elsewhere, so it is not clear how or why the height makes the Antenna unlawful. The lack of clarity of the Denial effectively supports

[2] Applicant concedes the fact that the Antenna is approximately 40 feet high.

Applicant's position that "the Department wants to characterize this antenna as illegal and wants to punish [Applicant] for having it, but cannot even cite to a specific section of law that makes the antenna illegal" (Applicant's Statement, p. 6).

Accordingly, the Applicant cannot answer this question. The Applicant respectfully submits that DOB itself is best situated to explain its "areas of concern," and awaits DOB's answer to that question with great interest.

6. Provide copies of any and all correspondence with the Department of Buildings regarding the matter that is the subject of this appeal.

See copies of correspondence, annexed hereto as Exhibit B.

7. Provide copies of all case law cited to in your Statement of Facts.

See copies of cases, annexed hereto as Exhibit C, in the order in which they are cited in Applicant's Statement.

Please note that Applicant takes this opportunity to correct an error in Applicant's Statement. The block citation at the bottom of Page 13 of Applicant's Statement is incorrectly attributed to Kleinhaus v. Zoning Bd. of Appeals, Town of Cortlandt, 3/26/96 N.Y.L.J. 37 (Sup. Ct. Westchester County March 26, 1996).[3] The correct citation is to Pentel v. City of Mendota Heights, 13 F. 3d 1261 (8th Cir. 1994). Both Kleinhaus and Pentel are included herein.

8. Provide proof of service of this application of the General Counsel of both Department of Buildings and the Department of City Planning.

Please see affidavits of service, annexed hereto as Exhibit D. Copies of these affidavits of service were handed in at the BSA counter on May 16, 2012.

Conclusion

The Applicant hereby submits this response to the Board's Notice of Comments, and stands ready to provide any further information that the Board may require in evaluating this application.

With best regards,

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

[3] Although not the source of the citation in question, Kleinhaus also generally supports Applicant's position.

cc: Office of the General Counsel, NYC Department of City Planning
Office of the General Counsel, NYC Department of Buildings
Mr. Paul Isaacs