***CORRECTION**

This resolution adopted on December 11, 2012, under Calendar No. 151-12-A and printed in Volume 97, Bulletin Nos. 46-48, is hereby corrected to read as follows:

151-12-A

APPLICANT – Christopher M. Slowik, Esq./Law Office of Stuart Klein, for Paul K. Isaacs, owner.

SUBJECT – Application May 9, 2012 –

Appeal challenging the Department of Buildings' determination that a roof antenna is not a permitted accessory use pursuant to ZR § 12-10. R8 zoning district.

PREMISES AFFECTED – 231 East 11th Street, north side of E. 11th Street, 215' west of the intersection of Second Avenue and E. 11th Street, Block 467, Lot 46, Borough of Manhattan.

COMMUNITY BOARD #3M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson.....4

Negative: Commissioner Montanez 1

THE RESOLUTION –

WHEREAS, this is an appeal of a Department of Buildings ("DOB") final determination dated April 10, 2012, issued by the First Deputy Commissioner (the "Final Determination"); and

WHEREAS, the Final Determination reads in pertinent part:

> 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; and

WHEREAS, the appeal was brought on behalf of the owner of 231 East 11th Street (hereinafter the "Appellant"); and

WHEREAS, a public hearing was held on this application on August 21, 2012 after due notice by publication in *The City Record*, with a continued hearing on October 16, 2012, and then to decision on November 20, 2012; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

WHEREAS, the subject site is located on the north side of East 11th Street between Second Avenue and Third Avenue, within an R8B zoning district; and

WHEREAS, the site has approximately 25'-6" of frontage of East 11th Street, a depth of 100 feet, and a total lot area of 2,550 sq. ft.; and

WHEREAS, the site is occupied by a five-story residential building with a height of approximately 58'-0" (the "Building"); a radio tower with a height of approximately 40'-0" is located on the rooftop of the Building (the "Radio Tower"); and

PROCEDURAL HISTORY

WHEREAS, on November 2, 2009 DOB issued Notice of Violation No. 34805197M charging work without a permit for the Radio Tower contrary to Administrative Code Section 28-105.1; the violation was sustained by an Administrative Law Judge of the Environmental Control Board on October 26, 2010; and

WHEREAS, on or about November 30, 2009, the Appellant filed Job Application No. 120213081 for a permit to legalize the Radio Tower, and on September 30, 2010 DOB issued Permit No. 120213081-01-AL for the Radio Tower; and

WHEREAS, on or about December 16, 2010, DOB reexamined the application and determined that it was approved in error contrary to the Zoning Resolution and on January 13, 2011, DOB issued an Intent to Revoke Approval(s) and Permit(s), Order(s) to Stop Work Immediately letter with an objection that "Proposed antenna is not accessory to the function or principal use of the building"; on or about February 9, 2011, a stop work order was served upon the Appellant and the Radio Tower permit was revoked; and

WHEREAS, on July 12, 2011, DOB denied the Appellant's request to reinstate the permit and rescind the stop work order; the July 12, 2011 determination was renewed by DOB on April 10, 2012, and forms the basis of the Final Determination; and

RELEVANT ZONING RESOLUTION PROVISIONS

WHEREAS, the Appellant and DOB cite the following Zoning Resolution provisions, which read in pertinent part:

> ZR § 12-10 (Accessory Use, or accessory)
>
> 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) . . .; 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# . . .

An #accessory use# includes…

(16) #Accessory# radio or television towers…

* * *

ZR § 22-21 (By the Board of Standards and Appeals)

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#...

* * *

ZR § 73-30 (Radio or Television Towers)

In all districts, the Board of Standards and Appeals may permit non-#accessory# radio or television towers, provided that it finds that the proposed location, design, and method of operation of such tower will not have a detrimental effect on the privacy, quiet, light and air of the neighborhood.

The Board may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant makes the following primary arguments: (1) the Radio Tower meets the ZR § 12-10 definition of accessory use; and (2) the Zoning Resolution is preempted by federal law and regulation from precluding international communications, and to the extent DOB maintains the Radio Tower is impermissible due to its height, DOB's interpretation is subject to limited preemption because it has not "reasonably accommodated" the Appellant's needs; and

1. Accessory Use

WHEREAS, as to the definition of accessory use, the Appellant asserts that the proposed Radio Tower meets the criteria as it is: (a) located on the same zoning lot as the principal use (the residential building), (b) the Radio Tower use is incidental to and customarily found in connection with a residential building, and (c) the Radio Tower is in the same ownership as the principal use and is proposed for the benefit of the owner of the Building; and

WHEREAS, the Appellant notes that DOB acknowledges that the principal use of the site is as a residential building, and that the owner maintains a residence at the Building; and

WHEREAS, the Appellant states that the owner has been a licensed "ham" radio operator since 1957, and is in frequent contact with other amateur radio operators around the world; and

WHEREAS, the Appellant notes that the owner is an amateur radio operator (amateur radio license No. W2JGQ) and is not engaged in a commercial use of the Radio Tower; and

WHEREAS, the Appellant submitted a needs analysis prepared by an engineer which concludes that, based on the owner's desired use of the ham radio to engage in communication to Israel and the Middle East, "a significantly taller tower should be utilized to provide optimal coverage," however the proposed Radio Tower with a height of 40 feet "is an acceptable compromise adequate for moderate needs of the amateur radio operator when measured against commonly used engineering metrics;" and

WHEREAS, the Appellant cites to 7-11 Tours, Inc. v. Board of Zoning Appeals of Town of Smithtown, 454 N.Y.S.2d 477, 478 (2d Dept. 1982) for the following discussion of the definition of "accessory use":

> "[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…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; and

WHEREAS, the Appellant asserts that the owner's use of the Radio Tower is clearly that of a hobbyist engaged in an avocation from his own residence, and that the owner's hobby as an amateur ham radio operator is both "attendant to" and "commonly, habitually, and by long practice reasonably associated with" the primary use of the Building as a residence; and

WHEREAS, as to whether amateur radio antennas are customarily found in New York City, the Appellant notes that the FCC website lists the names of all amateur radio licensees in the country, and as of May 7, 2012 the site listed a total of 1,086 active amateur radio licensees in Manhattan, while at least 2,235 additional licensees are located in the other four boroughs of New York City; and

WHEREAS, the Appellant asserts that almost all of the licenses reflected on the FCC website are issued to natural persons who enjoy long distance amateur radio communications from their residences; thus, the outdoor radio antennas are commonly in use by radio amateurs in New York City to support international communications; and

WHEREAS, in support of its position that ham radio antennas are customarily found in connection with residences, the Appellant cites to the Oxford English Dictionary definition of "customarily" as "in a way that follows customs or usual practices; usually"; and

WHEREAS, the Appellant contends that a use can be "customary" without being very common, such as swimming pools and tennis courts, which are undoubtedly "customarily" found as accessories to residences, regardless of the frequency with which they so appear; and

WHEREAS, the Appellant argues that it is clear that ham radio antennas are "usually" found as accessories to residences, in that when such antennas are found, they are found appurtenant to residences, and the fact that amateur radio towers may be a relatively rare use is irrelevant to the consideration of whether such use is accessory to a residence; and

WHEREAS, at the Board's request and to support its contention that ham radio antennas are "customarily found in connection with" a residence, the Appellant submitted a series of photographs depicting similar antennas maintained throughout New York City, which provides the borough, underlying zoning district, size, and use group of the residence to which the antenna is accessory, and where available and to the extent possible to obtain such information, it also provides the height of the antennas pictured; and

WHEREAS, specifically, the Appellant submitted photographs of nine other antennas found in Manhattan, the Bronx, Brooklyn, and Queens, which are associated with various types of buildings, from single-family homes to 19-story apartment buildings, and which are found in residential, commercial and manufacturing zoning districts; and

WHEREAS, the Appellant asserts that despite the diversity amongst the buildings depicted, they are all residences, and the ham radio antennas attached to each residence is an accessory use to the main use of the building as a residence; and

WHEREAS, the Appellant represents that the antennas pictured in the photograph array are comparable in size to the Radio Tower, and in some cases, larger than the Radio Tower; and

WHEREAS, the Appellant further represents that there are many more such antennas annexed to other residences throughout the City, however, given the time constraints of the Board's hearing process and the reluctance of some ham radio operators to expose themselves to possible enforcement action by DOB, the Appellant provided the aforementioned photographs as representative of the type of antenna systems found throughout the City; and

WHEREAS, the Appellant also submitted an array of 23 photographs of antennas from other jurisdictions, many of which are significantly taller than the subject Radio Tower with a height of 40 feet, which the Appellant argues reflects that the subject Radio Tower is modest in size and scope; and

WHEREAS, the Appellant also submitted 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"), which states that "[n]umerous radio towers have been erected throughout the city for amateur radio stations," and further states that such towers "may be accepted in residence districts as accessory to the dwelling;" and

WHEREAS, the Appellant contends that the 1955 Memo serves as evidence that amateur radio towers were numerous throughout New York City and DOB customarily found them as accessory to residences since at least 1955; and

2. Preemption

WHEREAS, the Appellant argues that the Zoning Resolution is preempted by federal law and regulation from precluding international communications, and to the extent DOB maintains the Radio Tower is impermissible due to its height, DOB's interpretation of the Zoning Resolution as it applies to the site is subject to limited preemption because DOB has not "reasonably accommodated" the owner's needs; and

WHEREAS, the Appellant states that federal laws and FCC regulations strongly favor the maintenance of ham radio equipment such as the Radio Tower, and pre-empt local ordinances which prohibit the maintenance of such equipment, either on their face or as applied; and

WHEREAS, specifically, the Appellant asserts that 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"), requires local authorities to reasonably accommodate amateur radio; and

WHEREAS, the Appellant notes that PRB-1 was codified as a regulation of the FCC at 47 CFR § 97.15(b)(2006), which states:

> 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.); and

WHEREAS, the Appellant further notes that PRB-1 explains that antenna height is important to effective radio communications as follows:

> 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…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; and

WHEREAS, the Appellant states that the needs analysis it submitted reflects that the proposed Radio Tower with a height of 40 feet is the minimum bulk necessary to accommodate the owner's desired communications; and

WHEREAS, accordingly, the Appellant argues that DOB's position that the Radio Tower is impermissible as an accessory use due to its height fails to reasonably accommodate the international amateur service communications that the owner desires to engage in, and therefore DOB's position is subject to the limited preemption of PRB-1 and 47 CFR § 97.15(b), and is preempted as applied; and

DOB'S POSITION

WHEREAS, DOB makes the following primary arguments in support of its revocation of the Permit for the Radio Tower: (1) the Radio Tower is not accessory to the principal residential use and therefore requires a special permit from the Board as a non-accessory radio tower; and (2) the Zoning Resolution provides a "reasonable accommodation" in accordance with federal law; and

WHEREAS, DOB asserts that pursuant to ZR § 22-21, in R8B zoning districts, "radio or television towers, non-accessory" are permitted only "by special permit of the Board of Standards and Appeals," and because no special permit has been issued for the Appellant's radio tower, it must satisfy the ZR § 12-10 definition of "accessory use"; and

WHEREAS, DOB contends that the Radio Tower does not satisfy the ZR § 12-10 definition of accessory use primarily because it does not satisfy the criteria that such a radio tower be "customarily found in connection with" the principal use of the site as a residence; and

WHEREAS, specifically, DOB argues that the proposed Radio Tower is significantly taller and more elaborate than the traditional accessory radio towers (or "aerials") that have been found atop residences for decades in New York City, which are typically used to receive remotely broadcast television and/or AM/FM signals for at-home private listening or viewing and are usually 12 feet or less in height and often affixed directly to chimneys or roof bulkheads; and

WHEREAS, DOB distinguishes traditional "aerials" with the proposed Radio Tower which extends 40 feet above the roof of the Building and must be secured to the roof at multiple points by one-half inch steel wires; and

WHEREAS, DOB further distinguishes the proposed Radio Tower because it functions differently than traditional aerials in that it both receives and transmits radio signals (as opposed to traditional aerials which merely receive radio signals) and is powerful enough to communicate with people living in South America and the Middle East; and

WHEREAS, accordingly, DOB considers the proposed Radio Tower to be categorically distinct from the aerials that are "customarily found in connection with" New York City residences, and argues that the plain text of the Zoning Resolution does not support its use as accessory to the principal use of the zoning lot as a residence; and

WHEREAS, DOB asserts that while the Appellant has cited a number of cases from other states that support the general notion that ham radio use may be permitted as accessory to a residence, the subject case is controlled by the Court of Appeals decision in Matter of New York Botanical Garden v. Board of Standards and Appeals of the City of New York, 91 N.Y.2d 413 (1998); and

WHEREAS, DOB notes that in Botanical Garden the Board agreed with DOB's determination that a 480-ft. radio tower on the campus of Fordham University adjacent to the New York Botanical Garden was a permitted accessory use for an educational institution that operated a radio station, finding that the radio tower was clearly incidental to and customarily found in connection with an educational institution; and

WHEREAS, DOB states that, in upholding the Board's determination, the Court of Appeals explained that there was "more than adequate evidence to support the conclusion that [the operation of a 50,000 watt radio station with a 480-ft. radio tower] is customarily found in connection with a college or university" and articulated the following standard for determining whether a use is accessory under the Zoning Resolution:

> [w]hether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question. Botanical Garden, 91 N.Y.2d at 420; and

WHEREAS, DOB notes that the Court also stressed that the accessory use analysis is fact-based and that "[t]he issue before the [Board] was: is a station of this particular size and power, with a 480-foot tower, customarily found on a college campus or is there something inherently different in this radio station and

tower that would justify treating it differently" Botanical Garden, 91 N.Y.2d at 421; and

WHEREAS, DOB argues that, based on the standard set forth in Botanical Garden, the proposed Radio Tower is not permitted as accessory to the Building; and

WHEREAS, specifically, DOB asserts that the Radio Tower is incompatible with the principal use and the surrounding area, in that it adds an additional 40 feet of height to the Building and its supporting wires and structures, which are permanently affixed, occupy a substantial portion of the roof; thus, when measured by its size in relation to the Building, the Radio Tower is not clearly incidental; and

WHEREAS, DOB further asserts that the Radio Tower is out of context with the subject residential neighborhood, as it is located on an interior lot situated mid-block in a contextual, medium-density residential district on a narrow street of a quintessential East Village block on which no other buildings have aerials approaching the size and complexity of the proposed Radio Tower; and

WHEREAS, DOB argues that, even if the proposed Radio Tower were considered "clearly incidental" to the residential building, the Appellant has also not demonstrated that the Radio Tower of this size and power is "customarily found in connection with" New York City residences; and

WHEREAS, as to the photographs and evidence submitted by the Appellant of other radio towers within New York City, DOB asserts that they do not constitute sufficient evidence to establish that a rooftop radio tower with a height of 40 feet is customarily found in connection with the principal use of a residential building located in an R8B zoning district; and

WHEREAS, specifically, DOB states that of the nine photographs provided by the Appellant, five photographs show rooftop radio towers which are not comparable to the subject Radio Tower because they are located on buildings which are 11 to 19 stories tall, and none of which appear to be close to the height of the residential building below the tower; and

WHEREAS, DOB further states that of the remaining four photographs that show radio towers that are located on or near buildings less than 11 stories, only one is located on the roof of a building and that radio tower appears to be approximately half the height of the two-story dwelling; the other three photographs do not appear to show radio towers located on the roofs of the buildings, and the only one of those three that appears to be more than 40 feet in height is a stand-alone radio tower with a height of 80 feet associated with a two-story residential building, and DOB represents that it would not consider such a radio tower to be an accessory use; and

WHEREAS, DOB contends that in order for the subject Radio Tower to satisfy the "customarily found in connection with" criteria, it is not sufficient to provide evidence of other radio towers with similar heights as the subject Radio Tower; rather, the Appellant would have to provide evidence that it is customary to have a radio tower with a height of 40 feet on the rooftop of a four-story building of similar height as the Building, within an R8B zoning district; and

WHEREAS, accordingly, DOB asserts that the evidence submitted by the Appellant is insufficient to establish that a rooftop radio tower with a height of 40 feet located on a four-story residential building in an R8B zoning district is customary, and therefore it does not meet the ZR § 12-10 definition of accessory use; and

WHEREAS, DOB argues that the evidence submitted by the Appellant reflects a similarity between the facts in the subject case and those of BSA Cal. No. 14-11-A (1221 East 22nd Street, Brooklyn), which involved a challenge to DOB's denial of a permit for an accessory cellar that was nearly as large as the single-family residence to which it was to be appurtenant; and

WHEREAS, DOB asserts that the Board affirmed DOB's denial in that case, in part, because the appellant failed to demonstrate that such oversized, non-habitable cellars were customarily found in connection with residences, and that in the subject case the Appellant's evidence similarly fails to demonstrate that a rooftop radio tower with a height of 40 feet is customarily found on a four-story residential building; and

WHEREAS, by letter dated November 8, 2012, the Department of City Planning ("DCP") states that it expresses no opinion regarding the merits of the subject case but requests that the Board take the height of the antenna into account in determining whether it is accessory, as it did in BSA Cal. No. 14-11-A, because the size of a use can be relevant to whether it is "incidental to" and "customarily found in connection with" a principal use; and

WHEREAS, as to the 1955 Memo submitted by the Appellant, DOB asserts that the 1955 Memo merely deals with the permitting safety requirements, and specifications for the construction of radio towers, and does not indicate that radio towers are necessarily accessory uses to residences; and

WHEREAS, DOB acknowledges that the Zoning Resolution is clear that some radio towers are accessory, however it is also clear that some radio towers are not accessory, and the 1955 Memo does not state which type of radio towers could be considered accessory or non-accessory; and

WHEREAS, in response to the Appellant's preemption argument, DOB contends that the Zoning Resolution does provide a "reasonable accommodation" in accordance with federal law; and

WHEREAS, DOB asserts that PRB-1 is a declaratory ruling issued by the FCC requiring that "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

WHEREAS, DOB contends that its interpretation of the Zoning Resolution to prohibit the proposed radio tower as accessory to the subject residence as-of-right was proper and consistent with PRB-1, and that it has reviewed the proposal at the highest level and determined that it had no authority to allow the radio tower because a special permit is required pursuant to ZR §§ 22-21 and 73-30; and

WHEREAS, DOB further contends that ZR § 73-30, which authorizes the radio tower by special permit, contemplates the sort of fact-finding and analysis required by PRB-1; accordingly the Zoning Resolution as interpreted by DOB is consistent with the FCC's "reasonable accommodation" requirement; and

THE APPELLANT'S RESPONSE

WHEREAS, in response to the arguments set forth by DOB, the Appellant asserts that DOB's reliance on Botanical Garden and BSA Cal. No. 14-11-A are misplaced; and

WHEREAS, as to Botanical Garden, the Appellant first notes that that case involved a radio tower that was accessory to an educational institution rather than an amateur radio tower that is accessory to a residence, and that to the extent that case is comparable to the subject case, a clear reading shows that it actually supports the Appellant's position; and

WHEREAS, at the outset, the Appellant states that in Botanical Garden, DOB, 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 Appellant; and

WHEREAS, the Appellant notes that, 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, stating that "[t]his argument ignores the fact that the Zoning Resolution classification of accessory uses is based upon functional rather than structural specifics." Botanical Garden, 91 N.Y.2d at 421; and

WHEREAS, the Appellant contends that Botanical Garden therefore reflects that DOB's contention that the Radio Tower is not an accessory use because of its size conflates use regulation and bulk regulation in a way that is not contemplated by the Zoning Resolution; and

WHEREAS, the Appellant asserts that Botanical Garden also supports its position that the Radio Tower is an accessory use because it is "customarily found in connection with" the principal use, as the Court of Appeals observed:

> 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; and

WHEREAS, finally, the Appellant notes that in Botanical Garden the Court of Appeals recognized that, unlike other examples of accessory uses listed in ZR § 12-10, there is no height restriction associated with accessory radio towers and that it would be inappropriate for DOB to arbitrarily restrict the height of such radio towers, as the Court stated 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. 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 even more than 500 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; and

WHEREAS, accordingly, the Appellant asserts that Botanical Garden reflects that there is no "bright line" height restriction in the Zoning Resolution beyond which an accessory antenna becomes non-accessory, and since there is no law, rule, or regulation which permits DOB to deem the Radio Tower non-accessory on the grounds of its purportedly excessive height, DOB thus makes an error of law in trying to forbid the Appellant's

maintenance of the Radio Tower as non-accessory in the absence of a guiding statute; and

WHEREAS, the Appellant contends that DOB's reliance on BSA Cal. No. 14-11-A to support the position that size of a use can be relevant to whether it is "incidental to" and "customarily found in connection with" a principal use is similarly misguided; and

WHEREAS, specifically, the Appellant notes that in that case, in a discussion of the Botanical Garden case, the Board expressly rejected the use of size as a criterion in evaluating whether radio antennas are accessory uses, noting 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…"; and

WHEREAS, the Appellant also distinguishes BSA Cal. No. 14-11-A from the subject case in that in the former there was an attempt to promulgate and follow universally applicable standards for determining accessory use in cellars, while in the subject case DOB's determination is limited to this single antenna and not based on any articulated standard; and

WHEREAS, finally, the Appellant argues that BSA Cal. No. 14-11-A is only implicated if it is conceded that the Radio Tower is somehow "too big" for the Building; however, the Appellant asserts that the Radio Tower is in no way "too big" for the site, as it is a standard-sized, if not smaller than standard-sized, amateur radio antenna chosen specifically for the types of communications that the amateur operator desires to engage in, the intended distance of communications, and the frequency band; and

WHEREAS, the Appellant also refutes DOB's contention that, because the Radio Tower both receives and transmits signals (as opposed to merely receiving signals) the subject Radio Tower is somehow not an accessory use; and

WHEREAS, the Appellant asserts that there is absolutely no support in any statute for this proposition, and the Zoning Resolution does not treat antennas differently depending on whether or not they transmit; and

CONCLUSION

WHEREAS, the Board has determined that the subject Radio Tower satisfies the ZR § 12-10 definition of an accessory use to the subject four-story residential building, such that the maintenance of the Radio Tower at the site does not require a special permit from the Board under ZR § 73-30; and

WHEREAS, specifically, the Board finds that the Radio Tower meets the criteria of an accessory use to the residence because it is: (a) located on the same zoning lot as the principal use (the residential building), (b) the Radio Tower use is clearly incidental to and customarily found in connection with a residential building, and (c) the Radio Tower is in the same ownership as the principal use and is proposed for the benefit of the owner of the Building; and

WHEREAS, the Board agrees with the Appellant that the owner's hobby as an amateur ham radio operator is clearly incidental to the principal use of the site as a residence, and is not persuaded by DOB's argument that the Radio Tower is not clearly incidental to the Building merely because the height of the Radio Tower (40 feet) is comparable to that of the Building (58 feet); and

WHEREAS, the Board finds that the Appellant has submitted sufficient evidence reflecting that, when amateur radio antennas are found, they are customarily found appurtenant to residences, and agrees with the Appellant that the fact that amateur radio antennas are not a common accessory use is not dispositive as to whether or not such use is accessory to a residential building; and

WHEREAS, as to DOB's contention that the subject Radio Tower does not qualify as an accessory use because it functions differently than traditional aerials in that it both receives and transmits radio signals (as opposed to traditional aerials which merely receive radio signals), the Board agrees with the Appellant that the fact that the Radio Tower transmits radio signals is of no import as to whether or not it qualifies as an accessory use; and

WHEREAS, the Board notes that DOB has acknowledged that amateur ham radio antennas can qualify as accessory uses, and since all ham radio operators by definition both receive and transmit radio signals, it appears that DOB has accepted certain amateur radio towers which both receive and transmit radio signals as accessory uses; and

WHEREAS, as to DOB's contention that the subject Radio Tower does not qualify as an accessory use because it is significantly taller and more elaborate than traditional accessory radio towers, the Board finds that the Appellant has submitted sufficient evidence to establish that radio towers similar to the subject Radio Tower are customarily found in connection with residential buildings in New York City; and

WHEREAS, specifically, the Appellant submitted photographs of nine other ham radio towers maintained throughout the City, and the Board notes that several of the photographs depict radio towers similar in size to the subject Radio Tower; and

WHEREAS, the Board further notes that the Appellant was able to ascertain the height of five of the radio towers for which it submitted photographs, which include: (1) a radio tower with a height of approximately 40 feet located on the rooftop of an 11-story residential building with ground floor commercial use within an M1-5M zoning district in Manhattan; (2) a radio tower with a height of approximately 50 feet located on the rooftop of a 13-story residential building with ground floor commercial use within an R10-A zoning district in Manhattan; (3) a radio tower with a height of approximately 28 feet located on the rooftop of a nine-

story residential building within an R8B zoning district in Manhattan; (4) a radio tower with a height of approximately 80 feet located in the backyard of a two-story residential building within an R4-1 zoning district in Brooklyn; and (5) a radio tower with a height of 15 feet located on the rooftop of a two-story residential building within an R2A zoning district in Queens; and

WHEREAS, the Board considers the photographs submitted by the Appellant to be a representative sample of the amateur ham radio antennas maintained by the approximately 3,321 licensed ham radio operators located throughout the City, and finds that the photographs submitted to the Board, in particular those of the rooftop radio towers in Manhattan with heights of 40 feet and 50 feet, respectively, serve as evidence that radio towers similar in height to the subject Radio Tower with a height of 40 feet are customarily found in connection with residential buildings in the City; and

WHEREAS, the Board is not convinced by DOB's argument that these radio towers cannot be relied upon as evidence that radio towers similar in size to the subject Radio Tower are customarily found in connection with residential buildings merely because they are located on taller buildings than the subject Building; and

WHEREAS, the Board does not find the height of the building upon which a radio tower is to be located to be the controlling factor as to whether or not that radio tower is deemed to be an accessory use; and

WHEREAS, as to DOB's contention that the subject case is controlled and consistent with Botanical Garden, the Board acknowledges that the case reflects that it is appropriate to take the overall character of the particular area into consideration when determining whether an accessory use is clearly incidental to and customarily found in connection with the principal use, however, the Board agrees with the Appellant that the facts of the case actually weigh in favor of the Appellant's position; and

WHEREAS, in particular, the Board notes that DOB is requesting that the Board rely on Botanical Garden to support the position that the subject Radio Tower is not an accessory use, despite the fact that the ultimate holding in Botanical Garden was that the radio tower in question qualified as an accessory use based on similar arguments advanced by the Appellant in the subject case; and

WHEREAS, the Board agrees with the Appellant that the Court's determination that "the Zoning Resolution classification of accessory uses is based upon functional rather than structural specifics" Botanical Garden, 91 N.Y.2d at 421, and "[t]he 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, weighs in favor of the Radio Tower as an accessory use, as the Appellant submitted a needs analysis which reflects that the antenna height of 40 feet is based upon an individualized assessment of the owner's needs to communicate with Israel and the Middle East and is the minimum necessary height required for the ham radio tower to function properly in communicating with these areas of the world; and

WHEREAS, the Board also does not find support in Botanical Garden for DOB's contention that the Radio Tower is non-accessory merely because there are no similarly-sized radio towers located on similarly-sized buildings in the immediately surrounding block, as in that case Fordham was the only university in the surrounding area and the Court supported the Board's consideration of the custom and usage of other universities which were not located near the site in reaching its determination that such radio antennas were customarily found as accessory uses to universities; and

WHEREAS, accordingly, the Board notes that while Botanical Garden set forth a standard that the overall character of the area should be taken into consideration in the accessory use analysis, the facts of that case itself reflect that such a standard does not require that there be an identical radio tower accessory to an identical building in the immediately surrounding area, as DOB appears to be requiring in the instant case; and

WHEREAS, the Board agrees with the Appellant that the fact that no other buildings on the immediate block have similar radio towers is not dispositive of whether the subject Radio Tower is an accessory use, and finds that the Appellant has submitted evidence that rooftop radio towers with heights of 40 feet are "customarily found in connection with" residential buildings in New York City; and

WHEREAS, as to BSA Cal. No. 14-11-A, the Board agrees with the Appellant that that case is also distinguishable from the subject case, as it was based on significantly different facts and in its decision the Board specifically noted 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…"; and

WHEREAS, the Board further agrees with the Appellant that, unlike the subject case, BSA Cal. No. 14-11-A involved DOB's attempt to promulgate and follow a universally applicable standard for determining whether a cellar was an accessory use, which has since been memorialized in Buildings Bulletin 2012-008; and

WHEREAS, specifically, the Board notes that in BSA Cal. No. 14-11-A, DOB sought to apply a single objective standard to all cellars in every zoning district, while in the subject case DOB is proposing to make a case-by-case analysis of each amateur ham radio tower that is constructed in the City and make a discretionary determination as to whether it is accessory based upon

factors such as the height of the radio tower, the height of the associated building, the prevalence of similar radio towers on similar buildings in the immediately surrounding area, the character of the surrounding area, and other subjective criteria; and

WHEREAS, the Board agrees with the Appellant that DOB has provided no provision of the Zoning Resolution or any other law, rule, or regulation which sets forth a standard for finding the subject Radio Tower non-accessory solely based upon its height; and

WHEREAS, the Board considers the lack of an objective standard for determining whether an amateur ham radio tower of a given height is accessory to be problematic and prone to arbitrary results, and while the Board does not make a determination as to whether amateur ham radio towers of any height may qualify as accessory, it recognizes that establishing a bright line standard for the permissible height of accessory radio towers may require an amendment to the Zoning Resolution or the promulgation of a Buildings Bulletin, as was the case in BSA Cal. No. 14-11-A; and

WHEREAS, the Board agrees with DCP that the size of a use can be relevant to whether it is "incidental to" and "customarily found in connection with" a principal use; however, it finds that in the case of amateur radio towers, unlike cellars and certain other uses, there is no articulated standard to guide DOB in determining at what height a particular radio tower becomes non-accessory; and

WHEREAS, as to the Appellant's argument that in not accepting the Radio Tower as an accessory use DOB has failed to "reasonably accommodate" the owner's needs contrary to federal laws and regulations, the Board recognizes that federal laws and FCC regulations favor the maintenance of ham radio equipment such as the Radio Tower and pre-empt local ordinances which prohibit the maintenance of such equipment; and

WHEREAS, however, because the Board has determined that the subject Radio Tower satisfies the ZR § 12-10 definition of accessory use, the Board deems it unnecessary to make a determination on the preemption issue in order to reach a decision on the merits of the subject appeal; therefore, the Board finds it appropriate to limit the scope of its determination accordingly; and

WHEREAS, the Board concludes that, based upon the above, the Radio Tower satisfies the ZR §12-10 criteria for an accessory use to the subject residential building.

Therefore it is Resolved that the subject appeal, seeking a reversal of the Final Determination of the Manhattan Borough Commissioner, dated April 10, 2012, is hereby granted.

Adopted by the Board of Standards and Appeals, November 20, 2012.

***The resolution has been revised to correct the amateur radio license No. which read "*WTJGQ*" now reads "*W2JGQ*". Corrected in Bulletin Nos. 1-3, Vol. 98, dated January 15, 2013.**

A true copy of resolution adopted by the Board of Standards and Appeals, November 20, 2012.
Printed in Bulletin Nos. 46-48, Vol. 97.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

CERTIFIED RESOLUTION

Chair/Commissioner of the Board