128-14-A
APPLICANT – Bryan Cave LLP, for Alicat Family LLC & AEEE Family LLC, owner.
SUBJECT – Application June 6, 2014 – Appeal challenging DOB determination that the proposed off-street loading berth is not accessory to a medical office. C2-5/R7A zoning district.
PREMISES AFFECTED – 47 East 3rd Street, East 3rd Street between First and Second Avenues, Block 445, Lot 62, Borough of Manhattan.
COMMUNITY BOARD #3M
ACTION OF THE BOARD – Appeal Denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Montanez ……..……..3
Recused: Chair Perlmutter.....1
THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Final Determination, dated May 9, 2014, by Department of Buildings ("DOB") First Deputy Commissioner Thomas J. Fariello (the "Final Determination"); and

WHEREAS, the Final Determination was issued in response to the applicant's submission of a Zoning Resolution Determination Form (the "ZRD1"), in which the applicant sought review of DOB's conclusion that the subject

> [l]oading berth is not clearly incidental to, and not customarily found in connection with ambulatory diagnostic facilities (ZR 12-10) [and, therefore] is not permitted as accessory use to ambulatory diagnostic facility (ZR 36-61); and

WHEREAS, the Final Determination states, in pertinent part, that:

> …the applicant has not demonstrated that off-street loading berths are customarily found in connection with medical offices, per the ZR 12-10 definition for "accessory uses." Since the off-street loading berth within the subject medical office is not a use which is clearly incidental to, and customarily found in connection with, the principal medical office use, the loading berth is not accessory to the medical office. Therefore, the above stated request is hereby denied and the off-street loading berth within the medical office, including any curb cuts providing access to the loading berth, must be removed; and

WHEREAS, a public hearing was held on this appeal on December 16, 2014, after due notice by publication in *The City Record*, with continued hearings on February 24, 2015, and April 28, 2015, and then to decision on May 12, 2015; and

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

WHERAS, this appeal is filed on behalf of Alistair and Catherine Economakis (collectively, the "Appellants"), the occupants of the building known as and located at 47 East 3rd Street, in Manhattan (the "Building," which is owned by Alicat Family LLC and AEE Family LLC); the Appellant contends that DOB's issuance of the Final Determination was erroneous; and

WHEREAS, DOB and the Appellants have been represented by counsel throughout this appeal; and

WHEREAS, the subject site is located on the north side of East Third Street, between Second Avenue and First Avenue, partially within an R7A (C2-5) zoning district and partially within an R8B zoning district, within the East Village / Lower East Side Historic District; and

WHEREAS, the site has 40 feet of frontage along East 3rd Street and approximately 3,080 sq. ft. of lot area; and

WHEREAS, the site is occupied by the six-story (with basement) Building; and

BACKGROUND AND PROCEDURAL HISTORY

WHEREAS, in May, 2008, the Appellants pre-filed an Alteration Type 1 application to convert one of the Building's two basement-level commercial spaces into a residential one-car garage; and

WHEREAS, after DOB rejected the proposed plans, the Appellants withdrew their application for a residential garage on December 9, 2008; and

WHEREAS, on December 12, 2008, the Appellants pre-filed an Alteration Type 1 application to convert the then-existing multiple dwelling into a single-family residence; and

WHEREAS, the Appellants' December 12, 2008 application did not include a change in use of the Building's basement-level stores and the plans filed therewith, dated December 5, 2008, do not depict a medical office or loading berth; and

WHEREAS, on June 15, 2009, the Appellants submitted a BC-1 Pre-Consideration and Reconsideration Application form related to the December 12, 2008 Alteration Type 1 application, in which the Appellants requested DOB's pre-consideration of an accessory loading berth with a 12 foot curb cut located in the basement of the Building; and

WHEREAS, in response to the June 15, 2009 BC-1, on July 14, 2009, DOB's Manhattan Borough Commissioner issued a determination that "no loading berth is required for doctor's office as per ZR 25-75"; and

WHEREAS, on October 20, 2009, DOB's Manhattan Borough Office issued a pre-consideration approval stating that it was "OK to accept accessory off-street loading berth since it is permitted for community facility use (Use Group 4)" and further noting that the subject "[l]oading berth shall not be used for accessory off-street parking"; and

WHEREAS, on February 19, 2010, the Appellants pre-filed a post approval amendment to the December 12, 2008 application to change the cellar from two stores, storage and a boiler room to a community facility, ambulatory loading berth, and boiler room, and submitted revised construction plans dated February 10, 2010 showing a loading berth of 442 sq. ft. and a medical office of 580 sq. ft.; and

WHEREAS, on May 27, 2011, the Appellants filed a subsequent post approval amendment to the December 12, 2009 application, increasing the size of the medical office to 640 square feet; and

WHEREAS, on September 9, 2011, DOB rescinded the October 20, 2009 pre-consideration approval, stating, in pertinent part, that, "the proposed loading berth fails to meet the definition of 'accessory' per ZR 12-10" in that, because of the relative size of the loading berth to the proposed medical facility, the proposed loading berth "is not 'clearly incidental' to the facility"; and

WHEREAS, on September 23, 2011, the Appellants filed a revised ZRD1 to increase the size of the medical office to 850 square feet and reduce the size of the loading berth to 429 square feet; and

WHEREAS, on October 14, 2011, DOB denied the September 23, 2011 ZRD1; and

WHEREAS, on May 31, 2012, the Appellants pre-filed an additional post approval amendment to the December 12, 2008 application, pursuant to which the area of the medical office was increased to 1,450 square feet and the loading berth was reduced to 396 square feet, together with a report, commissioned by the Appellants and prepared by Urban Cartographics, dated November 2, 2012 (the "UC Report") in support of the Appellants' contention that it is customary for medical offices to have accessory loading berths or off-street parking; and

WHEREAS, on February 28, 2013, DOB denied the Appellants' May 31, 2012 post approval amendment; and

WHEREAS, on October 11, 2013, the Appellants responded to DOB's denial of the May 31, 2012 post approval amendment and revised the plans submitted therewith to reflect a reduction in the area of the medical office, to 1,250 square feet (the "Medical Office"); and

WHEREAS, DOB denied the Appellants' October 11, 2013 submission on May 9, 2014 and ordered the removal of the subject loading berth (the "Loading Berth") which, as constructed, spans 396 square feet and is two stories tall; and

WHEREAS, on June 6, 2014, the Appellants brought the instant appeal; and

PROVISIONS OF THE ZONING RESOLUTION

WHEREAS, the Appellants and DOB agree that the Zoning Resolution provision at issue is the definition of "accessory use" set forth in ZR § 12-10, which provides in pertinent part:

> 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 the 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*.1

WHEREAS, the Board notes that it is the Appellants' burden to demonstrate, based on evidence in the record, that a proposed accessory use meets the foregoing criteria (*see e.g.*, BSA Ca. No. 45-96-A (July 23, 1996)); and

DISCUSSION

A. THE APPELLANTS' POSITION

WHEREAS, the Appellants assert that the Loading Berth is an accessory use to the Medical Office in that it is located on the same zoning lot as the Medical Office and Building, is in the same ownership as the Medical Office and Building and is clearly incidental to, and customarily found in connection with the medical office use of the Premises; and

WHEREAS, the Appellants submit that the Medical Office will be occupied by an orthopedic spinal surgeon whose work involves surgery, rehabilitation, and out-patient treatment of non-surgical spinal disorder; and

WHEREAS, the Appellants submit that the surgeon who will occupy the Medical Office intends to use the Loading Berth for patient services, including ambulances and deliveries, and

WHEREAS, the Appellants submit that approximately 20% of the surgeon's patients will arrive at the Medical Office by ambulette; and

WHEREAS, the Appellants have submitted letters from the surgeon who plans to occupy the Medical Office in support of the foregoing claims; and

WHEREAS, the Appellants offer the following arguments in support of their position: (1) that the Loading Berth is clearly incidental the Medical Office notwithstanding DOB's argument that the Loading Berth is too large relative to the Medical Office to constitute an accessory use; (2) that loading berths are customarily

1 Neither party disputes that the Loading Berth is located on the same zoning lot as the Medical Office, or that the Loading Berth is in the same ownership as the Medical Office and Building. As such, subsections (a) and (c) of the definition of Accessory Use are not at issue in the instant appeal.

found in connection with medical offices of the type at issue in this appeal and that in assessing this point DOB should consider the functionality of loading berths, rather than the term as used in the Zoning Resolution, such that off-street parking spaces used in connection with medical offices should support the Appellants' contention that loading berths are a customary accessory use to small medical offices; and (3) that the instant case presents the first instance in which a loading berth is claimed as accessory to a spinal surgeon's office to facilitate non-ambulatory patients and, as such, DOB must consider whether this new use is similar in function or type to other well-established accessory uses; and

WHEREAS, in support of their argument, the Appellants have submitted and referred the Board to the UC Report, which was initially submitted by the Appellants to DOB in response to the agency's request for examples of loading berths which are accessory to medical offices, and which the Appellants contend shows "8 locations where medical offices are accompanied by accessory off-street loading berths and parking spaces used for loading purposes"; and

WHEREAS, the Appellants have also submitted two letters from transportation companies Sinai Van Service and Medi Trans (the "Ambulette Service Letters") in support of their argument that off-street parking services serve similar purposes to those served by off-street loading berths; and

1. The Appellants argue that the Loading Berth is "clearly incidental" to the Medical Office.

WHEREAS, the Appellants argue that the Loading Berth is clearly incidental to the Medical Office and that DOB's rejection of their application is based on an allegedly erroneous insertion into the Zoning Resolution of a size limitation upon accessory loading berths; and

WHEREAS, as to their argument that the relative size of the Loading Berth to the Medical Office evidences that the former is clearly incidental to the latter, the Appellants submit that the square footage of the Loading Berth and Medical Office are 396 square feet and 1,250 square feet, respectively, thereby establishing that the Loading Berth is incidental to the Medical Office; and

WHEREAS, the Appellants argue that the "relative proportion of allowable accessory to principal uses runs a spectrum" and note that the Board has allowed accessory uses that occupied as little as two percent and as much as 69 percent of the square footage of the lot; and

WHEREAS, specifically, the Appellants cite *2294 Forest Avenue*, BSA Cal. No. 14-09-BZ (August 24, 2010), in which the Board allowed for an automotive laundry totaling two percent of the lot area of the lot area of the site as an accessory to an automobile service station with an accessory convenience store; and

WHEREAS, the Appellants also cite *11-11 131st Street*, BSA Cal. No. 202-05-BZ (July 18, 2006), in which the Board granted a Special Permit to operate a Physical Culture Establishment with a proposed accessory therapeutic and relaxation service space totaling 8,058 square feet, in excess of the primary massage, exercise and aerobics square footage, of 3,548 square feet; and

WHEREAS, the Appellants maintain that the Loading Berth comprises 24 percent of the square footage of the lot and, therefore, is within the range of acceptable accessory use to principal use ratio previously accepted by this Board, and states that the Board "has … recognized that there is no limitation on the amount of square footage an accessory use may occupy compared to the primary use"; and

WHEREAS, the Appellants further argue that notwithstanding that foregoing, DOB was in error when it held as dispositive the relative size of the Loading Berth to the Medical Office, and maintain that while the relative size of a proposed accessory use to its principal use is an appropriate consideration, it cannot be the sole consideration in the absence of a legislative mandate limiting the size of such proposed accessory use; and

WHEREAS, the Appellants maintain that DOB "was required to assess the propriety of the loading berth based on an 'individualized assessment of need' [quoting *New York Botanical Garden v Board of Standards and Appeals*, 91 NY2d 413 (1998)] reflecting its functional characteristic," an analysis, the Appellants argue, by which the proposed Loading Berth was clearly incidental to the principal Medical Office use; and

WHEREAS, the Appellants note that the *New York Botanical Garden* Court refused to create a restriction on accessory uses based on size and concluded, with respect to the use and tower at issue in that case, that "[t]he fact that the definition of accessory radio towers contains no … size restriction supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of need," *New York Botanical Garden*, 91 NY2d at 423; and

WHEREAS, in further support of their argument that relative size of the Loading Berth to the Medical Office cannot be dispositive to whether the Loading Berth is clearly incidental to the Medical Office, the Appellants cite *Mamaroneck Beach & Yacht Club v Zoning Board of Appeals of Village of Mamaroneck*, 52 AD3d 494 (2d Dept), *leave denied*, 11 NY3d 712 (2008), in which the Appellate Division, Second Department, held that a zoning board was not permitted to insert into the accessory use definition of a local zoning ordinance an area requirement based upon the relative size of the proposed accessory use to other buildings on the property at issue; and

WHEREAS, the Appellants also cite *231 East 11th Street*, BSA Cal. No. 151-12-A (Nov. 20, 2012) to support their claim that DOB, in determining whether the Loading Berth is clearly incidental to the Medical Office, should have taken into account the peculiarities of the

occupant, i.e., the proposed lessee's statement that some of his patients will arrive in a wheelchair or on a gurney, via ambulette, and that other ambulatory patients, many of whom are elderly and infirmed, would benefit from the use of the Loading Berth ramp to access the basement-level Medical Office; and

WHEREAS, the Appellants conclude that, in light of the foregoing proposed use of the Loading Berth, such use is "intrinsically related in function and entirely subordinate to" the Medical Office and, therefore, is clearly incidental to such principal use; and

2. The Appellants argue that loading berths are customarily found in connection with medical offices.

WHEREAS, the Appellants maintain that (1) loading berths are customarily found in connection with medical offices and (2) to the extent that loading berths are not customarily found in connection with medical offices, off-street parking spaces, which are the functional equivalent of loading berths, are customarily found in connection with medical offices and, as such, the Loading Berth should be deemed an accessory to the Medical Office; and

WHEREAS, the Appellants concede that a customary use is one that is usual to maintain in conjunction with a primary use, but argue, with reference to *231 East 11th Street*, BSA Cal. No. 151-12-A (Nov. 20, 2012), that "a use can be customary even though it is not very common"; and

WHEREAS, the Appellants argue that the Court's assessment in *New York Botanical Garden* was fact-based and turned "upon functional rather than structural specifics," *New York Botanical Garden*, 91 NY2d at 421 and, as such, the functional analysis for which they advocate, which equates accessory loading berths and accessory parking spaces, is appropriate; and

WHEREAS, specifically, the Appellants maintain that that loading berths are customarily found in connection with medical offices by virtue of their functional equivalence to off-street parking spaces, and that "it is appropriate to look for evidence of 'customary' use at both accessory loading *and* parking notwithstanding the fact that the Zoning Resolution distinguishes the two" (emphasis in the original); and

WHEREAS, the Appellants further state that:

> … the function that loading berths serve – patient pick up and drop off and medical deliveries – is customarily found in connection with medical offices whether in the form of loading berths or parking spaces used for loading and regardless of the formalities attending the occupancy's filing in Department records; and

WHEREAS, in support of their argument that off-street parking spaces and off-street loading berths are functionally equivalent, the Appellants referred the Board to the Ambulette Service Letters which, the Appellants argue, establish that "off-street parking spaces serve similar purposes to those served by off-street loading berths – they function as places for vehicles and ambulettes to stop briefly to discharge or pick up patients"; and

WHEREAS, in support of their argument that such uses are usually maintained in conjunction with medical offices, the Appellants referred the Board to the UC Report which purportedly "reflects 8 locations where medical offices are accompanied by accessory off-street loading berths and parking spaces used for loading purposes" and to certificates of occupancy showing multiple locations within a mile of the zip code (10003) in which the subject site is located which purportedly shows loading berths or parking uses accessory to medical offices; and

WHEREAS, in response to objections raised by DOB that the UC Report is not constrained, geographically, to an appropriate radius of the subject site, the Appellants argue that the Board has rejected an outright geographic limitation when considering whether a proposed accessory use is customarily found in connection with a principal use and is required to "tak[e] into consideration the over-all character of the particular area in question," *New York Botanical Garden*, 91 NY2d at 420; and

WHEREAS, the Appellants further argue that such "particular area" should not be, and has not been, constrained to the immediate area of the proposed accessory use, that so restricting an inquiry is bad public policy, and that medical offices and loading berth and off-street parking uses accessory thereto do not vary by neighborhood; and

WHEREAS, based on the foregoing, the Appellants conclude that "[t]he broader purpose of parking spaces includes their use for the more limited purpose of loading and unloading," that their reliance on evidence of accessory parking at medical offices, coupled with purported evidence that such parking is "often used for loading and unloading" is consistent with the functional analysis prescribed by the Court in *New York Botanical Garden* and, finally, that taken in the aggregate, the off-street parking spaces and loading berths cited by the Appellants are sufficient to demonstrate that the loading berths are customarily found in connection with medical offices; and

3. The Appellants argue, in the alternative to a finding that loading berths are customarily found in connection with small medical offices, that the subject Loading Berth is a novel accessory use to the Medical Office and should be permitted even if loading berths are not customarily found in connection with medical offices

WHEREAS, the Appellants note the well-

established law that in order to be customarily found in connection with a principal use, a proposed accessory use must "be 'commonly, habitually and by long practice … established as reasonably associated with the primary use,'" (citing *Gray v Ward*, 74 Misc2d 50, 55-56 (Sup. Ct., Nassau Co. 1973), *aff'd* 44 Ad2d 597 (2d Dept 1974) [internal citations omitted]); and

WHEREAS, the Appellants argue, however, that where there is no such longstanding use, this Board can and should recognize novel accessory uses where appropriate, "lest accessory uses be frozen in time and thus limited to those that existed when zoning was first enacted"; and

WHEREAS, thus, the Appellants urge this Board to find that the Loading Berth is a novel accessory use to the Medical Office;

WHEREAS, the Appellants support this position by arguing, in the first instance, that the Zoning Resolution recognizes the relationship between loading berths and medical offices by requiring loading berths at hospitals and related facilities with a floor area in excess of 10,000 square feet, and not prohibiting off-street loading berths for smaller facilities, and, thus, that "[t]he refusal to recognize a customary connection between medical office and loading functions effectively eviscerates the provisions governing permitted accessory off-street loading berths" in that, had the drafters of the Zoning Resolution intended to prohibit loading berths for medical offices of a certain size, they would have done so explicitly; and

WHEREAS, the Appellants further support this position by arguing, in the second instance, that New York courts have developed an analysis by which they determine whether a proposed use constitutes a novel accessory use, and that employing that analysis in the instant matter compels a reversal of the Final Determination; and

WHEREAS, specifically, the Appellants cite *Dellwood Dairy Co. v City of New Rochelle*, 7 NY2d 374, 375-376 (1960), in which the Court of Appeals ruled that a coin-operated milk vending machine located in the basement of an apartment building in a residential zoning district constituted an accessory use thereto, reasoning that "[t]he use of a milk vending machine is but a different method of doing a traditional service for a householder. It is a common experience that new times bring not only new problems but new ways and means of dealing with old ones" and further reasoning that "[t]he presence of a milk vending machine … in the basement of an apartment building which is not accessible to the general public, can have little, if any, adverse application to the character of the residential neighborhood"; and

WHEREAS, the Appellants maintain that because the Loading Berth, like the vending machine at issue in *Dellwood Dairy Co.*, will not adversely affect the character of the Building's residential district, and because it functions similarly to accessory parking, which is not permitted at the site, it should be recognized as a novel accessory use to the Medical Office; and

WHEREAS, the Appellants maintain that the foregoing application of *Dellwood Dairy Co.* is consistent with *New York Botanical Garden* in that it recognizes function, as opposed to structure or form, to determine the propriety of the proposed accessory use; and

B. DOB'S POSITION

WHEREAS, DOB maintains that the Final Determination was properly issued because, *inter alia*, the Loading Berth does not satisfy the definition of an "accessory use" in that it is neither (1) "clearly incidental to" nor (2) "customarily found in connection with" the Medical Office; and

WHEREAS, DOB also argues that the Appellants' function-based argument is inapplicable to the instant matter; and

1. DOB argues that the Loading Berth is not "clearly incidental" to the Medical Office.

WHEREAS, DOB cites *Gray v Ward* for the proposition that in order for a proposed accessory use to be "incidental" it must be "subordinate and minor in significance" as well as "attendant or concomitant," *Gray v Ward* 74 Misc2d at 54; and

WHEREAS, DOB maintains that the Loading Berth is too large and too prominent to meet the foregoing requirement and, as such, it is not "clearly incidental" to the Medical Office; and

WHEREAS, in support of this argument, DOB cites the following resolutions of the Board: *1221 East 22nd Street*, BSA Cal. No. 14-11-A (Oct. 18, 2011), in which the Board found that "… DOB may place a quantitative measure to ensure that the accessory use remains incidental to the primary use"; *11-11 131st Street*, BSA Cal. No. 202-05-BZ (July 18, 2006), in which the Board noted that "square footage may be a relevant consideration in some cases involving … primary uses [other than Physical Culture Establishments]"; and

WHEREAS, DOB notes *246 Spring Street*, BSA Cal. No. 315-08-A (Oct. 5, 2010) for the proposition that "what constitutes a loading berth for purposes of calculating floor area inherently goes beyond the floor space devoted to the loading berth itself, and may include some ancillary spaces as well"; and

WHEREAS, DOB notes that the two-story Loading Berth contains 396 square feet of floor area and is larger on the first floor of the Building than at the basement level, so that the "loading berth's upper part seems to span 627 square feet" and "takes up 47% as much as space as the medical office … [and, on the first floor of the Building] the loading berth appears to take up 157% more space than the medical office" and concludes that, accordingly, the Loading Berth is "simply too large and too significant to have a

reasonable incidental relationship to the [Medical Office]"; and

2. DOB argues that the Loading Berth cannot be accessory to the Medical Offices because the Loading Berth structure was proposed before the Medical Office was proposed.

WHEREAS, DOB argues that, because the Loading Berth was initially proposed as an off-street residential garage in a pre-filing submitted in May, 2008, and, as such, the proposed use of the subject structure predates its purported principal use, the Medical Office, the Loading Berth cannot be an accessory use thereto; and

WHEREAS, in support of this argument, DOB cites *2368 12th Avenue*, BSA Cal. Nos. 24-12-A and 1470120A (Aug. 7, 2012) for the proposition that "in order to determine whether a use satisfies the Zoning Resolution's §12-10 definition of 'accessory use,' the principal use, upon which the accessory use depends, must first be identified"; and

3. DOB argues that the Loading Berth is not "customarily found in connection with" the Medical Office.
   A. DOB maintains that loading berths are not customarily found in connection with medical offices in the East Village, the Manhattan Core or the City of New York.

WHEREAS, DOB maintains that "loading berths are not 'customarily found in connection with' medical offices of this size, and that the Appellants have presented no evidence showing otherwise"; and

WHEREAS, DOB maintains that New York courts look to the immediate neighborhood to determine whether a proposed accessory use is customarily found in connection with a principal use, and notes that the UC Report does not show any examples of loading berths associated with medical offices in the East Village, the immediate neighborhood of the Building; and

WHEREAS, DOB argues, in support of its position that the loading berths must be customarily found in connection with medical offices in the immediate neighborhood of the Building, that neighboring property owners within the East Village / Lower East Side historic district have different expectations with respect to off-street loading berths than property owners in other areas of the New York City; and

WHEREAS, specifically, DOB notes that the designation report for the East Village / Lower East Side historic district contains only one reference to a loading berth, thus, it would be reasonable for the Building's neighbors not to expect a loading berth at the Building; and

WHEREAS, DOB asserts, based on a WebMD physician directory, that there are 44 orthopedic surgeons and 1,527 physicians in the East Village area within a mile from the 10003 zip code in which the Building is located and, within a three mile radius of that zip code, 280 orthopedic surgeons and 7,535 physicians, and argues that if, notwithstanding the large number of such offices located in and around the East Village, the UC Report does not show any examples of loading berths associated with medical offices in the neighborhood, then such uses cannot be said to be "customarily found in connection with" medical offices; and

WHEREAS, DOB further notes that the UC Report does not show any examples of loading berths associated with medical offices in the Manhattan Core; and

WHEREAS, DOB argues that those sites identified in the UC Report which show off-street parking associated with medical offices are not probative because such medical offices are located miles from the Building in neighborhoods which differ in character from the East Village; and

WHEREAS, with respect to the Appellants' reliance on *231 East 11th Street*, BSA Cal. No. 151-12-A (Nov. 20, 2012) for the proposition that "a use can be customary even though it is not very common," DOB notes that in that case, the Board's reasoning turned on the fact that ham-radio towers are uncommon and maintains that the Appellants have not, and cannot, assert that small medical offices are similarly uncommon; and

   B. DOB rejects the Appellants' function-based argument that accessory off-street parking can support a determination that loading berths are customarily found in connection with medical offices.

WHEREAS, DOB notes that the Appellants' stated need to accommodate the drop-off and pick-up of patients is not a purpose for which loading berths are customarily used and argues that the Appellants' argument - that off-street parking spaces are the functional equivalent of loading berths for the purpose of establishing that a loading berths are customarily found in connection with medical offices - is erroneous in that loading berths are used for goods, not people, and that, as such, a loading berth cannot be accessory to a medical office in order to facilitate the discharge of patients thereat; and

WHEREAS, DOB states that by listing "off-street parking" and "off-street loading berths" as separate categories, Zoning Resolution §12-10 (accessory use) indicates that "off-street parking spaces" function differently than "off-street loading berths," and argues that the Appellants rely on an out-context phrase from *New York Botanical Garden* to suggest the Board ignore these functional distinctions…

WHEREAS, DOB argues that the distinction between loading berths and off-street parking spaces is significant and is evidenced by reports issued by the New York City Planning Commission and the Zoning Resolution itself; and

WHEREAS, specifically, DOB cites various reports issued by the City Planning Commission which the agency purports to demonstrate that "the Zoning Resolution permits accessory off-street loading berths where the proposed primary use needs to load and unload goods, but not 'load' and 'unload' people"; and

WHEREAS, in further support of its argument that loading berths contemplate a transfer of goods, rather than people, DOB notes that ZR §§ 25-72 and 36-62, which require accessory off-street loading berths for hospitals and related facilities with more than 10,000 square feet of floor area but, in the attendant tables entitled Required Off-Street Loading Berths for New Construction or Enlargements, state that "[r]equirements in this table are in addition to area utilized for ambulance parking," thereby suggesting a distinction in the Zoning Resolution between loading berths and ambulance parking; and

WHEREAS, DOB further notes that ZR §12-10 (street) clarifies that "vehicles … *take on* or *discharge* passengers" in support of its argument that loading is distinct from parking; and

WHEREAS, DOB concludes that the Zoning Resolution "states that ambulances use parking, not loading"; and

WHEREAS, DOB further argues that the Appellants have failed to provide sufficient evidence of the functional equivalency of loading berths and off-street parking spaces, i.e., that loading berths are customarily used for loading or unloading people; and

WHEREAS, DOB notes that the Ambulette Service Letters belie the Appellants contention that loading berths and off-street parking spaces are functionally equivalent, nothing that the use described in the Ambulette Service Letters is more akin to temporary parking than to using a loading berth to facilitate the drop-off and pick-up of patients; and

C. DOB offers a framework for determining whether a loading berth constitutes an accessory use.

WHEREAS, DOB offers the following thirteen-factor analysis to determine whether an off-street loading berth is an accessory use to a medical office; and

WHEREAS, specifically, DOB contends that the following factors should be used to determine whether such use is "clearly incidental": (1) Frequency of deliveries; (2) Size and amount of goods typically delivered; (3) Hours of operation; (4) Size and volume (i.e., proportionality) of loading berth in relation to primary use's loading needs; and

WHEREAS, DOB contends that the following factors should be used to determine whether an off-street loading berth addresses the needs of a small medical office: (5) Route for goods to travel from loading berth to primary use; (6) Access to the loading berth as service entrance; (7) Ingress and egress; (8) Effects on traffic, parking, pedestrians, and safety; (9) Site-specific characteristics (such as geography and building layout); (10) Inadequacy of alternatives to address the primary use's loading needs; and

WHEREAS, DOB contends that the following factors should be used to determine whether an off-street loading berth is customarily found in connection with a small medical office: (11) Character of the particular area; (12) Specific examples of loading berths found in connection with the primary use; (13) Details about how those examples use the loading berth; and

WHEREAS, the Appellants reject DOB's proposed framework on the basis that it is premised on the assumption that loading berths function solely to accommodate the delivery of goods, a position which the Appellants dispute; and

4. DOB maintains that *New York Botanical Garden* is inapplicable to the instant appeal, but also maintains that the case supports the distinction between parking and loading.

WHEREAS, DOB notes that in *New York Botanical Garden*¸ all parties agreed that radio towers were accessory to universities, and that the issue before the Court was "whether the *proposed* tower [was] 'incidental to' and 'customarily found' in connection with the University," and not, as is the case in the instant appeal, whether, the proposed accessory use at issue, generally, could be accessory to its purported principal use; and

WHEREAS, DOB argues that the decision in *New York Botanical Garden* does not support the Appellants' argument that evidence of the customary character of off-street parking spaces evidences the customary character of loading berths, based on their purported functional equivalency, and contends that the language from that case on which the Appellants rely, that "the Zoning Resolution classification of accessory uses is based upon functional rather than structural specifics," *New York Botanical Garden*, 91 NY2d at 421-22, is taken out of context; and

WHEREAS, DOB further argues that the Court's reasoning, that "the Zoning Resolution classification of accessory uses is based upon functional rather than structural specifics," supports the agency's position that "parking" and "loading" are distinct uses, and notes that by listing them as separate categories, Zoning Resolution §12-10 (accessory use) indicates that "off-street parking spaces" function differently than "off-street loading berths"; and

WHEREAS, DOB also argues that the record presented to the Board and Court in *New York Botanical Garden* was significantly more developed with respect to the number of accessory radio towers than the instant record, which, DOB argues, is devoid of evidence that loading berths are customarily used in connection with small medical offices; and

WHEREAS, DOB urges the Board to infer from this lack of evidence that loading berths are not customarily found in connection with small medical offices, and cites *Toys R Us v Silva*, 89 NY2d 411 (1996) for the proposition that the Board can consider lack of standard evidence in reaching a determination as to whether loading berths are customarily found in connection with small medical offices; and

WHEREAS, accordingly, DOB requests that the Board uphold the Final Determination; and

CONCLUSION

WHEREAS, the Board finds that the Loading Berth is not an accessory to the Medical Office because it does not satisfy subsection (b) of the ZR § 12-10 definition of "accessory use"; as such, the Final Determination is upheld and the appeal is denied; and

A. The Loading Berth is not "clearly incidental" to the Medical Office.

WHEREAS, the Board acknowledges *Gray v Ward*, 74 Misc2d 50, 55-56 (Sup. Ct., Nassau Co. 1973), *aff'd* 44 Ad2d 597 (2d Dept 1974) for the principle that incidental, in the context of accessory uses, means (1) that the contemplated use is not the principal use of the property and is, to the contrary, a use which is subordinate to and minor in significance when compared to the principal use; and (2) that the relationship of the of the proposed accessory use to the alleged principal use is attendant or concomitant; and

WHEREAS, the Board finds further support for this principle in *Matter of 7-11 Tours Inc. v. Board of Zoning Appeals of the Town of Smithtown*, 90 AD2d 486 (2d Dept 1982) (citing *Lawrence v. Zoning Bd. of Appeals of Town of North Branford*, 158 Conn. 509, 512-513 (1969)); and

WHEREAS, the Board credits the Appellants' argument that there is no strict limitation on the amount of square footage an accessory use may occupy relative to its principal use, but notes, as DOB has argued and as the Board has recognized in the past, that DOB may take into consideration, with respect to a purported accessory use, the relative size of such use to its stated principal use where the size of the purported accessory use is indicative of its status as subordinate and minor in significance to said principal use; and

WHEREAS, the Board reiterates that the issue of whether a purported accessory use is minor in significance relative to its stated principal use requires a fact-specific analysis, thus the range of relative sizes acknowledged by the Board in prior appeals to be incidental is varied and of insignificant precedential weight; and

WHEREAS, the Board does not accept the Appellants' reading of *New York Botanical Garden* as applicable to whether the Medical Office is incidental to the Loading Berth because, as noted by the Court in that case, there was no dispute that the accessory use at issue – radio stations and their related towers – were clearly incidental to and customarily found in connection with college campuses; and

WHEREAS, based on the foregoing, and accepting the Appellants' calculus regarding the size of the Loading Berth, the Board finds that the former is not 'clearly incidental' to the latter, as is required under subsection (b) of the ZR § 12-10 definition of "accessory use" because it is not minor in significance relative to the small Medical Office; and

B. Loading berths are not "customarily found in connection with" small medical offices.

WHEREAS, the Board notes that in order to qualify as a use which is customarily found in connection with its principal use, a purported accessory use must, as a general rule, be commonly, habitually and by long practice established as associated with such principal use (*see e.g., Gray v Ward*, 74 Misc2d 50 (Sup. Ct., Nassau Co. 1973), *aff'd* 44 Ad2d 597 (2d Dept 1974)); and

WHEREAS, the Board further notes that a purported accessory use need not be common where the principal use to which it is accessory is uncommon, but maintains that in order to meet the "customarily found in connection with" requirement, a purported accessory use must have a well-established and relatively frequent association with the principal use; and

WHEREAS, the Board notes that it is the Appellants' burden to demonstrate that a purported accessory use is "customarily found in connection" with its stated principal use; and

WHEREAS, the Board notes that the Appellants have failed to establish that loading berths are customarily found in connection with small medical offices; and

WHEREAS, the Board makes the foregoing finding without regard to the geographic denominator of the inquiry, and does not advance any position as to whether an analysis of a purported accessory use is customarily found in connection with its stated principal use must be performed on a neighborhood, borough or city-wide basis; and

WHEREAS, the Board notes that, for the purposes of this discussion, it accepts the findings advanced by the Appellants in the UC Report and finds that relatively insignificant number of loading berths presented as accessory uses to small medical offices (a single "loading space"), in light of the significant number of such medical offices, is an insufficient basis on which to determine that

loading berths are customarily found in connection with small medical offices, and the Board notes further that it infers from such lack of evidence that indeed loading berths are not customarily found in connection with small medical offices; and

WHEREAS, the Board rejects the Appellants' function-based argument that for the purpose of determining whether loading berths are customarily found in connection with small medical offices the Board should accept off-street parking spaces as the functional equivalent of loading berths in support of the position that loading berths are commonly, habitually and by long practice established as associated with small medical offices; and

WHEREAS, indeed, the Board finds that the Appellants' argument would divest "loading berth," a defined term, of any meaning and declines to conflate loading berths, parking spaces and any other "pick-up and drop-off" points (all of which, the Appellants argue, are "customarily associated with medical offices") in favor of an analysis which would vitiate the plain meaning of the Zoning Resolution; and

WHEREAS, contrastingly, the Board credits DOB's argument that by listing them as separate categories, Zoning Resolution §12-10 (accessory use) indicates that "off-street parking spaces" function differently than "off-street loading berths"; and

WHEREAS, the Board credits DOB's clarification of *231 East 11th Street*, BSA Cal. No. 151-12-A (Nov. 20, 2012) and notes that in that case, the Board reasoned that ham-radio towers, while not commonly found throughout the city, *are* well-established uses with a long history of association with principal residential uses, such that, to the extent that they exist, they are customarily found in connection with residential buildings; and

WHEREAS, the Board finds that its reasoning in *231 East 11th Street* applies to the instant case to the extent that Appellants' failure to establish that loading berths and small medical offices, neither of which are uncommon, have no such history of association with each other; and

WHEREAS, likewise, the Board rejects the Appellants' reading of *New York Botanical Garden* as supporting an analysis that would permit off-street parking, which the Appellants contend is the functional equivalent of a loading berth, to evidence the customary association of accessory loading berths to small medical offices; and

C. The Board declines to recognize a new category of accessory use to small medical offices

WHEREAS, the Board accepts that, in certain instances, it is appropriate to recognize novel accessory uses, even where such use is not customarily found in connection with its stated principal use, but declines the Appellants' request that the Board do so in this instance; and

WHEREAS, the Board notes that it need not consider the instant purportedly novel accessory use in lieu of finding that such use is customarily found in connection with its stated principal use where, as here, the Board finds that the subject purported accessory use is not clearly incidental to its stated principal use; and

WHEREAS, for the reasons set forth above, the Board finds that the Loading Beth is not accessory to the Medical Office; and

Therefore it is Resolved, that the subject appeal, seeking a reversal of the Final Determination dated May 9, 2014, is hereby *denied*.

Adopted by the Board of Standards and Appeals, May 12, 2015.

A true copy of resolution adopted by the Board of Standards and Appeals, May 12, 2015.
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Copies Sent
To Applicant
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Borough Com'r.