Form 150
(Revised 04/29/02)

Case No. 16990

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

MOTION

Notice: See other side of motion form for instructions.

Applicant, Appellant, Appellee, Party, Intervener	vs.	Applicant, Appellant, Appellee, Party, Intervener
American Towers, Inc.		District of Columbia Department of Consumer and Regulatory Affairs

Motion of: (state exactly what you want the Board to do)

The District of Columbia Department of Consumer and Regulatory Affairs moves for dismissal of this appeal as untimely. Because this motion may be dispositive of this appeal, the District of Columbia requests a hearing and decision on this motion prior to a hearing on the merits.

Points and Authorities: (State the each and every reason why the Board should grant this motion, including relevant references to the Zoning Regulations or Map)

See attached Memorandum of Points and Authorities (with Attachments).

RECEIVED
D.C. OFFICE OF ZONING
2003 JAN 30 PM 3:

CERTIFICATE OF SERVICE

I hereby certify that on this (date) 30 day of (month) Jan., (year) 2003, I served a copy of the foregoing Motion on each entity that has requested party status, or entities that have be granted party status – on the above referenced BZA case via:

☒ First class mail ☐ Hand delivery ☐ Other (specify)

(ATTACH A LIST OF PARTIES SERVED)

Signature: Bennett Rushkoff (Applicant*)

Print Name: Bennett Rushkoff | Firm/Organization: Office of Corp. Counsel

Address: 441 4th Street, N.W., Suite 450-N, Washington, DC 20001

* *In the event an authorized agent files a motion on the behalf of the maker of the motion, a letter signed by the maker of the motion authorizing the agent to act on his/her behalf shall accompany the notice of application.*

To be notified of hearing and decision:
(Maker of Motion or Authorized Agent)*

BZA Case No. 16990 Exhibit No. 16

Name:	Bennett Rushkoff, Senior Counsel				
Address:	Office of the Corporation Counsel, 441 4th Street, N.W., Suite 450-N, Washington, DC 20001				
Phone No.:	202-727-5173	Fax No.:	202-727-6546	E-Mail:	bennett.rushkoff@dc.gov

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

Board of Zoning Adjustment
District of Columbia
CASE NO. 16990
EXHIBIT NO. 16

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of American Towers, Inc.	)	
from the October 5, 2000 decision of the	)	BZA Appeal No. 16990
Department of Consumer and Regulatory	)	
Affairs regarding 4623 41st Street, N.W.	)	

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' MOTION TO DISMISS

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") moves the Board of Zoning Adjustment to dismiss American Towers, Inc.'s appeal as untimely. The appeal was filed on January 10, 2003, exactly 27 months after the final agency decision as to which review is sought.

If granted, this motion would be fully dispositive of the appeal. For this reason, DCRA respectfully requests that this motion be heard and decided prior to any hearing on the substantive merits of the appeal.

Respectfully submitted,

ARABELLA W. TEAL
Interim Corporation Counsel

CHARLOTTE W. PARKER (#186205)
Deputy Corporation Counsel
Civil Division

BENNETT RUSHKOFF (#386925)
Senior Counsel
Office of the Corporation Counsel
441 4th Street, N.W., Suite 450-N
Washington, DC 20001
(202) 727-5173 phone, 727-6546 fax
bennett.rushkoff@dc.gov

January 30, 2003

Attorneys for the District of Columbia

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of American Towers, Inc. from the October 5, 2000 decision of the Department of Consumer and Regulatory Affairs regarding 4623 41st Street, N.W.	))))	BZA Appeal No. 16990

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

This appeal by American Towers, Inc. ("American Towers") should be dismissed as untimely by the Board of Zoning Adjustment ("BZA") because American Towers waited until January 10, 2003 – more than two years – to seek BZA review of a decision issued by the Department of Consumer and Regulatory Affairs ("DCRA") on October 10, 2000.[1] This delay was unjustified and failed to comply with the BZA's requirement that one who is aggrieved by a zoning decision must file a "timely appeal" to the BZA. 11 DCMR § 3112.2 (2002).

The District of Columbia Court of Appeals has held that the BZA's requirement "that an appeal be timely is jurisdictional," and that the BZA lacks the power to consider an untimely appeal. *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1121 (D.C. 2001). In addition, the Court has described the "limit of timeliness" as "two months between notice of a decision and

---

[1] American Towers states that it is appealing from DCRA's "Notice" dated October 5, 2000, which stated that the "decision to cancel and rescind these invalid permits will become effective at 5 pm on Tuesday October 10, 2000," unless the Acting Director of DCRA received "written materials" altering her "conclusion that the permits are invalid." DCRA's "Final Notice," which addressed issues raised in American Towers' response to the October 5 Notice, was dated October 10, 2000. [**Attachment G** hereto]

appeal therefrom," absent "exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal." *Id.* at 1122 (emphasis in original); *accord Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964, 969 (D.C. 2002). Nothing prevented American Towers from appealing DCRA's October 10, 2000 decision within two months, *i.e.* by about December 10, 2000, rather than waiting until January 2003.

The October 10, 2000 decision from which American Towers appeals was DCRA's decision rescinding permits for American Towers to proceed with construction of a 756-foot tower at 4623 41st Street, N.W. DCRA's earlier decision issuing permits for construction of the tower had been appealed to the BZA by Jill Diskan, on behalf of Advisory Neighborhood Commission 3-E ("ANC"), on September 18, 2000. BZA Case No. 16649 (hereinafter referred to as "the ANC's appeal"). [BZA Form 1, **Attachment A** hereto] Seventeen days after the ANC's appeal was filed, DCRA decided to rescind the permits in question, and, shortly thereafter, American Towers and the ANC each asked the BZA to stay the ANC's appeal. [**Attachments B and C** hereto] The ANC's appeal was formally stayed by the BZA on September 6, 2001, and was finally withdrawn by the ANC on November 1, 2002. [**Attachments D and E** hereto]

American Towers misleadingly asserts in its "Statement of Agrievement [sic]" that the appeal it filed this month serves simply "to preserve its earlier exercised exhaustion of administrative remedies." In fact, prior to this belated appeal, American Towers neglected to pursue its administrative remedy at the BZA with respect to DCRA's October 10, 2000 decision rescinding the permits for construction of the tower. In an October 30, 2000 letter discussing the ANC's appeal to the BZA, the Director of the

Office of Zoning reminded American Towers' attorney of the need for his client to file *its own* appeal with respect to DCRA's decision to rescind the permits: "In the interest of maintaining your options, the Office of Zoning recommends American Tower Systems, Inc. file an appeal based on the revocation [by DCRA] of the permits for the tower." [**Attachment F** hereto] Moreover, DCRA's "Final Notice" of its decision, dated October 10, 2000, had clearly informed American Towers of the need to file a *timely* appeal with the BZA:

> Please be advised that you have a right to challenge this Notice. *In order to exercise this right, you must appeal the portion of the Notice that is based upon the inadequate side yard setback to the Board of Zoning Adjustment.* The remaining issues are to be appealed to the Board of Appeals and Review.
>
> In order to exercise this right, you must file written requests for hearings with the appropriate Board. A *timely* appeal to the Board of Zoning Adjustment must be filed with the Board at 441 4th Street, N.W., Suite 210 South, Washington, D.C. 20001 . . . .

[**Attachment G** hereto (emphasis supplied)] Nevertheless, ignoring both the Office of Zoning's recommendation and DCRA's Final Notice, American Towers chose to wait 27 months before filing its appeal with the BZA.

In its "Statement of Agrievement," American Towers also asserts that the instant appeal seeks to "preserve its position based upon the status-quo" that existed prior to the dismissal of the ANC's appeal in November 2002.

But American Towers had no status quo "position" in the ANC's appeal that an appeal by American Towers could conceivably "preserve." The appeal that was filed on behalf of the ANC on September 18, 2000, challenged the *original* agency action in issuing permits for American Towers to construct the tower. [BZA Form 1, **Attachment A** hereto] That agency decision was reversed by DCRA on October 10, 2000. As

American Towers' own attorney informed the BZA on October, 25, 2000, "[i]n essence," the ANC's appeal had become "Moot" due to DCRA's having "already revoked the Permits that are the basis of this ANC action." [**Attachment B** hereto] Two years later, on November 1, 2002, the ANC's appeal was finally withdrawn "as moot . . . in light of the official rescission of the permits" in October 2000. [**Attachment E** hereto] Since October 2000, American Towers' opposition to the ANC's appeal has been as moot as the appeal itself.

American Towers may argue that the BZA's September 6, 2001 decision to stay the ANC's appeal "until the recently filed court proceedings in this matter are concluded" implied that the ANC's appeal was not actually moot. [**Attachment D** hereto] But the BZA's decision to stay the appeal served only to acknowledge that if the judiciary ever *did* overturn DCRA's decision to rescind the permits, then the ANC would be allowed to pursue its appeal of DCRA's original issuance of the permits. The effect of the BZA's stay was to inform the ANC that, as a procedural matter, it did not have to choose between pursuing or withdrawing its appeal while awaiting the outcome of the court proceedings. The stay in no way changed the fact that unless and until DCRA's decision to rescind the permits was overturned by a court, any issues pertaining to DCRA's earlier action in issuing the permits continued to be moot. And the stay of the ANC's appeal did not in any way relieve American Towers of the obligation to file its own appeal if it wished to challenge DCRA's decision to rescind the permits.

The "reasonableness standard" applicable to delays in taking appeals "imposes a duty on appellants to act with diligence and prudent dispatch in protecting their own interests through the appellate process." *Waste Management*, 775 A.2d at 1122. In

considering the "limit of timeliness" for purposes of appealing to the BZA, the District of Columbia Court of Appeals has held that, normally, a "timely appeal" is one that is filed within two months of notice of a decision:

> Experience teaches that in the ordinary scheme of things, two months is ample time in which to decide whether to seek appellate review and act accordingly. At least in the absence of exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal[–] circumstances outside the party's control—we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness.

Id. (emphasis in original).

American Towers' decision to wait for more than two years to file its appeal to the BZA was presumptively unreasonable. *Cf. id. at* 1123 ("decision to wait three years before filing its appeal [to the BZA] was presumptively unreasonable"). And its decision to pursue federal court and D.C. Superior Court review of DCRA's action in no way constitutes "circumstances outside the party's control," *id.* at 1122, that could rebut the presumption of unreasonableness that arose from the two-year delay in appealing to the BZA.

Conclusion

The District of Columbia respectfully requests that the BZA grant the District of Columbia's motion and dismiss American Towers' appeal as untimely.

Respectfully submitted,

ARABELLA W. TEAL
Interim Corporation Counsel

CHARLOTTE W. PARKER (#186205)
Deputy Corporation Counsel
Civil Division

BENNETT RUSHKOFF (#386925)
Senior Counsel
Office of the Corporation Counsel
441 4th Street, N.W., Suite 450-N
Washington, DC 20001
(202) 727-5173 phone
(202) 727-6546 fax
bennett.rushkoff@dc.gov

Attorneys for the District of Columbia

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2003, copies of the foregoing Motion, supporting Memorandum of Points and Authorities (with Attachments A-G), and the attached Proposed Decision and Order were mailed, first-class postage prepaid, to the following:

Robert Clayton Cooper, Esq.
Jackson & Campbell, P.C.
1120 20th Street, N.W.
Suite 300-South
Washington, DC 20036-3437

Lori Monrow
Assistant Corporation Counsel
Office of the Corporation Counsel
441 4th Street, N.W., 6th Floor-N
Washington, DC 20001

American Towers, Inc.
690 Canton Street
Westwood, MA 02090

Ms. Ellen McCarthy
Office of Planning
Room 4000
801 N. Capitol Street, N.E.
Washington, DC 20002

Jill Diskan
ANC 3E
P.O. Box 9953
Washington, DC 20016

Bennett Rushkoff

BZA Form 1
(Revised 7/17/95)

Docket No. 16649

BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

APPEAL

NOTE: See reverse side of this form for filing instructions, filing fees and information required by the Board.

DO NOT MAIL DO NOT MAIL
TO THE BOARD OF ZONING ADJUSTMENT:

Pursuant to Sections 3105 and 3106 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken from the administrative decision of Michael Johnson Zoning Administrator
(Name of administrative officer and title)

made on 3/18/99 & 10/20/99, to the effect that a 756'
(Date of decision)
High definition digital television transmission antenna tower is being constructed at

Premises affected are located at 4623 41st St. NW
(Street Address)

Lot(s) 20, 30, 909, Square(s) 1769
in the District of Columbia, in Zoning District C2B.
Present Use of Property: Television Tower - 223'.
Proposed Use of Property: Television tower 758'.
Owner of Property: American Tower Systems/American Tower Corp
Address of Owner: 9300 Grant St Manassas, VA 20110 32 Columbus Ave Boston, MA
Name and address of appellant, if other than owner:
Jill Dikan
5315 43rd St. NW, WDC 20015

State manner in which appellant is aggrieved by administrative decision: Tower is too high, presents health dangers, no EIS was done, Mayor's consent not obtained.

State briefly the allegations of error in administrative decision:
Because of height of tower the application should have been referred to the BZA and to the mayor for an exception

Relevant Sections of the Zoning Regulations: 201.6, 701.6, 701.7, 701.9, 2510.1

Date: Sept 18, 2000 Signature: Jill Dikan
(Appellant)*

*If appeal is filed by agent of the appellant, Form 1 (notice of appeal) shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal.

TO BE NOTIFIED OF HEARING AND DECISION:

Name: Jill Dikan
Address: 5315 43rd St. NW, Washington
Zip Code 20015 Phone No. 202/879-3949 (w) 202/686-2100(h)

ANY APPEAL THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

Attachment A

JACKSON & CAMPBELL
A Professional Corporation

ATTORNEYS AT LAW

1120 Twentieth Street, N.W.
South Tower
Washington, D.C. 20036-3437
202-457-1600
Fax: 202-457-1678
www.jackscamp.com

ROBERT CLAYTON COOPER
202-457-1649

Attachment B

October 25, 2000

'00 OCT 25 P4:21

HAND-DELIVERED
Ms. Jerrily R. Kress, FAIA
Director, Board of Zoning Adjustment
Government of the District of Columbia
441 4th Street, N.W.
Suite 210-South
Washington, D.C. 20001

BZA
Case No. 16649
Exhibit No. 25

RE: BZA Appeal 16649
Our Client No.:010016.6

Dear Ms. Kress:

Please accept this letter as my formal request toSTAY the proceedings in the above referenced matter, currently scheduled for Hearing on December 5, 2000.

The request for the Stay is simple. The underlying matters from which the ANC has filed this Appeal, are either moot or are otherwise presently before the U.S. District Court as Civil Action # 00-2436 (PLF). That pending case, brought by American Towers, Inc. against the District of Columbia, seeks a judicial determination that the Permit(s) to construct a telecommunications Tower were unlawfully and illegally revoked by the D.C. Department of Consumer and Regulatory Affairs on October 10, 2000. The DCRA alleges that that revocation was proper because, in short, the Tower does not conform to the height limitations set by the Height Act and other violations of the Zoning and Construction Codes.

As reflected on the attached September 29, 2000 Notice of the Filing of Appeal, those allegations raised by the District are the exact same issues raised by Appellant Jill Diskan, ANC in this matter, with one exception. The ANC appeals from decisions of the DCRA that granted the Permit(s) which have since been revoked. In essence, the ANC's Appeal is Moot, because subsequent actions of the DCRA have reversed the actions from which this Appeal has been taken. Additionally, it would appear that one of the respondents (or at least an interested party) in this Appeal would be the DCRA. Since they have already revoked the Permits that are the basis of this ANC action, there would be no reason for them to appear and defend their actions in issuing the Permit(s) which have since been revoked.

111 South Calvert Street
Baltimore, Maryland 21202
410-385-5343

200 A Monroe Street
Rockville, Maryland 20850
301-340-0450

8300 Boone Boulevard
Vienna, Virginia 22182
703-522-1330

#25

Therefore, the respondent American Towers, Inc., respectfully requests that the currently scheduled Hearing on the Appeal of various Decisions rendered by the DCRA, be STAYED pending resolution of the exact claims pending before the U.S. District Court, and removed from the December 5, 2000 BZA Hearing calendar. Proceeding with the Hearing as scheduled is a waste of the precious administrative and financial resources of the Government of the District of Columbia and American Towers, Inc.

Respectfully submitted,

JACKSON & CAMPBELL, P.C.

Robert Clayton Cooper

RCC/kam

ADVISORY NEIGHBORHOOD COMMISSION 3E

TENLEYTOWN • AMERICAN UNIVERSITY PARK • FRIENDSHIP HEIGHTS

P.O. Box 9953 • Friendship Station
Washington, DC 20016

202-244-0800

Steve Posniak
SMD 01

Chris McNamara
SMD 02

Ted DiBiase
SMD 03

Jill Diskan
SMD 04

Charles Mayo
SMD 05

October 26, 2000

Attachment C

Board of Zoning Adjustment
441 4th Street, NW
Second Floor, South
Washington, DC 20001

RE: **BZA Case Number 16649, concerning application for construction of a 756' digital television transmission tower at 4623 41st Street, NW.**

Dear Members of the Board:

Since the Mayor has revoked the building permit for the television transmission tower in BZA Case Number 16649, I am writing to request that ANC 3E's request for an expedited hearing on our Appeal be placed on hold, pending the outcome of American Tower Systems lawsuit against the District government in the Federal courts.

Sincerely,

Jill Diskan
Chair, ANC 3-E

Cc:

Councilwoman Patterson
Andrew Altman, Director, Office of Planning
Carlyn Fuller, Acting Director of DCRA
Jo Cooper

BZA
Case No. 16649
Exhibit No. 26

Government of the District of Columbia

OFFICE OF ZONING

441 4TH STREET, N.W.
SUITE 210
WASHINGTON, D.C. 20001
(202) 727-6311

Attachment D

September 6, 2001

John J. Brennan, III, Esq.
Jackson & Campbell
1120 20th Street, N.W.
South Tower
Washington, D.C. 20036

Re: BZA Application No. 16649 – American Tower Systems

Dear Mr. Brennan:

Please be advised that the Office of Zoning will honor your telephone request made on September 5, 2001, requesting that the scheduling of the Board of Zoning Adjustment appeal hearing in the above-referenced case be postponed until the recently filed court proceedings in this matter are concluded.

Please call the Office of Zoning on (202) 727-6311, if you have any questions.

Sincerely,

JERRILY R. KRESS, FAIA
Director

Attachment:
Service on Parties

BZA APPLICATION NO. 16649

As Director of the Office of Zoning, I hereby certify and attest that on SEP - 6 2001 a copy of the attached letter addressed to John J. Brennan, III, Esq. dated September 6, 2001 was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Jill Diskan, Chairperson
Advisory Neighborhood Commission 3E
P.O. Box 9953
Friendship Station
Washington, D.C. 20016

Robert Cooper, Esq.
John J. Brennan, III, Esq.
Jackson & Campbell
1120 20th Street, N.W.
South Tower
Washington, D.C. 20036

Kathleen Patterson, City Councilmember
Ward Three

Michael Johnson, Zoning Administrator

Charlotte Parker
Office of Corporation Counsel

Ellen McCarthy, Deputy Director
Office of Planning

Alleb Bergstein, OCC

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director

ADVISORY NEIGHBORHOOD COMMISSION 3E

TENLEYTOWN • AMERICAN UNIVERSITY PARK • FRIENDSHIP HEIGHTS

P.O. Box 9953 • Friendship Station
Washington, DC 20016

202-244-0800

November 1, 2002

Leslie Quynn
SMD 01

Chris McNamara
SMD 02

Tad DiBiase
SMD 03

Jill Diskan
SMD 04

Frank Gordon
SMD 05

Ms. Jerilyn R. Kress, FAIA
Director, Office of Zoning
Suite 210-South
441 - 4th Street, N.W.
Washington, D.C. 20001

Re: BZA Appeal No. 16649

Attachment E

Dear Ms. Kress:

On behalf of Advisory Neighborhood Commission 3E, I hereby withdraw Appeal No. 16649, filed September 18, 2000 and supplemented by letter dated October 4, 2000, appealing the administrative decisions of Michael D. Johnson, Zoning Administrator, Building and Land Regulation Administrator, Department of Consumer and Regulatory Affairs, made approximately March 18, 1999 (Construction Permit No. B425211) and October 20, 1999 (Construction Permit No. 11644), to permit construction of a television and other telecommunications transmission antenna tower, 756 feet in height, at 4623 - 41st Street, N.W. The appeal is being withdrawn as moot (without prejudice in the event the permits in question were ever reactivated), in light of the official rescission of the permits on October 10, 2000.

Sincerely yours,

Jill Diskan

Jill Diskan
Chair, ANC 3E

cc (via first-class mail):
American Tower Systems, Inc.
C/O Robert C. Cooper, Esquire
Jackson & Campbell, P.C.
South Tower
1120 Twentieth Street, N.W.
Washington, D.C. 20036-3437

Honorable Anthony A. Williams
David Clark, Director, DCRA
Andrew Altman, Director, Office of Planning
Honorable Kathy Patterson
Honorable Phil Mendelson
Tim Cooper, President, Stop the Tower, Inc.
Nancy Macwood, Chair, ANC 3C

D.C. RECEIVED
OFFICE OF ZONING
2002 NOV -4 AM 11:41

Government of the District of Columbia
OFFICE OF ZONING

October 30, 2000

Attachment F

Robert Clayton Cooper, Esquire
Jackson and Campbell, P.C.
1120 20th Street, N.W., South Tower
Washington, D.C. 20036

Re: BZA Appeal No. 16649

Dear Mr. Cooper:

The Board of Zoning Adjustment is in receipt of a letter dated October 26, 2000, from the appellant Jill Diskan – ANC 3E, requesting the above referenced appeal be placed on hold pending the outcome of the American Tower, Inc. lawsuit in District Court. It is almost certain that this request will be granted.

In the interest of maintaining your options, the Office of Zoning recommends American Tower Systems, Inc. file an appeal based on the revocation of the permits for the tower.

If you have any questions or need further assistance, please call me at (202) 727-6311.

Sincerely,

Jerrily R. Kress, FAIA
Director

BZA
Case No. 16649
Exhibit No. 27

441 4th Street, N.W., Suite 210-S, Washington, D.C. 20001
(202) 727-6311 • (202) 727-6072 fax
E-Mail: zoning.info@dcoz.dcgov.org • Web Site: http://www.dcoz.dcgov.org/

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs

Office of the Director

Attachment G

October 10, 2000

Robert Clayton Cooper
Jackson and Campbell
1120 Twentieth Street, N.W., South Tower
Washington, D.C. 20036

FINAL NOTICE RESCINDING AND CANCELING BUILDING PERMIT NUMBERS B425271, B420358, B429362, B427534, B425352, B423438, B427157, B426691, AND B428792, AND PLUMBING PERMIT NUMBERS B412508 and B416480

Dear Mr. Cooper:

My consideration of your letter dated October 10, 2000, and the additional review of the file and plans confirm that the permits were issued in error, and that certain necessary processes (i.e. referring the applicant to the BZA, considering the excess height, determining environmental impact, and ensuring compliance with corporate and tax requirements) did not occur at the time of permit review. I will address the issues you raised in your response.

1. Side Yard Setback

The portion of the Notice that addressed the side yard setback did not pertain to the addition, but to the tower. Therefore, the first part of your argument is irrelevant. As to the tower, your original plans depict side yard setbacks of 5.04 and 4.93 feet. Therefore, your allegation that the Zoning Administrator required a ten foot setback is also irrelevant because a side yard was originally provided by your plans. In any event, 11 DCMR 775.5 (Side Yards) does not distinguish how a side yard is "provided." The side yard setback must be satisfied however it is "provided." Finally, the fact that a portion of your structure may rise only to one foot is irrelevant where the entire connected structure is to reach 756 feet.

2. Height Act

The Height Act was enacted by Congress and is separate and distinct from the Zoning Acts of 1920 and 1938, and the Building Code. The authority to grant an exception is a matter of high importance, both as to the aesthetics of the District of Columbia and the safety of its citizens, and therefore requires a separate and distinct action. You cite no order of DCRA which subdelegated this authority below the level of the Director. The fact that this building permit bears the DCRA's Director's typed name does not substitute for or create such a subdelegation.

3. Environmental Impact

A review of your permit application and plans does not provide a basis for the exception you claim exists. In particular, your claim of no additional capacity is not credible given the increase in height and newer design of this structure.

4 and 5. Failure to Register to Conduct Business and Failure to Register as a Corporation

Based on the Department's records, the corporation is not authorized to conduct business in the District of Columbia. Additionally, our records indicate that the corporation is not properly registered with the Office of Tax and Revenue.

Based on the foregoing, the above-referenced permit was issued in error and is *void ab initio*. The District is not required to stand by and permit a structure to continue to be built pursuant to invalid permits issued in violation of the Zoning Act and Regulations, the Height Act, the Building Code, and its environmental, corporate, and tax laws, even where the issuance of the invalid permit may have resulted, in whole or in part, from errors made by this Department.

Therefore my decision to rescind the permits indicated in the Notice of October 5, 2000 stands. I ordered that the Notice become effective as of 5:00 p.m. October 10, 2000. Since you do not have valid permits you are to cease all work immediately and secure the site by 7:00 p.m. October 12, 2000.

Please be advised that you have a right to challenge this Notice. In order to exercise this right, you must appeal the portion of the Notice that is based upon the inadequate side yard setback to the Board of Zoning Adjustment. The remaining issues are to be appealed to the Board of Appeals and Review.

In order to exercise this right, you must file written requests for hearings with the appropriate Board. A timely appeal to the Board of Zoning Adjustment must be filed with the Board at 441 4th Street, N.W., Suite 210 South, Washington, D.C. 20001, (202) 727-6311. Any appeal to the Board of Appeals and Review must be made within ten (10 days) of your receipt of this Notice. An appeal to the D.C. Board of Appeals and Review must be filed with the Board at 441 4th Street, N.W., Suite 540 South, Washington, D.C. 20001.

Sincerely,

Carlynn Fuller, Acting Director

cc: Michael D. Johnson, Acting Administrator, BLRA
Robert Warren, General Counsel, DCRA
Theresa W. Lewis, Deputy Director of Operations
Alan Bergstein, OCC
Karen M. Edwards, Esq., Program Manager, OCOM/ENFD
Robert Rigsby, Corporation Counsel, OCC
Eric Price, Deputy Mayor for Planning and Economic Development

Cc:

AMERICAN TOWER CORP.
321 Columbus Ave.
Boston, MA

AMERICAN TOWER CORP.
AMERICAN TOWER CORPORATION
3 Allied Drive
Bldg. 1, 2nd Floor
Dedhan, MA 02026

AMERICAN TOWER CORP./MICRONET
20 Park Plaza, Suite 436
Boston, MA 02116

AMERICAN TOWER SYSTEMS
9300 Grant St., Suite 203
Manassas, VA 20110

MICRONET, INC.
P.O. Box 130
Vernon, N.J. 07462

AMERICAN TOWER
4623 41st St., N.W.
Washington, D.C.

CERTIFIED MAIL:
JOHN HOOD, Agent:
11403 Old Baltimore Pike
Beltsville, MD 20705

JOHN HOOD
11403 Old Baltimore Pike
Beltsville, MD 20705

MARCOR REMEDIATION
3900 Vero Road
Baltimore, MD 21227

JUDD & DETWEILER, INC.
1925 K Street, N.W.
Washington, D.C. 20006

MARCOR REMEDIATION, INC.
3900 Vero Road
Baltimore, MD 21227

Robert Clayton Cooper
Jackson and Campbell
1120 Twentieth Street, N.W.,
South Tower
Washington, D.C. 20036

John Hood, Agent:
11403 Old Baltimore Pike
Beltsville, MD 20705

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of American Towers, Inc.	)	
from the October 5, 2000 decision of the	)	BZA Appeal No. 16990
Department of Consumer and Regulatory	)	
Affairs regarding 4623 41st Street, N.W.	)	

PROPOSED DECISION AND ORDER

American Towers, Inc. filed this appeal on January 10, 2003, challenging the October 10, 2000 decision of the Department of Consumer and Regulatory Affairs ("DCRA") to rescind permits for the construction of a 756-foot tower at 4623 41st Street, N.W. DCRA has moved to dismiss the appeal as untimely.

The appellant has not complied with the Board's requirement that one who is aggrieved by a zoning decision must file a "timely appeal" to the Board. 11 DCMR § 3112.2. Moreover, the appellant has not established, in response to the motion to dismiss, any exceptional circumstances that might justify the two-year delay in filing its appeal. *See Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 117, 1121-23 (D.C. 2001).

For these reasons, it is hereby **ORDERED** that the motion is **GRANTED** and that this appeal is **DISMISSED**.

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE IN TEN DAYS AFTER IT BECOMES FINAL.