BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Appeal of American Towers, Inc.	)	BZA Appeal #16990
	)	(4623-41st Street, N.W.)
	)	

APPELLANT AMERICAN TOWER'S OPPOSITION TO THE DISTRICT OF COLUMBIA'S MOTION TO DISMISS AND APPELLANT'S RENEWED REQUEST TO STAY PROCEEDINGS

Comes now the Appellant American Towers, Inc., ("American Tower") in opposition to the Government of the District of Columbia, Department of Consumer and Regulatory Affairs' ("DCRA") Motion to Dismiss Appeal #16990 and in support of the continued Stay of the administrative proceedings pertaining to the erection of the telecommunications tower located at 4623-41st Street, N.W., pending resolution of the matters currently pending before the Courts of the District of Columbia.

American Towers, Inc. filed this Appeal on January 10, 2003 shortly after it learned that a previously pending Board of Zoning Adjustment ("BZA") Appeal filed by Ms. Jill Diskan (on behalf of Advisory Neighborhood Commission 3-E, Appeal #16649, hereinafter "ANC Appeal") against the DCRA, had apparently been withdrawn on or about November 1, 2002. An additional letter from counsel for American Tower requesting a Stay of the proceedings in this Appeal was filed on January 14, 2003.

This Appeal was filed to preserve the "status quo" that had been instituted by the BZA when it previously granted a Stay of the ANC Appeal as a result of the then pending judicial actions filed by American Tower. Those pending judicial actions were filed in response and opposition to the October 10, 2000 DCRA revocation of the applicable

BZA
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Building Permits. American Tower informed the BZA of the status and purpose of the pending litigation in its request to Stay the proceeding: in that "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)". (Letter dated October 25, 2000, from Robert Cooper, Esq. to Ms. Jerrily R. Kress, FAIA, Director, Office of Zoning, in BZA Case #16990, as Exhibit 15, and in #16649, as Exhibit 25, ***Attachment 1, herein***). The "underlying matters" referred to in the letter are the same matters set forth in this Appeal: that the DCRA revocation of the applicable building permits on October 10, 2000 based, in part, upon the side-yard issue was improper and unjustified.

Ms. Jill Diskan also requested that the ANC Appeal be "placed on hold pending the outcome of American Tower Systems lawsuit against the District government in the Federal courts". (Letter dated October 26, 2000, from Ms. Jill Diskan, Chair, ANC 3-E to the BZA, in BZA Case #16649, as Exhibit 26, ***Attachment 2, herein***). Since that ANC matter was already pending in the BZA on the exact same issues, actions and property, American Tower was of the understanding that there was no need to file a separate action and have two (2) matters pertaining to the same issues pending before the BZA. By injecting itself into the then pending ANC Appeal (which was thereafter Stayed based upon the pending litigation), American Tower believed that it had met its initial BZA obligations and the parties thereafter maintained the status quo pending the conclusion of the judicial proceedings.

At some point thereafter, Ms. Kress apparently sent a letter dated October 30, 2000 to counsel for American Tower (1) referencing Ms. Diskan's request to Stay the proceedings and also (2) "recommending" that in order to maintain American Tower's

options, a Appeal be filed based upon the revocation of the permits for the tower; but did not address American Tower's request for a Stay. (Letter to Robert Cooper, Esq. from Ms. Jerrily R. Kress, FAIA, Director, Office of Zoning, in BZA Case #16649, as Exhibit 27, ***Attachment 3, herein***). Unfortunately, that letter was never received as addressed. Counsel for American Tower first became aware of it upon its receipt as an attachment to DCRA's Motion to Dismiss this Appeal, filed on or about January 30, 2003. (As **Attachment F** to DCRA's Motion to Dismiss). An immediate review of the ANC Appeal file maintained by the BZA was undertaken. The search revealed that the letter was, in fact, a part of that file and was properly addressed to counsel on BZA letterhead. Unfortunately, the letter was never received, and as a result, American Tower took no immediate action in response to it. Nevertheless, prior to and after October 30, 2000, the actions of the parties is illustrative of the continuing mutual agreement that the Stay of the ANC Appeal, and the American Tower involvement with that Appeal, satisfied the administrative remedy mandate of the October 10, 2000 letter of revocation based, in part, on the side-yard issue. Specifically, all of the parties continued to agree to a Stay of the BZA action as well as the pending BAR action, and neither the BZA nor the BAR held any Hearings on the matter.

More insightfully, during the course of the Federal litigation (American Towers, Inc. v. The Honorable Mayor Anthony Williams, Mayor of the District of Columbia, et. al., U.S. District Court for the District of Columbia, Civil Action #00-2436 (PLF) (relevant pages attached hereto as ***Attachment 4***), the Government of the District of Columbia took the position that American Tower's actions with respect to the ANC Appeal amounted to compliance with the administrative remedy mandate of the October

10, 2000 letter. In its own **Motion to Dismiss for Failure to State a Claim over which this Court has Original Jurisdiction**, filed on or about December 20, 2000, the District argued to the Federal Court that as a result of the pending administrative matters before the BAR and the BZA, the local government has jurisdiction and not the Federal Courts. The Government wrote "In fact, plaintiff [American Tower] has filed appeals with both bodies [BAR and BZA]. Plaintiffs (sic) cannot now seek to have this Court replace the appropriate body as the forum for resolution of this dispute." (USDC Motion, Page 19). It went on to state that "This course of conduct simply cannot be justified in light of the administrative procedures in place". (Id. at 19). The Government went on to argue that "Plaintiff can and has appealed every basis of the permit rescission to either the BZA (side-yard setback) or the BAR (all other grounds). In addition local law provides for judicial review of contested cases heard before either Board in the District of Columbia Court of Appeals. Clearly, there are adequate assurances that this Court can decline jurisdiction confident that plaintiff's claims will be given a very (sic) hearing through the District's process". (Id. at 22). It was clearly the understanding of American Tower, that the parties were in agreement that their responsibilities with respect to the BZA had been satisfied as a result of their injection into the then pending ANC Appeal.

As such, only upon a conclusion of the litigation (or the BZA's scheduling of a Hearing) would American Tower then be obligated to specifically set forth its case with respect to the side-yard issues before the BZA, but only if necessary. Had the parties not had the mutual understanding with respect to American Tower's involvement with the ANC Appeal, it would have only taken a minor filing with the BZA to have been in otherwise compliance. American Tower promptly and properly filed with both the BAR

and the BZA in order to preserve those issues for adjudication once the judicial litigation concluded, if necessary. The difference between the BAR and the BZA is that there was no other pending action at the BAR that could be appended to satisfy the administrative remedy mandate of the DCRA. In fact, the matter before the BAR was stayed for the same reasons as the ANC Appeal. Prior to its withdrawal by Ms. Diskan, the only time the BZA addressed the matter was on September 6, 2001, when the BZA agreed to postpone the scheduling of any hearings until the then filed court proceedings "in this matter" are concluded. (Letter dated September 6, 2001 from Ms. Jerrily R. Kress, FAIA, Director, Office of Zoning, ***Attachment 5, herein***).

Upon learning of the Dismissal, American Tower immediately placed the parties at status quo and continued to preserve the issues before the BZA, with a request for a continued stay. It was clear from 2000 to 2002 that the parties were in full agreement to stay all action before the BZA pending resolution of the related judicial proceedings, and that agreement and understanding should not now be disturbed. This Appeal presents the same or similar issues, parties and property presented in the ANC Appeal.

DCRA states in its Opposition to Request for Stay filed on or about April 24, 2003, that there are no Orders or decisions from the Courts or DCRA which would prevent the BZA from fully resolving this Appeal without awaiting the outcome of further judicial proceedings. American Tower agrees with the Respondent as to the independent authority of the BZA to act upon this Appeal without restriction. Nevertheless, American Towers respectfully submitted its request on January 14, 2003 that the BZA issue such an Order Staying the proceedings pending resolution of the matters already being adjudicated in the Courts of the District of Columbia. The request

was made to avoid duplicitous, and perhaps contradictory decisions, from the adjudicatory bodies, and to avoid a waste of resources in having to address the same matters in various forums. The same issues are also pending before the D.C. Board of Appeals and Review, and are also in a similar "stayed" status. (Copy of the Notice of Appeal filed with the D.C. Board of Appeals and Review on October 25, 2000, as ***Attachment 6, herein***; and a copy of the most recent Joint Status Report, filed by the parties on or about June 26, 2001, as ***Attachment 7, herein***).

As such, American Tower respectfully requests that the BZA Stay further proceedings in this Appeal, and return the parties to the "status quo". Further, American Tower submits that it properly and timely presented its position with respect to all issues to be presented before the BZA, when it intervened in the ANC Appeal. The parties have presented to the Court that the administrative remedy mandate of the DCRA letter of October 10, 2000 has been satisfied by American Tower. Additionally, the Appellant respectfully requests that the Board supplement the record in this matter with ***Attachments 4, 5, 6, and 7***, which are not currently a part of the official record.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing American Tower Opposition was mailed, first-class, postage prepaid, this 25th day of April, 2003 to:

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