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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

AMERICAN TOWERS, INC. Plaintiff, v, THE DISTRICT OF COLUMBIA Defendant	Civil Action No. 02-2183 Calendar 11- Judge Combs-Greene

MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER OF THIS SUIT OR IN THE ALTERNATIVE FOR AN IMMIDIATE STAY OF ALL PROCEEDINGS AND FOR EXPEDITED REVIEW

NOW COMES Defendant, the District of Columbia, by and through counsel the Corporation Counsel of the District of Columbia, and pursuant to SCRCiv 12(h), moves this Court to dismiss American Towers claims for lack of subject matter jurisdiction or in the alternative to stay all proceedings in this case until such time as the Board of Zoning Adjustment and the Board of Appeals and Review have ruled on the validity of the rescission of plaintiff's building permits.[1] The basis of this request is set forth below and in the accompany memorandum in support of this motion. Each of plaintiff's claims in this action allege the same underlying legal predicate, that the Department of Consumer and Regulatory Affairs' ("DCRA") proffered reasons for rescission of the plaintiff's permit to build a 756 ft. HDTV Broadcast tower were invalid. Under District of Columbia law, plaintiff is required to seek review of DCRA's decision in the appropriate administrative tribunals. Plaintiff has in fact brought such administrative appeal in the Board of Administrative Appeals ("BAR") but has not sought review in the Board of

BZA
Case No. 16990
Exhibit No. 26
Board of Zoning Adjustment
District of Columbia
CASE NO. 16990
EXHIBIT NO. 26

Zoning Adjustment ("BZA"). Plaintiff's failure to exhaust mandatory administrative remedies and to seek a determination from the administrative forum having primary jurisdiction over issues central to plaintiff's claims before this Court precludes, as a matter of law, this Court from considering plaintiff's claims.

SCRCiv 12-I CERTIFICATION

Counsel has discussed this matter with plaintiff's counsel and he does not consent to the relief requested.

WHEREFORE, the District of Columbia requests that this Court dismiss plaintiff's suit because the Court lacks subject matter jurisdiction over plaintiff's claims or in the alternative lacks primary jurisdiction to resolve issues central to those claims.

Respectfully submitted,

ARABELLA W. TEAL
Interim Corporation Counsel, D.C.

JOHN C. GREENHAUGH
Senior Deputy Corporation Counsel
Torts & Equity

ROBERT C. UTIGER [437130]
Deputy Corporation Counsel
Equity & Receivership Division
P.O. Box 14600
Washington, D.C. 20001
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[1] The District has previously moved to reconsider the Court's denial of the District's motion to dismiss Plaintiff's federal claims.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on counsel for plaintiff, Robert B. Cave, HOGAN & HARTSON, LLP, 555 13TH Street, N.W., Washington, D.C. 20004-1109, by U.S. Mail, postage prepaid and hand-delivery, defendant's motion to dismiss the complaint for lack of subject matter jurisdiction, memorandum in support and proposed order this 17th day of October, 2002.

Robert C. Utiger

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

AMERICAN TOWERS, INC.	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 02-2183
v,	)	Calendar 11- Judge Combs-Greene
	)	
THE DISTRICT OF COLUMBIA	)	
	)	
Defendant	)	
	)	

MEMORANDUM IN SUPPORT OF THE DISTRICT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR IN THE ALTERNATIVE TO STAY ALL PROCEEDINGS AND FOR EXPIDITED.

All of the claims set forth in plaintiff's complaint have one thing in common. As a threshold matter, they stand or fall on the determination that *all* of the reasons set forth by the District in its notice of rescission regarding American Tower's building permit are invalid. Because either the Board of Zoning Adjustment ("BZA") or the Board of Appeals and Review ("BAR") have exclusive jurisdiction to determine the legitimacy of each of the grounds upon which the District rescinded plaintiff's permits, this Court must either dismiss or stay all proceedings before this Court.

BACKGROUND

On October 5, 2000, the Department of Consumer and Regulatory Affairs ("DCRA") gave notice to American Towers of its intention to rescind certain building permits issued in connection with the proposed construction of a 756 ft. broadcast antenna. The notice set forth the grounds for the decision to revoke the permit and allowed American Towers until October 10, 2000 to provide a response as to why these grounds were invalid. American Towers did in fact respond and, on October 10, 2000,

DCRA issued a final notice rescinding plaintiff's building permit.[2] At that time, DCRA put American Towers on notice of its right to appeal the grounds for the rescission to the BZA and the BAR stating:

> Please be advised that you have the 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.

On October 25, 2000 American Towers in fact filed a notice of appeal with the BAR, representing that it did not waive the right to challenge the jurisdiction of the BAR to hear these issues. American Towers requested a stay of the proceedings before the BAR pending out-come of the federal action, a request the District did not oppose and which the Board granted. Incredibly, given plaintiff's apparent recognition that it would be prudent to at least take a "protective appeal" to the BAR, American Towers has failed to file any appeal with the BZA.[3]

PLAINTIFF IS PRECLUDED FROM LITIGATING ITS CLAIMS BEFORE THIS COURT

While each of plaintiff's claims in this action attempt to state different theories that would entitle it to relief, each claim rests on the same legal assumption, that the reasons proffered by the District as grounds to rescind plaintiff's permit to build a 756 ft. broadcast tower are all legally invalid. The reasons proffered by the District in its October 10, 2000 Final Notice are 1) that American Tower failed to provide a proper side-yard setback as required by the zoning regulations; 2) that the tower exceeds the height allowed by the Height Act; 3) that American Tower did not provide a valid

[2] This Final Notice is attached to the complaint at Tab 10.

[3] Given the passage of time, it is questionable of whether any appeal to the BZA would be timely at this point. That of course, is a question for the BZA to address should plaintiff ever attempt to exercise its right to appeal the determination of DCRA as to the side yard set back issue.

environmental impact statement and; 4-5) American Towers did not properly register to conduct business and failed to register as a corporation. As set forth below, plaintiff's failure to seek and obtain relief from the appropriate administrative review agency precludes any consideration of plaintiff's claims before this Court under well established principles of primary jurisdiction and exhaustion of administrative remedies. In this jurisdiction

> The doctrine of primary jurisdiction like the rule requiring exhaustion of administrative remedies is concerned with promoting proper relationships between courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

L. G. Indus. at 955. quoting *Drayton v. Poretsky Management, Inc.*, 462 A.2d 1115, 1118 (D.C. 1983.) As set forth below, under either "exhaustion" or "primary jurisdiction" theories plaintiff cannot prosecute the claims currently pending before the Court.

THE JURISDICTION OF THE BZA AND BAR

The first question to be addressed in determining if either the rule requiring exhaustion of administrative remedies or the doctrine of primary jurisdiction applies is whether resolution of issues central to resolution of the claims before this Court have been entrusted to an administrative body, in this case the BZA or BAR.

D.C. Code 6-641.07(f) charges the BZA with interpreting the zoning regulations of the District of Columbia. *Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment,* 634 A.2d 1234, 1242 (D.C. 1993) As our Court of Appeals

has said "[a] litigant entitled to permanent relief under the zoning regulations may be compelled to pursue his administrative remedies rather than ... to seek an initial judicial determination" because "[s]ound discretion leads the court to await the 'last word" of administrative expertise and perspective... before the court exercises its limited role of judicial review." *L.G. Indus.*, at 950. (quoting *Brawner Bldg., Inc. v. Shehyn,* 143 U.S.AppD.C. 125, 442 F.2d 847, 853 (1971)

It is settled law that review of contested zoning determinations is vested in the BZA. *L.G. Indus.* at 954.[4] That the requirements concerning side yard set backs are set forth in the zoning regulations is likewise beyond challenge. See 11 DCMR 775. In short, review of DCRA's determination that the tower at issue in this litigation violates the side yard set back provisions of the zoning regulations as been entrusted to the expertise of the BZA.

Likewise, the BAR has been designated to hear appeals filed by persons aggrieved by "applicants for licenses, permits, or certificates for action taken by responsible officials of the Department of Consumer and regulatory Affairs... with respect to denial, suspension, or revocation of a licenses, permit, or certificate" Mayor's Order 96-27 (attached for the Court's convenience) *See also,* D.C. Code 2-1803.01; 5 DCMR 500 et seq. The BAR's authority and expertise to hear matters entrusted to its review has long been recognized by the Courts. *J.C. Associates District of Columbia Board of Appeals and Review* 778 A.2d 296 (D.C. 2001); *Capital Hill Hospital, et al. v. The District of Columbia State Health Planning and Development Agency.* 600 A.2d 793,

[4] Because appeals to the BZA and BAR are "contested cases," any appeal from a determination by the BZA on the side yard set back issue or on the other issues entrusted to the BAR is in the first instance to the District of Columbia Court of Appeals. *Id.* See also *Fair Care Found v. District of Columbia Dep't of Ins. & Sec Regulation,* 716 A.2d 987, 997 (D.C. 1998)

799 (D.C. 1991); *Auger v D.C. Board of Appeals and Review,* 477 A.2d 196 (D.C. 1984) In particular the "BAR's specialized administrative understanding" in issues related to permit revocation has been accepted by our Court of Appeals. *Auger* at 207.

The only question remaining is the effect plaintiff's refusal to pursue the administrative remedies afforded it has on the case before the Court. The answer is quit clear; plaintiff's failure is fatal to this cause of action.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

As discussed above, the rule requiring the exhaustion of administrative remedies applies when a claim is cognizable in the first instance by an administrative agency alone. In plaintiff's prayer for relief, American Tower seeks both declaratory and injunctive relief and money damages. Plaintiff first seeks a declaration that the rescission of plaintiff's permit is "without legal force or effect and are in violation of District of Columbia law." Complaint at 23. Since each of the proffered grounds for rescission are entrusted to the expertise of either the BZA (side yard set back) or BAR (the remaining grounds) with review solely in the D.C. Court of Appeals, these two administrative tribunal have sole jurisdiction in the first instance, and the rule requiring exhaustion applies to plaintiff's claims here. *L.G. Indus.* supra.

It is well established in the District that available administrative remedies must be exhausted before a party may resort to judicial relief. Dano Resource Recovery v. District of Columbia, 566 A.2d 483, 485 (D.C. 1989); see also McKart v. United States, 395 U.S. 185, 195 (1969); Coalition for the Preservation of Hispanic Broadcasting v. F.C.C., 931 F.2d 73, 289 U.S. App. D.C. 228 (1991); Ticor Title Ins. Co. v. F.T.C., 814 F.2d 731, 738-743, 259 U.S. App. D.C. 202, 209-215 (1987). This exhaustion doctrine is premised on several policy

considerations, including the promotion of judicial economy by allowing an administrative forum with specialized knowledge to resolve issues and thereby possibly eliminate the need for further judicial action on those issues. See New York Ophthalmological Society v. Bowen, 854 F.2d 1379, 1387 272 U.S. App. D.C. 170 (1988).

Moreover, even if the administrative tribunal's resolution of the dispute does not eliminate the necessity for further judicial review, adherence to the exhaustion doctrine allows the Court to benefit from the application of agency expertise on the issues and ensures development of an administrative record as an efficient basis for later judicial action. Coalition for the Preservation of Hispanic Broadcasting v. F.C.C., 931 F.2d at 77, 289 U.S. App.D.C. at 232; Barnett v. District of Columbia Dept. of Employment Services, 491 A.2d 1556, 1160 (D.C. 1965). The exhaustion doctrine is also intended to ensure proper deference to legislative determinations that the initial forum for a particular dispute should be administrative rather than judicial and to promote respect for administrative autonomy, thereby preventing the deliberate and frequent flouting of administrative processes which obviously weaken a tribunal's effectiveness. Republic Indus. v. Central Penn. Teamsters Pension Fund, 693 F.2d 290, 293 (3rd Cir. 1982).

"[A] dissatisfied party must pursue and exhaust its administrative remedy before it resorts to the courts . . . ." Dano Resource Recovery, 566 A.2d at 487. Plaintiff cannot now have this Court replace the agency as the forum for resolution of this dispute. Id. Additionally, administrative exhaustion is required to provide this Court with a full record. Bufford v. District of Columbia Public Schools, 611 A.2d 519, 525 (D.C. 1992).

The District advised plaintiff more than two years ago of the availability and procedures for seeking review in the BAR and BZA, of DCRA's decision to rescind its

building permits. Despite this notice, plaintiff has refused to pursue these legally mandated appeals. Plaintiff's attempt to circumvent the BZA and BAR is improper and, more to the point, proscribed by law.

PRIMARY JURISDICTION

Even should the Court find that any of plaintiff's claims for relief are cognizable in this Court, the doctrine of primary jurisdiction mandates that all proceedings in this Court be suspended until the threshold issue of the validity of the permit rescission is resolved by the BZA and BAR. The doctrine of primary jurisdiction applies when a claim is originally cognizable in the courts, "but requires resolution of an issue that falls into the special competence of an administrative agency, the party must first resort to the agency **before he or she may sue for adjudication.**" *District of Columbia v. L.G. Industries et al* 758 A.2d 950, 955 (D.C. 2000) (emphasis added) (quoting *Drayton v. Proetsky,* 462 A.2d 1115, 1118 (D.C. 1983). If a claim in a civil suit requires resolution of an issue that is properly entrusted to the expertise of an agency, the court is required to suspend the judicial process until the agency decides the issue. In *L.G. Industries* the D.C. Court of Appeals had before it an appeal of a preliminary injunction from the Superior Court enjoining the District from pursuing administrative remedies before the BZA. The Court of Appeals reversed finding that "[f]ar from enjoining the continuation of proceedings before the BZA the trial court should have awaited the BZA's resolution of the..... issue." *Id.*

That the validity of the grounds upon which DCRA rescinded the permits in question is central to the claims before this Court is beyond question. Plaintiff, in the preamble to its complaint states that "[t]his suit involves the revocation by the Defendant

of a building permit to Plaintiff." Plaintiff challenges each and every ground relied on by DCRA in rescinding the permit in question. Paragraphs 40-44. If either the BZA or the BAR up-hold any of the grounds for rescission proffered by DCRA, than the actions of DCRA are presumptively valid.

CONCLUSION

For whatever reason, American Tower has chosen not to pursue administrative review in the BZA and the BAR. That is plaintiff's right. However, until plaintiff seeks and obtains such review, its claims are not properly before this Court. Under either the rule requiring exhaustion of administrative remedies, or the doctrine of primary jurisdiction, plaintiff may not proceed with this action.

Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

AMERICAN TOWERS, INC.	)	
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Plaintiff,	)	
	)	Civil Action No. 02-2183
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	)	
THE DISTRICT OF COLUMBIA	)	
	)	
Defendant	)	
	)	

ORDER

This matter is before the Court on Defendants' motion to dismiss for lack of jurisdiction over the subject matter of the complaint. After careful review of defendants motion, the opposition thereto, and the entire record herein, it is this _____ day of October, 2002

ORDERED, that defendants motion is **granted** for the reasons set forth in defendant's motion.

_____
Natalia Combs-Greene
Judge

Copies to:

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Deputy Corporation Counsel
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Washington, D.C. 20001

Robert B. Cave
Eric Von Salazen
HOGAN & HARTSON, LLP
555 13TH Street, N.W.
Washington, D.C. 20004-1109

Exhibit A

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 96-27
March 5, 1996

SUBJECT: Establishment - District of Columbia Board of Appeals and Review

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422 of the District of Columbia Self-Government and Governmental Reorganization Act, as amended, D.C. Code § 1-242, it is hereby **ORDERED** that:

I. ESTABLISHMENT AND PURPOSE

There is hereby established within the Executive Office of the Mayor a District of Columbia Board of Appeals and Review (hereinafter referred to as the "Board"), whose mission shall be to conduct review of District of Columbia government agency actions as hereinafter set forth and to provide final administrative decisions in cases under its jurisdiction, in accordance with the District of Columbia Administrative Procedure Act, D.C. Code § 1-1501 et seq., the DCRA Civil Infractions Act of 1985, D.C. Code § 6-2701 et seq., and other applicable laws and regulations.

In the carrying out of its functions, the Board shall be assisted by an Executive Officer designated by the Mayor. The duties of the Executive Officer shall be as hereinafter set forth in this Order.

II. JURISDICTION

The Board shall consider appeals from decisions in the following types of cases in which error is alleged and make a final administrative determination sustaining, reversing, or modifying the action from which the appeal is taken or, when appropriate, dismissing the appeal or remanding the case for further consideration:

A. Class A Cases: Except civil infractions, appeals from decisions of the Director of the Department of Consumer and Regulatory Affairs under the Housing Regulations and appeals by persons directed by responsible officials of such Department to act or refrain from acting in accordance with inspection or regulatory requirements (excluding dangerous and unsafe structures and excavations).

B. Class B Cases: Except civil infractions, the Board, in its consideration of appeals from decisions of the Director of the Department of Consumer and Regulatory Affairs under the Housing Regulations and under Section 640 of Article 6 of the Building Code, may in its discretion grant variances as therein authorized and shall, in addition, consider and make final decisions on cases as authorized therein that may be referred without final determination by the Director of the Department of Consumer and Regulatory Affairs.

C. Class C Cases: Appeals submitted by applicants for licenses, permits, or certificates or by holders of licenses, permits, or certificates for actions taken by responsible officials of the Department of Consumer and Regulatory Affairs (hereinafter referred to as "DCRA"), with respect to denial, suspension, or revocation of a license, permit, or certificate; provided, that in any case in which a license may be issued only with the approval of the Chief of Police, the Board of Appeals and Review shall have authority to set aside the decision of the DCRA whenever such decision is based upon an adverse recommendation of the Chief of Police which the Board finds arbitrary, capricious, or not supported by substantial evidence, law, or regulation.

D. Class D Cases: Appeals from final orders of hearing examiners, or the Mayor, in cases of civil infractions, as prescribed in Title III of the DCRA Civil Infractions Act of 1985, except such administrative appeals assigned by the Civil Infractions Act to other bodies, i.e., height of buildings, zoning, control of alcoholic beverages, regulation of occupations or professions, and infractions of the Rental Housing Act of 1985, D.C. Code § 45-2501 et seq. The Board shall have the authority granted by Section 303 of the Civil Infractions Act to review the decision on the record made by the hearing examiner according to the standards specified in Section 303 of the Civil Infractions Act; and to affirm, reverse, or modify the order of the hearing examiner, or to remand the

case for further proceedings, but not to modify a monetary sanction that is within the limits established by law or regulation.

E. Class E Cases: Appeals from final decisions of hearing examiners in cases of civil infractions, pursuant to Section 10 of the Litter Control Administration Act of 1985, D.C. Code § 6-2909.

F. Class F Cases: Such other matters as the Mayor may delegate or assign or may otherwise be appealable to the Board pursuant to law, rule, or regulation.

III. COMPOSITION

The Board shall consist of sixteen (16) members appointed by the Mayor and subject to the advice and consent of the Council of the District of Columbia. All Board members shall be residents of the District of Columbia.

A. Five (5) members shall be attorneys who are actively practicing members of the District of Columbia Bar and who have had at least five (5) years experience in the active practice of law in the District of Columbia at the time of their appointment (hereinafter referred to as "Legal Members").

B. Six (6) members shall be appointed from the public at large (hereinafter referred to as "Public Members").

C. Five (5) members shall be full-time employees of the District of Columbia government at Grade DS-13 or higher, none of whom shall be an employee of the Office of the Corporation Counsel (hereinafter referred to as "District Members").

D. The Mayor shall appoint from among the Legal Members of the Board a Chairperson and a Vice Chairperson who shall serve in those offices at the pleasure of the Mayor.

E. The Chairperson shall oversee the appeal adjudication process of the Board and the timely issuance of all final decisions and orders, and shall perform the duties hereinafter prescribed.

F. The Vice-Chairperson shall perform the duties of the Chairperson in the Chairperson's absence.

IV. TERMS

A. The Mayor shall appoint members with the advice and consent of the Council, initially for terms of one, two, or three years, and thereafter for three-year terms.

1. The members shall be appointed to three (3) year terms in such a manner that one-third of the members terms end annually. Of the first members appointed under this Order, six (6) shall be appointed for three (3) years, five (5) shall be appointed for two (2) years, and five (5) shall be appointed for one (1) year. Members shall be eligible for reappointment, and shall continue to serve until reappointed or replaced, to the extent permitted by District law.

2. Members may be appointed to fill unexpired terms as vacancies occur.

3. Members shall serve no more than two full (three-year) consecutive terms.

B. The members of the Board who are serving at the time this Order becomes effective shall continue to serve until the expiration of their current terms, and may continue to serve until reappointed or replaced, to the extent permitted by District law.

C. A member appointed to fill a vacancy shall be appointed in the same manner as the predecessor member for the remainder of the unexpired term.

D. Upon the expiration of a term, a member may continue to serve until reappointed or replaced, to the extent permitted by District law.

E. A member may be removed by the Mayor for good cause.

V. COMPENSATION

The members of the Board shall receive compensation in accordance with D.C. Code § 1-612.8. No member who is a full-time employee of the District of Columbia government shall receive additional compensation for services performed as a member of the Board.

VI. ORGANIZATION OF THE BOARD

The functions of the Board shall be carried out by Hearing Committees as follows:

A. Three-Member Hearing Committees

Except as provided otherwise herein, the Executive Officer shall designate and assign a Hearing Committee. Each Hearing Committee shall consist of three (3) members of the Board, at least one (1) of whom shall be a Legal Member, who shall be the Presiding Member, and at least one (1) of whom shall be a District Member of the Board.

No such District Member shall be a member of a Hearing Committee that hears an appeal from an action by an officer or employee or any department or office by which such District Member is employed. Except in the case of a Single Member Hearing Committee, a quorum of such a Hearing Committee shall be two (2) members thereof, except that decisions and other actions of the Committee shall be by majority vote.

B. Single-Member Hearing Committees

1. The Executive Officer may designate and assign a Single-Member Hearing Committee to a case where, in the Executive Officer's opinion, the public interest requires a decision on an expedited or emergency basis. Such Committee shall consist of a Legal Member.

2. Upon agreement by and among all parties to a case assignable or assigned to a Three-Member Hearing Committee, the Executive Director may assign or reassign the case to a Single-Member Hearing Committee consisting of a Legal Member.

VII. FUNCTIONS

A. Subject to the provisions of paragraph II. A. (a) of Reorganization Order No. 50, dated June 26, 1953, as amended, the Executive Officer shall exercise the following functions:

1. Where appropriate, expedite or designate cases to be heard and decided on an emergency basis.

2. Where a Single-Member Hearing Committee is utilized under Section VI (B)2 herein, designate the member of such Committee only after the agreement to use such Committee has been entered into, and without prior disclosure of the member to be so designated.

3. Act for the Board in matters arising prior to a hearing before a Hearing Committee.

4. Upon the request of the Presiding Member of a Hearing Committee, when appropriate, require the attendance and testimony of witnesses and the production of documents, as provided for in Section VIII (C) herein.

5. Perform any and all other functions that the Mayor may assign.

B. Except as provided otherwise herein, all powers, functions, and authority of the Board shall be exercised by a Hearing Committee of the Board, whose decisions and other actions shall be deemed actions of the Board. A Hearing Committee shall:

1. Conduct proceedings, make decisions, and take other actions as are appropriate in cases assigned to it, to include sustaining, reversing, or modifying the action from which an appeal is taken, and when appropriate, dismissing the appeal or remanding the case for further consideration. Such proceedings shall be governed by the District of Columbia Administrative Procedure Act, D.C. Code § 1-1501 et seq., except for civil infractions, which shall be governed by the DCRA Civil Infractions Act of 1985, D.C. Code § 6-2701 et seq.

2. File with the Executive Officer correspondence, pleadings, documents, findings of fact, conclusions of law, and decisions or other actions which it takes in cases before it.

3. When appropriate, request through its Presiding Member the opinion of the Corporation Counsel concerning any question of law on any case before it. Such opinion shall not be prepared by the section representing the agency before the Board in that case.

4. Expedite or hear or decide on an emergency basis any case at the request of the Executive Director.

5. Request the Chairperson of the Board to issue a subpoena or to direct a witness to testify, as provided in Section VIII (C) herein.

6. Administer oaths, through its Presiding Member, to witnesses testifying in cases before it as provided in Section VIII (C) herein.

7. As appropriate in any case before it, request through its Presiding Member that a section of the Office of the Corporation Counsel, other than the one representing the agency before the Board in the case at issue, prepare proposed findings of fact, conclusions of law, and an order.

VIII. PROCEDURES

A. Except as provided otherwise herein, the Corporation Counsel shall prescribe and amend the rules governing the practice and procedure of the Board, including the establishment of limitations where not otherwise set forth and the method by which appeals are to be filed with the Board. Such regulations shall be consistent with regulations issued pursuant to Section 105 of the DCRA Civil Infractions Act of 1985, and with the Litter Control Administration Act of 1985.

B. Upon the request of an agency whose action or proposed action is appealed, the Corporation Counsel may represent such agency before the Board.

C. The Board, through the Chairperson, shall have the power to require, by the issuance of a subpoena, the attendance and testimony of persons and the production of books and papers in any and all matters within its jurisdiction. Upon the failure of any such person to attend as a witness when subpoenaed or to testify or to produce documents when subpoenaed, the Chairperson shall have the power to refer the matter to the Superior Court of the District of Columbia for such relief as the Court may deem appropriate. The Board, through its Chairperson or through the Presiding Member of a Hearing Committee, shall have the power to administer oaths to witnesses testifying in cases before it.

D. Where the Board has not decided on appeal from the denial of a license application by the end of the license year for which the application was made and the appellant has made timely application for a license for the new license year, the pending appeal shall not become moot at the end of the license year for which the earlier application was made, but shall be deemed also to be an appeal from the denial of an application for a license for the new license year.

IX. ADMINISTRATIVE SUPPORT

Administrative support for the Board shall be provided by the Mayor through an annual appropriated budget and the appointment of an Executive Officer and such staff as are necessary to the functioning of the Board.

JACKSON & CAMPBELL
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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.

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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

ADVISC / NEIGHBORHOOD COMMI. .ON 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

Tad DiBiase
SMD 03

Jill Diskan
SMD 04

Charles Mayo
SMD 05

October 26, 2000

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

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

October 30, 2000

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.

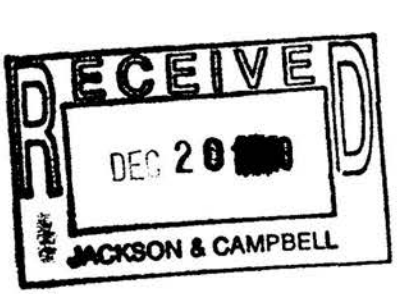
If you have any questions or need further assistance, please call me at (202) 727-6311.

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/



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN TOWERS, INC. Plaintiff, v, THE HONORABLE ANTHONY WILLIAMS, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. Defendants	Civil Action No. 00-2436 (PLF)

DEFENDANTS' MOTION TO DISMISS ALL DEFENDANTS FOR FAILURE TO STATE A CLAIM OVER WHICH THIS COURT HAS ORIGINAL JURISDICTION

NOW COME Defendants, by and through counsel, the Corporation Counsel of the District of Columbia, and pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) and move this Court to dismiss the complaint for failure to state a claim over which this Court has original jurisdiction. The reasons for this request are set forth below and in the accompanying memorandum in support, which is incorporated herein by reference.

Plaintiff, alleges three grounds for federal jurisdiction; a violation of the Telecommunications Act of 1996, 47 U.S.C. Section 332 (" Telecommunications Act"); a denial of equal protection; and denial of due process.[1] Each of plaintiff's federal claims fail as a matter of law. Plaintiff's claim under the Telecommunications Act fails because the defendants' actions neither unreasonably discriminated among the providers of functionally equivalent services nor had the effect of prohibiting the provision of personal wireless services. Plaintiff's equal protection claim also fails. The complaint itself

[1] Though the first amended complaint is silent on the issue, defendants assume that plaintiff's equal protection and procedural due process claims are brought under the 5th Amendment to the United States Constitution.

violations of local law.[8] Plaintiff has throughout this litigation insisted that local law does not allow for the rescission of permits except as provided for in Sections 108.9, 10 and 11 of the building code. Amend. Cmplt. at par. 120; Motion for Preliminary Injunction at pg. 5. Plaintiff also maintains that no side-yard is required under local law. Amend. Cmplt. at para. 125-26. Plaintiff also argues that approval of the building permit constitutes waiver of the Height Act under local law. Amend. Cmplt. at Exh. 10. Finally, plaintiff asserts that there was no basis under the D.C. Environmental Policy Act to either require an Environmental Impact Statement. Amend. Cmplt. at 138.

Each of these assertions involves complex issues of local law over which the Board of Zoning Appeals ("BZA") and Board of Appeals and Review ("BAR") have expertise. Plaintiff was informed in the Final Notice that it had a right to appeal the rescission of the permit to the appropriate administrative review authority. Amend Cmplt. at Exh. 11. Plaintiff was informed that the side-yard setback issue could be appealed to the BZA and the remaining grounds for rescission to the BAR. Amend. Cmplt. at Exh. 11. In fact, plaintiff has filed appeals with both bodies. Plaintiffs cannot now seek to have this Court replace the appropriate District body as the forum for resolution of this dispute. Dano Resource Recovery, 566 A.2d at 487. This course of conduct simply cannot be justified in light of the administrative procedures in place. "[A] dissatisfied party must pursue and exhaust its administrative remedy before it resorts to the courts . . . ." Id.

Burford Abstention

The abstention doctrine permits district courts to decline, under appropriate circumstances, to entertain lawsuits over which they have jurisdiction. Dano Resource

[8] Plaintiff 's allegations in Counts I & II that the defendants acted arbitrarily of course fail if the actions taken were in accordance with District law.

In determining whether to decline jurisdiction in favor of the District's local adjudicatory processes the Court must be sure that the District has a unified comprehensive regulatory mechanism subject to adequate judicial review capable of providing sufficient remedies. Buford at 333-334; *See also* Alabama Public Service Comm'n v. Southern railway Co., 341 U.S. 341 (1951). Plaintiff can and has appealed every basis of the permit rescission to either the BZA (side-yard setback) or the BAR (all other grounds.). Complt. at Exh. 11. In addition local law provides for judicial review of contested cases heard before either Board in the District of Columbia Court of Appeals. D.C. Code 1-1509. Clearly, there are adequate assurances that this Court can decline jurisdiction confident that plaintiff's claims will be given a very hearing through the District's process.

This, then, is a matter of significant and such predominately local "public interest that federal courts . . . should exercise their discretionary power with proper regard for the rightful independence of [the District's] government in carrying out [its] domestic policy." See Burford, supra at 318.

The circumstances of this matter make it prudent and appropriate for this Court to abstain from exercising its jurisdiction under the Burford doctrine. See, e.g., Colorado River, supra, at 1244; Burford, supra; Dano, supra, and to dismiss the complaint, see Burford, supra at 334. 17A Wright, Miller, & Cooper, Federal Practice and Procedure, § 4245 (2d ed. 1988) (stating that it is now accepted as the appropriate course of action in a Burford abstention case to dismiss the suit).

Government of the District of Columbia

OFFICE OF ZONING

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

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

FILE COPY

STAMP RETURN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW
441 - 4TH STREET, NW
5TH FLOOR SOUTH - SUITE 540
WASHINGTON, DC 20001

NOTICE OF APPEAL

APPEAL IS HEREBY MADE FROM THE ACTION OF THE DEPARTMENT OF
CONSUMER & REGULATORY AFFAIRS
~~VIOLATION, CITATION, ORDER OR SOCIAL SECURITY NO.~~ XXXXXXXXXX
FOR PERMIT REVOCATION

DATE OF DECISION: October 10, 2000

DATE OF RECEIPT OF THE DECISION: October 12, 2000

NAME: American Towers, Inc.

ADDRESS: 3 Allied Drive
Suite 210
Dedham, MA 02026

CITY: _____ STATE: _____ ZIP: _____

DAYTIME TELEPHONE NUMBER: (202) 457-1649

STATEMENT OF APPEAL. (IF NECESSARY, ATTACHED EXPLANATION):

SEE ATTACHED

SIGNATURE OF APPELLANT(S) _____

DATE: 10/25/00

Robert C. Cooper, Esq.
Jackson & Campbell, P.C.
1120-20th Street, N.W.
Washington, D.C. 20036

00-0240

STATEMENT OF APPEAL BEFORE THE BOARD OF APPEALS AND REVIEW

This Appeal is being taken from the October 10, 2000, Final Notice Rescinding and Canceling Certain Building Permits for the project undertaken by American Towers, Inc. for the property located at 4617 - 4623 41st Street, N.W. This Appeal is being noted as a "preventive measure only" without waiving our position that this Board has no jurisdiction to review this matter. It is our position that the actions taken by the Department of Consumer and Regulatory Affairs ("DCRA") are illegal and improper, and that the matter is properly before the U.S. District Court in Civil Action No. 00-2436 (a copy of the Complaint is attached hereto). The Court is in the process of reviewing the various motions and will presumably set this matter for hearing within the next ten days.

The DCRA issued certain building permits and are now attempting to rescind and cancel them based on alleged errors committed by the DCRA in reviewing, approving and issuing the permits. The DCRA set forth five issues upon which they allege error was committed. Per the Order of the DCRA, four (4) of these issues are allegedly subject to your review on appeal. As to each of the four matters, the Appellant states as follows:

1. Height Act. The Building Permit Application, all attachments and plans thereof, indicate the proposed height of the Tower, with and without the HDTV antennas. Throughout the entire process and review by the DCRA, the Office of Planning, and the Environmental Regulation Administration, the District Government was fully made aware of the proposed/requested height of the Tower and related antennas. Each of those agencies reviewed and approved the requested height of the Tower and related antennas.

2. Environmental Impact. The Notice of Revocation asserts that an Environmental Impact Statement should have been filed. The fact is that no Environmental Impact Statement has ever been required for such a project, to our knowledge. Further, the D.C. Environmental Regulations do not require an EIS to be filed under these circumstances. The proposed Tower will have substantially the same purpose and capacity and will have no more density than the three (3) structures it replaces. The new Tower and related studio building are in full compliance with all zoning regulations.

3. Failure to Register as a Corporation and/or to Conduct Business in the District of Columbia.

Both paragraphs 4 and 5 of the Notice to Rescind and Cancel are inaccurate. The Applicant is properly authorized to conduct business in the District of Columbia and is properly registered to do so. A copy of the certification from the Department of Consumer and Regulatory Affairs is attached hereto.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2000, I caused to be mailed, by first class mail, postage repaid, a copy of the foregoing Notice of Appeal to:

Ms. Carlynn Fuller, Acting Director
Department of Consumer Regulatory Affairs
District of Columbia Government
941 North Capitol Street, N.E.
Suite 9500
Washington, D.C. 20002

Robert Utiger, Esquire
Office of the Corporation Counsel
District of Columbia
441 4th Street, N.W.
Washington, D.C. 20001

Robert Clayton Cooper

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

AMERICAN TOWER, INC.,	)	
	)	
Appellant,	)	Docket No.: 01-5630-CI
	)	
v.	)	
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,	)	
	)	
Appellee.	)	

JOINT STATUS REPORT

This status report is being submitted to update the Board regarding the U.S. District Court's June 14, 2001 Order of Dismissal in *American Towers, Inc. v. Williams*, Civ. No. 00-2436 (PLF) (D.D.C. 2001). In this "final appealable" Order, U.S. District Judge Paul L. Friedman dismissed Plaintiff American Tower, Inc.'s four federal claims with prejudice and its four *non*-federal claims "without prejudice to their being refiled in a more appropriate forum." Copies of Judge Friedman's 15-page Opinion and one-page Order are attached hereto. (Attachments A and B)

The parties will submit another status report to the Board as soon as American Tower, Inc. determines its next step in the litigation with the District of Columbia Government.

Counsel for the Appellant has reviewed and concurs with this report.

Respectfully submitted,

ROBERT R. RIGSBY
Corporation Counsel

SHARON STYLES-ANDERSON (Bar #412158)
Senior Deputy Corporation Counsel

CHARLOTTE W. PARKER (Bar #186205)
Acting Deputy Corporation Counsel

BENNETT RUSHKOFF (Bar #386925)
Senior Counsel
Office of the Corporation Counsel
441 4th Street, N.W., Suite 450-N
Washington, D.C. 20001
202-727-3500

Attorneys for Appellee

Dated: June 26, 2001

CERTIFICATE OF SERVICE

I certify that on this 26th day of June, 2001, I caused a copy of the foregoing Joint Status Report (and Attachments A and B) to be mailed, first class postage prepaid, to:

John J. Brennan, III, Esq.
Robert Clayton Cooper, Esq.
JACKSON & CAMPBELL, P.C.
1120 20th Street, N.W., South Tower
Washington, DC 20036

Bennett Rushkoff

The duties of the Executive Officer shall include the following:

A. The Executive Officer is responsible for all administrative, managerial, budgetary, and housekeeping management of the Board.

B. The Executive Officer is responsible for the timely disposition of cases before the Board by efficient processing and scheduling of cases.

C. The Executive Officer is responsible for coordination with agencies for the collection of necessary information and documentation of cases.

D. The Executive Officer is responsible for the transmittal of all appropriate correspondence, pleadings, documents, and actions of the Board to parties in cases before the Board.

E. The Executive Officer is responsible for overseeing the preparation and certification of administrative records in cases where judicial review of board decisions is sought.

X. **RESCISSIONS**

Mayor's Order 94-115, dated May 9, 1994, is hereby rescinded.

XI. **EFFECTIVE DATE:** This order shall become effective immediately.

MARION BARRY, JR.
MAYOR

ATTEST:

BARRY K. CAMPBELL
CHIEF OF STAFF