GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Appeal No. 16990 of American Towers, Inc. pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Acting Director of the Department of Consumer and Regulatory Affairs (DCRA) rescinding Building Permits Nos. B425271, 420358, 429362, et al., relating to the construction of an antenna tower in a C-2-B District at premises 4623 41st Street, N.W. (Square 1769, Lots 20 and 30).

HEARING DATE: April 29, 2003
DECISION DATE: April 29, 2003

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

On January 10, 2003, American Towers, Inc.[1] ("American Towers") filed this appeal with the Board of Zoning Adjustment ("Board" or "BZA"). The appeal states that it challenges an October 5, 2000 administrative decision by the Acting Director of the Department of Consumer and Regulatory Affairs ("DCRA") to rescind and cancel building permits for construction of an antenna tower at 4623 41st Street, N.W. Exh. 1.

By letter dated January 14, 2003, American Towers requested that the Board stay the proceedings pending resolution of related judicial proceedings. Exh. 15. On January 30, 2003, DCRA filed a motion for dismissal of the appeal as untimely. Exh. 16. The Board then scheduled a hearing on the appeal for April 29, 2003, with DCRA's motion for dismissal to be considered as a preliminary matter. Exh. 17-21. On April 24, 2003, DCRA filed an opposition to American Towers' request for a stay. Exh. 23. On April 25, 2003, American Towers filed its opposition to DCRA's motion for dismissal and renewed its earlier request for a stay. Exh. 24.

The Advisory Neighborhood Commission for the subject property, ANC 3E, did not file a statement on the appeal. Exh. 25.

[1] Appellant in this case is American Towers, Inc. Exh. 1. Attached to the Appeal is a permit application (B425271) that listed American Tower Systems as the property owner. Exh. 4. For purposes of this appeal, the Board will assume that American Towers, Inc. is an aggrieved party.

BZA
Case No. 16990
Exhibit No. 30

Board of Zoning Adjustment
District of Columbia
CASE NO. 16990
EXHIBIT NO. 30

On April 29, 2003, the Board heard argument from DCRA and American Towers on DCRA's motion for dismissal and American Towers' request for a stay. At the conclusion of the argument, the Board voted 3-0-2 to grant the motion for dismissal.

FINDINGS OF FACT:

1. On March 18, 1999, American Tower Systems applied to the Building and Land Regulation Administration (DCRA) for a permit for construction at 4623 41st Street, N.W., of an antenna tower and two T.V. antennas with an "[o]verall height" of 756 feet. Exh. 4. On March 13, 2000, the Building and Land Regulation Administration issued Building Permit No. B425271 to American Tower Systems for construction of the proposed antenna tower and T.V. antennas. Exh. 6.

2. On September 18, 2000, Jill Diskan filed an appeal with the Board from two earlier administrative decisions of the Zoning Administrator relating to the proposed construction of a tower at 4623 41st Street, N.W. (BZA Appeal No. 16649). In her appeal, Ms. Diskan stated that "[b]ecause of [the] height of [the proposed] tower the application should have been referred to the BZA and to the mayor for an exception." Exh. 16 (Attach. A thereto). Ms. Diskan appealed in her capacity as Chair of Advisory Neighborhood Commission 3E ("ANC"). Exh. 16 (Attach. C thereto).

3. On October 5, 2000, the Acting Director of DCRA issued a Notice to Rescind and Cancel Building Permit No. B425271 and ten other related building and plumbing permits. The Notice to Rescind and Cancel cited five "errors identified in the original permit review process that resulted in the erroneous issuance of these permits": (1) insufficient side yard setback, (2) tower height in excess of Height Act limitations, (3) absence of any environmental impact analysis, (4) submitting an application for a construction permit without a Certificate of Authority to transact business in the District of Columbia, and (5) applying for building permits without having registered with the Office of Tax and Revenue.[2] Exh. 5.

4. The Notice to Rescind and Cancel provided that the "decision to cancel and rescind these invalid permits will become effective at 5 pm on Tuesday October 10, 2000, unless, prior to 12 noon that same day, I receive written statements, evidence, or documentation . . . demonstrating that the errors I cited did not take place." Exh. 5. By letter to the Acting Director of DCRA dated October 10, 2000,

[2] The Notice to Rescind and Cancel was mailed to "American Tower Corp." in Massachusetts, "American Tower Systems" in Virginia, and "American Tower" in the District of Columbia, as well as to other entities and individuals. Exh. 5.

John J. Brennan, III, Esq. and Robert Clayton Cooper, Esq., writing on behalf of "American Tower Corporation," challenged the Acting Director's stated reasons for rescission and cancellation and requested that construction of the antenna tower be authorized to continue. Exh. 22 (attachment thereto).

5. On October 10, 2000, the Acting Director of DCRA issued a Final Notice Rescinding and Canceling the eleven building and plumbing permits that had been the subject of the Notice to Rescind and Cancel. Pursuant to the Final Notice Rescinding and Canceling, the Notice to Rescind and Cancel would "become effective as of 5:00 p.m. October 10, 2000," and work at the site was to cease by 7:00 p.m. on October 12, 2000. The Final Notice Rescinding and Canceling provided notice of the right to appeal the "inadequate side yard setback" issue to this Board:

> 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.
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> 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, DC 20001, (202) 727-6311. . . . Exh. 16 (Attach. G thereto).

6. By letter dated October 25, 2000, on behalf of "American Towers, Inc.," Mr. Cooper requested that the Board stay the proceedings in BZA Appeal No. 16649, which was still pending. He explained:

> 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, seeking 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. . . . Exh. 24 (Exh. 1 thereto).

7. Similarly, by letter to the Board dated October 26, 2000, Jill Diskan requested "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." Exh. 24 (Exh. 2 thereto).

8. By letter dated October 30, 2000, Jerrily R. Kress, FAIA, Director of the Office of Zoning, informed Mr. Cooper of Ms. Diskan's request that her appeal "be placed on hold pending the outcome of the American Tower, Inc. lawsuit in District Court." Ms. Kress stated: "[i]t is almost certain that this request will be granted." She then advised Mr. Cooper: "[i]n 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." Exh. 24 (Exh. 3 thereto). Mr. Cooper has represented to the Board that he never received Ms. Kress' letter and that he did not become aware of the letter until receiving a copy in early 2003. Exh. 24 at 3.

9. By letter dated September 6, 2001, Ms. Kress informed 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 ["BZA Application No. 16649 – American Tower Systems"] be postponed until the recently filed court proceedings in this matter are concluded. Exh. 24 (Exh. 5 thereto).

10. In a motion filed on or about December 20, 2000 in the United States District Court for the District of Columbia in *American Towers, Inc. v. The Honorable Anthony Williams, et al.* (Civ. No. 00-2436 (PLF)), counsel for the District of Columbia ("District") stated:

> Plaintiff [American Towers] 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. Exh. 24 (Exh. 4 thereto).[3]

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[3] In its decision granting the motion to dismiss, the district court acknowledged, but did not appear to rely upon, the District's representation that American Towers had appealed to this Board:

> Since American Tower does not contest the fact that it has been provided with post-deprivation procedures – indeed, it currently is taking advantage of the District's administrative procedures by appealing the rescission to the Board of Zoning Appeals [sic] and to the Board of Appeals and Review, see Defs.' Suppl. Memo. at 8 – the question for the Court to decide on this motion is whether the notice sent by the District and the opportunity for hearing provided before rescission were sufficient to comport with due process.

Exh. 10 at 4.

11. Subsequently, in a motion to dismiss filed on October 17, 2002 in the D.C. Superior Court in *American Towers, Inc. v. District of Columbia* (Civ. No. 02-2183), counsel for the District stated: "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 [sic] ("BAR") but has not sought review in the Board of Zoning Adjustment ("BZA")." Exh. 26 (Motion at 1-2).

12. By letter dated November 1, 2002, Ms. Diskan informed Ms. Kress that BZA Appeal No. 16649 was "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." The letter shows that a copy was mailed to Mr. Cooper by first-class mail. Exh. 16 (Attach. E. thereto).

13. On January 10, 2003, American Towers, Inc. ("American Towers" or "Appellant") filed the instant appeal --BZA Appeal No. 16990 -- challenging DCRA's October 5, 2000 decision rescinding and canceling Building Permit No. B425271 (and the related permits). Exh. 1. Appellant's primary contention on appeal is that "the final building permit application and related approved drawings" did not create or provide for a side yard, and "therefore none is required." Exh. 2. In its "Statement of Ag[g]rievement," filed on January 10, 2003, with its appeal to the BZA, American Towers stated:

> This Appeal is being filed in order for the Appellant to preserve its earlier exercised exhaustion of administrative remedies. It was previously understood and agreed by the Appellant and the BZA, that the previously pending action (BZA Case #16649) would encompass all issues related to that case, including the side yard issue, and would be stayed pending the resolution of all matters before the U.S. District Court. However, despite that understanding, the matter has since been withdrawn and dismissed. So, in order to preserve its position based upon the status-quo, prior to that dismissal, Appellant American Towers submits this appeal, and requests that all matters before the BZA be stayed pending resolution of all judicial proceedings. Exh. 2.

CONCLUSIONS OF LAW AND OPINION:

One who is aggrieved by a zoning decision must file a "timely appeal" to the Board. 11 DCMR § 3112.2. The District of Columbia Court of Appeals has held that the requirement "that an appeal be timely is jurisdictional," and that the Board lacks the power to consider an untimely appeal. *Waste Management of*

Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment, 775 A.2d 1117, 1121 (D.C. 2001). The Court has described the "limit of timeliness" as "two months between notice of a decision and 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 Bd. of Zoning Adjustment*, 805 A.2d 964, 969 (D.C. 2002).[4]

Whether Appellant is appealing from the Notice to Rescind and Cancel dated October 5, 2000, as American Towers has stated (Exh. 1 & 5), or from the Final Notice Rescinding and Canceling dated October 10, 2000, as DCRA has stated (Exh. 16, Mem. at 1 & n.1), the appeal is untimely. The record in this case shows that Appellant had notice of the DCRA's October 5, 2000 decision on or before October 10, 2000, the date of Mr. Brennan and Mr. Cooper's letter challenging the Acting Director's stated reasons for the proposed rescission and cancellation. The record in this case also shows that Appellant had notice of DCRA's October 10, 2000 decision on or before October 25, 2000, the date of Mr. Cooper's letter to Ms. Kress stating that the permits for the tower "were unlawfully and illegally revoked by the D.C. Department of Consumer and Regulatory Affairs on October 10, 2000." Moreover, DCRA's October 10, 2000 decision expressly informed Appellant that "[i]n order to exercise" its "right to challenge this Notice," it had to "appeal the portion of the Notice that is based upon the inadequate side yard setback to the Board of Zoning Adjustment."

It follows that the "limit of timeliness" for appealing to the Board from DCRA's October 10, 2000 revocation decision was reached not later than December 25, 2000, *i.e.* two months after the last possible date (*i.e.* October 25, 2000) that Appellant could have received notice of the revocation decision. Therefore, in filing BZA Case #16990 on January 10, 2003, Appellant filed more than two years late.

In its opposition to DCRA's January 30, 2003 motion for dismissal, Appellant states:

> 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.

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[4] The Zoning Commission's recent rulemaking setting 60 days as the time limit for appeals to the Board did not become effective until February 7, 2003, and, therefore, is inapplicable to this appeal.

Opposition at 5. However, an agreement among the parties to stay a pending appeal from DCRA's administrative decisions to issue permits for the proposed tower (BZA Case #16649) would not have served to extend the time limit for appealing DCRA's *subsequent* administrative decisions to revoke the permits for the proposed tower (BZA Case #16990). Further, Appellant's decision to appeal the revocation of the permits in the United States District Court did not somehow relieve it of its responsibility to properly file an appeal before the BZA. The fact that American Towers "chose to concentrate on avenues that reasonably may have appeared more promising than an appeal [to the BZA] does not excuse its delay" in noting such an appeal. *Waste Management,* 775 A.2d at 1123.

Appellant contends that "[i]t was previously understood and agreed by the Appellant and the BZA, that [BZA Case #16649] would encompass all issues related to that case, including the side yard issue," and further contends that, following the dismissal of that action, Appellant filed BZA Case #16990 "in order to preserve its position based upon the status-quo." But whatever Appellant's understanding of the status quo, it is clear from Ms. Kress' October 30, 2000 letter that there was no agreement to treat BZA Case #16649 as an appeal from DCRA's decision to revoke the permits. That letter recommended that American Tower Systems, Inc., "[i]n the interest of maintaining [its] options . . . file an appeal based on the revocation of the permits for the tower." Such a recommendation would have been unnecessary if the BZA were treating Case No. 16649 as an appeal of DCRA's decision to revoke the permits. Moreover, it does not make sense to, as American Towers contends, treat Appeal No. 16649 as an appeal from both the issuance and the revocation of the same permits. In fact, the timing is irreconcilable. The permits were revoked on, at the earliest, October 5, 2000. Appeal No. 16649 was filed on September 18, 2000. There is no way that Ms. Diskan, when she filed the appeal, could have intended it to apply to the revocation of the permits -- an action which had not yet occurred.

American Towers' injecting itself into another party's appeal of a related, but clearly different matter, could not substitute for filing its own appeal with the BZA. However, in support of its position that it could rely on its involvement in BZA Case #16649 as the functional equivalent of its own appeal, Appellant also relies on a statement made by an attorney for the District, in a motion filed in the U.S. District Court on or about December 20, 2000, that Appellant *had* filed an appeal with the Board. Appellant cites this incorrect statement as evidence of the parties' "mutual understanding" that American Towers' "responsibilities with respect to the BZA had been satisfied as a result of their injection into the then pending ANC Appeal." The District's statement, however, appears to reflect not an "understanding" but a misunderstanding as to whether American Towers had appealed to the Board. And even if the parties had agreed to treat BZA Case #16649 as including an appeal by American Towers, such an agreement, by itself,

could not satisfy the Board's jurisdictional requirement that American Towers file a timely appeal. Nothing in the record of this case shows that the Board was ever informed prior to January 10, 2003 – by *any* party – that BZA Appeal No. 16649 should have been deemed to include (1) an appeal by American Towers or (2) an appeal from DCRA's decision to revoke the permits.

Finally, even if there had been some equitable reason, based on the existence of BZA Appeal No. 16649, for tolling the period during which American Towers could file an appeal from DCRA's revocation decision, the tolling would have ended when Appellant received notice of the November 1, 2002 withdrawal of BZA Appeal No. 16649. The letter of withdrawal shows that it was sent to Mr. Cooper by first-class mail, and American Towers does not contend that it failed to receive the letter prior to November 10, 2002. In waiting until January 10, 2003 to file its appeal, American Towers waited for more than two months after it received notice that the ANC had withdrawn its appeal. Therefore, even if the period for appealing had been tolled until American Towers received notice of the withdrawal of the ANC's appeal, American Towers' appeal would still have been untimely. Because this appeal will be dismissed as untimely, American Towers' request for a stay is now moot.

For the reasons stated above, it is hereby **ORDERED** that (1) DCRA's motion to dismiss is **GRANTED** and that this appeal is therefore **DISMISSED**, (2) American Towers' request for a stay is **DENIED**, and (3) American Towers' motion for rehearing is **DENIED** without prejudice to its right to move for reconsideration or rehearing pursuant to 11 DCMR § 3126.2.

VOTE: 3-0-2 (Carol J. Mitten, David A. Zaidain, Geoffrey H. Griffis to deny, Curtis L. Etherly, JR. and the Third Mayoral Appointee not present, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

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

FINAL DATE OF ORDER: JUN 25 2003

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 TEN DAYS AFTER IT BECOMES FINAL. LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16990

As Director of the Office of Zoning, I hereby certify and attest that on JUN 25 2003 a copy of the order entered on that date in this matter 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:

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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning