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June 20, 2003

Jerrily R. Kress, FAIA
Director, Office of Zoning
Government of the District of Columbia
Board of Zoning Adjustment
441 4th Street, N.W., Suite 210-S
Washington, DC 20001

RE: BZA Appeal No. 16990 - American Towers, Inc.

Dear Ms. Kress:

This responds to your letter of June 6, 2003. We ask that you reconsider your position regarding our Motion for Rehearing and Supplemental Memorandum in Opposition to the District of Columbia's Motion to Dismiss. First, it is a motion seeking a specific kind of relief or action by the Board of Zoning Adjustment. It is not addressed to the substance of the appeal. Accordingly, it is not within the provisions of 11 DCMR § 3121.9. Even if we assume, *arguendo*, that a motion for rehearing is addressed to the substance of an appeal which has not yet been heard, the regulation is still not applicable because the BZA has not yet heard the appeal. Finally, it is my understanding that, in fact, there was no order stating that the record had been closed, which is another predicate for the application of § 3121.9.

Section 3121.9 is contained in § 3121, "PROPOSED FINDINGS AND CONCLUSIONS; CLOSING THE RECORD." This section governs when there has been a full hearing on the merits. There, the parties have presented such evidence as may be appropriate, with full protection of the administrative rights to cross-examine and present rebuttal evidence afforded to those who may be opposing the appeal of the application. The purpose of § 3121.9 is to prevent a party to an application or an appeal from presenting evidence directed towards "the substance of the application or appeal after the merits of the appeal have been fully heard." If substantive matter was submitted after the close of the record, then opposing parties would not have the opportunity to either cross-examine the testimony or rebut the evidence so submitted.

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BZA
Case No. 16990
Exhibit No. 34

Board of Zoning Adjustment
District of Columbia
CASE NO. 16990
EXHIBIT NO. 34

Section 3121.9, therefore, prohibits the submission of substantive material after a hearing and closure of the record.

It is also noteworthy that this provision is contained within the larger section dealing with the submission of findings of fact and conclusions of law after a complete administrative record has been created. That has not occurred in this case. The Board did not hold a hearing on the merits pursuant to 11 DCMR § 3117. The Board did not accept evidence pursuant to § 3119 and, of course, the Board did not ask for proposed findings of fact nor did it set a date upon which the record would be closed pursuant to § 3121, et seq.

Rather, the Board heard oral argument on a procedural motion brought by the District of Columbia, that is, a motion to dismiss. The Board gave no consideration to the actual merits of the appeal; therefore, "the substance of the application or appeal" has never been entered into the record. Accordingly, the application of this regulation would have no purpose. Our motion is addressed solely to the District's procedural motion and not to the substance of the appeal, which has not been heard.

We request that our motion be submitted to the Board members for their ruling as to whether they will grant a motion for rehearing.

Sincerely yours,

JACKSON & CAMPBELL, P.C.

John J. Brennan, III

JJB:das