BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of American Towers, Inc. relating to the construction of an antenna tower at 4623 41st Street, N.W.	)))	BZA Appeal No. 16990

D.C. ... JAN 14 PM 4:03

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' OPPOSITION TO MOTION TO RECONSIDER

In its Motion to Reconsider, American Towers, Inc. ("American Towers") argues that the doctrine of judicial estoppel compels the Board of Zoning Adjustment ("BZA") to reconsider its conclusion that American Towers did not file a timely appeal with the BZA. The Motion argues that the BZA must treat American Towers as having filed an appeal with the BZA sometime prior to January 10, 2003 because counsel for the District of Columbia ("District") stated to two courts that American Towers had done so. The doctrine of judicial estoppel might have been properly invoked if the District had derived some advantage from these misstatements. But given that, in the court proceedings, the District's misstatements were either immaterial to its own position or supportive of American Towers' position, there is no basis for applying the doctrine in this BZA appeal.

The rationale behind the doctrine of judicial estoppel is that "'absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.'" *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001) (*quoting* 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981)). In considering whether to invoke this doctrine, courts typically consider, among other factors, "whether the party seeking to assert an inconsistent

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position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." 532 U.S. at 751, 121 S.Ct. at 1815. Application of the doctrine "precludes a litigant from playing fast and loose with a court of justice by changing his position according to the vicissitudes of self interest." *Lofchie v. Washington Square Ltd.*, 580 A.2d 665, 668 (D.C. 1990) (Schwelb, J., concurring); *accord Porter Novelli, Inc. v. Bender*, 817 A.2d 185, 188 (D.C. 2003).[1]

American Towers' argument fails because it has not pointed to any misstatement by the District's counsel that resulted in an advantage for the District. Indeed, in three of the four examples cited by American Towers, the District's misstatements were *against* the District's own litigation interest.

In the first example cited by American Towers, the District's misstatement about American Towers having appealed to the BZA was made in the course of the District's urging a federal district court "to decline jurisdiction in favor of the District's local adjudicatory processes." The District contended that it had "a unified comprehensive regulatory mechanism subject to adequate judicial review capable of providing sufficient remedies." Motion to Reconsider, Exh. A at 22. In resolving this issue, the federal district court relied on the uncontested "fact" that the District had made post-deprivation remedies *available* to American Towers:

> Since American Tower[s] does not contest the fact that it has been provided with post-deprivation procedures--indeed, it currently is taking

[1] On November 7, 2002, the District of Columbia Court of Appeals stated that the doctrine of judicial estoppel was of "questionable viability in this jurisdiction." *Thoubboron v. Ford Motor Co.*, 809 A.2d 1204, 1212 n.9 (D.C. 2002); *cf. Plough Inc. v. National Academy of Sciences*, 530 A.2d 1152, 1159 (D.C. 1987) (observing that doctrine had yet to have any vitality in D.C.). Three months later, however, the Court applied the doctrine in *Porter Novelli,* 817 A.2d at 188.

> advantage of the District's administrative processes by appealing the rescission [of permits] to the Board of Zoning [Adjustment] and to the Board of Appeals and Review, see [District's] 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.
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> * * *
>
> . . . Because plaintiff [American Towers] was offered and took advantage of [the described] pre-deprivation procedure *and was also advised of its right to post-deprivation hearings before the Board of Zoning [Adjustment]* and the Board of Appeals and Review, see Amended Complaint, Exs. 9 & 11, the Court cannot find that defendants violated plaintiff's right to procedural due process.

American Towers, Inc. v. Williams, 146 F.Supp.2d 27, 32-33 (D.D.C. 2001) (emphasis added), *copy attached to* Motion to Reconsider, Exh. D at 7-8 (JA 15-16). Because the court's decision was based on whether American Towers had been *advised* of its post-deprivation remedies – rather than on whether the post-deprivation remedies had been *exercised* – the District gained no advantage from its misstatement to the court about American Towers having exercised its right to appeal to the BZA.

In another example cited by American Towers, the misstatement about an appeal to the BZA was made in the course of the District's argument that American Towers had not pursued its administrative remedies "far enough" to support a substantive due process claim. The District had argued:

> [American Towers] must pursue its administrative remedies at least:
>
> > far enough to establish conclusively the effect of the regulations; only then can the court determine whether the impact has been draconian enough to make out a taking without just compensation.
>
> *Tri Country* [*Industries, Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997)].

> While [American Towers] has brought its claim to the Board of Zoning [Adjustment] and the Board of Appeals and Review, those administrative review agencies have not yet ruled and have not "establish[ed] conclusively the effect of the regulations." *Id.*

Motion to Reconsider, Exh. C at 7-8. As before, the District gained no advantage from its misstatement. Had the District stated accurately that American Towers had yet to file an appeal with the BZA, the District would have *strengthened* its argument that American Towers had not pursued its remedies far enough.

In the two other examples cited by American Towers, the misstatements about an appeal to the BZA were made in the course of the District's argument that American Towers had not "pushed its local remedies to the hilt." In one example, the District stated to the federal district court:

> While it is true that plaintiff [American Towers] filed appeals before the BZA and [Board of Appeals and Review], the mere filing of those appeals hardly constitute pushing its local remedies to the hilt. Plaintiff's argument is particularly weak since both [appeals] are currently stayed *at plaintiff's request*."

Motion to Reconsider, Exh. E at 10 (emphasis in original). In the other example, the District stated to the federal appellate court:

> . . . American Towers has not pushed its local remedies "to the hilt." Although Ms. Fuller advised that it could seek review of her decision in the District's Board of Appeals and Review and the Board of Zoning Adjustment, it did not allege that it had pursued either route. Instead, it filed suit in the district court on October 11, just one day after Ms. Fuller revoked its permits.[11]
>
> [11] However, as the district court's opinion notes, American Towers eventually elected to seek administrative review. . . . Despite these steps, we understand from our trial counsel that American Towers has successfully sought stays of those proceedings.

Motion to Reconsider, Exh. F at 26.

In these last two examples, the District's misstatements about American Towers having appealed to the BZA tended to undermine rather than support the District's argument that American Towers had not "pushed its local remedies to the hilt." The district and appellate courts could more easily have concluded that American Towers had not "pushed its local remedies to the hilt" if the District's counsel had accurately stated that American Towers had not even filed an appeal with the BZA. For example, in its decision, the appellate court held:

> [A] plaintiff generally will not be able to show the requisite substantiality [for a substantive due process claim] unless it "has pushed its local remedies to the hilt." . . . . American Towers has not yet secured appellate decisions from the District's Board of Zoning Adjustment and Board of Appeals and Review, as D.C. law entitles it to do, nor has it offered any explanation of its failure to do so. Its substantive due process claim was therefore properly dismissed for want of ripeness.

Motion to Reconsider, Exh. G at 2 (case citation omitted). Once again, the District gained nothing by suggesting that American Towers had "pushed its local remedies" further than it actually had pushed them. Rather, the District's misstatements served only to weaken its own legal argument.

American Towers has not contended – and could not reasonably contend – that American Towers' failure to file a timely appeal was *in reliance on* the District's misstatements as to the filing of an appeal. American Towers commenced its suit in the federal district court on October 11, 2000, the day after the Department of Consumer and Regulatory Affairs ("DCRA") issued its final decision rescinding and canceling American Towers' permits. *American Towers*, 146 F.Supp.2d at 29, *copy attached to* Motion to Reconsider, Exh. D at 7-8 (JA 13). Given that American Towers must have

received notice of DCRA's decision by no later than October 11, 2000,[2] American Towers' appeal to the BZA would have had to be filed by December 11, 2000 in order to be "timely." *Waste Management of Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 117, 1122 (D.C. 2001) ("limit of timeliness" is "two months between notice of decision and appeal therefrom," absent "exceptional circumstances substantially impairing [ability] to appeal"). However, the *earliest* of the misstatements cited by American Towers was in a court filing dated December 20, 2000. Motion to Reconsider at 8 & Exh. A thereto. By then, American Towers was already nine days past the deadline for filing a timely appeal with the BZA.

Finally, assuming for the sake of argument that the BZA were somehow bound by the District's statements regarding American Towers having filed an appeal with the BZA prior to January 10, 2003, the BZA would still not be obligated to treat American Towers' appeal as *timely*. For example, had American Towers filed its appeal during the period December 12-19, 2000, all of the District's (subsequent) statements to the federal courts about American Towers having filed an appeal with the BZA would have been *absolutely true*. Nevertheless, American Towers' appeal would have been untimely, and, therefore, subject to dismissal by the BZA on a "jurisdictional" ground. *Waste Management*, 775 A.2d at 1121 (requirement "that an appeal be timely is jurisdictional"). American Towers does not contend that the District ever stated to a court that American Towers had filed a *timely* appeal with the BZA.

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[2] In its June 25, 2003 Order in this Appeal, the Board found that October 25, 2000 was the "last possible date. . . that Appellant could have received notice of [DCRA's] revocation decision." Order at 6. The district court opinion attached to American Towers' Motion to Reconsider shows that on October 11, 2000, American Towers filed its federal court action challenging the revocation decision.

Conclusion

For the reasons stated above, American Towers' Motion to Reconsider should be denied.

Respectfully submitted,

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July 14, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2003, copies of the foregoing Opposition and the attached Proposed Decision and Order were mailed, first-class postage prepaid, to:

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PROPOSED DECISION AND ORDER

By motion dated July 7, 2003, American Towers, Inc. ("American Towers") seeks reconsideration of the Board of Zoning Adjustment's ("BZA") June 26, 2003 Order dismissing this appeal as untimely. On July 14, 2003, the Department of Consumer and Regulatory Affairs ("DCRA") filed its Opposition to the motion.

To be timely, American Towers' appeal to the BZA would have had to be filed no later than December 11, 2000, *i.e.* two months after American Towers filed its lawsuit challenging DCRA's revocation decision. In its motion, American Towers contends that the District of Columbia ("District"), and hence DCRA, is prevented by the doctrine of judicial estoppel from taking the position that American Towers' appeal was not filed until January 10, 2003. However, American Towers has not shown that there is a basis for applying the doctrine of judicial estoppel here. The District does not appear to have derived any advantage in a court proceeding from its misstatements about American Towers having filed an appeal to the BZA. Moreover, the District's misstatements, all of which were made on or after December 20, 2000, were not inconsistent with the BZA's conclusion that American Towers did not file a *timely* appeal to the BZA.

For this reason, it is hereby **ORDERED** that American Towers' motion to reconsider is **DENIED**.

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.