BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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

REPLY OF APPELLANT AMERICAN TOWER'S
IN SUPPORT OF ITS MOTION TO RECONSIDER

INTRODUCTION

The District's assertions to the federal courts that American Tower had an appeal pending before this Board were not "misstatements". They were part of a successful strategy to persuade the federal courts not to consider American Tower's due process claims on the merits. By taking an inconsistent position before the Board now, the District creates the perception that either the Court or the Board was misled. The doctrine of judicial estoppel will not permit this.

1. There Was No "Misstatement"

Twelve times in its Opposition the District refers to the position it took before the District Court and before the Court of Appeals as "misstatements." There is no basis for characterizing the District's position as a misstatement.

In New Hampshire v. Maine, cited by both parties, the Supreme Court rejected the taking of inconsistent positions "absent any good explanation...." 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001). Nowhere does the District provide any explanation, much less a good one, as to why it asserted to the courts that there was an

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Exhibit No. 37
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Board of Zoning Adjustment
District of Columbia
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EXHIBIT NO. 37

effective administrative appeal but asserts to the BZA that there was no such appeal. The Opposition is bereft of any fact or argument which would support the District's contention that the several factual representations it repeatedly made to the courts were misstatements. The positions taken by the District were not misstatements but were clear and accurate statements of the understandings of both the District of Columbia and American Tower with respect to both the effectiveness and timeliness of the October 25, 2000 appeal.

The question before the Board is whether the District of Columbia, consistent with the principles of judicial estoppel or equitable estoppel, can take a position before the courts and then radically change that position simply through the slight of hand of calling that position a misstatement. The answer is no, particularly where the District of Columbia offers absolutely no "good explanation" of why its earlier positions should be considered "misstatements."

2. The District of Columbia Benefited from its Assertions and Must Be Held to Those Assertions

The gravemen of the District's Opposition is that because it did not obtain the maximum advantage by making the representations that there had been a timely and effective appeal, the estoppel doctrines do not apply. That assertion is wrong.

American Tower asserted procedural and substantive due process claims, attacking the objectivity and validity of the administrative review process. The District defended the post-deprivation process by arguing that there was an effective (so necessarily timely) appeal to both the BZA and the BAR. The advantage to the District was that it could lull

the District Court into postponing consideration of the due process claims until the administrative appeals had run their course. The District argued that there was a "regulatory mechanism subject to adequate judicial review capable of providing sufficient remedies" and that American Tower "has appealed every basis of the permit rescission to either the BZA (sideyard setback) or the BAR (all other grounds)." The District assured the court that it need not be concerned in any way about post-deprivation due process claims: "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." Motion to Dismiss, at p. 22 (Exhibit A, Motion for Reconsideration) (emphasis supplied). As a result of the assurances (now apparently false), the court did not examine the post-deprivation process in any way.

If the District had told the Court that it intended, after the federal court proceedings were over, to disavow all these assurances and seek to deprive American Tower of an administrative remedy, the Court could have found that the post-deprivation proceedings were a sham, and considered American Tower's due process claims on the ,merits.

The District of Columbia District Court did, in fact, rely upon the assertion of an existing and exercised appeal with respect to both the substantive due process claim and the procedural due process claim. At page 32 of the Decision, as quoted at page 10 of the Motion for Reconsideration, the Court especially noted that American Tower was "currently ... taking advantage of the District's administrative processes by appealing the rescission to the Board of Zoning Appeals and to the Board of Appeals and Review ..." –

meaning that the court had to determine only whether or not the pre-deprivation procedures were "sufficient to comport with due process." In persuading the Court that American Tower did, in fact, have a sufficient administrative remedy which would address its grievances, the District prevailed in both the trial court and the Court of Appeals. It would be the gravest injustice for the Board to allow the District to now maintain that in fact there was no such administrative remedy.

3. The Chronology of the District's Statements Prove that the October 25, 2000 Appeal Was an Effective and Timely Appeal

The District claims that American Tower did not "rely" on the District's statements that American Tower had an appeal pending before the Board. But judicial estoppel requires a no such showing of reliance. As discussed in our Motion For Reconsideration (at 6-7) , judicial estoppel is based on the impropriety of a party – here, the District – "playing fast and loose with a court of justice by changing its position according to the vicissitudes of self interest." Porter Novelli, Inc. v. Bender, 817 A.2d 185, 188 (D.C. 2003), quoting from Lofchie v. Washington Square Ltd. Partnership, 580 A.2d 665, 668 (D.C. 1990) (concurring opinion by Schwelb, J.). The point of judicial estoppel is not that American Tower was misled into not filing an appeal. The point is that American Tower did file an appeal, by joining in No. 16649, and the District so contended throughout the federal court proceedings. The District cannot now take the opposite position "according to the vicissitudes of self interest."

American Tower's first appeal was No. 16649, when it intervened on October 25, 2000. Only days before this, on October 20, 2000, the District of Columbia filed Defendant's Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. (Exhibit 1 attached hereto). At page 10, the District stated:

> As set forth in the Notice, plaintiff may appeal the Director's determination on zoning issues to the Board of Zoning Adjustment and the Height Act and environmental impact issue to the Board of Appeals and Review. Id. Significantly, plaintiff has to date chosen not to avail itself of these rights.
>
> In addition, as noted above, plaintiff has failed to appeal the Director's determinations to either the BZA or the BRA.

Defendant's Opposition, p. 10.

Thereafter, after American Tower intervened in No. 16649, every pleading filed by the District acknowledged that American Tower, in fact, had filed a timely and effective appeal. The December 20, 2000 Motion to Reconsider was the first such correct statement. The District maintained that position throughout. The only event that occurred between the District's October 20, 2000 statement that no appeal had been filed and the District's December 20, 2000 motion, stating that an appeal had been filed, was the October 25, 2000 appeal by American Tower. There can be no clearer proof that the District treated the October 25 appeal as both timely and effective. The District cannot be permitted to pretend now that there was no appeal, or that it had no effect.

CONCLUSION

The District did not make any "misstatement." The District correctly acknowledged an effective and timely appeal. Elementary fairness requires that the District be held to this, and that the Board hear the merits of American Tower's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply of Appellant American Tower in Support of Its Motion to Reconsider was mailed, first-class, postage prepaid, this 31st day of July, 2003 to:

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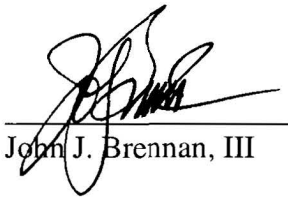
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John J. Brennan, III

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 OPPOSITION TO PLAINTIFF'S MOTION
FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION[1]

This matter is before the Court on plaintiff's motion for a temporary restraining order and preliminary injunction. Plaintiff seeks an order compelling the District to refrain from enforcing the recission of certain building permits for a 756 foot high broadcast tower that were improperly sought and erroneously granted. As set forth below, plaintiff is not entitled to the extraordinary relief it seeks for a multitude of reasons. First, plaintiff has failed to present *any* evidence that it will suffer irreparable harm. Second, plaintiff is unlikely to prevail on the merits of any of its claims.[2] In fact, since plaintiff's purported "federal" claims are so wholly without merit, this Court should decline jurisdiction over this purely local matter. In addition, resolution of plaintiff's federal claims is so dependant on the resolution of its local law claims that this Court

[1] At the request of the Court, the parties agreed to postpone hearing of this matter until the issues are briefed. In effect, the parties eschewed the motion for temporary restraining order in favor of a more deliberate hearing on the motion for preliminary injunction.

[2] While the complaint sets forth a multitude of accusations, plaintiff advances only two grounds for relief in the instant motion. First, that the defendants' actions violate the Telecommunications Act of 1996 and, second, that the Notice to Rescind is facially invalid.

by plaintiff in support of either claim.[6] That said, plaintiff's due process claim is so facially devoid of merit that defendants address it below.

The uncontested record in this case clearly demonstrates that prior to rescission of the permits at issue plaintiff was provided with the basis of the proposed rescission. (Exhibit 7 to Plaintiff's Motion) Further, plaintiff was to given the opportunity to contest the rescission prior to the time it became effective. Id. In fact, plaintiff took advantage of this process, albeit half-heartedly. (Exhibit 8 to Plaintiff's Motion)

Further, plaintiff has significant post-rescission appeal rights of which it was clearly informed. (Exhibit 9 to Plaintiff's Motion) As set forth in the Final Notice, plaintiff may appeal the Director's determination on zoning issues to the Board of Zoning Adjustment and the Height Act and Environmental Impact issue to the Board of Appeals and Review. Id. Significantly, plaintiff has to date chosen not to avail itself of these rights. Having failed to take advantage of the clearly adequate process afforded, plaintiff cannot now be heard to complain that its rights have been violated.[7]

B. Plaintiff's Local Law Claims are Meritless

Because plaintiff's federal claims are wholly without merit, this Court should decline jurisdiction under 28 U.S.C. Section 1367(c) (3). Because it is clear that plaintiff's local law claims predominate in this case, raise novel issues of local law and effect the powers of the District government, this Court should decline jurisdiction under 28 U.S.C. 1367(c)(1), (2) and (3). In addition, as noted above, plaintiff has failed to appeal the Director's determinations to either the BZA or the BRA. It is well settled that

[6] This is particularly true of plaintiff's equal protection claim. It is virtually impossible to address this issue in the absence of plaintiff's articulation of its theory and support.

available administrative remedies must be exhausted before a party may resort to judicial relief. McKart v. United States, 395 U.S. 185, 195 (1969) Dano Resource Recovery v. District of Columbia, 566 A.2d 483, 485 (D.C. 1989)

Even if plaintiff's local law claims where properly before the Court, they are substantively without merit. Plaintiff in its motion argues that the District's Notice to Rescind and Cancel is facially invalid under Section 108.9 of the District of Columbia Construction Code. (Attached to plaintiff's motion as Exhibit 10).

Plaintiff, correctly, points out that Section 108.9 only lists five basis to revoke a permit and that the Notice to Rescind is not based on any of those five permissible reasons to revoke. Further, plaintiff correctly notes that the Notice did not conform to the requirements of Section 108.11. Had the District *revoked* the permits at issue, the plaintiff's arguments might have some validity.[8] As set forth below, the distinction between a revocation and a recission is more than semantics.

Revocation, as clearly envisioned in the in the Building Code, is an appropriate remedy for the District when the permit holder has acted improperly. For example, if the permit holder obtained the permit through fraud or has failed to comply with the approved construction plans. See Section 108.9 (Attached as Exhibit 10 to Plaintiff's motion).

The District did not revoke plaintiff's permit within the meaning of Section 108.9. Instead, the District rescinded the permits because of serious errors in the permitting process, which called into question the legality of that process. The ability of

[7] Defendants note that judicial review of contested matters before the BZA and BRA can be had in the Court of Appeals of the District of Columbia, providing plaintiff's with further process.

citizens. The right of the citizens of the District to self-government is already far less than other Americans. This Court should not further limit those rights in favor of plaintiff's tenuous claim of lost profits.

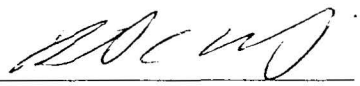
CONCLUSION

As set forth above, plaintiff has failed to establish that it will suffer irreparable harm and has failed to establish that it is likely to prevail on any of its claims. Certainly it has failed to establish that its lost profits weigh more heavily than the District of Columbia's right to enforce its laws. Plaintiff's motion for a preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on counsel for plaintiff, John J. Brennan, III, Esq., Jackson & Campbell, 1120 20th Street, N.W., South Tower, Washington D.C. 20036, by U.S. Mail, postage prepaid and by facsimile the forgoing Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction this 20th day of October, 2000.

Robert C. Utiger.