GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

**Appeal No. 16990-A 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
**DATE OF DECISION ON RECONSIDERATION:** August 5, 2003

**ORDER DENYING RECONSIDERATION**

By motion dated July 7, 2003, American Towers, Inc. ("American Towers") seeks reconsideration of the June 25, 2003 Order ("Dismissal Order") of the Board of Zoning Adjustment ("BZA") dismissing this appeal as untimely. On July 14, 2003, the Department of Consumer and Regulatory Affairs ("DCRA") filed its Opposition to the motion, and on July 31, 2003, American Towers filed its Reply.

To be timely, American Towers' appeal to the BZA had to be filed within two months of the date that American Towers had notice or knowledge of, or reasonably should have had notice or knowledge of, DCRA's October 10, 2000 decision rescinding and canceling building permits related to the construction of its antenna tower (revocation decision). *Waste Management of Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment,* 775 A.2d 1117, 1121-1122 (D.C. 2001); § 3112.2 of Title 11 of the District of Columbia Municipal Regulations ("DCMR"). In its Dismissal Order, 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. However, the federal district court opinion that American Towers submitted as Exhibit D to its Motion to Reconsider reveals that American Towers, in fact, had notice or knowledge of DCRA's decision by October 11, 2000, the date that American Towers filed its federal court action challenging the decision.[1] Accordingly, the last day for American Towers to have

[1]The opinion states that "[o]n October 11, 2000, plaintiff filed suit in this Court seeking ... relief that would allow it to proceed with construction of the tower." *American Towers, Inc. v. Williams,* 146 F. Supp.2d 27, 29 (D.D.C. 2001.) American Towers could only have filed for such relief subsequent to receiving notice of DCRA's revocation of the permits.



BZA Case No. 16990-A Exhibit No. 38
Board of Zoning Adjustment District of Columbia CASE NO. 16990 EXHIBIT NO. 38

filed a timely appeal to the BZA was December 11, 2000.[2] This appeal was filed on January 10, 2003.

In its Motion to Reconsider, American Towers contends that the District of Columbia ("District") is estopped from opposing its appeal to the BZA on the grounds that District counsel had represented in court proceedings that American Towers had filed an appeal before the BZA, and that the District could not subsequently take an inconsistent position in this case.[3] American Towers did not contend and could not reasonably have contended that its failure to file a timely appeal was *in reliance on* the District counsel's misstatements as to the filing of an appeal because none of the District counsel's statements cited by American Towers in support of its estoppel argument were made on or before December 11, 2000, the last date for a timely appeal to the BZA.

Timeliness is jurisdictional. If an appeal is not timely filed, the Board has no authority to hear the case. *Waste Management of Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121 (D.C. 2001); *citing Goto v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 917, 923 (D.C. 1980); *accord, Mendelson v. District of Columbia Board of Zoning Adjustment,* 645 A.2d 1090, 1093 (D.C. 1984). After December 11, 2000 passed, the BZA no longer had jurisdiction to entertain this appeal. Once the BZA lost jurisdiction, nothing that the District or its counsel might later have said could give this jurisdiction back to the BZA. Even if the doctrine of judicial estoppel might otherwise apply, it cannot be used to revive jurisdiction that the BZA no longer has. *See Spring Valley Wesley Heights Citizen's Ass'n. v. D.C. Bd .of Zoning Adjustment,* 644 A.2d 434, 438, fn. 6 (D.C. 1994). . ("[T]he BZA's jurisdiction cannot be expanded by the actions of private parties... The application of any doctrine of estoppel ... could not confer on the Board authority which it does not possess under the applicable statute and regulations.") American Towers has presented no facts or authority that cure its initial failure to timely appeal the revocation order. Accordingly, this Board is without jurisdiction to hear the appeal in this case.

For these reasons, it is hereby **ORDERED** that American Towers' Motion to Reconsider is **DENIED**.

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[2]Even if the time ran from the October 25th date provided by the Board, the last date for filing a timely appeal would have been December 26, 2000.

[3]American Towers did not show how the District derived any advantage from its alleged misstatements. Because the doctrine of judicial estoppel is generally invoked only against a litigant that has derived some unfair advantage from asserting an inconsistent position, American Towers has not made a convincing case that the doctrine of judicial estoppel applies even as a threshold question. *See, New Hampshire v. Maine*, 532 U.S. 742, 751 (2001).

**VOTE:** **5-0-0** (Carol J. Mitten, Ruthanne G. Miller, Geoffrey H. Griffis, Curtis L. Etherly, Jr., and David A. Zaidain to deny)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**
Each concurring member approved the issuance of this order.

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

**FINAL DATE OF ORDER:** OCT 20 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 IN TEN DAYS AFTER IT BECOMES FINAL. LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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**BZA APPLICATION NO. 16990-A**

As Director of the Office of Zoning, I hereby certify and attest that on OCT 20 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**