

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**BT RESIDENTIAL, LLC,
RESPONDENT
vs.**

**BOARD OF ZONING ADJUSTMENT OF KANSAS CITY, MISSOURI
APPELLANT**

**AMERICAN TOWER CORPORATION,
APPELLANT**

DOCKET NUMBER WD74780 (Consolidated with WD74861)

DATE: DECEMBER 4, 2012

Appeal from:

The Circuit Court of Clay County, Missouri
The Honorable Anthony R. Gabbert, Judge

Appellate Judges:

Division Two: Joseph M. Ellis, P.J., Alok Ahuja and Mark D. Pfeiffer, JJ.

Attorneys:

James C. Bowers, for Respondent

Margaret Moran, for Appellant Board of Zoning Adjustment of Kansas City, MO

Booker T. Shaw, for Appellant American Tower Corporation

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

**BOARD OF ZONING ADJUSTMENT OF KANSAS CITY, MISSOURI, APPELLANT
AMERICAN TOWER CORPORATION, APPELLANT**

WD74780 (Consolidated with WD74861)

Clay County, Missouri

Before Division Two Judges: Joseph M. Ellis, P.J., Alok Ahuja and Mark D. Pfeiffer, JJ.

The Board of Zoning Adjustment of Kansas City, Missouri ("the BZA") and American Tower Corporation ("ATC") challenge a judgment entered by the Circuit Court of Jackson County reversing a decision issued by the BZA dismissing an appeal filed by BT Residential, LLC, which challenged a decision by the Department of Planning and Development ("the Department") to allow ATC to construct a cellular tower on property it owned at 707 N.W. 96th Street. The BZA had found that BT Residential was aware of the issuance of the building permit by August 10, 2010; that BT residential failed to file its appeal within fifteen days of that date; and that the appeal was, therefore, untimely. The circuit court determined that BT Residential was actually appealing to the BZA from the later denial of its request that the Director of the Department revoke the building permit, that this request was denied in an e-mail sent by a Department employee, that the denial of that request was an appealable decision, and that BT Residential had timely filed its appeal to the BZA within fifteen days of the Department's decision. The sole issue on appeal is whether the Department employee's e-mail was a decision that could be appealed to the BZA.

REVERSED.

Division Two holds:

- (1) Appellate review of a contested agency decision is upon the findings of fact and conclusions of law of the agency, not the findings and conclusions of the circuit court. As the party aggrieved by the BZA's decision, BT residential assumes the role of the appellant in this matter pursuant to Rule 84.05(e), and ATC and the BZA are treated as respondents. While the decision reviewed on appeal is that of the BZA and not the circuit court, this Court must reverse, affirm or otherwise act upon the judgment of the trial court.
- (2) BT Residential has not identified, nor has our review of those provisions of the City Zoning and Development Code that were entered into evidence uncovered, any provision in the zoning code that grants the Director the authority

to revoke a previously granted building permit based on considerations which existed at the time of the permit's original issuance. (Chapter 88 of the Kansas City Code of Ordinances was the only portion of the city ordinances admitted into evidence)

(3) Furthermore, even if the Director had the authority to revoke a building permit, it is unclear from the record before this Court that such authority was delegated to the Department employee or, for that matter, whether the employee even purported to exercise such authority in his e-mail. The language contained in the e-mail could reasonably be interpreted as an explanation of the Director's decision to issue the permit, as opposed to a decision whether to revoke that permit. Thus, the BZA could reasonably have concluded that the e-mail was not an appealable decision.

(4) Moreover, the issues raised by BT Residential to the Department all related to the propriety of the original issuance of the building permit and did not relate to any change or event occurring subsequent to the issuance of the permit. Thus, BT Residential was essentially asking for reconsideration of the Director's original decision to issue the permit, rather than revocation based on new circumstances or later developments. Under section 88-530-12-A of the zoning code, the Director's decision to grant a building permit must be appealed **to the city plan commission** within 15 days of the Director's decision. Were we to conclude that a party could request, at any time in the future, even though aware of the problem at an earlier date, that a building permit be revoked because it was improperly granted and then obtain a hearing by the BZA, rather than the city plan commission, if that request was denied, section 88-530-12-A and its 15-day limitation would be rendered meaningless.

Opinion by Joseph M. Ellis, Judge

Date: December 4, 2012

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