

CLAIRE B. LEVY, LLC

September 17, 2001

Jefferson County Planning Commission
C/o Susan Wood
Jefferson County Planning Department
100 Jefferson County Parkway
Golden, Colorado 80419

RE: CASE NO. 00015485RZP1/EXP1 FOR PINNACLE TOWERS, INC.

Dear Planning Commissioners:

During the hearing on September 5, 2001, Chairman Steighorst asked opponents of the rezoning application where, if not on Eldorado Mountain, a digital television tower should be located. The question reflects Pinnacle Towers' position that Jefferson County has an obligation to rezone property to assist in siting a digital television tower. It also presupposes that a new tower or towers are necessary. Neither premise is correct. Although Chairman Steighorst's question may have been rhetorical, since it reflects Pinnacle Towers' approach to this rezoning application the question merits a response.

In 1997 the National Association of Broadcasters filed a petition with the Federal Communications Commission requesting that the FCC issue a rule preempting local zoning authority over digital television towers to facilitate inauguration of this new service. The FCC issued a notice of proposed rule making and accepted public comment, but did not act on the petition. Despite FCC policy of rapid implementation of digital television, the FCC did not displace local zoning authority. Therefore, the Telecommunications Land Use Plan, the North Mountains Community Plan and the Jefferson County Zoning Resolution are the guiding and governing documents in this case.

Rezoning is not a property right. There is a legal presumption, regardless of the type of rezoning application, that the existing zoning on a parcel should not be changed, unless the proposed new zoning conforms to the master plan and is compatible with surrounding land uses. The TLUP, the North Mountains Community Plan, the criteria in the Zoning Resolution, and the character of the surrounding land uses must be given the same weight in this case as would the applicable community plan and surrounding land uses in a request to rezone for mini-warehouses or any other type of use. The issue is not where a broadcast tower should be located. The issue is whether this applicant's proposal conforms to the master plan, meets the minimum criteria in the Jefferson County Zoning Resolution, and is compatible with the surrounding uses.

The testimony you heard on September 5 and the testimony you will hear from the public and neighboring jurisdictions in future hearings demonstrates the non-conformance of the proposal to the master plan, and the incompatibility of the proposal with the surrounding park land and open space. The history of rezoning cases on Mount Morrison and Lookout Mountain should not bear on the decision in this case. This application must stand or fall on its own merits.

Pinnacle Towers, Inc. would like the Planning Commission to believe that it is necessary to allow a large new tower in some location to meet a public need. The Telecommunications Act of 1996 adopted by Congress authorized use of new portions of the spectrum for digital television. Congress did not make development of digital television a national priority or mandate an accelerated implementation schedule. The FCC established its own policy of accelerated implementation through an independent rulemaking process, but has not determined that the federal interest in digital television is sufficiently strong to preempt local land use authority. In the Balanced Budget Act of 1997 (codified at 47 U.S.C. §309 (j)(14)), Congress established a target date of 2006 to recover the analog spectrum so that the FCC could auctioned that spectrum for other uses. The 2006 date contains a built-in extension if digital television has not achieved an 85% market penetration by that date. By basing return of the analog spectrum on market penetration, Congress recognized that consumer acceptance of digital television must drive implementation of the service.

Michael Powell, Chairman of the FCC, has recently questioned the wisdom of previous FCC policy pushing rapid implementation of digital television. In an interview given at the National Association of Broadcasters 2001 convention in Las Vegas, Commissioner Powell stated that he did not think the market would support the target dates. (A partial transcript of that interview obtained from the FCC home page is attached.) Commissioner Powell expressed willingness to reconsider the deadlines in recognition of the cost to consumers to buy new televisions and in recognition of the typically slower period necessary for the public to accept new technology. He also noted that 80% to 84% of Americans pay for their television service and speculated that over-the-air broadcasting may become be obsolete.

The lack of legal force behind the implementation date has several implications for this rezoning application. First, digital television cannot be treated as a public necessity. It is simply another new technology available to consumers. Jefferson County and other local governments have no public duty to facilitate the availability of the service. Second, developments in antenna technology may obviate the need for additional towers. The broadcasters currently delivering an analog signal may be able to broadcast their digital signals from the same antennas. They may be able to obtain and deliver digital signals from satellite transmission. No law or regulation requires Jefferson County to facilitate the delivery of this service at this time in the manner that Pinnacle Towers has chosen.

Even if Jefferson County rezones Eldorado Mountain, it will not necessarily provide digital television service. The proposal for Eldorado Mountain is analogous to a proposal for new office space. Market studies may show demand for more office space, but the proposed new space will not necessarily be leased by those who need the space. Existing FCC regulations may be creating short-term demand for tower space. Under Jefferson County's rezoning policies, approving new towers on Eldorado Mountain may support

denial of other rezoning applications for new tall towers in Jefferson County. But the broadcasters will not necessarily lease space from Pinnacle Towers, Inc. As you know, they are applying again to rezone the land on Lookout Mountain. The broadcasters could individually find separate space elsewhere. Alternatively, they may find a way to broadcast a digital signal from their existing towers.

To summarize, this case is a garden variety rezoning case and should be decided as such. The Planning Commission should not recommend approval unless the proposal meets all of the legal requirements for rezoning.

Sincerely,

Claire B. Levy