

GABLEHOUSE & EPEL, LLC

Attorneys and Counselors at Law

P.O. BOX 536
TABERNASH, COLORADO 80478

410 SEVENTEENTH STREET
SUITE 1375
DENVER, COLORADO 80202

(Please respond to the Denver address.)

TIMOTHY R. GABLEHOUSE

(303) 572-0050

(800) 818-0050

FAX (303) 572-3037

tgablehouse@gablehouse-epel.com

October 2, 2001

VIA FAX ONLY

Susan Wood
Jefferson County Planning and Zoning
100 Jefferson County Parkway, Suite 3550
Golden CO 80419-3550

Re: Pinnacle Towers, Inc. - Application for Rezoning and Exemption from Platting
Case Nos. 0001548RZP1 and 0001548EXP1
Access Issues

Dear Ms. Wood:

Our client, the Crescent Park HOA, has recently learned of a letter from the firm of Brenman Bromberg & Tenenbaum, PC that suggests access to Pinnacle Towers, Inc.'s property is not a significant issue. We strongly disagree. As the body of this letter will describe, our positions are as follows:

- Counsel's argument that Pinnacle may obtain an easement of necessity on state park land is simply preposterous.
- Counsel's argument that the reverter from the State to BLM is discretionary is without merit.
- Counsel's argument that an easement can be condemned across Keller's land is speculative at best.

In general, nothing in counsel's letter actually demonstrates that PTI has legal access. Just like the question of whether they have customers, this is another example of speculation, not fact.

PTI would face great difficulty in condemning an easement across Keller's land.

Counsel relies heavily on the case of *Bear Creek Development Corp. v. Dyer*, 790 P.2d 897 (Colo. App. 1990) for the proposition that they can force access across Keller's property. We assume that if they were able to negotiate and acquire legal access from Keller, this would be a non-issue.

PTI's assertion is likely defeated by the fact that they already have an easement across some portion of Keller's land. Condemnation by the process they suggest is defeated if the party seeking condemnation already has a present and enforceable legal right to an easement. There are many cases on this point including *Bear Creek Development Corp. v. The Genesee Foundation*, 919 P.2d 948 (Colo. App. 1996) and *Freeman v. The Rost Family Trust*, 973 P.2d 1281 (Colo. App. 1999).

PTI does not get to have it both ways. Either they don't have a current legal easement, in which case they could sue Keller to condemn access, or they have an easement, in which case they cannot condemn something else. Colorado courts have said that the constitutional way of necessity is a "remedy of last resort." *Bear Creek, supra*. In any event, clarifying access through this process could easily take years of litigation and is hardly a certainty.

PTI may not condemn an easement of necessity across state park land.

Counsel fails to understand the very fundamental premise that C.R.S. §38-3-101 applies only to entities that otherwise have a right to condemn property. PTI is not such an entity and has no specific right to condemn any property much less state land. Absent a specific grant of such power in statute it does not exist. It is simply preposterous for PTI to suggest they have such power when even the Town of Parker found it could not condemn state parks land. *Town of Parker v. The Colorado Dept. Of Natural Resources*, 860 P.2d 584 (Colo. App. 1993).

Reversion to BLM is not discretionary and access should the property revert is hardly certain.

Counsel's reading of the reversionary language of the patent to State Parks is certainly creative. To suggest that a procedural requirement to hold a hearing somehow makes the otherwise clear language of the reversion discretionary is wishful thinking at best. There is nothing in the patent that suggests that BLM can waive the reversion.

Counsel goes on to suggest that reversion would be a good outcome for PTI as then BLM would be required to provide access. It is truly astounding that PTI would suggest that forcing State Parks to lose such a significant asset is a good thing. First, this position makes the highly dubious assumption that State Parks would act in a way to trigger the reversion to BLM. Second, PTI suggests that such access is a certainty when actually the process is complex and time-consuming at best. Lastly, this position makes it clear that PTI could care less about the community and is only looking out for its own interests.

In the final analysis, if PTI really had access they would make a clear and convincing demonstration. Second, if access was readily available, they would acquire appropriate access and put this issue behind them. Rampant speculation about how they could get access, without noting that lengthy litigation of uncertain result would be required, is illusory at best. The fact is they do not have legal access and they do not have access that comports with County design standards. Apparently, they remain unable to satisfy this requirement.

Please let me know if you have any questions.

Best regards,


Timothy R. Gablehouse
for Gablehouse & Epel, LLC

TRG/tg