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VIA HAND DELIVERY

Jefferson County Board of County Commissioners
100 Jefferson County Parkway
Golden, CO 80419-5550

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JEFFERSON COUNTY
COMMISSIONERS

Re: Access Issues in Pinnacle Towers, Inc. Application
Case No. 00015485RZP1/EXP1 (rezoning and exemption from platting)

Dear Commissioners:

The Front Range Alliance (the "Alliance") submits this letter in response to a letter submitted to Susan Wood by Pinnacle Towers, Inc. ("Pinnacle") on September 25, 2001.

One of the major issues in this application is the lack of legal access to the site. A portion of Pinnacle's access is on property owned by the Colorado State Parks. The Bureau of Land Management ("BLM") conveyed this land to the State Parks in 1997 pursuant to the Recreation and Public Purposes Act for the use and benefit of the Division of Parks and Outdoor recreation. *See* Land Patent (Attachment 1). In order to obtain access across this land, Pinnacle must negotiate a right-of-way with State Parks. State Parks, however, has stated that it will not negotiate a right-of-way until Jefferson County has made a decision on this application. Even if State Parks and Pinnacle eventually reach agreement on the right-of-way, the BLM must approve the right-of-way. BLM will not approve the agreement unless it determines that the right-of-way will not interfere with the existing use and will provide a benefit to the patented lands or further the public purpose. *See* December 4, 2000 letter from BLM to Colorado State Parks. (Attachment 2). If the BLM does not approve the right-of-way, but Colorado State Parks allows Pinnacle to have access across the land anyway, the land will revert back to the BLM. *See* Recreation and Public Purposes Act, 43 U.S.C. § 869-2(a) (Attachment 3).

Pinnacle's letter states that even if it is unable to negotiate a right-of-way that is approved by BLM, it will be able to obtain access to its site either across the Keller Farm land or across the land owned by the Colorado State Parks in one of three ways: (1) by condemning public land; (2) by asserting an easement of necessity under the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3210, *et seq.*, ("ANILCA"); or (3)

by condemning private land owned by Keller Farm. As described in more detail below, Pinnacle's first argument fails because Pinnacle does not have authority to condemn public lands. Second, whether Pinnacle could obtain access by invoking ANILCA is uncertain at best because the issue of ANILCA's application to lands managed by the BLM outside Alaska has not been decided and because it is unlikely that Pinnacle's site would meet the requirements of ANILCA even if it did apply. Finally, with respect to condemnation of the Keller Farm property, it is uncertain whether Pinnacle would prevail in a condemnation proceeding. Moreover, even if Pinnacle did prevail, the easement across the Keller Farm property would cause unacceptable visual impacts and would be incompatible with the surrounding land uses because it would go straight up the undisturbed east face of Eldorado Mountain.

1. **Pinnacle cannot condemn public property.**

Pinnacle asserts that, pursuant to C.R.S. § 38-3-101 and Article II, § 14 of the Colorado Constitution, it has the right to condemn an easement of necessity across state park land. Pinnacle is wrong.

As the Alliance noted in its comments on March 29, 2001, Pinnacle does not have the authority to condemn public land for private use. *Town of Parker v. Colorado Division of Parks and Outdoor Recreation*, 860 P.2d 584 (Colo. App. 1993) (Attachment 4). In *Town of Parker*, the town sought to condemn property owned by the Colorado Division of Parks and Outdoor Recreation and the Colorado Department of Natural Resources. Like Pinnacle, Parker relied on C.R.S. § 38-3-101 for authority to acquire state lands through eminent domain. The court disagreed that it had such authority finding:

The language of the statute does not expressly confer the power to condemn state lands based solely on a general grant of power of eminent domain. Had the General Assembly intended to confer the power of eminent domain in this statute it could have employed statutory terminology which clearly expressed that intent as it has done under other circumstances.

Id. at 588. The court concluded that C.R.S. § 38-3-101 does not grant a corporation authority to condemn state lands. "It merely establishes the procedure to be followed by a corporation which otherwise has been authorized to condemn state lands." *Id.* at 589 (emphasis added). The court explained that state lands "cannot be taken by a general grant of power." *Id.* at 587. Rather, "power to condemn state-owned lands must be granted expressly or by necessary implication." *Id.* Parker could not point to any other statute that gave the town the express authority to condemn state lands; therefore, it did not have the power to condemn the public property owned by Colorado Division of Parks and Outdoor Recreation and the Colorado Department of Natural Resources. *Id.*

Likewise, C.R.S. § 38-3-101 does not give Pinnacle, as a private corporation, express authority to condemn state lands. Pinnacle also points to Article II, § 14 of the Colorado Constitution for authority to condemn state lands. However, Article II, § 14 only authorizes the taking of private property for private use for a private way of necessity. Pinnacle has not cited any Colorado statute that gives it express authority to condemn state lands. Therefore, it cannot invoke C.R.S. § 38-3-101 as a means for obtaining an easement across the State Parks land at issue in this matter.

2. **It is unlikely that Pinnacle can use ANILCA to obtain access from BLM if the land owned by State Parks reverts back to the BLM.**

Pinnacle asserts that, in the event they are able to negotiate a right-of-way with State Parks, but the right-of-way does not meet BLM approval and the land reverts back to the BLM, it will be able to obtain a right of access pursuant to a federal statute known as ANILCA.¹ Pinnacle relies on *Utah Wilderness Ass'n*, 91 Interior Dec. 165, 80 IBLA 64 (1984), a Department of Interior Board of Land Appeals decision, as support for its argument that ANILCA applies to BLM land nationwide. Pinnacle's reliance is misplaced because the *Utah Wilderness Ass'n* has been vacated.

In *Southern Utah Wilderness Alliance*, 127 IBLA 331 (1993), the Department of Interior Board of Land Appeals stated that it vacated the decision in *Utah Wilderness Ass'n* in 1986. *Id.* at 366 (Attachment 6). The Board explained:

The pivotal holding in that split decision was that section 1323(b) of ANILCA was applicable to all BLM lands and not merely to BLM lands in Alaska. Subsequent to the issuance of that decision, however, a suit for judicial review was filed in the United States District Court for Utah. By Memorandum Opinion dated December 16, 1985, the suit was dismissed as moot. [Citation omitted]. However, as a precondition to the dismissal for mootness, the Court also issued an order directing the Board to vacate its decision in *Utah Wilderness Ass'n*. By Order dated February 26, 1986, the Board, in compliance with the Court's decision, vacated that decision. Thus, there is no decision presently on point determining the applicability of section 1323(b) of ANILCA to BLM lands outside of Alaska, and that question must be deemed to remain open.

¹ Section 3210(b) of ANICLA (formerly 13 U.S.C. 1323(b)) states:

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof; Provided, that such owner comply with rules and regulations applicable to access across public lands.

(Emphasis added) (Attachment 5).

Id. The Board went on to note that the purpose of requiring the Board to vacate its decision was to “wipe the slate clean.” *Id.* at n. 18. The Board also stated that any BLM materials stating that section 1323(b) applies nationwide were also incorrect and could not be relied upon. *Id.*

Thus, the only support cited by Pinnacle cannot be relied upon because that decision has been vacated. No other court or administrative agency has issued any decision determining that ANILCA applies to BLM land outside of Alaska. Regardless, it is doubtful that Pinnacle could invoke Section 3210(b) of ANILCA even if it did apply to BLM land outside of Alaska because Pinnacle’s site is not “surrounded by public lands” as is required by the express language of Section 3210(b). At least one side of the site is adjacent to private land owned by Keller Farm. Therefore, it is unlikely that Pinnacle could use ANILCA to obtain access across the land currently owned by State Parks.

3. **Although Pinnacle could possibly obtain an easement across the Keller Farm land, that access would create unacceptable visual impacts down the east face of Eldorado Mountain.**

Pinnacle argues that, if it cannot obtain an easement or right-of-way from State Parks, it could obtain a private way of necessity across the Keller Farm pursuant to Article II, § 14 of the Colorado Constitution. Pinnacle’s argument assumes that it could not negotiate such an easement with Keller Farm, and in that case, it would have to initiate a lengthy and costly lawsuit the outcome of which is anything but guaranteed. In addition, even if Pinnacle were to prevail in its lawsuit, the access that Pinnacle refers to would go straight up the front of Eldorado Mountain and would create enormous visual impacts. Right now, the east face of the mountain is undisturbed. A road would be highly visible from Highway 93 and would be incompatible with the existing surrounding land uses. Due to these impacts, it is unlikely that Jefferson County would allow Pinnacle to construct a road up the face of Eldorado Mountain. Therefore, an easement across the Keller Farm property would not solve Pinnacle’s access issues.

In summary, none of the three legal arguments made by Pinnacle in its September 25, 2001 letter guarantee that Pinnacle will obtain legal access to the site. Access remains an unresolved issue, and is likely to remain unresolved for months or even years if Pinnacle has to pursue access through the courts.