OFFICE OF THE GUNNISON COUNTY ATTORNEY
David Baumgarten, County Attorney
Art Trezise, Deputy County Attorney

MEMORANDUM
ATTORNEY-CLIENT PRIVILEDGED INFORMATION

TO: Board of County Commissioners
Gunnison County Planning Commission
Environmental Health Board
Board of Adjustments
Board of Appeals
Gunnison Basin Sage-grouse Strategic Committee
Extension Advisory Committee
Trails Commission
Gunnison Valley Land Preservation Board
Gunnison Watershed Weed Commission
Historical Preservation Commission
Housing Administrative Board
Cemetery Board

CC: Matthew Birnie, County Manager

FROM: David Baumgarten, County Attorney
Art Trezise, Deputy County Attorney

DATE: February 7, 2013

RE: Reducing Risks of Personal Liability

We'd like to use the occasion of a new year to re-brief Gunnison County Boards and Commissions on practices that will foster good governance discipline, will well serve our constituents, and will keep us out of legal jeopardy. We are available to meet to discuss any of these issues at your convenience. All three sources of protection from personal liability - statute (Colorado Governmental Immunity Act), common law, and insurance - have limits, self-protection is advisable. The following are suggestions for self-protection:

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1. Know the limits of your authority and act within those limits. The protections provided by the Act, common law, and insurance policies generally extend to an act or omission occurring in the performance of your official duties and within the scope of your office or employment. Consequently, knowing the limits of your authority and acting within those limits is important in reducing the risk of personal liability. Planning Commissioners have duty and authority regarding County planning functions, those applications before it pursuant to L.U.C. and special Development Regulations. Obtain legal advice prior to acting where a question exists and a claim is possible.

2. Avoid any conflict of interest. See: C.R.S. 24-18-101 *et seq.* attached. See: Guidelines attached. Avoid any conflict of interest and the appearance of a conflict and do not act from personal motivation; otherwise, your conduct may be outside the scope of your official or public duties. As a practical matter, the likelihood of suit can increase if personal motivations appear to be involved, emotions may rise, making resolution of the suit more difficult, and judges and juries are less likely to be sympathetic to your position.

Understand the rules applicable to your actions and decisions, follow the rules, apply the rules even-handedly and don't play favorites; change the rules if they don't work.

3. Avoid willful, wanton and malicious conduct. "Willful" is defined as "voluntary and intentional;" "wanton" is defined as "reckless, headless, malicious . . . reckless disregard of rights of another." The Act's protections do not extend to such conduct, most common law immunities will not be available, and insurance policies often exclude such conduct from coverage. Punitive damages are more likely if such conduct is found to exist.

4. Establish and follow where required, understandable, practical, and legally sufficient procedures which meet due process requirements. See: Land Use Resolution, Guidelines. Due process violations often provide a basis for federal civil rights act claims, particularly with respect to land use, licensing and permitting decisions. Typical claims often allege inadequate or improper notice, lack of a hearing, inadequate hearing procedures, improper timing of the hearing, biased decision-makers, failure to follow required procedures, consideration of improper evidence and so forth. The risk of liability can be reduced if procedures, to be followed whenever due process requirements must be met, are created and periodically reviewed for legal sufficiency. Then, follow them.

5. Be wary of involvement in personnel decisions. Increasingly, personnel decisions form the basis for lawsuits against government officials. The law in this area is developing and awards encourage the filing of suits. Every employee termination or substantial disciplinary action should be viewed as a potential liability event. Moreover, personnel decisions are often fraught with emotion and the risk of suit is thereby increased.

6. Keep good records of what you do and why you do it. Being right is good; being able to prove you're right is even better. The increasing volume of paperwork becomes frustrating at times, but it is vital that accurate records of your official activities be kept, that proper and lawful reasons are expressed for the actions you take, and that those reasons are recorded in some fashion.

While staff maintain records of formal meetings of the commission, it is wise to keep your own personal records and calendar of those significant events, if any, which occur outside recorded meetings. Lawsuits can take months or years to bring and years to conclude. Determining what happened in

preceding years may be important to successfully resolving the lawsuit. Memories fade, but documents often remain available.

Be aware of tape recorders, and be guided by the assumption that what you say and write in or out of a meeting will become public knowledge and evidence in a lawsuit.

7. As County officials, focus your efforts on legislative and significant quasi-judicial decisions-making. Common law immunities do not protect elected officials in every action they take; instead, the immunities protect governmental operations of a legislative, judicial, executive or administrative nature. Legislature and judicial actions are afforded greater protection by the courts than are administrative actions. Thus, while limiting the involvement of elected officials in administrative matters is sometimes suggested as a good management practice, it also is a good method of reducing their risk of personal liability. (E.g. you are not consultants, insurers, guarantors.)

An attorney is available to meet with your respective Board or Commission to discuss further. Please contact our office should you need anything further.