OFFICE OF THE GUNNISON COUNTY ATTORNEY
David Baumgarten, County Attorney
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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: *Ex Parte* Communications In Quasi-Judicial Proceedings

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. This memo will focus on issues that may arise regarding communications that individual County Commissioners may have with parties to, or members of the public interested in, quasi-judicial proceedings (as opposed to "quasi-legislative" proceedings) before Gunnison County (either Planning Commission or the Board of County Commissioners).

A "quasi-legislative" proceeding is prospective in nature, is of general application, and requires balancing of questions of judgment and discretion; generally it is policy-making. A "quasi-judicial" proceeding decides rights and liabilities based on past or present facts; a quasi-judicial proceeding is one in which the Planning Commission or Board investigates facts, weighs evidence and draws conclusions as a basis

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for official acts. It is the application of policy, guidelines and regulations to a fact-specific situation. E.g., a Planning Commission or Board determination on a Land Use Resolution permit applications is "quasi-judicial." It is useful to recognize that a Planning Commissioner or County Commissioner in quasi-judicial proceeding is acting as the equivalent of a judge. An *ex parte* communication is one that occurs outside of the normal hearing process; e.g., with an applicant off the record.

Since County Commissioners are public officials who act in both "quasi-legislative" and "quasi-judicial" proceedings, and may be accustomed by philosophy and choice to constant and open interaction with members of the public, and since the members of the public may not know or appreciate the different obligations and constraints a County Commissioner has in the different types of proceedings, it is not surprising that both Commissioners and those who lobby them for support may have discomfort recognizing the perils of such *ex parte* contacts and difficulty avoiding *ex parte* contacts when the issue at hand involves a quasi-judicial rather than quasi-legislative matter.

Nonetheless, *ex parte* contacts in quasi-judicial proceedings do have perils; they may cause damage to the applicant, to the public and to the integrity of the process. Courts give guidance to judges and to one acting as the equivalent of a judge. The United States Supreme Court has stated that "the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial . . .". Berger v. United States, 255 U.S. 22, 35-36 (1921). Basic to our system of justice is the precept that a judge must be free of all taint of bias and partiality. A judge ". . . must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments". People v. Hrapski, 718 P.2d 1050 (Colo. 1986). A trial judge must "conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary". A.B.A. Standards, The Function of the Trial Judge 1.5. Code of Judicial Conduct, Canon 2, provides that a judge should avoid the appearance of impropriety in all activities. Code of Judicial Conduct Canon 3(A)(4) provides in pertinent part: "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding . . .".

May I suggest five rules of thumb regarding *ex parte* communications in quasi-judicial proceedings.

The first rule of thumb is to not initiate them and to avoid them when others initiate them; do this politely but firmly. Encourage participation in the normal hearing process, through an in person appearance on the record, or if an in person appearance is not convenient, by letter to the Planning Commission or Board that can be entered into the hearing record.

The second rule of thumb is to limit conversations outside of the hearing process to policy rather than facts of the particular matter before the Planning Commission or Board. A decision maker's public stance on a policy issue related to an application or the dispute normally will not disqualify the decision maker, endanger the process or deprive the applicant or the public of a fair decision. What might demonstrate bias would be to engage in an *ex parte* discussion about facts of a particular matter or to make an *ex parte* statement indicating that the decision maker has made up his mind about the facts of a particular case before the evidence has been officially presented.

The third rule of thumb is to remember and indicate in any conversation outside of the hearing process that the County is allowed discretion to regulate but not to make arbitrary decisions. It is important that all decisions and disputes must be made within the constraints of both established process and policy guidelines; e.g., "if an application fulfills County requirements, it will be granted; if it does not, it will be denied." Avoid blanket statements of "always" and "never."

The fourth rule of thumb is that if an *ex parte* communication does take place during the pendency of a quasi-judicial proceeding, the commissioner should place on the record of the proceeding the circumstances and substance of the communication. This will give notice to all participants and the public and will afford them the opportunity to respond.

The fifth rule of thumb to follow is to remember that these rules of thumb apply even before an application or dispute is officially before the Planning Commission or Board.

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