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

RE: Colorado Sunshine Law

DATE: February 7, 2013

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. Please remember that Colorado law is explicit in the following statements:

1. C.R.S. 24-6-402(2)(b) states that "All meetings of a quorum or three or more members of any local public body, whichever is fewer, at <u>which any public business is discussed</u> or at which any formal action may be taken are declared to be public meetings open to the public at all times." (Emphasis added.)

2. C.R.S. 24-6-402(2)(c.)states that "Any meeting at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or <u>at which a majority or</u>

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quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public. In addition to any other means of full and timely notice, a local public body shall be deemed to have given full and timely notice if the notice of the meeting is posted in a designated public place.... No less than twenty four hours prior to the holding of the meeting." (Emphasis added.)

3. C.R.S. 24-6-402(2)(d)(III) states: "If elected officials use electronic mail to discuss... public business among themselves, the electronic mail shall be subject to the requirements of this section." I suggest that appointed members of boards and commissions strictly follow the same discipline.

4. C.R.S. 24-6-402(4) states that the members of a local public body, upon the announcement by the local public body to the public of the topic for discussion in the executive session, and upon the affirmative vote of two-thirds of the quorum present, may hold an executive session only at a regular or special meeting; no adoption of any formal action shall occur at any executive session.

5. C.R.S. 24-6-402(4)(f)(I) authorizes a local public body to conduct an executive session on "(p)ersonnel matters except if the employee who is the subject of the session has requested an open meetings."

6. C.R.S. 24-6-402(8) states that no action of a local public body shall be valid unless taken or made at a meeting that meets the law's requirements.

7. C.R.S. 24-6-402(9) authorizes the County or District courts to enforce this law on behalf of any citizen, and, if the court finds a violation of this law, to award costs and attorney's fees.

A fair reading of the law demonstrates that it is the explicit policy of the state that meetings of boards and commissions be given public notice; that public notice can be easily accomplished; and that a personnel matter can be discussed in an executive session except if the employee who is the subject of the session has requested an open meeting.

Because the law can be complied with readily and with ease, and because noncompliance raises an unnecessary issue and places an ultimate decision in jeopardy, I urge you to provide public notice.

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

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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.

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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.