

# COLORADO COUNTIES, INC.

January 16, 2025 Training – Colorado Sunshine Law, *Ex Parte* Communications and Conflicts of Interest



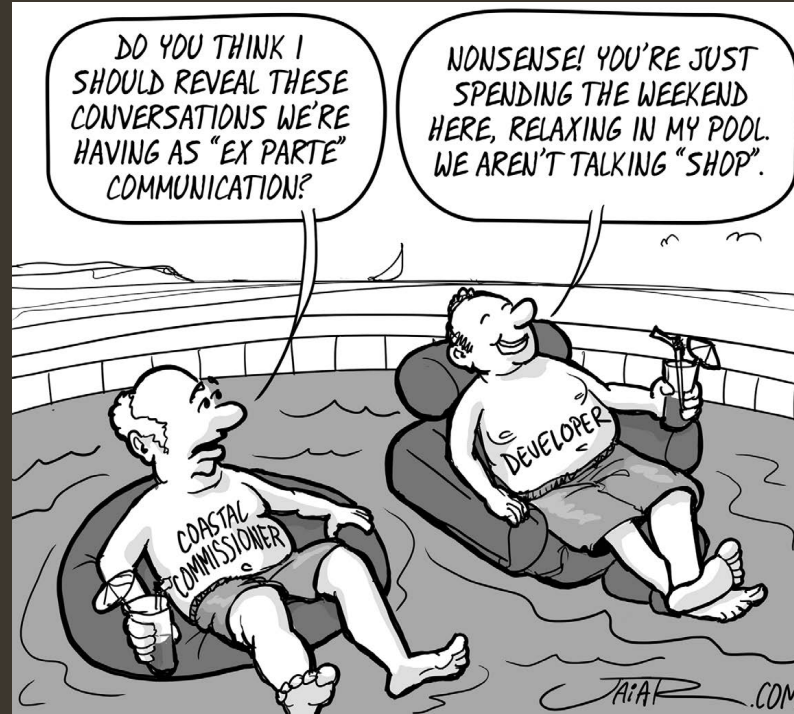
# TOPICS

- Colorado Sunshine Law – the Open Meetings Law



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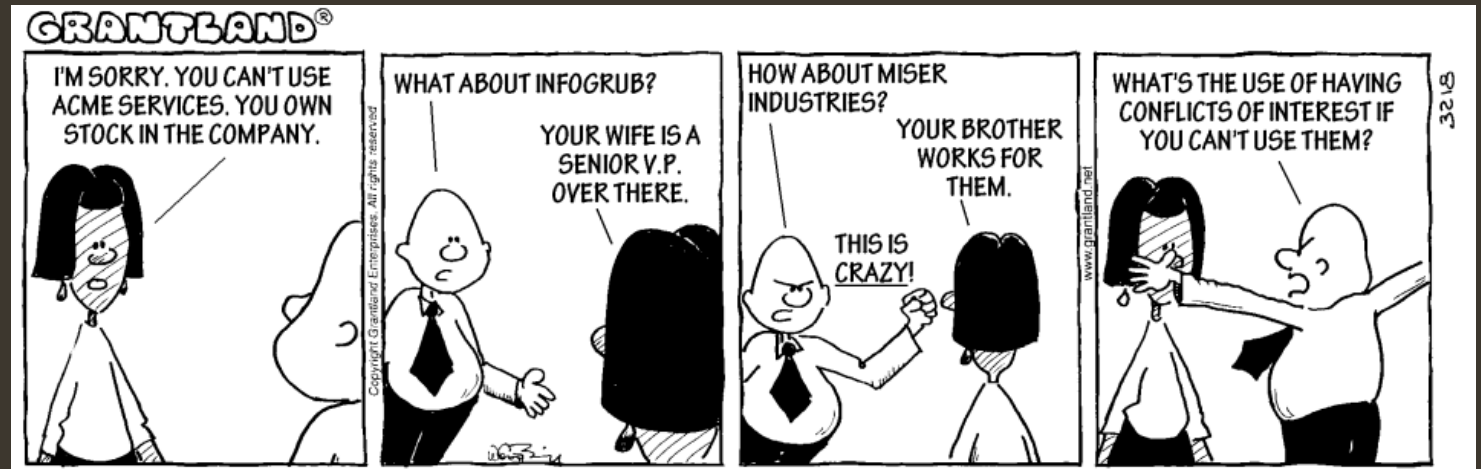
- *Ex Parte* Communications





# TOPICS

- Conflicts of Interest





# Colorado Open Meetings Law (OML)



# Colorado Open Meetings Law

- C.R.S. §§ 24-6-401 to -402
- Law originated in citizen initiative known as the “Colorado Sunshine Act of 1972”

*“It is declared to be a matter of statewide concern and the policy of this state **that the formation of public policy is public business and may not be conducted in secret.**”<sup>1</sup>*

<sup>1</sup> C.R.S. § 24-6-401 (emphasis added)

# Colorado Sunshine Law – Open Meetings Law (OML)

- Generally requires that all meetings of a quorum or three or more members (whichever is fewer) of any local public body, where public business is discussed or formal action taken, must be open to the public.
  - Meeting is broadly defined as gathering in person, by telephone, electronically or by other means of communication.
  - Meeting can only be held after full and timely notice to the public.
  - The Gunnison County Commission is a local public body.

# Colorado Sunshine Law – Open Meetings Law (OML)

Local Body	Any board, commission, or other advisory decision-making body of a political subdivision of the state; or entity delegated governmental decision-making function
Subject to OML	If three or more members of the body (or two if two is a quorum) conduct business
Timely Notice	Notice must be publicly posted at least 24 hours prior to the meeting
Minutes	Must be taken and promptly recorded as well as open to public inspection
Executive Session	<p>Must announce topic for discussion and cite to specific subpart of C.R.S. 24-6-402(4)</p> <p>Vote of 2/3 of quorum present required to enter executive session</p> <p>No formal action or adoption can take place in executive session</p> <p>Discussion electronically recorded UNLESS a privileged attorney-client communication</p>
Attorney Client Privilege	<p>Waived only by majority vote of the Commission, never by a single member</p> <p>All communication between CAO and Commission must remain confidential unless privilege waived</p>





# *Ex Parte* Communications



# *Ex Parte* Communications

- Broadly defined as any written or verbal communication initiated outside of a regularly noticed public hearing between an official with decision-making authority and one or more of the parties, but not all of the parties, concerning a matter currently being considered or about to be considered by that official.
  - Seeks to influence or present information relating to the matter that the official will be deciding.
- Applicable in quasi-judicial actions involving a “determination of rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in question.”<sup>2</sup>
  - Gunnison County Commission determination on a Land Use Resolution (LUR) application is a quasi-judicial action – it bears many similarities to adjudicatory role performed by courts.

<sup>2</sup> Cherry Hills Resort Development Company v. City of Cherry Hills Village, 757 P.2d 622 (Colo. 1988).

# *Ex Parte* Communications

- Improper because all applicants requesting a decision by a local body acting within the scope of its powers are entitled to Due Process:
  - 5<sup>th</sup> Amendment of the US Constitution – no person shall be deprived of “life, liberty or property without due process of law.”
  - 14<sup>th</sup> Amendment of the US Constitution – “nor shall any state deprive any person of life, liberty or property without due process of law.”
  - Colorado Constitution, Article II, Section 25 – “no person shall be deprived of life, liberty or property without due process of law.”
- Property rights are at question in land use applications so all three provisions above are applicable

# *Ex Parte* Communications

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## PROCEDURAL DUE PROCESS

Minimum standards of fairness in process regarding land use regulations and actions

- (1) Right to notice and to be heard
- (2) County Commission obligation to adhere to statutory time requirements or deadlines
- (3) Regulations can't be uncertain or vague

## SUBSTANTIVE DUE PROCESS

Advancement of legitimate government interests – related to public health, safety and welfare

- (1) Valid purpose for the regulation
  - (2) Means adopted to achieve the purpose must be substantially related to it
  - (3) Impact on individual property owner cannot arbitrarily or capriciously deprive them of legitimate use of property
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# *Ex Parte* Communications

- Commission can be a quasi-judicial decision-making body and any *ex parte* communications related to applications pending or coming before you are improper because:
  - (1) Applications where property rights are determined require due process or that the matter be heard by an impartial body;
  - (2) Quasi-judicial decisions must be supported by facts and based upon evidence in the record which is only matters presented at the hearing, nothing outside of it;
  - (3) If parties are allowed to cross-examine the other side, they cannot cross-examine or question *ex parte* communications they were not a party to;
  - (4) If your decision is challenged, any *ex parte* communications could be grounds for reversing the decision.

# *Ex Parte* Communications

## Tips for Avoiding *ex parte* contacts (in-person, verbal, phone etc.)

- Stop the person and advise them you are sitting as a judge/adjudicator in the matter and cannot hear things outside of the hearing.
- Encourage participation in the public hearing by testimony or written submission.
- General policy discussions are unlikely to disqualify a commissioner, endanger due process or deprive applicant of a fair decision, but discussions about facts of a particular matter or a commissioner's decision on a specific question might fall into the realm of an *ex parte* communication.
- Disclose at the hearing and on the record about the contact, your response and whether you can make an impartial decision despite the contact.
- Consider if you should abstain or recuse yourself from voting on the matter.
  - Does the communication affect your impartiality, create an appearance of impropriety or create a conflict?



# Conflicts of Interest



# Conflicts of Interest

It is not a conflict of interest to have an opinion.

A conflict arises when you act on that opinion and personally benefit from it rather than putting the public interest first.

## Colorado Code of Ethics §§ 24-18-101 – 24-18-113

C.R.S. § 24-18-101	Citizens in public office may face conflicts between their public duty and private interests
C.R.S. § 24-18-102(6)	Local government officials are elected or appointed officials of a local government
C.R.S. § 24-18-103(1)	Holding public office or employment is a public trust, created by the publics' confidence in the integrity of officials or employees performing duties for the benefit of the people of the state
C.R.S. §§ 24-18-108.5(2), 24-18-109	A member of a local board, commission, council or committee shall not take official action that may have a direct economic benefit on a business or undertaking in which the member has a direct or substantial financial interest



# Conflicts of Interest

- If a commissioner has a direct financial interest in a decision being made or an issue being resolved a certain way = CONFLICT OF INTEREST
- Steps to take if a CONFLICT OF INTEREST arises
  - (1) DISCLOSE the conflict
  - (2) ABSTAIN from voting
  - (3) DO NOT PARTICIPATE either by lobbying your fellow commissioners or speaking for/against as a public citizen

# Conflicts of Interest\*

IMPARTIALITY	<p>Two council members help with petition opposing issuance of a permit for a massage parlor license</p> <ul style="list-style-type: none"> <li>- Member A actively involved, wrote opinion piece in newspaper urging public to oppose</li> <li>- Member B limited involvement with organizing the petition</li> </ul>	<ul style="list-style-type: none"> <li>- Member A's conduct is a conflict of interest and should disqualify self</li> <li>- Member B's conduct does not amount to a conflict of interest and can participate and vote on the permit</li> </ul>
FINANCIAL OR PROPERTY INTEREST	<ul style="list-style-type: none"> <li>- Member of church on planning board that received an application for rezoning church land so it could be sold</li> <li>- Member of planning board owned land abutting proposed subdivision application</li> <li>- Councilman owned land on edge of reclassified property as cemetery/golf course</li> </ul>	<ul style="list-style-type: none"> <li>- Church member's indirect personal interest enough to disqualify</li> <li>- Member must disqualify and can't vote</li> <li>- Councilman's interest too remote and speculative and no need to disqualify</li> </ul>
BUSINESS ASSOCIATIONS	<ul style="list-style-type: none"> <li>- Applicant is personal accountant for zoning board member</li> <li>- Member of zoning board owned land which was sold to applicant requesting variance from another body</li> <li>- Planning board member also architect that could benefit from urban renewal project</li> <li>- Applicant and planning commissioner both members at same golf club but no personal relationship</li> </ul>	<ul style="list-style-type: none"> <li>- Zoning board member must disqualify self</li> <li>- Shouldn't participate even with no direct role</li> <li>- Must disqualify as personal interest/gain</li> <li>- No direct or indirect interest so no need to disqualify</li> </ul>
APPEARANCE OF FAIRNESS	<ul style="list-style-type: none"> <li>- Councilman votes against and then later for upzoning application, and 48 hours after upzoned acts as lawyer for developer</li> <li>- Zoning board member testify against variance at planning commission, variance needed before zoning board can give subdivision approval</li> </ul>	<ul style="list-style-type: none"> <li>- Timing between vote and working as lawyer gave appearance of impropriety and was improper</li> <li>- Zoning board member must disqualify even though no pecuniary gain</li> </ul>
PERSONAL INTEREST OR ANIMOSITY	<p>Not every interest will disqualify, instead the commission member must have an interest in the matter or a particularly personal relationship with a party</p>	<p>In order to disqualify, personal interest must lead to favoring or hostility towards one party or bias must imperil open-mindedness and fairness, evaluated by specific facts and on a case-by-case basis</p>

\* Case cites for examples found at *Memo RE: Conflicts of Interest* (April 16, 2021).



Questions?



# Scenarios