



## Protection of Plans Filed in Land Use Matters

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Who owns the plans that are filed with a local jurisdiction in a land use matter? Almost every zoning application (rezoning, use permit, or variance) and certainly any site plan or plan of development includes plans of some type showing building elevations, building locations, driveways, landscaping, general site layouts, or a combination of these. Even the simplest development projects now require review of these items as part of the necessary approvals.

So what happens if the original applicant is no longer involved in the project? It is not unusual that a contract purchaser applies for a rezoning and includes a site layout, elevations and landscaping plans. Its contract typically is contingent on the rezoning, and therefore, while the contract purchaser has filed the case, it does not yet own the property. If that contract is terminated and the purchaser no longer has the right, or the inclination, to pursue the rezoning, the rezoning application may still be pending, awaiting a new purchaser or even the owner to pursue the approval. In that case, who has the right to those plans that are now part of the public record?

### **Is the Work Protectable?**

The first question to ask is whether the work is even protectable. Plans, whether architectural plans, landscape plans or site plans, are a type of intellectual property and may be protected by copyright law. However, copyright does not protect facts, ideas, systems, and the like. A survey showing an existing building or a property's topography is not protected, and the work can be copied and used by others. Further, even proposed improvements to a site may not be protected if they are deemed general with insufficient detail to be used in construction. In a recent U.S. District Court case (*Scholz Design Inc. v. Sard Custom Homes LLC* (100 USPQ2d 1782) (July 15, 2011)), the Court opined that a work is protected only if it allows the copier to construct the design reflected in the work. In that case, the Court found that the subject images "... do not convey sufficient information with respect to designs to allow construction of homes, and since, without [the] necessary level of detail to allow construction, copied images do not fulfill [the] intrinsic function of architectural plan[s], and [the] act of copying them does not violate any right protected by copyright for architectural technical drawings."

In summary, then, architectural plans, engineering plans (such as a site plan) or landscape plans that are particular in detail and not general and that can be used for construction purposes may be detailed enough to be protected. No single factor will control the issue, but rather the elements are looked at as a whole.

## **Who Owns Protected Work?**

If the work is protectable, then the next question is who owns the work. If the plans are designed not by an employee of the applicant, but by an independent contractor, as is usually the case, the copyright for the work is owned by the author of the work, not the customer. In this case, it is therefore the property of the architecture firm, the engineering firm, or the land planning company that created the work. On the other hand, if a protectable work is created on an employer's behalf by an employee, then the person creating the work has no copyright in the work. This is called a "work made for hire". Thus the architect working for XYZ Company has no ownership of the work, but XYZ Company does own the work.

## **How to Protect Yourself.**

An easy way for authors to protect their rights would simply be to file a copyright application with the US Copyright Office. The forms are simple, and the fees typically are nominal. If the author does not want to go through that process, then a simple stamp on the plans with a copyright statement (such as "(C) Copyright, December, 2011, XYZ Company") may at least deter others from copying or otherwise using that work. However, in order to fully protect plans, they should be filed with the US Copyright Office.

Ownership rights, of course, can be transferred if consideration is paid. Thus, a customer of XYZ Company may ask that the ownership rights to those plans created for and paid for by the customer be transferred to the customer for its use as it sees fit. Certainly, any lender would require this upon the purchase or development of the property. Similarly, the property owner, as part of a sales contract, may require that any plans filed in conjunction with a land use application involving the property be assignable to, and upon termination automatically assigned to, the owner/seller by the purchaser and the author of the work. This would require the consent of all parties, including the author of the plans. Depending upon the complexity of the case and the details provided, having the rights to filed plans may be an important factor when looking for a new purchaser to develop the property. It also becomes that much more imperative if the application has been approved, and those plans are made a part of and referenced in that approval. Those plans will then have to be used as part of the development of the property by any subsequent purchaser or the property owner.

## **What is Protected?**

Copyright infringement occurs only if (i) ownership of a work is protected by a valid registered copyright, (ii) there has been an actual copying of the work by the infringer, and (iii) there has been an improper use of the work's protected expression by the infringer. If the copyright owner prevails in a copyright infringement claim, it may collect statutory damages and attorney's fees, but only if the work was registered with the Copyright Office. Even if the work is not registered with the Copyright Office, a claim may be available under state or common law for infringement, civil theft or deceptive trade practices, among other claims. The remedies available on such claims will differ based on the claim and specific facts.

At the end of the day, disputes regarding filed plans are rare. However, in those few instances in which plans have been filed and are necessary for the continuation of a case or for future development, it is essential that the property owner clarify the rights to use those plans. Depending upon the situation and the detail of the plans, that clarification may simply be an informal understanding by the parties or a formal assignment of the rights to use those plans.

*For more information about this topic, please contact Andrew M. Condlin at 804.420.6457 or or any member of the firm's Financial Services & Real Estate Team.*

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