OOR Holds that Some Development Plans Cannot Be Copied Pursuant to the Copyright Act

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In *Zove v. Whitemarsh Township*, AP 2019-0739 (June 14, 2019), the Requester sought to inspect and obtain copies of documents, plans and memos relating to a preliminary development plan. The Township partially granted the request, but informed requester that she could only inspect copyrighted records. On appeal, the Township submitted an affidavit confirming that the preliminary plan set, stormwater plans and plans within the soils and foundation subsurface investigation contained copyright marks.

The Copyright Act precludes the reproduction of any copyrighted works without the consent of the copyright holder. See 17 U.S.C. §§ 106, 501. Section 106 of the Copyright Act vests in the owner of the copyright the *exclusive* right to duplicate and to authorize duplication of the copyrighted work. It does not, however, restrict inspection.

In *Ali v. Philadelphia City Planning Commission*, 125 A.3d 92, 102 (Pa. Cmmw. 2015), the Commonwealth Court held that the Copyright Act is not a federal law that exempts copyrighted material from disclosure under the RTKL (Section 305(a)(3) of the RTKL) nor is it a federal law that renders such materials "nonpublic" (Section 306 of the RTKL). Instead, it "limits the level of access to a public record only with respect to duplication, not inspection." Accordingly, Section 3101.1 of the RTKL, which provides that if "the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply" to copyrighted records.

The first step in the analysis is to determine if the Copyright Act applies. In *Zove*, the records at issue were marked with the copyright symbol and it was uncontested that the plans were covered by the Copyright Act. However, the Copyright Act protects all original works of authorship that are fixed in a tangible form of expression, including pictorial, graphic and sculptural works and architectural works. Copyright protection in the United States exists automatically from the moment the original work of authorship is fixed.

The issues then were whether: 1) the Township could presume the absence of the required consent from the copyright holder when refusing to duplicate the records; 2) whether the "fair use" doctrine should apply; and 3) whether Township approval of the requested plans would transform the copyrighted records into public records.

With respect to the first issue, the OOR relied on the Commonwealth Court's decision in *Ali* where the Court confirmed that local agencies do not need to seek the consent of the copyright holder when responding to a RTKL Request. To do so would impose additional burdens and costs on local agencies already challenged by the RTKL's strict deadlines. Instead, "where a local agency invokes the Copyright Act as a basis to limit access to a public record to inspection only, the absence of consent by the copyright owner to duplication in response to a RTKL request should be presumed." *Id.,* at 105. Accordingly, the OOR rejected this argument.

The OOR also rejected Requester's claims that the documents should be available pursuant to the "fair use" doctrine. The exclusive rights granted by the Copyright Act give way to what is referred to as "fair use" of the copyrighted work by the public. Section 107 of the Copyright Act provides that the "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. However, the *Ali* court rejected the "fair use" argument because ordering an agency to rely on such a doctrine could subject it to substantial fines if a federal court were to disagree with the OOR's assessment later. Accordingly, the OOR rejected this argument and confirmed that the "fair use" analysis does not apply to agencies responding to RTKL requests.

The OOR concluded that the Requester's final argument, that the Township's approval of the plans turned the plans into public records was irrelevant because it was not disputed that the records constitute public records.

Therefore, the OOR concluded that the Township properly invoked the Copyright Act and was only required to provide access to the Requester via inspection.

Open Records Officers should be familiar with the Copyright Act and the limits it places on their agency's ability to duplicate records in its possession and should work with their solicitor to determine if the Act applies to any requested records.

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.