

REAL ESTATE DEVELOPERS AND THEIR INTELLECTUAL PROPERTY

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There is something magical about turning a parcel of raw land into a place where people live and raise their families, where businesses go about their business, or where people return for their vacations year after year. It starts with a vision by a developer. Then there are plans, detailed plans, and drawings, elevations and views. There is experience and knowhow brought to bear, in financing, in marketing, in sales, in project management, in construction. Gradually the development takes shape and takes on a life of its own. Of course, a development is about real property, but that real property is then invested with a significant amount of intellectual property. A developer's deed protects the real property. What protects the intellectual property?

To put the intellectual property of a development in perspective, imagine a development, such as a golf course running through a parcel of property with homes along the golf course. This takes little imagination because this type of development is typical of thousands of developments. This particular development we are imagining, however, has no name. The homes are all 2500 square foot split entry homes, painted white; all with the same floor plan. The golf course is a copy of a nearby public course and is maintained by people who never took care of a golf course before and probably never will (or should) again. The streets have no names but are designated only by numbers and letters. Each house has one tree in its yard that looks like a buggy whip. The community center looks like an inner city bus station.

This development is devoid of intellectual property. Who would look forward to living in it but people desperate for anonymity, maybe only those in a witness protection program?

Now, imagine a development that includes a golf course designed by a world famous golfer and which course is the site of a major pro tour competition every year. The grounds are immaculate and gorgeous. You just see them and want to take up photography because of it. The development has a theme but each home is custom-designed, with integrated landscaping including mature trees. Generous bike and jogging paths and horse riding trails run throughout the grounds. Common areas are tasteful, discrete, inviting. Activities managed by the developer encourage a feeling of community; holidays are celebrated with appropriate decorations and activities for families. This development has a distinctive name which means "Shangri-la" to busy executives; its reputation of course says that it is exclusive, and, indeed, it is, but the families who want to live there do so simply because that name symbolizes what they have worked so hard for. The difference between this development and the no-name development described above is *intellectual property*.

It begins with the name. The name of a development will embody all of the goodwill the developer hopes to pack into his creation. The name must be distinctive and protectable so the developer can prevent others from using this name for similar real

estate related activities. The name can be registered as a service mark for real estate development services, real estate construction services, real estate sales services and others as appropriate. The same name ought to serve as the domain names for the website and should be selected so that the domain name is available and can be registered. The name can be licensed by the developer to other businesses who might wish to use it. A ski resort development might license a hotel near the resort to use the resort's name as part of its hotel name: The HILTON at "Wunderski Resort" for example.

Using confidentiality agreements throughout the planning process, the concept documents and all plans and drawings related to the project can be kept in confidence, and remain the acknowledged property of the developer.

The development plans and drawings should carry copyright notices and those copyrights should be registered in the name of the developer. Home designs should also carry copyright notices and also be registered by the developer. The website graphics, photos and text must carry a copyright notice and be registered in the name of the developer is possible or the developer should at least be the exclusive licensee and given the right and obligation to enforce the copyrights. Copyrights in advertising must be registered in the name of the developer. Note that paying for plans, photos, website content and programming of a website does not give the payer the copyrights in these; there must be a provision in writing describing how the developer obtains copyrights in works created by those other than his employees.

Considerably know-how goes into creating a development. Know-how is the collective skill of the planning and construction team. Keeping that team together through the completion of the development assures that that assembled know-how is fully applied to the development. Keeping a team together for a period of years may be difficult but is accomplished by effective management and the use of consulting and other contracts.

This is a brief overview of the intellectual property of a real estate development. Each development presents a unique collection of intellectual property issues. The developer wishing to protect the intellectual property of the development will identify that intellectual property and secure rights to it in order to create a more valuable asset.