

STATE OF IDAHO)
County of KOOTENAI)^{ss}

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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

JACKLIN LAND COMPANY, an Idaho)
limited partnership,)
)
Plaintiff,)
)
vs.)
)
BLUE DOG RV, INC., an Idaho corporation,)
et al.)
)
Defendants.)
_____)

Case No. **CV 2008 6752**

**MEMORANDUM DECISION AND
ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

I. BACKGROUND.

As part of plaintiff Jacklin Land Company's (Jacklin) development of the Riverbend Commerce Park, which was platted in 1988, Jacklin recorded an original set of covenants, "Declaration of Covenants, Conditions, and Restrictions of Riverbend Commerce Park." Affidavit of Tom Stoeser, Exhibit B. These covenants were later amended in 1989. The amended covenants encumbered the property which is presently leased by defendant Blue Dog RV, Inc. (Blue Dog), which is the subject of this litigation. Affidavit of Tim Stoeser, Exhibit C.

In 1990, Quality Centers Associates (QCA), the predecessor in interest of defendant KL Properties, Inc. (KLP), wished to purchase the property KLP now owns, and QCA asked Jacklin to remove the 1989 covenants then in effect, as a matter of title. Jacklin agreed on the terms and conditions memorialized in the QCA/Jacklin Agreement (hereinafter "Agreement"), dated November 7, 1990, which removed the

then-existing Declaration of Covenants, Conditions, and Restrictions in return for QCA agreeing: (1) to construct and maintain a first-class shopping center; (2) to work with Jacklin to achieve a mutually accepted design and appearance for the shopping center, and (3) to agree to comply with Articles 2,3,4,5, and 6 of the Declarations of Covenants, Conditions, and Restrictions recorded in 1988, as subsequently amended. Affidavit of Pat Leffel, Exhibit B. This agreement between QCA and Jacklin was unique to the property now at issue, Lots 1 to 4 (of Lots 1 to 17) of Block 1 of Phase I of the development, and differs from the covenants applicable to the Riverbend Commerce Park generally. After purchasing lots 1 to 17, QCA worked with Jacklin and achieved a mutually acceptable design and appearance for the Factory Outlets on Lots 5-17 of Block 1. In 2005, KLP purchased the property from QCA, including Lots 1 to 17 of Block 1.

On July 1, 2008, Blue Dog entered into a lease with KLP for Lots 1-4 of Block 1. Jacklin filed its motion for summary judgment on December 11, 2008. Jacklin moves for summary judgment on its claims for a permanent injunction prohibiting the use of the property for an RV dealership/facility and for declaratory judgment that the uses the defendants have put the property to violate the QCA/Jacklin Agreement. Defendants argue no interpretation of the Agreement would prohibit Blue Dog's RV Center. Defendants argue Jacklin has not made a showing of irreparable injury to support injunctive relief. Defendants argue Jacklin itself breached the Agreement. Finally, defendants argue defendants' waiver and estoppel defenses preclude summary judgment in Jacklin's favor. On February 17, 2009, defendants filed "Defendants Cross-Motion for Summary Judgment." Following extensive briefing and submission of affidavits by both parties, which the Court has considered, oral argument was heard on

March 3, 2009. On March 31, 2009, Jacklin filed a “Supplemental Citation of Authority by Plaintiff.” That supplemental authority is *Bushi v. Sage Health Care, PLLC*, 2009 Opinion No. 30, 09.6 ISCR 244 (March 4, 2009), a case concerning good faith and fair dealing. The cross-motions for summary judgment are at issue.

II. STANDARD OF REVIEW

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Where both parties file motions for summary judgment relying on the same facts, issues and theories, the fact that both parties have filed summary judgment motions alone does not in itself establish

that there is no genuine issue of material fact. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518, 650 P.2d 657, 661, n. 1. This is so because by filing a motion for summary judgment a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues of theories. *Id.*

In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

III. MOTIONS PRIOR TO CROSS-MOTIONS FOR SUMMARY JUDGMENT.

A. Jacklin's Objection to Defendants' Cross-Motion for Summary Judgment is Denied.

Jacklin objected to defendant's Cross-Motion for summary judgment as being untimely under I.R.C.P. 56. Affidavit of John Magnuson in Support of Plaintiff's Objection and Motion to Strike Defendants' Cross-motion for Summary Judgment, p. 5. Jacklin moves this Court to strike the cross-motion for summary judgment as it cannot now timely conduct additional discovery and meaningfully respond. *Id.* Defendants urge the Court to deny the motion to strike because its cross-motion addresses the same legal and factual issues as Jacklin's motion for summary judgment. Defendant's Reply Memorandum, pp. 2-3. Defendants state they could not prepare responsive briefing until after depositions could be taken in late January. *Id.*, p. 3.

Idaho Rule of Civil Procedure 56(c) requires motions and affidavits for summary judgment and proceedings thereon to be filed 28 days before hearing, and responsive affidavits and answering briefs are to be served 14 days before hearing. "The court may alter or shorten the time periods and requirements of this rule for good cause

shown, may continue the hearing, and may impose costs, attorney's fees and sanctions against a party, a party's attorney, or both." I.R.C.P. 56(c). The hearing on the motion for summary judgment was set for March 3, 2009. Jacklin filed its motion and memorandum in support on December 11, 2008. Defendants filed their cross-motion, memorandum in support, and motion to shorten time on February 17, 2009. It will be noted that defendants failed to ask permission from this Court's Deputy Clerk of Court (scheduling clerk) to add hearing on defendants' motions. On February 25, 2009, Jacklin filed an objection to the cross-motion and motion to shorten time, along with its Reply Memorandum in Support of Motion for Summary Judgment (addressing Defendants' cross-motion). Jacklin's reply memorandum is forty-two pages in length and thoroughly rebuts defendants' factual assertions. Reply Memorandum in Support of Motion for Summary Judgment, pp. 7-20.

Sanctions pursuant to I.R.C.P. 56 are a matter left to the Court's discretion as evidenced by the Rule's "may" language. Similarly, evidentiary rulings, such as ones on the motion to strike before the Court, are reviewed under an abuse of discretion standard. *Perry v. Magic Valley Reg'l. Med. Ctr.*, 134 Idaho 46, 50, 995 P.2d 816, 820 (2000). Where, as here, a party has time to respond and address the arguments in the opposing party's untimely filing, it is unlikely that they are prejudiced. I.R.C.P. 61 instructs the Court that, at every stage of a proceeding, the Court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." I.R.C.P. 61; *See McClure Engineering, Inc. v. Channel 5 KIDA*, 143 Idaho 950, 155 P.3d 1189, 1194 (Ct. App. 2006). For example, the Court of Appeals has declined to reverse summary judgment merely because the summary judgment motion and supporting documents were not mailed to the opposing party at least thirty-one

days in advance of the hearing as [then] required by I.R.C.P. 56(c). *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 317, 870 P.2d 663, 670 (Ct. App. 1994). The Court of Appeals held that technical error did not require reversal because the appellants had not demonstrated whether, if given additional time, they could have submitted evidence or legal argument that would have prevented summary judgment against them. *Id.* The only party arguably prejudiced here is the Court, who received Jacklin's objection on February 26, 2009, and Defendants' Reply Memorandum on March 2, 2009. This Court denied the objection and motion to strike brought by Jacklin on the record on March 3, 2009.

B. Jacklin's Motion to Supplement the Record is Granted.

Jacklin moved this Court for an Order allowing it to supplement the record pursuant to I.R.C.P. 32(a)(4) and 56(c) because defendants opposed its motion for summary judgment and had submitted extensive excerpts from Pat Leffel's and Tom Stoeser's deposition transcripts. Leffel is a former employee of Jacklin, and Stoeser is a current employee and the I.R.C.P. 30(b)(6) deponent. Motion to Supplement the Record, pp. 2-3. Jacklin's proposed submissions, attached to the Affidavit of John Magnuson Submitted Pursuant to Motion Under I.R.C.P. 32(a)(4) and I.R.C.P. 56(c), were proffered because the excerpts submitted by defendants "did not include portions of the referenced deposition transcripts, and certain exhibits referred to therein..." *Id.*, p. 3. As set forth by Jacklin, I.R.C.P. 32(a)(4) states, "[i]f only a part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." Whether portions of depositions should or should not "in fairness" be admitted is a matter for the discretion of the Court. *Slack v. Kelleher*,

140 Idaho 916, 924, 104 P.3d 958, 966 (2004) (citing *State v. McKinney*, 107 Idaho 180, 687 P.2d 570 (1984)).

Defendants argue Jacklin has not identified any deposition pages or exhibits cited to in defendants' briefing which was not attached to a submitted Affidavit. Defendants' Reply Memorandum, p. 4. The deposition pages Jacklin identified in its motion to supplement were not referenced by defendants and were therefore not submitted. *Id.* The Idaho Rules of Civil Procedure provide the Court has discretion to determine whether portions of transcripts ought in fairness be considered with portions already introduced, and either party may introduce any other parts of depositions. See I.R.C.P. 32(a)(4). This Court granted Jacklin's motion to supplement the record at the hearing on March 3, 2009, recognizing the decision to be a matter of discretion.

IV. ANALYSIS OF CROSS-MOTIONS FOR SUMMARY JUDGMENT.

A. The QCA/Jacklin Agreement is Enforceable Against Defendants.

1. This is a "Use" Agreement.

As a starting point, the two parties cannot agree as to whether this is a use agreement or a development agreement. Defendants in their brief call the agreement a "Development Agreement" on more than twenty occasions in five pages of briefing. Memorandum in Support of Defendants' Cross-Motion for Summary Judgment, pp. 15-20. Defendants claim that the term "use agreement" is found nowhere in the Agreement. Defendant's Reply Memorandum, p. 6. While the Agreement does not contain the phrase "use agreement", it does contain the word "use". While the Agreement does not contain the phrase "development agreement", it also does not even contain the word "development." This Court finds, as Jacklin correctly points out: "Actually, the 'Development Agreement,' a moniker invented by Defendants since the

word 'development' does not appear in the Agreement, actually contains the word 'use'.

Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 25. The November 6, 1990, Agreement between Jacklin and QCA reads in pertinent part:

The parties agree as follows:

In consideration of the purchase of Lots 1-17, Block one, Riverbend Commerce Park, Phase I, City of Post Falls, County of Kootenai, Idaho ("Purchased Property"), by Purchaser and the removal of record on even date herewith of that certain Declaration of Covenants, Conditions and Restrictions (as amended) as it affects the Purchased Property, and other good and valuable consideration, Purchaser agrees: (i) to construct and maintain upon said Purchased Property, a first class shopping center which shall be in compliance with all state and local building codes and ordinances; (ii) to work together with Seller to achieve a mutually acceptable design and appearance for the shopping center so that it shall be aesthetically pleasing and compatible with other **uses** within Riverbend Commerce Park; and (iii) despite its removal of record as to the Purchased Property, Purchaser agrees to comply and conform to Articles 2, 3, 4, 5, and 6 contained in those Declarations of Covenants, Conditions and Restrictions recorded * * * which are incorporated herein by this reference in its **use** and maintenance of the Purchased Property excepting those which are inapplicable to a retail shopping center (as shall be mutually agreed upon) or which violate applicable local building codes and ordinances.

Purchaser's obligations under this Agreement shall terminate in the event it no longer owns the Purchased Property, but said obligations shall inure to and be binding upon Purchaser's successors and/or assigns.

Stoesser Affidavit, Exhibit G; Cordes Affidavit, Exhibit B. (bold added).

2. Incorporation of Articles 2, 3, 4, 5, and 6 of the Declaration of Covenants, Conditions, and Restrictions.

Jacklin argues the Agreement specifically incorporates Articles 2-6 of the covenants in force at time of QCA's closing on the property (and binding on QCA's successors). Memorandum in Support of Motion for Summary Judgment, p. 12.

Defendants argue the Articles were previously terminated as the Amendment to the Covenants, dated November 7, 1990, terminates the restrictions of the 1990 and prior CC&Rs. Affidavit of Hines, Exhibit E. Jacklin responds this termination was made

pursuant to the Agreement and at the time the Agreement was filed, two minutes prior to the filing of the Amendment, the 1990 CC&Rs were still in effect. Reply Memorandum in Support of Motion for Summary Judgment, p. 29. Jacklin also points out defendants cite no support for the proposition that parties cannot contractually incorporate covenant restrictions found in another recorded document. Defendants reply the Agreement merely references CC&Rs that were null and void at the time the Agreement was executed and recorded.” Defendant’s Reply Memorandum, p. 9. However, despite the fact that the Agreement was executed on November 7, 1990, and the Amendment was executed on October 16, 1990, the Agreement was filed *before* filing of the Amendment and the Agreement explicitly states, “...on removal of record on even date herewith of that certain Declaration of Covenants, Condition, and Restrictions (as amended) as it affects the Purchased Property...” Affidavit of Leffel, Exhibit B. It is without question that the property was removed from the Riverbend Commerce Park Covenants as part of consideration for sale and that Articles 2-6 were intended to remain binding.

Defendants argue Articles 2-6 do not prohibit Blue Dog’s use as its use is a light industrial and commercial use and is not one of the specific uses prohibited. Memorandum in Support of Defendants’ Cross-Motion for Summary Judgment, p. 20. Jacklin responds that storage yards are specifically prohibited by Article 6, and while not all RV sales facilities constitute storage yards, this one does. Reply Memorandum in Support of Motion for Summary Judgment, p. 31. Further, if there is any question as to whether using four unimproved lots to house RVs is appropriate, Jacklin argues Article 6(5) provides, “any use which is arguably in conflict with this Declaration... shall be submitted and approved.” *Id.* To this, defendants reply its use is not that of a storage

yard; the RVs are inventory which are sold in the due course of business. Defendant's Reply Memorandum, p. 8. However, as Jacklin has filed suit seeking relief, clearly there exists a conflict as to use, and no request for approval has been made by defendants. See Reply Memorandum in Support of Motion for Summary Judgment, p. 31. As to Articles 4 (signage), 3 (parking), 5 (lot usage and 5 ft. parking setback), and 2 (landscaping), defendants argue they are only triggered when the property has been developed, which Blue Dog has not done. Memorandum in Support of Defendants' Cross-Motion for Summary Judgment, p. 21. Jacklin urges the Court to read all portions of the Articles in conjunction and consider the requirements that undeveloped areas be maintained in a weed-free and dust-controlled condition, be landscaped if required, and have groundcover maintained so as not to detract from the aesthetics of the Development. Reply Memorandum in Support of Motion for Summary Judgment, p. 32. Jacklin also states no requests for approval of conflicting uses, signage, parking plan, landscaping, or temporary uses have been submitted for approval by defendants. *Id.*, p. 31.

Defendants argue Blue Dog made efforts at site improvement which were rendered futile by Jacklin's refusal to work with defendants on site issues. Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 21- 22. In response, Jacklin points out the only offer of improvements made was to fund providing of gravel, which Jacklin argues does not comport with the paving requirement found in the Declaration of Covenants, Conditions, and Restrictions. Reply Memorandum in Support of Motion for Summary Judgment, p. 33. Jacklin also argues its Rule 30(b)(6) deponent only stated the current use of the property was not capable of being approved, not that no RV park would ever be approved. *Id.*, p. 34. Defendants' argument still does not

provide the Court with definitive evidence of its attempts (beyond the gravel) to work together with Jacklin or to submit for approval uses which arguably conflict with the Declaration of Covenants, Conditions, and Restrictions.

Defendants argue Jacklin breached the implied covenant of good faith and fair dealing by refusing to work with defendants to develop a site plan and thereby has breached the Agreement. Memorandum in Support of Cross-Motion for Summary Judgment, p. 24. Defendants argue violation of the covenant of good faith and fair dealing occurs when either party nullifies or significantly impairs any benefit of the contract. *Id.*, p. 25. Jacklin responds that the covenant of good faith and fair dealing cannot override express provisions in a bargained-for contract. Reply Memorandum in Support of Motion for Summary Judgment, p. 38. Although defendants point to the testimony of Jacklin's Property Manager, Leffel, stating that Jacklin categorically refused to work with defendants to address concerns about "Blue Dog's shopping center operation," (Memorandum in Support of Cross-Motion for Summary Judgment, p. 26), this testimony presupposes that Jacklin had mutually agreed to the design and appearance of the RV shopping center location. The covenant of good faith and fair dealing will be discussed in more detail in the next section of this opinion.

This Court finds as a matter of law that the Agreement specifically incorporates Articles 2-6 of the covenants in force at time of QCA's closing on the property (and binding on QCA's successors).

3. Violation of the Agreement by Blue Dog/KLP.

Jacklin argues the Agreement is enforceable as covenants restricting use of privately-owned land are valid under Idaho law. Memorandum in Support of Motion for Summary Judgment, p. 4. Jacklin states because restrictive covenants are analyzed

under the principles of contract construction, the Court must determine if a given covenant is ambiguous. If the covenant is not ambiguous, the Court applies the plain meaning. If the covenant is ambiguous, the Court determines the intent of the parties at the time of drafting. *Id.*, pp. 4-5. While Jacklin argues “first-class shopping center” has a common meaning and is unambiguous, defendants argue the term is never defined, that even Jacklin admitted it does not know the distinction between a first, second, or third-class shopping center, and that its RV shopping center does not violate any definition of first-class shopping center. Memorandum in Support of Defendant’s Cross-Motion for Summary Judgment, p. 18. Jacklin argues that no matter what definition is given the term, defendants’ “circus-like flea market” certainly would not equate to a first-class shopping center. Memorandum in Support of Motion for Summary Judgment, p. 8. Jacklin goes on to argue defendants made no effort to “work together” with Jacklin to achieve a mutually acceptable design and appearance. Defendants respond that it made efforts at site improvement, offering to spend in excess of \$50,000, but Jacklin categorically rejected its efforts. Memorandum in Support of Defendant’s Cross-Motion for Summary Judgment, p. 21.

As argued by the parties, Idaho recognizes covenants restricting the free use of land as valid and enforceable,

[h]owever, since restrictive covenants are in derogation of the common law right to use land for all lawful purposes, the Court will not extend by implication any restriction not clearly expressed. Further, all doubts are to be resolved in favor of the free use of land.

Berezowski v. Schuman, 141 Idaho 532, 535, 112 P.3d 820, 823 (2005). Courts apply the general rules of contract construction to covenants. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003). A covenant is ambiguous if capable of more than one reasonable interpretation; if a covenant is unambiguous, the

court must apply its plain meaning as a matter of law. *Id.* If a covenant is ambiguous, its interpretation is a matter of fact. *Intermountain Eye and Laser Centers, PLLC v. Miller*, 142 Idaho 218, 221, 127 P.3d 121, 125 (2005). Ambiguity is not established simply because parties present differing interpretations to the court. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). Thus, this Court must view the agreement as a whole to determine the intent of the parties at the time of contracting. See *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 817, 172 P.3d 1088, 1092 (2007).

The Agreement at issue, despite defendants' argument to the contrary, clearly binds them to construct and maintain a first-class shopping center, to work with Jacklin to achieve a mutually acceptable design and appearance for the shopping center, and to conform to Articles 2, 3, 4, 5, and 6 of the Declaration of Covenants, Conditions and Restrictions last amended in 1989. Defendants argue the Agreement is not a "use" restriction and does not state how the lots are to be used. Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, p. 16. This Court disagrees, and finds the Agreement does concern how the property is to be used.

What is crystal clear to this Court, and beyond doubt, is that the Agreement requires defendants to work with Jacklin to ensure the first-class shopping center to be compatible with other uses within the Riverbend Commerce Park. Affidavit of Pat Leffel, Exhibit B; Reply Memorandum in Support of Motion for Summary Judgment, p. 25. Defendants next argue its obligation to construct and maintain a first-class shopping center was complied with because QCA constructed the Factory Outlets and no further development was required. Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, p. 17. But this argument does not take into account

that only lots 5-17 encompass the Factory Outlets, and Blue Dog, on lots 1-4, has not complied with the requirements of the Agreement. See Reply memorandum in Support of Motion for Summary Judgment, p. 26. Defendants argue its operation is a first-class shopping center as it is a retailer selling high-end RV units. Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, p. 18. But defendants made no attempt to work with Jacklin to achieve a mutually acceptable design and appearance for the shopping center compatible with other uses, and even if Blue Dog's RV sales *could* be a first-class shopping center, to date there has been no working together to achieve a "mutually acceptable" design and appearance. Reply Memorandum in Support of Motion for Summary Judgment, p. 26. Defendants argue Blue Dog's use is temporary and the agreement does not prohibit temporary use prior to construction of a first-class shopping center. Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, p. 18. Jacklin responds that a five-year lease is not temporary and the only reference to temporariness in the Agreement (Article 3 on parking incorporated by reference thereto) precludes temporary parking on unimproved lots unless prior to or during construction and not to exceed six months. Reply Memorandum in Support of Motion for Summary Judgment, p. 27. Defendants' final argument on this issue is that a first-class shopping center must only be constructed after development of the lots, and Blue Dog has never developed the property. Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, p. 19. Jacklin responds the Agreement is a use agreement and defendants never worked together with Jacklin to achieve a mutually acceptable aesthetically-pleasing design and appearance for the shopping center compatible with other uses in the Riverbed Commerce Park. Reply Memorandum in Support of Motion for Summary Judgment, p. 28.

Ultimately, any interpretation of the use of “first-class shopping center” is left to the Court as the trier of fact. This will be a Court trial, not a jury trial. It appears from a plain reading of the Agreement and the Articles of the Declaration of Covenants, Conditions, and Restrictions incorporated therein, that Jacklin sought the purchaser (and thus the successors now before the Court) to build a shopping center which all parties found aesthetically pleasing and which was compatible with the uses already in place at the Riverbend Commerce Park. The approval of QCA’s Factory Outlets provides the Court with an idea of what Jacklin found acceptable. This Court agrees with Jacklin’s argument: “the First phase of the Factory Outlet Malls, as constructed and as depicted on Ex. H, constitutes irrefutable objective evidence of the parties’ understanding as to the use of the phrase ‘first-class shopping center.’” Memorandum in Support of Plaintiff’s Motion for Summary Judgment, p. 10. Although the parties dispute what “first-class” is and whether Blue Dog’s RV sales is first-class, a large difference exists between the QCA’s Factory Outlets approved by Jacklin in the past, and Blue Dog’s business, and the reason for that difference was QCA’s adherence to the Agreement. Jacklin states QCA worked with it to achieve a mutually acceptable design and appearance and operated consistent with the Agreement. Plaintiff’s Statement of Undisputed Material Facts, p. 8, ¶ 23 (citing Affidavit of Tom Stoesser, p. 8, ¶ 20). Jacklin claims defendants made no effort at any time to take corrective action. Memorandum in Support of Motion for Summary Judgment, p. 11. Certainly there is no evidence in the record of the defendants’ working together with Jacklin to achieve a mutually acceptable design. Defendants point to their offer to spend \$50,000 to make site improvements, but this offer relates specifically to its obligations under the Articles. Memorandum in Support of Cross-Motion for Summary Judgment, pp. 21-22. Jacklin

states it refused Blue Dog's offer to spend \$50,000 as the offer would only provide gravel while the Declaration of Covenants, Conditions, and Restrictions required paving. Reply Memorandum in Support of Motion for Summary Judgment, p. 33.

Defendants argue: "It is further undisputed that Jacklin categorically failed to work with Blue Dog and KLP to address any site concerns that Jacklin had or to work on an acceptable plan. *Russell Aff.* ¶ 20; *Cordes Aff.* ¶ 19; *Hines Aff., Exh. A*, pp. 63-65; *Exh. B*, pp. 65, 67, 126." Memorandum in Support of Defendants' Cross-Motion for Summary Judgment, p. 11, see also p. 24-26. Cordes' Affidavit reads:

19. Moreover, at no time did Jacklin ever attempt to work with KLP to address any concerns that Jacklin had with respect to Blue Dog's operation. The only option Jacklin ever gave KLP was to have Blue Dog immediately vacate the property or be sued. Exhibit C. Jacklin never made any attempt to work with Blue Dog or KLP on a site plan or to address any site concerns with Blue Dog's operation. KLP even offered to spend upwards of \$50,000 to make site improvements, which Jacklin summarily rejected. In fact, Jacklin responded that any site plan submitted by Blue Dog and/or KLP would have been rejected, and no site improvements would be satisfactory to placate their opposition.

Cordes' Affidavit, p. 8, ¶ 19. As pointed out by Jacklin, there is no citation to any part of the record to support Cordes' claim. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 13. The only citation is to Exhibit C, a string of emails in which at one time Pat Leffel of Jacklin wrote on July 15, 2008: "Not sure if you gave Blue Dog RV a date when they would need to move but we would like Blue Dog RV off the site within the next 10 days." In context, that string of emails shows it was the use to which Blue Dog and KLP made of the property to which Jacklin objected. That *use*, to which Blue Dog had *already made* of the property, for which no prior approval had ever been sought by Blue Dog and KLP, was non-compliant, and as such, Jacklin was pointing out it would not be approved. See Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 13. A few weeks after this email string, on August 5,

2008, Jacklin advised Blue Dog and KLP:

Any use proposed under Section 6 must be submitted for prior approval by the project owner or its representative. No such approval was sought nor would it be given given the inconsistent nature of the Blue Dog RV Center.

Id., Complaint, Exhibit D. The point is, given the terms of the Agreement, approval needed to be sought by Blue Dog and KLP in the first instance. Instead, Blue Dog simply started its business on KLP's property without asking for approval from anyone. Blue Dog's business runs counter to the Agreement. Thus, defendants' argument that "...Jacklin categorically failed to work with Blue Dog and KLP to address any site concerns that Jacklin had or to work on an acceptable plan", ignores the fact that Blue Dog's business, which was *already existing*, at that time failed to conform with the Agreement. Memorandum in Support of Defendants' Cross-Motion for Summary Judgment, p. 11. Blue Dog put itself in violation by starting its business without checking (or if it checked, then disregarding) the terms of the Agreement. When Blue Dog is already in violation of the Agreement, through only its own fault, why would Jacklin have a duty to "work with" Blue Dog on an acceptable plan? Keep in mind the Agreement at subsection ii, reads: "[QCA/KLP's predecessor agrees] to work together with Seller [Jacklin] to achieve a mutually acceptable design and appearance for the shopping center so that it shall be aesthetically pleasing and compatible with other uses within Riverbend Commerce Park." There was no "mutually acceptable design" to be worked toward because Blue Dog *had already implemented its business*. This Court finds Jacklin's following argument persuasive:

Russell finally concludes by stating that, "Blue Dog offered to undertake substantial site improvements on the four undeveloped lots, including landscaping and surface work." See Russell Affidavit at ¶ 23. He concludes that there wasn't anything Blue Dog could do "to satisfy Jacklin's concerns short of vacating the premises." Id. Offering to pay

\$50,000 to put gravel on four vacant lots without addressing the paving requirement, as clearly specified in the November 1999 Covenants, together with the signage, lighting, setback, and landscaping requirements (ignoring for the moment the “first class shopping center” and “mutually-acceptable design” criteria) is hardly a proposal meriting serious consideration. Why should Jacklin consider a proposal (even though one was never submitted) which is incapable of complying with the unambiguous provisions of the Covenants that KLP acknowledges it is bound by?

Plaintiff’s Reply Memorandum in Support of Motion for Summary Judgment, pp. 19-20.

While there may be an ambiguity in what constitutes a “first-class” shopping center, this Court finds there is no ambiguity that Big Dog’s RV sales lot is **not** a “shopping center.” Accordingly, this Court finds part “i” of the Agreement has been violated.

Even more clearly, this Court finds no dispute of fact that there was absolutely no effort by Blue Dog or KLP, prior to Blue Dog’s RV park materializing, to “work together with Seller [Jacklin] to achieve a mutually acceptable design and appearance for the shopping center so that it shall be aesthetically pleasing and compatible with other uses within Riverbend Commerce Park.” Thus, part “ii” of the Agreement has been violated by Blue Dog and KLP. This Court finds Blue Dog and KLP’s argument that Jacklin has not “worked together” with them to be unavailing, for the reasons set forth above.

Finally, this Court finds no dispute that part “iii” of the Agreement has been violated in that “Articles ...3, (and) 4, contained in those Declarations of Covenants”, have been violated. Article 3 pertains to parking, and requires any owner utilizing any lot for an appropriate purpose must submit a parking plan that meets with the approval of the Riverbend Property Owners’ Corporation. Stoesser Affidavit, Exhibit C, p. 3. This includes landscaping (to encourage a park-like entrance (*Id.*, p. 4, § 3.2), and parking areas must be paved with asphalt or concrete. *Id.*, § 3.4. There are requirements for

lighting, access and striping. *Id.*, § 3.5-3.8. There is no dispute that there has been no request for approval of any parking plan with respect to Blue Dog/KLP's property.

Stoesser Affidavit, p. 10, ¶22. Compliance with this provision is crucial, as parking is essentially all of Blue Dog's business...parking RVs as inventory waiting for them to be sold. Article 4 pertains to signage, and requires:

All signs shall be properly maintained and kept in a neat and proper state of repair. To assure sign quality and design format, all signs shall be submitted and approved by the Owner's corporation.

Stoesser Affidavit, Exhibit C, p. 5. There is no dispute that Blue Dog has not complied with or made any request for approval under Article 4. The remaining Articles (2, 5, 6 and 7) may have been violated, but at this juncture, this Court finds such Articles to be ambiguous and/or disputed as to Blue Dog's violation.

As pointed out by Jacklin, if this Court determines that any of these terms of the Agreement are unambiguous, enforceable and have been violated, summary judgment, at least as to the violation should be granted. Memorandum in Support of Plaintiff's Motion for Summary Judgment, pp. 11-12. This Court finds the Agreement is applicable and binding on Blue Dog and KLP. This Court finds Blue Dog/KLP have violated part i, ii, and iii (via Articles 3 and 4 of the Declarations of Covenants), and summary judgment is granted in favor of Jacklin on these issues.

4. Jacklin Has Not Breached the Covenant of Good Faith and Fair Dealing.

As mentioned above, defendants argue Jacklin breached the implied covenant of good faith and fair dealing by refusing to work with defendants to develop a site plan and thereby has breached the Agreement. Memorandum in Support of Cross-Motion for Summary Judgment, p. 24. Defendants argue the covenant of good faith and fair dealing is violated when either party nullifies or significantly impairs any benefit of the

contract. *Id.*, p. 25. Jacklin responds that the covenant of good faith and fair dealing cannot override express provisions in a bargained-for contract. Reply Memorandum in Support of Motion for Summary Judgment, p. 38. Although defendants point to the testimony of Jacklin's Property Manager, Leffel, stating that Jacklin categorically refused to work with defendants to address concerns about "Blue Dog's shopping center operation," see *Memorandum in Support of Cross-Motion for Summary Judgment*, p. 26, this testimony presupposes that Jacklin had mutually agreed to the design and appearance of the RV shopping center location.

There is no evidence that Jacklin has breached either a term of the Agreement or the implied covenant of good faith and fair dealing. The covenant of good faith and fair dealing cannot override express provisions in a contract. *Bushi v. Sage Health Care, PLLC*, 2009 Opinion No. 30, 09.6 ISCR 244 (March 4, 2009). See also *Idaho First Natl. Bank v. David Steed & Associates*, 121 Idaho 356, 360, 825 P.2d 79, 83 (1992). Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 38. This Court agrees with Jacklin's question: "How can Jacklin be claimed to have acted in bad faith if it simply stands on its rights under consensually-negotiated agreements which the Defendants apparently didn't read until after they had put their property to an improper use?" *Id.*

Defendants make essentially three arguments on this breach of implied covenant of good faith and fair dealing. First, defendants argue: "...the CC&R's were null and void at the time they were incorporated by reference into the Development Agreement..." Defendants' Reply Memorandum, p. 9. The Court has already rejected this argument and has found the CC&R's apply to the Agreement (not a "Development Agreement" as consistently, but errantly, argued by defendants). Second, defendants

argue Jacklin referred Blue Dog to KLP (and why would Jacklin do such a thing if Jacklin knew Blue Dog could never satisfy the Agreement). *Id.* This Court finds Jacklin's argument persuasive:

Apparently, Defendants claim that since Dave Russell (on behalf of Blue Dog) asked Leffel (Jacklin's property manager) who owned Lots 1 through 4 of Block 1, and since Leffel gave Russell KLP's contact information, that somehow Jacklin has "waived" any rights under the QCA/Jacklin Agreement or the Covenants incorporated therein. The facts suggest otherwise.

There is no disputed issue of material fact that Leffel, who was first employed by Jacklin in 1993, some two years after the execution and recordation of the QCA/Jacklin Agreement, had no knowledge of the same. Hence, Defendants have failed to show an "intentional relinquishment of a known right," since Leffel, the only person who dealt with Blue Dog (and who had no contacts with KLP), didn't even know the Agreement existed.

Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 39.

Third, defendants argue: "It remains undisputed that Jacklin did not attempt to work with Blue Dog, but rather simply sought eviction..." Defendants' Reply Memorandum, p. 10. This argument has already been resolved by the Court against defendants. Jacklin is entitled to summary judgment on defendants' allegations of Jacklin's breach of the covenant of good faith and fair dealing.

B. Blue Dog and KLP's Defense of Waiver and Estoppel.

Defendants argue Jacklin waived its right to now enforce the Agreement because prior to leasing from KLP, Blue Dog negotiated with Jacklin and Jacklin repeatedly assured Blue Dog an RV sales operation would be compatible. Defendants argue that Jacklin only changed its position once KLP entered into a lease with Blue Dog (the "sour grapes" argument). Indeed, the first words in defendants' briefing is: "This is a case about sour grapes." Memorandum in Support of Defendants' Cross-Motion for Summary Judgment. Defendants also argue Jacklin should be estopped from changing

its position. Memorandum in Support of Cross-Motion for Summary Judgment, p. 27.

Jacklin argues its property manager had no knowledge of the QCA/Jacklin Agreement and never had contact with KLP, although KLP had record notice of the Agreement. (See the discussion by this Court regarding good faith and fair dealing immediately above). Thus, there was no “intentional relinquishment of a known right.” Reply Memorandum in Support of Motion for Summary Judgment, pp. 38-39.

Importantly, the record does not reveal Jacklin ever assured defendants that Blue Dog’s RV sales operation would be a compatible use *regardless* of compliance with the Agreement. Absent such a specific showing (that defendants could ignore written and recorded restrictive covenants to the contrary), Jacklin should not now be estopped for having allegedly waived its right to rely on the written, recorded restrictive covenants.

But the most important reason waiver and estoppel do not apply in this case is the parcels defendants discuss *are not at all the same*. KLP’s Richard Cordes in his affidavit swears that Lots 1-4 of the KLP property which are leased to Blue Dog “are nearly identical in location and condition” to lots 1-4 of the Jacklin property, which were the subject of the lease negotiations between Jacklin and Blue Dog. Affidavit of Richard A. Cordes, p. 3, ¶ 6. That sworn statement is simply not true. As noted by Jacklin, the KLP property is not subject to the RCP Covenants, but is subject to Articles 2-6 of the Covenants in effect in November 1990 (Instrument No. 1155779), via incorporation under a consensually agreed to contract. Plaintiff’s Reply Memorandum in Support of Motion for Summary Judgment, p. 7. “The KLP property is subject to the property-unique limitations arising under the QCA/Jacklin Agreement (“first class shopping center” and “mutually acceptable design and appearance”).” *Id.* Finally, “the Jacklin property, which actually remains in the Riverbend Commerce Park, is subject to a

wholly separate set of restrictions, in the form of the current covenants and any subject amendments thereto.” *Id.*, pp. 7-8, citing Hines Affidavit, Exhibit D. (emphasis in original). Estoppel and waiver cannot apply when the subject matter of the comparison is so vastly different.

C. Declaratory Relief.

This Court has found Blue Dog has breached the Agreement and the Articles. The question remaining is whether in light of that breach, at the summary judgment level, can this Court grant Jacklin the relief sought: eviction of Blue Dog and permanently enjoining its business on the property?

One of the prerequisites to a declaratory judgment is an actual and justiciable controversy. *Miles v. Idaho Power*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989). A controversy must be definite and concrete, touching the legal relations of the parties who have adverse legal interest. *Welson v. Bonner County Tax Coalition*, 124 Idaho 31, 36, 855 P.2d 868, 873 (1993) (quoting *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). In *Harris*, the Idaho Supreme Court stated a right sought to be protected by declaratory relief “may invoke either remedial or preventive relief; it may relate to a right that has either been breached or is only yet in dispute or a status undisturbed but threatened and endangered; but in either event, it must involve actual and existing facts.” 106 Idaho 513, 516-17, 681 P.2d 988, 991-92. “We have also stated that a declaratory judgment must clarify and settle the legal relations in issue, and afford relief from the uncertainty and controversy which gave rise to the action.” *Harris*, 106 Idaho 513, 517, 681 P.2d 988, 992. Again, all doubts about restrictive covenants are resolved in favor of free use of land. *Pinehaven Planning Board*, 138 Idaho 826, 829, 70 P.3d 664, 667. In order for Jacklin to have Blue Dog evicted, the

Agreement must have clearly stated such limitation, and the Court will not read into the Agreement and find such relief by implication. See *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 590, 166 P.3d 374, 380 (2007). “Courts do not possess the roving power to rewrite contracts in order to make them more equitable.” *Smith v. Idaho State Univ. Fed. Credit Union*, 114 Idaho 680, 684, 760 P.2d 19, 23 (1988). Thus, declaratory judgment in this matter would relate to the fact that defendants breached the Agreement and the applicability and validity of the Agreement and Articles it incorporates.

The declaratory judgment Jacklin seeks would likely not provide Jacklin the authority to evict Blue Dog. However, the declaratory judgment Jacklin seeks would provide Jacklin the authority to have this Court order Blue Dog cease its business as it presently exists, since it is in violation of the Agreement and the Articles. However, Blue Dog would still be entitled to its leasehold interest with KLP and could make use of that property if such use conformed with the Agreement and the Articles.

D. Injunctive Relief.

Jacklin seeks an Order of the Court permanently enjoining the use of the property as an RV dealership/facility and ordering removal of items associated with that business by a date certain. Memorandum in Support of Motion for Summary Judgment, p. 15. Defendants reply this claim fails for Jacklin’s inability to prove irreparable injury; Jacklin did not plead any irreparable injury in its Complaint and Jacklin’s Rule 30(b)(6) deponent could not testify to any harm or injury caused by Blue Dog’s RV operation. Memorandum in Support of Cross-Motion for Summary Judgment, p. 23. Jacklin replies it seeks a permanent injunction and states “injunctive relief of a permanent nature can issue to ensure that the prevailing party obtains the benefit of its bargain.” Reply

Memorandum in Support of Motion for Summary Judgment, p. 35. However, no authority is cited for this proposition. Jacklin cites to Stoesser's testimony (which it seeks to supplement pursuant to I.R.C.P. 32(a)(4)) in which Stoesser opines Blue Dog's continued operation would cause damage to Jacklin because tenants that come to Riverbend Commerce Park pay a premium for their facilities over less-restrictive, lower-priced commerce parks. *Id.*, pp. 36-37, quoting Affidavit of Magnuson Pursuant to I.R.C.P. 32(a)(4) and I.R.C.P. 56(c), Exhibit B, pp. 115-118.

A District Court's decision to grant a permanent injunction is both a question of law and fact. *D & M County Estates Homeowner's Ass'n v. Romriell*, 138 Idaho 160, 163-164, 59 P.3d 965, 968-69 (2002). On questions of fact, the Court's decision will not be set aside unless findings of fact are clearly erroneous; questions of law are freely reviewed. *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997). The Agreement at issue here unambiguously requires three things of defendants: construction and maintenance of a first-class shopping center, working with Jacklin to achieve a mutually acceptable design and appearance for the shopping center, and conforming to Articles 2, 3, 4, 5, and 6 of the Declaration of Covenants, Conditions and Restrictions last amended in 1989. Although "first-class" is arguably ambiguous, "shopping center" is not. Most importantly, defendants have not worked with Jacklin and have not conformed to the requirements of the Articles or the Agreement. Injunctive relief is granted as a matter of discretion of the trial court and an appellate court will not interfere absent a manifest abuse of discretion. *Harris*, 106 Idaho 513, 517, 681 P.2d 988, 992. The party seeking an injunction bears the burden of proving a right thereto. *Id.* Here, Jacklin bears the burden of proving I.R.C.P. 65(e) grounds for preliminary injunction, Jacklin must show: (1) it is entitled to the relief demanded, which

consists of restraining continuance of the acts complained of, either for a limited period or perpetually; (2) the complained-of act would produce waste or great or irreparable injury to plaintiff; (3) the defendant is doing something in violation of plaintiff's rights, respecting the subject of the action and tending to render judgment ineffectual; (4) the defendant threatens to or is about to remove or dispose of its property with the intent to defraud. I.R.C.P. 65(e)(1)-(4) (subsections (5) and (6) are not applicable to this matter).

Jacklin has shown an entitlement to enjoin Blue Dog from continuing its business in violation of the Agreement. Jacklin has not provided the Court (at least not at summary judgment) with evidence of waste or great injury. Stoesser only testifies that tenants who operate in Riverbend Commerce Park pay premiums to not operate in lower-end parks. Stoesser's testimony on this point was noted by Jacklin in its last brief:

Q. Can you describe for me in general terms the nature of the tenant base that you have out there at the Riverbend Commerce Park as it has been developed?

A. Yes. We've marketed ourselves as the premier commerce park in North Idaho with success. We've landed nationally-acclaimed tenants in there.... We were instrumental in relocating Buck Knives from California....Generally, people that come to Riverbend Commerce Park want to acquire land there with the hope of appreciation because of the quality of the Park.

Q. Based on that knowledge and experience, do you have an opinion one way or another as to whether or not the continued maintenance of the Blue Dog RV Center in its current form for the remaining term of the lease that we understand exists would cause any damage to Jacklin Land Company?

A. I personally feel it would.

Q. Why do you believe that?

A. Because as I stated before, most people come to Riverbend Commerce Park because it is the premier commerce park in the area. Many tenants have the option to locate in commerce parks that are less restrictive, have lower priced land, and allow a lower level of building design. So those that come to Riverbend are basically paying a premium for their facilities over many lower end parks.

Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, pp. 36-37, citing Magnuson Affidavit pursuant to IRCP 32(a)(4) and IRCP 56(c) at Exhibit B, pp.

115-18. There is testimony that Jacklin will be damaged, but no testimony or even argument as to why that damage cannot be compensated with a monetary award. The testimony of damage, while logical and understandable, seems speculative at the present time in that Jacklin has not pointed to a tenant that has left, is thinking about leaving, or a prospective tenant that has decided not to rent land as a result of the presence of Blue Dog.

Another impediment is that this Court finds it is quite possible that declaratory judgment in favor of Jacklin would entitle it to essentially all the relief it seeks. A temporary injunction will not usually be allowed where its effect is to give plaintiff principal relief he seeks without bringing the cause to trial. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869, 872 (1925); *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720, 722(1936); *Gilbert v. Elder*, 65 Idaho 383, 144 P.2d 194, 195 (1943).

Jacklin has demonstrated that defendants are acting in violation of its rights under the Agreement. Jacklin has not alleged defendants are removing or disposing of their own property with the intent to defraud Jacklin. Jacklin has not provided this Court with evidence at this time entitling it to enjoin Blue Dog's continued business on the subject property pursuant to I.R.C.P. 65(e). Those issues will be left for trial.

III. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED plaintiff's motion for summary judgment is GRANTED in favor of plaintiffs on the following issues: 1) The QCA/Jacklin Agreement is enforceable against defendants; 2) the Agreement is a "Use" agreement and not a "development" agreement; 3) Articles 2, 3, 4, 5, and 6 of the Declaration of Covenants, Conditions, and Restrictions apply to defendants; 4) defendants have violated the

Agreement.

IT IS FURTHER ORDERED plaintiff's motion for summary judgment is DENIED as to its entitlement to declaratory relief sought (eviction) and injunctive relief sought, at this time.

IT IS FURTHER ORDERED defendant's motion for summary judgment is DENIED in all aspects, and specifically, this Court finds plaintiff has not breached the covenant of good faith and fair dealing and defendants are not entitled to the defense of waiver or estoppel

Entered this 15th day of June, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
John Magnuson

Fax #

| Lawyer
Michael Hines

Fax #

Secretary