

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.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 1-3.

On June 15, 2009, this Court filed its "Memorandum Decision and Order on Cross-Motions for Summary Judgment." At the conclusion of that twenty-seven page decision, this Court ordered as follows:

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.

On July 13, 2009, plaintiff Jacklin Land Company (Jacklin) filed “Plaintiff’s Motion for Reconsideration”, “Plaintiff’s Second Motion for Summary Judgment”, and “Memorandum in Support of Plaintiff’s (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration.” On July 27, 2009, defendants filed a “Response to Plaintiff’s (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration. On July 27, 2009, defendants (collectively referred to as “Blue Dog”) also filed “Defendants’ Motion for Reconsideration”, a “Memorandum in Support of Defendants’ Motion for Reconsideration” and an “Affidavit of Michael J. Hines in Support of Defendants’ Motion for Reconsideration.” On August 5, 2009, Jacklin filed its “Reply Memorandum in Support of Plaintiff’s (1) Second Motion for Summary Judgment; and (2) Motion for Reconsideration.” On August 7, 2009, defendants filed their “Reply Memorandum in Support of Defendants’ Motion for Reconsideration.”

On September 22, 2009, this Court issued its Memorandum Decision and Order Granting Motion for Reconsideration, Granting Plaintiff’s Second Motion for Summary Judgment and Denying Defendants’ Motion for Reconsideration. After reviewing several cases, this Court held:

As noted by Jacklin (Reply Memorandum in Support of Plaintiff’s (1) Second Motion for Summary Judgment and (2) Motion for Reconsideration, p. 10), the Washington Court of Appeals case of *W.F. Hagemann v. Worth*, 56 Wn.App. 85, 782 P.2d 1072 (1989), has clearly held:

In Washington, owners of land have an equitable right to enforce covenants by means of a general building scheme designed to make it more attractive for residential purposes, without showing substantial damage from the violation. 782 P.2d 1072, 1974.

This Court agrees with Jacklin’s argument that the “irreparable harm” requirement is inapplicable regarding a prayer for injunctive relief **where a breach of a restrictive covenant is alleged**. Thus, it is proper

for this Court to grant the injunctive relief sought by Jacklin. This is also the case if the Court were to balance the equities in determining Jacklin's entitlement to a permanent injunction.

Memorandum Decision and Order Granting Motion for Reconsideration, Granting Plaintiff's Second Motion for Summary Judgment and Denying Defendants' Motion for Reconsideration, p. 12. (emphasis added). The Court then stated:

While the facts of this case have not changed, this Court has been given new information in the form of overwhelming case law which provides the basis for this Court to overturn this Court's previous ruling. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

Id. p. 15. At the conclusion, the Court held:

For the reasons stated above, this Court exercises its discretion and grants Jacklin's motion for reconsideration/summary judgment, finding as a matter of law that no irreparable harm need be shown when issuing a permanent injunction to enforce a restrictive covenant. Because no such showing need be made, this Court denies Blue Dog's motion for reconsideration (asking the Court to hold as a matter of law that Jacklin cannot make any showing of irreparable injury and to determine as a matter of law that Jacklin cannot recover damages).

IT IS HEREBY ORDERED plaintiff Jacklin's Motion for Reconsideration is GRANTED, plaintiff Jacklin's Second Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED defendants' Motion for Reconsideration is DENIED.

Id., p. 17.

On October 19, 2009, this Court entered a Judgment. On October 23, 2009, defendants filed "Defendants' Notice of Appeal." Also on October 23, 2009, defendants filed: Motion to Stay Injunction Pending Appeal, Motion to Shorten Time to Hear Motion to Stay Injunction Pending Appeal, and Affidavit of Rebecca Asplund (an owner of defendant Blue Dog). On October 28, 2009, plaintiff Jacklin filed its: "Plaintiff's Objection to Defendants' 'Motion to Stay Injunction Pending Appeal'", "Memorandum in Opposition to Defendants' 'Motion to Stay Injunction Pending Appeal'", and "Affidavit of John F. Magnuson in Support of Plaintiff's Objection to Defendants' 'Motion to Stay

Injunction Pending Appeal”’. Oral argument was held on October 29, 2009.

At oral argument, the Court granted defendants’ Motion to Shorten Time, and took the Motion to Stay Injunction Pending Appeal under advisement.

II. STANDARD OF REVIEW.

The Court’s decision to stay an injunction pending appeal is discretionary. Idaho Rule of Civil Procedure 62(c) states:

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction or writ of mandate, the court in its discretion may suspend, modify, restore, or grant an injunction or writ of mandate during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security rights of the adverse party.

III. ANALYSIS.

Blue Dog moves this Court for an order staying the permanent injunction issued by this Court pending appeal. Blue Dog has provided the Court with the Affidavit of Rebecca Asplund (co-owner of Blue Dog along with her husband) to demonstrate that irreparable harm would inure to Blue Dog if the permanent injunction were not stayed pending appeal. Memorandum in Support of Motion for Stay, p. 3. Asplund states Blue Dog has sought an alternative site to which Blue Dog could relocate since June 2009, but “Unfortunately, we have yet to locate an acceptable alternative site.” Affidavit of Rebecca Asplund, p. 2, ¶ 4. However, Asplund does not provide any explanation of what an “acceptable alternative site” means. Asplund provides no review of the properties Blue Dog has viewed, where they are located and why they would not be “acceptable.” The nature of Blue Dog’s business would require simply vacant land, properly zoned, presumably on or near a high-traffic street or highway.

Asplund goes on to state Blue Dog is seeking a construction loan and hopes to fully vacate Jacklin’s site and relocate by June 2010. *Id.* This statement ignores the

fact that had Big Dog obtained a construction loan in 2008, met with and obtained Jacklin's approval of a plan which satisfied all the covenants, and then built those approved improvements, Blue Dog would not have found itself in this lawsuit.

As pertains to irreparable harm, Asplund states she believes being forced to close Blue Dog's operations before finding an alternative site would result in Blue Dog needing to file for bankruptcy and losing approximately \$300,000 in gross revenue per month. *Id.*, p. 3, ¶ 5. That statement assumes that in fact there is nowhere Blue Dog can relocate, or at least that statement assumes that if there is a place Blue Dog can relocate, they will sell not a single motor home or trailer.

Blue Dog states this significant injury would result despite the decision it now appeals having been a close call for the Court as no Idaho authority was directly on point (as to whether actual harm must be shown to enjoin violation of a restrictive covenant) and that the equities balance in favor of Blue Dog. Memorandum in Support of Motion to Stay, p. 3. However, Blue Dog does not explain how the equities tip in their favor. The claim ignores the fact that the reason Blue Dog is in the situation it now finds itself (needing to relocate) is because Blue Dog set up its recreational vehicle sales lot without approval from Jacklin. This is a situation truly of Blue Dog's own making.

Blue Dog goes on to argue if the Court deems a stay of the permanent injunction is proper, no bond should be required. *Id.*, p. 4. Blue Dog notes the bond requirement of I.R.C.P. 62(c) is not mandatory and, because Jacklin had not demonstrated any actual harm below, no bond is necessary and the Court would need to speculate as to the appropriate amount of any bond. *Id.* Finally, Blue Dog requests the Court to extend the automatic stay provision in I.A.R. 13(a) (which extends the current deadline from the October 25, 2009, date imposed by this Court's Judgment to fourteen days from the

filing of the Notice of Appeal on October 23, 2009 (to November 6, 2009)) pursuant to I.A.R. 13(b) so that a stay may be sought from the Idaho Supreme Court. *Id.*, p. 5.

In response, Jacklin argues the equities do not balance in favor of Blue Dog, regardless of any harm that would result. Memorandum in Opposition to Motion to Stay, p. 8. Jacklin notes this Court's having previously determined that the equities in this case favor Jacklin and argues Blue Dog has:

...had every opportunity, since the first week of its lease in July of 2008, to rectify the situation, to find an alternative location, and to acknowledge that which is undisputed, to-wit, the unambiguous provisions of the QCA/Jacklin Agreement that bind and control the Defendants' use of the subject property. Rather than address the situation, the Defendants have put their collective heads in sand and now amazingly claim to the Court that equity is on their side.

Id., pp. 9-10. Jacklin argues Asplund's affidavit does nothing to counter the fact that Blue Dog has had notice since August 2008 that relocation was a possible outcome of the parties' differing interpretations of the QCA/Jacklin Agreement. *Id.*, p. 11. "Blue Dog has now been utilizing the subject property in violation of unambiguous Agreements, brought to Blue Dog's attention in July of 2008, for sixteen (16) months." *Id.* Jacklin states Blue Dog is in error in suggesting the case was a close call and notes the Court held Jacklin and QCA "determined in advance that violation of the restrictive covenants would cause Jacklin harm." *Id.*, p. 12. Jacklin goes on to note a stay would provide the other named defendants, including KLP- the ownership defendants, with rental income while they must demonstrate no irreparable harm. *Id.*, p. 13.

As to Blue Dog's argument that the Court should set no bond because any amount would be speculative in light of Jacklin's inability to show actual harm below, Jacklin states Blue Dog misreads the rule. *Id.* While Rule 62(c) does not make a bond requirement mandatory, a suspension, modification, etc. of the injunction is "upon such

terms as to bond or otherwise as [the Court] considers proper for the security of the rights of the adverse party.” *Id.*, quoting I.R.C.P. 62(c). Jacklin notes it is merely unable to quantify economic harm, but that harm is presumed once the restrictive covenant is violated and that Blue Dog would skate on such violations for a period of two years while the matter is on appeal. *Id.*, pp. 13-14. Jacklin requests a significant bond or cash undertaking (no less than \$200,000) be posted with the Clerk as a condition of any stay, if a stay is granted. *Id.*, pp. 14-15.

Both parties agree that the applicable law is that a party seeking a stay must show irreparable harm, that such irreparable harm be certain and great, and that there is a clear and present need for equitable relief. Memorandum in Support of Motion to Stay, p. 3; Memorandum in Opposition to Stay, p. 8; *Knutson v. AG Processing, Inc.*, 302 F.Supp.2d 1023, 1037 (2004). As noted by Blue Dog, the irreparable harm must be “certain.” Memorandum in Support of Motion to Stay, p. 3, citing *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297 307 (D. D.C. 1976). Here, while Blue Dog has certainly claimed irreparable harm, and that such harm is great (a loss of \$300,000 in gross revenues per month), there has been no evidence presented as to the basis for that claim and there has been no evidence as to the “certainty” of such harm resulting. Nor, as Jacklin argues, and this Court has held on two prior occasions, do the equities of this case balance in Blue Dog’s favor. Additionally, Jacklin’s reading of I.R.C.P. 62(c) is more accurate. Idaho Rule of Civil Procedure 62(c) gives the Court discretion to grant a stay of an injunction on terms the Court feels properly secure the rights of the adverse party.

Thus, a stay in this matter, if granted, should be upon terms that properly secure Jacklin’s rights. Whether those terms amount to a “bond or otherwise” is a matter left to the Court’s discretion. Finally, any grant by this Court of an I.A.R. 13(b)(8) stay until

Blue Dog can seek a stay from the Supreme Court is also a matter committed to the Court's discretion. I.A.R. 13(b)(8) permits the Court to enter a stay of execution or enforcement of any injunction or mandatory order entered "upon such conditions and upon the posting of such security as the court determines in its discretion." Thus, the Court's reasoning on Blue Dog's motion for a stay under I.R.C.P. 62(c) would be identical to that under I.A.R. 13(b)(8).

IV. CONCLUSION AND ORDER.

For the reasons set forth above, Blue Dog has not demonstrated the certainty of irreparable harm, and has not shown the equities balance in its favor. Blue Dog's Motion to Stay Injunction Pending Appeal under I.R.C.P. 62(c) and I.A.R. 13(b)(8) must be denied.

IT IS HEREBY ORDERED defendant Blue Dog's Motion to Shorten Time is GRANTED; defendant Blue Dog's Motion to Stay Injunction Pending Appeal is DENIED, thus, the issue of surety bond pending appeal is not addressed.

Entered this 29th day of October, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 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